

**THE FUTURE OF CLINICAL LEGAL EDUCATION IN LESOTHO: A
STUDY OF THE NATIONAL UNIVERSITY OF LESOTHO'S LEGAL
EDUCATION AND ITS RELEVANCE TO THE NEEDS OF THE
ADMINISTRATION OF JUSTICE IN LESOTHO**

By

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**A Dissertation Submitted in Partial Fulfilment of the Requirements
for the Degree of Master of Laws, University of Natal (Durban).**

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NOVEMBER 2002

DECLARATION

I, the undersigned;

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do solemnly declare that this dissertation constitutes my original work in whole unless where the context indicates otherwise, and in that case references acknowledging the sources of my information have been fully disclosed, and that this work either wholly or partially or howsoever else, has not been submitted in partial fulfillment or for the satisfaction of the academic requirements for any other degree in any other university in the whole world, and confirm and consent that the work shall be available for any legitimate purpose in advancing knowledge without thereby renouncing any of my lawful rights and remedies under copyright law.

Signed this day the30th.....of ~~NOVEMBER~~ 2002


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Qhalehang Ambrose Letsika

ACKNOWLEDGEMENTS

I wish to express my sincere gratitude to Messrs Canon Collins Educational Trust for Southern Africa for their generous financial support which enabled me to further my studies. I was very fortunate to have been a supervisee of Professor David McQuoid-Mason, an eminent scholar in clinical legal education and social justice. I am indebted to his unstinting mentoring skills, constructive criticisms, comments suggestions and motivation. He is, however, not responsible for any solecisms appearing in this work. The staff of the National University of Lesotho library, in particular Mrs Qobo (an archivist) and Mr Molapo, for their assistance and patience in taking long hours and days searching for some of the documents used herein, deserve compliments. In the same vein I wish to thank the staff of the UND Faculty of Law library for assisting me in locating some of the references used herein.

I wish to thank Ms Leomile Monyake, the secretary of the Faculty of Law, National University of Lesotho, for her prompt responses and action to my demands for documents from the law clinic.

Finally, I wish to thank my parents, especially my mother, for their unfailing moral support.

SUMMARY

Lawyers must possess the full panoply of fundamental lawyering skills for them to be able to develop, analyse, collate, synthesise, identify and evaluate strategies for solving legal problems. For students to acquire and master these skills it is essential for them to have: a basic knowledge of the legal rules and their various authoritative sources; an understanding and appreciation of the relationship between law and the socio-economic environment in which it operates; and abilities to handle facts and apply the law to them. Traditionally, the function of providing aspiring lawyers with the necessary repertoire of fundamental skills was reserved for law firms. Variations in terms of the content of training provoked criticisms from some legal scholars especially in the United States of America, where the clinical method of teaching owes its origins, that law schools had defaulted in their obligation to law students. In part reaction to these vehement criticisms clinical legal education was developed with the object of promoting experiential learning by exposing law students to the real-life cases where they could consult live-clients and take appropriate action under close supervision of qualified lawyers.

The Lesotho law school recently incorporated clinical legal education into its law curricula. Arguably there has been an inordinate delay in introducing the clinical method of teaching in part reaction to the international developments, but in particular to meet the professional needs of law students especially their fundamental lawyering skills. It is important to note that law students qualify for admission as legal practitioners (although those who intend to become attorneys must write professional examinations) immediately after completing their legal studies. This consideration on its own calls for serious thought on intensive practical legal training programmes. Although practical legal training programmes such as moot courts and simulations, and recently the internship, have always been utilized it has been clear that there is a dire need for a concretized and extensive practical legal training programme, which would give law students first-hand and hands-on experience with the objective of preparing them for the practice of law.

The study examines the impact the Faculty of Law of Law of the National University of Lesotho has had and will continue to have in the administration of justice especially because it produces about 90 per cent of the legal trainees serving the justice system. The central issue is whether the legal education it provides is

responsive and relevant for meeting the needs of justice. Inherent in this issue are critical questions such as whether clinical legal education: (a) will transform legal education in Lesotho; (b) will improve the administration of justice to be accessible to all Lesotho nationals particularly the disadvantaged and ignorant members of society; and (c) fits in with the legal academy traditions. The study shows that clinical legal education is a novel method of teaching in Lesotho. It also concludes by showing that clinical legal education faces a number of challenges, some of which require to be addressed urgently such as large classes. It further shows that the law clinic will contribute to the development of better administration of, and access to, justice particularly in providing legal services to indigent members of the public. Finally, having examined clinical programmes in other jurisdictions such as South Africa and America it is submitted that the law clinic can learn some lessons from the operations of law clinics in these countries. In particular it is suggested that the authorities should consider importing the street law programme used in South Africa to teach social justice. Considering that there is no postgraduate practical legal training clinical legal education will transform legal education by preparing law students for the practice of law.

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ABBREVIATIONS AND MODE OF CITATION

AALS	<i>Association of American Law Schools</i>
BCLR	<i>Butterworths Constitutional Law Reports</i>
Clinical LR	<i>Clinical Law Review</i>
Columbia LR	<i>Columbia Law Review</i>
Consultus	<i>A Journal of the South African Bar</i>
De Rebus	<i>Journal of the Law Societies of South Africa</i>
Hastings LJ	<i>Hastings Law Journal</i>
Inter J of Clinical Legal Education	<i>International Journal of Clinical Legal Education</i>
J of Legal Education	<i>Journal of Legal Education</i>
Law Teacher	<i>Journal of the Association of Law Teachers</i>
Lesotho LJ	<i>Lesotho Law Journal</i>
Lesotho LR	<i>Lesotho Law Reports</i>
Michigan LR	<i>Michigan Law Review</i>
New York Law School LR	<i>New York Law School Law Review</i>
NULSR	<i>Natal University Law and Society Review</i>
Oxford J of Legal Studies	<i>Oxford Journal of Legal Studies</i>
SA	<i>South African Law Reports</i>
SALJ	<i>South African Law Journal</i>
THRHR	<i>Tydskrif vir Hedendgagse Romeins-Hollandse Reg</i>
TSAR	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
UCLA LR	<i>University of California Los Angeles Law Review</i>
University of Pennsylvania LR	<i>University of Pennsylvania Law Review</i>
Washington LR	<i>Washington Law Review</i>
Yale LJ	<i>Yale Law Journal</i>

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Chapter One

1 General Overview of Clinical Legal Education

1.1 Statement of the problem

The Faculty of Law of the National University of Lesotho emerged from a peculiar historical background. In the 1970s law was offered concurrently with the other social sciences under the Faculty of Social Sciences on the understanding that it, too, was a social science. It was not until the *Paul-Twining Report* emphasized the importance of teaching law as a separate discipline under a separate faculty of law for quality assurance purposes and because law is a professional study that initiatives were made to divorce it from social sciences.¹ At the time the winds of change blowing in South Africa and the United States of America for transformation towards more practice-oriented legal education had little or no effect at all.² This is understandable in view of the fact that the Department of Law of the National University of Lesotho had to reposition itself for the struggle of recognition as a faculty. The unique character of legal education at that time is evidenced by the fact that two-fifths of the syllabus was managed and taught at another prestigious law school in Europe.³ Following the *Paul-Twining Report* initiatives were taken to establish a comprehensive system of legal education drawing its syllabus with the objective of meeting the national needs and priorities. Sadly, even after attaining the status of a fully-fledged faculty the Lesotho law school took considerable time before introducing a conventional system of clinical legal education.

¹ J Paul and W Twining *Legal Education in the U.B.L.S.* (1971).

² It is to be noted that clinical legal education spread throughout South Africa by the late 1970s. While in America the clinical programmes firmly established themselves in the late 1960s and early 1970s. See DJ McQuoid-Mason 'Legal Aid Clinics or Clearing Houses?' (1977) *De Rebus* 132; DR Barnhizer 'The Clinical Method of Instruction: Its Theory and Implementation' (1979-80) 30 *J of Legal Education* 67; N Franklin 'The Clinical Movement in American Legal Education' (1987-89) 2 *NULSR* 55.

³ At the University of Edinburgh (Scotland). Much about the details of this arrangement is reserved for Chapter Three where a thorough historical background of legal education in Lesotho will be covered.

A comprehensive system of clinical legal education only found its way into the law curriculum in Lesotho in 2000, when the Lesotho law school established a legal aid clinic and introduced a course called 'Clinical Legal Education.'⁴ Although this move is welcomed it has been long overdue. There are challenges facing this new educational model. The major challenge being whether or not the legal education provided by the Lesotho law school is responsive and relevant to the needs of the administration of justice in Lesotho. This paper seeks to investigate this problem by reviewing the position of the law school from a historical perspective. The idea is to find out what led to these changes in order to understand whether they mark a milestone in the history of legal education in Lesotho. What is important is whether under the new model competent lawyers, who will be able to dispense with justice objectively without in any way compromising their ethical responsibility and intellectual scholarship, will be trained. The other important factor is whether the Lesotho law school has any role to play in the administration of justice. An overview of how clinical programmes operate in other jurisdictions will be used as a framework for reflecting on an appropriate model for Lesotho.

The theory of clinical scholarship has emerged quite recently as a discrete discipline when law educators became aware of the need to prepare and equip students with the lawyering skills necessary for the practice of law.⁵ In some jurisdictions⁶ the driving force was the chorus of complaints from the

⁴ This move followed the decision to phase out the old BA/LL.B programme which was a tier programme. Under the old programme students were to complete the BA (Law) programme, which ran for a period of four years and thereafter proceed to the LL.B programme whose duration was two years and three years for holders of non-law degrees. The new LL.B programme lasts for a period of five years and the three-year programme remains intact for holders of non-law degrees, with some modifications. The legal aid clinic is manned by a qualified attorney who was appointed towards the end of the year 2000; see also PF Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13,22 foot note 32 wherein the learned author remarks: '[W]ith effect from 1999, the National University of Lesotho has transformed its system of legal education and the introduction of a comprehensive system of clinical education is expected to be implemented as from the year 2000 as part of the new system of legal education.'

⁵ D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87.

⁶ U Kumar 'Legal Scholarship in Lesotho' in M Guadagni (ed) *Legal Scholarship in Africa* (1989) 77; N Franklin 'The Clinical Movement in American Legal Education' (1987-89) *NULSR* 55.

legal profession and judiciary that law graduates did not possess adequate practical skills. In other jurisdictions commissions entrusted with the duty of determining the adequacy or relevance of legal education were set up and they recommended clinical legal education as a solution to the problem of deficiency of practical skills evident in the curriculum of most law schools.⁷ The reasons for these complaints and reports became the driving force for law schools to reshape their curriculum towards an educational model that would be skills-oriented.⁸ The deficiencies replete in traditional legal education were evident and required a dramatic change. The need not to compromise legal scholarship and intellectual capacity building in the process of transformation was also acknowledged. Clinical legal education, therefore, emerged as an educational methodology aimed at fulfilling the lacunae that traditional doctrinal scholarship failed to address.⁹

The ensuing valuable scholarship identified a more significant challenge. Clinical legal education, though seen as a new educational methodology within the legal academy, would not be effective and complete without the use of live-clients. This rather paradoxical position has hitherto established itself to the extent that clinical legal education is now considered an invaluable methodology of teaching students about social justice.¹⁰ It is widely accepted that clinics perform dual functions:¹¹ (a) training students in the acquisition of

⁷For example, in the United States of America the first Commission was set up in the 1970s through the funding provided by the Council on Legal Education for Professional Responsibility (CLERP). Following its recommendations law clinics spread throughout the country. Recently, *the Report of the Committee on the Future of the In-House Clinic* (1990) of the American Association of Law Schools and the *Report of the [American Bar Association] Task Force on Law Schools and the Profession: Narrowing the Gap* (1992) (*MacCrate Report*) reiterated the need to emphasize skills training in the teaching of law.

⁸ P Hoffman 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical LR* 93.

⁹ P Iya 'Addressing Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13.

¹⁰ DJ McQuoid-Mason 'Legal Aid Clinics or Clearing Houses' (1977) *De Rebus* 132,133; see also DJ McQuoid-Mason 'Legal Aid Clinics as a Social Service' in DJ McQuoid-Mason (ed.) *Legal Aid and Law Clinics in South Africa* (1983) 64; DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in PF Iya, NS Rembe & J Baloro (eds) *Transforming South African Universities* (2000) 89, 93-4. He points out that: 'Thus there are two important aspects of student work in a legal aid clinic: (a) the opportunity to help disadvantaged and indigent members of society to obtain what is due to them; and (b) the theoretical and practical exposure they receive to the social justice issues of the day – something that is not possible in a regular black letter law course.'

¹¹McQuoid-Mason 'Legal Aid Clinics or Clearing Houses?' (1977) *De Rebus* 132.

lawyering skills; (b) providing the indigent members of public with legal services. The provision of legal services nowadays involves dissemination of information on the legal rights of the poor and ignorant and human rights awareness campaigns.¹² Clinical legal education in this context presents a rather paradoxical picture. It becomes an amorphous combination of an educational methodology, a laboratory of learning (a physical location in the law school premises), and a discrete field of scholarship in the legal academy.¹³

It is not easy to define the meaning of 'clinical legal education' as a concept.¹⁴ Despite this fundamental deficiency clinical legal education forms an integral part of legal education and is recognized as an effective educational method in legal education for equipping students with the practical legal skills necessary for the practice of law.¹⁵ *The Report of the Committee on the Future of the In-House Clinic in the United States of America* defines it in the following terms:¹⁶

For non-clinicians, the term "clinical education" can be a shorthand phrase for a setting (the real world, as opposed to the classroom) or a synonym for skills-training education. For clinical teachers, clinical education includes those aspects, but encompasses a great deal more. Clinical education is first and foremost a method of teaching. Among the principal aspects of that method are those features: students are confronted with problem situations of the sort that lawyers confront in practice; the

¹² PF Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared experiences with New Initiatives for the 21st Century' (2000) 1 *Intern J of Clinical Legal Education* 13.

¹³ Hoffman (note 8 above) 98.

¹⁴ *Ibid.* 96.

¹⁵ D Givlver, B Baker & J McDevitt 'Learning Through Work: An Empirical Study of Legal Internship' (1995) 45 *J of Legal Education* 1, 4; PC Snyman 'A Proposal for a National Link-up of the New Legal Services Corporation Law Offices and law School Clinical Programmes' (1979-80) 30 *J of Legal Education* 43, 47, he says: 'Clinical legal education today is a fact. Its virtues are now widely accepted, both in its service and pedagogical settings.'

¹⁶ This is the report by the Association of American Law Schools' (AALS) committee on clinical legal education (1990) 40 *J of Legal Education* 508; see also PT Hoffman 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical LR* 93, 96. H Brayne N Duncan & R Grimes *Clinical Legal Education* (1998) 1 describe clinical legal education as learning law through application, practice and reflection. Many authors have attempted to define this concept. However the definitions given seem to be inadequate or defective one way or the other. It is not intended to burden this work with the approach adopted by these scholars, suffice to say that clinical legal education in this work covers all the aspects of legal education intended to equip students with the acquisition of practical legal skills.

students deal with the problem in role; the students are required to interact with others in attempts to identify and solve the problem; and, perhaps most critically, the student performance is subjected to intensive critical review.

A number of questions may stem from this definition: What type of educational methodology is clinical education? What is or should be the content of clinical legal education? If clinical education seeks to attain the objectives laid down in the *AALS report*, why is that there is in many common law and civil law jurisdictions such as South Africa, Britain, Lesotho and Poland an insistence on the part of the legal profession that graduates of law schools should serve an apprenticeship before they can be admitted to the legal profession? Does this say something about the adequacy or relevance of the 'type' of clinical education offered in such jurisdictions? Or, does it mean that the law schools have built 'ivory towers' isolating themselves from the legal profession or vice versa?¹⁷ Essentially, although clinical legal education is acclaimed as an effective method for practical skills training, it is still difficult to say with precision which skills should be taught or form the core content of a legal curriculum. An educational methodology is used to achieve certain neutral pedagogical values.¹⁸

Clinical education as a method of teaching and learning faces a number of challenges. In the first place, the question may be: What should or should not form part of the skills training, and why?¹⁹ The selection of the skills to be taught and to be learned by students is a matter of grave importance.

The greatest danger of the phrase "clinical legal education" is its very amorphousness. The phrase conceals a large amount of loose thinking and sloppiness about what is being taught. Many clinical courses do not have well thought out and articulated objectives, nor can many clinical teachers, when pressed, define the objectives for the programs in which they teach except in the broadest of terms.²⁰

¹⁷ S Bright 'What, and How, Should we be Teaching?' (1991) 25 *Law Teacher* 11. The British legal education system has been criticized for living in an Ivory Tower, see M F Fitzgerald 'Stirring the Pot of Legal Education' (1993) 27 *Law Teacher* 4.

¹⁸ Hoffman (note 8 above) 95.

¹⁹ Brayne, Duncan & Grimes note 16 above.

²⁰ Hoffman (note 8 above) 111.

Secondly, it may be asked: Why not leave the task of skills training to the profession? In any case the profession will still subject the students to further practical training and make them write practical professional examinations notwithstanding the endeavours of law schools. Alternatively, members of the legal profession are best suited to teach students the skills they need through intensive participant-observation.²¹ The point is that by graduation the law graduates no longer have other academic commitments and so can focus fully on their practical training. On the contrary, an argument can be raised that practitioners are not teachers. They do not have the time a legal educator would ordinarily have for the guidance of students, as the latter's core business is teaching. A further argument is that teaching is measured against academic standards and aims to achieve certain pedagogical objectives.²² The nature of a law office is alien to the effective teaching of students. A law office puts much emphasis on the practice of law while in an academic setting the emphasis is on teaching and learning. Legal practitioners teach their pupils to master those skills which are required in the performance of the duties of the particular firm. It is also recognized that clinical legal education has some practical deficiencies in that it cannot deal with each and every aspect of legal practice nor can it adequately deal with those aspects that have been selected. The main reason is that clinical legal education constitutes a small part of legal education. There are many substantive courses that a law school cannot do away with and which require input from the students.

Thirdly, the general public perceives legal aid clinics as charitable organizations through which universities realize their social responsibility mission. The question is: If this argument is sound, what is or should be the core business of legal aid clinics? Are they laboratories of learning used to achieve certain pedagogical objectives or charitable organizations for making universities socially responsible to societies? In any event universities obtain

²¹ PC Snyman 'A Proposal for a National Link-up of the New Legal Services Corporation Law Offices and Law School Clinical Training Programmes' (1979-80) 30 *J of Legal Education* 30, 43.

²² N Franklin 'The Clinical Movement in American Legal Education' (1987-89) *NULSR* 55, 65.

a sizeable share of the taxpayers' money and therefore, they should be made to reciprocate. The main issue is which of the functions of law clinics between the provision of legal services and teaching should be given priority. If it is argued that the service provision forms the core business of legal aid clinics, of what value are they to the legal academy? Why should they form part of the latter?²³ If it is argued that skills training forms their core business, are law schools not doing an injustice and thus indirectly frustrating the course of the administration of justice by using the poor and sometimes ignorant members of the public as guinea pigs for trial and error?²⁴

Finally, it is not easy to define in clear terms what skills training seeks to achieve. In other words clinical scholars are not able to tell what it is that they seek to achieve as an educational goal.²⁵ There are no theories underpinning the teaching of skills, instead there is rhetoric about how to accomplish particular tasks. Though such rhetorical suggestions may be helpful to a law student they cannot be ordained as theories. There is a deep perception and culture in academic circles that unless subject matter can be presented in the form of theory it will receive very little respect or recognition. Legal scholars believe that for a subject matter to be part of the curriculum and legal scholarship it must flow from a theory of some sort. In the end the question is: Should clinical educators teach all the skills which they believe are necessary for the practice of law, or should they only teach the 'nuts and bolts'²⁶ on the basis that the rest will be learnt by students in practice? However, does not the latter option reflect on the competency of clinical law teachers particularly in respect of skills training? Commentators on law curricula often contend that

²³ J Tomain & M Solimine 'Skills Skepticism in the Post Clinic World' (1990) 40 *J of Legal Education* 307.

²⁴ Ibid.

²⁵ The *AALS Report* (note 16 above) 553 points out that there is no consensus among the clinical scholars as to which educational goal is most important or whether law clinics should attempt to meet each of all the goals. However, given the nature of the legal academy, size of classes, resources, students' academic loads and other constraints it may not be, and it is not always, possible to meet all the articulated goals.

²⁶ This phrase denotes those discrete skills which may be perceived to be strictly necessary in the practice of law. The skills that make a lawyer what he should be and without which he cannot 'survive' in practice. These include problem-solving, legal analysis, proper file management, negotiation and the art of advocacy (see PF Iya 'Addressing the Challenges of Research into Clinical Legal education Within the Context of the New South Africa' (1995) 112 *SALJ* 265, 272).

a law degree requires students to take 'core' subjects and yet, both they and the profession differ as to which subjects should be regarded as 'core' for legal practice.²⁷

It is possible to argue that law schools should provide students (their clients) with what the latter want. In other words, before designing any curriculum they should conduct feasibility studies to find out about the needs of students and exercise their discretion on that basis. However, there are many variables involved in designing a curriculum for a law degree. In the first place, the judiciary and legal profession value practical skills, and in many jurisdictions have brought pressure to bear on law schools to train students in practical skills. Law schools have had to take these complaints into account when designing the curriculum. This is one of the factors that largely contributed to the introduction of clinical education.²⁸ The underlying reason is that clinical education is thought to be an effective educational model for integrating doctrinal education with the professional skills required for the practice of law. The idea that law is a craft is now widely accepted.²⁹

In the second place, the public plays a pivotal role in affecting the manner in which legal curriculum must be shaped. Lawyers do not operate in a vacuum. They are part and parcel of the general public and serve the latter. The public is entitled to fair administration of the justice system. The public has the right to insist that lawyers act responsibly and ethically in the public interest and

²⁷ See J Goldring 'Better Legal Education: An Essential Element of Justice for All' in J Goldring, C Samford & R Simmonds (eds) *New Foundations in Legal Education* (1998) 151, 159.

²⁸ See JC Dubin 'Faculty Diversity as a Clinical Legal Education Imperative' (2000) 51 *Hastings LJ* 445, 446. He remarks that: 'Responding to the criticisms of prominent members of the bench and bar about the failure of law schools to prepare law students for the practice of law, American Bar Association accreditation standards now require law schools to offer a course providing "live client" or "real life" experiences and every accredited law school now offers such a course.' It must also be noted that American clinical education was partly influenced by Frank through his two articles, in which he pleaded for what he called 'lawyer-schools' (J Frank 'Why Not a Clinical Law School?' (1933) 81 *University Pennsylvania LR* 907 and J Frank 'A Plea for Lawyer-Schools' (1947) *Yale LJ* 1303); see also K Llewellyn 'On What's Wrong with So-called Legal Education' (1935) *Columbia LR* 651.

