Pre-admission Legal Education in South Africa: An Assessment of the Dominant Patterns Influencing the Transmission of Legal Knowledge

by

SUNDAY OLÁDÒKUN ÒGÚNRÓNBÍ

Submitted as the dissertation component (which counts for fifty percent of the degree) in partial fulfilment of the requirements for the degree of Master of Laws in Legal Education in the School of Law, University of Natal, Pietermaritzburg.

January 1998

ABSTRACT

The purpose of this study was to narrate the major influences shaping the construction and transmission of legal knowledge in South Africa. The paper contends that these influences revolved around the role of the state, the profession, and the university law schools.

The conceptual framework informing the study was the place of values in policy measures intimately affecting legal education. The values connection is contextual and not formal or abstract. It is the politics of legal education.

The study revisited the site of the current debates in legal education, that of the divide between practical and academic education/training, and the staging of academic and professional education. Particular attention was also paid to the considerations allowed in determining the content of law studies. The role of legal education and training in promoting adversarialism and litigiousness was addressed.

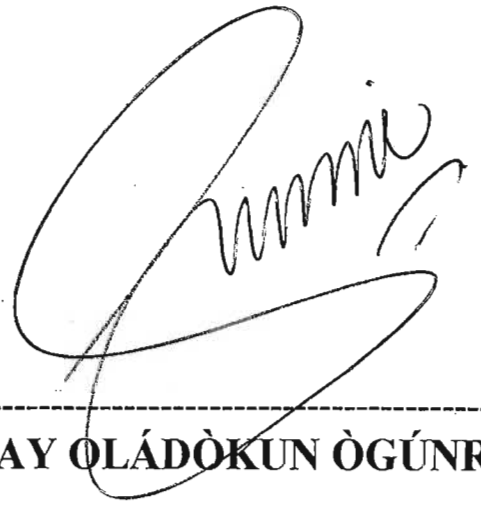
Of the three major stakeholders in legal education, the state wields more influence than others. The fresh political dispensation in the country has further supported the state's intervention in legal education. Most of the policies introduced by the state revolve around the enhancement of opportunities for the previously disadvantaged to gain access to legal education. The spate of government measures in this regard is still growing.

The effects of government policy measures like the Outcomes-based Education, the underpreparedness of a segment of the student population for law study, admission of more students in the face of tension between a 'mass' and 'elite' system, and the growing diversity in the law schools, are some of the social factors identified in this study.

The study concluded with an expression of optimism in the system even in face of frictions and tensions. As envisaged for this exercise, a number of the issues identified were not fully explored. It is expected that further research may be conducted to determine the far reaching consequences of the factors thus identified.

DECLARATION

I declare that the whole of this dissertation,
save as specifically admitted and acknowledged in the text,
is my original work, and has neither been published elsewhere
nor submitted in any other University.



SUNDAY OLÁDÒKUN ÒGÚNRÓNBÍ

ACKNOWLEDGEMENTS

The decision of the Higher Degrees Committee of the School of Law admitting me to the candidacy of the degree of *Master of Laws* remains one of the most memorable events in my life. That I completed this piece of work is therefore a manifestation of the confidence reposed in me. The Graduate Award with a monetary grant extended to me by the School of Law provided succour at a critical period. I cannot repay the debt of gratitude sufficiently enough. To the entire members of University of Natal, Pietermaritzburg School of Law, I hereby register my thanks.

Two people deserve special thanks. John Milton has been a father, friend, mentor and gentle critic throughout my studentship at the School of Law. He supervised my writing and has always been generous with his time and advice. Through what he said and what he omitted to say, I have learned more from him than from anyone else with whom I have worked. Michael Cowling inspired me and reminded me of the capacity to achieve set goals.

My debt to Tharuna is equally profound. She has been a pillar of strength and support throughout my pre- and post-writing times. She bore the pains of my anger and frustrations with equanimity during those trying times. The extraordinary privilege of having two Master's degree candidates (in fields other than Law!) typed my dissertation with the positive accompanying constructive comments certainly forced me to clarify my thinking and correct missteps too numerous to count. I therefore express my gratitude to Sola Adeyemi and Peace Nganwa for their secretarial support.

I was unable to be a good son and brother to my mother, and two brothers and two sisters during my studentship as I had to leave a paid employment, thus a dependant and not a provider. I praise them for their patience, prayers and support at those critical moments. My good friend and younger brother, Olateju deserves special mention for his steadfastness. He held the forth with abiding faith in goodness of God. What touches us most shall be last served. Olagbemileke Ogunronbi, my late father remains a constant presence in my life. His larger-than-life conception of the centrality of a continuous search for knowledge as an antidote of intellectual impoverishment over material acquisition provided the pad for any intellectual attainment in my life.

ad majorem dei gloriam

TABLE OF CONTENTS

CHAPTER ONE

INTRODUCTION AND AN OVERVIEW OF LEGAL KNOWLEDGE

1.1 INTRODUCTION

The *law* as a discipline may be studied for both the descriptive and predictive reasons. Practising lawyers obtain knowledge of legal rules and principles embodying the law to enable them predict the judicial attitude including what is necessary to persuade judges. On the other hand, it may be studied in order to be able to explain the law, for instance as a sociological or economic phenomenon, or to determine the conceptual elements of legal systems and to distinguish law from other institutions and practices (legal philosophy). Law can also be studied to determine what legal principles are justifiable and desirable (the normative purpose).[1]

The scope of this study falls within an emerging area of law called Legal Education. As rightly noted by Avrom Sherr, 'discussions of legal education tend towards the political, the practical and the methodological and not towards the theoretical or the analytical. As a subject of study it is often thought of as weak, unrigorous or worst still sociological.'[2] This present exercise is undoubtedly sociological as it seeks to narrate a phenomenon surrounding the law, or better still its study, as

---

[1]M D Bayles, *Principles of Law: A Normative Analysis* Law and Philosophy Library 1987

[2]Avrom Sherr, *Legal Education; Legal Competence and Little Bo Peep* Inaugural lecture as Woolf Professor of Legal Education at the Institute of Advanced Legal Studies, University of London, May 1997.

opposed to an internal examination of the rules or systems of the law as a disciplinary focus.[3]

1.1.1 Statement of the Problem

The process of educating potential lawyers involves both *standardization* and *differentiation*. According to Schlegel[4],

> 'Standardizing and identifying the product [5] must be accomplished indirectly by gaining control over the providers of service. This control is acquired in two ways; through state sanctioned exclusion of potential competitors and through control of the production of producers. Standardisation of knowledge also aids products differentiation, for members of the group thus come to share a common cognitive base, a distinctive kind of knowledge. [Thus] the key social institutions of professional advancement are the *State* and the *University*.'[6]

The third leg may be added to the tripod of legal education, that is, the legal profession. This paper intends to look at these three institutions, the state, the university and the legal profession, and how they impact on the transmission of legal knowledge to the aspirant to the profession of the law.

---

[3]Lilly GC, 'Law Schools Without Lawyers? Winds of Change in Legal Education' (1995) 81 *Virginia LR* 1421. Professor Lilly identifies three broad approaches to the study and teaching of law. The first approach concerns the practical or operational aspects of law; the second approach relates to the 'doctrinal' which he says is the analytical rigour applied in a legal context, searching for rules, rule systems and underlying principles in legal material; the third approach to law is 'theoretical'. He quotes Judge Posner in suggesting that the doctrines are being pushed from the centre stage by "economic analysts of law, by other social scientists of law, by Bayersians, by philosophers of law, by critical legal scholars...and critical race theorists, all displaying the tools of non-legal disciplines."

[4]JH Schlegel, 'Between Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor' (1985) 35 *J. Legal Educ* 311 at 320. cf: JH Schlegel, 'Searching For Archimedes - Legal Education, Legal Scholarship, and Liberal Ideology' (1984) 34 *J. Legal Educ.* 103 at 106.

[5]Presumably a legal qualification.

[6]Emphasis supplied.

In South Africa, law, and importantly the legal knowledge transmitted to the novice seeking the wisdom of law, may not claim to be value-free or neutral.[7] With the advent of majority rule in 1994 in South Africa, tremendous changes have been, and are being, introduced to affect the purposes, shapes and structure of legal education in order to reflect new national aspirations. The process of curriculum reform forced by the need to chart a new course, to accommodate future challenges, and increase the capacity of change, involves identifying those pertinent patterns influencing the transmission of legal knowledge.

---

[7]See John Hund and Hendrick W van der Merwe, *Legal Ideology and Politics in South Africa: A Social Science Approach* 1986 Centre for Intergroup Studies, UCT. The authors explored the link between law and legal ideology and posited that the South African legal order is a peculiar blend of 'repressive' and 'formal' law, that results in a system of 'dual law' and class justice. They further identified two cardinal features of repressive law as, (i) a close integration of law and politics in the form of direct subordination of legal institutions to the source of power and, (ii) rampant official discretion. In a recent submission to the Truth and Reconciliation Commission (TRC), five top judges - ex Chief Justice Mick Corbett, Chief Justice Ismail Mahomed, Deputy Chief Justice Hennie van Heerden, Constitutional Court President - Justice Arthur Chaskalson, and his deputy, Justice Puis Langa stated that "apartheid was defined by law and enforced by law. It is necessary...to acknowledge the role of the legal system in upholding and maintaining apartheid, and the injustices associated with it" On judicial attitude to construction of legal material, their Lordships further averred that on a substantial number of occasions judges failed to grasp the opportunity to adopt a statutory interpretation that would favour the protection of human rights. (reported in the Sunday Times issue of October 19, 1997). The submission of the General Council of the Bar to the TRC contains more scathing remarks of the legal order of the apartheid days. In his inaugural address entitled *Legal Education and Public Policy* (delivered at the University of Natal, Pietermaritzburg, 17 October 1984) Professor L G Baxter bemoaned the 'decline of legal autonomy' in this direction, and asserted that "...most of the activities of the public administration in South Africa based upon a philosophy which, despite the rhetoric, is extremely interventionist. The policy of apartheid has had an immense impact upon the legal system and it has profoundly altered the interrelationship of law and public policy." See also C R M Dlamini, 'The Law Teacher, the Law Student and Legal Education in South Africa' (1995)112 *SALJ* 595

1.1.2 Aims of the study

- To identify those factors, influences and patterns affecting the purposes, shape and structure of legal education of intending lawyers in South Africa.
- To outline fundamental issues that may provide bases for further investigation in undertaking a comprehensive study of law curriculum planning and development.
- To speculate on the shape of the law curriculum in South Africa aftermath of the spate of recent government policies and legislation in this regard.

1.1.3 Hypotheses

> 'Under apartheid, undereducation of the black population denied most an opportunity for anything beyond menial labour. The Central Statistical Service reported that in 1994 ten million people had no education, 86% of whom were black. In the same year per capita spending on white children not attending private school was 147% higher than the amount spent on blacks. Whites, who comprise only 13 per cent of the population, received as many university degrees, certificates, and diplomas as blacks.'[8]

> 'Almost 69% of all law students at South African universities in 1989 were white; only 17% were African. Approximately 98% of law students at the University of Pretoria in 1991 were white. The situation at other South African universities is not substantially different... Black South Africans form only 12% of the more than 10,000 academics in South Africa, their numbers are increasing only by 1,3% a year, which means that it will take 30 years before blacks constitute 50% of the academic staff population. Approximately 88% of the members of the society of University Law Teachers are white.'[9]

---

[8]See *A House No Longer Divided: Progress and Prospects for Democratic Peace in South Africa* - A Report to the Carnegie Commission on Preventing Deadly Conflict. Carnegie Corporation of New York. July 1997

[9]Johann van der Westhuizen *On Equality, Justice, the Future of South African Law Schools and Other Dreams* March 1993, Occasional Paper No. 1, Published by the Centre for Human Rights, University of Pretoria, Pretoria. Ed Tshidi Mayimele, p 1. The picture painted by this writer has no doubt improved, yet, they form the basis of the structure of legal education and a necessary springboard for observing measures influencing the direction of legal education.

In addition to enhanced access for the previously disadvantaged people of this country, amidst several other competing demands,[10] is the interrelationship between the state's tertiary education agenda and its macro-economic strategy."[11]

From the above, the following hypotheses are assumed for this study:

- demand for legal education from suitably qualified applicants is growing
- there is a growing diversity of students in the law schools
- legal education as provided by the law school continues to have a key role in developing the powers of the mind, and in advancing understanding and learning through scholarship and research
- interdependence of knowledge and economy; knowledge drives economy in terms of ideas,

---

[10]These include competing tensions between *selection* among applicants and active *recruitment* of applicants; between *minimum* standards of entry or eligibility and criteria of selection in situations of competitions; between competition for *any* place and competition for more *desirable* places; between *selection* on entry to higher education and *certification* at the end of the educational process; between *direct* (or intentional) and *indirect discrimination* (both in a negative sense) and between *reverse discrimination* and other kinds of *positive action*; between criteria of selection which involve *preferential* treatment and those that are different without being discriminatory. See generally for a detailed exposition of the dialectics outlined by Professor W Twining as facing the fictitious Law Faculty of the University of Xanadu in *Access to Legal Education and the Legal Profession*. Butterworths, 1989. See also M J le Brun 'Curriculum Planning and Development in Law in Australia: Why is Innovation so Rare?' in *Legal Education and Legal Knowledge* (ed) Ian Duncanson 1991 *Law in Context* La Trobe University Press.

[11]See *Growth, Employment and Redistribution - A Macro Economic Strategy. 'GEAR'* - June 1996 which states that 'progress in education shows up consistently in comparative studies as a key determinant in the long run economic performance and income redistribution. Sustained improvements in the quality of public schooling available to the poor and greater equity in the flow of students through secondary school and tertiary education are central to government's approach'.

creating new products, designs, and services; and Law Schools are part of the process of creating and helping to discriminate between these ideas

- flexible employment opportunities must be created for law graduates; emphasis will be on autonomy, the ability to transfer what you know to new contexts and to manage your learning
- continued funding and support by the state of any learning programme, including legal education, will therefore be based on institutional recognition, acceptance and adherence to national aspirations as prescribed by the state.

1.1.4 Study Layout

The present chapter introduces the thematic approaches to this study. It attempts to delimit the scope of the work. A brief overview of the major strands of 'legal knowledge', especially its claim as an autonomous discipline including the relationship to the educational process is provided.

Chapter two explores the role of two of the three parties to the legal education tripod - the Law Schools and the legal profession. A brief excursion into the historical hold of the legal profession on education is provided. The Law School, having displaced the old apprenticeship system, hitherto the gateway to the legal profession, battles for a definition of its role within the academe and the institutional work to the legal profession. The status of the Law School and legal profession in legal education is thus the focus of this chapter.

The state, in post-apartheid South Africa, assumes greater responsibility than ever before in charting policies than will satisfy its political orientation and direction. Several national policy documents,

dating from the March 1995 White Paper No 1 on Education and Training, to the Education White Paper 3 - A Programme for the Transformation of Higher Education - which debuted in July 1997, reflects several programmes and plans of far-reaching consequences for higher education. In addition to the Green Papers and White Papers, a number of statutes have been promulgated with direct bearing on tertiary education. The South African Qualifications Act 58 of 1995 is atypical of such state actions. Non-educational government programmes with multiplier effect in the education abound. The 'GEAR' (*Growth, Employment and Redistribution - A Macro Economic Strategy*) is a case in point. Chapter three accounts for most of these developments.

In Chapter four this study moves from the institutional forces shaping the direction of legal education to social factors challenging the values, assumptions, goals, and methods involved in the transmission of legal knowledge. Specifically Affirmative Action in higher education, access and selection to the law school, Artificial Legal Intelligence, Computer-Assisted Legal Research (CALR) and Computer-Assisted Legal Instructions are sketched out.

The concluding remarks in chapter five draw from the accounts in the preceding chapters to offer postulation into the shape of legal education as they are being affected by the various factors identified.

1.2 OVERVIEW OF LEGAL KNOWLEDGE

> "Much of the law is like a thin crust of rules lying over a swamp of reasons. Certain fixed points of firm ground are dotted about the swamps, in the form of moral institutions which would be widely shared. But when one tries to build outwards from these islands of firm

ground, one is building over a swamp."[12]

1.2.1 Legal Traditions

The form of legal knowledge in South Africa is substantially shaped by its history as part of the Western tradition of law which in turn has its roots in Roman, Greek and Judeo-Christian thought.[13] Its structure of law, that is, the concepts through which its rules are expressed and categories with which they are organised may then be contrasted with the legal systems in other political societies to determine into which legal family the South African system may be classified.[14] The South African legal systems is based on the Roman Dutch Law which is, a synthesis of Roman law, Germanic

---

[12]N E Simmonds, 'Bluntness and Bricolage' in Hyman Gross and Ron Harrison, *Jurisprudence Cambridge Essays* 1992, Clarendon Press, Oxford. page 1 at 20.

[13]See generally, W J Hosten et al *Introduction to South African Law and Legal Theory* 2nd edition 1995 Butterworths; Hahlo and Kahn, *The Union of South Africa: The Development of its Laws and Constitution* 1960, Juta; Donavan Marais, *South Africa: Constitutional Development: A Multi-Disciplinary Approach.* 2nd edition 1993, Southern Book Publishers.

[14]See generally René David and J E C Brierly, *Major Legal Systems in the World Today.* 3rd Edition, 1985, Stevens & Sons, London. This major work views Western legal systems as being broadly divided into the Romano-Germanic family, and the Common Law family. The learned writers in discussing the relationship between the two families resisted a watertight compartmentalization between the two by identifying that 'the laws of some states cannot be annexed to either family, because they embody both Romano-Germanic and Common Law elements' at page 25. The South African Legal System, like the Laws of Scotland, Israel, Quebec and the Phillippines, falls into this trap with 'mixed jurisdictions'. In this regard also, Lourens M du Plessis admitted that the 'South African legal system can best be described as a hybrid. It is historically related to two different families of legal systems; on the one hand the *Romano-Germanic* family of Western Europe in which legislation has come to enjoy an indisputable supremacy as a formal source of law, and on the other hand the English *Common Law* family in which case or the judge-made law prevails.' See *The Interpretation of Statutes* 1986, Butterworths at pg 2.

Customary law, feudal law, canon law, and other variants.[15] South African Common law,[16] as such does not equate with Roman Dutch law itself (especially that of the Province of Holland during the era of the United Netherlands) as considerable modifications including significant incursion from the English Common law into the South African legal system have taken place.[17] Though there is no doubt that the South African legal system is a hybrid, a mixed system of its own unique complexion, the structures and concepts bear striking resemblance to the English Common Law family in a number of respects while still retaining its historical roots of the Roman Dutch law heritage. The influence

---

[15]See G J van Niekerk 'Indigenous Law in South Africa: A Historical and Comparative Perspective' 1990 (1) *Codicillus* 34.

[16]Albie Sachs, *Protecting Human Rights in a New South Africa* (1990) vehemently asserted that '(i)n the first place, if what is referred to as RDL today is to survive, it must cease to be RDL. The term Roman-Dutch Law once had a faintly patriotic aspect inasmuch as it emphasized local particularity rather than imperial connection. Amongst the great pioneers of RDL in South Africa were persons like Rose-Innes, Solomon and Maasdorp who were neither anti-African nor anti-Boer nor anti-English. Ironically, the prestige they gave to the system was almost entirely destroyed by a more recent generation of judges who, under the guise of purifying and saving RDL, managed to combine extremely authoritarian views supportive of the apartheid state with medieval scholarhip so exquisitively recondite and impractical as to appear a parody of serious legal research. ... The term RDL is both inaccurate and insensitive, inaccurate in so far as it focuses on only one of the many sources of South African law, insensitive inasmuch as it highlights the system's colonial origins. What is needed is a self-consciously South African law for an emerging South African nation (at 94) ... Thus Roman-Dutch Law, which survived in the past by incorporating transplants of English Law, will survive by fusing itself with African law, shedding its name, and becoming an integral part of a new South African law' (at 103)

[17]B Beinart 'The English Legal Contribution to South Africa: The Interaction of Civil and Common Law' (1981) *Acta Juridica* 7. According to the learned writers of W J Hosten et al, *Introduction to South African Law and Legal Theory*, Roman-Dutch law 'may be taken to mean the civil or Roman law (*beschreren rechten*) as modified by the *placaaten* and customary law of the Province of Holland...on the other hand, to regard Roman-Dutch law as being solely the law as it prevailed in Holland narrows the perspective unduly, for such a definition fails to take into account the canon law, natural law, and Western European Common Law elements which undoubtedly formed part of the eighteenth century uncodified Roman-Dutch legal system.' pp 370-371

of English Common law on the South African legal system or some part of it has, however, been a subject of resistance from Roman Dutch law purists.[18]

Having noted that the law of South Africa derives from the Roman-Dutch Law, it is asserted that no genuine claim may be made to a doctrinal purity[19] at both theoretical and practical levels. A scholar's grounding in some of the conceptual elements of the South African legal system without reference to its epistemological origin may be grossly inadequate, yet, an intellectual pursuit roundly founded in insular local ideologies and a professional discourse built solely on Roman-Dutch legal principles can produce but 'prisoners of traditions' to employ Charles Simpkins' phrase.[20] From another perspective,

---

[18]See for instance Du Plessis LJ, 'A Plea for a New Approach in the Law of the Republic' (1961) 78 *SALJ* 457. On a comparative basis, the continuing depreciation of natural sovereignties in deference to increasing European "State" in Western Europe with its attendant development of new European jurisprudence has led to the question being asked in UK for instance, *has common law a future?* See Jack Beatson, 'Has Common Law a Future?' (1997) 56 *Cambridge LJ* 291. On the other hand, Professor Reinhard Zimmermann in 'Stauta Sund Stricte Interpretanda? Statutes and the Common Law: A Continental Perspective' (1997) 56 *Cambridge LJ* 315 has seen as a welcome development the convergence of the civil law and common law systems.

[19]I adopt Peter Goodrich's conceptualisation of a legal doctrine, "we used the term doctrine as a reference to a clearly definable set of legal beliefs as to the nature and characteristics of legal meaning. In general terms, legal doctrine is that set of prior adherences or allegiances that constitute the legal code as validated discourse. Doctrine assumes certain *truths* as to legally authoritative utterances, truths as to the sources and methods and content of legal statements." See P Goodrich *Reading the Law: A Critical Introduction to Legal Method and Techniques* 1986 Oxford. Geoffrey Wilson aptly contends that there is the tendency to contrast *legal reasoning* with other forms of meaning, legal reasoning itself is *national*. He contrasts the way German law students reason with English legal scholars. See G. Wilson 'English Legal Scholarship' (1987) 50 *Modern LR* 818 at 830. Also AWB. Simpson 'The Rise and Fall of the Legal Treatise' (1981) 48 *Univ of Chicago LR* 614.

[20]Charles Simpkins, *The Politics of Nation Building and the Prisoners of Tradition.* 1988 South African Institute of Race Relations, Johannesburg.

the application of Roman-Dutch principles by the courts has occasioned several distillations in consequence of which the bulk of the law is absorbed into the modern case law. Practically thus, in litigations, legal arguments reflect more of legal analysis infused with contemporary factors of particular cases and where the more recent South African legal materials are insufficient, the tendency is to look to other modern legal systems instead of principles in the original Roman-Dutch law texts. With South Africa now a constitutional democracy,[21] many aspects of the legal system are being shaped by the new approach to adjudication.[22]

1.2.2 Contemporary legal thoughts

The inability of both jurists and legal scholars to arrive at a uniform characterisation of the nature on 'law' has led to the exposition of various theories on, and about law, either as a discipline in its own right or how it is to be differentiated from other social phenomena, or perhaps from other non-legal social control mechanisms. Within the western legal tradition the most obvious of the 'traditional spaces of legal thought'[23] are 'Positivism' and 'Natural law'. Beyond the binary divide encapsulated in the theses of the 'Natural lawyers' and 'Positivists', growth in legal thoughts has given birth to other schools like the Critical Legal Studies Movement (CLS), Realist Movements, Feminists, Neo-

---

[21] See Section 2, *Constitution of the Republic of South Africa* (Act 108 of 1996) on Supremacy of the Constitution which affirms this contention.

[22] This trend appears more prominently in the field of constitutional adjudication, albeit with rollover effects on other areas of substantive and procedural law. Section 39 of the Constitution on the interpretation of the Bill of Rights implies an order in the hierarchy of interpretative options open to the judge to relegate common law (Roman-Dutch law) to the background. cf:Jeremy Sarkin, 'The Political Role of The South African Constitutional Court' (1997) 114 *SALJ* 134.

[23] To use the phrase employed by Margaret Davies *Delimiting the Law - Postmodernism and the Politics of Law* 1996 Pluto Press Chicago p1.

Marxists, 'Law and Economics' Movements, and others that have been termed the 'critical theories of law'.[24]

The theory of natural law asserts the existence of a higher law to which all man-made laws should conform, stipulates that the human person should be treated as a rational being who is capable of distinguishing between right and wrong. Natural law's conception of law locates law in society and as a social institution so that legal systems based on repressive or discriminatory policies cannot last.[25] Three major theses are traditionally associated with legal positivism. First is the reductive semantic thesis which proposes a reductive analysis of legal statements according to which they are non-normative and particular descriptive statements. The contingent connection thesis posits that there is no necessary connection between law and moral values. The third is the sources thesis which claims that the identification of the existence and content of law does not resort to any moral

---

[24]Margaret Davies, supra at p2; also C Douzinas and R Warrington, 'The Face of Justice A Jurisprudence of Alterity' (1994) 3 *Social and Legal Studies* 405 at 412. This is not, however, to limit the schools of thought in the legal traditions to those named. The sociological and historical schools for instance also occupy spaces within legal thought. On *Law and Economics* theory, literature include, Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Thoughts' (1961) 70 *Yale LJ* 499. Richard Posner, *Economic Analysis of Law* 3rd Edition (Boston: Liytle Brown, 1983); Edmund Kitch, 'The Fire of Truth: A Rememberance of Law and Economics' (1982) 33 *J. Legal Educ.* 184, Judy Fudge, 'Marx's Theory of History and a Marxist Analysis of Law' in R F Delvin (ed) *Canadian Perspectives on Legal Theory* 1990.

