

# RE-VISIONING LEGAL EDUCATION IN SOUTH AFRICA: HARMONISING THE ASPIRATIONS OF TRANSFORMATIVE CONSTITUTIONALISM WITH THE CHALLENGES OF OUR EDUCATIONAL LEGACY

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## 1 INTRODUCTION

This paper addresses the imperative to align the education of South Africa's lawyers with the project of transformative constitutionalism. The obligation to change the essential character and methodologies of legal education, to equip law graduates to participate in the ongoing project of constitutionalism, carried immediate implications for curriculum reform and the training of lawyers in the late 1990s. Now, after twenty years, with the wisdom of hindsight and experience, it is appropriate to review whether legal education is meeting the challenges of producing law graduates with the requisite attributes and skills to fulfil the pivotal role that they are required to play in advancing constitutional democracy.

This appraisal cannot be accomplished without a careful consideration of who our students are and how we address systemic obstacles to the achievement of transformative legal education. The historical legacy of unequal educational opportunities and a deficient secondary schooling system demand creative and pragmatic approaches to effect a harmonisation of the aspirational ideals of post-apartheid legal education within the context of higher education in South Africa in 2014.

A review of the history and current state of legal education in South Africa will first be undertaken to frame the racial disparities and the regulatory context in which legal education exists. Thereafter, critical perspectives that have informed a vision of transformative legal education will be considered. Against this background, the reality of the present condition of higher education in South Africa will be discussed in order to highlight the challenges of providing legal education that is equitable and fit for purpose. Finally,

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pedagogical strategies to address systemic fractures and obstacles will be proposed in order to develop recommendations for the future.

## 2 HISTORICAL ORIGINS OF LEGAL EDUCATION

In order to understand the features that characterise legal education today, I will first outline the historical background. The earliest legal qualification offered in law in South Africa was the Law Certificate, which was taught informally by practitioners and was made a pre-requisite for practice at the Cape in 1858.<sup>2</sup> Formal university teaching of law began when a Bachelor of Laws (LLB) degree was introduced at the University of Cape Town (UCT) in 1859.<sup>3</sup> This degree was subsequently offered at a growing number of universities established in other regions of the country.

The practical training of attorneys was regulated by the Attorneys, Notaries and Conveyancers Admission Act, enacted in 1934.<sup>4</sup> This statute required law graduates to complete two years of articles of clerkship, prior to being admitted to practice as an attorney. Graduates wishing to be admitted as advocates, who appeared in the high courts, were required to complete a period of pupillage, under the close tutelage of a practicing advocate, before writing a bar examination.<sup>5</sup>

By the 1970s, three law degrees were offered at South African universities. First, most law faculties offered the LLB degree, which by then was a two- or three-year postgraduate degree, which followed a Bachelor of Arts or other undergraduate degree, and qualified graduates for practice in both the higher and lower courts. Secondly, some faculties offered a four-year undergraduate degree, the Baccalaureus Procuratoris (B Proc),

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<sup>2</sup> Act 4 of 1858 and Act 12 of 1858 were passed by the Cape Parliament to establish a Board of Public Examiners and to regulate the admission of candidates to practice.

<sup>3</sup> Denis Cowen & Daniel Visser *The University of Cape Town Law Faculty, A History 1859-2004* (2004) 22.

<sup>4</sup> Attorneys, Notaries and Conveyances Admission Act 23 of 1934 (*repealed* by the Attorneys Act 53 of 1979 and *amended* by the Qualification of Legal Practitioners Amendment Act 78 of 1997).

<sup>5</sup> Rule 8 (*amended* 2012) of the General Council of the Bar, Uniform Rules of Professional Ethics, available at [http://www.sabar.co.za/ethics\\_rules.pdf](http://www.sabar.co.za/ethics_rules.pdf), accessed on 11 October, 2014.

which qualified graduates for practice as attorneys only.<sup>6</sup> Thirdly, a few faculties offered the three-year Baccalaureus Juris, (B Juris) which qualified graduates for practice only as civil servants (prosecutors and magistrates) in the lower courts.

Under apartheid, separate education, including university education, was provided for students according to their racial designation, with separate institutions established for 'white', 'black', 'Indian' and 'coloured' (mixed race) persons.<sup>7</sup> The historically 'black' universities (HBUs) were under-resourced and inconveniently located in rural areas, so that the quality of the education provided was not comparable to that offered at generally urban historically 'white' universities (HWUs). The abridged law qualifications were typically offered at HBUs, while HWUs offered only the LLB degree that required a minimum period of study of five years.<sup>8</sup>

A small number of black students were permitted to attend white universities if they obtained permission from the Minister of Education to do so.<sup>9</sup> This separation perpetuated a sense of different quality degrees for different races and impacted graduates' abilities to obtain employment in top law firms. The cost of a postgraduate education, as well as the difficulties of obtaining articles or affording a period of pupillage, whilst not earning, excluded the majority of aspiring black lawyers from entering private legal practice.