²⁹ See N Franklin 'The Clinical Movement in American Legal Education' 1988-89 *NULR* 55, 58 J Frank 'Why not a Clinical Law School' (1933) 81 *University of Pennsylvania LR* 907, 908; PF Iya 'Addressing the Challenges of Research into Clinical Legal Education within the Context of the New South Africa' (1995) 112 *SALJ* 265, 272.

that they should not abuse the legal system for the benefit of their own clients. To ensure that the public will have confidence in the administration of justice a sufficiently high standard of these qualities must be inculcated into students during their academic training and must be maintained.³⁰ In the words of Boshoff J in *Kaplan v. Incorporated Law Society, Transvaal*³¹ legal practitioners must,

[maintain the] prestige, status and dignity the profession has in the eyes of the public in general and in the eyes of the practitioners and the court in particular. In this connection it is not to be overlooked that the trust and confidence reposed by the public and by the court in practitioners to carry on their profession under the aegis of the courts must make the courts astute to see that persons who are enrolled as attorneys are persons of dignity, honour and integrity.

In the third place, law school curriculum must keep pace with social and technological developments. For instance, recently the Internet has emerged as a threat to physical boundaries undermining even the very legal regimes designed to regulate commercial transactions and economic crime. With the advent of this new technology a person in South Africa can conduct commercial transactions with his American counterparts without physical contact. The law has had to respond to these new developments. A prudent curriculum designer will have to take these developments into account in deciding which subjects must form the core content of the curriculum.³² On the other hand, the demands of the prospective employers of law graduates do influence the manner in which the law curriculum must be shaped since it is the main reason, of course, why many students choose their educational career. In the end the university may bring pressure to bear on the law school to design its curriculum in such a way that it will attract the best students and in as high numbers as possible to ensure its survival.

Finally, specialization by legal educators plays a vital role in determining what type of curriculum should be put in place. Having considered new

³⁰ D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87.

³¹ 1981 (2) SA 762, 792 (T).

³² Brayne, Duncan & Grimmes *Clinical Legal Education* (1998) 45.

developments in the legal system, the attitude of the judiciary and the legal profession, students' demands and the expectations of the public, it will become imperative for a prudent curriculum designer to decide whether the available personnel will be capable of teaching the selected subjects.

Lesotho is not immune from the challenges highlighted above. Although a legal aid clinic is a new phenomenon within the structures of legal education in Lesotho it does not mean that clinical legal education is a new paradigm. Moot courts and mock trials, and more recently internships, have always constituted a practical component of legal education in Lesotho.³³ Their major disadvantage is that students never get an opportunity to be involved in the atmosphere of a case; that is, the real lawyer-client relationship with its countless variables. Some commentators such as Spiegel³⁴ argue that these methods should be retained and should be used to substitute clinical legal education (clinics method) for the simple reason that they are less expensive and because clinical education constitutes such a minimal activity in law schools such that it could still be retained through their use.

1.2 Aim of the study

The aim of this paper is to investigate the appropriateness of the current educational model for meeting the requirements of the proper administration of justice in Lesotho. The study seeks to establish whether or not the Lesotho law school does what it is supposed or at least expected to do, namely equipping students with the necessary skills to competently practise law. In other words, the question is whether the legal education provided by the Lesotho law school is responsive and relevant to the challenges of the

³³ The internship programme was first introduced in 1996/97 academic year. First year LL.B students (those in possession of BA Law degree) were attached to various law practising outlets in the country.

³⁴ M Spiegel 'Theory and Practice in Legal Education: An Essay on Clinical Education' (1987) 34 *UCLA LR* 577, 594. See also D McQuoid-Mason 'Using Mock Trials to Teach Court Procedures to University Law Students: Some Different Approaches' in KS Sobion (ed) *CLEA Conference Proceedings*, Jamaica (1998) 26, 41.

administration of justice. In the end the study will investigate whether or not the model requires further transformation to bring it in line with the developments in other countries. The strengths and weakness of the models in other jurisdictions will be examined in order to consider what may be of use to Lesotho.

The reason for establishing a law clinic at the University of Lesotho was in reaction to regional and international trends regarding the provision of a more skills-oriented legal education. For the National University of Lesotho law clinic to be considered to be responsive and relevant for purposes of the administration of justice it must address the practical challenges that face lawyers in the practice of the art of lawyering. It must equip law students with the necessary skills for them to be able to represent their clients effectively and to measure up to the national and international standards that may be expected of them by bodies such as the Law Society of Lesotho and the International Bar Association respectively. The underlying theme of all these standards is the proper administration of justice. As to what this means in practice is difficult to say with precision.³⁵ The understanding of these different bodies, which are charged with the responsibility of seeing to it that members preserve the highest possible standards of practice underpinning their professional conduct, is to facilitate proper administration of justice. Some variations may occur due to different factors in each country but the overall understanding is that attempts should be made to ensure that legal practitioners are fit and proper persons to remain in the ranks of the profession. The prestige, status and dignity of the profession and the

³⁵ Dlamini defines the concept 'justice' in these words: 'Justice is an elusive goddess, the essence of which it is difficult to define precisely. In general justice is the major attribute whereby law attains peace and social stability. Over the centuries law has either been regarded as the embodiment of justice, or the attainment of justice was, and still is, considered the chief and ultimate aim of law; hence the expression "administration of justice" when reference is made to the formal settlement of disputes by the application of rules of law by competent institutions in societies' (CR Dlamini *The Administrative Law of a Typical South African University* (1994) (UWC) (LL.D thesis) 24. See also different definitions given by philosophers cited therein.

standards of professional and ethical responsibility of practitioners form the concern of most legal professional bodies.³⁶

In an attempt to ensure that these qualities are maintained these bodies often influence the manner in which law schools shape their curriculum. In many jurisdictions law societies have required legal education to be supplemented by postgraduate practical training and insist that the practical legal training component is an admission pre-requisite. For example, in South Africa before law graduates can be admitted as attorneys or advocates, they must serve articles of clerkship for two years, attend at a practical training course and write professional examinations, or articles for one year coupled with successful completion of a six-month practical legal training school programme offered by the schools of legal practice,³⁷ or serve pupillage for four months followed by practical bar examinations respectively.³⁸

In the succeeding sections of this chapter the role of law clinics as 'laboratories of learning' will be discussed. Various fundamental skills such as negotiation, advocacy, counselling, problem-solving, interviewing and critical thinking will be examined. The role of law clinics in providing legal services including the reasons why skills training is essential will also be discussed.

1.3 Why the use of clinical method in legal education?

1.3.1 Introduction

Legal aid clinics are used in legal education as 'laboratories of learning.' The idea is to ensure that law students obtain the same practical exposure as their

³⁶ See *Society of Advocates of Natal v De Freitas and another* 1997 (4) SA 1134 (N); *Prince v President, Cape Law Society and others* 2002 (2) SA 794 (CC).

³⁷ PF Iya 'The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges' (2001) 51 *J of Legal Education* 355; Attorneys Act No. 53 of 1979.

³⁸ JB Kaburise 'The Structure of Legal Education in South Africa' (2000) 51 *J of Legal Education* 363.

counterparts in the medicine field.³⁹ As has been mentioned, legal aid clinics perform two major functions. First, clinics are used to supplement traditional theoretical teaching in providing practical lawyering skills by:

- (a) introducing students to the practical challenges of the type that lawyers confront in practice;
- (b) giving students the opportunity to participate in problem-solving exercises through role-assumption;⁴⁰
- (c) allowing students to reflect on their experiences through peer criticism and thereby developing their own skills;
- (d) giving legal educators an opportunity to weigh the practical capabilities of students in certain skills with the aim of nurturing such capabilities through intensive critical review;
- (e) sharpening intellectual skills and enhancing the contextual understanding of law;⁴¹
- (f) giving students an opportunity to experience functional competence in legal work as early as practicable in their legal career; and
- (g) exposing students to the complexities and demands of justice in practice.⁴²

³⁹ Brayne, Duncan & Grimes *Clinical Legal Education* (1998) 3 remark: 'Clinical methods have long been in the education and training of a range of students from doctors and nurses to engineers, linguists, teacher and computer programmers.' And they ask: 'At a practical level, who would want to consult a medic who had not yet met a patient or did not have practical experience to complement his or her theoretical knowledge?'

⁴⁰ McQuoid-Mason outlines a number of skills that the clinical method exposes students to such as counselling, interviewing, drafting and effective communication (DJ McQuoid-Mason 'Legal Aid Clinics or Clearing Houses?' (1977) *De Rebus* 132, 133).

⁴¹ DJ Givelber, B Baker & J McDevitt 'Learning Through Work: An Empirical Study of Legal Internship' (1995) *J of Legal Education* 1, 9. In his stimulating and provocative article Elson argues extensively for a balanced and complementary approach to legal education. He advocates the teaching of both doctrinal scholarship and practical skills (what he calls professional competencies) contemporaneously with the object of avoiding any compromise in standards of one of these models. In his own words: 'From one perspective, the goals of critical scholarship and professional education are complementary: teaching students to think critically about questions of social welfare and professional ethics in the context of actual practice ought to enable students to become more effective, ethical practitioners. If, however, the goal of developing critical thinking is to be taken seriously as a pure-knowledge-seeking scholarly discipline, rather than as an approach specifically for the purpose of developing more effective strategies for practical decision-making, the two goals are in pedagogical conflict' (JS Elson 'The Case Against Scholarship or, If the Professor Must Publish, Must the Profession Perish?' (1989) 39 *J of Legal Education* 343, 346).

⁴² For instance the University of Natal Durban runs a Street Law programme which sees students going to high schools and surrounding communities to teach about social justice issues. In this way students get the opportunity to see how law operates in societies (see DJ

Second, law clinics provide indigent members of society with legal services. The role of law clinics in providing legal services and teaching will be examined below.

1.3.2 Clinics as laboratories of learning

Clinical legal education is particularly concerned with the teaching of practical skills. In this context clinical legal education has been conceptualized as an overall framework and a term encompassing a number of discrete lawyering skills such as interviewing, drafting, problem solving, advocacy and negotiation.⁴³ Lack of a precise definition and theories underpinning the subject matter of clinical education complicates any attempt to theorize about clinical scholarship.⁴⁴ Clinical method approaches legal education from a different perspective. It combines both cognitive contextualism and role assumption. The cognitive aspect allows students to form judgments, develop research and analytical skills and the ability to synthesize problems. Role assumption gives students an opportunity to build 'self-reconstructed autonomy' and functional competence in legal practical work.⁴⁵

Snyman has summarized the role of clinical legal education in the following words:⁴⁶

...[O]nly clinical legal education effectively places the [student] practitioners to be in the chaos of real life; sharpens their skills in this context; teaches them to triumph over emotional stress and tension as professionals; heightens their appreciation of quality standards of practice; shows them what it is to be people-oriented; enables

McQuoid-Mason 'Teaching Social Justice Through Community Service to Law Students: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89.

⁴³ PT Hoffman 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical LR* 93.

⁴⁴ DR Barnhizer 'The Clinical Method of Legal Instruction: Its Theory and Implementation' (1979-80) 30 *J of Legal Education* 67.

⁴⁵ Givelber, Baker & McDevitt note 41 above.

⁴⁶ PC Snyman 'A Proposal for a National Link-up of the Law School Clinical Training Programmes' (1979-80) 30 *J of Legal Education* 43; see also P Pretorius 'Legal Aid Clinics as Teaching Instruments' in DJ McQuoid-Mason (ed.) *Legal Aid and Law Clinics in South Africa* (1983) 85; A Corbett 'The Administration and Management of Legal Aid Clinics' in DJ McQuoid-Mason (ed.) *Legal Aid and Law Clinics in South Africa* (1983) 64.

them to help the machinery of justice function better by their presence as lawyers in training; and, above all, exposes them to the complexities and demands of justice on the level at which it operates and affects them as lawyers and their clients as individuals.

The advantages of clinical method in addressing the challenges of the contemporary realities of running a legal practice outweigh its disadvantages. On completion of clinical training, in the sense of a formal supervised training – since learning is life-long process and a continuum, graduates of law leave their academic life with a sense of confidence as to the particular challenges they are going to meet in the vocational world. In sum clinical legal education in broad terms seeks to ensure the mastery of: (a) effective client interviewing; (b) client counselling; (c) advocacy; (d) negotiation; (e) critical thinking; (f) problem-solving; and (g) drafting. Each of these will be discussed in turn.

(a) Effective client interviewing

An interview is generally the first contact between a lawyer and an individual client. In practice it is called a consultation. To be able to take full and proper instructions a lawyer must create a rapport with the client. The skill of interviewing is essential for a lawyer to be able to extract all the necessary and material information for effective execution of a client's mandate. A good interview should therefore be geared towards understanding client's needs and demands.⁴⁷

Better and effective interviewing techniques save time and effort throughout the different stages in executing a client's mandate. The manner in which a client is interviewed affects the mutual trust and confidence relationship between a lawyer and client. An interview aims to discover the nature of the problem and to obtain proper instructions by extracting relevant information.⁴⁸

⁴⁷ H Twist *Effective Interviewing* (1992) 20.

⁴⁸ J Alexander *Client Care* (1997) 12.

(b) Client Counselling

The main purpose of an interview is that client relates his/her problems to a lawyer so that he/she may be advised on an appropriate course of action. A properly trained lawyer knows when to give tentative advice and when to defer the matter for further consideration. Exercising the option of deferring the matter may impinge on the image of a lawyer as a legal expert.⁴⁹ Clinical method prepares students to make their choices in an ethical and practical professional manner.⁵⁰

Client counselling constitutes the essence of the role of a lawyer. It is imperative that a lawyer should have the capacity to communicate with, and advise clients with effective and efficient service.⁵¹

(c) Advocacy

In practice not all cases brought to the attention of a lawyer require to be litigated. However, where litigation becomes inevitable the ability to advocate a client's case with the skill of persuasiveness becomes a requirement. The skill of advocacy develops with experience and determination on the part of the learner. No fast and hard rules can be laid down as to how this skill should be exercised. Clinical method trains students in such skills as oral argument, coherent case presentation, prudent witness examination and the appreciation of the full panoply of advocacy tactics and strategy.⁵²

⁴⁹ J Chapman *Interviewing and Counselling* (1993) 25.

⁵⁰ HT Edwards 'The Growing Disjunction Between Legal Education and Legal Profession' (1992) 91 *Michigan LR* 34.

⁵¹ Alexander note 48 above.

⁵² See generally R Palmer & D McQuoid-Mason *Basic Advocacy Skills* (2000) 32.

d) Negotiation

It has been argued that successful negotiators tend to possess a number of qualities.⁵³ It is of paramount importance for law students to understand that litigation is not the only method of dispute resolution and settlement. The role of clinical legal education is to expose law students to the practical challenges of negotiation.⁵⁴ In the clinic students negotiate settlements on behalf of clients on a routine basis and eventually develop their own instincts regarding negotiation through experience.⁵⁵

This experience gives students an opportunity to understand the economic reasons for reaching a settlement. In practice a settlement is predicated upon the assessment of the prospects of success in litigation – taking into account both the economic and non-economic costs of a settlement and litigation. An analysis of a client's case involves knowing when to litigate a matter or when to proceed further with negotiations. Without guidance or experience when to accept a settlement a lawyer is likely to resort to speculation in deciding what is best for a client's case.⁵⁶

(e) Critical Thinking

Traditional scholarship is predicated upon the search for the intrinsic value of knowledge – truth.⁵⁷ Contextual learning stimulates cognitive contextualism

⁵³ S Lee & M Fox *Learning Legal Skills* 2nd ed. (1994) 150-1. The learned authors suggest that for one to be able to be successful in negotiating one should aim to be: patient; to persevere; able to think on one's feet; cool under pressure or fire; inventive; creative; capable of changing and responding to a change so as to hide the true value of some or all issues which are on the table; self-confident; assertive; able to accept criticism; listening carefully and actively; perceptive; able to exploit power; able to show self-control; able to take charge; analytical; persuasive; able to see the other side's point of view; flexible; slightly unpredictable; cautious; pleasant; tactful; reasonable; rational; realistic; ambitious; determined; firm and resolute; able to show unreasonableness when necessary; able to show scepticism when necessary; able to feel comfortable with certainty and unemotional.

⁵⁴ P Goldfarb 'A Clinic Runs Through It' (1994) 1 *Clinical LR* 65.

⁵⁵ See generally J Chapman *Interviewing and Counselling* (1993) 56.

⁵⁶ Inns of Court's Practical Manual *Negotiation* (1996) 45.

⁵⁷ See Elson note 41 above, who makes out a good case against 'homogenous' legal scholarship. The thrust of his argument is not that legal scholarship *per se* is wrong, but he rejects the idea that it should dominate the legal academy resulting in the subordination of

and thinking. Clinical method complements dogmatic learning in research by putting the actual research challenges into practical perspective. Clinical research is geared towards assisting the client by resolving legal problems one-way or the other. In a way students use their theoretical background for conducting research in real life situations.⁵⁸

(f) Problem-solving

The skill of problem-solving 'encompasses identifying and diagnosing a problem, generating alternative solutions and strategies, developing a plan of action, implementing, and keeping the planning process open to new information and ideas.'⁵⁹ The skill of problem-solving is broad in scope and encompasses a variety of options for solving client's legal problems. It entails identifying: (a) client's concerns; (b) legal and non-legal options and strategies for addressing client's problems; (c) the strengths and weaknesses of various options; (d) known facts, investigating and discovering unknown facts; (e) multiple theories generated by the nature of the problem and their evaluation; and (f) theoretical and practical solutions to client's problems.⁶⁰ In other words, the skill is all about forming a 'clinical judgment' about the viability of solutions to client's legal problems.

clinical legal education (or clinical scholarship as it were). He suggests a compromising approach that both clinical and doctrinal scholarships should be concurrently pursued to their extreme ends. He warns against law schools' inclination to cling to traditional legal scholarship for prestigious purposes on the ground that one day '... law firm clients [will] finally rebel against paying for the hours new associates spend learning how to practice, [and that] law schools will need more than scholarly prestige to attract students.'

⁵⁸ HT Edwards 'The Growing Disjunction Between Legal Education and Legal Profession' (1992) 91 *Michigan LR* 34.

⁵⁹ PF Iya 'Strategies for Skills Development: The Fort Hare Experience in Curriculum Design for the New LL.B' in PF Iya, NS Rembe & J Baloro (eds) *Transforming South African Universities* (2000) 62, 67.

⁶⁰ D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87.

(g) Drafting

The clinic enables students to draft pleadings, contracts, leases, wills and a variety of legal documents. Clinical educators have the opportunity to assess the linguistic capacities of students in drafting documents. Students learn writing, drafting and drawing skills by doing the actual work for clients. This experience exposes them to the ethos of good draftsmanship.⁶¹

1.3.3 Social responsibility of law schools through clinics

Clinical legal education extends beyond the traditional classroom setting. The pedagogical value of the clinical method is characterized by the fact that law schools experiment by teaching students lawyering tasks and skills through real cases. To fulfill this educational goal law clinics have been used to offer legal services to indigent members of society. Through a variety of programmes designed to remedy the imbalances between the poor and rich in relation to legal representation and access to justice law clinics have and continue to supplement the national legal aid systems and the initiatives of private organizations.⁶²

Scholars argue that incorporating skills training in a law curriculum reflects a concern for the welfare of society.⁶³ The tenor of the argument is that '... such student-oriented and practice-referenced concern with questions of social good would be fully consonant with the intellectual traditions and social obligations of the university law school.'⁶⁴ Law school clinics offer peculiar educational opportunities to integrate lawyering skills and values into an actual practice setting. The fundamental values of the legal profession requiring practitioners to act in conformity with the considerations of justice,

⁶¹ Ibid.

⁶² See DJ McQuoid-Mason 'Legal Aid Services and Human Rights in South Africa' www.pili.org/library/cle.html (consulted 17th April 2002).

⁶³ Elson note 41 above.

⁶⁴ Elson (note 41 above) 380.

fairness and moral obligations on behalf of clients become an underlying focus of clinical method. By helping students fulfil the legal profession's responsibility towards those who cannot afford the services of private practitioners and furthering the course of justice, clinics inculcate into students the best values underpinning the existence of the legal profession.⁶⁵

[Therefore] from a societal perspective, legal clinics serve a second purpose by meeting the legal needs of the poor and underrepresented. The two main functions [educational and social service] are often intertwined. Both purposes, however, fall under a broader set of goals: reforming the legal system, enforcing the rule of law, and shaping the attitudes of future generations of legal professionals.⁶⁶

Another area that seems to attract law school clinics is social justice. In this context clinical legal education places students in social service programmes designed to satisfy the needs of the society. These programmes differ from one country to another. In South Africa, for example, clinics deal with the issues of housing, affirmative action, welfare, health and many other programmes tailored to redress the injustices created by the apartheid system.⁶⁷

1.4 The case for skills training

It is fundamental for students to acquire elementary lawyering skills at the different stages of their career development. Students must develop

⁶⁵ *MacCrate Report* 213.

⁶⁶ E Rekosh, K Buchko & V Terzieva *Pursuing the Public Interest: A Handbook for Legal Professionals and Activists* (2001) 265. The learned authors warn that law clinics must balance these two functions and that sufficient time must be provided for supervision and evaluation of students' performances. Their suggestion is that clinics should handle as few cases as possible in order to achieve these goals.

⁶⁷ E.g. The University of Natal (Durban) Street Law programme is designed to train law students to teach high schools children about human rights and diversity. In this regard students get the opportunity to understand and appreciate the relationship between law and society by observing how law affects ordinary people. Some of the campus law clinic's activities include housing, land redistribution, women and children's rights, administrative justice and HIV/Aids issues. See Iya (note 12 above) 30 and McQuoid-Mason note 62 above. Both authors deal extensively with the Natal Law clinic and its activities. But the last author has written a number of articles on the Natal law clinic and its educational and service programmes. Some have been referred to above and others will be referred to in the succeeding chapters.

capabilities to investigate, collate, analyze and solve the legal problems of clients. For students to acquire and master these skills it is essential for them to have:

- (a) A basic knowledge of the legal rules and their various authoritative sources;
- (b) An understanding and appreciation of the relationship between law and the socio-economic environment in which it operates; and
- (c) Abilities to handle facts and apply the law accordingly.⁶⁸

Most university law teachers will probably concede that generally the emphasis is on teaching students principles of law and where to find it. The idea is to provide students with the basic knowledge of law and its various sources. Traditionally, various teaching methods such as simulated problem-solving and tutorials have always 'monopolized' a substantial part of clinical legal education in attempts to equip students with practical skills. The disadvantages of these methods have been summarized as follows:⁶⁹

A number of consequences follow; students lack an adequate theoretical framework within which to make sense of the mass of legal material presented to them; they develop passive and uncritical attitudes towards the legal system; and because they lack *practical, problem skills* they experience great difficulty in making the transition from the academic to the vocational stages.

It is recognized that clinical legal education provides the following educational values:⁷⁰ First, skills training introduces students to the problem situations of the type that lawyers confront in practice. Secondly, it makes students role players in the learning process. Thirdly, students are able to reflect on their own experiences resulting from intensive critical review from both clinical supervisors and their peers. Fourthly, it cultivates the culture of self-

⁶⁸ DJ McQuoid-Mason 'The Law Students' Laboratory: Integrating Clinical and Academic Courses' A Paper Delivered at AULAI Conference held in Cape Town on the 21st -23rd April 1995.