[25]J Finnis, *Natural Law and Natural Rights* Oxford 1980, Barney Reynolds, 'Natural Law Versus Positivism: The Fundamental Conflict' (1993) 13 *Oxford J. Legal Studies* 441.

argument.[26] These three theses of legal Positivism are, however, logically independent[27] and rejection of one does not destroy the positivistic stance of the other[28]

While Natural law is thus centrally about the relationship between law and ethics or morality, positivism denies the existence of any necessary relationship between law and what is 'just'. According to Margaret Davies, what this natural law-positivism stance has 'entailed is a collapse of law and justice in legal thinking; although positivist thought envisages a separation between what is legal and what is, strictly speaking, just, it also manages to reduce the discourse of justice to that of law.'[29]

The American Realists view law as essentially a political construct, and central to their methodology is the idea that progressive law reform must be grounded in social scientific research.[30] The Critical

---

[26]Joseph Raz, 'The Purity of the Pure Theory' in Richard Tur and William Twining (eds) *Essays on Kelsen* Clarendon Press Oxford 1986 at 81-82. HLA Hart, 'Positivism and the Separation of Law and Morals' 1958 71 *Harvard LR* 593, Joseph Raz, *The Authority of Law,* Oxford 1979 at 45-47.

[27]Joseph Raz, 'The Purity of the Pure Theory', supra.

[28]Barney Reynolds, 'Natural Law versus Positivism: The Fundamental Conflict' supra.

[29]*Delimiting the Law* op cit at 1: See also N MacCormick, 'The Concept of Law and 'The Concept of Law' (1994) 14 *Oxford J. Legal Studies* 1.

[30]Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship' (1982) 95 *Harvard LR* 1669 at 1671. Margaret Thornton, 'Portia Lost in the Groves of Academe Wondering What to Do About Legal Education' in Ian Duncanson (ed) *Legal Education and Legal Knowledge* Law in Context 1991/92, La Trobe University, Australia.

Legal Studies Movement, the intellectual descendants[31] of the Realists has a more radical agenda than their forerunners in that it 'does not set out to simply reform the law within its existing framework but to critique every facet of the legal order, including its ideologies, underlying philosophies and pre-suppositions. Ultimately, it is hoped to effect a transformation of society, not via revolutionary means, but via an intellectual process of critique and theorising.'[32] Like the Marxists,[33] the critical legal scholars take as their starting point the connection between *law* and *power*, law being not so much about the constraining of power, but rather its channelling and legitimization. CLS perceives law to have a vital ideological dimension that perpetuates hierarchy and enforces inequality.[34] Law is then not the antithesis of power, but its crystallization.[35]

Sketching an outline of the main strands of legal thought as part of the factors affecting the transmission of legal knowledge, is in dire recognition that some preconceived notion of 'law' must be taken into account in one's analysis.[36] The reality of any study cannot in the process of the

---

[31]M Tushnet, 'Critical Legal Studies: An Introduction to its Origin and Underpinnings' (1986) 36 *J. Legal Educ.* 505; R M Unger 'The Critical Legal Studies Movement' (1982) 96 *Harvard LR* 561.

[32]Margaret Thornton, 'Portia Lost in the Groves' op cit.

[33]W J Hosten et al, *Introduction to South Africa Law and Legal Theory* at 145 posit that although CLS scholars have affinity with marxism (and also interpretive sociology), their thinking is not attuned completely to marxist thought.

[34]Duncan Kennedy, 'Legal Education as Training for Hierarchy' in D Kairys, *The Politics of Law: A Progressive Critique*. New York, Pantheon 1982; Peter Goodrich, *'Sleeping with the Enemy: An Essay on the Politics of CLS in America'* (1992) 68 *NYU LR* 289.

[35]R M Unger, 'Legal Analysis as Institutional Imagination' 1996 59 *Modern LR* 1. Cf: Emilios A Christodoulidis 'The Inertia of Institutional Imagination: A Reply to Roberto Unger' (1996) 59 Modern LR 377.

[36]W J Hosten et al, *Introduction to South African Law and Legal Theory* at 241.

investigation obliterate the ideological orientation most appealing to the writer out of the competing *truths* advanced in the theories. It is a myth that the art of writing itself can be neutral. Significantly, the primary role of jurisprudence is to provide a legal epistemology - a theory of legal knowledge. As noted by W J Hosten et al, 'each of these theories offers a distinctive notion of legal knowledge and...adds a particular bias to legal education.'[37]

1.2.3 Reading (the) law

> 'But minds are not mirrors; they are interpreting all the time. As soon as an impression impinges into consciousness, it ignites memories and memories of memories. Soon it is hard to untangle from the other.'[38]

Limiting the notion of lawyering expertise to the competence in the instrumental solving of the problems of the client to the exclusion of the political question of ethics, morality, and justice[39] may betray a proper search for the constant question of what do lawyers know? And how do they know it? In reading the law, or more precisely, the rules of law, one may venture to see legal rules as signifying logical connections within an interrelated network of ideas subject to and connected by the dictates of formal logic. The application of a given rule will thus be testable against a broader consistency of actual and potential application across a range of ideas denoted by other rules. Ultimately, all rules are postulated from elemental premises that are scientifically verifiable, and so

---

[37]W J Hosten et al, *Introduction to South African Law and Legal Theory* at 260.

[38]G Johnson, *In The Palaces of Memory: How We Build the Worlds Inside Our Heads* 1992, Grafton London, p 229.

[39]Cf: Gary L Blasi 'What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory' (1995) 45 *J. Legal Educ.* 313.

the study of law entails a 'scientific' method.[40] The legal rules to be imparted upon the learner thus constitute 'a specialised body of knowledge'.[41]

The disciplinary status of the 'law' from a positivist perspective,[42] is marked by its 'institutional' character. Neil MacComick states that 'the law speaks through institutional agencies, and these agencies speak with authority. ...Legal institutions exist and their authority is established within a systematic hierarchy.'[43] 'Law' thus exists in a formal milieu with its symbols and doctrines . It is largely self-defining in practice because those who have power within the system have also the authority to recognise the law.[44] This doctrinal tradition which views law as a normatively closed field of inquiry, with its own sources of knowledge and its own self-validating canons of inquiry[45] has, however, not gone unchallenged.[46] As a springboard for launching an attack, a critical scholar[47]

---

[40]This *scientific* attitude to the study of law is largely influenced by the 19th and 20th centuries American posture to legal education. See A W B Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *Univ of Chicago LR* 632.

[41]Joan Church, 'Reflections on Legal Education' (1988) 51 *THRHR* 153 at 158.

[42]Neil MacCormick, 'The Concept of Law and "The Concept of Law"' op cit.

[43]Neil Mac Cormick op cit on 40.

[44]Margaret Davies, op cit. see also P Goodrich, *Reading the Law* p 4. The two claims, those of unity and separation, have traditionally been closely linked in legal doctrine; law is kept separate and distinct from other institutions and forms of control precisely by virtue of being a unity, by virtue of having an *essential* characteristics which distinguishes law from all else.

[45]R Cotterrell, 'Law and Sociology: Notes on the Constitution and Confrontation of Disciplines' (1986) 13 *Journal of Law and Society* 9.

[46]Critical scholars and social scientists challenge the laws claim to autonomy and doubt the distinctiveness of legal phenomena amidst other normative social controls. See S Macaulay, 'Elegant Models, Empirical Pictures, and the

viewed doctrinal analysis as the primary work of legal officials. Hutchinson portrayed the task of the lawyer as similar to that of a warehouse person as follows:

> 'law comprises a great storehouse of rules, principles, and similar normative goods that have been individually catalogued and systematically shelved. During the course of business, goods shift in and out of the warehouse in response to the quantity and quality of legal trade. Apart from keeping the detailed inventory, doctrinal analysts have to ensure that incoming norms are screened and sorted so that the existing stock is not unsuitable or errant goods. At any time, however, experienced scholars can point to a principle or set of rules that is appropriate to resolve a particular litigate dispute. Also, they will be able to perform a thorough stock-taking and present a workable account of the totality of normative goods housed. An exhaustive survey is precluded by the open-ended character of such goods and the brisk nature of a legal trade.'[48]

The proponents of the non-doctrinal approach present a claim that the purpose of legal studies was "not to look at lawyers' law but from another perspective - that of the sociologist, philosopher or historian, for example - but to explore social-regulative and subject-constitutive terrains at large and to theorise the place of lawyers' beliefs and cultures' within them."[49]

1.2.4 Law as a language: The legal Discourse Community

Complexities of Construct' (1977) *Law and Society Review* 507; W T Murphy and S Roberts, 'Introduction' 1987 50 *Modern LR* 677; R Cotterrell, 'Law and Sociology' op cit.; A C Hutchinson, 'Crits and Crickets: A Deconstructive Spin (Or Was it a Googly?)' in R F Devlin, *Canadian Perspectives on Legal Theory* 1990.

[47]Allan C Hutchinson, Crits and Crickets op cit

[48]Allan C Hutchinson, Crits and Crickets op cit.

[49]Ian Duncanson 'The Ends of Legal Studies' (1997) 3 *Web Journal of Current Legal Issues*; also Neil C Sargent, 'Labouring in the Shadow of Law: A Canadian Perspective on the Possibilities and Perils of Legal Studies' in Duncanson, I (ed) *Legal Education and Legal Knowledge*, Special Issue of Law in Context 1991/2. George Priest, 'Social Science Theory and Legal Education: The Law School as University' (1983) 33 *J. Legal Educ.* 437 at 441 argues that the legal system, as a subject of academic enquiry 'can at best be understood with the methods and theories of the social sciences.'

According to Peter Goodrich, "the study of law is a very specialised form of literary pursuit. It is the acquisition of a knowledge of legal texts, of written law or of the discourse of the legal institutions rather than an empirical study of how law affects and controls actual behaviour."[50] In this sense, the study of law turns not only on the decipherment of, and reading, specific legal texts but also the capacity to translate the acquired knowledge in writing. Law, is then conceived as a linguistic act where 'writing' becomes a way of describing that which exists independently of human design by translating perception into thought, thought into speech, and speech into representational symbols.[51] Legal writing becomes writing law, that is, the 'reflection of a complex service of problem-solving decisions; it is the battle among disparate ideas; it is the effort of a creative mind trying to work within the rhetorical confines of the discourse. Law relies on a new understanding of rhetoric, schemata, ethics, and language. In law, language is not mere style, it is the law.'[52]

Discourse Community is a 'community withing a larger culture that has created its own language, forms and traditions for communicating with each. Specifically, discourse communities are socio-rhetorical networks that form in order to work towards a set of common goals'[53] It is expected that students acquire from their law school experiences specific rhetorical preferences. They also bring

---

[50]P Goodrich, *Reading the Law* 1986, Basil Blackwell p 91.

[51]Joel R Cornwall, 'Legal Writing as a Kind of Philosophy' (1997) 48 *Mercer LR* 1091.

[52]J C Rideout and J J Ramsfield, 'Legal Writing: A Revised View' (1994) 69 *Washington LR* 35 at 42 - 43; see also J M Williams, 'On Maturing of Legal Writers: Two Models of Growth and Development' (1991) *Journal of Legal Writing Institute* 1; C S Bamford 'Adding Value by Writing Clearly' (1994) 111 *SALJ* 514; and A Riley 'The Meaning of Words in English Legal Texts: Mastering the Vocabulary of Law - A Legal Task' (1996) 30 *Law Teacher* 68.

[53]Jill J Ramsfield, 'Is "Logic" Culturally Based - A Contrastive International Approach to the US Law Classroom' (1997) 47 *J. Legal Educ. 157.*

their own 'logic'. Before proceeding further, the logic, language, syntax and rhetorical preference of law must be assimilated. This process is viewed as an exercise of enculturation.[54]

1.3 LEGAL KNOWLEDGE AND LEGAL EDUCATION

Developments in Legal Education are exerting tremendous pressures on the academic study of the law. The notion of Learning Outcomes with its prodding influence on legal education makes it necessary to ask the awkward question in relation to knowledge, *useful to whom?*[55] The preexisting problems posed by the expectations that academic legal knowledge should bow to a professional legal knowledge remains present in legal education.[56] The developments, first from the binary divide between *natural law* and *positivism*, to the critical theories of law is also advancing to a fledging postmodern discourse of a theory of law.[57]

In South Africa, the wholesome importation of educational ideas open a vista of opportunities for transformation. Yet, genuine doubts have been expressed not only on the epistemological incompatibility of some of these measures, but on the availability of suitably qualified human resources to see the policies through. Since change is not an event but a process, legal education is constantly being muddled by the tides of change.

---

[54]See Richard Mullender, 'Law, Undergraduates and the Tutorials' 1997 3 *Web Journal of Current Legal Issues.*

[55]The concept of learning outcomes and its associated matters are explored in Chapter Three, *infra.*

[56]The debates around this are discussed in Chapter Two, *infra.*

[57] See particularly, Margaret Davies, *Delimiting the Law, supra*

The autonomous status of the discipline of law, and the proper role of other disciplines in law study is also a perennial concern. As Roger Cotterrell[58] points out, the defining attribute of a discipline lies in its intellectual frame of reference (its objects of enquiry, the conceptual and methodological tools relied upon and the manner in which the autonomy of the field of enquiry is established) which tends to be autonomous and self-validating. The difficulties faced by legal studies[59] in challenging the hegemony of the doctrinal tradition is integrally connected with the institutional autonomy of the professional law schools.[60]

Notwithstanding the choice between the bipolar image of, and relationship between academic and professional legal education, it stands out that university law degrees will continue to serve as a foundation for a wide variety of careers, not limited to the practising legal profession.[61]

---

[58] 'Law and Sociology: Notes on the Constitution and Confrontation of Disciplines' (1986) 13 *Journal of Law & Society Review* 507. See also S Macaulay, 'Elegant Models, Empirical Pictures, and the Complexities of Construct' supra.

[59] See generally Ian Duncanson, 'The Ends of Legal Studies' (1997) 3 *Web Journal of Current Legal Issues*; Ian Duncanson, 'Broadening the Discipline of Law' (1995) 19 *Melbourne Univ LR* 1075. See also Neil C Sargent, 'Labouring in the Shadow of Law: A Canadian Perspective on the Possibilities and Perils of Legal Studies', in Duncanson, I (ed.,) *Legal Education and Legal Knowledge*, Special Issue of Law in Context 1991/2. George Priest 'Social Science Theory and Legal Education: The Law School as University' (1983) 33 *J. Legal Educ.* 437.

[60] See David Sugarman, "A Hatred of Disorder": Legal Science, Liberalism and Imperialism ' in Peter Fitzpatrick (ed.,) *Dangerous Supplements: Resistance and Renewal in Jurisprudence* 1991.

[61] See A Bradney, 'Raising the Drawbridge: Defending University Law Schools' (1995) 1 *Web Journal of Current Legal Issues*. See also Murray L Schwartz, 'The Reach and Limits of Legal Education' (1982) 32 *J. Legal Educ.* 543.

CHAPTER TWO

INSTITUTIONS OF LEGAL SCHOLARSHIP

2.1 BACKGROUND

The two institutions of legal scholarship, the Law school and the profession owe a great deal of their dual dominance on the training aspirant lawyers to the history of the profession, and the professionalisation of law.[1] In South Africa, up to 1827 for instance, it was stated that to be admitted as an attorney in the Cape, the requirements were residency, solvency, Dutch language literacy and passing the exams conducted by the Commissioner of Courts.[2] Hahlo and Kahn[3] reported that in the Cape, attorneys up to 1877 could qualify simply by serving five years as articled clerks. The origin of legal qualifications for entry into the legal profession in South Africa dates from the requirement of a Doctor of Laws degree in the Netherlands for aspirant

---

[1]From the outset it is necessary to clarify the meanings I attach to the two institutions, "The Law School" and "The Profession". While the Law School in South Africa firmly belongs to the University, for a wide variety of reasons any depiction of the " Law School" may be fraught with the risk of overgeneralisation and mischaracterisation. The nature and institutional values of one Law School may contrast sharply with another. Nonetheless there remains collective institutional traits, dominant patterns and influences in them for one to still employ the term "Law school". See Lilly GC, 'Law Schools Without Lawyers? Winds of Change in Legal Education' (1995) 81 *Virginia LR* 1421. Also with regard to the term "Profession" or 'Professional' as labels for the occupation of the so-called 'practising' or courtroom practice lawyer, I attempt not to define the profession. I would oscillate between the cynical view of G Hanlon that '... professions are merely occupations which have achieved a certain status and power, as a result of various struggles over past centuries. Hence, they are subject to change and indeed those who adapt sufficiently well or quickly are downgraded and lose their professional status', and the blunt opinion of Roger Cotterrell that '(p)erhaps, indeed, the very idea of law as a profession is giving way to the idea that the practice of law is a business of selling a varied range of facilitative or defensive technical services.' See G Hanlon, 'A Profession in Transition? -- Lawyers, The Market Place and Significant Others' (1997) 60 *Modern LR* 798; and R Cotterell, *The Politics of Jurisprudence* 1989 Butterworths p 224. See also WR Prest, *The Rise of the Barristers* 1986 Clarendon Press Oxford.

[2]C G Botha, 'Early Legal Practitioners of the Cape Colony' (1924) 41 *SALJ* 255. A law graduate was however exempted from these requirements.

[3]*The Union of South Africa: The Development of Its Laws and Constitution* 1960 Juta at 219.

advocates in the Cape during the Batavian era.[4] The localisation of academic qualifications in South Africa is, however, traceable to the creation in 1859 of a Chair of Law at the then South African College (later University of the Cape of Good Hope, and Universities of Cape Town, and South Africa)[5] where the first LLB degree exams were instituted in 1874.[6] Training of students for the LLB degree and the Board of Public Examiners First Class Certificate in Law and Jurisprudence[7] was then provided part-time by practitioners.[8] The first chair of law in South Africa, created in 1859, as a matter of course went to a practising barrister.[9] Before legal education however became object of university study, training of aspirants was within the exclusive preserve of practising lawyers who engaged students intending to qualify as lawyers under a training contract called articles or clerkship or pupillage.[10]

---

[4]Hahlo and Kahn, *The Union of South Africa: The Development of Its Laws and Constitution* 1960 Juta at 202; cf: D V Cowan, 'The History of the Faculty of Law in the UCT 1859 - 1959' (1959) *Acta Juridica* 1 stated that when the British took over the Cape in 1806, South African legal scholarship was virtually non-existent. See also Joan Church, 'Reflections on Legal Education' op cit

[5]D V Cowan, 'The History of the Faculty of Law in the University of Cape Town 1859 - 1959', supra.

[6]D V Cowan, op cit at 13; see also D Pont, 'Die Opleiding van die Juris in Suid Africa' (1961) *Acta Juridica 58*; JRL Milton, 'Legal Education in South Africa in Retrospect and Prospect' (1975) *De Rebus Procuratoriis* 207.

[7]Since the profession was divided in the Cape, local qualifications for aspirants to the Bar commenced with the setting up in 1858 of the Board of Public Examiners that organised the First Class Certificate in Law and Jurisprudence examination. See Hahlo and Kahn, op cit at 218. The then University Colleges at Cape Town, Johannesburg, Pretoria, Grahamstown and Pietermaritzburg, all established at the seat of a Supreme Court provide instructions before and after hours for these examinations and for the examinations for Attorneys Admissions and the Public Service Law Qualification. See D Pont, 'Die Opleiding van die Juris in Suid Africa', supra at 112.

[8]See D Pont, op cit.

[9]See D V Cowan, op cit at 9 quoting the *Commercial Advertiser* of March 16th 1859 announcing the appointment of J H Brand to the Chair of Law in the South African College.

[10]See Hahlo and Kahn, op cit at 219; see also W R Prest, *The Rise of the Barristers* 1986 Clarendon Press, Oxford. The apprenticeship scheme of training was characterised by a practical orientation, focus on argumentation and dialectical skills and legal reasoning based on the particular case facts, rather than systematic issues which is the acclaimed hallmark of university training.

In the history of academic study of law in South Africa three developments are noteworthy.

- Though Roman-Dutch law forms the basis of the South African common law, in 1809 the system which originated in Holland was superseded in its birthplace by the Napoleonic Code. As noted by D V Cowan, 'the Roman-Dutch Law (was) virtually orphaned in those countries where the Dutch had planted it.'[11]
- While the British era in South Africa, with the first occupation in Cape in 1795 could have led to the displacement of Roman-Dutch law with English law, the British government decided to retain the Roman-Dutch law as the common law.[12]
- Notwithstanding the official retention of Roman-Dutch law as the law of South Africa, there was a gradual anglicising of the Roman-Dutch law.[13]

2.2 CONTEXTS OF CURRENT DEBATE

A principal aspect of most legal education involves the preparation of lawyers to enter the profession. The professions thus maintain active interest in what may be termed the 'accreditation agenda'[14] The concern resulting from the tension between the university law schools and the profession is that of the widening gap between legal education and legal practice. A corollary of this concern is that the cause of this dichotomy is the 'academic' orientation of

---

[11]D V Cowan, op cit at 2

[12]Hahlo and Kahn, *The South African Legal System and Its Background* 1968 Juta at 575.

[13]Hahlo and Kahn, *The South African Legal System and Its Background* 1968 Juta at 576.

[14]E Clark and M Tsamenyi, 'An Australian Perspectives on the Promises and Pitfalls of Law School Accreditation' in P Birks (ed.,) *Reviewing Legal Education* OUP 1994; 'Report of the ABA Section on Legal Education and Admissions to the Bar, The American Bar Association's Role in the Law School Accreditation Process' (1982) 32 *J. Legal Educ.* 195; H First, 'The Business of Legal Education' (1982) 32 J. Legal Educ. 201; cf: E Boschoff, 'Professional Legal Education in Australia' 1997 *De Rebus* 27.

university study against the 'practical' dictates of the nature of law practice.[15]

Further discussions in this chapter would thus revolve around the following themes

- Do academics owe a greater loyalty to the discipline of law more than the universities?
- Professions have their own specific standards and expectations which may not correspond with the institutional goals of the law schools
- Should the conception of 'the profession' equate the 'practice' view of law by certified practitioners?
- How far has legal education contributed to the idea of 'law as litigation'?

2.3 NATURE OF LEGAL EDUCATION AND TRAINING IN SOUTH AFRICA

2.3.1 What is legal education and training?

Legal education and training may be taken to include any process, procedure or technique of instruction by which legal knowledge is imparted.[16] It may however be noted that the traditional mode of the production and transmission of knowledge is occasioning intellectual shifts. The competing epistemologies are ushering in an era of intense interrogation of the process of

---

[15]Maharaj, 'The Role of the Law School in Practical Legal Training' (1994) 111 *SALJ* 328; N Gold, 'The Role of the University Law School in Professional Formation in Law' (1986) 4 *JPLE* 15; H T Edwards, 'The Growing Disjunction Between Legal Education and The Legal Profession' (1992) 91 *Mich. LR* 34; G Priest, 'The Growth of Interdisciplinary Research and The Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards' (1993) 91 *Mich. LR* 1929.

[16]Critical scholars would however dismiss the value neutrality of this definition. For instance, in 'Portia Lost in the Groves of Academe Wondering What to do About Legal Education' in I Duncanson, *Legal Education and Legal Knowledge* Law in Context Special Issue 1991, Margaret Thornton claims her attempt was to 'show briefly how legal epistemology is constructed so that intellectual reflexibility is discouraged'. See also D Kennedy, 'Legal Education as Training For Hierarchy' supra.

intellectual production and of the position of the scholar.[17] National policies are further strengthening this paradigm shift.

2.3.2 Stages of Legal Education and Training

Lawyers training is traditionally divided into three, not always distinct phases:

- academic or 'law degree' education,
- pre-admission Practical Legal Training (PLT), and
- Continuing Legal Education (CLE)

The first level in the staged progression of lawyers' education is largely conducted by academics in universities, while the practical legal training is overseen by the profession. The professions also takes charge of the third level with possible institutional links with the universities. The three phases reveal the acclaimed theoretical and professional dimensions of legal education. The three-year undergraduate *Baccalaureus Juris* (BJuris), four-year undergraduate *Baccalaureus Procurationis* (BProc) and the two- or three-year postgraduate *Baccalaureus Legum* (LLB) are the three professional legal qualifications obtainable from South African universities in order to satisfy the first level of the staged education. The first two degrees of *BJuris* and *Bproc* entitle the holders respectively to a career in the civil service (as a Magistrate, Prosecutor or Legal Administration Officer) and admission as an attorney. To be admitted as an advocate, a candidate must hold the LLB degree. For the intending attorney the Practical Legal Training (PLT) preceding admission to the practice after the academic stage will be satisfied by any of the following:

a) five years articles of clerkship whilst studying towards a degree;

[17]See Chapter Three, infra, for the discussions on the emerging educational paradigm.

b) three year articles of clerkship, having a Bachelor's degree (other than BProc and LLB);

after obtaining a BProc or LLB,

c) one year of articles of clerkship plus five months attendance at a School of Legal Practice;

d) two years of articles of clerkship;

e) one year of articles of clerkship and one year of community service;

f) two years of community service;

g) five years of appropriate legal experience.[18]

Continuing Legal Education (CLE), the last stage of the continuum usually refers to educational activities which meet the specific guidelines set by the professional bodies imposing mandatory CLE requirements. CLE may however also refer to law/practice-related training which is available to lawyers following admission to practice which may or may not be part of a formal accredited scheme of continuing education.[19]

2.4 'ACADEMIC' AND 'PRACTICAL' LEGAL EDUCATION

2.4.1 Distinction between 'academic' and 'practical' legal education

'Academic' and 'practical' are the usual metonyms[20] for the several other labels affixed to the

---

[18]In respect of the last 4, that is, (d), (e), (f) and (g) attendance at a six week practical training course is also required. See University of Natal, Pietermaritzburg Faculty of Law 1997 Handbook. With effect from 1998, a uniform LLB will replace all the three qualifications, See *Qualifications of Legal Practitioners Amendment Act 78 of 1997.*

[19]See R Hale, 'The Place of CLE Within Legal Education' (1994) 12 *JPLE* 69; A Blunden, 'Designing and Running Continuing Legal Education Programs in a Private Law Firm' (1993) 11 *JPLE* 35 at 38.

[20]Other labels commonly found include abstract, doctrinal and vocational. See Maharaj, op cit at 331 - 333; N Gold, op cit.

divide within legal education. The academic stage broadly equates the education provided by the law schools. Law schools, as part of the university sector, generate new learning organised around systems of perceptions through research and critique of world practices.[21] According to Burchell[22] 'the term "academic", derived from the name given to the followers of Platonic philosophy, has acquired two distinct meanings. On the one hand, the word describes a teacher in a scholarly institution, usually a university. On the other hand, "academic" is a less flattering epithet describing a matter which is possibly of theoretical but no practical importance.' In achieving their mission, it appears the law schools thus skew their curricula towards traditional substantive law subjects where law students are largely exposed to the logic, philosophy and beliefs underlying law in a systemic manner, rather than the mechanistic application and instrumental actions displayed in law practice.