⁶⁹ D Woolfrey 'Curriculum Development in Legal Education – Some Reflections' (1995) 112 SALJ 151, 156.

⁷⁰ AALS Report (1992) 42 *J of Legal Education* 508, 511.

confidence through live-client interaction. Finally, it promotes public interest lawyering and the understanding of social justice values.

In the words of Elson⁷¹ skills training offers the following educational values:

At the higher level of generality are the behaviours common to a variety of lawyering practices across specialty areas, such as framing a problem to be solved from the unstructured, ambiguous welter of facts confronting the practitioner; creating innovative approaches to problem-solving; analyzing risks of alternative courses of action and planning strategic and tactical approaches; learning rhetorical performance skills in context such as negotiation, trials, and appellate argument; planning and conducting thorough and creative fact gathering; work cooperatively with colleagues to solve mutual problems; learning to interview and counsel clients; learning how to think and act from a partisan perspective; understanding and coping with the economic realities of law practice; and developing methods for learning from one's own experiences.

1.5 Conclusion

In summary, clinical legal education offers a dichotomy of social service and educational values. 'The result is that by exposing students to clinical work, lawyering skills as well as professional values are not only acquired but also nurtured and developed in an atmosphere of real life.'⁷² Clinical method teaches students: (a) how to reflect on the practice of law in a contextual setting; (b) how to integrate the principles and rules learned in a traditional classroom setting with practice; (c) how to synthesize problems and search for solutions through cognitive thinking; (d) how to critique the legal system and legal principles; (e) how to contextualize each set of facts and utilize analytical skills to resolve client's legal problems; and (f) how to resolve issues of ethical dilemmas and professional responsibility.⁷³ Through their social service function clinics ensure that the indigent and disadvantaged members of society have access to justice.

⁷¹ JS Elson 'The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?' (1989) 39 *J of Legal Education* 343, 346.

⁷² PF Iya (note 12 above) 18.

⁷³ A Amsterdam 'Clinical Legal Education – A 21st Century Perspective' (1984) 34 *J of Legal Education* 612.

Chapter Two

2 Comparative Study

2.1 General introduction

In order to give a broader picture of the educational functionality and value of clinical legal education a comparative study is useful. Before examining the position in Lesotho it is important to consider how far other jurisdictions have advanced in developing and experimenting with clinical legal education. Until fairly recently law schools worldwide did not recognize the educational value of utilizing the clinical method in practical training. Law clinics were perceived as institutions of social justice aimed to augment the governments' initiative in making sure that everybody had access to the justice system through legal representation.⁷⁴ However, that attitude seems to be declining and a rapid growth of clinics has been witnessed so far. The study will be confined to the United States of America, Botswana and South Africa.

2.2 United States of America

2.2.1 The Clinical movement era

The clinical movement in America had its origins in the 1930s and 1940s when the American realists criticized legal scholarship for pursuing elitism to the prejudice of practical training.⁷⁵ One of the 'anti-intellectual' advocates was Jerome Frank. Through his two provocative articles he criticized law schools in America for failing to recognize the educational value of clinical programmes in legal education and branded them 'lawyer-teacher' law

⁷⁴ PF Iya 'Addressing the Problems of Research in Clinical Legal Education Within the Context of the New South Africa' (1995) 112 *SALJ* 265.

⁷⁵ N Franklin 'The Clinical Movement in American Legal Education' (1987-89) 2 *NULSR* 55; S Ellman, R Gunning & R Hertz 'Why Not a Clinical Lawyer-Journal?' (1994) 1 *Clinical LR* 1.

schools.⁷⁶ Most law schools followed the positivist sentiments of Christopher Langdell. Langdell argued that law is one of the greatest and most difficult of sciences deserving to be approached in a scholarly and scientific manner.⁷⁷ Langdell rhetorically suggested that for students to be able to master law as a science they had to use printed books in the library. He considered a law library as a workshop for both law professors and law students alike. Frank replied as follows:⁷⁸

The lawyer-client relation, the numerous non-rational factors involved in persuasion of a judge at a trial, the face-to-face appeal to the emotions of juries, the elements that go to make what is loosely known as the "atmosphere" of a case – everything that is undisclosed in upper-court opinions – was virtually unknown (and was therefore all but meaningless) to Langdell. A great part of the realities of the life of an average lawyer was unreal to him.

The law students [trained under Langdell] system are like the future horticulturists confining their studies to cut flowers, like architects who study pictures of buildings and nothing else. They resemble prospective dog breeders who never see anything but stuffed dogs.

It was not until the Council on Legal Education for Professional Responsibility (CLEPR) took an active role in supporting the establishment of clinical programmes in the 1960s and 1970s that a formal system of clinical legal education was fully developed.⁷⁹ For the first time law schools in America with

⁷⁶ F Kristein (ed) *The Philosophy of Judge Jerome Frank: A Man's Reach* (1965) 273-4; See also J Frank 'Why Not a Clinical Law School?' (1933) 81 *University of Pennsylvania LR* 907 and J Frank 'A Plea For Lawyer-Schools' (1947) *Yale LJ* 1303. In the campaign for clinical legal education Frank was not alone. He obtained support from other realists such as K Llewellyn and F Rodell, a professor of law at Yale Law School. See further K Llewellyn 'On What's Wrong With So-called Legal Education?' (1935) *Columbia LR* 651; F Rodell *Woe Unto You, Lawyers!* (1957). Rodell not only rejected the primacy given by legal scholars to critical scholarship but also anything that had to do with scholarly research and writing. According to him the whole literature of legal scholarship was useless. He argued that for one to be a good teacher s/he had to be a unique and spontaneous individual with peculiar mannerisms and a sharp mind. (See a critique about his thinking by N Duxbury 'In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique' (1991) 11 *Oxford J of Legal Studies* 354.

⁷⁷ A Sutherland *The Law at Harvard: A History of Ideas and Men, 1817-1967* (1967) 175.

⁷⁸ J Frank 'Why Not a Clinical Law School?' (1933) 81 *University of Pennsylvania LR* 907, 908-9.

⁷⁹ See generally N Gold 'Why Not an International Journal of Clinical Legal Education?' (2000) 1 *Inter J of Clinical Legal Education* 1; Franklin (note 75 above) 55; DJ McQuoid-Mason 'Clinical Legal Education: Its Future in South Africa' (1977) *THRHR* 343.

the assistance of the Ford Foundation devoted their resources to establishing advanced clinical programmes.⁸⁰

2.2.2 Contemporary clinical legal education in America

Over the past three decades clinical legal education has pervasively become an integral part of American legal education.⁸¹ Law schools ensure that students assume a participatory role in learning by taking on primary responsibility for cases and actually appearing before the courts of law and other tribunals under close supervision.⁸² Recognizing the importance of clinical legal education in the development of practical legal skills the American Bar Association [ABA] allows law students of accredited law schools to engage in legal practice immediately.⁸³ Besides the accreditation of law schools, the ABA regulates the content of and infrastructure for legal education throughout America through periodic reviews.⁸⁴

The American courts have developed standard student practice rules.⁸⁵ For a student to have the right of audience in the courts of law and other tribunals s/he must be enrolled with an accredited law school and must have reached a

⁸⁰ For a discussion of CLEPR's role in the field of clinical legal education see L Brickman 'CLEPR and Clinical Education: A Review and Analysis' in *Clinical Education for the Law Student*, CLEPR Conference Proceedings (1973) 56.

⁸¹ This position seems to augur well with the vision of Jerome Frank that: 'Each law school would build its teaching around a clinic... The clinic would render its services for little or no fees... Indeed, the clinic would be a law office... the teachers would, too, illuminate the defects in our trial methods and the need for reform; and would sensitize the students to other moral problems of lawyerdom. Theory and practice would thus constantly intertwine' (J Frank 'Both ends Against the Middle' (1951) 100 *University of Pennsylvania LR* 20, 29-30).

⁸² See Rule 13.01 of the Missouri Court Rules of 1970 and Rule 46B of the Rules of the US Court of Appeals for the Eighth Circuit (1996); see further R Walsh 'The ABA's Standards for the Accreditation of Law Schools' (2000) 51 *J of Legal Education* 427.

⁸³ See DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 193 for a detailed discussion of the American student practice rules. Also in terms of Rule 46B of the Rules of the Supreme Court for the Eighth Circuit (adopted in January 1st 1996) any student acting under a supervising attorney may appear and participate in proceedings in the Court of Appeals for the Eighth Circuit. For guidelines for admission requirements, see further *Comprehensive Guide to Bar Admission Requirements* (2002) by the American Bar Association; and *Official Guide to ABA-Approved Law Schools* (2002) by ABA Law School Admission Council. These documents are also available at www.abanet.org/legaled/publications/officialguide.html.

⁸⁴ See N Gold (note 79 above) 10.

⁸⁵ DR Barnhizer 'The Clinical Method of Legal Instruction: Its Theory and Implementation' (1979-80) 80 *J of Legal Education* 67.

certain specified stage in his/her level of legal education.⁸⁶ The dean of the concerned law school must provide proof of such student's competence, character and training. The certificate granted by the dean is filed with the court and expires after a certain period.⁸⁷

2.2.3 Types of clinical programmes

The American law schools use two main types of clinical programmes for skills training: (a) externships and (b) in-house clinical work.

(a) Externships

These programmes take the form of: (i) Farming-out; and (ii) partnership.

(i) 'Farming-out'

This model of clinical programme is characterized by the placement of students in the offices of outside law practising outlets.⁸⁸ The overall students' supervision becomes entrusted to the practitioners of the outlets. This method has been criticized for compromising the quality of training because the law school does not exercise direct supervision.⁸⁹

(ii) Partnership

This model differs from the farming-out model in that students are placed in the outside law practising outlets under supervision of the law schools.⁹⁰

⁸⁶ DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 193.

⁸⁷ See note 83 above.

⁸⁸ Barnhizer (note 85 above) 97; D McQuoid-Mason 'Clinical Legal Education: Its Future in South Africa' (1977) *THRHR* 343, 347.

⁸⁹ See note 88 above. Both Barnhizer and McQuoid-Mason criticize this model on the ground that it lacks direct faculty supervision and therefore it cannot be expected to reflect the articulated educational goals. In other words, their contention is that it cannot be measured against academic standards.

⁹⁰ McQuoid-Mason note 88 above.

(b) In-house clinical work

(i) Legal aid clinics

Law clinics can be run either within a law school premises or outside. The most important aspect of clinics is that teachers control and supervise all the activities of the students. The advantage of legal aid clinics is that teachers and students become co-counsel and this gives students a sense of responsibility.⁹¹ Students have opportunities of confronting all manner of cases. Its disadvantage is that if the caseload is not controlled the focus of the clinic may be diminished and its educational value reduced. As a result handling a few cases may lead to 'inadequate content from which to build a learning base.'⁹²

(ii) Simulations and moot courts/mock trials

In simulations the teacher simulates the court situation and the students assume various roles such as defence counsel, witnesses and judges. In the case of moot courts the students argue over a set of 'manufactured' facts. Their advantage lies in the fact that the teacher has control over the subject matter and may devise the facts to achieve certain educational goals. Although these models are less expensive than the live-client law clinic their educational value in terms of preparing the students for what Frank described as 'the atmosphere of a case' is rather less.⁹³

⁹¹ F Kristein (ed) *The Philosophy of Judge Jerome: A Man's Reach* (1965) 275.

⁹² Barnhizer (note 85 above) 95.

⁹³ See note 91 above; McQuoid-Mason concedes that despite their usefulness 'there must still be some contact with live clients' (DJ McQuoid-Mason 'Clinical Legal Education: Its Future in South Africa' (1977) *THRHR* 343, 348); For an instructive discussion on mock trials (simulations), see D McQuoid-Mason 'Using Mock Trials to Teach Court Procedures to University Law Students: Some Different Approaches' in KS Sobion (ed) *CLEA Conference Proceedings*, Jamaica (1998) 26, 27.

2.2.4 Conclusion

The clinical programmes are used intensively in American legal education. One important aspect is that students are allowed to appear before the courts and represent their clients. This enables law students to obtain hands-on experience regarding representation their giving them opportunities to develop professional skills. At the time law students get admitted to practise as professional lawyers they are already used to the courtroom atmosphere.

2.3 Botswana

2.3.1 Introduction

The University of Botswana shares historical links with the National University of Lesotho. It was born out of the disintegration of what was called University of Botswana, Lesotho and Swaziland before 1975, which then provided the manpower training of the people of these three countries.⁹⁴ Despite this common historical background Botswana boasts a more comprehensive model of clinical legal education than its sister universities.⁹⁵ According to Kakuli:⁹⁶

In designing the new programme, the Department of Law was conscious of the fact that lawyer's competence in most, if not all, areas of law practice demands a wide range of fundamental skills. The Department, therefore, departed from the traditional approach which unnecessarily separated academic and professional education and introduced clinical legal education built into the LL.B programme.

⁹⁴ U Kumar 'Legal Scholarship in Lesotho' in M Guadagni (ed) *Legal Scholarship in Africa* (1989) 77.

⁹⁵ PF Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13, 22.

⁹⁶ GM Kakuli 'Experimenting in Clinical Legal Education in Botswana' (1989) *Commonwealth Legal Education Newsletter Annexure IV* 1.

2.3.2 Types of clinical programmes

(i) Legal aid clinic

Under supervision students become responsible for assisting clients in resolving the legal problems they bring to the clinic. Students interview and counsel clients. They also conduct research into, and analyze, the legal issues raised by clients' cases. Students write letters of demand, draft pleadings and other legal instruments. They participate in settlement negotiations, pre-trial conferences and other matters on behalf of clients. In appropriate cases they refer clients to relevant governmental or non-governmental organizations.⁹⁷

(ii) Internship

During the long vacation of the third and fourth years students are placed in various law practising outlets such as law firms, the law clinic, courts, government law offices and financial institutions.⁹⁸ Except for those employed by the clinic itself this model resembles the American system of 'farming-out' in that the content of duties assigned students and supervision lies at the sole discretion of the personnel in the outlet to which a student is attached. The disadvantage of this system lies in the fact that except for those employed by the clinic the Department of Law has no direct supervision of the students' performances, let alone the fact that it cannot prescribe what 'legal duties' should be assigned students. At the end of each period of internship the students are required to submit full reports of their experiences.⁹⁹ The internship is credited towards the clinical legal education course.

⁹⁷ See University of Botswana, *Faculty of Law Handbook* (2000-2001) 22.

⁹⁸ *Ibid.*

⁹⁹ The internship starts when students are in their third year until they complete their academic training. It is submitted that this gives students opportunities to experience live client interaction at the early stages of their legal career and builds a solid foundation in the long run.

(ii) Moot courts

Students are required to participate in at least one moot court each academic year. The moot courts are usually presided over by the judicial officers or legal practitioners.¹⁰⁰ The students' performances are evaluated and are used for credit towards an award of a law degree.¹⁰¹

(iii) Clinical seminars

These seminars must be attended for at least two hours each week. Their major educational goal is to engage students in discussions, debates and simulations aimed at displaying the full panoply of lawyering skills.¹⁰² The idea is to expose students to the practical dimensions of lawyering as another way of preparing them for the legal clinic work.

2.3.3 Conclusion

In conclusion, therefore, it is submitted that Botswana system of clinical legal education represents an advanced model for Southern Africa.¹⁰³ It is ahead of almost all the clinical programmes in the region. It combines the internship in terms of which students are placed in various law practising outlets including the clinic itself. Undoubtedly a combination of legal aid clinic work and internship broadens students' experiences. Currently the Department of Law is contemplating reviewing the operation of the clinic.

¹⁰⁰ *Botswana Law Handbook* 23; Iya (note 101 below) 22.

¹⁰¹ P Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13.

¹⁰² *Botswana Law Handbook* (2000-2001) 22.

¹⁰³ It can only be matched by the Zimbabwean model in this region; see further DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 186.

2.4 South Africa

2.4.1 Introduction

In South Africa the use of clinical legal education as a method of teaching students about lawyering skills began in the early 1970s.¹⁰⁴ By the beginning of the 1980s the majority of South African law schools had established clinical programmes.¹⁰⁵ The different methods of skills training will be discussed below.

2.4.2 Types of Clinical programmes

Though clinical legal education is widely accepted in South Africa as a gateway to the proper practical training of competent ethical lawyers the programmes vary in content and practice.¹⁰⁶ Whereas in some law schools the clinical work (legal aid practice) is used as a credit-bearing component of the academic record,¹⁰⁷ in other universities it is optional and students engage in clinical work on a voluntary basis.

(i) Law clinics

Most South African law schools have well established law clinics. Students engage in interviewing and counselling clients on a regular basis. In some instances students write letters, draft legal documents and assist with clients' claims. The overall position is that all these activities are performed under

¹⁰⁴ The Universities of Cape Town, Natal (Durban) and Witwatersrand are the pioneers in this regard. See DJ McQuoid-Mason 'Clinical Legal Education: Its Future in South Africa' (1977) *THRHR* 343, 359-1; DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89, 90.

¹⁰⁵ See DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 139.

¹⁰⁶ See generally D McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 *Fordham Inter LJ* S111.

¹⁰⁷ For example, at the Universities of Natal (Durban) and Witwatersrand.

close supervision of a qualified legal practitioner. The practitioner's main function is to ensure that the students' conduct measures up to the required professional standards.

It must be remembered that in South Africa (much as in America) the legal profession was sceptical about the clinical law programmes in the 1970s.¹⁰⁸ The profession's main opposition was on the use of the word 'client' which in their view suggested a client/lawyer relationship when this was not the case because the students are unqualified. The legal profession standpoint was that the only appropriate word would be 'consultant'.¹⁰⁹ McQuoid-Mason criticizes the reasons advanced in support of this opposition on the grounds that:¹¹⁰

- (a) proper clinical programmes ensure better supervision of student work than articles of clerkship in a law firm;¹¹¹
- (b) unless students are required to treat their 'consultants' as clients in the true sense of the word, an essential ingredient of clinical legal education (professional responsibility) would be missing.

The educational value of clinical programmes rests on the premise that they expose students to real live-client cases.¹¹² Some universities such as Cape Town, Natal Durban and Witwatersrand offer specialist clinical programmes. For example, the University of Natal Durban focuses on women and children's rights, administrative justice and land restitution.¹¹³ Witwatersrand on the

¹⁰⁸ See DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 164-5.

¹⁰⁹ McQuoid-Mason (note 106 above) 165.

¹¹⁰ *Ibid.*

¹¹¹ This view receives support from other commentators. See, for example, N Gold 'Why Not an International Journal of Clinical Legal Education' (2000) 1 *Inter J of Clinical Legal Education* 7, 11.

¹¹² Iya (note 74 above) 267.

¹¹³ DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89.

other hand offers specialist programmes in family, refugee, labour and criminal laws.¹¹⁴

(ii) Simulations and mock trials

Moot courts, mock trials and simulations are used extensively in many South African law schools. Although moot courts and mock trials involve make-believe cases their contribution to the development of critical skills such as advocacy, effective and oral communication, research and analytical skills is quite significant. The participants are prepared for the live-client scenarios such as legal aid work or the real practice. Client interviewing is one of the most important skills they learn.

(iii) Street law programme

Some law schools such as Natal Durban run street law programmes.¹¹⁵ Street law programmes were imported from America where many law schools use them to address the issues of social justice. These programmes are meant to teach high school children, disadvantaged communities and groups about their human and legal rights. For instance, the Natal Durban law school uses a variety of student-centred activities in its teaching methods. The main emphasis of the University of Natal Durban law school is engaging law students to teach the ignorant and disadvantaged communities, groups and high schools pupils about social justice issues. The participants also engage in human rights awareness campaigns and sensitize the poor and ignorant of their rights in matters such as housing, health, pensions and related matters which affect South Africans in almost every day of their lives.¹¹⁶

¹¹⁴ S Woolman, P Watson & N Smith ‘“Toto I’ve a Feeling We’re Not in Kansas Any More”: A Reply to Professor Motala and Others on the Transformation of Legal Education in South Africa’ (1997) 114 *SALJ* 30.

¹¹⁵ McQuoid-Mason note 113 above.

¹¹⁶ See further DJ McQuoid-Mason ‘Legal Aid Services and Human Rights in South Africa’ www.pili.org/library/cle/legal_aid_services_and_human_rights_in_south-africa.html. (Consulted 17th April 2002); PF Iya ‘Fighting Africa’s Poverty and Ignorance Through Clinical

In the words of Iya:¹¹⁷

Currently the law school of the University of Natal, Durban is engaged in the experimentation of teaching social justice through clinical programmes, the initiator [Professor McQuoid-Mason] of which defines social justice as the concerns for satisfying the needs of society for fair distribution of health, housing, welfare, education and legal resources including distribution of such resources on affirmative action basis to disadvantaged members of the community. The initiative involves teaching methods far distant from the traditional systems used in legal aid clinics and street law programmes.

2.4.3 Gilbert Report and its aftermath

In July 1993 Shanara Gilbert of the City University of New York (CUNY) Law School was requested by the Ford Foundation in Southern Africa to review the status and needs of several selected university legal aid clinics.¹¹⁸ The underlying objective for this mission was to identify ways and means through which the clinical programmes at the Historically Black Universities (HBUs) could be strengthened through funding and restructuring. This was necessary to make them more responsive to the needs of access to justice of the historically disadvantaged communities and groups. It was also to improve and increase the number of law graduates emerging from these groups in order to constitute a representative legal profession compatible with the notion of the 'new South Africa'.¹¹⁹

The *Gilbert Report* makes the following recommendations: First, it suggested that increased student participation in casework enhances effective teaching of lawyering skills and values. Students must be actively involved during the

Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13, 30.

¹¹⁷ Ibid.

¹¹⁸ The Universities she visited were Witwatersrand (four days), Natal Durban (three days), Durban-Westville (two days), Transkei (two days), Fort Hare (one day), the Western Cape (three days) and the North (two days). See Shanara Gilbert's untitled presentation made at the South African Law Teachers Conference held in Port Elizabeth on 6th July 1994 (Gilbert Report).

¹¹⁹ Gilbert Report 13.

interviews and litigation. It advocated the implementation of the proposed student practice rules¹²⁰ in terms of which law students should handle cases up to the trial stage in the lower courts. It also advocated the involvement of candidate attorneys as junior supervisors.¹²¹ Secondly, law schools should consider reducing traditional course loads and give sufficient time allocation for clinical work.¹²² The *Report* criticized high course contact hours in traditional legal subjects among some law schools such as Witwatersrand and Durban Westville, which were not ideally consistent with effective clinical legal education.¹²³ Thirdly, the *Report* emphasized the need to address diversity to strengthen tolerance during and beyond the academic setting.¹²⁴ Fourthly, the use of simulations was recommended to enhance the quality of the student/teacher interactive process.¹²⁵ Finally, the *Report* stressed the importance of developing and articulating feedback and evaluation methods.¹²⁶ There should be criteria for assessing the quality of all stages of a student clinical work and clinical teachers should provide students with systematic and continuous feedback on their work. The rationale is to identify areas for improvement and to indicate directions on how that improvement may be achieved. It recommended the use of all types of teaching aids including audio-visual equipment.¹²⁷

¹²⁰ These rules were drafted by Professor McQuoid-Mason of the University of Natal Durban in 1985 based on the American Model rules of student practice at the request of the law societies. The obstacle to their implementation seems to be the red tape within the bureaucratic structures of the Department of Justice. See DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89; D McQuoid-Mason 'The Law Students' Laboratory: Integrating Clinical Legal and Academic Courses' A paper delivered at AULAI conference held in Cape Town on the 21st–23rd April 1995 (on file with author).

¹²¹ *Gilbert Report* 16-17.

¹²² The report cited Witwatersrand and Durban-Westville as having enormously high course loads making it incompatible with effective clinical teaching.

¹²³ *Gilbert Report* 20.

¹²⁴ *Gilbert Report* 21; see also JC Dubin 'Faculty Diversity as a Clinical Legal Education Imperative' (2000) 51 *Hastings LJ* 445.

¹²⁵ *Gilbert Report* 22. The report recommended the University of Natal model of dividing students into small groups (law firms) for dealing with clinical work or simulation exercises.

¹²⁶ *Gilbert Report* 24-26.

¹²⁷ *Gilbert Report* 27.

In 1996 Motala¹²⁸ made a damning indictment about the quality of South African legal education in terms of preparing students for the practice of law. In his view South African law schools did nothing in terms of skills training other than promoting rote learning. The article provoked a highly sentimental response from some South African academics.¹²⁹ The gist of Motala's indictment is that:¹³⁰

Law-school education in South Africa to a large extent represents going to class, taking down verbatim the lecture of the instructor, and at the end of the year or semester being tested on what the instructor said in class. Law graduates come out of law schools as 'couch-potato' law graduates – as receivers of information, and not as people who can apply knowledge to real-life legal problems.

In their response Woolman, Watson and Smith¹³¹ criticized the views of Motala without convincingly indicating that his contentions were not true that there was a general complaint about the lack of practical skills amongst law students in South Africa. Their response was premised on the national survey and interviews they said they conducted at Witwatersrand law school amongst the teaching staff.¹³² Nowhere did their research make mention or challenge the findings and recommendations of the *Gilbert Report*. In the course of their 'reply' they made the damning admission that '...the Wits interviewees invariably went on to describe their lectures as routinely including *extended*

¹²⁸ Z 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.

¹²⁹ S Woolman, P Watson & 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.

¹³⁰ Z Motala (note 128 above) 695; One can add to this by arguing that the fact that the legal professions insist that law graduates go through either the articles or pupillage system supports Motala's indictment. In fact Schools of Legal Practice have recently mushroomed throughout the whole of South Africa with the sole objective of training articled clerks and pupils. See further 'Editorial' (1995) *De Rebus* 251 it is said that: 'A general lack of skills training is a *more universal complaint*: in a research conducted among 140 candidate attorneys attending the schools for legal practice in Cape Town, Durban and Pretoria last year they characterised their university education on the *whole as woefully lacking in skills training* in such areas as problem analysis, legal research, document drafting and general writing.' Does this not support Motala's charges?

¹³¹ Woolman, Watson & Smith (note 129 above) 33.

¹³² Woolman, Watson & Smith 36-7.

*periods of question, answer and discussion.*¹³³ Ironically, (or perhaps paradoxically) the survey revealed *extensive* use of lecture method (rote learning) though in some cases tutorials were used.¹³⁴ What is not clear is whether they challenged transformation *per se* as the title to their article would probably suggest or the conclusions of Motala that there is a need to place more emphasis on research and skills training. Motala and other clinical commentators do not see anything wrong with critical scholarship. What they perceive as an endemic problem is giving legal theory undue primacy to the prejudice of skills training.¹³⁵ They conclude by echoing the following words:

The stultifying remnants of a conservative pedagogy wedded to an impatient and practical transformation agenda will make it very difficult for law educators to produce the kind of thoughtful graduate *able to do justice to the law* because she understands the demands of both *what is and what ought to be* ... Unless we wish to turn our law schools into *paralaw schools and produce not lawyers but paralegals, we must offer more theory, not less*. Our current system of education has not only stunted the growth of our students' repertoire of basic skills, it has also significantly retarded their capacity to think critically ... [T]hey cannot be taught the skills needed for practice in isolation from the higher-order cognitive functions which give the use of those skills meaning.¹³⁶ They conclude, 'better elitism than elidism'¹³⁷

It is a truism that clinical legal education cannot be offered in isolation from the substantive legal courses. What is important is that there should be a balanced approach to legal education. Both theoretical education and clinical legal education must be regarded as playing a complementary role and not

¹³³ Woolman, Watson & Smith 36-7. They seem to have misconceived the argument of Motala that what is essential is legal education that exposes students to the qualities of good lawyering by making them role players. What the learned authors seem to acclaim is nothing but the promotion of cognitive thinking, which in any event, Motala argues must be supplemented with practical learning.

¹³⁴ Woolman, Watson & Smith 28.

¹³⁵ See JS Elson 'The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?' (1989) 39 *J of Legal Education* 343; HT Edward 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 *Michigan LR* 3; D Gilvever, B Baker & J McDevitt 'Learning Through Work: An Empirical Study of the Legal Internship' (1995) 45 *J of Legal Education* 1, 4; PT Hoffman 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical LR* 93.

¹³⁶ Woolman, Watson & Smith 61-2.

¹³⁷ Woolman, Watson & Smith 63.

competing with one another.¹³⁸ The rationale being that law students must be able to apply legal principles and doctrines in practice with competent skill.¹³⁹ It is necessary to combine both theoretical and practical legal skills teaching. The suggestion that law schools must offer 'more theory' seems to lose sight of the fact that lawyers do not practice in a vacuum. Legal practice requires a high degree of proficiency in legal skills. Interviewing clients and witnesses, drawing pleadings, oral advocacy in courts, counselling clients and other fundamental lawyering skills must be mastered in order for a lawyer to be able to competently represent clients and contribute effectively and meaningfully to the administration of justice.¹⁴⁰ Almost every clinical commentator (and other traditional scholars) now recognizes the importance of skills training in legal education.¹⁴¹

Neither clinical scholarship nor clinical scholars seek to sideline legal scholarship. Clinical scholarship seeks to place legal theory in practical contextual settings – to engage law students in developing the required repertoire of lawyering skills.¹⁴² Although law schools must prepare law students to understand 'the demands of what is and what ought to be',¹⁴³ they have an obligation to provide students with opportunities to pursue educational programmes designed to develop their fundamental lawyering

¹³⁸ JS Elson 'The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?' (1989) 39 *J of Legal Education* 343, 373.

¹³⁹ D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87.

¹⁴⁰ See the comment in 'Editorial' (1997) 10 *Consultus* 84 that: 'Everyone laments the fact that junior advocates who join the Bar have not undergone adequate advocacy training.'

¹⁴¹ See generally PT Hoffman 'Clinical Scholarship and Skills Training' (1994) 1 *Clinical LR* 93; PF Iya 'Addressing the Challenges of Research into Clinical Legal Education Within the Context of the New South Africa' (1995) 112 *SALJ* 265, 272; DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 190; DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89; JS Elson 'The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?' (1989) 39 *J of Legal Education* 343; D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87. Barnhizer remarks: 'A clear set of value choices underlies the clinical themes. These include: (1) the search for practical conceptions of justice; (2) the attempt to generate new forms of knowledge, primarily of a practical nature; (3) the challenge to entrenched institutions perceived either as obstacles to achieving the liberal vision of a just society or as engaged in specific acts of injustice.'

¹⁴² HT Edward 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 *Michigan LR* 34.

¹⁴³ Woolman, Watson & Smith (note 129 above) 54.

skills as well.¹⁴⁴ Without such fundamental lawyering skills it can hardly be expected of law students to competently serve their clients not to mention the administration of justice with its multi-faceted demands.¹⁴⁵ The complementary co-existence of doctrinal and clinical scholarship is now firmly embedded in the academic circles and further attempts must be made to improve the two methodologies to meet contemporary educational needs which include the mastery of professional skills.¹⁴⁶ The whole idea behind practical skills training, after all, is to develop law students' abilities to use legal concepts in factual situations affecting ordinary clients on daily basis. The mastery of these fundamental professional skills coupled with a thorough understanding of legal principles and rules is therefore a necessity for law students. A combination of critical scholarship and clinical work teaches students to think critically about questions of social welfare and professional ethics in the context of actual practice.¹⁴⁷ The ultimate result is that students become more effective and ethical practitioners. It is submitted that students who merely become exposed to theoretical dimensions of law without more will be woefully unprepared for legal practice.

2.4.4 Conclusion

In addition to the clinical work South African universities mount street law programmes which see law students teaching the high school children about issues of social justice. It is hoped that once student rules have been approved by the relevant authorities this will enable law schools to mount

¹⁴⁴ RK Walsh 'The ABA's Standards for Accreditation of Law Students' (2001) 51 *J of Legal Education* 427.

¹⁴⁵ See generally PF Iya 'Developing a Comprehensive Practical Programme in a University Law Curriculum: Some Reflections on a Suitable Programme for the University of Swaziland' (1990) 6 *Lesotho LJ* 109.

¹⁴⁶ Most law schools in South Africa use clinical programmes to teach law students practical skills. Postgraduate practical legal training is provided by the Schools of Legal Practice situated in major city centres. See McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 *Fordham Inter LJ* S111; DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming the South African Universities* (2000) 89; DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 190. McQuoid-Mason remarks: 'The advantage of exposing students to live cases is that they have to function as lawyers faced with unpredictable situations found in normal legal practice.'

¹⁴⁷ Elson (note 138 above) 373.

intensive practical training programmes. In the end postgraduate apprenticeship could be abolished or its duration could be substantially reduced.

2.5 Conclusion

There are a number of lessons to be learned from the above discussion. Clinical programmes in the United States of America, Botswana and South Africa operate slightly differently. In the USA law students have the right of appearance in the courts of law under supervision of their clinical teachers or the attorneys hosting them for their internship. In contrast, in Botswana and South Africa students do not have the right of appearance in the courts. But in South Africa there is some limited progress since law clinics are awaiting a much-delayed go-ahead from the Ministry of Justice for the approval of the student practice rules. These rules will allow students to represent clients in the lower courts. Botswana and USA have internship programmes whereby students are placed with various outside law practising agencies and the law clinics themselves. Not only do the operations of the law clinics benefit students, the general public benefits as well by obtaining free legal services. The South African and American law clinics use street law programmes to address the issues of social justice such as consumer rights, human rights, women and children's rights, HIV/Aids issues and other social programmes. A typical example of a street law programme can be seen at the University of Natal Durban.¹⁴⁸

¹⁴⁸ See DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89.

Chapter Three

3 Historical Development of Legal Education in Lesotho

3.1 Introduction

In this chapter the historical development of legal education in Lesotho will be discussed. The discussion will trace the historical background of legal education from the inception of the Department of Law at the University of Botswana, Lesotho and Swaziland (UBLS) and various attempts made thereafter to offer practical training programmes until the time when a comprehensive system of clinical legal education was introduced. The nature of the legal profession during all these developmental stages will be examined to see if indeed the legal education provided was relevant and responsive to the administration of justice. Any discussion on legal education cannot be undertaken in isolation from the composition of the legal profession as it influences the nature, qualifications and professional competence of its members. Central to legal education therefore is the goal of training competent and ethical lawyers to be entrusted with the administration of justice for the benefit of the public. Accordingly, curriculum designers must bear in mind that they must develop curricula and syllabi that are relevant and responsive to the needs of their particular societies while simultaneously taking into account the professional priorities and requirements of the legal profession. In developing countries such as Lesotho legal education should be geared towards meeting the demands of legal services for the poor members of society while at the same time ensuring that such a move does not in any way threaten the survival of the legal profession.

3.2 Legal education in Lesotho prior to 1981

3.2.1 General position prior to 1964

Before 1964 all the practitioners including legal officers were trained outside Lesotho. The majority of them were expatriates and held senior legal positions in the public service.¹⁴⁹ The profession was dual in nature consisting of both advocates and attorneys. The majority of legal practitioners came from South Africa. There were about 70 Basotho courts administering Sesotho customary law under the presidency of the local Basotho who had no legal training.¹⁵⁰ In 1964 a 'crash' educational programme was established with the objective of producing more magistrates and to bridge the gap between the magistrate courts and Basotho courts.¹⁵¹ Those who passed the 'course' were appointed to the magistracy while the presidents could then exercise dual jurisdiction i.e. administer both common law and customary law.

The legal profession was not organized under a professional or a statutory body.¹⁵² Though the profession was supposed to be dual in theory, in practice this was not the position.¹⁵³ The main reason was that an advocate could enroll as an attorney provided he had not practised for three months.¹⁵⁴ Because there was no professional body to regulate the professional conduct of the legal practitioners the Attorney-General was given exclusive powers to deal with matters involving their discipline and had a discretion to refer such matters to a committee consisting of a crown counsel and two attorneys practising in Botswana (then Bechuanaland) and Swaziland.¹⁵⁵ There was a

¹⁴⁹ See the report by LCB Gower titled *Report on Legal Training in the High Commission Territories* (1964) (*Gower Report*) 3-4. According to this report in 1962 there were only five legal practitioners with offices in Lesotho, one of them being a South African. There were about 200 South Africans enrolled to practise as either advocates or attorneys; See also V Palmer & S Poulter *The Legal System of Lesotho* (1972) 506.

¹⁵⁰ Formally known as the Central and Local Courts in terms of Central and Local Courts Proclamation 1958 (as amended).

¹⁵¹ *Gower Report* 5.

¹⁵² *Gower Report* 5.

¹⁵³ *Ibid.* 9.

¹⁵⁴ S 6 of the Legal Practitioners Proclamation 93 of 1955.

¹⁵⁵ S 12 of the Legal Practitioners Proclamation 93 of 1955.

need for locally trained lawyers who would understand and appreciate the indigenous needs of the people of Lesotho. The formidable challenge was where and how such lawyers would be trained. The legal training of such lawyers had to be done in a Roman-Dutch jurisdiction because they would be dealing with the Roman-Dutch law, the common law of Lesotho. South Africa was not a desirable place for Basotho (nationals of Lesotho) because of the apartheid system.¹⁵⁶ The British and USA universities did not offer any training in Roman-Dutch law. The only legal system which had relatively similar characteristics to Roman-Dutch law was the Scots law. Indeed this seems to be the underlying reason which ultimately influenced the University of Bechuanaland, Basutoland and Swaziland (UBBS) authorities to forge links with the University of Edinburgh for the teaching of the other portion of the curriculum.¹⁵⁷

3.2.2 Birth of legal education (1964)

In 1964 the first group of Basotho students enrolled for an LL.B degree at UBBS. These students graduated in 1969 after four and half years of study.¹⁵⁸ Though it is not clear how many these students were presumably this was small number. The Law Department was manned by one teacher.¹⁵⁹ Students were admitted to the first year of the LL.B degree after completing and passing Cambridge Overseas School Certificate in the first or second division. The structure of the LL.B consisted of three parts.¹⁶⁰

Part I consisted of the first and second years. Part II comprised the third and fourth years. Part III consisted of the final one and half years. Parts I and III

¹⁵⁶ U Kumar 'Legal Scholarship in Lesotho' in M Guadagni (ed) *Legal Scholarship in Africa* (1989) 77.

¹⁵⁷ See generally Kumar (note 156 above) 82; Palmer & Poulter note 149 above.

¹⁵⁸ Palmer & Poulter (note 149 above) 507; Kumar note 156 above.

¹⁵⁹ Mr. RD Leslie. The Law Department belonged to the Faculty of Social Sciences. See page 1 above.

¹⁶⁰ Palmer & Poulter note 149 above.

were offered at University of Botswana, Lesotho and Swaziland (UBLS).¹⁶¹ Part II was offered at the University of Edinburgh. In Part I law students took courses in law and other non-law courses in other departments. Parts II and III focused exclusively on legal subjects. Once a student had successfully satisfied the requirements for these three parts s/he would be awarded an LL.B degree. The degree was also recognized for professional requirements and entitled its holders to have the right of admission and enrolment as legal practitioners.¹⁶²

The dynamics relating to the tuition of Part II raised concerns about the future of legal education in Lesotho. Further, the limited number of law teachers itself posed a serious constraint hampering any efforts to offer a curriculum drawn exclusively in accordance with the national needs and priorities. What compounded the problem further was the fact that in addition to the teaching of law students the Law Department law teachers had to teach other non-law students.¹⁶³

¹⁶¹ After attaining independence in 1966 both Botswana and Lesotho changed their names from Bechuanaland and Basutoland respectively.

¹⁶² S 6 of the Legal Practitioners Act 11 of 1967 (Repealed by the Legal Practitioners Act 11 of 1983) provided as follows:

'6. Every person who applies to be admitted and enrolled as an advocate shall produce to the satisfaction of the High Court proof that –

- (a) he is a fit and proper person to be admitted as an advocate; and
- (b) he is of or above the age of twenty-one years; and
- (c) he –

-
- (iv) has satisfied all the requirements for a degree of Bachelor of Laws of the University of Botswana, Lesotho and Swaziland or any university established in place thereof.

S 7 made provision for persons who sought to be admitted as attorneys. S/he must prove that s/he would otherwise be entitled to be admitted as an advocate and must pass practical examinations set by the Chief Justice or his nominees. The other factor was that persons holding Matriculation or COSC could serve articles with an attorney for a period of five years and after passing practical examinations they could apply for admission as attorneys. The system of pre-admission practical training, which was considered a pre-requisite for admission in both South Africa and Britain, did not apply. In other words, save for those who did not hold a legal qualification there was no requirement of service of articles by attorneys or a system of pupillage for advocates. This position as will be seen exists even to date except that a person holding an LL.B degree can enter into service of articles for two years. The system of pupillage or any likeness of the Inns of Court for postgraduate practical legal training is non-existent.

¹⁶³ *Gower Report* 8.

In 1969 serious consideration was given to the closing down of the Department of law.¹⁶⁴ The move was influenced by the suggestion that the number of graduates required in law was negligible and the scheme of co-operation arranged with the University of Edinburgh was not working quite as had been hoped.¹⁶⁵ Suggestions were made that law courses required a separate investigation with the possibility of transferring specialist teaching in law to Swaziland, which apparently, at that time, was the only territory where private practice was thriving quite substantially.¹⁶⁶ However, these suggestions were discarded when it was decided to develop both the Botswana and Swaziland centres.¹⁶⁷

The main weakness of the legal education offered by UBLS was that it provided inadequate grounding in procedural subjects and did little to develop the basic practical skills of law students. Though the *Gower Report* recommended a pre-admission practical training course this did not materialize.¹⁶⁸ Another reason is that Part III was too short and its curriculum was too overloaded to accommodate effective and meaningful practical training. In general terms, the orientation of the legal education offered by the Department of Law was 'academic' rather than 'practical'.

3.2.3 Practical legal skills training

As already mentioned immediately above, the fundamental deficiency of the UBLS-Edinburgh legal education was that it placed too much emphasis on theoretical learning and little on professional skills. Many practitioners

¹⁶⁴ *Gower Report* 9.

¹⁶⁵ *UBLS Report of the Academic Planner* (First Alexander Report 1969) 17; see also J Paul & W Twining *The Future of the Legal Education in the UBLS* (1971) (Paul-Twining Report) 5 (on file with author).

¹⁶⁶ *Paul-Twining Report* 5.

¹⁶⁷ The decision to develop the campuses of Swaziland and Botswana came after the recommendation of the *UBLS Report of Academic Planning Mission* (Second Alexander Report 1970) (on file with author). Moreover, Lesotho was required to fill in legal posts in the civil service for purposes of legal services for national development in various crucial spheres. In other words, locally trained lawyers were conceived of as an indispensable tool for national development. See further U Kumar 'Legal Scholarship in Lesotho' in M Guadagni (ed) *Legal Scholarship in Africa* (1989) 77.

¹⁶⁸ *Gower Report* 37.

complained about the lack of practical skills evident in UBLS-Edinburgh law students.¹⁶⁹ Although acknowledging that '[n]o system of training can be expected to produce a Compleat lawyer' (sic), the *Paul-Twining Report* emphasized that '[t]here is a common tendency to expect rather a lot from newly qualified lawyers and write them off as (sic) incompetent, before giving them a chance.'¹⁷⁰ The report encouraged 'more positive guidance and encouragement' of the novice lawyers.¹⁷¹

The *Paul-Twining Report*, however, criticized postgraduate practical legal training and suggested that practical training should form part of the academic training. According to *Paul-Twining Report*:¹⁷²

The two step (sic) pattern of an "academic" degree followed by "practical" training suggests a division between theory and practice which is quite inappropriate to a sound philosophy of legal education. The main protagonist of the two-step system, Professor Gower, has acknowledged that no sharp line can be drawn between "academic" and "practical" subjects, nevertheless the system of separate courses does in fact leave the formal training in skills and the gaining of first-hand experience largely to the last, and often separate, stage of legal education and training, and the whole educational process may suffer as a result. We feel that students should have a substantial exposure to and have participated in the law in action while they are reading for their law degree and this is the reason why we place heavy emphasis on the proposed vacation internship programme.

However, the Head of the Department of law took a different view.¹⁷³ The position he took was that the only viable option would be to establish a 'Law Practice Institute' with the objective of providing LL.B graduates with one year of 'intensive practical training' after they had completed their academic studies. The rationale for this approach was grounded on the premise that

¹⁶⁹ *Paul-Twining Report* (note 165 above) 13.

¹⁷⁰ *Paul-Twining* 23.

¹⁷¹ *Paul-Twining* 23.

¹⁷² *Paul-Twining* 23-4.

¹⁷³ Robert Martin, see SS. 46/72 *Implementation of Paul-Twining Report* (Recommendation by Department of Law 1972) (on file with author).

separating academic and professional training in this manner would permit persons who wish to gain a law degree, but who might not necessarily wish to become practising lawyers to avoid the specialised practical training which will be offered at the Law Practice Institute.¹⁷⁴

Gower, Johnstone and Stevens suggested that legal education must provide teaching of practical skills. In their words:¹⁷⁵

The education of such lawyers should further include extensive emphasis on the sharpening of a lawyer's skills; ability to write and speak clearly and well, to recognize and assemble relevant factual data, to locate appropriate legal authority in the mass of writings in the law, and, above all, to analyse and reason intelligently in solving the legal and human problems with which they must deal. All of this requires that those trained as lawyers should be informed and knowledgeable about a wide range of matters, for law deals with all facets of life; and law trained persons should have the appropriate skills to perform their demanding jobs with ability.

The other important factor was that the *Paul-Twining Report* recommended that during long vacations law students should be placed in law practising outlets under the close supervision of the Law Department as part of the LL.B degree.¹⁷⁶ Under the proposed programme it was contemplated that each student would spend a substantial part of at least two long vacations working in an environment where he would be able to obtain first-hand experience on how law operated in action.¹⁷⁷ The *Paul-Twining Report* encouraged more emphasis 'on exposure to the law in action more than on formal training.'¹⁷⁸

¹⁷⁴ *Ibid.* 2.