On the other hand, practical or professional training has acquired a connotation of having the educational objectives of inculcating these skills, competencies and attitudes required for the actual day to day running of the lawyering business. A number of the skills and competencies that are practical or instrumentalist in essence are normally attached to this stage. This stage is further divided into institutional and in-service training. Institutional Practical Legal Training (PLT) is that offered at schools for legal practice set up and managed by the organised professions themselves. In in-service training, articles of clerkship, pupillage and training contract, the

---

[21]N Gold, op cit; Lilly, op cit; N Savage and G Watt, *'A House of Intellect for the Profession'*, and S Toddington, 'The Emperor's New Skills: The Academy, The Profession and the Idea of Legal Education' in P Birks (ed) *Pressing Problems in the Law Vol.2, What Are Law Schools For?* 1996.

[22]J M Burchell, *Beyond the Glass Bead Game: Reshaping Academic Legal Research* inaugural lecture delivered at the University of Natal, Pietermaritzburg on 12 April 1989.

aspirant lawyers understudy an experienced member of the profession for a specified duration in order to gain first-hand experience of the workings and functions of law in practice, management of law office and art of lawyer-client relations. This apprenticeship system, being the earliest means[23] (and indeed the initial sole route) to being a certified practitioner, has been canvassed as a more effective means of attaining the highly desirable skills and competencies required in real-life law practice. The apprenticeship scheme, now[24] as at the earliest stage of the incursion of the university into the domain of lawyers training, offers a shield of resistance to the complete academic study of the law leading to admission to the profession.

Locating meanings for academic education or practical training would ordinarily suggest that there is indeed a distinction between them, and probably legitimise its pursuit in stages. William

---

[23]See JRL Milton, 'Legal Education in South Africa in Retrospect and Prospect' (1975) *De Rebus Procuratoriis* 207, and Joan Church, 'Reflections on Legal Education', op cit.

[24]A V Dicey, the reputable legal scholar, in his inaugural lecture in 1883 echoed the voice of his time to ask the question, 'Can English Law be taught at Universities?' (Referred to in JW Bridge, 'The Academic Lawyer: Mere Working Mason or Architect' (1975) 91 *LQR* 488 at 490); for the present trend see Daan Steenkamp, 'Changes in the Attorneys' Profession' (1996) De Rebus 635, 708 and 808. Daan Steenkamp's survey, which covers 349 out of 1196 candidate attorneys who had completed a law degree with articles of at least six months and 337 junior attorneys who had completed the tertiary education and articles with ostensibly less than ten years experience, reveals that, a) 78.6% of candidate attorneys and 78.3% of junior attorneys disagreed that their law degrees had prepared them adequately to practise as attorneys without further practical training; b) majority of both candidate attorneys and junior attorneys agreed that their tertiary education had been very theoretical; c) narrow majority supported the integration of theoretical training and practical training (thus questioning the validity of the separation of academic legal education and practical legal training); d) over 90% of junior attorneys supported introduction of practical legal training as part of university legal education; e) 95.2% of junior attorneys opted for retention of articles; and f) 52.4% want 19 - 24 month's articles. However, in employing Daan Steenkamp's study, mention need be made of an ideological stance. J van der Westhuizen, *On Equality, Justice, The Future of South African Law Schools and Other Dreams*, supra, painted a statistical portrait of racial imbalance in the ethnographic composition of lawyers and law students in the country (see chapter 1.1.3 of this paper). Also *University of Fort Hare's Response to the Report of the Task Group on Legal Education* May 1996 -- The Lewis Document (dated 26 August 1996) strikes a chord in the ideological minefield when it stated that '(t)o speak of the *profession* as if it is a monolith and needs no transformation is to support a closed shop approach. We assert that the mainstream *profession* in South Africa are not the legitimate gate keepers of entry or exit to the profession.'

Twining[25] and J W Bridge[26] provide insightful perspectives from which the dangers inherent in the fallacy of this divide may be gleaned.[27] According to Twining, this divide conjures a bipolar image of two recipients of legal knowledge whom he termed the *Pericles* and the *Plumber*. To employ Twining's *ipsissima verba*,

> 'the image of the lawyer as a plumber is a simple one. "The lawyer" is essentially someone who is a master of certain specialised knowledge, "the law" and certain technical skills. What he needs is a no nonsense specialised training to make him a competent technician. A "liberal" education for such a functionary is at best wasteful: at worst it can be dangerous... The image of the lawyer as Pericles - the lawgiver, the enlightened policy-maker, the wise judge. The Periclean image of "the lawyer" is not so distance; this is perhaps due in no small part to the influence of our ideals of liberal education'[28]

While Twining espoused the effect of the academic-practical divide on legal educational objectives in relation to the student,[29] J W Bridge was concerned with the educational objectives *vis a vis* the academy, his primary constituency. With regard to the legal academic, Bridge etched the images of the *mason* and the *architect*. According to Bridge[30]

> 'by mere working mason I mean an undoubtedly skilled technician who can handle

---

[25]'Pericles and the Plumber' (1967) 83 *LQR* 396.

[26]'The Academic Lawyer: Mere Working Mason or Architect' op cit.

[27]This debate has also been seen by certain academics as a fierce battle in which one's position must be defended. See particularly Stuart Toddington, 'The Emperor's New Skills: The Academy, The Profession and The Idea of Legal Education' in P Birks, 1996 op cit at 76 - 77 where he stated that '(n)ow, unless we are to accept that all is merely commerce, and thus law is merely commerce, this form of skills discourse is evidence of a complete breakdown of a critical understanding of the complexity and distinctiveness of legal phenomena and thus of the appropriate organisation and content of legal education. To accede to this view is a complete abrogation of intellectual responsibility in a debate which is now no less than a struggle to reinvent the very idea of the legal academy.' See also N Savage and G. Watt, 'A House of Intellect for the Profession' in P Birks, 1996, op cit.

[28]Twining, op cit at 397 - 398.

[29]In fact Twining, op cit at 396 claims that 'the sub-title to this lecture is *prolegomena* to a working theory for lawyer education'

[30]Bridge, op cit at 489.

> traditional materials in a traditional way and can teach others to do so. But one who is not capable, on his own initiative, of adapting skills to new purposes or of developing new material and techniques in response to the changing needs of time. An architect, on the other hand, is a virtuoso, a person of imagination and inspiration. Whilst skilled in traditional methods he is aware of the inadequacies and can devise new techniques and develop new materials so as to meet the challenge of change. He is also capable of inspiring others to achieve even greater things.'

The Periclean ideals of legal education seem to flow from the object of a broad-based liberal education afforded by a university legal education. On the other hand, practical training leans more towards Twining's plumber. Also drawing from Bridge's phraseology, the mason would refer to the academic lawyer intent on transmitting mass of knowledge as technical legal skills. The architect image of the legal academic elevates him beyond that of a mere teacher to that of a facilitator developing the inner faculties of the student, he is involved in 'received wisdom' while at the same time subjecting them to scrutiny, not only transferring knowledge but building the capacity to generate knowledge. In recognition of the futility of deepening our thoughts of, thus promoting a divide, Twining stated[31] 'the simplistic images of "the lawyer" that have so often hidden in people's assumptions about legal education has a fertile source of confused and confusing controversy. Both the Periclean and plumbing are quite inadequate; they are crude, over simplified and unrealistic.' Bridge too, aptly allayed potential fears, he declared,[32] 'it is my thesis that it is the duty of an academic lawyer to be an architect of law and not a mere working mason.'

---

[31] ibid, 420.

[32] Ibid, 489

2.4.2 TEACHING AN ADVERSARIAL MIND SET (THINKING LIKE A LAWYER)

The adversarial system of litigation has its roots in the common law legal family of which the South African legal system belongs. 'Adversarial system' itself may be interpreted neutrally, in which case its essential features would include:

- In the litigation system, proceedings are essentially controlled by the parties to the dispute and there is an emphasis of the presentation of oral argument by counsel.
- The role of the judiciary is more reactive rather than proactive. Parties are afforded the opportunity and responsibility for mounting their own case.
- The expense and effort of determination of disputes through litigation falls largely on the parties
- The judiciary possess an inherent and separate power to litigate
- The courtroom is a forum in which arguments of the disputing parties are pitted against each other.[33] The system, due partly to its emphasis on the final hearing, is about winning and losing - each party has responsibility for advocating its own case and attacking the other party's case, thus placing emphasis on confrontation.
- The lawyer's role is partisan - to represent the interest of her client.[34]

In examining the role of legal education in fostering an adversarial mind set, the Australian Law Reform Commission[35] noted, that 'legal education and training may contribute to current

---

[33]See *Jones vs National Coal Board* (1957) 2 QB 55 at 63 - 64 per Denning LJ where it was stated '... the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large... So firmly is all this established in our law that the judge is not allowed in a civil dispute to call a witness whom he thinks might throw some light on the facts. He must rest content with the witnesses called by the parties.' See generally Australian Law Reform Commission Issues Paper 20 *Review of the Adversarial System of Litigation: Rethinking the Federal Civil Litigation System*. ALRC IP 20 (May 1997).

[34]See generally, Australian Law reform Commission Issues Paper 21, *Reviewing of the Adversarial System of Litigation: Rethinking Legal Education and Training*. ALRC IP 21 (August 1997).

[35]ALRC IP 21, op cit at para. 1.10

litigation practices by creating or maintaining an adversarial style of engagement, including the confrontational style in some adversarial processes. Often academic legal education concentrates on appellate decisions and court processes in teaching about law, rather than in the majority of disputes that are resolved outside of courts. This may create an expectation that court-based adjudication is the norm in legal practice.' There is no evidence to suggest the contrary in the South African context.

The thesis about the connection between the various uses of litigation and two interrelated branches of legal education, that is, scholarship and pedagogy, is not unsupported by practices at both the university law schools and the schools for legal practice.[36] Before examining these issues, it may be apposite to re-pose the following queries: What does it mean to have a legally trained mind? What kind of purposes and achievements are prescribed for those who seek schooling in law? What kind of failures are associated with those who adopt a legal mind-set? What happens to the moral sensibilities of those who follow the path of teachers who claim to teach "thinking like lawyers"?[37]

For most students, based on the doctrinal analysis of legal texts fostered by lecturers, coupled with simulation exercises and skills development exercises like the moot-court, the law school experience focuses remarkably on litigation in court, not only as a means of resolving disputes

[36]E W van Valkenburg, 'Law Teachers, Law Students and Litigation' (1984) 34 *J. Legal Educ.* 584 at 585.

[37]James R Elkins, 'Thinking Like a Lawyer: Second Thoughts' (1996) 47 *Mercer L R* 511; see also Peter R Teachout, 'Uneasy Burden: What It Really Means to Learn to Think like a Lawyer' (1996) 47 Mercer L R 543.

but as the essence of what lawyers do.[38]

In relation to adversarialism as a basis for the 'litigiousness' of the lawyer's practice, legal education might have contributed its share through the following patterns:

- the law curriculum stresses disputes between private parties more than between private parties and the state;
- While the contexts leading to disputes are limitless, law curriculum reveals a dominance of injuries inflicted by one person upon another; competing claims to the uses of property; and *ultra vires* acts of the state;
- Considerable time is spent in studying the procedures by which the courts resolve these disputes;
- de-emphasized in the law curriculum are topics such as, non-judicial methods of compensating injured persons, including insurance and administrative remedies, arbitration, mediation and conciliation; counselling and planning; historical, anthropological or political studies of conflict and conflict resolution.[39]

In the above premises, an interim coda may be entered on the strength of educational studies that the learner's perceptions are largely constructed by these educational objectives.[40]

---

[38]See E W van Valkenburg, op cit at 599; cf: McQuid-Mason, 'Clinical Legal Education: Its Future in South Africa' (1977) 40 *THRHR* 343, Joan Church, 'Reflections on Legal Education', op cit; J R L Milton, 'Constructing A Curriculum for the University Study of Law' (1975) *De Jure* 109.

[39]See E W van Valkenburg, op cit at 598; cf: M L Schwartz, 'The Reach and Limits of Legal Education' (1982) 32 *J. Legal Educ.* 543; Zemans and Robenblum, *The Making of a Public Profession*, Chicago: American Bar Foundation, 1981; J P Byrne, 'Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education' (1993) 43 *J. Legal Educ.* 315; E M Fox, 'The Good Law School, The Good Curriculum, and the Mind and the Heart' (1989) 39 *J. Legal Educ* 473.

[40]J L du Plooy, et al, *Fundamental Pedagogics For Advanced Students*, Pretoria, 1993.

2.4.3 CONTENT OF LEGAL STUDIES

The areas of knowledge to be taught in a programme of instruction leading to a legal qualification is in the main affected by the peculiar nature of law school's dilemma in simultaneously attempting to meet the traditional values associated with university education and the demands of law practice. Apart from this dilemma producing an unclear purpose of legal education in certain respects,[41] the law schools themselves seem not to be able to agree on a proper role for law schools in the training of legal professionals.[42] To this extent the view of what legal education is for, and of the desired product (the law student) particularly influences the direction of any curriculum content.

Notwithstanding the satisfaction by a law school of any professional requirement, it may attempt to offer an educational programme designed to emphasize some aspects of the law or legal profession while giving less attention to others. The mission of the law school may thus be a ground to assess its content, its identity is marketed through the areas of knowledge it promotes. In this category, South African law schools may be seen, or indeed portraying themselves as liberal, Christian or Afrikaans.[43]

---

[41]The academic-practical divide is exemplar of this scenario.

[42]A number of institutions not only feel that a 'practice' view of legal studies should be held, leading academics have equally suggested, and actively promoted the concept of clinical legal education probably over the so called theoretical / substantive law subjects. See for instance McQuid-Mason, op cit; A Chaskalson, 'Responsibility for Practical Legal Training' 1985 *De Rebus* 116; M Motshekga, 'A System of Internship' 1986 *De Rebus* 425; the collection of papers in Legal Aid and Law Clinics in South Africa -- Conference Proceedings, University of Natal, Durban, July 1983 edited by D J McQuid-Mason; and J H Maharaj, 'The Role of the Law Schools in Practical Legal Training', op cit.

[43]See J van der Westhuizen, *On Equality, Justice, The Future of South African Law Schools and Other Dreams*, supra

Contemporary demands may also interpose a relevance in the prescription of areas of knowledge in a law curriculum. As law schools continue to exist in South Africa under a government supposedly committed to human rights, social justice and other valued concepts, the lawyer's training must necessarily accommodate the promotion of a well-nourished and reflective practitioner capable of grasping his relevance to the society at that point in time.

Internationalisation of areas of knowledge, its creation and application is another factor in this regard. South African legal scholarship in positioning itself as a player in the regional, African and global arena must offer a comparative and non-closed circuit view of legal knowledge. While thus affording the student the opportunity to glean and appreciate its rich Roman-Dutch heritage, its place in and adaptability to international understanding, interpretation and application are other factors in law curriculum.[44]

Sensitivity to intellectual movement on the part of the faculty may have a bearing on the content of a curriculum and its design. The way a faculty conceives law as an object of inquiry within other disciplinary traditions informs both the scholarship and pedagogy.[45] The traditional character of the university life *vis-a-vis* a multiplicity of the factors outlined above bears a relationship to the content of a law curriculum. Furthermore, either as an academic or vocational responsibility, law schools must meet their obligation to the profession in the transmission of legal knowledge. As such an admixture of the phenomena above may also influence the selection

[44]Exemplary in this direction is the Constitutional Courts' adoption of foreign jurisprudence in the determination of cases.

[45]Margaret Thornton, op cit; Ian Duncanson, 'The Ends of Legal Studies' in Duncanson I (ed) *Legal Education and Legal Knowledge,* Special Issue of *Law in Context 9:2.*

of a particular subject as either compulsory or optional in the curriculum. Identifying compulsory subjects or the core of the law curriculum, and what influences the categorization of certain subjects as compulsory may be fairly ascertained from the stipulation of the minimum areas of knowledge deemed representative of the dominant areas of law. This core must be able to provide a minimum overview of the important segments of the discipline, subject to its being supplemented with another minimum from a basket of electives.[46]

Other considerations in assessing what to include in a law curriculum may be the level of non-law subjects,[47] and the inclusion or exclusion of language requirements.[48]

2.5 THE ROLE OF THE PROFESSIONS IN LAWYERS' EDUCATION - AN OUTLINE

The professions' interest in legal education is manifested in more than one of the following ways:

- directing the focus of the law school curriculum by ensuring that students receive education in areas that are perceived to be essential for the practice of law,

- managing and administering vocational training programmes, in the form of institutional Practical Legal Training (PLT) schools and in-service training contracts (articles of

---

[46]Peter Birks, 'Short-Cuts' in Birks P (ed.) *Reviewing Legal Education* warns on the danger of a minimalist approach to curriculum content which he said leads to impoverishment of legal science, and ultimately facilitating declining level of real understanding of law among lawyers themselves.

[47]See Ian Duncanson, 'The Ends of Legal Studies' Supra.

[48]For instance, in terms of Section 6 of the *Constitution of South Africa*, Act 108 of 1996, there are eleven official languages. Section 6(2) thereof further advances the cause of certain languages especially African in that their status and use have been historically diminished. With respect to the place of Latin, it appears finally settled that it belongs to history, see J Sinclair and E Mureinik, 'Compulsory Latin: A Compelling Case?' (1989) *SALJ* 158.

clerkship and pupillage),

- acting as admitting authorities for intending practitioners,[49]
- taking charge of any scheme of Continuing Legal Education (CLE)
- ensuring quality assurance in the training of intending members of the profession wherever education and training is received.

[49]The *Attorneys Act* 53 of 1979 and *Admission of Advocates Act* 74 of 1964; cf: *Quality of Justice: The Bar's Response* by The General Council of the Bar (UK) 1989, Butterworths; cf: *The English Report on Legal Education*, 1996 stressed the importance of a partnership between the professions and the law schools, at 23, 'The freedom of universities to decide what, whom and how they teach, has to be reconciled with the duty of the professional bodies to maintain and improve the educational standards and qualifications of entrants and practitioners.' Contrariwise, the chairman of the Canadian Consultative Group in Research and Education in Law, H W Arthurs, says that 'Canadian legal scholarship... is too monolithically committed to traditional analytical methods, too pre-occupied with an agenda of issues defined by professional priorities, too firmly implicated in the value structures and mind set of the practising bar and government law reform activities.' See H W Arthurs, 'To Know Ourselves: Exporting the Life of Canadian Legal Scholarship' (1985) 23 *Osgoode Hall LJ* 403, cited in H J Glasbeek and R A Hasson, *'Some Reflections on Canadian Legal Education'* (1987) 50 *Modern LR* 777.

CHAPTER THREE

STATE POLICIES AND NATIONAL OBJECTIVES

3.1 INTRODUCTION

In chapter one, it was contended that the legal system together with the bases of the legal knowledge transmitted to the aspirant lawyer is not value-free or neutral. The present government has not only acknowledged[1] this situation but expressed its determination to supplant previous ideologies with its own conception of social order.[2] In the process of implementing this agenda several policy documents in the field of education have been produced, chiefly, three different White Papers in education, and a Language in Education Policy. The National Commission on Higher Education (NCHE) at the head of a plethora of other commissions serves as a think-tank for government's educational policies. In addition to its main report issued in August 1996, the NCHE has other technical committees which turn in their own reports too. To provide teeth for the policies on education, the South African Qualification Authority Act,[3] the National Educational Policy Act,[4] the South African Schools Act[5]

---

[1]The *White Paper on Education and Training* (White Paper No 1) Government Gazette No 16312, Vol 357, Notice 196 of 1995 stated at p 19 that '...education has been a deeply contested terrain from colonial times and throughout the long history of minority rule. Language, cultural and education policies have always been closely allied to the main themes of state policy'

[2]*The Report of the National Commission on Higher Education*, August 1996 stated that 'the system of higher education must be reshaped to serve a new social order, to meet pressing national needs, and to respond to a context of new realities and opportunities.'

[3]58 of 1995

[4]24 of 1996

[5]84 of 1996

and the yet-to-be promulgated Higher Education Bill all contain varying provisions designed to reshape the face of higher education. With particular reference to legal education, the Qualification of Legal Practitioners Amendment Act[6] has been enacted to cater for the introduction of a new qualification structure for intending legal professionals.[7] Two other broad policy documents -- *The Reconstruction and Development Programme* (RDP 1994) and the *Growth, Employment and Redistribution -- A Macro-economic Strategy* (GEAR, June 1996) also have implications for the direction of higher education.

While the spate of changes in curricula proposed by the different government policy documents and legislation may ordinarily be attributed to the political dispensation since 1994, the South African system of education is also catching up in many respects with global developments in the manner education and subsequent curriculum development is conceptualised.[8] Particularly, in the field of Legal Education, tremendous changes are being introduced into the law curriculum in other countries from which influences the South African Legal Education will not be immune.[9] It is nonetheless

---

[6]78 of 1997

[7]It is particularly noteworthy to record that while the central argument in this paper is that there are three major role players in legal education -- the state, the university and the profession -- the overbearing influence of the Department of Justice in respect of the training of future lawyers is markedly outstanding. The events leading to the enacting of the Act 78 of 1997 where the Department of Justice played a significant role is a case in point.

[8]See Hunkins F and Hammill P. 'Beyond Tyler and Taba: Reconceptualising the Curriculum Process' (1994) 69 *Peabody J. Education* 4.

[9]For instance, in Australia, the Australian Law Reform Commission has within the past one year issued at least two papers touching on Legal Education and Training. See ALRC IP20 - *Review of the Adversarial System of Litigation* (1997) and ALRC IP21 - *Rethinking Legal Education and Training* (1997); in the UK, The Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC), 1996, continues to generate concern. See A Bradney, 'The Rise and Rise of Legal Education' supra and A Bradney, 'Raising the Drawbridge: Defending University Law Schools' (1995) 1 *Web JCLI*.

recognised that the paramount concern for major policy initiatives remains the need for reconstruction and development of the South African society.[10] Furthermore, the Higher Education Bill[11] articulates a vision which rests on democratic and quality management principles. Importantly, the government policies seek to put in place a system that contributes to knowledge and scholarship of an international standard which is sensitive to local, national and African needs. The government programmes thus envisage and provide for transformation.

As Philip Collet[12] determined, 'transformation', a theme that runs through all the recent policy documents, involves four dynamics: rationalisation of the system, democratisation, quality assurance and market forces. Rationalisation of the system involves a programme-based approach under a National Qualification Framework (NQF)[13] which imposes co-operation between institutions as well as optimal utilisation of resources. Democratisation involves a transition from erstwhile practices to a system of accountable governance including equity and access in admissions and appointments. The acclaimed academic freedom[14] in higher education to structure its programmes as deemed fit is under

---

[10]The White Paper No 1 specifically states that the ministry of education 'locates education and training within the National RDP, discusses the implication of the new constitution for the education system, especially in respect of fundamental rights.'

[11]756 of 1997

[12]Philip Collet, 'Capacity Building For Professional Development in Higher Education' (paper read at the SAAAD Conference, Nov 30 - Dec 3 1997) in 1997 SAAAD Conference Proceedings.

[13]See The South African Qualifications Authority (SAQA) Act.

[14]Cf: J P Byrne, 'Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Legal Education' supra; Charles Simkins, *Do We Need to Rethink the Concept of Academic Freedom in Contemporary South Africa*, Senate Special Lecture, University of Witwatersrand, 22 August 1996 at <http://www.164.88.55.4/online/hero/full.text/text2.html> (accessed: 7 Dec. 1997)

stress from the provisions of the Higher Education Bill and the South African Qualifications Authority Act. The Higher Education Bill mandates the establishment of a Quality Assurance (QA) system in Higher Education. Lastly, the Education White Paper 3[15] states the education ministry's intention to promote growth in career-oriented courses at certificate and diploma levels and in all programmes as a means of responding to development needs and market forces.

In assessing the impact of the various policies and legislation on legal education, discussion will be centred around the National Qualifications Framework, Learning Outcomes, Quality Assurance and the impact of modularisation and semesterisation. The structure of a professional programme, like the LLB degree, as envisaged within government structures will also be examined.

3.2 THE NATIONAL QUALIFICATION FRAMEWORK (NQF) DISCOURSE.

The Higher Education Bill states as one of its objectives, '(t)o provide for the establishment of a single co-ordinated system of Higher Education while encouraging diversity within such a system to provide for programme-based education.' According to the Education White Paper 3, a Programme-based approach

- recognises that higher education takes place in a multiplicity of institutions and sites of learning, using a variety of methods, and attracting an increasingly diverse body of learners; and,
- is fully compatible with all the functions and integral components of higher education.[16]

---

[15]Notice 1196 of 1997 (24 July 1997)

[16]See Chapter 2.5, Education White Paper 3.

The Education White Paper 3 further explains that a programme-based approach to Higher Education will:

- promote diversification of the access, curriculum and qualification structure, with programmes developed and articulated with the NQF, encouraging an open and flexible system based on credit accumulation and multiple entry and exit points for learners;
- promote the development of a flexible learning system, progressively encompassing the entire education sector, with a diversity of institutional missions and programme mixes, a range of distant and face-to-face delivery mechanism and support systems, using appropriate, cost-effective combinations of resource-based learning and teaching technologies;
- improve the responsiveness of the higher education system to present and future social and economic needs, including labour market trends and opportunities, the new relations between education and work, and in particular, the curricula and methodological changes that flow from the information revolution, the implications for knowledge production and the type of skills and capabilities required to apply or develop the new technologies;
- the introduction of the new system will require a system-wide and institution-based planning process and a responsive regulatory and funding system which will enable planned goals and targets to be pursued. The process will ensure that the expansion of the system is responsibly managed and balanced in terms of the demand for access, the need for redress and diversification, the human resource requirements of the society and economy and the limits of affordability and sustainability.[17]

[17]See Chapter 2.6, Education White Paper 3

A learning programme (LP) which is at the root of the programmes-based approach is said to be 'a structured set of learning experiences designed to enable learners to achieve agreed upon / pre-specified learning outcomes. It leads to a qualification (an accumulation of credit points) and must serve an academic or vocational purpose.'[18] The traditional learning programme sought to be replaced is allegedly based on curriculum designed to meet *assumed needs*, as opposed to the outcomes-based approach under the National Qualification Framework (NQF). The White Paper No 1 proposed '(a)n integrated approach to education and training, linked to the development of a new National Qualification Framework (NQF) based on a system of credits for learning outcomes achieved, ... encourage creative work on the design of curricula and the recognition of learning attainments wherever education and training are offered.'[19] The thrust of the National Qualification Framework (NQF) is the introduction of a coherent system of national vocational qualifications based on the assessment of competency. By specifying competencies sought independently of the learning process, access to learning through any mode becomes possible.[20] Along with unit credits and credit accumulation, continuing education and training will be made available to sectors of the population which have never participated in the formal system. A qualification in terms of the NQF is conceived

---

[18]See A H Duminy, *Programmes: A Checklist*. Unpublished paper. September 1997 (Curriculum Development, UND).