¹⁷⁵ LCB Gower, Q Johnstone & R Stevens *Legal Training in Uganda* (1969) quoted in *Paul-Twining Report* 10.

¹⁷⁶ *Paul-Twining Report* 38

¹⁷⁷ *Paul-Twining Report* 50

¹⁷⁸ *Paul-Twining Report* 50. The Report goes on to suggest that the internship programme 'should be seen as a part of the LL.B programme, as important as the ordinary courses leading to examinations.'

3.3 Establishment of the Faculty of Law (1981) and post developments

The UBLS-Edinburgh programme was fraught with practical problems and the *Paul-Twining Report* recommended a review of the arrangement. Following the influence of its recommendations efforts were taken to develop a 'local' LL.B programme. One other drawback was that neither the proposed idea of the Law Practice Institute did materialize nor did the Department of Law introduce the internship programme duly recommended by the *Paul-Twining Report*.

In 1975/76 the Edinburgh link was severed.¹⁷⁹ This event coincided with the establishment of the National University of Lesotho, following the demise of the interuniversity venture between Botswana, Lesotho and Swaziland. New dimensions were introduced in the structure of the LL.B programme curriculum. The Department of Law introduced the BA (Law) degree running for a period of four years, followed by a further two years of study leading to a postgraduate LL.B for those students who had achieved a 60% overall pass mark. It must be remembered that a BA with a law major was initially designed for students who had passed Part I of the LL.B but who, for whatever reason, were not able to proceed to Edinburgh for Part II.¹⁸⁰ Prior to the split of UBLS and Edinburgh University practical legal training used to be done very little in courses such as evidence and civil procedure. Moot courts and mock trials were also used with the objective of enhancing skills training.¹⁸¹ Postgraduate pre-admission practical training was marred by practical problems. Articles of clerkship were not compulsory because of the fact that there were few law firms. The other reason was that in terms of section 6 of the Legal Practitioners Act of 1967 law students could be admitted to practise upon proof to the satisfaction of the High Court that they had satisfied the requirements of the LL.B degree.¹⁸² The majority of law

¹⁷⁹ Kumar (note 156 above) 83.

¹⁸⁰ *Paul-Twining Report* 49.

¹⁸¹ PF Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13, 21; KB Kaburise 'The Structure of Legal Education in South Africa' (2001) 51 *J of Legal Education* 363.

¹⁸² See note 162 above, for details.

graduates considered the period of articles too long and considered the further disadvantage of having to sit the professional examinations on its completion. Many law students opted to be admitted as advocates.¹⁸³

The main argument for the establishment of a faculty of law was that the faculty status would enable the Law Department to be more responsive to the demands of the legal profession. To quote from the memorandum of the Head of the Department, addressed to Dean of the Faculty of Social Sciences:¹⁸⁴

This is not 'window-dressing' nor is it included simply to bolster our case. It is a fundamental issue. In a number of countries there is a serious lack of coordination between the academic and non-academic members of the legal profession.

In Lesotho an excellent opportunity exists to avoid this split and to establish a close working relationship between National University of Lesotho and the judiciary and practitioners which can only benefit Lesotho.

By September 9th 1981 the university acceded to the demands of the Department of Law and the Faculty of Law was established.¹⁸⁵ The curriculum did not change and no formal system of clinical legal education in the form suggested by the *Paul-Twining Report* was introduced. Nor did the Law Practice Institute come into being. From the 1970s to the early 1980s the bulk

¹⁸³ Palmer & Poulter (note 149 above) 508.

¹⁸⁴ Memorandum dated 24th March 1980 from the Head of Law Department to the Dean of Social Sciences. On the 15th March 1976 in a meeting held in the chambers of the Chief Justice of the High Court, it had been said that:

'It is also recommended that in order to have a comparable international status with other Law Schools and Faculties in Africa, the Law Department should become a full faculty with its separate identity.'

Note also that in his letter dated the 7th March 1980 the then Chief Justice of Lesotho, Mr Justice TS Cotran had endorsed the idea of establishing a faculty of law and expressed concern that there had been an inordinate delay in giving effect to the proposed faculty (on file with the author).

¹⁸⁵ The new Faculty was headed by its first Dean, Professor Umesh Kumar. It initially did not have any departments, but they were established in 1988. It now has three departments viz the Department of Public law, the Department of Private law and the Department of Procedural and Adjectival law. See further U Kumar 'Legal Scholarship in Lesotho' in M Guadagni (ed) *Legal Scholarship in Africa* (1989) 77, 82.

of substantive law courses were taught at the BA (Law) level with the majority of procedural and specialized courses reserved for the LL.B degree.¹⁸⁶

A course called 'practical legal training' formed part of the LL.B curriculum. This course, which exists until today, exposes students to aspects of drafting of pleadings, correspondence and other documents, techniques of client and witness interviewing, client counselling, negotiation skills, advocacy skills, legal ethics and office management.¹⁸⁷ It also comprises moot courts and mock trials which constitute 50% of the overall coursework assessment.¹⁸⁸ The other course which has always formed part of the curricula in Lesotho is 'conveyancing and notarial practice.' The syllabus of this course requires students to draw mortgage and notarial bonds, wills, company and societies' constitutions and to have a thorough knowledge of how the office of the Master of the High Court functions.¹⁸⁹

Despite these efforts criticisms did not end. The legal profession complained that there was a general lack of professional skills evident from the law graduates. In the words of Kumar:¹⁹⁰

One of the major criticisms of the legal education has been from the Bar. They have stressed that the legal education at the National University of Lesotho does not adequately equip the student with sufficient professional skills. They point out that there is no obligatory system of apprenticeship in Lesotho and that a fresh B.A. (Law), LL.B. graduate is qualified to be admitted as an advocate. Therefore, they argue that the practical law skills should be emphasized far more in legal education.

These criticisms called for a reflection on the part of Lesotho law school. At the end of the academic year 1996/97 the first year LL.B students were placed with various law practising outlets such as law firms, government departments, national legal aid offices, public prosecutors' offices and non-

¹⁸⁶ See The National University of Lesotho Academic Calendars (1979 –86). This trend changed dramatically in the 1980s when procedural and adjectival courses were introduced at BA (Law) level. The situation has been reversed since the 1990s to date.

¹⁸⁷ National University of Lesotho, *Faculty of Law Students' Handbook* (1999-2000) 47.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid* 47-8.

¹⁹⁰ Kumar, note 185 above.

governmental organizations. The supervision was entrusted to the officials of the organization that had hosted the student. Students were assigned a law teacher who would visit them and review their learning progress. The details of this arrangement will be discussed below.

3.4 Clinical legal education and methods of skills training

A comprehensive system of clinical legal education found its way into the structures of the law school curriculum in 2000. Following various meetings designed to prepare the structure of the curriculum for the new LL.B a workshop on the proposed changes to the LL.B was held in January the 27th-29th 1999. It was attended by all the stakeholders involved in the administration of justice in Lesotho including experts on clinical legal education.¹⁹¹ The participants suggested the overhaul of the existing BA (Law)/LL.B to be replaced by an integrated LL.B degree which would run for a period of five years.¹⁹² Suggestions were made at the workshop for the establishment of a legal aid clinic to facilitate practice-oriented legal education. Resulting in part from these suggestions and previous initiatives a legal aid clinic was established.¹⁹³ The legal aid clinic is housed in the premises of the Faculty of Law. It boasts fully furnished offices for the manager (director) and his secretary ideally suited for a modern law firm's offices. It is situated adjacent to the moot court building, which is fully equipped with modern audiovisual facilities such as video cameras, television sets etc. The physical structure of the moot court room resembles a real

¹⁹¹ Among the specialists of clinical legal education were Professor P Maisel of the University of Natal Durban, CH Ngongola of the University of Botswana and Professor PF Iya of the University of Fort Hare to mention but a few.

¹⁹² Workshop on the Review of Law Programmes and Curriculum held on the 27th-29th January 1999 at Maseru Sun, Lesotho; A number of papers were presented at the workshop on clinical legal education issues and curriculum change. See, for example, NL Mahao & M Owori 'Legal Education at the National University of Lesotho: Inspiration for Change'; PF Iya 'The Law Programme for the 21st Century – Reflections on the Critical Issues Relevant to Review of the Law Programme and Curriculum in Lesotho'; and CH Ngongola 'Legal Education in Botswana'.

¹⁹³ The manager of the legal aid clinic was employed towards the end of 2000 and he is a qualified attorney.

courtroom. The University provided these facilities from its own financial resources.

A survey of the attitudes of the members of public towards the legal profession and of the members of the legal profession regarding the quality of legal education provided by the Lesotho law school was conducted by the present writer in the capital town of Lesotho, Maseru and its outskirts. It is necessary to briefly discuss the methodology used to collect data before discussing the methods of practical skills training because the results of the survey will be referred to more when substantiating certain submissions.

3.4.1 Surveys of the public attitudes towards the legal profession and the legal profession towards the legal education provided by the University of Lesotho

3.4.1.1 Empirical research and methodology of public attitudes

The survey was in the form of questionnaires designed to obtain the perceptions of the members of the public about the legal profession in Lesotho. Most of the questions were framed in simple language with the object of finding out how the members of the general public perceived lawyers either through experience or by hearing from other people's stories on how lawyers treat the public. The study was intended to find out whether the members of public believe that the Lesotho law school has any role to play in the administration of justice. Further, whether graduates should serve apprenticeship before they practise.

The methodology used in administering the questionnaires was random sampling. The respondents consisted of the working middle class in the government departments, policemen, soldiers, nurses, employees of NGOs,

and the general public from the surrounding residential areas. Three hundred and fifty people responded.¹⁹⁴

3.4.1.2 Empirical Research and methodology of attitudes of the legal profession towards legal education

The other set of questionnaires was addressed to members of the legal profession practising in Maseru. The majority of legal practitioners are based in Maseru. The questionnaire targeted lawyers in both the private sector and public sector. Out of sixty-five questionnaires distributed to the members of the legal profession thirty were answered. The questionnaires addressed to the members of the legal profession were totally different from those addressed to the members of the public. The main objective was to obtain the views of the members of the legal profession on whether they thought that legal education provided by the Lesotho law school properly prepared its graduates for the practice of law, particularly whether it was relevant and responsive to the demands of the administration of justice.

3.4.1.3 General observations

The questionnaires addressed to both groups consisted of both 'yes or no' and open-ended questions. The reason for this type of approach was that there are advantages and disadvantages associated with the use of each set of questions. 'Yes or No' questions are simply meant to confirm or disapprove. Their advantage is that they elicit the required relevant information because they are quick and simple. Their disadvantage lies in the fact that the respondents will not give supplementary information for their answers should that be necessary. In this regard they omit vital information which respondents

¹⁹⁴ Five hundred questionnaires were distributed. Some respondents did not answer the questions completely and will not be considered for purposes of the discussion. There were some who did not answer specific questions. They are included in the statistics and this fact will be disclosed in the discussion.

could otherwise bring to the attention of the researcher. There are also possibilities of distortion particularly where respondents are not certain about the answers. On the other hand, open-ended questions give respondents latitude to relate the facts from their own perspective in their own words. Respondents are given freedom to select what is relevant for the question and will feel comfortable about giving what they believe is the correct answer to the question. Their disadvantage is that they elicit a lot of irrelevant and unnecessary information, particularly from loquacious respondents. The end result is that the targeted point can easily be missed.¹⁹⁵

At this point the clinical methods presently used by the Lesotho law school with the objective of preparing law students for the practice of law will be discussed. These are the legal aid clinic, internship programme, simulations, moot courts and tutorials.

3.4.2 Legal aid clinic

The legal aid clinic work is compulsory for final year law students.¹⁹⁶ Students who engage in clinical work must have served two terms of the internship (attachment) during long vacations as a pre-requisite.¹⁹⁷ Furthermore, as a way of preparing the students for clinical work they must do a pre-requisite course called 'Practical legal training.'¹⁹⁸ The course engages students in compulsory simulations (mock trials) and moot courts usually presided over by legal practitioners and judicial officers. In the legal aid clinic students are expected to conduct interviews and counsel clients on a variety of legal problems under close supervision of the legal aid manager.¹⁹⁹ Students are also required to participate in weekly clinical seminars. Presently the clinical

¹⁹⁵ See generally P Jones, J Webb, M Maughan & M Keppel-Palmer *Lawyer's Skills* (1996).

¹⁹⁶ See National University of Lesotho, *Faculty of Law Students' Handbook* (1999-2000) 47.

¹⁹⁷ *Ibid* 48.

¹⁹⁸ *Ibid*.

¹⁹⁹ Because of the fact that the students doing the 'new LL.B' have not reached their final year the legal aid work is voluntary and is not used for purposes of credit towards an award of the degree. The first group of this programme will be involved in compulsory clinical work in the academic year 2003/4.

seminars are not done because clinical work is not compulsory for LL.B students in the 'old stream' which is now on the verge of being phased out. It will become compulsory for students in the new LL.B.

The legal aid clinic has not taken a single case to court. The law clinic currently serves as an advisory centre and where cases have to be litigated clients are referred to the national legal aid office.²⁰⁰ It is hoped that once it has secured the necessary facilities the clinic will be able to represent its own clients in the courts of law.²⁰¹

The results of the survey show that 66.7% of the respondents from the legal profession considered graduates produced by the Lesotho law school properly trained to meet the challenges of legal practice. 33.3% were of the view that law students lack basic practical skills. The latter complained that novice lawyers showed practical problems as far as civil procedure and the law of evidence were concerned. One of the respondents indicated that these 'new lawyers cannot even lead witnesses.' On the question whether the law school should continue with clinical legal education 86.7% answered in the affirmative. Their reasons were that the programme: 'will contribute to the student's practical preparedness; exposes students to real-life problems; is a yardstick for students to measure their appreciation of legal concepts; and builds their confidence.' But some indicated that the programme should not be used to replace apprenticeship for those law students who would be ready to enroll for it. None of the respondents answered in the negative except that 6.7% indicated that they did not know what clinical education is all about. The other 6.6% did not answer the question.

²⁰⁰ In other words, the law clinic acts as 'the clearing house' as McQuoid-Mason would call it (see DJ McQuoid-Mason 'Legal Aid Clinics or Clearing Houses' (1977) *De Rebus* 132.

²⁰¹ Besides the question of distance and lack of office for service of court papers (which must be within a radius of five kilometres from the High Court and the Maseru magistrate courts), the clinic will have to resolve the question of revenue duties on the court process with the tax authorities. The clinic is situated at the Faculty of Law premises in Roma, a distance of about 35 kilometres from Maseru where the High Court and the Subordinate Courts (magistrate courts) are situated. The question of revenue stamps on court process has been taken up with the Chief Justice. (My interview with the Head of the Department of the Procedural and Adjectival law on the 17th May 2002). The clinic will need an office in Maseru.

On the question whether the Lesotho law school trains 'good' lawyers 62.9% of the members of the public answered in the affirmative while 11.4% answered in the negative. The rest did not answer the question. On the question whether graduates should practise immediately upon leaving the academic circles 71.4% of the members of public indicated that they should not while 11.4% indicated that they should. Those who suggested law graduates should not practice immediately upon leaving law school gave a number of reasons. In their view students must undergo supervised practical training before engaging in legal practice on their own. Some indicated that lawyers are professionals and should be treated in the same manner as nurses and medical doctors by doing 'practicals'.

3.4.3 Internship Programme

The internship (also referred to as attachment) began in the academic year 1996/97 and saw completing first year LL.B students (old stream which will be phased out in 2004) placed in various law practising agencies in Lesotho. The purpose of the internship is to expose students to the realities of law in operation. It lasts for a period of six weeks during the long vacation. At present it involves two sets of student groups – students studying in the old LL.B and those in the new five-year undergraduate programme. Whereas in the former students are 'attached' at the end of their first year (which precedes the year in which they will be graduating) and is done once, in the new LL.B internship begins when they are in their third year. They also do it at the end of their fourth year.

The content and nature of the duties assigned to each student is a matter entirely within the discretion of the supervisor of the legal office where such student is placed.²⁰² Clearly, students become exposed to uneven

²⁰² For criticisms of this programme, which have been discussed above in Chapter One, see DJ McQuoid-Mason 'Clinical Legal Education: Its Future in South Africa' (1977) *THRHR* 343. The system is similar to the American model of 'farming-out'.

experiences. The students are also assigned a law teacher who is expected to review their learning progress on regular basis and must file an assessment report with the faculty. Students are given a diary in which they must record all their daily activities for the whole period.²⁰³

Upon completing the internship programme students must provide a written comprehensive report reflecting on their experiences, problems encountered, treatment received and how the programme can be improved. The report counts as credit towards the award of the LLB degree. A random reading of some of the reports made during the period 1997 to 2000 raised a number of important issues about the programme. The overall majority of the students seem to suggest that the programme is important in that it offered them experience of seeing how the institutions of the administration of justice function in practice. The general complaint seemed to be about the duration of the programme. Many students suggested that the duration of the programme should be increased. The other concern related to the type of tasks their host supervisors assigned to them. Most students in their reports indicated that their 'field supervisors' should be told in exact terms the aims and objectives of the programme so that they can assign students 'relevant' duties.²⁰⁴

The host supervisor is given an assessment form.²⁰⁵ The intention is that s/he should evaluate the student's abilities and weaknesses and make suggestions as to how the latter can be overcome with a view to improve the student's professional skills. It is a pre-formulated standard form containing specific information the law school wants the supervisor to comment upon. However, at the end of the form there is some space where the supervisor can offer his general comments and suggestions about the student.

²⁰³ See Annexure A. See page 101 below for the faculty supervisor's form.

²⁰⁴ The co-ordinator of the programme has already addressed this problem. Each law practising outlet that hosts a student is normally given a letter explaining in great detail the objectives of the programme and what type of duties the faculty desires to be assigned students.

²⁰⁵ See Annexure B.

3.4.3.1 Survey results

On the question whether skills training in an academic setting is necessary for the practice of law all the members of the legal profession overwhelmingly indicated that it is a necessity. On being asked whether moot courts and internship are sufficient for preparing students for the practice of law, 46.7% answered in the affirmative, while 43.3% indicated that they are not sufficient. 3.3% constituted respondents who were not sure and the rest did not answer the question. The group which indicated that moot courts and internship are not sufficient for preparing students to practice law gave the following reasons: They complained that the internship period is too short and that moot courts are not held regularly. The group that argued that they are sufficient indicated that the graduates of the Lesotho law school have always performed well in practice notwithstanding the fact that there had been no internship programme in the past.

The internship programme differs from the apprenticeship system in that it aims at achieving defined educational goals and outcomes rather than work experience.²⁰⁶ Whereas with the internship students are placed with the law practising outlets during their academic career they only manage to do an apprenticeship after completing their academic studies. Again, internship students are placed with any law practising law outlet while with the apprenticeship students must serve a practising attorney or advocate. After completing the apprenticeship programme usually the apprentices have to write practical professional examinations, but this is not the case with internship. Students doing internship do not represent clients but pupils or clerks do represent clients in the lower courts. The only attribute which they share in common is that they both undergo skills training.²⁰⁷

²⁰⁶ PF Iya note 181 above.

²⁰⁷ See generally DJ Givelber, B Baker & J McDevitt 'Learning Through Work: An Empirical Study of Legal Internship' (1995) 45 *J of Legal Education* 1; N Franklin 'Clinical Movement in American Legal Education' (1987-89) 1 *NULR* 55, 63; RT Stuckey 'Ensuring Basic Quality in Clinical Courses' (2000) 1 *Inter J of Clinical Legal Education* 47, footnote 1 where he says: 'Externships share some characteristics with in-house clinics, particularly the experience of practice. Externships, however, have two characteristics that distinguish them. First, the students' direct mentors or supervisors are not members of a law faculty but, instead, are

The fundamental deficiency of the internship programme is that the law school does not monitor the content and the type of legal work taught to students. Worst of all students receive uneven training. For example, students attached to the office of the Director of Public Prosecutions will not receive the same experience and exposure as students placed in a large private law firm.²⁰⁸

3.4.4 Simulations and moot courts

Simulations simply involve make-believe facts designed by a law teacher. Students assume various roles such as witnesses, prosecutors and defence counsel or they may invite their fellow students majoring in drama to act as witnesses.²⁰⁹ While simulation involves students in a mock trial, moot courts simply involve arguing about defined issues of law from a pre-formulated set of facts. In other words, in moot courts a law teacher designs 'a problem-type question' by 'manufacturing' a set of facts from which students are expected to distill legal issues for argument.

Both moot courts and mock trials methods have been at the Lesotho law school since its inception. In recent years regular moot courts and simulations have been mounted under the auspices of the course called 'practical legal training.' Judicial officers and legal practitioners have often presided in the past during the moot court sessions. They constitute 50% of the overall assessment for the course and are compulsory. A student is expected to participate in at least two-thirds of the moot courts in any given year.

Although moot courts and mock trails in general are good for practical training and for achieving certain defined educational goals and values, their major

practising lawyers and judges. Second, students do not usually undertake primary responsibility for the representation of clients.'

²⁰⁸ See N Gold 'Why Not an International Journal of Clinical Legal Education?' (2000) 1 *Inter J of Clinical Legal Education* 7, 11.

²⁰⁹ See D McQuoid-Mason 'Using Mock Trials to Teach Court Procedures to University Law Students: Some Different Approaches' in KS Sobion (ed) CLEA Conference Proceedings, Jamaica (1998) 26.

problem is that they do not give students opportunities to utilize most of their generic skills. Particular attention seems to be paid on developing the skill of advocacy in the form of ability to present arguments coherently and comprehensively both in writing and orally to the prejudice of other skills such as interviewing, counselling, and negotiation.²¹⁰

3.4.5 Tutorials

It is quite difficult to tell precisely whether tutorials form part of methods of skills training.²¹¹ Tutorials are used to assess students' capabilities in understanding legal doctrines. This method involves exchange of questions and answers between a teacher and the students. It is the Socratic method of learning. Students are assigned an area of law which they should read in advance for a meaningful discussion to take place.²¹² In a large class it may not be possible to utilize tutorials effectively since ideally all students must participate in the discussions for them to benefit from the subject. Students are divided into small groups with each group dealing with a specific assignment. Tutorials involve law teachers asking students to apply the law to specific sets of facts. In other words, students must be prepared in advance to participate in class discussions. In the majority of cases the teacher randomly selects the names and number of students to be actively involved in preparing for the discussion of the assigned material.

Having discussed various methods used for skills training the requirements for access to the legal profession and the general practice of law in Lesotho will be examined below. Any broader reflective discussion on legal education

²¹⁰ H Brayne, N Duncan & R Grimmes *Clinical Legal Education* (1998) 45.

²¹¹ Woolman Watson & Smith note 129 above, seem to suggest that they are. It is submitted with respect that these methods are generally used in many disciplines to test the abilities of students in grasping and understanding theoretical information given in a lecture. The University of Natal, Durban uses tutorials in small groups, often using graduate assistants or completing LL.B students to conduct the discussions.

²¹² Woolman, Watson & Smith note 129 above. The learned authors deal extensively with the problems of this method. One of them being that students do not prepare for the tutorial nor read the assigned materials.

particularly clinical legal education cannot be understood in isolation from the composition of the legal profession.

3.5 Access to the legal profession in Lesotho

The Lesotho law school provides legal education to about ninety per cent of the legal professionals in the country.²¹³ It follows therefore that it can hardly be disputed that it plays a critical role in the administration of justice by training law graduates to man the formal institutions entrusted with the duty of administering justice. In this section the nature of the legal profession, admission requirements, apprenticeship, ethical responsibility and the future of the legal profession will be discussed.

3.5.1 Nature of the profession

The legal profession in Lesotho is dual in nature. It consists of advocates and attorneys. All members of the legal profession (both practising and non-practising) are members of the Lesotho Law Society – a statutory body established in terms of the Law Society Act of 1983. The Law Society's main functions, amongst other things, include provision for the maintenance and advancement of sound legal training, uniform practice and discipline and suppression of professional misconduct.²¹⁴ In theory advocates are not entitled to appear before any court of law otherwise than on the instructions of an attorney admitted to practise in the courts of Lesotho, nor may they demand or receive money or instructions from lay clients.²¹⁵ In *Legal Practitioners' Committee v Karim*²¹⁶ Roney J (as then was) said:

As far as I can ascertain the legal profession in this country has always been divided between attorneys and advocates ... [A]n advocate has not (sic) mandate to act for

²¹³ In the survey 90% of the respondents indicated that they received their legal education from the National University of Lesotho.

²¹⁴ Preamble of the Law Society Act 13 of 1983.

²¹⁵ Ss 6 and 32 of the Legal Practitioners Act 11 of 1983.

²¹⁶ 1979 (1) *Lesotho LR* 300, 310.

any person in any cause or matter unless he has first been instructed by an attorney duly admitted to practise before the courts of this country.

Sadly, the practice reveals quite the opposite as will be shown below. There is no distinction in practice between the functions of an attorney and those of an advocate. Advocates consult lay clients without instructions from attorneys and demand payment directly from them. In *Mosenye v Ramone and others*²¹⁷ Maqutu J in dealing with a case involving an advocate who practised as a firm of attorneys said:

What Mr. Mosito was challenging was Naledi Chambers Attorneys. To him this was similar to K.E.M. Chambers Attorney. Naledi Chambers is run by two attorneys, Mrs. Makara and Mrs. Chimombe. Mr. Mosito had copied this style to make it appear that K.E.M. Chambers was attorneys' firm when it was not. That was what I said was an abuse that had been bred by the use of the name Naledi Chambers Attorneys. Now advocates like K.E.M. felt they could run attorneys offices under such names as E.K.M. (sic) Chambers. The only point of convergence between the two was that K.E.M. Chambers had copied the style of Naledi Chambers to do what was forbidden for an advocate.

What brought about the hardening of the court's attitude was because K.E.M. Chambers was practising as attorneys. In fact it was Mr. Mosito who was doing this. K.E.M. Chambers was in fact his firm. His names are Kananelo Everitt Mosito. I had found this fact from Mr. Maieane who had told me that although he was an attorney, the firm K.E.M. Chambers was Mr. Mosito's firm and he was working for the firm. I informed Mr. Maieane that this was illegal, he cannot be employed by an advocate.

²¹⁷ 1991-96 *Lesotho LR* Vol 1 777, 778-780; see also the dictum of the same judge in the case of *Moahloli v Lesotho Highlands Water Revenue Development Civ/T/141/96* (unreported), 'I find that of late advocates use their initials to masquerade as firms of attorneys. This practice started after a firm of attorneys called itself by a name which was not a name of one of the partners. Advocates now simply use their initials and give the impression that they are attorneys.' For the position in South Africa see *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T) (where an advocate was suspended for six months for professional misconduct relating to taking instructions directly from the lay clients); *De Freitas v Society of Advocate of Natal* 2001 (3) SA 750 (SCA) 579 (where an advocate was struck off the roll for professional misconduct of consulting lay clients without the intervention of an attorney).

Attorneys are required by law to keep trust accounts for all the funds received on behalf of clients.²¹⁸ This is not the case with advocates. Further, each year or at any time fixed by the Law Society an attorney is obliged to submit a certificate by an auditor approved by the Law Society.²¹⁹ The certificate must state that the auditor has made an examination or audit of the books of the attorney in question and whether or not under the period in review the attorney is keeping proper books in a manner that enables him to comply with the provisions of the Legal Practitioners Act.²²⁰

3.5.2 Admission requirements for legal practice

3.5.2.1 Advocates

A person who seeks to be admitted and enrolled as an advocate must prove to the satisfaction of the High Court that:²²¹

- (a) He is of or above the age of 21 years and that he is a fit and proper person to be admitted as an advocate;
- (b) He has satisfied all the requirements for a degree of Bachelor of Laws of the National University of Lesotho; or
- (c) He has been admitted to practise as an advocate in the High Court of South Africa or Namibia or Zimbabwe; or
- (d) He has been admitted as a barrister or advocate in other countries.

There is a further requirement for those in category (c) and (d) to remain enrolled in the courts of their respective countries and must not be under any order of suspension at the time of application. The other point is that citizens of Lesotho who have obtained their LL.B outside the country are eligible for admission. It is important to note that there is no system of pupillage as is

²¹⁸ S 27 of the Legal Practitioners Act 11 of 1983.

²¹⁹ S 28 of the Legal Practitioners Act 11 of 1983.

²²⁰ Ibid.

²²¹ S 6 of the Legal Practitioners Act.

currently in force in South Africa nor any kind of pre-admission practical legal training. This is a serious flaw considering that currently the students do only mock trials, internship and moot courts for their practical training. It is submitted that the pupillage system would be an appropriate vehicle for sharpening the graduates' rudimentary skills before they join the mainstream of the administration of justice.

In the survey 26.7% of the members of the legal profession indicated that on their first time in practice they were nervous and lacked confidence. 46.7% indicated that they were confident when the rest did not answer the question. On the question whether there should be pupillage system for LL.B holders 63.3% answered in the affirmative and 16.7% indicated that it was not necessary. The rest indicated that they do not know what the system entails.

Considering that there is no system of pre-admission practical training it is clear that clinical legal education must be used intensively to prepare students for legal practice. As part of the clinical work the Faculty of Law may request the relevant authorities to permit students to appear in the magistrate courts and other tribunals in matters involving minor claims under the close supervision of the legal aid manager to gain first-hand experience of legal representation. This option may necessitate the drafting of student practice rules to regulate the conduct of practising students.²²²

3.5.2.2 Attorneys

In terms of s13 of the Legal Practitioners Act a person who seeks to be admitted as an attorney must prove to the satisfaction of the High Court that:

- (a) He is or above the age of 21 years and is a fit and proper person;

²²² See D Barnhizer 'The University Ideal and Clinical Legal Education' (1999) 35 *New York Law School LR* 87.

- (b) He has been or is entitled to be admitted as an advocate under the Act and has passed the practical examinations; or
- (c) He has passed the practical examinations in addition to having served articles of clerkship for two years, three years or five years if he holds an LL.B or any other degree or other qualification not being a degree respectively; or
- (d) He is a solicitor or attorney admitted to practise in other countries and that he remains enrolled in that capacity and is not under any order of suspension in the courts of such countries; or
- (e) He is an attorney of the High Court of South Africa or Zimbabwe or Namibia and he remains enrolled in that capacity and is not under any order of suspension in the courts of such countries.

3.5.3 Apprenticeship

Generally speaking there is no compulsory system of postgraduate practical legal training in Lesotho. As indicated above holders of LL.B are entitled to be admitted and enrolled as advocates without the need to undergo any further practical training. They do not even have to write practical examinations. This contrasts quite sharply with the position obtaining in South Africa, where holders of LL.B intending to be admitted as advocates must serve pupillage for a period of four months under the supervision of a qualified and experienced advocate.²²³ After completing their pupillage graduates write practical examinations meant to test their proficiency in practical professional skills.²²⁴

In Lesotho only law graduates who wish to become attorneys serve apprenticeship in the form of articles of clerkship. This route is optional for the

²²³ J Kaburise 'The Structure of Legal Education in South Africa' (2000) 51 *J of Legal Education* 363.

²²⁴ See PF Iya 'The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges' (2001) 51 *J of Legal Education* 355.

LL.B degree holders because they are entitled to write attorneys examinations without the need to serve articles of clerkship before.²²⁵ Again, this is in sharp contrast with the position obtaining in South Africa, where articles of clerkship are compulsory in terms of the Attorneys Act 53 of 1979. In South Africa the period of articles can be reduced through attendance of lectures and passing examinations set by the Schools of Legal Practice.²²⁶

The period of apprenticeship offers further opportunities for students to learn practical skills. The system gives them the chance to prepare themselves for the challenges of legal practice. The advantage of this programme is that the apprentices learn by doing under the supervision of their principals. Despite its advantages the apprenticeship system has not gone without criticisms. It has been said:²²⁷

Anyone who knows the apprenticeship system, whether by experience or description, can testify to its myriad weaknesses. Legal practitioners in their practices are preoccupied with service and their work, not education, training and mentoring. Oddly, legal practitioners do not seem to have accepted the notion that supporting the learning of others is in the best interests of their particular practices, perceiving mentoring as oriented to the interests of the junior or the public.

A comprehensive system of apprenticeship system can offer excellent practical training by exposing the apprentices to a variety of legal problems. It can prepare apprentices adequately for legal practice and instill confidence in them. The deficiencies replete in this method are several. Apprentices may serve in a law firm whose legal work involves dealing with legal issues of a particular branch of law in the majority of cases. Examples are law firms that

²²⁵ S 8 (c) (iii) of the Legal Practitioners Act 11 of 1983.

²²⁶ See *Ex Parte Schweltnus* 2000 (3) SA 172 (E), where the court held that the two-year service of articles applies where a candidate attorney (articled clerk) has not attended and passed a practical training course from the School of Legal Practice. It further indicated that a person who proves to the satisfaction of the court that he has received and passed a practical instruction course and served articles of clerkship is regarded to have fulfilled the practical requirements of the Attorneys Act 53 of 1979.

²²⁷ N Gold 'Why not an International Journal of Clinical Legal Education' (2000) 1 *Inter J of Clinical Legal Education* 7, 11; see further J Kaburise 'The Structure of Legal Education in South Africa' (2001) 51 *J of Legal Education* 363; PF Iya 'The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges' (2001) 51 *J of Legal Education* 355.

specialize in certain fields of law such as intellectual property law or criminal law. As Gower puts it:²²⁸

It is, however, coming to be increasingly recognised that articles work most unevenly. If the principal has (i) a good varied practice and (ii) the time and ability to instruct his articulated clerks, it may be an unrivalled method of learning the practical "know how" of the profession. If both these conditions are not fulfilled (and they rarely are) it may be a complete waste of the articulated clerks time and even a method of obtaining skilled assistants on the cheap.

This may have the effect of restricting the career choices of apprentices. The other drawback is that there are fewer law firms than law graduates leaving the law school each year.

3.5.4 Some reflections on the practice of law

In all jurisdictions where practice of law is considered a public service the bodies charged with the duty of regulating the legal profession enforce the code of professional conduct ruthlessly. For example, in South Africa the professions of attorney and advocate are regulated by different bodies – the law societies and the provincial bar councils respectively. Advocates are by law precluded from taking instructions directly from lay clients.²²⁹ Only attorneys have the right to consult and take instructions directly from the members of the public. They are entitled to demand payment from the public as well and that is the reason why they are required by law to keep trust accounts.²³⁰ A cursory look at the reported cases indicates a resolute commitment on the part of the governing bodies to enforce the common law and the statutory regulatory regimes.²³¹

²²⁸ *Gower's Report* 21-22; see also PF Iya 'Developing a Comprehensive Practical Training Programme in a University Curriculum: Some Reflections on a Suitable Programme for the University of Swaziland' (1990) 6 *Lesotho LJ* 109, 112.

²²⁹ See *Society of Advocates of Natal v De Freitas and another* 1997 (4) SA 1134 (N).

²³⁰ See the Attorneys Act 53 of 1979.

²³¹ *General Council of the Bar of South Africa v Van der Spuy* 1999 (1) SA 577 (T); *Bayers v Pretoria Balieraad* 1966 (2) SA 593 (A); *De Freitas v Society of Advocates of Natal* 2001 (3) SA 750 (SCA); *Society of Advocates of South Africa (Witwatersrand) v Edeling* 1998 (2) SA 852 (W).

Though the *Paul-Twining Report* recommended the fusion of the two professions in Lesotho that did not happen.²³² In theory an advocate is not entitled to consult and take instructions from lay clients.²³³ In practice there is no distinction between the functions of advocates and those of attorneys in Lesotho, the former performing the functions which in law are only reserved for the latter. In the words of Rooney J in the case of *Legal Practitioners' Committee v Karim*.²³⁴

Advocates resident in Lesotho have no local association [now it is the Lesotho Law Society] and many of them have proceeded to perform functions which in other jurisdictions would be strictly reserved to attorneys. In particular the practice has grown up of advocates receiving instructions direct from lay clients in both civil and criminal matters.

...[A]n advocate has not (sic) mandate to act for any person in a cause or matter unless has first been instructed by an attorney duly admitted to practice before the courts of this country.

Unlike in South Africa where attorneys previously did not have the right of audience in the superior courts until fairly recently, attorneys have always had such a right in all the courts in Lesotho.²³⁵ The following case illustrates the

²³² *Paul-Twining Report* 12-18.

²³³ For authoritative statements, see cases cited in note 222 above. S 6 (2) (a) of the Legal Practitioners Act 11 of 1983 provides as follows:

'6. –

(2) An advocate shall not –

(a) appear in the courts of Lesotho otherwise than on the instructions of an attorney admitted to practise in the courts of Lesotho; and that attorney is in possession of a practising certificate;

(b) demand or receive money or instructions direct from a client except through his instructing attorney being attorney in possession of current practising certificate.'

S 36 of the same Act provides to the same effect. The High Court rules No. 9 of 1980 – rule 17 (1) (c) entitles an advocate to have the right of audience in the High court only when duly instructed by an attorney. This shows a clear determination to divide the professions of attorney and advocate on the part of the legislature.

²³⁴ 1979 (1) *Lesotho LR* 300, 308-310.

²³⁵ Presently the Right of Appearance in Courts Act 62 of 1995 gives attorneys in South Africa the right to appear in the superior courts. They only have the right of audience in the courts in which they have applied and have been granted certificate of appearance by the Registrar. The right of audience is granted only to attorneys who hold the LL.B degree. See further D

point. In *Masoabi v Fischer*²³⁶ the applicant, a practising advocate, brought an urgent application against F for an arrest *fundamandem jurisdictionem* on the ground that F owed him professional fees for legal services rendered. Cotran CJ refused the application and made the following remarks:

Without in any way prejudicing the proceedings in the lower court, it seems clear on the face of things, that the legal profession in Lesotho is not fused except to the extent that attorneys have a right of audience in the superior courts.

Although the Act [Legal Practitioners Act of 1967] is silent on the question of fees to attorneys and advocates, the position at common law, at any rate English common law, is that a barrister's fee (if a barrister is taken as synonymous with advocate and distinguished from a solicitor or attorney) is not legally recoverable.

The learned Chief Justice expressed his doubts about the position under the Roman-Dutch common law (which doubts of course, make it clear that he did not even bother to refer to South African authorities and legal literature, from which his doubts would have been cleared) proceeded as follows:

In Lesotho, as I understand the legislation, the courts would apply the above rule, even though, to a larger extent, a blind eye has in the past been turned to advocates accepting direct briefs. If what the applicant has done is not *per se* illegal, it is probably a breach of professional etiquette as it is understood in this part of the world, and may subject the advocate to disciplinary hearing.

The High Court disapproves of such a practice and is not prepared to come to the assistance of the Applicant in giving this extraordinary remedy by ordering the Respondent's arrest.

The survey shows that 43.3% of the members of the legal profession believes that the practice of law in Lesotho measures up to the expected or required standards, while 23.3% is of the view that it does not.²³⁷ 10% of the

McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 *Fordham Inter LJ* S111.

²³⁶ 1978 *Lesotho LR* 434.

²³⁷ One must confess that in asking the question an example of South Africa and UK was made and the respondents who did not answer the question either in the affirmative or in the negative decided to go out of their way by asking me whether I think the standards in the abovementioned countries are better than those existing in Lesotho. Some made very

respondents were not sure. 56.7% of the advocates indicated that they do consult lay clients. It must be noted that this number consists of 26.7% of advocates in the civil service and private organizations, whom, by law, are entitled to consult their clients directly. The attorneys and those who indicated that they never consult lay clients confirmed that they have heard of instances where advocates take instructions directly from the lay public. Those advocates who admitted that they consult and take instructions from the public indicated they even obtain their professional fees from such clients (these made 30%).

Not surprisingly, 76.7% of the respondents were of the view that the two professions must be fused. Their reasons amongst others were that: the division is just 'a cosmetic one' based on conservatism; there is no need to duplicate legal services; the professions are already 'merged' in practice; attorneys appear in all the courts and as a result do not instruct advocates; and that there is no need for maintaining such a division in a developing country such as Lesotho. 16.7% rejected the idea that the two professions should be fused together. Their reasons were crisply that advocates and attorneys perform different functions and this enhances professionalism.

On the question whether the law society does what it is supposed to do in terms of the law, 76.7% indicated that it does not. 16.7% indicated that it does. The group suggesting that the law society does not do its duties pointed out that it does nothing to bring 'corrupt lawyers to book' in the interests of the public. They also indicated that the attorney/advocate relationship makes it difficult for enforcement action because some members of the Law Society Council practise in both capacities. The other suggestion was that the council relaxes the rules because of high demand for legal services. One of the extreme responses was to the effect that 'the law society does not exist, it died in 1992.'

unprofessional nasty remarks which are not worth mentioning here. I am not able to tell what might have triggered this attitude.

It is clear that the legal profession in Lesotho does not adhere strictly to the common law rule which stipulates that advocates cannot appear before the courts of law without the instructions of the attorneys. More especially when this rule has been made statutory.²³⁸

It is questionable, in the light of the judicial pronouncements and the results of the survey, whether the 'theoretical division' of the legal profession should be maintained. Its danger lies in the fact that law teachers will teach students that the professions are divided and yet, the students will observe otherwise when they observe the situation on the ground.

The reasons for this 'unsolemnized fusion' can be tersely summarized as follows. First, the fact that law graduates become entitled to be admitted as advocates upon graduation means that the public becomes sceptical about the quality of the legal services provided by these novice lawyers. This means that the 'graduate lawyers' are compelled by economic circumstances to flout the rules. The reason being that they cannot 'compete' for clients with the established members of the legal profession. Secondly, the present statutory regulatory regime combines both the common law principles of the traditional division with advocates having to be instructed by attorneys, while at the same time it gives the latter the right of audience in the superior courts. Traditionally, the corollary principle of prohibiting advocates from taking instructions directly from the public is that attorneys in turn must not appear in the superior courts.²³⁹ The right of attorneys to appear in the superior courts shatters any merit in retaining the division.

Thirdly, the majority of the lay public, presumably, does not understand the theoretical dimensions of the division. It is doubtful whether the majority of them even know the difference between attorneys and advocates. The other reason is that most people are poor so that even if they desire to instruct counsel financial constraints would not permit them to do so. Fourthly, the South African practitioners admitted to practise in Lesotho seem to have no

²³⁸ S 6 of the Legal Practitioners Act 11 of 1983.

²³⁹ See *Society of Advocates of Natal v De Freitas and another* 1997 (4) SA 1134 (N).

interest in 'involving' themselves in the affairs of the legal profession. It is remarkable to note that some of them are renowned senior advocates. This fact alone would have a tremendous impetus and would become a source of inspiration for the novice lawyers. Finally, the historical background plays a major role. The Law Society in practice has never meaningfully enforced the division.

3.5.5 Ethical responsibility

The concept 'ethics' entails manifold meanings. First, 'ethics' consist of rules, codes of conduct, guidelines and rulings regulating the professional conduct of legal practitioners.²⁴⁰ Any conduct that does not conform to these rules, codes of conduct and guidelines may constitute professional misconduct and lead to disciplinary action.²⁴¹ Law societies and bar councils and other international bodies charged with the responsibility of ensuring that legal practitioners conduct themselves according to the highest possible standards often emphasize the importance of observing these standards and do not take lightly the conduct that is calculated to violate them.²⁴² Second, ethics involves value judgment on what is or is not correct.²⁴³ Finally, ethics allows for a distinction to be drawn between professional misconduct, unprofessional conduct and breach of etiquette.²⁴⁴ The existence and purpose of ethical standards and rules of professional conduct is to regulate the conduct of legal practitioners within and beyond the legal profession. Professional misconduct involves violation of rules and regulations designed to regulate the conduct of legal practitioners such as the provisions of the South African Attorneys Act of 1979 relating to the keeping of trust accounts and other matters. Unprofessional conduct is improper conduct *per se*. Though it does not

²⁴⁰ L Lewis *Ethics: A Guide to Professional Conduct for South African Attorneys* (1982) 2-12.

²⁴¹ Lewis above 3.

²⁴² Lewis 10-12.

²⁴³ See generally *Prince v President, Cape Law Society and others* 2002 (2) SA 794 (CC); *Cape Law Society v Parker* 2000 (1) SA 582 (C).

²⁴⁴ Lewis (note 240 above) 12.

amount to professional misconduct it may constitute that conduct which is nevertheless not approved of a legal practitioner.²⁴⁵

Appreciation of ethical responsibility must be inculcated into aspiring lawyers in their early stages of legal training.²⁴⁶ They should be imbued with the standards and codes of professional conduct. In addition, they must generally be ingrained with the public obligation to protect individuals and the general public from abuse or threats of abuse of private and public power.²⁴⁷ In broader perspective ethical responsibility transcends the codes of professional conduct, rules and regulations to issues such as how each practitioner must treat his clients, the courts, colleagues, witnesses, prosecutors and all other stakeholders in the administration of justice.²⁴⁸ Failure to observe such professional codes of conduct may lead to their being struck off the roll on the grounds that they are not fit and proper persons to remain on the roll of practitioners.²⁴⁹

The fact that advocates consult and take instructions directly from lay clients in Lesotho casts doubts about the ethical professional responsibility of members of the legal profession. To add to the problem is the fact that the Law Society, which is charged with the responsibility of ensuring that professional codes of conduct and standards are maintained and observed, seems to be lax and failing in its duty. It is noteworthy that 76.7% of the members of the legal profession indicated that the legal profession does not measure up to the highest possible standards. Moreover, on the question whether the Law Society upholds legal standards expected of the legal practitioners 66.7% indicated that it does not. Only 3.3% held the view that it does. The rest did not answer the question. The suggestion of the majority of the respondents was that the law society should adhere strictly to the letter of the law. Other respondents suggested that the Law Society should hold

²⁴⁵ See *Society of Advocates of Natal v De Freitas and another* 1997 (4) SA 1134 (N).

²⁴⁶ See generally D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87.

²⁴⁷ J Tomain & M Solimine 'Skills Skepticism in the Post Clinic World' (1990) 40 *J of Legal Education* 307.