[19]See Government Gazette Vol 357, No 16312 of 15 March 1995, Chapter two, paragraph 7.

[20]The Education White Paper 3, at 2.65 argues that 'separate and parallel qualification structures for universities, technikons and colleges have hindered articulation and transfer between institutions and programmes, both horizontally and vertically. The impermeability of multi-year degree and diploma programmes is a further obstacle to mobility and progression.' In respect of the education and training of future lawyers, it may be expected that the provisions of the Attorneys Act No 53 of 1979 and the Admission of Advocates Act 74 of 1964 might have to be amended to de-emphasize number of years spent on programme of study, and where previous qualification was attained, instead, the learning *outcomes* achieved would be of paramount factor.

as a statement of competence,[21] clearly relevant to work, that is intended to facilitate entry into or progression in employment.[22] Stemming from this premise is that the focus shifts to *outcomes* rather than the inputs or content. A learning outcome represents the end result of a learning process, that is, a clear workplace-based occupational statement of what the learner will be able to

- know and understand (content, knowledge, concepts and theories);
- do (skills and competencies);
- what attitudes and values the learner will have;

as a result of the process of learning.[23]

Outcomes-based (OB) or Competency-based education (CBE) is then a system in which the focus is on the result of the learning rather than the process. The notion of Learning Outcomes has two essential components:

- that learning should have a purpose; and
- that the purpose should be describable and measurable.

In effect, the SAQA Draft Regulations[24] require that a learning outcome must be expressed in terms

---

[21]See also *South African Qualifications Authority (SAQA) Draft Regulations* SAQA 12/P, Notice 764 of 1997 (9 May 1997). The Draft Regulations defines a 'Qualification' as 'a planned combination of learning outcomes which has a defined purpose or purposes, and which is intended to provide qualifying learners with applied competence and a basis for further learning.'

[22]See Section 2 *(Objectives of National Qualifications Framework), SAQA Act*, No 58 of 1995; Chapter Two, White Paper No 1.

[23]R Boam and P Sparrow, *Designing and Achieving Competency: A Competency-Based Approach to Developing People and Organisations.* London: McGraw-Hill, 1992.

[24]See Appendix B to Regulations for NSB (The NQF: Decision affecting levels, bands, qualifications, unit standards and critical outcomes). SAQA Draft Regulations, supra.

of the *range statements* and *assessment criteria*. Range statements indicates the critical areas of the content, the scope, depth, level of complexity and parameters of achieving the outcome. Assessment or performance criteria contain evidence of what constitutes learner's achievement of specific outcomes, description of what performance the learner will need to do in order to demonstrate achievements of a particular learning outcome. The criteria indicate in broad terms the observable processes and products of learning which serve as a culminating demonstration of learner's achievement. The assessment criteria are explained and detailed in the range statements. The assessment criteria provide a framework for assessment, while the range statements add the substance of what assessment will be applied to.[25]

In specifying outcomes, the SAQA Draft Regulations make a distinction between *Critical Outcomes* and *Specific Outcomes*. Critical outcomes express the generic competencies which should be built into the entire learning programme. For instance, in respect of the Bachelor of Laws' degree, a critical outcome may be 'an understanding of, and grounding in, foundation skills, both intellectual and practical, necessary to practice law, especially problem solving skills.' Specific outcomes, on the other hand, are learning area / discipline specific outcomes, which are developed in specific modules of the learning programmes. An outcomes-based programme is then designed by first conducting analyses of the professional roles and / or a theoretical formulation of professional responsibilities. Outcomes describe competencies expected from the performance of professionally related functions, or the knowledge, skills and attitudes thought essential to the performance of those functions. As

[25]See Chris Boys, 'NVQ: The Outcomes-plus Model of Assessment' in Edwards A and P Knights (eds) *Assessing Competence in Higher Education* 1995, London: Kogan Page.

opposed to the traditional learning programme where there seems to be little or no causal link between ability to pass a subject and competent performance in the vocation concerned, in the outcomes-based curriculum, assessment of occupational needs precedes the formulation of a learning programme. An assessment of what constitutes competent performance, that is, a functional analysis of the lawyering business, and lawyers' tasks is a pre-requisite to curriculum development. Either one or both of two possibilities may result from the functional analysis in the specification of learning outcomes:

- competent performance can already be matched -- then no course is required before a certificate may be awarded (certification)[26], and / or
- performance falls short of what is required -- then the professional skills of the tutor are required in order to identify what learning experiences are most likely to bring about an improvement (diagnostic).

In this manner, competency specification act as tentative predictors of professional effectiveness and are subjected to continual validation procedures which are specified and made public prior to instruction.

Since the traditional learning programme is premised on a curriculum designed to meet assumed needs, the Outcomes-based education proposed under the National Qualifications Framework (NQF) instead intends to utilise National Standards Bodies (NSBs) and Standards Generating Bodies (SGBs)[27] to identify Learning Outcomes which are clear and precise statements which describe what

---

[26]This is the aspect termed 'Recognition of Prior Learning' (RPL). See Education White Paper 3 at 2.6

[27]Bodies registered in terms of Section 5(1)(a)(ii) of the SAQA Act responsible for establishing education and training standards or qualifications, and to which specific functions relating to the registration of national standards and qualifications have been assigned in terms of Section 5(1)(b)(i) of the Act. See also SAQA Draft Regulations, op

effective performance means in distinct occupational areas.[28] The standards are then used to develop 'new' vocational qualifications and the assessment which underpin them together with those of the overall learning programme. Once assessment of what constitutes specific occupational competence precedes the designing of a learning programme, the performances of the learners are assessed to match the pre-specified standards which are then criterion referencing.[29] Competence should therefore be described in general terms as:

- being able to perform
- to standards in employment; and
- in real working conditions.

Standards, in this guise, would qualify competence in such a way that it can link with performance. Standards then are benchmarks derived from concepts of competence against which performance is measured and matched.[30]

3.3 QUALITY ASSURANCE

The notion of quality assurance is affirmed by all the major policy documents on higher education.

---

cit.

[28] See also *Curriculum 2005: A User's Guide*, published by the Department of Education, Pretoria, March 1997.

[29] Criterion-referenced assessment means measuring individual performance against the defined NQF standards. See *Curriculum 2005: A User's Guide* (supra). See also D L Nuttal, 'The Validity of Assessments' in Murphy P and B Moon (eds) *Developments in Learning and Assessment* 1989, London: Hodder and Stoughton.

[30] See generally Bob Mansfield 'Competence and Standards' in John W Burke, *Competency Based Education and Training* 1990. The Palmer Press London. Hall C, 'Blending Academic Standards with the New Zealand National Qualifications Framework: Lessons for other Countries' in Strydom A, Lategan L and A Muller (eds). *Quality Assurance in South African Higher Education: National and International Perspectives* 1996, University of Orange Free State: Bloemfontein. The National Commission on Higher Education Report, August 1996, Pretoria.

The National Commission on Higher Education[31] stated that the issue of quality of Higher Education programmes has become a priority on the *political* and *educational* agendas of governments around the world in the last decade as part of ensuring accountability and value for money. The NCHE further argues that quality as well as assurance of quality is not only an internal institutional matter, but an essential ingredient of an emerging new relationship between the government and higher education in which the former steers the overall mission and goals of the Higher Education System through sets of incentives and more regular evaluation of institutions and programmes, rather than through detailed regulation and legislation. The NCHE also believes that a quality differential across institutional programmes is an important element in the governance of institutions; and furthermore, it is one of the ways of drawing private Higher Education into the system.

The Education White Paper 3 endorses the NCHE proposal that a quality assurance system for Higher Education must be co-ordinated by a Higher Education Quality Council (HEQC).[32] It concedes that the primary responsibility for quality assurance rests with the Higher Education institutions under the umbrella of the HEQC. The functions of the HEQC will include programme accreditation, institutional auditing and quality promotion. It should operate within an agreed framework underpinned by:

- the formulation of criteria and procedures in consultation with higher education institutions;

---

[31] *National Commission on Higher Education (NCHE): A Framework for Transformation*, 1996, Pretoria at 6.43.

[32] The HEQC is to be established in terms of the proposed Higher Education Act as a committee of the Commission on Higher Education (CHE). While it will operate under the aegis of the CHE, it will still be registered with SAQA as an ETQA (Education Training Quality Assurance) for Higher Education in terms of Section 5(1)(a)(ii) of SAQA Act. See The Education White Paper 3 and the Higher Education Bill.

- a formative notion of quality assurance, focused on improvement and development rather than punitive sanction;
- a mix of institutional self-evaluation and external independent assessment.

The Higher Education Bill provides that the HEQC, with the approval of the CHE, may delegate any quality promotion and assurance functions to other appropriate bodies, authorities or structures capable of performing such functions. It is then noteworthy that in January 1995, the South African Universities Vice-Chancellors Association (SAUVCA) approved the establishment of a Quality Promotion Unit (QPU) which should promote quality at South African Universities.[33] This unit which will be administered by the universities themselves for the universities will:

- assist universities in conducting productive institutional self-evaluation at institutional and at programme levels; and
- create a basis in the Higher Education System for development, promoting accreditation for purposes of articulation.

The QPU is not conceived as a regulatory body but one with a role of guidance and direction. As conceived, the QPU is intended to work with and on behalf of universities which in turn assist the entire Higher Education system.[34] Brink identifies three areas that are expected to influence the quality movement in South Africa in the next couple of years:

- The growth of Quality Assurance systems in overseas countries and the influence of such systems on the South African Higher Education System;

---

[33]See Brink J A, 'The Future of the Quality Promotion Unit (QPU) of The Committee of University Principals (CUP)' in Strydom, Lategan and Muller (eds) *Quality Assurance in South African Higher Education: National and International Perspectives*. 1992, Bloemfontein: Quality Audit Manual, Quality Promotion Unit 1997, Pretoria.

[34]Brink T A, op cit.

- The role of university autonomy and a concomitant lack of public accountability by universities; and
- The diversity in the University system. The 21 universities in the system have different histories, student bodies, languages of instruction, a mix of faculties, as well as the present binary divide in the Higher Education system.

3.4 THE SOUTH AFRICAN QUALIFICATIONS AUTHORITY (SAQA) AND UNIT STANDARDS.

The SAQA was established[35] as a juristic body with a brief to develop a comprehensive and coherent framework for all nationally recognised qualifications. The functions of the Authority include:

- to oversee the development of the National Qualifications Framework (NQF);
- to formulate and publish policies and criteria for registration of bodies responsible for establishing education and training standards or qualifications, and the accreditation of bodies responsible for monitoring and auditing achievements in terms of standards and qualifications; and
- to advise the Ministers of Education, and of Labour on registration of standards and qualifications.[36]

The debates regarding the relationship of higher education to the NQF revolves, not mainly around the aims and objectives of the framework, but the use of the unit standard methodology as the main

[35]SAQA Act No 58 of 1995.

[36]See Section 5 of the SAQA Act No 58 of 1995.

organising principle.[37] As stated in the three Education White Papers and the SAQA Act, the NQF aims to provide the base for a co-ordinated, coherent and flexible post-compulsory education and training sector. It will incorporate on-job training and recognise prior learning and will provide a continuum of learning opportunities through a unit standard format. In the pre-NQF curriculum, education and training tend to play the leading role in defining the manner in which the employers' needs can be met -- through training. Standards are now external reference points to individuals as they are descriptions of what any individual would have to do in order to demonstrate competence in meeting a particular outcome. A Unit Standard will represent a relatively discreet area of competence having independent value in employment, that can be separately assessed and credited to an individual. This opens way for credit accumulation towards gaining a qualification. In terms of the SAQA Draft Regulations, the purpose of a unit standard is to provide an assessor document, a learner's guide, and an education's guide for the preparation of learning materials. With the move towards a unit standards format, the traditional curriculum content and *inputs* will be replaced with *outputs* called learning outcomes where learners must demonstrate specified skills, knowledge and competencies. Unit Standards would be the nationally registered outcome statements (elements) together with assessment criteria. The unit standards will be the building block of the NQF as qualifications will consist of unit standards generated by the SGBs and NSBs, and registered with SAQA in terms of Section 5 of the SAQA Act. The flexibility element of the NQF will enable a learner to study one unit standard or a combination of unit standards leading to a qualification. The learner can also cross-credit unit standards between qualifications where appropriate and between

[37] See Report of Task Group 5 on the Construction of a Unified National Higher Education System, Chapter 1, Recommendation 11, Part B, NCHE 1996.

places of learning. Specifically, a unit standard will consist of:

- a unit standard title
- a SAQA approved logo
- a unit standard number
- a unit standard level on the NQF
- the credit attached to the unit standard
- the field and sub-field of the unit standard
- the issue date, the review date
- purpose of the unit standard
- prior knowledge
- specific outcomes to be assessed
- assessment criteria
- range statements
- a notes category comprising, inter alia, reference to critical crossfield outcomes.[38]

This unit standard methodology which functions by breaking down knowledge into myriad separate units contrasts with the holistic approach of higher education aimed at providing coherent and integrated higher learning embodied in qualifications.[39] This notwithstanding, the unit standard format is favoured due to the negative effect of the impermeability of multi-year degree and diploma programme which reportedly inhibits access, transfer and student mobility. On the other hand, the unit standard methodology facilitates access, transfer and mobility by enabling students to accumulate

---

[38] *Lifelong Learning for the 21st Century: A User's Guide.* Department of Education, Pretoria, march 1997.

[39] See Report of Task Group 5 on the Construction of a Unified National Higher Education System, supra.

portable credits at their own pace.[40]

3.5 LEGAL EDUCATION AND GOVERNMENT HIGHER EDUCATION POLICIES.

The NCHE in recognition of the potential effects of major policy propositions on professional education and training set up a Technical Committee to investigate the various issues arising therefrom.[41] The Technical Committee identified the distinctive characteristics of a profession as:

- a service orientation, making expertise available to others;
- a distinctive body of knowledge and skills, coupled with abilities and values;
- autonomy in performance of work, within agreed boundaries;
- public recognition of the authority of the practitioner by virtue of operation within ethical standards.[42]

The Report further outlined a number of practical attributes peculiar to a profession which includes, the existence of a professional body, usually a statutory council; a monopolistic situation arising out of legal requirements for registration in order to practice the profession; existence of agreed modes of experiential training; and the professional registration activity is usually parallelled by a learned society activity with the objectives of promoting the development of its members. The major players in professional Higher Education were also suggested by the Technical Committee to include

---

[40]See Report of Task Group 5, loc cit 39

[41]The brief from Task Group 5 of the NCHE to the Technical Committee 6 on Professional Education and Training is in the main to define the role of Higher Education in a comprehensive and co-ordinated professional training system linked to national policies. The *Report of Technical Committee 6 as Professional Education and Training* available on the Internet via <http://star.hsrc.ac.za/nche/final/tg5/systems/chap6.html> (accessed: 17 July 1997).

[42]See the Report of Technical Committee 6, supra, particularly *Introduction*.

individual professional faculties -- the providers; providers within a professional field collectively, for instance, Council of Deans of Faculties of law; provider umbrella bodies such as the Committee of the University Principals (CUP); a possible future higher education quality body, for instance, the Higher Education Quality Council (HEQC);[43] existing professional accrediting bodies, for instance the Association of Law Societies and the General Council of the Bar; the South African Qualifications Authority (SAQA); and the state through the Ministry of Education, together with other ministries having particular interest and responsibility for a particular professional field, for instance the Department of Justice.

The nature of South African legal education is in no way radically different from the picture of professional higher education as conceived by the Technical Committee. It is thus expected that the Government's Higher Education policies should reflect well-informed and articulated view of professional legal education that is beneficial to major stakeholders. Some of the major submissions of the NCHE with potential impact on the future direction of legal education include:

- Professional qualifications should not be narrowly knowledge and skill-based, rather, programmes leading to professional qualifications must contain both knowledge and ability elements, producing professionals who can operate in a multi-disciplinary terms.[44]
- While it is desirable for professional bodies to remain responsible for the assessment, and accreditation of programmes, examinations and qualifications, a rationalisation (or phasing

[43]To be set up in terms of the proposed Higher Education Act.

[44]See Propositions 3 and 4 under *Systems of HE for the Professions* in the Report of Technical Committee 6, supra.

out) of professional examinations hitherto organised by the professional bodies which can be conveniently undertaken within HE is suggested.[45]

- Within each professional field, there must exist a coherent system of qualifications having multiple entry points which accommodate would-be students with conventional and unconventional educational backgrounds, and a progression system which allows a student to attain qualifications within his or her potential, desire to achieve and commitment of effort.[46]
- Professional HE should recognise that the benefits of work-place experience, in terms of the acquisition of knowledge and the development of skills, should be taken into account both in the process of gaining admission to higher education programmes and in awarding credits within the programme.[47]
- Within each professional field, there should be recognised competency standards covering both HE qualifications and registration for professional practice, as well as a single standards setting and accreditation authority comprising both professional bodies and academics within each professional fields at all levels.[48]
- Standards for professional qualifications must be set at internationally comparable level where equivalences exist within the functionally differentiated structure.[49]

---

[45]See Propositions 5 and 6 under *Systems of HE for the Professions* in the Report of Technical Committee 6, supra.

[46]See Proposition 11 under *Access to the Professions* in the Report of the Technical Committee 6, supra

[47]See Proposition 14 under *Access to the Professions* in the Report of the Technical Committee 6, supra.

[48]See Propositions 17, 18 and 19 under *Qualification Standards for Professional Study* in the Report of the Technical Committee 6, supra.

[49]See Proposition 21 under *Qualification Standards for Professional Study* in the Report of the Technical Committee 6, supra.

- Within each professional field, there must exist a relationship between the parties: professional bodies, the corresponding HE faculties, SAQA and other quality auditing and promotion organisations. This relationship should be built in the first instance by the professional body and the providers, with facilitation by government if necessary.[50]

These submissions, though not having the force of law or status of a Commission Report, weigh heavily in policy formulation[51] that further discussion on impacts of measures adopted in policy documents will reveal their worth.

3.6 LEARNING OUTCOMES IN LEGAL EDUCATION.

The development of the National Qualification Framework (NQF) rests on an outcomes-based approach which has as its starting point the intended outputs as opposed to the inputs of traditional curriculum driven education and training.[52] The outcomes-based approach thus is premised on two propositions. These are that learning should have a purpose, and that that purpose should be describable and measurable. The Outcomes-based approach has a behaviourist premise in so far as it is based on an instrumentalist view of knowledge.[53] According to Sid and Kathy Luckett, '(t)he

---

[50]See Proposition 22 under *Qualification Standards for Professional Study* in the Report of the Technical Committee 6, supra.

[51]It may be recalled that the NCHE itself was established in terms of a Presidential Proclamation. See Government Gazette No 5460 of February 1995. It is particularly noteworthy that the Education White Papers, especially Education White Paper 3 of July 1997 as well as the Higher Education Bill manifest significant reliance upon the NCHE Final Report 1996.The NCHE Final Report 1996 at page 24 '(t)he Commission was established to advise government on issues concerning the restructuring of higher education by undertaking a situation analysis, formulating a vision for higher education and putting forward policy proposals to ensure the development of a well-planned, integrated, high quality system of higher education.'

[52]See *Curriculum 2005: A User's Guide*, supra

[53]Sid and Kathy Luckett, 'Implementing Outcomes-based Education in a South African University', paper presented at the SAAAD 1997 Annual Conference. Nov 30 -Dec 3 1997, *1997 SAAAD Conference Proceedings.*

outcomes approach to course design, in which outcomes and assessment / performance criteria are pre-specified has a technicist taste which runs counter to our desire to prepare students for the unknown and unpredictable and to allow them to construct their own meanings and leanings.'[54] While the unit standard will allow students to enter and exit the educational system flexibly,[55] its use to describe specific learning outcomes in particular modules may amount to no more than a fragmentation of knowledge.[56]

In applying the notion of learning outcomes to legal education, the starting point will be the designing of an outcomes-based learning programme leading to a legal qualification. At least four different *approaches* to describing learning outcomes have been identified.[57] The four approaches were based on:

- objectives -- the stated intentions of the course
- subject knowledge -- the knowledge content commonly identified in syllabuses or course documentation
- discipline -- the notion of a discipline as a culture and value to which the graduate is admitted
- competence -- what a graduate can do as a result of the degree programme, including the

---

[54]Sid and Kathy Luckett, op cit.

[55]See *Report of Technical Committee 4 on Quality, Qualification, Accreditation, Access and Articulation* to Task Group 5 of the NCHE. 1996, Pretoria; at <http://star.hsrc.ac.za/nche/final/tg5/systems/chap4.html> (accessed: 17 July 1997)

[56]The *Report of Technical Committee 4* cites the New Zealand experience where the NZ NQF already has 5000 units standards, but only 55 complete qualifications (44 of them from the printing industry) and no degrees.

[57]See Sue Otter *Learning Outcomes in Higher Education* Unit for the Development of Adult Continuing Education (UDACE), London, 1992.

narrower notion of occupational competence.[58]

The most influential of all the outcomes approach has been based on the notion of aims and objectives.[59] Andrew J Pirie[60] proposed a Systematic Instructional Design (SID) process in formulating a competency-based or outcomes-based legal curriculum. Pirie[61] suggests that we follow four important steps of:

- *Performance analysis* -- used to determine whether there is an important difference between what someone is *already* able to do and what it is *intended* for him to be able to do. Where an important difference exists, to determine whether instructions or some other course of action (inform, manage, or ignore) is appropriate.[62]
- *Task analysis* -- a break down into fairly clear and specific units what the performance involves. A task analysis, by identifying what the student has to know or do to achieve the goal, will make the goals much more visible.[63]
- *Skills analysis* -- 'the task analysis will identify the exact steps a person must take to perform a goal... The skills analysis breaks down each of the identified steps into its component part.'[64] The skills analysis thus reveals the pattern of the identified performance, that is, informational,

---

[58]Sue Otter, op cit at 15.

[59]See Robert Mager, *Preparing Instructional Objectives* 2nd ed. London: Kogan Page, 1990.

[60]'Objectives in Legal Education: The Case for Systematic Instructional Design' (1987) 37 J.Legal Educ. 576.

[61]Op. Cit at 590.

[62]Pirie, op cit at 590, relying on Robert Mager, *Preparing Instructional Objectives* 1984 at p.7.

[63]Pirie, op cit at 591.

[64]Ibid

cognitive (intellectual) or behaviour patterns.

- *Writing performance objectives* -- the first three steps of this Systematic Instructional Design (SID) process results in an educational objective, that is learning outcome; communicating *performance* -- what the learner is expected to do; the important *conditions* (if any) under which the performance is to occur; and the *criterion* of acceptable performance by describing how well the learner must perform in order to be considered acceptable. A performance objective expressed as a learning outcome is then 'a detailed description of what students will be able to do when they complete a unit of instruction.'[65]

In the outcomes-based instructional design, the programme is thus derived from, and linked to specified competencies. Instructions which support competency development (after a diagnosis) are organised into units of manageable size. Learner progress is determined by demonstrated competence. The extent of the learner's progress is made to the learner throughout the programme. Instructional specifications are reviewed and revised based on feedback data.[66] In designing a learning programme,[67] the curriculum must be expressed in terms of:

- *Rationale* -- this clarifies why the learning field is important in the curriculum; what constitutes the essential elements of the learning field; and how the learning field contribute to the critical outcomes.
- *Broad Outcomes* -- the broad generic curricular outcomes for a particular learning programme.

---

[65]Pirie, op cit at 593.

[66]Pirie, op cit Robert Mager op cit.

[67]Say The Bachelor of Laws degree.

The outcomes must be demonstrated via assessable performance. They should be applicable to knowledge, understanding and skills.

- *Specific Outcomes* -- refers to the specifications of what learners are able to do at the end of a learning experience. In each learning area, module or subject, a set of specific outcomes describe what learners will be able to do at all levels of learning. The specific outcomes should be preceded by a separate rationale for each module.
- *Assessment Criteria* -- this provides evidence that the learner has achieved the specific outcome. They indicate broadly, the observable (behavioural) processes and products of learning which serve as evidence of learner's achievements. The criteria are derived from the specific outcomes and form a logical set of statements of what achievements could or should look like.
- *Range Statements* -- they indicate the areas of content, product and process; provides direction but allow the choice of specific content and process, and for a variety of assessment methods.[68]

3.7 LIMITS OF THE OUTCOMES-BASED EDUCATION IN LEGAL EDUCATION.

The introduction of the outcomes-based education into the South African educational system has not been without an intense debate on its suitability for the country.[69] The Technical Committee 4 of the

---

[68]See *The Report of the Technical Committee to Assist the Department of Education in the Development of Standards*. March 1997, Department of Education, Pretoria.

[69]The most scathing critique of the OBE system remains of Jonathan D Jansen, *Why OBE Will Fail*. Unpublished paper, March 1997. This paper outlines ten reasons why OBE will impact negatively on South African schools. The thesis of this writer is that OBE will fail, not because of lack of good intentions by politicians and bureaucrats, but because the 'policy is being implemented in isolation and ignorance of almost 50 years of accumulated experience with respect to curriculum change in both first world and developing countries.'

NCHE[70] acknowledge that '(t)he problem is that unit standard methodology is based on some assumptions that are increasingly seen as problematic in the context of higher education (particularly humanities).' The suitability of the outcomes-based approaches to legal education may be assessed on the following grounds:

- The language and terms associated with the outcomes-based approach are complex, confusing and possibly contradictory. At the level of implementation, the success of the programme requires awareness on the part of the staff. As Jansen stated '(a) teacher attempting to make sense of OBE will not only have to come to terms with more than 50 different concepts and labels but also keep track of the changes in meaning and priorities afforded to these labels over time.'[71]
- Outcomes, competencies, and even competence are seen to conflict with 'discursive' mode of traditional higher education.[72] The discursive mode is concerned with the skills of mastering the intellectual requirements of disciplines, involving familiarisation with a diverse range of discourses, explanations and discipline-specific procedures at a necessary distance from society and the economy, and encompassing social and ethical aspects of education. Such abstract nuanced components, overall capacities, conceptual skills and higher-order thinking skills, as well as self-directed research and enquiry, are about process and progressive development and will not sit easily with a competency approach emphasizing *end-stopping*

---

[70]See *Report of Technical Committee 4 on Quality, Qualification, Accreditation, Access and Articulation*. supra.

[71]Jonathan Jansen, *Why OBE Will Fail*, supra at p 2.