²⁴⁸ Lewis note 240 above.

²⁴⁹ *Incorporated Law Society v Behrman* 1957 (3) SA 221 (T) 222.

seminars and workshops to teach and discuss issues of ethical responsibility with the legal practitioners. At this juncture it is convenient to examine the future of the profession.

3.5.6 Future prospects and outlooks

The organization and composition of the legal profession in Lesotho requires further reflection and analysis with a view to restructuring and overhauling the existing regime. That the existence of a dual profession is a theoretical sentimental fiction cannot be gainsaid. The realities on the ground call for a rethinking of the ways and means of reshaping the profession for the public good and for the applicability of universally shared and accepted standards of professional conduct. It is desirable to redefine the ethos underpinning the existence of professional ethics in the professions of attorney and advocate. However, considering the fact that the practice in Lesotho reflects a 'hybrid' system, which stands to frustrate legal theory and the philosophy underlying the distinct traditional foundations of the professions, one cannot but advocate the fusion of the two professions. In the words of Gower:²⁵⁰

In the light of these considerations I have no hesitation whatever in strongly recommending that the profession should be fused *de jure* as, in reality, it has already been fused *de facto*. A small and poor country [like Lesotho] simply cannot afford to preserve the distinction, and [Lesotho] has for practical purposes already done away with it.'

3.6 Conclusion

The fact that the National University of Lesotho has continued to offer legal education consistently for a period of about three decades is a significant achievement. In its developmental stages legal education was marred by practical problems particularly the aspect of developing curricula and syllabi that would address the national priorities and demands. Eventually a suitable

²⁵⁰ Gower's Report 22.

model was devised and exists until today.²⁵¹ Throughout the different development stages no comprehensive system of clinical legal education was introduced. Although moot courts and simulations featured prominently they proved inadequate for the purposes of equipping law students sufficiently for competent legal practice particularly in view of the fact that there was no postgraduate pre-admission practical training offered to law graduates. Recently they have been supplemented with the internship programme. It was only about three years ago that a law clinic was established. The move is encouraging. The law clinic was established at the time when there was a high demand for legal services. Poor Lesotho nationals stand to benefit from free legal services provided by the law clinic. It will also be necessary to balance the service function with the teaching mission of the Law Faculty.

The other significant lesson to be learned from the survey conducted by the writer is that although the legal profession is supposed to be dual in theory the practice reveals quite the opposite. The survey and reported cases have shown that advocates do not observe the rule prohibiting them from taking instructions directly from the lay clients and demanding payment from them. This has far-reaching implications about concerns of ethical responsibility. It is submitted that there is no point in insisting that the profession should be dual when the practice shows that this cannot be maintained and regulated properly.

²⁵¹ J Karibuse 'The Structure of Legal Education in South Africa' (2001) 51 *J of Legal Education* 363.

Chapter Four

4 The Role of Clinical Legal Education in the Administration of Justice

4.1 Introduction

In this chapter the role of clinical legal education in the administration of justice will be examined. It is intended to examine whether clinical legal education has any role in the administration of justice. Law clinics, in addition to playing an important role in teaching law students practical lawyering skills, also provide indigent people with legal services and thereby make justice accessible to all the people. Particular attention will be paid to the role of the Lesotho law school law clinic in the administration of justice.

The administration of justice may simply be described as the process through which disputes are resolved and settled by the application of the legal rules and principles by formal institutions reposed with the power to do so in law.²⁵² According to postmodern thinking administration of justice involves social or distributive justice as well.²⁵³ On the one hand, legal justice constitutes the traditional form of justice widely regarded as the cause with which all the courts of law must strive to dispense. It consists of such formulations as all people must be treated equally before the law or that courts must be impartial and unbiased in settling disputes between litigants. It is subdivided into two categories, namely formal justice and substantive justice.²⁵⁴

First, formal justice connotes a consistent and well-defined application of established procedural rules indicating how people are to be treated in

²⁵² L Du Plessis *An Introduction to Law* 3rd ed (1999) 90. Du Plessis suggests that the administration of justice embraces all processes whereby the courts of law, as organs with state authority, intervene to adjudicate justiciable disputes.

²⁵³ DJ McQuoid-Mason 'Legal Aid Clinics as a Social Service' in DJ McQuoid-Mason (ed) *Legal Aid and Law Clinics in South Africa* (1983) 64; DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 172.

²⁵⁴ W Hosten, B Edwards F Bosman & J Church *Introduction to South African Law and Legal Theory* 2nd ed (1995) 27-32.

different situations. For example, in most jurisdictions there are rules of court prescribing the procedure that must be followed when one intends to institute legal proceedings in the courts of law. These rules must be standard and must apply universally and uniformly. Secondly, substantive justice relates to the substance of the rules and principles affecting the disputes to be resolved.²⁵⁵ Traditionally, it is argued that substantial justice is done when formal rules have been applied correctly to the relevant facts. But the danger with this approach lies in the fact that not all rules are just. It is the requirement of substantial justice that legal rules must be just, reasonable and legitimate.²⁵⁶ They must reflect the normative values, public policy and existing moral dimensions. It is imperative that such rules must be based on existing legal theory, philosophy, standards and fundamental rights. For instance, in the 'new South Africa' the principles of the rule of law, constitutionalism and basic human rights form the democratic values underpinning the ethos of constitutional dispensation, so that all the laws are tested on these normative values.²⁵⁷

On the other hand, social justice is not restricted to the settlement of disputes only, but encompasses a broader perspective of how political and economic rights must be exercised and safeguarded.²⁵⁸ The concern of social justice is to ensure that those who are entitled to the enjoyment of economic and political rights do actually benefit.²⁵⁹ If for any unjustifiable reason they are deprived of what rightfully belongs to them distributive justice justifies interference to ensure that the injustice is redressed. For example, South Africans have witnessed major social programmes designed to redress the social and economic imbalances created by the apartheid system such as affirmative action, redistribution of land, housing and economic

²⁵⁵ Hosten et al note 254 above.

²⁵⁶ W Twining *Globalisation and Legal Theory* (2000) 71.

²⁵⁷ See s 36 of the Constitution of 1996 of the Republic of South Africa.

²⁵⁸ See DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89, 94.

²⁵⁹ PF Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13.

empowerment.²⁶⁰ There are some institutions which make a significant contribution to distributive justice, such as the Legal Resources Centres and University of Natal which through its street law programme has played a pivotal role in making social justice meaningful by disseminating information on human rights, engaging in consumer awareness campaigns and other social activities.²⁶¹

The role of legal education in the administration of justice is undoubtedly pivotal and serves to highlight the need for the provision of quality legal training with the object of ensuring that administrators of justice become competent and effective.²⁶² It therefore means that any study on clinical legal education cannot pretend to isolate itself from the justice system.

4.2 Administration of justice in Lesotho

Before examining the role of Lesotho law school law clinic in the administration of justice it is prudent to briefly give an outline of how the justice machinery operates in Lesotho. It is important to note that for purposes of this paper the discussion will be limited to the courts of law and other tribunals possessing the power to adjudicate over disputes.

In terms of section 118 of Constitution of Lesotho of 1993 the judicial function reposes in the following tribunals; the Court of Appeal,²⁶³ the High Court,²⁶⁴ the Subordinate Courts,²⁶⁵ the Courts-martial,²⁶⁶ the Labour Appeal Court,²⁶⁷ the Labour Court,²⁶⁸ the Central and Local Courts (commonly referred to as

²⁶⁰ See Iya, note 259 above.

²⁶¹ DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89, 90.

²⁶² D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87.

²⁶³ Court of Appeal Act 10 of 1978.

²⁶⁴ High Court Act 5 of 1978.

²⁶⁵ Subordinate Courts Act 9 of 1988 (as amended).

²⁶⁶ Lesotho Defence Force Act 4 of 1996.

²⁶⁷ Labour Code (Amendment) Act 3 of 2000.

²⁶⁸ Labour Code (as amended) 24 of 1992.

the Basotho Courts),²⁶⁹ and other such tribunals that may be established by the parliament through legislation from time to time. Save for the Court of Appeal, the majority of whose judges come from South Africa, the other courts are manned by locals who have received their legal training from the local law school. With the exception of the Central and Local courts, which administer customary law, the other courts administer the common law and other laws. These courts will be briefly examined.

The Court of Appeal is the highest court in the hierarchy. It is the appellate tribunal for all the decisions of the High Court and the superior court of record.²⁷⁰ The High Court comes second in the hierarchical structure. It possesses unlimited original jurisdiction to hear and determine both criminal and civil matters within the territorial borders of Lesotho.²⁷¹ It is the superior court of record.²⁷² It is also an appellate tribunal for the decisions of the lower courts in the hierarchy and in accordance with the principle of *stare decisis* its decisions are binding on all inferior courts. The subordinate courts are creatures of statute (Subordinate Courts Act 9 of 1988). Their jurisdiction is limited to the territorial borders of the districts within which they are situated.²⁷³ The Labour Appeal Court is the appellate tribunal (including reversionary powers) in respect of all decisions of the Labour Court.²⁷⁴ The Labour Court possesses exclusive jurisdiction in respect of labour and industrial matters.²⁷⁵ The Basotho Courts (Central and Local Courts) administer the Sesotho customary law. The Central Courts are appellate tribunals for all decisions of the local courts. They also possess unlimited jurisdiction in all matters involving customary law.²⁷⁶

²⁶⁹ Basuto Courts Proclamation 23 of 1958 (as amended by the Central and Local Courts Proclamation of 1965). These courts administer customary law.

²⁷⁰ S 123 of the Constitution of Lesotho 1993.

²⁷¹ S 2 of the High Court Act 5 of 1978; S 119 (1) of the Constitution of Lesotho.

²⁷² S 119 (3) of the Constitution.

²⁷³ In terms of s 4 of the Subordinate Courts (Amendment) Act 6 of 1998 the jurisdiction of the courts in claims sounding in monetary terms is limited to a claim not exceeding R25 000.00. In relation to criminal jurisdiction they cannot try treason, sedition, murder and other economic crimes involving sums of money exceeding the monetary ceiling of their jurisdiction. They may impose a maxim sentence of R40 000.00 fine or imprisonment for twenty years.

²⁷⁴ S 38 of the Labour Code (Amendment) Act 3 of 2000.

²⁷⁵ S 24 of the Labour Code 24 of 1992 (as amended).

²⁷⁶ V Palmer & S Poulter *The Legal System of Lesotho* (1972) 511.

In practice courts are expected to be impartial and independent from external pressure and interference in adjudicating disputes between litigants. This principle is the corollary of the *trias politica* principle which states that there must be separation of powers between the executive, judiciary and legislature organs of the state.²⁷⁷ The independence of the judiciary takes a two-dimensional form – subjective independence and objective independence.²⁷⁸ On the one hand, subjective independence connotes the actual impartiality and lack of bias. The concept of impartiality denotes lack of bias and manifest neutrality on the part of judicial officers. Judicial officers must conduct themselves in such a manner that the public conceives of them as neutral umpires in litigation.²⁷⁹ They must ensure that they retain and observe their paramount duty of protecting the justice system from being brought into disrepute through dishonourable conduct. This will guarantee and safeguard the dignity and integrity of the courts of law.²⁸⁰ This quality is intended to enhance public confidence in the justice system. In the end it is the public who must have confidence in the integrity of the judicial system.²⁸¹ If such trust lacks it is questionable whether the judiciary can function properly. Under such circumstances there is no doubt that the rule of law will simply perish. It goes without saying that the importance of preserving public trust in the judiciary and because of its fundamental role of resolving disputes, judicial officers have a primary responsibility to ensure maintenance of the dignity,

²⁷⁷ See N Jayawickrama 'Combating Corruption in the Judiciary: Need for New Strategies' (2001) 10 *The Commonwealth Lawyer* 15.

²⁷⁸ *Sekoati v President of the Court Martial and another* 2001 (7) BCLR 750 (LAC) 759G-H the court said: 'The generally accepted core of the principle of judicial independence is the complete liberty of individual judges to hear and decide cases that come before them without interference from any outsider.'

²⁷⁹ See PM Nienaber 'Regters en Juriste' (2000) TSAR 190. According to Nienaber judges are not philosophers or legal reformers. The judge's role of adjudication of a dispute begins not with the principle but with the facts. The judge applies his legal intuition to the facts. The legal intuition is the product of the judge's inherent feeling of justice and decency, of his education as a lawyer, his experience as a person and a practitioner. It is not simply a feeling and has nothing to do with sympathy for any party to the dispute. He acknowledges that legal intuition can have a negative side such as personal judgments, ideology and political preference. A good judge, he argues, is able to identify, confront and neutralise these negative tendencies. A judge's intuition is, however, no substitute for the applicable legal rule for otherwise there would be a departure from objective norms and this would lead to disorder and confusion.

²⁸⁰ See generally N Steytler 'Access to Justice: The Role of Legal Aid' in J Hund (ed) *Law and Justice in South Africa* (1988) 25.

²⁸¹ *S v Mamabolo* 2001 (3) SA 401 (CC).

honour and respect the courts of law must have in discharging their public duties.²⁸²

On the other hand, institutional independence means objective independence.²⁸³ It is normally guaranteed through security of tenure of office, reasonable remuneration and all other privileges accorded judicial officers to enable them to discharge their functions properly.²⁸⁴

The independence of the judiciary is a fundamental precept in the maintenance of the rule of law and it is the hallmark for the guarantee of fundamental human rights against encroachments by the state and other institutions.²⁸⁵ It is the cornerstone of democratic values guaranteeing that disputes between the state and the citizens, the citizens and other bodies and the citizens *inter se* are settled in accordance with the due process of the law as opposed to arbitrariness and capriciousness.²⁸⁶ In short, courts of law must be able to attend to the proper administration of justice and wield public confidence in performing their adjudicative role.²⁸⁷ Judicial officers must receive a high standard legal education particularly skills training because without such training they cannot be expected to discharge the duty of administering the justice machinery efficiently and effectively.²⁸⁸

4.3 The role of Lesotho law clinic in the administration of justice

The Lesotho law clinic has been in operation since the beginning of 2001. The law clinic has until today advised clients on cases involving divorce, wills, criminal law, succession, contracts, domestic violence, labour, administrative

²⁸² P Nienaber 'Regte en Juriste' (2000) 1 *TSAR* 190.

²⁸³ *Sekoati's case* note 278 above.

²⁸⁴ *Sekoati's case* 790A-C.

²⁸⁵ *Sekoati's case*.

²⁸⁶ I Mahomed 'Preventive Detention and the Rule of Law' (1989) 5 *Lesotho LJ* 1; CJR Dugard *Human Rights and the South African Legal Order* (1978) 37-49.

²⁸⁷ *S v Mamabolo* 2001 (3) SA 401 (CC).

²⁸⁸ HT Edward 'The Growing Disjunction Between Legal Education and the Legal Profession' (1992) 91 *Michigan LR* 34; D Barnhizer 'The University Ideal and Clinical Legal Education' (1990) 35 *New York Law School LR* 87.

justice, maintenance, delict and customary law. Unfortunately, there are no statistics indicating the number of cases the law clinic has handled until today because no records are kept. The clients of the law clinic are indigent people from the surrounding rural areas and members of staff. The law clinic offers its services in a way that ensures that disadvantaged members of the public have access to legal services. Legal aid services are only open and available to members of the public who cannot afford services of private lawyers. The clinic does not take cases of people who are unable to show that they are poor. The 'means test' criterion is designed to ascertain the financial or income circumstances of a client.²⁸⁹

The essential information required for the purposes of determining whether a client qualifies for legal services include: marital status; family income from any source; where a client is married the income of his or her spouse; the number of dependants particularly children; and the monthly contribution to the maintenance of the family. Where the income of a person seeking legal assistance fails to satisfy the means test such person is normally advised to seek assistance from private lawyers. Consultation times are between 9:00 am – 4:00 pm during the weekdays. The clinic operates continuously throughout the year.

The law clinic will start to advertise its services in the beginning of 2003 as a preparatory step for the law students who will be required to participate in its activities as part of their skills training in order to attract as many varied cases as possible. Where the client's case requires legal action (litigation) she or he is normally referred to the National Legal Aid Office. The law clinic does assist clients with other legal work such as drafting of constitutions of friendly societies or drawing up of wills. The referral to the National Legal Aid Office does not guarantee that a client will automatically receive legal assistance. S/he still has to prove to the National Legal Aid Office that she or he is entitled to legal aid services. In other words, the law clinic simply recommends the

²⁸⁹ A single person whose monthly income is Six Hundred Maloti (equivalent to R600) or less qualifies for legal aid services. For a married person the amount is increased to One Thousand Maloti or less.

client to the National Legal Aid Office but the client has the ultimate say regarding whether he or she wants to utilize the National Legal Aid Office's services or those of other charitable organizations such as the Federation of Women Lawyers. Currently participation of students in the law clinic is voluntary and many of them have shown keen interest in the law clinic's activities despite constraints imposed by their lecture loads.

The Lesotho law school must provide legal education which is responsive and relevant to the demands of the justice system. It is imperative for this purpose that law curriculum should reflect the common goals and interests of legal educators, the judiciary and legal profession, and the general public. The public interest should generally become the starting point in determining the appropriateness of legal education to the national needs and priorities. In general the Lesotho law school has an obligation to provide an opportunity for students to pursue educational programmes designed to:

- (a) develop their understanding of legal theory and its implications to Lesotho society;
- (b) develop their professional skills to enable them to participate meaningfully and effectively in the administration of justice.²⁹⁰

The main focus should be to introduce students to the social dimensions underpinning law and lawyering. The role of clinical scholarship is to teach students to understand and assimilate their professional and public responsibilities in the context of public service.²⁹¹ Students must understand that good lawyering constitutes an essential integral part of the administration of justice.²⁹² Furthermore, they have to understand that in the public service they: (i) must work towards the reform of the justice system to reflect existing

²⁹⁰RK Walsh 'The ABA's Standards For Accreditation of Law Schools' (2001) 51 *J of Legal Education* 427; P Prest & L Krieger 'On Teaching Professional Judgement' (1994) *Washington LR* 527.

²⁹¹ DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89.

²⁹² DJ McQuoid-Mason 'The Law Students' Laboratory: Integrating Clinical Legal and Academic Courses' A Paper delivered at AULAI Conference held in Cape Town on the 21st-23rd April 1995 (on file with author).

socio-economic, moral and social values of Lesotho; (ii) must ensure equitable distribution of legal services among the Basotho society; and above all, (iii) must appreciate their duty to protect fundamental human rights.²⁹³

Generally speaking the Faculty of Law is and will be expected to become socially responsible in the sense that it must not only design curricula that meets national and societal needs, but must also endeavour to have positive direct impact in contributing to the development of the poor communities.²⁹⁴ It is possible that the public is likely to perceive the law clinic as a charitable social institution given the levels of poverty among the Basotho people.²⁹⁵ The law clinic will supplement the national legal aid system and other institutions of public interest law.²⁹⁶ It will be desirable and necessary to educate the members of the public using the services of the law clinic that while the aim of the law clinic is to ensure that they have access to justice, but that the law schools' main objective is to use it to achieve defined educational

²⁹³ In many developing countries (and presumably in the first world) legal representation is still regarded as 'a rich man's thing' despite the fact that it is enshrined in the constitutions of these countries and other instruments proclaiming fundamental human rights. For general observations see M Wallis 'Civil Litigation: Who Can Afford It?' (1996) 9 *Consultus* 121,122, the learned author makes the following interesting remarks:

'For those, the great mass of society, civil litigation is a fearful thing. Far from wanting their day in court the majority of people give thanks if in life-time they can avoid having anything whatsoever to do with the law, the lawyers and litigation.

It is not surprising that lawyers go along with this because these procedures and rituals add up to more billable hours. We justify it to ourselves by saying we are carrying out a professional duty to act in the best interests of our client.'

Jerome Frank once said: 'The lay attitude toward lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its most vital problems, yet concurrently it sneers at them as tricksters and quibblers' (J Frank *Law and Modern Mind* (1970) 3; BF Kristein (ed) *The Philosophy of Judge Jerome Frank: A Man's Reach* (1965) 275.

²⁹⁴ See generally DJ McQuoid-Mason *An Outline of Legal Aid System in South Africa* (1982) 183.

²⁹⁵ See generally C Samford & S Benlowe 'Context and Challenges of Australian Legal Education' in J Goldring, C Samford & R Simmonds (eds) *New Foundations in Legal Education* (1998) xi; J Goldring 'Better Legal Education: An Essential Element of Justice for All' in J Goldring (eds) *New Foundations in Legal Education* (1998) 151, 152. Goldring argues that law schools must assess the demands of justice in society. This must reflect the need for technical competence on the part of lawyers. Lawyers must be able to demonstrate and apply basic legal competence if the legal system is to function properly, efficiently and justly.

²⁹⁶ DJ McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 *Fordham Inter LJ* S111.

objectives.²⁹⁷ In practice these two functions may and do at times compete, with the law clinics being obliged to select and moderate the type and quantity of cases to be accepted to meet pedagogical objectives, whilst at the same time ensuring that they do not abandon the social responsibility of providing legal services to indigent people.²⁹⁸

4.4 Conclusion

In conclusion, the Lesotho law clinic contributes indirectly to the administration of justice by incorporating a curriculum with the primary objective of enhancing professional competence. The idea is simply to sensitize law students about the social effects of law and legal institutions and thereby construct a power base for highly ethical and competent practitioners who appreciate their professional and social responsibilities in the practice of law.²⁹⁹ Such student-oriented and practice-referenced activities must be compatible with the intellectual traditions and social responsibility of law schools.³⁰⁰ The ultimate result is that the Lesotho public will feel confident that administration of justice will exist to serve the public interest when institutions of justice are manned by lawyers who are mindful of social concerns, possess the required repertoire of professional competencies and have high professional ethics. The implication here is that not only will such lawyers be trusted for the value of providing competent legal representation (their

²⁹⁷ PF Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13.

²⁹⁸ E Rekosh, K Buchko & V Terzieva (eds) *Pursuing the Public Interest Law: A Handbook for Legal Professionals and Activists* (2001) 257.

²⁹⁹ See further DJ McQuoid-Mason 'Teaching Social Justice to Law Students Through Community Service: The South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89, 90.

³⁰⁰ JS Elson 'The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?' (1989) 39 *J of Legal Education* 343, 348. Elson argues that doctrinal analysis characterised by law teacher's domination results in shaking students' self-confidence and reinforces the misconception that law has hidden truths that only the brightest can discover. According to him intense doctrinal analysis diminishes creativity towards social utility. It breeds frustration. It tends to disable students from recognising and coping with distinct human and interpersonal dimensions of clients and societal problems.

responsibility to clients), but they will also be expected to strive to promote justice (their responsibility to the administration of justice).³⁰¹

The other important aspect is that the Lesotho law clinic positively contributes to the administration of justice. The law clinic plays a significant role in providing the poor and ignorant Basotho people with legal services. It is hoped that in the near future the law clinic will be able to graduate from being an advice centre to actively represent its clients in the courts of law. Legal representation constitutes a fundamental human right in modern legal theory and the significant role played by law clinics in this regard requires no overemphasis.

It is submitted that the Lesotho law school students can benefit a lot if the law clinic can also import the street law programme run by the universities of South Africa with some modifications to meet the local demands and social issues. The benefit of this programme is that it addresses the legal problems of society at the grassroots level by empowering them to know their legal and human rights. It can benefit law students in that they would actively participate in disseminating information on human rights, consumer rights, HIV/Aids issues and other socio-legal problems that confront the poor on daily basis.³⁰²

There is also a need for the law clinic to represent its clients in the courts of law. In addition to reducing the demand for legal services representation of clients will enable law students to understand the different stages of litigation such as pre-trial conference, discovery, trial and execution of judgment. They may also assist in the drafting of some court documents and participate in activities such as the pre-trial conference.

It stands as challenge to the law clinic to demonstrate a deep commitment to striving for justice by challenging existing social injustices such as inequitable distribution of wealth. It means that it will have to design clinical courses with

³⁰¹ See generally R MacCrate 'Keynote Address – The 21st Century Lawyer: Is the Gap Narrowed?' (1994) 69 *Washington LR* 517.

³⁰² See DJ McQuoid-Mason 'Teaching Social Through Community Service: the South African Experience' in Iya, Rembe & Baloro (eds) *Transforming South African Universities* (2000) 89, 94; DJ McQuoid-Mason 'The Delivery of Civil Legal Aid Services in South Africa' (2000) 24 *Fordham Inter LJ* S111.

sound and clear vision of social justice. The majority of Basotho do not have access to the courts of law because of poverty and ignorance. This stands as a challenge to the law clinic not only to sensitize students about such issues, but also to play a direct positive role in endeavouring to rectify these injustices. A close co-operation with the legal profession, the judiciary and other stakeholders is indispensable in this regard.

Chapter Five

5 Conclusion

5.1 The future of clinical legal education in Lesotho

The Faculty of Law of the National University of Lesotho will soon begin to experiment with clinical legal education in the form of a law clinic as a new method of teaching in the academic year 2003-2004. Law students enrolled in the five-year LL.B will be required to participate in the clinical work and weekly clinical seminars. The attendance and participation will be compulsory and contribute to credit towards partial fulfillment of the requirements of the LL.B degree.³⁰³

The future of clinical legal education in Lesotho faces a number of challenges: The legal profession that is divided in theory but not in practice raises serious doubts about the issue of professional ethics; lack of compulsory postgraduate practical legal training; a high demand for legal services; the environment which makes it difficult for poor and ignorant members of the public to have access to justice because of expensive legal services; lack of (or inadequate) sensitivity about consumer rights, human rights, women and children's rights and other social issues, particularly among poor and ignorant members of society; inequitable distribution of wealth and other social benefits (including other social injustices); increasing numbers of students getting admitted each year to undergo legal training with serious implications for the teacher/student ratios; the problem of the brain drain of academic staff; limited resources (both manpower and financial) with serious implications for the operation and fulfilment of the physical needs of the law clinic; scant scholarly writings about issues of clinical scholarship relating to Lesotho; and the law clinic's role in striking a balance between its teaching mission and its social responsibility. The last includes choosing 'relevant' and 'appropriate' cases to

³⁰³ See Chapter 3 above 54-5.

meet the educational needs of students, and addressing the problem of access to justice.

In view of these challenges the impetus of clinical legal education as a teaching method remains to be seen in the long term. Its effectiveness will have to be evaluated on the understanding that it does not compete with other traditional methodologies of teaching, but rather seeks to complement and supplement them, thus integrating doctrinal knowledge with contextual practical settings. Although the theoretical dimensions relating to skills discourse are still developing clinical work offers exciting opportunities for Lesotho scholars to intensively engage in research on skills training. It is important to briefly examine the following critical issues which challenge clinical legal education in Lesotho: Teacher/student ratios; resources and facilities; heavy student lecture loads; inadequate scholarly writings; the brain drain of staff; access to justice; and the lack of compulsory apprenticeship. Each will be discussed in turn.

5.1.1 Teacher/Student Ratios

The size of law classes is a major problem that the administrators of the National University of Lesotho must seriously address. In recent years there has been a rapid growth in the numbers of students admitted for legal education. For example, in the academic year 2000/2001 80 students were admitted in the common first year. In the academic year 2001/2002 this number more than doubled to 169. Teacher/student ratios must be kept to reasonable proportions for effective learning and teaching through clinical work. Clinical work is time consuming and interactive in nature. With high student numbers and limited staff numbers it is questionable whether the targeted educational goals and outcomes will be achieved. Woolman, Watson and Smith remark as follows:³⁰⁴

³⁰⁴ S Woolman P Watson & N Smith ' "Toto I've a Feeling We're not in Kansas Any More": A Reply to Professor Motala and Others on the Transformation of Legal Education in South Africa' (1997) 114 SALJ 30, 48.

The drawbacks of large classes are primarily twofold. Discussions are hard to handle effectively – either because students frequently cannot hear comments made by other students and cannot track the conversation or because conversations amongst such a large group are difficult to discipline and often degenerate into free-for-alls. The large classes also make time-intensive written assignments difficult to manage – at least for the lecturers.

Ideally a clinical teacher should be able to interact with each and every student under his or her supervision.³⁰⁵ The end result of disproportionate teacher/student ratios is that each student's problems will not be attended to on a personal basis thereby diminishing the educational value of the clinical method.³⁰⁶ It is submitted that the number of clinical supervisors should be increased. In the alternative, the University may consider the option of limiting the number of students admitted each year.

5.1.2 Resources and facilities

To run a law clinic is expensive because it has to measure up to the standards of law offices in terms of facilities and office equipment. Moreover a law clinic requires more space and other facilities such as audiovisual equipment for students' use. This means that clinical programmes are expensive when compared with the traditional methods of teaching such as lectures or tutorials. The Lesotho law clinic is housed in the Faculty premises. The necessary equipment has been purchased such as office furniture, filing cabinets and video cameras etc. In view of the increasing numbers of students in the annual intakes it may become necessary to increase the number of clinical staff from one to two. Alternatively, arrangements could be made for the traditional staff to actively partake in the law clinic's activities as part of their teaching portfolio since most of them run private practices and are qualified to undertake clinical work with law students.

³⁰⁵ See Association of American Law Schools Section on Clinical Education, *Report of the Committee on the Future of the In-House Clinic* of 1990 (1992) 42 *J of Legal Education* 507.

³⁰⁶ See generally U Kumar 'Legal Scholarship in Lesotho' in M Guadagni (ed) *Legal Scholarship in Africa* (1989) 77, 85. Cf H Brayne N Duncan & R Crimes *Clinical Legal Education* (1998) 127.

5.1.3 Heavy student lecture loads

A law student is expected to register for courses whose total credit hours are thirty-six or more.³⁰⁷ This relatively heavy lecture loads may limit participation of students in clinical work and seminars. This problem must be seriously addressed if students are to effectively participate in clinical work and make a meaningful contribution to the seminar programme. It is submitted that some courses may be eliminated from the compulsory list of courses and made electives.

5.1.4 Inadequate scholarly writings

There is scant literature on clinical issues in Lesotho.³⁰⁸ Apart from the problems of accessibility to most international journals on the subject and publication subsidies, which acutely constrain the capacity of staff to research and publish frequently, the very fact that clinical legal education is a new phenomenon explains the reason why there has been such little scholarly writing about skills discourse in Lesotho. Legal educators (both clinical and traditional) will have to focus on researching issues of skills learning and teaching in addition to researching in their fields of specialization. They will have to use the subject matter of clinical legal education, that is, the very skills which they teach, to develop skills scholarship. In this regard it means that there are exciting research opportunities to pioneer work of a scholarly nature on skills training in Lesotho.

The clinical staff may use their experiences and encounters with students as a basis for developing legal skills scholarship on Lesotho related issues. This may necessitate that clinical staff be assisted by their traditional colleagues in

³⁰⁷ National University of Lesotho, *Faculty of Law Students' Handbook* (1999-2000) 31.

³⁰⁸ E.g. PF Iya 'Fighting Africa's Poverty and Ignorance Through Clinical Legal Education: Shared Experiences with New Initiatives for the 21st Century' (2000) 1 *Inter J of Clinical Legal Education* 13; U Kumar 'Legal Scholarship in Lesotho' in M Guadagni (ed) *Legal Scholarship in Africa* (1989) 77.

the supervision of the law clinic's cases with the objective of giving the former an opportunity to engage in research. Alternatively, sabbaticals could be arranged and proper replacements arranged to enable the clinical staff to pursue their research obligations. These issues will require co-ordination at all levels without adversely affecting the students' learning and supervision. In this way clinical staff would be able to meet the tenure requirements of the law school and address the problem of the dearth of skills scholarship.

5.1.5 The brain drain of staff

The National University of Lesotho recently experienced a rapid loss of highly qualified educators in large numbers.³⁰⁹ These educators have left for greener pastures either in the private sector or to join the South African institutions of higher learning. The Faculty of Law has been the hardest hit. For example, since 1997 the faculty has lost nine lecturers. In the academic year 2001-2002 alone the faculty lost a professor, a senior lecturer and a lecturer. A number of reasons have been cited as the cause of this problem such as low salaries, stringent promotion criteria etc.³¹⁰ As mentioned above, for a clinical programme to be effective students' activities require to be closely supervised and monitored. A ratio of 1:10-15 has been recommended as suitable to realize the educational goals of clinical programmes.³¹¹ It is submitted that a ratio of 1:20-25 would be suitable for Lesotho in light of the fact that it is difficult to attract and retain highly qualified staff.

³⁰⁹ Kumar 308 above.

³¹⁰ Kumar (note 308 above) 93. Kumar remarks: 'The Faculty has suffered considerable attrition of local talent as a result [of the requirement of long service before one can be promoted]. In the last five years, the local lecturers – particularly the senior ones – have left for greener pastures at an alarming rate. The professional expertise is in short supply and salaries and promotional avenues outside the University system are far more attractive.'

³¹¹ *Association of American Law Schools Report* (note 305 above) 552. After reviewing its empirical findings the committee concluded: 'Good supervision is the hallmark of any high-quality clinical program. A key factor influencing the ability of a clinician to provide adequate supervision is the teacher/student ratio.'

5.1.6 Access to justice

Most of the people in Lesotho are poor. One of the obstacles to access to justice is that litigation is generally expensive especially in the courts administering the common law. The effect of this is to deter potential litigants from settling their disputes through the judicial system with the result that people may be forced to accept perpetration of injustice or resort to self-help. People use the cheaper traditional Basotho courts (Central and Local Courts) only in matters involving customary law issues. The critical issue is whether the Faculty of Law should respond to this acute need of legal services by training more law graduates, or whether the law clinic should limit the number of cases it handles. It is submitted that the choice to be made will have serious repercussions for the educational goals the law clinic is expected to achieve. It is further submitted that the law clinic should take reasonable cases to meet the educational needs of law students. The other option would be to increase the number of staff in the law clinic and make provision for staff members who will deal solely or mainly with legal problems of the public. The latter suggestion is not likely to appeal to the university authorities particularly in view of the cost implications.

5.1.7 Lack of compulsory apprenticeship

Lack of compulsory pre-admission apprenticeship will require the Faculty to mount intensive practical training programmes to prepare law students to be competent and ethical practitioners and to possess hands-on experience. It is submitted that the faculty should seriously consider requesting the relevant authorities to give students permission to represent clients under supervision in the lower courts.³¹² This will serve as the substitute for the pre-admission practical training option because it will give students first-hand experience about legal representation. In this regard student-practice-rules may be drawn up to regulate the conduct of students-practitioners.

³¹² See generally RK Walsh 'The ABA's Standards for Accreditation of Law Students' (2001) 51 *J of Legal Education* 427.

5.2 General Conclusion

According to McQuoid-Mason.³¹³

The proponents of clinical education claim that it has a variety of advantages: it takes the student out of the classroom, after a long period of “theoretical” education; it develops the student as a “whole” person by exposing him to “real life” frustrations; it requires the student to exercise judgment by distinguishing truth from falsity; it enables the student to see that the law as practised does not operate in clearly defined compartments; it teaches professional responsibility and develops legal skills; it allows a student to reflect on what he is doing and why, under the guidance of an experienced lawyer; it makes a student aware of the practical implications of the legal process and encourages his social consciousness; and it improves the quality of teaching by exposing teachers to “greater student-initiated speculation, criticism and thought.”

In summary, clinical legal education will transform legal education in Lesotho. Clinical legal education fits in with the legal academy traditions in Lesotho. Clinical scholarship will contribute to the development of better administration of, and access to, justice in Lesotho. Lesotho’s legal education has always been characterized by clear inadequacies as far as professional training is concerned. While in other countries such as South Africa the weakness of legal education, in failing to adequately prepare law students for the practice of law, is usually overcome by compulsory postgraduate practical training in the form of apprenticeship, and practical training courses this has never been the position in Lesotho. Although law students have been required to participate in simulations and moot courts, and recently, to serve an internship during long vacations, these initiatives have proved to be insufficient to address the problem of lack of professional skills which an average lawyer must possess in practice. The incorporation of a syllabus whose objective it is to equip law students with professional skills marks a dramatic shift in the

³¹³ DJ McQuoid-Mason ‘Clinical Legal Education: Its Future in South Africa’ (1977) *THRHR* 343, 355 (footnotes omitted); See also DJ McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 204.

curricula of the Faculty of Law. It is hoped that the calibre of law graduates who join the legal profession will serve to highlight the importance of clinical legal education.

It is submitted that the following conclusions can be drawn from this work:

- (a) Clinical legal education is a novel method of teaching in Lesotho. The use of the clinical method of teaching for skills training is widely accepted in most jurisdictions worldwide. It is accepted that in its infant stages the method may present some practical problems but these will be resolved once identified.
- (b) Clinical legal education as a method of teaching faces a number of challenges, some of which require to be addressed urgently, such as large classes and heavy student lecture loads.
- (c) Clinical legal education can play a crucial role in the administration of justice. The fact that the law clinic acts as an advice centre with the possibility of being involved in 'active' practice in future means that it will impact positively on the problem of the high demand for legal services, particularly by the poor. The other important factor is that in the process of participating in the law clinic's activities students will learn fundamental lawyering skills. It is submitted that the Street law programme used by the University of Natal (Durban) offers a good model to be imported with some adaptations for the rest of the first year students.
- (d) Because Lesotho does not have a pre-admission apprenticeship requirement it means that the academic skills training programmes must be intensive. The option of student practice rules must also be seriously considered in order to give students the right of audience in the lower courts so that they can not only practise their skills but also contribute to access to justice.

- (e) The legal profession in Lesotho is divided in theory but this is not so in practice. This presents difficulties as far as the question of ethical responsibility is concerned. This aspect has to be seriously considered with a view to unifying the profession in order to enhance professional responsibility and maintain uniform standards.
- (f) The United States of America, Botswana and South Africa have advanced clinical programmes although these programmes operate differently. South Africa and the USA also have Street law programmes. In the USA law students get admitted straight away after completing their academic studies and board examinations, while in South Africa they have to serve an apprenticeship in the form of articles or pupillage before they get admitted to practise. It is submitted that the operation of clinical programmes in these jurisdictions offers some instructive lessons for Lesotho.

ANNEXURE A

STUDENT'S ATTACHMENT DIARY (See page 57 above)

Name of Student

Week Beginningto

Time	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
7.00						
8.00						
9.00						
10.00						
11.00						
12.00						
1.00						
2.00						
3.00						
4.00						
5.00						

Signature of Student

Signature of Supervisor

Comments (if any) by the Supervisor

.....

.....

NB Students must keep a record of all the activities they perform each hour.

ANNEXURE B

EXTERNAL SUPERVISOR'S FORM (See page 57 above)

NATIONAL UNIVERSITY OF LESOTHO

FROM: HEAD, DEPARTMENT OF PROCEDURAL & ADJECTIVAL
LAW

TO: ALL SUPERVISORS

DATE:

Re: Attachment Programme Assessment Form

This report will be treated as confidential but please indicate whether you are prepared to allow the student in question to see the report.

YES/NO

NAME OF STUDENT (PLEASE PRINT)

NAME OF MAGISTRATE'S COURT/FIRM/OFFICE

STUDENT PERFORMANCE

Please mark the appropriate box with X

GENERAL CONDUCT

	Excellent	V. Good	Good	Average	Poor	V. Poor
Punctuality						
Reliability						
Appearance						
Co-operation						
Integrity						
Behaviour/Courtesy*						
Ability to take instructions						

.....
.....
VALUE OF THE ATTACHMENT PROGRAMME

Excellent	V. Worthwhile	Worthwhile	OK	Marginal	Worthless
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SIGNED:

NAME (Please print)

Please return the form to the Faculty of Law, National University of Lesotho,
as soon as the student has completed attachment.

INTERNAL SUPERVISOR'S FORM

NATIONAL UNIVERSITY OF LESOTHO

FROM: HEAD PROCEDURAL & ADJECTIVAL LAW

TO : ALL COLLEAGUES

DATE :

**ATTACHMENT PROGRAMME
FACULTY SUPERVISION**

NAME OF STUDENT DATE:

NAME OF FIRM/COURT/OFFICE.....

TOWN:.....

GENERAL IMPRESSION:

Please mark the appropriate box with an "x".

	Excellent	Good	Average	Poor	Too early to assess
Overall impression of placement					
Working conditions					
Attitude of firm					
Attitude of student					

SPECIFIC ISSUES: FROM STUDENT

Variety of tasks					
Learning value					
Relevance of course taken					

COMMENTS:

.....
.....
.....
.....

APPENDICES

Appendix A: Questionnaire to the Members of the Legal Profession

Questionnaire (To obtain the views of the Members of the Legal Profession in both the Public and private practice)

In this context public practice includes not only lawyers employed by the government or the public corporations but also those lawyers who do not practise for their own account or in partnership. Learned members this survey is aimed at establishing whether the graduates of the National University of Lesotho are properly trained to meet the challenges of the practice of law. In other words, whether the legal education of NUL measures up to the required standards and if not so, how it can be improved to be relevant for the needs of the administration of justice. Kindly take your time in answering the questions and be as frank as you can be, as this will assist us in reshaping our profession for the benefit of the public and the administration of justice in Lesotho. In case you feel you want to make extra comments they will be welcomed and you can do so in a separate sheet if you are of the feeling that the space provided is inadequate. Tick the appropriate answer by shading or circling it.

1. Are you a private or public practitioner?
2. How long have you been in practice?
3. Are you a successful lawyer? (Optional) 1.No 2. Yes 3. Uncertain 4.Not sure 5.Don't know
4. Were you confident when you first confronted a legal problem in practice 1. No 2. Yes
If no what made you so uneasy?
5. Are you an attorney or advocate? If you are an attorney did you serve articles of clerkship? 1.No 2.Yes
6. Do you think we should introduce the pupillage system as is the case in South Africa?
1. No 2. Yes Why?

7. Do think the National University of Lesotho graduates are properly trained for the practice of law 1. No 2. Yes If no why?

8. What do you think NUL should do to improve its legal education? Do you think the system of internship and moot courts is sufficient to prepare graduates for the practice of law? 1. No 2. Yes Please provide reasons for your answer below.

[Empty response box]

9. Do you think the current legal practice measures up to the required standards e.g. those obtaining in South Africa or United Kingdom? 1.No 2. Yes
10. If you are an attorney have you ever briefed advocates from South Africa? 1.No 2. Yes If so why?

[Empty response box]

11. If you are an advocate do you ever consult clients and get instructions directly from them? 1.NO 2. Yes
12. If answer to 11 is yes, do you even go to the extent of charging them? 1.No 2.Yes If no, how do you get paid for your services?

[Empty response box]

13. If you do neither of 11 nor 12 have you heard of instances where advocates consult and get instructions directly from the lay clients? 1.No 2.Yes
14. In your opinion, does the Law Society does what it is supposed to do in terms of the law? 1. NO 2.Yes If no what do think makes it lax?

[Empty response box]

15. Should the professions of attorney and advocate be merged and why? 1.No 2. Yes

[Empty response box]

16. Would you recommend that NUL proceed with programme of clinical legal education? 1.NO 2. Yes If no or yes why?

[Empty response box]

17. Do you think NUL has any role to play in the administration of justice? 1. No 2. Yes If so how?

[Empty response box]

18. Do you think the legal profession measures up to the highest possible ethical standards 1.No 2. Yes

19. Does the Law Society, in your view, uphold the ethical standards expected of the legal practitioners? 1. Yes 2. No 3. Don't know 4. Not sure
20. What you think the Law Society should do to ensure that all practitioners observe high ethical standards?

21. Is there any other thing you would like to say about the legal profession and what the role of NUL should be in improving its graduates? If so, please feel free to indicate below:

Appendix B: Questionnaire to Members of the Public

Questionnaire (To obtain the perceptions of the public about the Legal Profession in Lesotho)

In this survey we want to find out about the perceptions of the public regarding the services they get from the lawyers in Lesotho. The important thing is to provide brief but concise answers that will enable us to understand your feelings about the legal profession. Kindly, therefore, take your time in answering the following questions. They are important for the improvement of the profession for the benefit of the public and the administration of justice. Where you feel you want to make suggestions of any sort they will be very much appreciated and it would not matter for that matter even if you attach a separate extra sheet. Please tick the appropriate answer by shading or circling it.

1. Do you use the services of lawyers when you have a dispute or for any other purpose? 1. No 2. Yes. If so, how often? a) rarely b) regularly c) on every problem
2. Did you find the services worth the money you paid? 1. No 2. Yes
3. If the answer to question 2 above is No, how did the lawyer treat you and why do you think he did what he did?

4. Do you think that our lawyers are properly trained? 1. Yes 2. No
5. Do you think the National University of Lesotho trains good lawyers? 1. No 2. Yes
6. Do you think lawyers are determined to see justice done in all the cases they handle? 1. No 2. Yes
7. If the answer to 6 above is No, why do think they behave as they do?

8. Do you think our lawyers measure up to the required standards of practice e.g. if you compare them with South African lawyers or lawyers from any country that you know? 1. No 2. Yes
9. Have you ever used lawyers from South Africa or any other country 1.No 2.Yes . If yes Why?

10. If you were to choose between a South African and Lesotho Lawyer, which one would you choose and why?

11. Do you think the administration of justice in Lesotho measures up to the standards or expectations of the people? 1.No 2.Yes If no why?

12. Do you think the National University of Lesotho has any role to play in the administration of justice? 1.No 2. Yes If yes how? (that is, what can it do?)

[Empty rectangular box for response]

13. What do you think should be done to improve the administration of justice in Lesotho?

[Empty rectangular box for response]

14. Do you think the graduates of the National University of Lesotho should become lawyers immediately they complete their studies as is currently the practice? 1.No 2.Yes If no why?

[Empty rectangular box for response]

15. Do you think the graduates should first be taught lawyering skills (the practice of law) for at least a certain period before they are allowed to go on their own and offer legal services to the people? 1. No 2. Yes

16. Do you have any other comments or suggestions you would like to make regarding the lawyers and the role of the National University of Lesotho in their training? If so, feel free to include them below.

[Large empty rectangular box for response]