[72]See Kraak A *Towards a New Qualification Structure for University Education in South Africa* (1994) Academic Planning Unit, UWC, Cape Town.

and measurable outcomes.[73]

- On the relationship between the curriculum and the society, the OBE portrays the 'new' role of the teacher as a facilitator of learning who will create relations between learners and facilitator which engender values based on co-operative learning as opposed to the teacher being an authority. Jansen notes that 'such claims are clearly ridiculous; they represent a conceptual leap of staggering proportions from outcomes to dramatic changes in social relations in the classroom.'[74] The claims and assumptions underpinning these declarations omit the availability of human resources, especially qualified hands to deliver the social goods.
- With the OBE focus on instrumentals -- what a learner can demonstrate given a particular set of outcomes, it challenges the notion of knowledge acquisition for its own sake. Learning in the outcomes-based approach must be work-related or career-oriented. The OBE is premised on the assumption that, provided the *end* can be appropriately described and measured, it must be susceptible to an outcomes approach, it then contrasts with the cognitivists' enquiry into how much theory informs professional practice like law.[75]
- The two pillars upon which the outcomes-based education is based, that learning must have a purpose and that that purpose must be describable and measurable is inadequate for a professional discipline like law. The conception of competencies/outcomes which are discreet elements of competence derived from job analysis, assumes that abilities and characteristics

---

[73]See *Report of Technical Committee 4*, supra.

[74]Jonathan Jansen, op cit at 4.

[75]See G L Blasi, 'What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory' (1995) 45 J. Legal Educ. 313.

of a good lawyer can be externally manifested, and as such definitively expressed (as learning outcomes) and measured (assessment criteria). This is a reductionist conception of professional competence. As Caroline Maughan, et al point out, attempts to measure the cognitive performance are by themselves only capable of measuring the apparent rationality of certain behaviour. We can make no meaningful assessment of the underlying value system from such measures.[76]

- Since the outcomes orthodoxy is premised on a prespecified and measurable statement of competence, that is what a learner can do in a work environment, there is the danger of excluding 'knowledge' or theory in a professional programme like law to the advantage of 'skills' which are more measurable. Then, there is a practical pitfall that someone may perform apparently competently in what is being assessed, though the underpinning process on which that performance was based may not be competent. Conversely, an unsatisfactory performance against a criterion may well be based on perfectly competent reasoning and attitudinal processes but be adversely affected by factors outside that performer's control.[77]
- Outcomes-based approach may fall into a trap of reductive behaviouralism as they tend to minimise the extent to which theoretical knowledge is used to inform practical activity.[78] Fears have been expressed that only lower levels of understanding may be assessed by a reliance[79]

---

[76]Caroline Maughan, Mike Maughan and Julian Webb, 'Sharpening the Mind or Narrowing It? The Limitations of Outcome and Performance Measures in Legal Education' (1995) 29 *Law Teacher* 255.

[77]Caroline Maughan, et al, op cit at 267 to 270. Cf: Kramer MH, '*False Conclusions from True Premises: Warnings to Legal Theorists*' (1994) 14 *Oxford J. Leg. Studies* 111

[78]Caroline Maughan et al, op cit at 270.

[79]Avrom Sherr, *Legal Education, Legal Competence and Little Bo Peep* supra. Professor Sherr further stated in respect of the outcomes-based approach that '(p)rogression ... is often by wave upon wave of reductive lists of skills'.

on the principles enunciated by the apostles of this approach.

3.8 MODULARISATION AND SEMESTERISATION IN LEGAL EDUCATION.

In terms of the Education White Paper 3, '(s)eparation and parallel qualification structures for universities, technikons and colleges have hindered articulation and transfer between institutions and programmes, both horizontally and vertically. The impermeability of multi-year degree and diploma programmes is a further obstacle to mobility and progression. This is clearly untenable in the light of the new NQF and the programme-based approach to higher education, which is premised on enhancing horizontal and vertical mobility through flexible entry and exit qualifications.'[80] In this premise, students may be permitted to build degrees from self-selected range of selected courses validated by the university. Emphasis would be on the credits (unit standards) obtained and not the year level or the number of years. According to Phil Harris and Diana Tribe,[81] '(t)he rationale underlying the process of modularisation has been that it breaks the traditional boundaries of learning by allowing students of all ages within non-traditional backgrounds to take advantage of opportunity to study in higher education. ... Flexibility of study patterns is dramatically increased, at least in theory, and thus student choice is increased.'

The nature of a modular scheme is that the higher education provider divides teaching and learning

---

He cites Professor William Twining as remarking that learning outcomes are 'all fine, provided you do not actually believe in them.'

[80] *Education White Paper 3, op cit at 2.65.*

[81] 'The Impact of Modularisation and Semesterisation on the Assessment of Undergraduate Law Students' (1995) 29 *Law Teacher* 279.

into standard-size credits ratings of about 12 to 15 weeks short duration (equivalent of a semester). Each module is assessed at the end of that module. The discrete modules can be accumulated at a variety of rates.[82] The flexibility element would be allow for articulation within separate university departments and also the transferability between institutions in the same sector. In respect of articulation and transfer within the existing systems, the Technical Committee 4 of the NCHE[83] recommended that:

- Regional consortia be established to develop articulation agreements on the basis of programme "equivalency' as determined by agreed criteria and processes.
- Institutions and faculties commit themselves to accepting transfer students with full credit, within the context of overall enrolment policy and academic planning.
- Further investigations be conducted into the organising principles that govern a process of modularisation in higher education. It also noted that modularisation may have much to offer in terms of increasing curriculum flexibility and maximising articulation and transfer.

Theoretically, the new policies envisage that students may move between academic departments within a university carrying credits with them - or even between universities subject to compatibility of unit system. In so doing they build up credits at their own rate.[84]

There however appears to be a paucity of locally documented accounts of the effects of modularisation, semesterisation and assessment impacts on students' learning and the overall system

---

[82]Harris P and D Tribe, op cit at 280

[83]See *Report of Technical Committee 4,* supra.

[84]Harris P and D Tribe, op cit at 280.

of education.[85] In the United Kingdom, a major survey of Law Schools was undertaken recently.[86] This survey collected data, inter alia, on possible changes within the structure of legal education in the United Kingdom including the effects of semesterisation and modularisation in Law Schools. On the question of how far UK Law Schools adopted modularisation and a semesterised academic year, the survey revealed that:

- 45.9% and 68.4% respectively of old and new universities had modular schemes in 1994-5.
- 43.2% and 64.8% respectively of old and new universities operate a semesterised year.
- Modularisation does not necessarily imply a semesterised academic year, or vice versa.

In respect of the relationship between curricular structure and assessment patterns, the data revealed the followings:

- 60% of the Law Schools requiring students to undergo between 9 to 15 assessment events were neither modularised nor semesterised; 10% within the same bracket operated a modular scheme, but did not operate a semesterised year; 10% ran a semesterised year, but did not have modular schemes; only 20% were both modularised and semesterised.
- 62.9% of the Law Schools requiring students to undergo between 16 and 25 assessment events were both modularised and semesterised; 18.5% were modularised but not semesterised; and 18.5% were neither modularised nor semesterised.
- 70% of the Law Schools requiring students to undergo between 26 and 35 assessment events were both modularised and semesterised; 10% ran a modularised course but not a semesterised

---

[85]See *Report of Technical Committee 4,* supra. This Report however cites a number of instances being developed by institutions like the Universities of Natal, Western Cape and Cape Town.

[86]Harris P and M Jones, 'A Survey of Law Schools in the United Kingdom' (1996) 31 *Law Teacher* 58, also at <*http://www.law.warwick.ac.uk/ncle/html/alt96-1.html*> (accessed: 14 November 1997)

year; 10% ran a semesterised year but not a modularised course: and 10% were neither modularised nor semesterised.

- 80% of Law Schools requiring students to undergo over 36 or more assessment events were both modularised and semesterised, and only 20% operated neither modularisation nor semesterisation.

The data from the survey of UK Law schools thus tend to support a contention that the adoption of a modular scheme and a semesterised year will lead to a substantial increase in the number of assessment events applied to measure students' performance over the period of the Law degree programme. This premise, coupled with the increased student enrolment figure will no doubt occasion serious strain on the capacity of available human resources to deal with impending challenges noted. The implication of this data for student learning experience is that once law subjects are split into segments, and assessed at increasingly regular intervals, it will impact negatively on course delivery and student learning.[87] This notwithstanding, the modular system is claimed to be capable of achieving the following benefits in respect of first degree/diploma levels:[88]

- As rules apply to the accumulation of credit-points and not to the completion of 'years of study', students can proceed at their own pace, subject to the proviso that a maximum period of study is prescribed for the completion of a course (or 'module') as well as for the completion of the certificate, diploma or degree itself.

---

[87]Harris P and D Tribe, op cit at 287.

[88]See *Report of Technical Committee 2 on Student Access, Support and Development* to the Task Group 5 of the NCHE 1996, at <http://star.hsrc.ac.za/nche/final/tg5/systems/chap2.html> (Accessed: 17 July 1997)

- There is greater flexibility in degree construction, especially if a semester system is adopted, and this makes it easier to incorporate 'foundation', 'bridging' or 'introductory' courses (i.e. courses which are regarded as requiring competencies below those which 'normally' apply to'First-year' courses).
- Because students are not regarded as being in a 'year-cohort', they are able to take courses appropriate to their needs and so acquire the skills/competencies that are required for the next level of study.
- As courses in the various institutions will conform to an agreed notion of 'size', the system greatly facilitates articulation, either at exit -points or by means of credit transfers.
- Because students are not required to take a minimum number of courses in a semester, the distinction between full- and part-time studies vanishes. If exit-points are provided, students can suspend their studies and resume at a later stage.
- The system encourages the development of alternatives to the contact-lecture mode of teaching.
- Students are able to register for the number of courses which they feel they can manage and can mix study with part-time work or periods of full-time employment. Should they have to rely on loans, they need not incur the large debts which accrue when they have to be funded as full-time students.
- The modular approach will provide for flexible degree construction, transferability across institutions and differential rates of student movement through the system.

CHAPTER FOUR

OTHER CHALLENGES TO THE LAW CURRICULUM

4.1 INTRODUCTION

In addition to the dominance of the state, the universities and the profession on legal education and training, a number of other factors that may not be solely dependent on measures taken by any of the three are identifiable. These social influences nonetheless impact in a significant form the direction of legal education and training. That the state retains the right, as it often does, to intervene in respect of a number of these factors is not disputed. The apartheid education legacy, which has led to serious concern[1] on the preparedness of students for law study is a huge social problem[2] as much of political malaise to the state.[3] The South African legal system, as well as its Roman Dutch law heritage, is perceived to be somewhat tainted by the stultification in the growth of a human rights culture in the past. This stultification may be attributed to the linkage

---

[1] See S Woolman, P. Watson and N Smith, '"Toto: I've a Feeling We're not in Kansas Anymore." A Reply to Professor Motala and Others on the Transformation of Legal Education in South Africa' (1997) 114 *SALJ* 30; Ziyad Motala, 'Legal Education in South Africa: Moving Beyond the Couch-Potato Model Towards a Lawyering Skills Approach - A Case For A Comprehensive Course on Legal Research, Analysis and Writing' (1996) 113 *SALJ* 695.

[2] See V Bronstein and J Hersch, 'Teaching Law as a Second Language in a Second Language.' 1991 108 *SALJ* 159; CRM Dlamini, 'The Law Teacher, The Law Student and Legal Education in South Africa.' 1995 *SALJ* 595

[3] J van der Westhuizen, *On Equality, Justice, The Future of South African Law Schools and Other Dreams* (March 1993); *Education White Paper No 3* (1997, Pretoria); DM Davis, 'Post-Apartheid South Africa -- What Future For a Legal System?' 1987 *Acta Juridica* 220; cf: E Bonthuys and LM du Plessis, 'Observations on the Conceptualisation and Definition of Legitimacy in a Legal Context.' 1996 (2) *Stell. LR* 217.

between law and public policy.[4] While human rights law and its public education now attract so much frenzy and currency, some of the traits associated with the previous order still taunt the system, even in the construction and transmission of legal knowledge.

The policy of affirmative action embarked upon by the authorities to facilitate enhanced access to the law schools, and ultimately the profession of law, for the benefit of the previously disadvantaged group generates interest particularly as to the subsequent quality of legal education. The prodding influence of internationalisation of the law curriculum in order to afford global competitiveness of educational certificates looms large on law faculties as it attracts attention of policy formulators. Development in the field of technology is reportedly effecting the 'computerization of legal education from workbooks to the web.'[5] Not only is the 'information superhighway' challenging the traditional modes of course delivery, learning and teaching but there are rays of hope that it may offer a panacea to some of the recurrent problems in legal scholarship and pedagogy such as teaching large classes. In this regard, the utilisation of Computer-Aided Instruction (CAI),[6]

---

[4] See DM Davis, 'Post-Apartheid South Africa -- What Future For a Legal System', supra; A Cockrell, 'The South African Bill of Rights and the "Duck/Rabbit".' (1997) *60 Modern LR* 513.

[5] See Michael A Geist, 'Where Can You Go Today?: The Computerization of Legal Education From Workbooks to the Web.' *1997 11 Harvard Journal of Law and Technology*, also at <http://www.columbia.edu/~mag76/webweave.html> (2 November 1997); see also David A Rier, 'The Future of Legal Scholarship and Communication: Publication in the Age of Cyberspace.' *1996 30 Akron LR* (No 2) at <http://www.uakron.edu/awrev/w96v30n2.html> (2 November 1997).

[6] See S Schreiner-Linford, 'The Centre for Computer Assisted Legal Instruction and Chicago-Kent College of Law' *(1995) 4 Law Technology Journal*, at URL <http://www.law.warwick.ac.uk/html/4-2.html> . See also Paul F. Teich, 'How Effective is Computer-Assisted Instruction? An Evaluation for Legal Educators' *(1991) 41 J. Legal Educ. 489*

Computer-Assisted Legal Research (CALR),[7] Electronic Journals (e-journals),[8] Electronic Casebooks,[9] Virtual Classroom on the Internet and/or via Satellite,[10] Legal Search Engines on the Internet,[11] as well as digital libraries[12] in South Africa as well as abroad are to be outlined. Lastly, there is the human element in both the formulation of legal thought and delivery of legal services, however, the growth in research efforts on the application of Artificial Intelligence (AI) to Legal Reasoning and the formative developments in Artificial Legal Intelligence[13] offer stimulating dimensions to legal epistemology and the construction of legal knowledge.

---

[7]See Surend Dayal, 'Benefits of Computer Assisted Legal Research' at URL <http://law.anu.edu.au/nglrw/lr2.htm> (accessed 12 November 1997); and Richard Susskind *The Future of Law: Facing the Challenges of Information Technology* Clarendon Press Oxford 1996.

[8]See generally *Richmond Journal of Law & Technology* at URL <http://www.urich.edu/~jolt/other.html> (accessed 12 November 1997) for the homepages of several Law Reviews and Law Journals available electronically on the Internet. The electronic journals available on the Internet include Journals and Reviews traditionally available in print forms but now with full texts or abstracts on the Internet, or those solely available in electronic forms, and lastly those specifically devoted to the relationship between Law and Technology.

[9] See Ronald W. Staudt, 'An Essay on Electronic Casebooks: My Pursuit of the Paperless Chase' *(1992) 68 Chi.-Kent L. Rev. 291, 294*

[10] See *Distributed Learning: Approaches, Technologies and Solutions* by Lotus Education (September 1996 Lotus Institute) and the LearningSpace Program developed by Corporate Systems Pty Ltd (Australia) in conjunction with Lotus-IBM. See also URL <http://www.corporatesystems.com.au>

[11] See search engines at the following URL <http://www.altavista.digital.com>; <http://webcrawler.com> <http://www.excite.com>; <http://www.ananzi.co.za>; <http://www.yahoo.com>; <http://www.infoseek.com>

[12]D Marshall, 'Law Schools' Libraries Go Digital: Plug in and Learn' (1995) 9:2 *Canadian Society for the Advancement of Technology (CSALT) Review 5*

[13] See Pamela N Gray *Artificial Legal Intelligence* (Applied Legal Philosophy Series) Dartmouth Publishing Company UK 1997.

4.2 THE CHALLENGE OF EQUITY

4.2.1 Access to Legal Education

Notwithstanding attempts at enveloping within a legal doctrinaire box the wider social dimensions involved in a determination of the legitimacy or otherwise of the legal order during the apartheid era,[14] well-documented opinions[15] on this subject suggest some credibility problems. Widespread reform measures being instituted in the educational system then imply some cultural and value reform.[16]

In her 'Reflection on Legal Education' Professor Joan Church grasped the direction of legal education and stated that '(w)here the legal system is out of keeping with the values and needs of the various communities that go to make up society at large, it runs the risk of being labelled unjust. At best this may lead to what rather emotively has been termed

---

[14] See E Bonthuys and LM du Plessis, 'Observations on the Conceptualisation and Definition of Legitimacy in a Legal Context,' *supra*. See also Chief Justice Rabie's expression of agreement with the total onslaught thesis in an interview in 1987 (*Sunday Star* 3 May 1987, cited in the Inaugural Lecture of Professor Dennis Davis *Social Power and Civil Rights: Towards a New Jurisprudence For a Future South Africa,* October 24, 1990 UCT at page 4). In the words of the interview, "[Rabie CJ] seems unperturbed by the Government's encroachment on the right guaranteed by Roman-Dutch Common law. As far as the Court is concerned, there is no question of conflict. Once Parliament says that is law, it is law," he says.

[15] See Hugh Corder, 'The Judicial Branch of Government: An Historical Overview' in DP Visser (ed.), *Essays in the History of Law*. 1989; Stephen Ellman, 'Lawyers Against the Emergency' *(1990) 6 SAJHR 228*; MA Kidd, 'Internal Security and Specialist Judges' *(1990) 6 SAJHR 417*; Hugh Corder, 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' *1989 SAJHR 1*; Richard L Abel, *Politics by Other Means: Law in the Struggle Against Apartheid 1980 - 1994* (1995); John Duggard, *Human Rights and the South African Legal Order* (1978); Sydney Kentridge, 'The Theories and Realities of the Protection of Human Rights Under South African Law' *1981 56 Tulane LR 227*; Edwin Cameron, 'Rights Constitutionalism and the Rule of Law' *1997 114 SALJ 504*.

[16] See Mauro Cappelletti, 'The Future of Legal Education: A Comparative Perspective' *Supra*; see also the message from the Minister prefacing the *Education White Paper 2* Notice 130 of 1996.

'the crisis of disillusionment' and at worst to revolution.'[17] As if extending this statement, another eminent legal scholar[18] added that '(t)his situation contributes to the feelings of alienation, irresponsibility and aggression, the legitimacy crisis of the courts, civil unrest and crime.' Since the previous legal order was one based on racism and racialism, implicit therein is that law exists as 'a means of securing political rights'[19] for members of particular social groups, race or class. The apartheid ideology on higher education was given legalistic teeth by legislation such as the Bantu Education Act of 1953 which divided education in South Africa along racial/ethnic lines. According to the NCHE Final Report, the Bantu Education Act 'reinforce[d] the dominance of white rule by excluding blacks from quality academic and technical training.' Another piece of ideological stance couched in statutory form is the Extension of University Act of 1959 which established racially based universities. This model has generated racial inequalities in higher education generally that by 1986, of the total student enrolments at Technikon, 7% were Africans while 83% were white; in the university sector only 23% were African compared to 64% white.[20] Though the period between 1986 and 1993 marked increased African enrolments at Universities and Technikons,[21] statistics may not adequately capture the

---

[17] Joan Church, 'Reflections on Legal Education' *(1988) 51 THRHR 153 at 154.*

[18] Johann van der Westhuizen, *On Equality, Justice, The Future of South African law Schools and Other Dreams.* (1993 Pretoria) at page 2.

[19] DM Davis, 'Post Apartheid South Africa -- What Future For a Legal System' *op cit* at 222.

[20] Source: *NCHE Final Report* (1996) Pretoria. Chapter three.

[21] African enrolments at universities and the Technikons increased at an average rate of 14% compared to an average growth of 0.4% for the whites. Source: NCHE Final Report, Chapter three.

complexities of the increased enrolment, and may even be misleading.[22] In legal education, almost 69% of all law students at South African Universities in 1989 were reported to be white and only 17% were Africans contrastingly against the natural demographic composition of 75.3% African and 13.5% white at the same period.[23]

While there is a noticeable expansion in student enrolment figures in recent years to dislocate the pictures presented by statistics, in legal education, the vexed issue of 'access' extends beyond mere admission of more black students. In this direction, it may be recalled that the contestations over the legitimacy of the legal system are intricately bound with the ethnic/racial composition of the legal profession. As CRM Dlamini opined,[24] the South African Legal system made no pretension about its alleged superiority and sophistication over whatever system that existed among the non white South Africans. The apartheid legal system exemplified the so-called superiority of western civilisation over

---

[22] Enrolment statistics shows that Historically-Black Universities (HBUs) have within this period almost doubled their student numbers, and at distance learning universities of Vista and Unisa. Furthermore, across disciplines and in senior levels of study, the concentration of particularly African and Coloured students' enrolments at the HBUs and distance learning institutions reveals the type and levels of programmes black students had access to. See the NCHE Report, supra. It is largely accepted that there is an alarming lack of an academic and research culture at most of the HBUs in comparison to the Historically-White Universities. George Subotzky Report, *The Enhancement of Graduate Programmes and Research Capacity at Historically Black Universities* (1997 UWC) noted that between 1989 and 1992, student numbers at the 11 HBUs surveyed soared by an average of 35% a year compared with 5% at Afrikaans Universities and 8% at English Universities. Also postgraduate students made up only 5% of HBUs' enrolments as against 22% at HWUs within same year.

[23] See J van der Westhuizen, *On Equality, Justice, the Future of South African Law Schools and Other Dreams, supra.*

[24] CRM Dlamini, 'The Law Teacher, The law Student and Legal Education in South Africa,' supra.

the non-western.[25] Dlamini puts it this way, '(b)esides the fact that apartheid was meant to protect white people in this country, the attitude of white people in general has been that black people are different from them. Their institutions, including their law, has largely been regarded as primitive, undeveloped and uncivilized. South African law, on the other hand has been regarded as the epitome of civilization, development and modernity. Its imposition on blacks was therefore regarded by its custodians as a boon to them.'[26] Access to legal education is a vital force which determines the social composition and ultimately the public perception of the legal profession.[27] The view of legal education as an avenue for training a crop of 'elite' may thus not satisfy the requirements of access in so far as the motive is not one that places legal services at the disposal of the citizens.[28] An understanding of the role of lawyers, what is essential about law and the work of law are the essential guides for determining access to legal education.[29]

---

[25] Yash Ghai, 'Law, Development and African Scholarship' *1987 50 Modern LR 750*; see also Marlene van Niekerk. 'African Thinking: A Critical Discussion' in Romaine Hill, et al (eds), *African Studies* Vol. 1,' HSRC Pretoria, 1991.

[26] CRM Dlamini, op cit 600.

[27] E Clark and M Tsamenyi, 'Legal Education in the Twenty-First Century: A Time of Challenge' in Peter Birks (ed) *Pressing Problems in the Law Vol.2: What are Law Schools For*. 17 at 39.

[28] DJ McQuoid-Mason, 'Problems Associated with Legal Representation in the Urban Areas of South Africa,' 1984 *Acta Juridica* 181; Barend van Niekerk, 'The Role and Function of the Radical Lawyer in South Africa' *(1975) 1 Natal Univ. LR* 147; CRM Dlamini, 'The Role and Function of the Black Lawyer in South Africa' 1988 *De Rebus* 479; cf: NC Steytler, *The Undefended Accused at Trial.* (1988).

[29] See TH Marshall and Tom Bottomore, *Citizenship and Social Class* (1992 Pluto Perspectives); M Cappelletti, 'The Future of Legal Education: A Comparative Perspective,' supra; Avrom Sherr, 'Legal Education, Legal Competence and Little Bo Peep,' supra.

In facilitating access to legal education by the previously disadvantaged as a means of increasing the accessibility of legal services to the majority in this country, two issues are central to educational planning. These are the 'elite system' and the 'mass system.' The term 'elite system' refers to higher education provision for a smaller number of selected individuals from privileged social classes, while the 'mass system' indicates a system providing a greater diversity of programmes to much larger number of students recruited from socially more distributed or varied backgrounds.[30] Against the background of a legal profession said to have in 1992 only about 10% of its total membership from the black race that constitutes more than 80% of the national population,[31] it is no surprise that the 'mass system' would hold sway. The main strategy for the promotion of enhanced access is the 'affirmative action policy'[32] especially in South Africa where the previous educational policies have produced a nation of illiterates.[33] The practical import of affirmative action in education is to employ other factors apart from, or in addition to merit as a basis for selection to educational institutions. 'Race' and 'gender' play significant roles in

---

[30] See *NCHE Final Report* Chapter Four (August 1996).

[31] Cited by Justice Poswa, 'The Advocates' Profession in South Africa,' May 1997 *Consultus* 52.

[32] Affirmative action, as a measure of discrimination in favour of members of particular group to secure special advantage has also been called 'positive discrimination', 'quota system', 'national character.' See generally N Smith, 'Affirmative Action: Its Origin and Point' *supra*

[33] IA Bunting, *A Legacy of Inequality: Higher Education in South Africa* 1994 UCT Press.

redressing past injustices in legal education[34] as in other disciplines.[35] Race and gender-based preferential policies have however always violated the constitutional principle of equal protection. Inherent in the use of race and gender as factors for preferential allocation of public goods, even for the acclaimed end of promoting diversity, is that it is at the expense of equal treatment before the law.[36] The 'compelling interest'[37] argument which not only allows institutions to achieve a diverse student body, but the constitutionally permissible goal of redressing past inequities and injustices has been advanced in favour of maintaining the policy of affirmative action.[38] As the Report of the NCHE Technical Committee 2[39] points out, the question of access to higher education in South Africa may not be meaningfully addressed in isolation from the strategies to promote student success, especially in the first degree/diploma level.[40] Also, in addition to the

---

[34] See Norman Arendse, 'The Role of Affirmative Action in the Advocates' Profession' May 1997 *Consultus* 54; J van der Westhuizen, *On Equality, Justice, the Future of South African law Schools and Other Dreams,* supra; Justice Poswa, 'The Advocates Profession in South Africa,' *supra.*

[35] See *The Education White Paper No 3* July 1997 (Pretoria). In other jurisdictions, geographical representation as well as religious affiliations have been adopted as part of redress measures. See generally N Smith, 'Affirmative Action: Its Origin and Point' *supra.*

[36] See J van der Westhuizen, *op cit*; Robert D Alt, 'Toward Equal Protection: A Review of Affirmative Action' (1997) 36 *Washburn LJ* 179; Richard H Seaton, 'Affirmative Action at the Crossroads' (1997) 36 *Washburn LJ* 248.

[37] See Sheila Foster, 'Difference and Equality: A Critical Assessment of the Concept of 'Diversity,'" 1993 *Wisc. LR* 105; Paul Brest and Miranda Oshige, 'Affirmative Action for Whom?' (1995) 47 *Stan. LR* 855.

[38] Kristal L Cosner, 'Affirmative Action in Higher Education Lessons and Directions From the Supreme Court' (1997) 72 *Indiana LJ.*

[39] *Report of the Technical Committee 2 on Student Access, Support and Development* (Pretoria 1996).

[40] A fallout of the enhanced access is the underpreparedness of the majority of students from the previously disadvantaged group. Particularly noteworthy in respect of professional law programme is the gap between secondary schooling and law studies. With the introduction of a four year undergraduate LLB to replace the three degrees available within legal education, it is expected that a redirection of programmes has to be undertaken to address the potential effect of such gap. The Technical Committee 2 suggested that the gap between secondary schooling and higher education could be addressed by way

admissions policy having a corresponding effect on the students' capacity to successfully complete the course, other factors to be noted in constructing the strategies for selection to law courses must necessarily include the changing face of consumers of legal services. Sophistication in nature of legal services required necessitates a change of emphasis on the types of skills and attributes lawyers require to meet the demand.[41] Though it is feared that efficiency and the need to maintain and improve standards may be sacrificed by the application of measures designed to enhance access, the scenario may not be so bleak as to destroy previous standards.[42]

4.2.2 Cultural Sensitivity/Multicultural Education.

The South African legal system has its roots in the Western legal tradition and heavily influenced by Judeo-Christian values.[43] The policy of 'apartheid'[44] ensured that both legal

---

of:
- improvement in the quality and level of secondary schooling; and/or
- the provision of an intermediate level of programmes between school and higher education; and/or
- the adjustment of higher education starting levels to meet the needs of the majority of entrants.

[41] See Maria Tzannes, 'Strategies For the Selection of Students to Law Courses in the 21st Century: Issues and Options For Admissions Policy Makers,' *Supra*

[42] See generally: S Woolman, et al, 'Toto, I've a Feeling We're not in Kansas any more: A Reply to Prof. Motala and Others on the Transformation of Legal Education in South Africa,' *supra*.

[43] See generally: WJ Hosten, et al, *Introduction to South African Law and Legal Theory 2nd Ed.* 1995, Butterworths; Hahlo and Kahn, *The Union of South Africa: The Developments of its Laws and Constitution* 1960 Juta; Donavan Marais, *South Africa: Constitutional Development: A MultiDisciplinary Approach 2nd Ed.* 1993 Southern Book Publishers.

[44] See Alfred Cockrell, 'The South African Bill of Rights and the Duck/Rabbit.' 1997 60 *Modern LR* 513 who described the term as ' a programme of institutionalised racism which exploited the machinery of the law in order to ensure that different races would develop both *separately and unequally*" (emphasis supplied).

knowledge[45] and the personnel of the institutions servicing the law[46] firmly serve the interests of a minority racial group. Law, having attained this status of satisfying the interests of a narrow segment of the society, 'legal education' and 'public policy'[47] became co-travellers in this mission to define law's concepts within the parameters set by the political masters.[48] Legal education, essentially a political construct, from which the majority of the society has previously been excluded does not only refuse to acknowledge as proper law those indigenous rules of the greater number of South Africans, but defines its concepts of law through western thoughts and prisms of legality.[49]

Whilst the demographic composition of South Africa remains as diverse as it was during the reign of racially-based opportunities to legal education, developments within the national political landscape have tilted substantially the balance of law schools' student enrolment figures. Law Schools are now increasingly admitting more students from previously disadvantaged backgrounds who now constitute the majority in those schools. The relative homogeneity of law faculty staff is also subtly giving way to a more

---

[45] See generally John Hund and Hendrik W van der Merwe, *Legal Ideology and Politics in South Africa: A Social Science Approach.* 1986 Centre for Intergroup Studies, UCT.

[46] See Norman Arendse, 'The Role of Affirmative Action in the Advocates' Profession.' May 1997 *Consultus* 54

[47] See LG Baxter, *Legal Education and Public Policy*, Inaugural Lecture 17 October 1984. Univ. Of Natal Press, 1984.

[48] See CRM Dlamini, 'The Law Teacher, The Law Student and Legal Education' *supra.*

[49] See Ian Duncanson, 'Broadening the Discipline of Law' *supra*; A Rhodes-Little, 'Teaching Lawyering Skills For the Real World: Whose Reality? Which World? Or the Closing of the Australian Legal Mind' in Ian Duncanson (ed) *Legal Education and Legal Knowledge*, Special Issue of Law In Context, La Trobe University, Australia (1991).

demographically representative bodies. It is commonly accepted that there is a close link between culture, incorporating language, religion and custom, and the law.[50] Consequently, educational planners, academicians and policy makers alike concur on the need to restructure the current law schools' syllabi to recognise and protect the cultural values of all South Africans.[51]

Truly, the South African legal system presently, as in the past,[52] is based on the rule of law, including a belief in the doctrine of equality before the law. To treat unequals equally may also amount to perpetuating inequities. Laws have even been passed to discriminate in favour of persons on the basis of special disadvantages. The fact that the majority of South Africans had previously been excluded from the mainstream of the legal system with the consequent inadequate recognition[53] or distortion[54] of their cultural values, may justify a

---

[50] See Jill Ramsfield, 'Is "Logic" Culturally Based: A Contrastive Approach to the US Law Classroom,' (1997) 47 *J. Legal Educ* 157; M Chesterman and David Weisbrot, 'Legal Scholarship in Australia,' 1987 50 *Modern LR* 709, 709 - 721.

[51] cf: Charles Dlamini, 'The Transformation of South African Universities' (1995) 9 *SA J of Higher Education* 39; K Anthony Appiah, 'Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction' in A Gutman (ed) *Multiculturalism the Politics of Recognition* (1994) 149.

[52] The positivistic and formal stance characteristic of some major legal works in South Africa coupled with judicial attitude to interpretation of law may be said to be the distinguishing departure from the past to the present. See generally: John Duggard, *Human Rights and the South African Legal Order*, Princeton: Princeton University Press, 1978; G Bindman (ed) *South Africa: Human Rights and the Rule of Law* . London: Pinter Publishers, 1988.

[53] cf: Joan Church, 'Reflections on Legal Education' *supra* at 155.

[54] See John Hund and Hendrick van der Merwe, *Legal Ideology and Politics in South Africa: A Social Science Approach, supra.*

phenomenal 'ethnic revival' within various groups demanding to preserve their cultures.[55] Multiculturalism in the context of a law curriculum should have as its guiding principle, 'every person should be able to maintain his or her culture without prejudice or disadvantage and should be encouraged to understand and embrace other cultures.'[56] The incorporation of multicultural perspectives into existing courses, while not entirely nonexistent, may be better considered within traditional subjects rather that optional topics. Increasingly, it is expected that there would be the questioning of the appropriateness of some aspects of South African law with the infusion of multi-cultural perspectives to the traditional curriculum. Significantly, social policy initiatives like the Project 90 of the South African Law Commission on 'the Harmonisation of the Common Law and the Indigenous Law'[57] are welcome developments in this regard. A law programme should thus, like the brief of the Australian Law Reform Commission on 'Multiculturalism and the Law'[58] include the promotion of equality before the law by systematically examining the implicitly cultural assumptions of the law and the legal system to identify the manner in which they may unintentionally act to disadvantage

---

[55] The use of the term 'culture' in this context does not equate an admission of a 'determinate status for its meaning.' Rather as Denise G Réaume, 'Justice Between Culture: Autonomy and the Protection of Cultural Affiliation' (1995) 29 *Univ of British Columbia LR* 117 at 120 points out, ''culture' is one of the most indeterminate concepts in the political and philosophical lexicon.' Yet, the term may still admit a modest description as 'the entire web of social practices, beliefs and ways of doing things that constitute and structure a group's understanding of itself as a group.' See G Réaume, op cit at 120.

[56] See Greta Bird, Susan Campbell, Maria Barbayannis and Helen Smith, 'Preparing Lawyers for a Multicultural Society,' 1996 JPLE 57.

[57] See *Issue Paper On Customary Marriages* published on 31 August 1996, and the *Discussion Paper 74 (Customary Marriages)* of August 1997.

[58] *Multiculturalism and the Law,* ALRC 57 of 28th April 1992.

certain groups of citizens; and an environment that is tolerant and accepting of cultural and social diversity and respects and protects the associated rights of individuals.[59]

4.2.3 Language Policy in the Law Curriculum.

Language is another socio-cultural issue in the law curriculum that merits consideration. In terms of section 6 of the Constitution of South Africa,[60] there are eleven officially recognised languages.[61] In addition to the constitutionally prescribed languages is Latin which is rooted in legal history. Together, these languages may be grouped into four categories for purposes of present discussion. These are English, Afrikaans, African Languages and Latin. In considering the role of languages in the law curriculum, Section 6(2) of the Constitution[62] is quite important. This subsection advances the cause of certain languages, especially African, on account of their historically diminished status. The English language, apart from being one of the constitutionally prescribed languages, occupies a preeminent position in the political and legal system. The English language, though a colonial heritage, has come to be the language of many South Africans. Afrikaans, together with English, was the other official language in South Africa before the attainment of majority rule in 1994. In relation to law and its institutions in South Africa,

---

[59] See also E Clark and M Tsamenyi, 'Legal Education in the Twenty-First Century: A Time of Challenge' *supra.*

[60] Act 108 of 1996

[61] Sepedi, Sesotho, Setswana, isiSwati, Tshivenda, Xitshonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

[62] Act 108 of 1996.

Afrikaans and English languages are more pervasive. Having permeated the legal system over the years, it appears that the Afrikaans and English languages are both comfortably placed in legal practice. The English language, especially in recent times enjoys unquestioned acceptance as the medium of instruction in official circles in the country. Afrikaans, despite its historic development and influence on the legal system may not enjoy such acceptance any longer. These two languages have dominated the legal scene leaving the potential utility of African languages unrecognised. African languages on the other hand were not within the main stream of legal practice and developments in South Africa. Incorporation of South African indigenous languages into the law curriculum now appears to be feasible in the light of the new constitutional dispensation.

In the above premise, the relevance of a language requirement in a law curriculum does not attract common argument for all the categories of languages. It appears fairly settled that the use and relevance of English language are beyond further justification. Apart from being a local constitutional imperative, the world of commerce is largely dependent on English language as a mode of communication. Afrikaans however seems to suffer categorisation into the realm of other languages despite its historic preeminence. While no longer enjoying the status of a compulsory subject within the law curriculum, its use and relevance in law and its institutions are still substantial. This factor basically distinguishes Afrikaans from the class of other languages which are undeveloped for use in legal scholarship. The chief argument in support of the introduction of African languages into the law curriculum appears to be that the role and influence of law have been largely to serve an interest detrimental to the collective aspiration of African

communities in the country notwithstanding their demographic superiority. Knowledge of local African languages by those involved in law and legal processes, it may be argued, would facilitate access to legal services by the largely unserviced and non-English literate Africans. An argument against the inclusion of African languages in the curriculum may however be that the law curriculum need not be further inflated by the addition of more nonlegal subjects. The local specificity of African languages, with no relevance to the world of commerce or even beyond the shores of South Africa would well limit the relevance in the law curriculum.

It should nevertheless be mentioned that the debate around the language requirement in education generally and legal education in particular is largely a political measure to seek advancement for the plight of the hitherto deprived segments of the society. An extension of the debates on the role of language in education is that of employing African languages as mode of academic instruction. The *Language in Education Policy*[63] and the *Norms and Standards Regarding Language Policy*[64] are the two policy statements demonstrating the government's interest on this issue. Briefly, the two policy documents provide for the teaching of two languages up to secondary school (Grade 12) level made up of the language of instruction and any other second language. While the policy documents view

[63] Issued by the Department of Education in terms of Section 3(4) of the *National Education Policy Act 27 of 1996*, dated 14 July 1996 (Pretoria).

[64] Issued by the Department of Education in terms of Section 6(1) of the *South African Schools Act of 1996*. 14 July 1997 (Pretoria).

language-in-education as a matter of promoting cultural diversity[65] in the country, no mention has been made of its place in higher education. It is contended that the introduction of languages into academic calendars may serve less purpose in higher education. Appreciation of local languages through formal institution may well be limited to the pre-university stage. In higher Education languages, however as branches of humanities, may be included in the basket of electives available to the student.

The fourth language, Latin, in the law curriculum used to be a compulsory subject for admission as an advocate.[66] Even its proper place in the law curriculum then was not without controversy[67] as it was said to be of doubtful utility.[68] The central thesis of the proponents of Latin in the law curriculum was that ancient writs and testaments on Roman/Roman-Dutch law were contained in this language, as such, Latin literacy paved direct access for the practitioner to the undiluted sources of his authority.[69] It was also said that the knowledge of Latin aids in logical reasoning and analytical comprehension of legal texts generally.[70] The subsequent relapse of Latin into disuse globally could not dissuade

---

[65] cf: J van der Westhuizen, *On Equality, Justice, the Future of South African Law Schools, and Other Dreams, supra.*

[66] Section 3(2)(a) of the *Admissions of Advocates Act of 1964.*

[67] CRM Dlamini, 'The Demise of Latin For Legal Practice' (1988) 1 (2) *Consultus* 16; Keith Wilson, 'Points of View' (1988) 1 (2) *Consultus*; HP Viljoen, 'The Latin Debate: More Heat than Light?' (1988) 1 (2) *Consultus* 4.

[68] J Sinclair and E Mureinik, 'Compulsory Latin: A Compelling Case?' *supra*

[69] J Sinclair and E Mureinik, *op cit;* Jo-Marie Claasen, 'Latin and Lawyers: A Five-Year Dialogue' (1988) 105 *SALJ* 769.

[70] cf: J Sinclair and E Mureinik, op cit.

the proponents. At the other end of the spectrum, it was decried that legislating Latin as a mandatory subject for intending lawyers ascribe rather too much importance to a language that is not in daily use and where most texts originally inscribed in this language have been sufficiently translated for practical usage. Many national legal systems, modern as South Africa's and even more sophisticated, have since discarded the Latin component of their law studies without loss of worth and prestige.[71] Intending black advocates then also had to contend with two other foreign languages, Afrikaans and English, their own first language notwithstanding.[72] This capability of turning the advocate into a polyglot could not be an advantage to the black advocate but a barrier to access to the profession. Relegating the Latin requirement from being mandatory to the realm of other optional subjects was a welcome development in the legal community. Like other nonlegal subjects, languages inclusive, Latin has thus taken a deserving place within the humanities' basket expected to swell the range of opportunities for the intending lawyer.

4.3 THE CHALLENGE OF INTERNATIONALISATION

Like the developments in Europe which are progressively impacting on legal education to diminish the status of a national legal order in favour of transnational legal rules,[73] the

---

[71] See WR Prest, *The Rise of the Barristers*. Oxford: Clarendon Press, 1986.

[72] CRM Dlamini, 'The Law Teacher, The Law Student and Legal Education in South Africa,' supra 594 at 603.

[73] See generally: Bruno de Witte, 'The European Dimension of Legal Education' in Peter Birks (ed) *Reviewing Legal Education* OUP 1994, p 68; Jack Beatson, 'Has Common Law a Future?' 1997 56 *Cambridge LJ* 291; R Zimmermann, '*Stauta Sund Stricte Interpretanda*? Statutes and the Common Law: A Continental Perspective' 1997 56 *Cambridge LJ* 315.

South African situation is not immune from similar influences.[74] Internationalisation is however not a concept that is easily defined. It has been pointed out that 'internationalisation is a complex multidimensional construct, and consequently there is no single or simple means of describing it. Internationalisation behaviour is a response to situation specific conditions as well as the general character of the educational institutions, its members and its environment.[75] In gleaning the implications of internationalisation on the law curriculum the following may then be isolated for the sake of clarity:

- Internationalisation of legal education providers;
- Internationalisation of students and courses; and,
- Emerging internationalisation of legal practice.

4.3.1 Internationalisation of Legal Education Providers

With the recent democratic transformation of the South African civil society, the higher education sector has not only been attracting foreign students but academics from African countries and beyond are swelling the ranks of faculties generally. A drive towards diversity of law faculties will likely lead to the employment of both foreign trained South Africans and foreigners with overseas experience leading to greater interaction of local and foreign jurisprudence. Local Universities are also initiating institutional links with

---

[74] The *Education White Paper No 3* of July 1997 for instance claims in respect of the 'Needs and Challenges of Higher Education' that 'too many parts of the system observe teaching and research policies which favour academic insularity and closed-system disciplinary programmes.'

[75] N Barrett, 'Internationalisation of Business Education: An Australian Perspective' in T Cavusgil, *Internationalizing Business Education: Meeting the Challenge*, Michigan State University Press, East Lansing, Michigan, 1993, at 277, quoted in E Clark and M Tsamenyi, *Legal Education in the Twenty-First Century: A Time of Challenge*, op cit at 24.

universities the world over with a possibility of international law degree programmes being undertaken in institutions locally and abroad. Accreditation programmes associated with institutional linkages may also permit students transferring credits from a university abroad towards a degree locally.[76] Distance education institutions like that of the University of South Africa would not only admit foreign students to their law programmes but would be likely to entertain legal materials with substantial non-South African sources. Both the distance education institution enrolling foreign students and the residential institutions admitting foreign students either to their programmes or as part of an exchange programme, will ultimately need to be sensitive to the cultures of the foreign students. The foreign trained faculty member would need similar sensitivity. Existing faculty members engaged in exchanges or collaborative research with colleagues in other countries similarly would help to develop a new culture of international awareness.

4.3.2 Internationalisation of Students and Courses

Apart from the introduction of specialist courses such as Public International Law, International Trade Law, International Human Rights Law, etc., another dimension to the law curriculum is the vertical consideration of the international aspects of every subject.[77] Strategies like student exchange programmes allowing students to undertake part of their

---

[76] cf: E Clark and M Tsamenyi, 'An Australian Perspective on the Promises and Pitfalls of Law School Accreditation' in P Birks (ed) *Reviewing Legal Education*. OUP, 1994.

[77] JM Vogelson, 'A Practitioner Looks at Globalization II' 19** *J. Legal Educ.* 315; see also K Kibwana, *Enhancing Co-operation Among African Law Schools: Comparative Law Studies within the African Context*. Occasional Paper No 4, December 1993, Centre For Human Rights, University of Pretoria.

study programme in foreign institutions also add to the internationalisation of the law curriculum. A sustained trend towards internationalisation would expose global developments leading to the harmonisation and convergence of legal systems.[78]

4.3.3 Emerging Internationalisation of Legal practice.

Several resolutions of regional and global organisations as well as international treatises on diverse issues touch on aspects of national law that local practitioners of law often have to deal with. Multinational corporations also seek services of legal counsel in matters straddling more than one jurisdiction. In these instances, the lawyer needs to be able to offer informed opinions at minimal risk to the professional integrity of lawyers. Internationalisation of the law curriculum which offers courses with broad themes stressing a one-world community rather than separate and insulated sovereignties may help in this regard.[79] Probably most ambitious is to institute International LLB programmes entitling the holder to right of practice in several jurisdictions.[80]

---

[78] cf: E Clark and M Tsamenyi, 'Legal Education in the Twenty-First Century: A Time of Challenge' supra; R Zimmermann, '*Stauta Sund Stricte Interpretanda*? Statutes and Common Law: A Continental Perspectives,' *supra.*

[79] cf: I Dore, 'The International Law Programme at Saint Louis University' (1996) 46 *J. Legal Educ.* 336; JE Sexton, 'The Global Law School Program at New York University' (1996) 46 *J. Legal Educ.* 329.

[80] See J Golding and N Gold, 'The International LLB' Paper delivered to Commonwealth Legal Education Association Conference on Emerging Educational Challenges For Law in Commonwealth Asia and Australasia: Implications For Legal Education. University of Hong Kong, April 10 - 12, 1992, cited in E Clark and M Tsamenyi, 'Legal Education in the Twenty-First Century: A Time for Challenge' *supra.*

4.4 THE CHALLENGE OF INFORMATION TECHNOLOGY

As suggested elsewhere[81] there are three areas in which technology has affected the operation of law schools. These are, the substantive legal rules which affect the manufacture and the use of information technology (Information Technology Law); how the work of lawyers and the legal process are affected by the use of technology (Information Technology and the Law); and lastly how information technology is used to assist the learning and teaching process. The present exercise revolves more around the application of information technology to legal scholarship and pedagogy.

Legal literature which traditionally has relied on treatises printed on papers[82] seems to be drifting towards a paperless era[83] where computers are increasingly being utilised to teach and learn.[84] In South Africa, the two large law publishing houses, Butterworths Publishers Limited[85] and Juta & Company[86] have also entered the field of electronic publishing with

---

[81]Dick Jones, 'Computer Managed Teaching and Learning in Law' (1994) 3 *Law Technology Journal*, at <http://www.law.warwick.ac.uk/html/3-3f.html>

[82]cf: Peter Goodrich, *Reading The Law*, supra; AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' *supra.*

[83]Ronald W Staudt, 'An Essay on Electronic Casebooks: My Pursuit of the Paperless Chase' *supra.*

[84]Michael A Geist, 'Where Can You Go Today? The Computerization of Legal Education from Workbooks to the Web.' *supra.*

[85]At URL <http://www.butterworths.co.za>

[86]While the holding company Juta & Company maintains a Website at <http://www.juta.co.za>, its electronic publishing subsidiary is situated at <http://www.jutastat.com>

several products offered online.[87] Universities are also providing on the Internet useful legal materials and/or links to sites having legal information.[88] The impact of Information Technology on Legal education may be viewed from the two ends of Computer Assisted Legal Research (CALR) and Computer Assisted Legal Instruction (CALI).

4.4.1 Computer Assisted Legal Research (CALR)

With the increase in the volume of judgments, legal textbooks, legal treatises and statutes being churned out by the courts, legal scholars, jurists, national and international law making bodies, the legal materials available to the law researcher requires new perspectives in treatment and handling. The advent of computerised legal research to obviate the traditional manual research may thus be seen as a welcome development. Seaching through volumes of papers and books as opposed to a co-ordinated enquiry via a single medium in the convenience of an office setting or choice of the researcher may be less preferred by most. Resources available electronically via the World Wide Web (WWW)[89] and other

---

[87]Products offered by both companies include statutes, cases and other specialised legal information on the Compact Disc - Read Only Memory (CD-Rom), databases of legal materials, and folio views of law reports and legislations.

[88]See for instance the web sites of the School of Law, University of Witwatersrand at <http://www.law.wits.ac.za> ; the Electronic Legal Repository, and the Marine and Shipping Law sites of the University of Cape Town Law School at <http://www.uct.ac.za/depts/law/ler> & <http://www.uct.ac.za/depts/shiplaw/> ; the South African Environmental Project site of the University of Rhodes Faculty of Law at <http://www.ru.ac.za/departments/law/SAenviro/saep.html> Another good source of local legal materials is the Sabinet On-line Legal Resouces at <http://www.sabinet.co.za/sabi_legal_resouces.html> which has databases as well as a search engine specifically for the legal community.

[89]The World Wide Web (WWW) is a universal hypermedia-based method to access information. The WWW (or Web or W3) has a body of software, and a set of protocols and conventions. Practically, a server connected to the Internet provides the information which is stored on files. A corresponding client is able to access this information from every point on the Internet. See Ben Segal, 'A Short History of Internet Protocols at CERN' (April 1995) at <http://wwwcn.cern.ch/pdpnls/ben/TCPHIST.html> ; see also 'W3 Concepts' at <http://www.w3.org/Talks/General/Concepts.html>

Internet networks[90] increased in 1994 to 50 billion pages (or about 25 million books) transported monthly from about half (2.5 billion pages per month) the previous year.[91] One of the United States of America's (USA) major providers of legal databases, LEXIS-NEXIS claimed that as of November 1, 1997, it had on line about 1.3 billion documents with more than 9.5 million documents added each week.[92] Though the local statistics on the volume of information placed on the Internet and other computer media may be unavailable, progressive trend in this regard may be claimed by the availability of Gophers, web sites, and FTPs offering variety of legal information including bills, notices, proclamations, reports, gazettes, etc.[93]

---

[90]The Internet is a network of networks. Computers may be linked to one another and the internet provides capability to further link networks to networks. Once a computer user has gained access to the Internet through a service provider (ISP), materials contained on networks worldwide and stored on computer servers can be easily accessed. The WWW or Web is just a part of the Internet. The Web uses the hypertext system or HTML (HyperText Markup Language). Hypertext documents use marked words or sentences which are linked to other documents via an Uniform Resource Locator (URL). The URL specifies the location of files on other servers and and include the type of resource being accessed, the address of the server and the location of the file. Other information-retrieval protocols available on the internet include the FTPs(File Transfer Protocol), Telnet (a programme which enables the connection to remote computers across networks) and Gophers. See generally, Franco Zizzo, 'Legal Resouces Via the World Wide Web', A Paper presented at the 10th BILETA Conference on 'Electronic Communications' 30 -31 March 1995, available at <http://www.law.warwick.ac.uk/html/95%2D15.html> ; and, Michael Geist, 'Where Can You Go Today? The Computerization of Legal Education from Workbooks to the Web', *Supra.*

[91] Franco Zizzo, 'Legal Resources Via the World Wide Web' *op cit.*

[92]Source: LEXIS-NEXIS at <http://www.lexis-nexis.com>

[93]See for instance the following URLs <http://www.constitution.org.za> (the Constitutional Assembly); <http://www.salaw.co.za> (the South African Law Online); <http://www.pix.za/hlp/salu> (the South African Law Update)

Law Journals and Reviews are not only now available on the Internet,[94] Law professors are engaging in independent publishing of their materials on the Internet too.[95] These developments in Computer-mediated communication technologies are likely to reshape substantially the direction of legal publishing and research making it uneasy by legal scholars to neglect the trend.[96] Internet publishing of materials by legal scholars, which is still at its infancy has attracted opponents as well as sceptics even in the face of those heralding its emergence as a positive step in legal scholarship.[97] Interestingly the United Kingdom (UK) Higher Education Funding Councils have announced that articles published in electronic journals will be treated on the same basis as those appearing in printed journals for the purposes of Research Assessment Exercises.[98]

Operationally, computerised legal research may be conducted on a database generally consisting of the texts of whatever cases, statutes, regulations and other legal authorities the particular computer service has chosen to include. Each database may be divided into

---

[94]See <http://www.findlaw.com/03journals/general.html> for a path to several law journals and reviews available on the Internet.

[95]See 'Jurist: Law Professors on the Web' maintained by Bernard J Hibbitts, Associate Dean for Communications & Information Technology, Professor of Law, University of Pittsburgh School of Law, at <http://www.law.pitt.edu/hibbitts/jurist.htm>

[96]Bernard J Hibbitts, 'Last Writes? Re-Assessing the Law Review in the Age of Cyberspace' at <http://www.law.pitt.edu/hibbitts/lastrev.htm> and its sequel, 'Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews' at <http://www.law.pitt.edu/hibbitts/akron.htm> which argue that the ongoing development of Internet Technology allows and should encourage legal scholars to move away from traditional Law Review publication towards a self-publishing system in which electronically-posted articles would be centrally archived and made available for post-hoc open peer review.

[97]Ibid

[98]See HEFCE Circular RAE96 1/96 Research Assessment Exercise, at <http://www.niss.ac.uk/education/hefc/rae96/c1_94.html>

libraries and sublibraries.[99] At the computer terminal, a researcher instructs the computer to search a particular library's database for particular words and then reports the results.[100] Surend Dayal[101] identifies as possible benefits of Computer Assisted legal Research the followings:

- The capacity to create hypertext links between related pieces of information. The researcher can proceed directly from an index of defined words to the places in an electronic database where those words are actually used and/or defined. This can be used to cross reference large quantities of information in meaningful and useful ways.
- Flexible access options. There are multiple routes to access desired information in the publication. For example, the researcher can search for words in indexes, using many different tables of contents (eg tables of cases or legislation) or look for specific instances of particular words.
- Faster Search. With a good grasp of required operating instructions, a researcher can search vast sources of information in less time than conventional manual search.
- Speedy update of information. Advancement in software technology affords the opportunity of obtaining up to date information on time and at minimal cost.

---

[99]See Christopher G Wren & Jill R Wren, *The Legal Research Manual: A Game Plan for Legal Research and Analysis* 2nd Ed, Adams & Ambrose Publishing, Madison, 1986, at p133.

[100]Ibid. at 133 - 134

[101]'Benefits of Computer Assisted Legal Research' *Supra*

- Ease of printing and copying. It is very easy to print and download the precise information needed instead of having to carry around lots of redundant information.

4.4.2 Computer Assisted Legal Instruction (CALI)

The developments in information technology has led to the exploration of the possibilities of utilising the Computer to alleviate or even solve a multitude of problems encountered in the teaching and learning process. In then applying technology to legal education, Computer Assisted Legal Instruction (CALI) is allied to Computer Assisted Legal Research (CALR). The use of Electronic Mail (E-Mail) supplements the two.[102] CALI basically takes the form of programmed exercises developed by the teacher and presented to students via the computer either within a Local Area network (LAN) or the Internet for distance education.[103] In a model of CALI, the programmed exercises enabled students to conduct individual tutorials by responding to the various questions. Students were required to enter the correct response before proceeding to the next question, leading them through particular legal issue in a step-by-step manner while simultaneously creating an active learning experience.[104] The Center for Computer- Assisted Legal Instruction (CALI)[105] has

---

[102]Cf: 'The 2nd BILETA Report into IT for UK Law Schools' by the British and Irish Legal Education Technology Association (BILETA) July 1996 at <http://www.law.warwick.ac.uk/html/b2.html>

[103]See generally Peter B Maggs & Thomas D Morgan, 'Computer-based Legal Education at the University of Illinois: A Report of Two Years Experience' (1975) 27 *J. Legal Educ. 138*

[104]See Roger Park and Russel Burriss, 'Computer-Aided Instruction in Law: Theories, Techniques, and Trepidations' (1978) 1 *Am. B. Found. Res. J 1* cited in Michael A Geist, 'Where can You Go Today?: The Computerization of Legal Education from the Workbooks to the Web' *Supra.*

[105]Initially established out of the ties between the University of Minnesota law School and the Harvard Law School in 1982, CALI though essentially an American organisation has attracted its over 165 members from all over the world. See <http://www.cali.org>

developed more than 100 CAI exercises in more than 20 law subjects.[106] In addition to these exercises, CALI has made available a software programme *Webolis*[107] which is a Web Version of its earlier Widows-based software *CALI-Iolis*[108] to students and faculty members alike interested in utilising Computer Assisted Instruction (CAI) in their learning and teaching.

4.4.3 Computers Vs Print: Achieving the Goals of Legal Education.

It may be assumed that the teacher of law aims to achieve at least the following pedagogical objectives:

- Imparting a basic knowledge of black letter rules.
- Developing an understanding of the underlying rationales behind the rules.
- Developing the ability to independently to analyse legal issues.
- Developing research and writing skills.[109]

The pertinent issue lies in whether computers, both in Computer Assisted Legal Research (CALR) and Computer Assisted Instruction (CAI) as well as other forms of electronic retrieval, storage and communication, improve our ability to achieve our stated

---

[106]Ibid

[107]See <http://www.webolis.org/webolis/index.html> described as an 'internet-based library of legal education exercises.

[108]See <http://www.cali.org/calitech/geninfo.html> (4/Dec/1997)

[109]Richard Warner, 'Teaching Electronically - The Chicago-Kent Experiment' (1997) 20 *Seattle Univ LR*

educational objectives. The benefits of computers in learning outweighs what is offered by the print. Seven identified[110] differences between the two forms which gives the Computer the leading edge are:

i. ***Search capabilities***: Computers excel at storing information and at searching for the stored information quickly and accurately. Law students need to manage a very large amount of information, and the obvious thought is that the search capabilities of computers could help them do so.

ii. ***Hypertext links***: A Hypertext link is essentially a cross-reference. In a print book, for example, one might see the following cross-reference: Texts displayed on computer screens may, of course, contain similar cross- references. There is one crucial way, however, in which Hypertext improves on print cross-references. One can programme the computer so that a click of the mouse button on the words "Section II" brings Section II immediately up on the computer screen; another click returns one to the original location.

iii. ***Projection***: If one links a computer to a projector, one can project on a large screen whatever the computer is currently displaying. If an instructor does this in class (from a notebook computer on the podium), the result is an electronic chalkboard. One can quickly display large amounts of information without having to turn one's back to the class to write on the chalkboard.

---

[110]Ibid

iv. ***Interaction***: Computer programs can be interactive. They can pose questions or provide answers and other forms of feedback. Print books do not, of course, have to be wholly non interactive. One can, for example, pose a question on one page and put the answer on another with instructions to answer the question before going on. The computer, however, offers far greater possibilities (such as automatic score-keeping).

v. ***Multimedia***: Computers can incorporate animated graphics, sound, and video. This provides avenues for learning that extend well beyond what is possible with print.

vi. ***User modification***: Computer programmes can be highly user modifiable. Modification can tailor-make the programmes to suit individual needs. Where computers are used for learning, modification could accommodate different learning styles.

vii. ***Network connectivity***: Students and lecturers can connect computers to the law school's computer network. This facilitates communication, delivery of teaching materials, and allows on-line research.

Can one exploit these differences to improve the effectiveness with which one achieves the pedagogical goals identified earlier?[111]

[111] Ibid

4.5 THE EMERGENCE OF ARTIFICIAL LEGAL INTELLIGENCE.

The application of the developments in the field of Artificial Intelligence (AI) to legal reasoning falls within the sub-disciplinary scope of jurisprudence and legal theory.[112] Essentially, attempts to simulate the processes of legal reasoning using Artificial Intelligence (AI) denotes the acceptance of a particular theory of law and legal reasoning.[113] It involves a measure of research on formal models of legal argumentation since its framework at this stage suggests that legal logic has to be constructed as not to face the problems encountered by attempts to model law as a deductive system. The aim of researchers in this field ultimately may be to offer a framework for the integration of rule-based and case-based reasoning.[114] Artificial legal intelligence then according to Pamela N Gray[115] is 'the computer simulation of any of the theoretical and practical forms of legal reasoning, or the computer simulation of legal services involving the communication of legal intelligence.' The themes to be explored in a study of Artificial Legal Intelligence would necessarily include discussions on the nature of computer systems lawyers need, rationales for developing legal expert systems, and general introduction to the various theories about legal reasoning. Other issues to be explored would be the use of logic

---

[112]Cf. Dan Hunter,' Teaching Artificial Intelligence To Law Students' (1994) *3 Law Technology Journal*, at <http://www.law.warwick.ac.uk/html/3-3h.html> (accessed: 1/1/98)

[113]Susskind RE, 'Expert Systems in Law : A Jurisprudential Approach to Artificial Legal Reasoning' (1986) 49 *Modern LR* 168.

[114]KD Ashley, *'Case-based Reasoning and Its Implications for Legal Expert Systems'* (1992) 1 *Artificial Intelligence and Law* 113-208; KD Ashley, *Modelling Legal Argument: Reasoning with Cases and Hypotheticals. Cambridge* (Massachusetts) (MIT 1990)

[115]*Artificial Legal Intelligence* (Applied Legal Philosophy Series) Dartmouth Publishing Company UK 1997.

programming and production rules, network and frame-based representations of legal concepts, case-based reasoning and neural networks.[116]

Artificial Legal Intelligence researchers admit that their work with legal reasoning is mainly from an internal view of a jurist. Orthodox logical analysis and models of legal argumentation by the researchers leave out many problems that practising lawyers perceive as important.[117] However the research in this field provides both an understanding of the role of artificial legal intelligence in the legal system, and the nature of the intelligence which is to be further developed and automated.[118] The second part of this intellectual search[119] involves what is term 'jurisprudential systematisation'[120] by which attempt is made to formulate a technological context for the development of artificial legal intelligence, and some design aids for the construction of intelligent legal programmes. The recent history of artificial legal intelligence reveals the contributions of people from different countries. A legal system connotes certain norms internally created by a complex series of various actions within the jurisdiction, resulting in variations among laws of countries. The claim of artificial legal intelligence however is that although there are

---

[116]Dan Hunter, 'Teaching Artificial Intelligence To Law Students' *supra*

[117]Aleksandar Peczeenik, 'Jumps and Logic in the Law: What Can One Expect from Logical Models of Legal Argumentation?' (1996) 4 *ArtificialIntelligence and Law 297 - 329*. An instance is the difficulty of their computational models to effectively deal with role of personal preferences in legal decisions. To them moral opinions are necessarily vague and subject to irrational (emotional) change.

[118]Pamela N Gray, *Artificial Legal Intelligence, op cit* at 5

[119]That is, the nature of the legal system together with the paradigms of that intelligence which must be taken into account in the tasks of legal knowledge engineering.

[120]Pamela N Gray, *Artificial Legal Intelligence, op cit* at 6-7

differences between legal systems, the form of the intelligence which creates and applies the law share a lot of common attributes.[121] The maturation of artificial legal intelligence may thus herald a multinational phenomenon where legal systems may have to adapt to the requirements of new technologies.

The discursive nature of legal argument is not disputed by researchers in the field of Artificial legal intelligence. Attempt to computerise the discursive nature of legal reasoning is through the use of non-monotonic logic.[122] In monotonic logic, when the antecedents of a rule exist, the consequences of the rule necessarily result.[123] For example, a rule states: 'if A and B and C exist then X'. Whenever A, B and C exist the conclusion X automatically follows.[124] Monotonic logic can however not deal with inconsistency amongst rules and arguments. If two rules leading to opposite conclusions exist, the system concludes that both outcomes are equally likely. For example, if in addition to the above rule, the following rule also existed: 'if A and B and C exist then not(X)'. The system would conclude that both X and not(X) will occur.[125]

As stated by Michael Aikenhead,

---

[121]Ibid.

[122]See JC Hage, *Reasoning With Rules: An Essay on Legal Reasoning and Its Underlying Logic,* Law & Philosophy Library Vol 27 1997 Kluwer Academic Publishers.

[123]Michael Aikenhead, 'A Discourse on Law and Artificial Intelligence' (1996) 5 *Law Technology Journal* at <http://www.law.warwick.ac.uk/html/5-1c.html>

[124]Michael Aikenhead, 'A Discourse on Law and Artificial Intelligence' (1996) 5 *Law Technology Journal* at <http://www.law.warwick.ac.uk/html/5-1c.html>

[125]Ibid.

> 'Discourse theory indicates that law is a system based around opposing arguments. Thus a system that seeks to model law has to be able to deal with opposing arguments. Non-monotonic reasoning systems, which utilise non-monotonic logic, achieve this to a limited extent. In non-monotonic reasoning systems the existence of the antecedents of a rule does not automatically trigger the consequences of the rule; the consequences specified in a rule are only implied by that rule. A rule's conclusion will not occur if the conclusion of another rule is stronger than the conclusion from the first rule. This avoids the problem with monotonic logic which arises when the existence of the antecedents of a rule strictly imply the conclusion of the rule.'[126]

This attempt is however still fraught with its own difficulties especially as no reference is made to standards of principle, policy or value which are applied in law and legal reasoning. Other problems abound in the development of intelligent legal machines calling for more research.

[126]Ibid

CHAPTER FIVE

CONCLUDING OBSERVATIONS

PROEM

Thus far most of the issues facing legal education have been highlighted in the preceding four chapters. The local events have also been narrated amidst developments in other jurisdictions with whom we share common heritage. The stage of legal education in South Africa today as presented reveals that the process of curriculum development may only be undertaken with due consideration of the diversity of, and sometimes conflicting, views. The developments in the law schools appear to take into cognizance the multiplicity of these factors that impinge on the process. The factors are in no way constant, they remain variables, so that fresh perspectives may always be thrown upon them from time to time. As in any narrative, the present exercise has only isolated those influences as they appear to the writer. Like each of the blind men of Hindustani, the description has not been of the whole picture, rather, just from the angle of perception.

The Wind of Change

The changes in the law school curricula cannot be attributed solely to the fresh political dispensation since 1994, it gave the right impetus to it though, the developments globally also continue to play a pivotal role. Interestingly, the process of curriculum development in legal education since 1994, to apply a cut of date, displays evidence of collaborations and contestations among the stake holders.

Having argued that there are several underlying values and assumptions inherent in legal education, it remains attractive not only to those with immediate interest, the state, the law schools, the professions and students but also the public. The series of events leading to the adoption of a uniform law degree to replace the three law degrees in South Africa is a typical scenario. Though the hatchets are buried now, these events demonstrated the deep schisms and level of distrust embedded in the institutions of legal scholarship in the country. A cursory perusal of the *Report Back by the Task Group on Legal Education*, (November 1996) could not have revealed these deep-seated differences and negative feelings by some vital segments of the civil society on legal education. It may be recalled that it was a task group (consisting of representatives of the universities, the Black Lawyers Association, The National Association of Democratic Lawyers, The Association of Law Societies and the General Council of the Bar) that met in December 1995 to investigate the restructuring of the LLB degree. Though a report was presented to the National Liaison Committee meeting on the 10 June 1996 leading to the adoption of the task group's report by the Law schools' deans, the later events betrayed the contestations between the stakeholders.

From Five to Four

The most significant change recommended by the developments is that the various periods of university study for the three previous degrees as well as the nomenclature of those degrees were to be synchronised into a uniform four-year LLB. While it has been variously canvassed that the four-year LLB is in effect a conversion of the otherwise postgraduate (five years) LLB into an undergraduate degree, the argument should not lose sight of the positive effect of abrogating the

divide between the so-called inferior and superior degrees. There is no doubt that a four-year degree as opposed to a five-year LLB imports the perception of loss of credibility, especially in view of the explosion of information creating more study materials for the law student.

Two issues are however paramount in curriculum development, that of the balance between autonomy or academic freedom and accountability. It should be obvious that law school autonomy to know best what is required in legal education cannot equate with a complete independence from the state and the society. This view taken, the introduction of a single degree for law study should invest the law schools with the responsibility to play a more active role in shaping the potential lawyer. In the past, especially in respect of the post graduate LLB a university graduate in any discipline may apply for the LLB degree and complete it in about two to three years of study. It was not uncommon to have, say a chemistry graduate in the LLB class. Whilst not pitching a tent for or against what branch of knowledge suits best a scholar preparing for law study, the correlative of any privilege remains a responsibility. As such, it may as well be that the law schools should now assume more responsibility in prescribing the areas of knowledge, especially those non-legal courses that a law student may take as a prelude to core law study. The introduction of the four-year LLB no doubt leans more in favour of the state and the society. It is a choice between 'mass' and 'elite' legal education.

It remains to be seen within the purview of the higher education policies the emphasising number of years (in favour of semesterisation and modularisation) whether law schools may exercise within whatever is left of the institutional autonomy to structure the law programme to ensure that law

students attend the same level in depth and breadth in scope as ascribed to the previous postgraduate LLB. For argument sake it is possible that a law school can draw up a tight curriculum incorporating all what was required for the attainment of the double degree BA LLB. As long as specific measures are not put in place to unduly burden the learner, it should be feasible to have a four-year LLB cover not a dissimilar syllabus from the past. Even among different law schools, no empirical evidence exists to demonstrate that students do attain the same level and breadth of study, yet students graduate with degrees bearing the same titles, deemed to be of same status. Under the three -degree system, law schools frequently offer similar courses to students at the same level, yet towards different degrees. Exemptions are even usually granted towards the LLB degree for law subjects previously done, regardless of whether it was at BA or BProc levels. Should it not then be enquired whether the post graduate LLB a significantly superior degree in depth or years compared to other degrees. Two views are possible, one is that a graduate of whatever discipline before LLB study has a broader perspective of things as well as a matured mind to navigate the vagaries of legal argumentation and reasoning, as such the LLB is effectually a superior degree. On the other hand, the fact that the same subjects are not unusually offered simultaneously at the levels of the three degrees should suggest a superficial superiority of the LLB degree. Wherever one stands, the position reveals a part of the conflicting feelings of the stakeholders in the process of law curriculum development.

The OBE Orthodoxy

Beside the political changes in the law curriculum, an important paradigm shift is the introduction of

the outcomes-based education (OBE) and its looming effect on legal education. It may be asked whether the OBE will improve or impoverish the law curriculum. Revelations from afar and anecdotal evidence from around reveal that this OBE portends a bleak future for most disciplines in the humanities including law. Policy makers flaunt the OBE as a panacea to our educational woes, as well as imbuing dynamic life long learners with skills best suited to modern demands. Upon these received wisdom, the government had even appointed a date for its implementation. By happenstance, policy formulators trust the efficacy of their prescription (the OBE) either as not to prepare its midwives (the teachers), or rather possess an unrevealed understanding of this truth that its indefeasible veracity need not be subject to unnecessary scrutiny. For whatever it is worth, in so far as the OBE adopts an instrumental, monolithic and measurable view of knowledge, it is likely to disappoint legal educators interested in proceeding beyond the black letter view of law to a more critical, analytic and dynamic stance of legal knowledge.

New Thinking

That the notion that curriculum development is about change makes it inevitable that traditional beliefs and assumptions are subject to challenge as well as allowing opportunity for a shift in perceptions. The law curriculum in this regard is expected to come in years to witness confrontations of ideas in respect of opinions previously held to be near immutable. The move from the parliamentary to constitutional democracy with more politically active role for the highest court of the land (the constitutional court) will likely occasion a reconsideration of legal rules both in public and private law spheres.

Roman Dutch law, whether taken as the common law of South Africa or as one of the sources of South African law may now be ready to witness epistemological shifts from pragmatists intent on displacing the vestiges of colonialism and apartheid. Multiculturalism, its infusion into law and relationship to academic development may also aid in a revival to search for new definitions or redefinition of otherwise settled legal positions. The challenge of internationalisation to the law curriculum may also alter local conditions as to open up the allegedly insular and closed-circuit educational system of the past to greater competitiveness the aims of legal education have tended to be premised on historical relationships between the law schools and the practising professions. On this score, the professions exert considerable influence on legal education and training. The number of law students not entering into the actual practice of law keeps growing. Those advocating the extension of legal knowledge beyond the natural law - positivism axis to a more social study of law may also assist in the search for new goals for legal education. Emphasis may be on the provision of broad general education consistent with the reality of training students beyond the courtroom practise of law.

Tools of our own Tools

In assessing the impact of technology, especially information technology, on legal education, it remains to be defined clearly how the law schools can meet the challenge of technology. Apart from the inadequacy of funding required to meet this challenge, significantly searching for attention is the prominence of educational value and whether the technologies can be utilised to achieve our goals

of legal education. Combining the unrelenting sophistication of computer softwares with growth in artificial legal intelligence resulting in the potentials to develop intelligent legal machines, it may lead to another question. Will the social knowledge acquired by the lawyer become devalued by computers? Probably not. There remains the unlikely event of computers taking the place of humans, higher order thinking in legal education will in the near future reside in human beings not the tools like computers created by them.

Funding

Throughout this exercise, one thing that has not before now attracted attention is the funding of legal education. This is not out of its insignificance but the otherwise, as it may even unilaterally mar brilliant ideas or make improvements upon sterile causes. Economic science however counsels that inadequate resources is a problem shared globally. What is left is how law schools can manage their dwindling resources in the face of severe pressure on government funding levels. Resources from fee paying students are unlikely to significantly assist the cause of inadequate funding. The future survival of law schools may thus heavily depend on the resourcefulness of the law schools themselves.

CODA

Regardless of the ultimate choice between 'mass' and 'elite' legal education, or the Pericles and the plumber, or the architect and the mason, most importantly is a link between available resources, both human and material, committed to legal education. Solving the pressing problems in the transmission of legal knowledge requires the availability of capable hands supported with the wherewithal to

prosecute the goals of legal education best suited to the needs of the country. The stage is still evolving and while the face of tomorrows legal education may be unclear in view of the unsettled though buried differences in the process of curriculum development, the past is visibly shedding its complexion.

BIBLIOGRAPHY

(1957) 2 QB 55 — *Jones vs National Coal Board*

Abel RL — *Politics by Other Means: Law in the Struggle Against Apartheid 1980-1994(1995)*

Act 78 of 1997 — *Qualifications of Legal Practitioners Amendment Act 78 of 1997*

Act 108 of 1996 — *Constitution of The Republic of South Africa (1996)*

Act 53 of 1979 — *The Attorneys Act of 1979*

Act 74 of 1964 — *Admission of Advocates Act 74 of 1964*

Aikenhead MA — 'Discourse on Law and Artificial Intelligence' 5 *Law Technology Journal* at <http://www.law.warwick.ac.uk/html/5-1c.html> (1996)

ALRC IP 57 — Australian Law Reform Commission Issues Paper 57: *Multiculturalism and the Law.* ALRC IP 57 (28 April 1992)

ALRC IP 21 — Australian Law Reform Commission Issues Paper 21: *Review of the Adversarial System of Legal Education and Training.* ALRC IP 21 (August 1997).

ALRC IP 20 — Australian Law Reform Commission Issues Paper 20: *Review of the Adversarial System of* Litigation: Rethinking the Federal Civil Litigation System. ALRC IP 20 (May 1997).

Alt RT — 'Towards Equal Protection: A Review of Affirmative Action' 36 *Washburn LJ* 179 (1997)

Appiah KA — 'Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction' in Gutman,A.(ed). *Multiculturalism and the Politics of Recognition* p149 (1994)

Arendse N — 'The Role of Affirmative Action in the Advocates' Profession' *Consultus* 54 (May 1997)

Arthurs HW — 'To Know Ourselves: Exporting the Life of Canadian Legal Scholarship' 23 *Osgoode Hall Law Journal* 403 (1985)

Ashley KD — 'Case-based Reasoning and Its Implications for Legal Expert Systems' 1 Artificial Intelligence and Law 113-208 (1992)

Ashley KD *Modelling Legal Argument:* Reasoning with Cases and Hypotheticals. Cambridge(Massachusetts) (MIT 1990)

Bamford CS 'Adding value by Writing Clearly' III *SALJ* 514 (1994)

Barrett N 'Internationalisation of Business Education: An Australian Perspective' in Cavusgil, T. *Internationalizing Business Education:* Meeting the Challenge, Michigan State University Press (1993)

Baxter LG *Legal Education and Public Policy* Inaugural address delivered at the University of Natal, Pietermaritzburg, 17 October 1994.(1994)

Beatson J 'Has Common Law a Future?' 56 *Cambridge Law Journal* 291 (1997)

Beinart B 'The English Legal Contribution to South Africa: The Interaction of Civil and Common Law' *Acta Juridica* 7 (1987)

Bindman, G.(ed) *South Africa: Human Rights and the Rule of Law.* London: Pinter Publishers (1988)

Bird G, Campbell S, Barbayannis M & Smith H. 'Preparing Lawyers for a Multicultural Society' 57 *JPLE* (1996)

Blasi LG 'What Lawyers Know: Lawyering Expertise, Cognitive Science and the Functions of Theory' 45 *J. Legal Educ.* 313 (1995)

Blunden A 'Designing and Running Continuing Legal Education Programmes in a Private Law Firm' 11 *JPLE* 35 (1993)

Boam R & Sparrow P *Designing and Achieving* Competency: A Competency-Based *Approach to Developing People and Organisations.* London: McGraw-Hill, (1992)

Bonthuys E & Du Plessis LM 'Observations on the Conceptualisation and Definition of Legitimacy in Legal Context' (2) *Stell. LR* 217 (1996)

Boschoff E 'Professional Legal Education in Australia' *De Rebus* 27 (1997)

Botha CG 'Early Legal Practitioners of the Cape Colony' 41 *SALJ* 255 (1924)

Boyles MD *Principles of Law: A Normative Analysis* (Law and Philosophy Library) (1987)

Boys C 'NVQ: The Outcome-Plus. Model of Assessment' in Edwards, A. And Knights, P.(eds) *Assessing Competence in Higher Education.* London

Kogan Page (1995)

Bradney A 'Raising The Drawbridge: Defending University Law Schools' 1 *Web Journal of Current Legal Issues* (1995)

Bradney A The Rise and Rise of Legal Education. *Web Journal of Current Legal Issues* (1997)

Brest P and Oshige M 'Affirmative Action for Whom?' 47 Stan. LR 855 (1995)

Bridge JW 'The Academic Lawyer: Mere Working Mason or Architect' 91 *LQR* 488 (1975)

Brink JA 'The Future of the Quality Promotion Unit(QPU) of The Committee of University Principals(CUP)' in Strydom, Lategan and Muller (eds) *Quality Assurance in South African Higher Education*. Bloemfontein.(1992)

British and Irish Legal Education Technology Association, *2nd Report into IT for UK Law Schools* July 1996, at <http://www.law.warwick.ac.uk/html/b2.html> (1996)

Bronstein V & Hersch J 'Teaching Law as a Second Language in A Second Language' 108 *SALJ* 159 (1991)

Brown L & Kitch E 'The Fire of Truth: A Remembrance of Law and Economics' 33 *J Legal Educ.* 184 (1982)

Bunting IA *A Legacy of Inequality: Higher Education in South Africa* UCT Press (1994)

Burchell JM *Beyond The Glass Bead Game:* Reshaping Academic Legal Research. Inaugural Lecture delivered at the University of Natal, Pietermaritzburg on 12 April 1989.(1989)

Byrne J. P. 'Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education' 43 *J. Legal Educ.* 315 (1993)

Calabresi G 'Some Thoughts on Risk Distribution and the Law of Thoughts' 70 *Yale LJ* 499 (1961)

Cameron, E. 'Rights Constitutionalism and the Rule of Law' 114 *SALJ* 504 (1997)

Cappelletti, M. *The Future of Legal Education:* A Comparative Perspective .

Carnegie Corporation of New York *A House No longer Divided: Progress and Prospects for Democratic Peace in South Africa.* (July 1997)

Chaskalson A 'Responsibility for Practical Legal Training' *De Rebus 116* (1985)

Chesterman M & Weisbrot D 'Legal Scholarship in Australia' 50 *Modern LR* 709, 709-721 (1987)

Christodoulidis EA 'The Inertia of Institutional Imagination : A Reply to Unger' 59 *Modern LR* 377 (1996)

Church J 'Reflections on Legal Education' 51 *THRHR* 153 (1988)

Claasen J 'Latin and Lawyers: A Five-Year Dialogue' 105 SALJ 769 (1988)

Clark E & Tsamenyi M 'An Australian Perspectives on the Promises and Pitfalls of Law School Accreditation' in Birks, P. (ed) *Reviewing Legal Education* OUP (1994)

Clark E & Tsamenyi M 'Legal Education in the Twenty-First Century: A Time of Challenge in Birks, P. (ed) *Pressing Problems in the Law Vol.2: What are Law Schools For* OUP (1996)

Cockrell A 'The South African Bill of Rights and the "Duck/Rabbit"' 60 *Modern LR* 513 (1997)

Collet P 'Capacity Building for Professional Development in Higher Education' Paper read at SAAAD Annual Conference Nov.30-Dec.3 1997 (1997)

Corder H 'Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa' *SAJHR* 1 (1989)

Cosner KL 'Affirmative Action in Higher Education Lessons and Directions From the Supreme Court' 72 *Indiana LJ* (1997)

Corder H 'The Judicial Brand of Government: An Historical Overview' in Visser D.P.(ed) *Essays in the History of Law.* (1989)

Cornwall JR 'Legal Writing as a Kind Of Philosophy' 48 Mercer LR 1091 (1997)

Cotterrell R 'Law and Sociology: Notes on the Constitution and Confrontation of Disciplines' 13 *Journal of Law and Society* 9 (1986)

Cowan DV 'The History of the Faculty of Law in the UCT 1859-1959' *Acta Juridica* 1 (1959)

Curriculum 2005: A User's Guide. Department of Education, Pretoria, March 1997.

David R and Brierly *J.E.C. Major Legal Systems in the World Today.* 3rd Edition 1985, Stevens & Sons, London. (1985)

Davies M *Delimiting The Law-Postmodernism and the Politics of Law* Pluto Press Chicago (1996)

Davis DM *Social Power and Civil Rights: Towards a New Jurisprudence For a Future South Africa.* Inaugural Lecture of October 24 1990 UCT.

Davis DM 'Post-Apartheid South Africa -- What Future For a Legal System?' *Acta Juridica* 220 (1987)

Dayal S *Benefits of Computer Assisted Legal Research* at <http://law.anu.edu.au/nglrw/lr2.htm>

De Witte B 'The European Dimension of Legal Education' in Birks P(ed.) *Reviewing Legal Education* OUP (1994)

Department of Education Pretoria *The Higher Education Bill* (1997)

Department of Education Pretoria, *The White Paper on Education and Training No 3* (July 1997)

Department of Education Pretoria, *The Report of The Technical Committee to Assist The Department of Education in The Development of Standards* (March 1997)

Department of Education Pretoria, *Language in Education Policy* (July 1996)

Department of Education Pretoria, *Norms and Standards Regarding Language Policy* (July 1996)

Department of Education Pretoria, *Lifelong Learning for the 21st Century:* A User's Guide.. (March 1997)

Department of Education Pretoria, *The White Paper on Education and Training : White Paper No 1* Notice 756 of 1997.

Dlamini CRM 'The Law Teacher The Law Student and Legal Education in South Africa' *SALJ* 595 (1995)

Dlamini C 'The Transformation of South African Universities' 9 *SA J Higher Education* 39 (1995)

Dlamini CRM 'The Demise of Latin For Legal Practice' 1 (2) *Consultus* 16 (1988)

Dlamini CRM 'The Role and Function of the Black Lawyer in South Africa' *De Rebus* 479 (1988)

Dore I 'The International Law Programme at Saint Louis University' 46 *J. Legal Educ.* 336 (1996)

Douzinas C & Warrington R 'The Face of Justice: A Jurisprudence of Alterity' 3 Social and Legal Studies 405. (1994)

Du Plooy JL *et al.* *Fundamental Pedagogics for Advanced Students* Pretoria (1993)

Du Plessis LJ 'A Plea for New Approach in the Law of the Republic' 78 SALJ 457 (1961)

Du Plessis LM *The Interpretation of Statute* Butterworths (1986)

Duggard J *Human Rights and the South African Legal Order* Princeton: Princeton University Press (1978)

Duminy AH *Programmes: A Checklist* Unpublished paper September 1997 (Curriculum Development UND). (1997)

Duncanson I 'Broadening the Discipline of Law' 19 *Melbourne University LR.* at <http:/universe.edu.au.//law/pub/journals/m-Duncanson html#Vol 1 9 No.4-Ian Duncanson>

Duncanson I 'The Ends of Legal Studies' *Web Journal of Current Legal Issues 3.* (1997)

Duncanson I(ed) *Legal Education and Legal Knowledge (Law in Context* 1991/92) La Trobe University Australia. (1992)

Edwards HT 'The Growing Disjunction Between Legal Education and The Legal Profession' 91 *Michigan LR* 34. (1992)

Elkins JR 'Thinking Like a Lawyer: Second Thoughts' 47 *Mercer LR* (1996)

Ellman S 'Lawyers Against the Emergency' 6 *SAJHR 228* (1990)

Faculty of Law University of Fort Hare's Response to the Report of the Task Group on Legal Education May 1996.

Finnis J *Natural Law and Natural Rights.* Oxford (1980)

First H 'The Business of Legal Education' 32 *J. Legal Educ.* 201 (1982)

Foster S Difference and Equality: A Critical Assessment of the Concept of 'Diversity' *Wisc. LR* 105 (1993)

Fox EM 'The Good Law School The Good Curriculum and the Mind and the Heart' 39 *J. Legal Educ.* 473. (1989)

Fudge J 'Marxist Theory of History and Marxist Analysis of Law' in Delvin RF(ed) *Canadian Perspectives on Legal Theory* (1990)

Geist MA 'Where Can You Go Today?: The Computerization of Legal Education From Workbooks to the Web' 11 Harvard Journal of Law and Technology also at <http://www.columbia.edu/~mag76/webweave.html> (1997)

General Council of The Bar (UK) Quality of Justice:The Bar's Response. Butterworths (1989)

Quality Promotions Unit Committee of University Principals Pretoria: Quality Audit Manual (1997)

Ghai Y 'Law Development and African Scholarship' 50 *Modern LR* 750 (1987)

Glasbeek HJ & Hasson RA 'Some Reflections on Canadian Legal Education' 50 *Modern LR* 777 (1987)

Gold N 'The Role of the University Law School in Professional Formation in Law' 4 *JPLE* 15 (1986)

Golding J & Gold N 'The International LLB' Paper delivered to Commonwealth Legal Education Association Conference on Emerging Challenges For Law in Commonwealth Asia and Australasia: Implications For Legal Education. University of Hong Kong April 10-12 1992 cited in Clark E. and Tsamenyi M. Legal Education in the Twenty-First Century: A time for Challenge.

Goodrich P *Reading the Law: A Critical Introduction to Legal Methods and Techniques* Oxford (1986)

Goodrich P 'Sleeping with The Enemy: An Essay on the Politics of CLS in America' 68 *NYU LR* (1992)

Gray PN *Artificial Legal Intelligence* (Applied Legal Philosophy Series) Dartmouth Publishing Company UK (1997)

Growth Employment and Redistribution - A Macro Economic Strategy. `GEAR' June 1996.

Hage JC — *Reasoning With Rules: An Essay on Legal Reasoning and Its Underlying Logic* Law & Philosophy Library. Vol 27 Kluwer Academic Publishers (1997)

Hahlo and Kahn — *The Union of South Africa. The Development of its Laws and Constitution* JUTA (1960)

Hale R — 'The Place of CLE Within Legal Education' 12 *JPLE* 69 (1994)

Hall C Blending — 'Academic Standards with the New Zealand National Qualifications Framework: Lessons for other Countries' in Strydom A. Lategan L and Muller A.(eds) *Quality Assurance in South African Higher Education: National and International Perspectives* University of Orange Free State Bloemfontein. (1996)

Harris P & Jones M — 'A Survey of Law Schools in the United Kingdom' 1996 31 *Law Teacher* 58 also at <http://www.law.warwick.ac.uk/ncle/html/alt 96-1.html> (1996)

Harris P & Tribe D — 'The Impact of Modularisation and Semesterisation on The Assessment of Undergraduate Law Student' Law Teacher 29 279 (1995)

Hart HLA — 'Positivism and the Separation of Law and Morals' 71 *Harvard LR* 593 (1958)

HEFCE — Circular RAE96 1/96 Research Assessment Exercise at <http://www.niss.ac.uk/education/hefc/rae96/c1.html>

Hibbitts BJ — 'Yesterday Once more: Skeptics Scribes and The Demise of Law Reviews' at <http://www.law.pitt.edu/hibbitts/akron.htm>

Hibbitts BJ — 'Last Writes? Re-assessing the Law Review in the Age of Cyberspace' at http://www.law.pitt.edu/hibbitts/lastrev.htm>

Hosten WJ *et al.* — *Introduction to South African Law and Legal Theory.* 2nd Edition (1995) Butterworths.

Hund J & Van der Merwe H. *Legal Ideology and Politics in South Africa. A Social Science Approach.* Centre for Intergroup Studies UCT (1986)

Hunkins F and Hammill P. 'Beyond Tyler and Taba: Reconceptualising the Curriculum Process' 69 *Peabody J. Educ.* 4. (1994)

Hunter D — 'Teaching Artificial Legal Intelligence To Law Students' (1994) 3 *Law Technology Journal* at <http://www.law.warwick.ac.uk/html/3-3h.html>

Hutchinson AC 'A Deconstructive Spin (Or Was it a Googly?)' in Devlin R.F. *Canadian Perspective on Legal Theory* (1990)

Jansen JD *Why OBE Will Fail.* Unpublished Paper. March 1997.

Johnson G *In The Palaces of Memory: How We Build the Worlds Inside Our Heads* Grafton London. (1992)

Jones D Computer Managed Teaching and Learning in Law. 3 *Law Technology Journal* 1994 at <http://www.law.warwick.ac.uk/html/3-3f.html> (1994)

Kennedy D Legal Education as Training for Hierarchy in Kairys D. *The Politics of Law: A Progressive Critique* New York Pantheon (1982)

Kentridge S 'The Theories and Realities of the Protection of Human Rights Under South African Law' 56 *Tulane LR* 227 (1981)

Kibwana K *Enhancing Co-operation Among African Law Schools: Comparative Law Studies Within the African Context.* Occasional Paper No 4 Centre for Human Rights University of Pretoria 4 December (1993)

Kidd MA 'Internal Security and Specialist Judges' 6 *SAJHR* 417 (1990)

Kraak A *Towards a New Qualification Structure for University Education in South Africa* Academic Planning Unit UWC Cape Town.(1994)

Le Brun MJ 'Curriculum Planning and Development in Law in Australia: Why is Innovation So Rare? in Duncanson I(ed) *Legal Education and Legal Knowledge (Law in Context* 1991/92) La Trobe University Australia. (1992)

Lilly GC 'Law Schools Without Lawyers? Winds of Change in Legal Education' 81 Virginia LR 1421.(1995)

Lotus Institute *Distributed Learning: Approaches Technologies and Solutions* (Corporatesystems Pty Ltd(Australia) & Lotus-IBM) September 1996.

Luckett K & Luckett S 'Implementing Outcomes-based education in a South African University. Paper presented at SAAAD Annual Conference Nov.30-Dec.3 1997 (1997)

Macaulay S 'Elegant Models Empirical Pictures and the Complexities of Construct' *1997 Law Society Review 507.* (1997)

MacCormick N. 'The Concept of Law and 'The Concept of Law' 14 *Oxford Journal Of Legal Studies* 1. (1994)

Mager R. 'Preparing Instructional Objectives' 2nd Edition London Kogan Page (1990)

Maggs PB & Morgan TD 'Computer-Based Legal Education at the University of Illinois: A Report of Two Years' Experience' (1975) 27 *J. Legal Educ.* 138

Maharaj JH 'The Role of the Law School in Practical Legal Training' 111 *SALJ* 328 (1994)

Mansfield B 'Competence and Standards' in Burke JW *Competency Based Education and Training* The Palmer Press London (1990)

Marais D *South Africa: Constitutional Development: A Multi-Disciplinary Approach.* 2nd Edition Southern Book Publishers (1993)

Marshall TH & Bottomore *T. Citizenship and Social Class.* Pluto Perspectives (1992)

Marshall D 'Law Schools' Libraries Go Digital: Plug in and Learn' 9:2 *Canadian Society for the Advancement of Technology(CSALT) Review* 5. (1995)

Maughan C et al 'Sharpening the Mind or Narrowing it? The Limitations of Outcome and Performance Measures in Legal Education' 29 *Law Teacher* 255 (1995)

McQuid-Mason DJ The Collection of Papers in Legal in Legal Aids and Law Clinics in South Africa *Conference Proceedings, University of Natal, Durban.* July (1983)

McQuid-Mason DJ 'Clinical Legal Education: its Future in South Africa' 40 *THRHR* 343 (1977)

McQuid-Mason DJ 'Problems Associated with Legal Representation in the Urban Areas of South Africa' *Acta Juridica* 181 (1984)

Milton JRL 'Constructing A Curriculum for The University Study of Law' *De Jure* 109. (1975)

Milton JRL 'Legal Education in South Africa in Retrospect and Prospect' *De Rebus Procuratoriis* 207 (1975)

Motala Z 'Legal Education in South Africa: Moving Beyond the Couch-Potato

Model Towards A Learning Skills Approach - A Case For A Comprehensive Course on Legal Research Analysis and Writing' 113 *SALJ* 695 (1996)

Motshekga M 'A System of Internship' *De Rebus* 425 (1986).

Mullender R 'Law Undergraduates and The Tutorials' 3 *Web Journal of Current Legal Issues.* (1997)

Murphy WT & Roberts S. 'Introduction' 50 *Modern LR* 677 (1987)

NCHE *A Framework For Higher Education Transformation: National Commission for Higher Education (NCHE) Final Report* (August 1996)

NCHE *National Commission for Higher Education(NCHE):The Report of Technical Committee 6 on Professional Education and Training* at <http://star.hsrc.ac.za/nche/final/tg5/systems/chap6.html> Pretoria (1996)

NCHE *National Commission for Higher Education(NCHE):The Report of Technical Committee 2 on Student Access Support and Development* at <http://star.hsrc.ac.za/nche/final/tg5/systems/chap2.html> (1996)

NCHE *National Commission for Higher Education(NCHE): The Report of Task Group 5 on The Construction of a Unified National Higher Education System* (1996)

NCHE *National Commission for Higher Education(NCHE): The Report of Technical Committee 4 on Quality Qualification, Accreditation, Access and Articulation*, Pretoria 1996 at <http://star.hsrc.ac.za/nche/final/tg5/systems/chap4.html> (1996)

Note *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship'* 95 Harvard LR 1669 (1982)

Nuttal DL 'The Validity of Assessments' in Murphy P & Moon B (eds) *Developments in Learning and Assessment* London. Hodder and Stoughton. (1989)

Otter S *Learning Outcomes in Higher Education* Unit for the Development of Adult Continuing Education(UDACE)London (1992)

Park R & Burriss R 'Computer-Aided Instruction in Law: Theories Techniques and Trepidations' 1 *Am. B. Found Res. J* 1 (1978)

Peczeenik A 'Jumps and Logic in the Law: What can one Expect From logical Models

of Legal Argumentation?' 4 *Artificial Intelligence and Law* 297 (1996)

Pirie AJ — Objectives in Legal Education: The Case for Systematic Instructional Design. 37 *J. Legal Education* 576 (1987)

Pont D — 'Die Opleiding Van die Juris in Suid Africa' *Acta Juridica* 58 (1961)

Posner R — *Economic Analysis of Law*. 3rd Edition Boston.

Poswa J — 'The Advocates' Profession in South Africa' *Consultus* 52 (May 1997)

Prest WR — *The Rise of the Barristers* . Clarendon Press Oxford 1986.

Priest G — 'The Growth of Interdisciplinary Research and The Industrial Structure of the Production of Legal Ideas: A Reply to Judge Edwards' 91 *Mich. LR* 1929. (1993)

Priest G — 'Social Science Theory and Legal Education: The Law School as University' 33 *J. Legal Educ.* 437. (1983)

Ramsfield JJ — 'Is "Logic" Culturally Based-A Contrastive International Approach to the USA Law Classroom'. 47 *J. Legal Educ*. 157 (1997)

Raz J — *The Authority of Law* Oxford (1979)

Raz J — 'The Purity of The Pure Theory' in Tur R & Twining W (eds) *Essays on Kelsen.* Clarendon Press Oxford (1986)

Réaume DG — 'Justice Between Culture: Autonomy and the Protection of Cultural Affiliation' 29 *Univ. of British Columbia LR* 117 (1995)

Reynolds B — 'Natural Law Versus Positivism: The Fundamental Conflict' 13 *Oxford Journal of Legal Studies* 441 (1993)

Rideout JC & Ramsfield JJ 'Legal Writing: A Revised View' 69 *Washington LR* 35 (1994)

Rier DA — 'The Future of Legal Scholarship and Communication: Publication in the Age of Cyberspace' 30 Akron LR (No2-1996)at <http://www.uakron.edu/awrev/w96v30n2.html> (1996)

Riley A — 'The Meaning of Words in English Legal Texts: Mastering the Vocabulary of Law- A Legal Task' 30 *Law Teacher* 68 (1996)

Sachs A — *Protecting Human Rights in A New South Africa*. 1990.

SALC — Issue Paper on Customary Marriages 31 August 1996.

SALC — Discussion Paper 74 (Customary Marriages) of August 1997.

SAQA — *South African Qualifications Authority(SAQA) Act: Draft Regulation* SAQA 12/P Notice 764 of 1997.

Sargent CN — 'Labouring in the Shadow of Law: A Canadian Perspective on the Possibilities and Perils of Legal Studies' in Duncanson I(ed) *Legal Education and Legal Knowledge* (Law in Context 1991/92) La Trobe University Australia. (1992)

Sarkin J — 'The Political Role of the South African Constitutional Court' 114 *SALJ* 134 (1997)

Savage N & Watt G — 'A House of Intellect for The Profession' in Birks P. *Reviewing Legal Education* OUP (1994)

Schlegel JH — 'Between Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor' 35 *J. LEGAL Educ.* 311 (1985)

Schlegel JH — 'Searching for Archimedes. Legal Education Legal Scholarship and Liberal Ideology' 34 *J. Legal Educ.* 103 (1984)

Schreiner-Linford S — 'The Centre for Computer Assisted Legal Instruction and Chicago-Kent College of Law' 4 *Law Technology Journal* 1995 at URL <http://www.law.warwick.ac.uk/html/4-2html> (1995)

Schwartz ML 'The Reach and Limits of Legal Education' 32 *J. LEGAL Educ.* 543 (1982)

Seaton RH — 'Affirmative Action at the Crossroads' 36 *Washburn LJ* 248 (1997)

Segal B — 'A Short History of Internet Protocols at CERN' at <http://wwwcn.ch/pdpnls/ben/TCPHIST.html>

Sexton JE — The Global Law School Program at New York University 46 *J. LEGAL Educ.* 329 (1996)

Sherr A — Legal Education: Legal Competence and Little Bo Peep. Inaugural Lecture by Woolf Professor of Legal Education at The Institute Of Advanced Legal Studies University of London. (May 1997)

Simmonds NE 'Bluntness and Bricolage' in Gross H and Harrison R *Jurisprudence: Cambridge Essays*. Clarendon Press Oxford (1992)

Simpkins C Do We Need to Rethink the Concept of Academic Freedom in Contemporary South Africa. Senate Special Lecture University of Witwatersrand 22 August 1996 at <http://www.164.88.55.4/online/hero/full.text/text2.html>

Simpkins C *The Politics of Nation Building and the Prisoners of Tradition*. South African Institute of Race Relations Johannesburg (1988)

Simpson AWB 'The Rise and Fall of Legal Treaties: Legal Principles and the Forms of Legal Literature' 48 *University of Chicago LR* 632 (1981)

Sinclair J & Mureinik E 'Compulsory Latin: A Compelling Case?' 106 *SALJ* 158 (1989)

Smith N. Affirmative Action: Its Origin and Point'

Staudt RW 'An Essay on Electronics Casebooks: My Pursuit of the Paperless Chase' 68 *Chi.-Kent L. Rev.*291294 (1992)

Steenkamp D 'Changes in the Attorneys' Profession' *De Rebus* 635 (1996)

Steytler NC *The Undefended Accused at Trial*. (1988)

Subotzky G *The Enhancement of Graduate Programmes and Research Capacity at Historically Black Universities(HBUs)* UWC (1997)

Sugarman D. 'A Hatred of Disorder: Legal Science Liberalism and Imperialism' in Fitzpatrick P.(ed) *Dangerous Supplements: Resistance and Renewal in Jurisprudence*. (1991)

Sunday Star 3 May 1987.

Susskind RE *The Future of Law: Facing the Challenges of Information Technology*. Clarendon Press Oxford (1996)

Susskind RE 'Expert Systems In Law: A Jurisprudential Approach to Artificial Legal Reasoning' 49 *Modern LR* 168 (1986)

Teachout PR 'Uneasy Burden: What It really Means to Learn to Think Like a Lawyer' 47 *Mercer LR* 543 (1996)

Teich PF — How Effective is Computer-Assisted Instruction? An Evaluation for Legal Educators. 41 *J. LEGAL Educ.* 489 (1991)

Thornton M — 'Portia Lost in the Groves of Academe: Wondering What to do About Legal Education' in Duncanson I(ed) *Legal Education and Legal Knowledge* (Law in Context 1991/92) La Trobe University Australia. (1992)

Toddington S — 'The Emperor's New Skills: The Academy The Profession and The Idea of Legal Education' in Birks P (ed) *Pressing Problems in the Law Vol. 2 What Are Law Schools For* (1996)

Tushnet M — Critical Legal Studies: An Introduction to its Origin and Underpinnings. 36 *J. LEGAL Educ.* 505 (1986)

Twining W — Access to Legal Education and the Legal Profession. Butterworths (1989)

Twining W — 'Pericles and The Plumber' 83 *LQR* 396 (1967)

Tzannes M — 'Strategies For the Selection of Students to Law Courses in the 21st Century: Issues And Options For Admissions Policy Makers.' *Law Teacher*

Unger RM — 'Legal Analysis as Institutional Imagination' 59 *Modern LR* 1 (1996)

Unger RM — 'The Critical Legal Studies Movement' 96 *Harvard LR* 561 (1982)

University of Natal Pietermaritzburg. Faculty of Law Handbook 1997.

URL <http://www.sabinet.co.za/sabi Legal resouces.html>
<http://www.corporatesystems.com.au>
<http://www.altavista.digital.com>
<http://www.yahoo.com>
<http://www.infoseek.com>
<http://www.butterworths.co.za>
<http://www.law.wits.ac.za>
<http://www.uct.ac.za/depts/law/ler>
<http://www.uct.ac.za.depts/shiplaw/>
<http://www.ru.ac.za/departments/law/SAenviro/saep.html>
<http://www.cali.org/calitech/geninfo.html>
<http://www.webolis.org/webolis/index.html>
<http://www.cali.org>
<http://www.law.pitt.edu/hibbits/jurist.htm>
<http://www.findlaw.com/03journals/general.html>
<http://www.constitution.org.za>
<http://www.urich.edu/~jolt/other.html>

<http://www.salaw.co.za>
<http://www.pix.za/hlp/salu>
<http://www.lexis-nexis.com>
<http://www.w3.org/Talks/General/Concepts.html>

Van Valkenburg EW 'Law Teachers Law Students and Litigation' 34 *J. LEGAL Educ.* 584 (1984)

Van Niekerk GJ 'Indigenous Law in South Africa. A Historical and Comparative Perspective' (1) *Codicillus* 34. (1990)

Van Niekerk B 'The Role and Function of the Radical Lawyer in South Africa. 1 *Natal Univ. LR* 147 (1975)

Van Niekerk M 'African Thinking: A Critical Discussion' in Hill R et al (eds) *African Studies* Vol.1 HSRC Pretoria (1991)

Van der Westhuizen J. *Equality Justice The Future of South African Law Schools and other Dreams.* March 1993 October Paper No 1 Published by The Centre for Human Right, University of Pretoria(eds) Tshidi Mayimele. (March 1993)

Viljoen HP 'The Latin Debate: More Heat than Light?' 1 (2) *Consultus* 4 (1988)

Vogelson JM 'A Practitioner Looks at Globalization II' 46 *J. LEGAL Educ.* 315 (1996)

Warner R Teaching Electronically - The Chicago-Kent Experiment' (1997) 20 *Seattle Univ. LR*

Williams JM 'On Maturing of Legal Writers: Two Methods of Growth and Development' *Journal of Legal Writing Institute* 1 (1991)

Wilson G 'English Legal Scholarship' 50 *Modern LR* 818 (1987)

Wilson K 'Points of View' 1(2) Consultus (1988)

Woolman S Walton P & Smith N. 'Toto: I've a Feeling We're not in Kansas Anymore." A Reply to Professor Motala and Others on the Transformation of Legal Education in South Africa' 114 *SALJ* 30 (1997)

Wren CG & Wren JR *The Legal Research Manual: A Game Plan for Legal Research and Analysis* 2nd Edition Adams & Ambrose Publishing Madison (1986)

Zemans & Rosenblum *The Making of a Public Profession.* Chicago American Bar Foundation

(1981)

Zimmermann R — 'Stauta Sund Stricte Interpretanda? Statutes and Common Law: A Continental Perspective' 35 *Cambridge LJ* 315 (1997)

Zizzo F — Legal Resources 'Via the World Wide Web' at <http://www.law.warwick.ac.uk/html/95%2D15.html>