The late Chief Justice, Pius Langa, in his submission to the Truth and Reconciliation Commission (TRC), described the many indignities suffered by black lawyers, in being prevented from obtaining chambers near to the courts and being excluded from advocates'

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<sup>6</sup> The minimum entry requirements for the attorneys' profession were promulgated in the Attorneys' Act 53 of 1979, s 2. The minimum entry requirements for advocates were promulgated in the Admission of Advocates Act 74 of 1974, s 3.

<sup>7</sup> University Education Act 45 of 1959 (*repealed*).

<sup>8</sup> Lesley Anne Greenbaum *The Undergraduate Law Curriculum: Fitness for Purpose?* (unpublished PhD thesis, University of KwaZulu-Natal, 2009) 23.

<sup>9</sup> Phillip F Iya 'The Legal System and Legal Education in Southern Africa: Past Influences and Current Changes' (2001) 51 (3) *Journal of Legal Education* 355 at 358.

robing rooms.<sup>10</sup> The all-pervasive exclusion, on a systemic basis, of black South Africans from superior quality legal education and the upper reaches of the legal system served to provoke resistance and protest, as well as a burning urgency to ameliorate the inequalities.

As Dhlamini observed in 1992:

‘[O]ur legal education in South Africa was strongly influenced by the governmental policy of apartheid. This policy was not based on the idea of justice, and it had an effect on our approach to law, as well as on the relationship between law teacher and law student. As a result, our legal education was riddled with contradictions, anomalies and inconsistencies. There are various ways whereby our legal education either bolstered apartheid or was influenced by it.’<sup>11</sup>

It was inevitable that the effects of a positivist approach to law, which enabled the enactment of racist legislation while claiming adherence to the rule of law, albeit in its most impoverished and formalist interpretation, would percolate down through the teaching of ‘black letter’ law at universities. Although opposition to the apartheid regime was a clarion call to academics at some liberal ‘white universities’, it is clear from the legal academics’ submission to the TRC in 1995 that the majority of law academics were complicit in sustaining the apartheid legal system, whether out of fear or genuine support for Nationalist Party policy.<sup>12</sup> The views of some notable activist academics including Dugard, Mathews, Van Niekerk, McQuoid-Mason and Suttner in the 70s, and later Cameron, Corder, Davis, Haysom, Cheadle, Thompson and Mureinik ensured their unpopularity in government circles.<sup>13</sup> Failure to criticise, oppose and speak out against the injustices of the legal system, to support students and colleagues who were expelled or detained, or to engage with

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<sup>10</sup> Truth and Reconciliation Commission Submission by the Society of University Teachers of Law and Certain Law Schools in ‘The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal Academics, Written Representations’ 115 *S. African LJ* (1998) 15 101.

<sup>11</sup> C Dhlamini “The law teacher, the law student and legal education in South Africa” 109 *SALJ* 595 598.

<sup>12</sup> Op cit note 10.

<sup>13</sup> Author’s discussions with Professor Hugh Corder and Judge Dennis Davis (UCT, September 2014).

historically black universities were culpable omissions for which the Law Teachers' Society apologised to victims of apartheid. In the TRC Report, it was observed that:

'Legal education and training had been largely uncritical of unjust legal dogma and practice. Those few academics who had dared to speak out had received insufficient support from their colleagues and institutions. This was not particularly unusual in international terms and students needed to be familiar with current legal rules in order to be equipped to practice law.'<sup>14</sup>

### 3 TRANSITION TO DEMOCRACY 1994

With the transition to democracy in 1994, came an urgent call to transform the legal professions and legal education. There was no doubt that the legal system had to develop 'a system of justice which is effective, efficient and accessible....legitimate, credible and accepted by our people....consistent with the values of a civilized and democratic society.'<sup>15</sup>

It is estimated that in 1994, 85% of the legal profession in South Africa consisted of white lawyers. At that time, there were only four black judges and two female judges on the bench.<sup>16</sup>

Law curricula reflected the concerns of the economically dominant white population, with emphasis placed on commercial subjects.<sup>17</sup> Scant regard was had to issues such as

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<sup>14</sup> Report of the Truth and Reconciliation Commission, 'Institutional Hearing: The Legal Community' vol 4, chapter 4, 96-7.

<sup>15</sup> Minister Dullah Omar, Speech made at University of South Africa Law Faculty on 2 March, 1999, page 3. Quoted in Greenbaum op cit note 8 at 22.

<sup>16</sup> David McQuoid-Mason 'Transforming Legal Education for a Transforming Society: The Case of South Africa' (2008) Paper delivered at International Conference on the Future of Legal Education, Georgia State University available at <http://law.gsu.edu/FOLEC/ppt/Friday%20220208/McQuoid-Mason220208.ppt> accessed on 11 October 2014.

<sup>17</sup> D McQuoid Mason "Developing the law curriculum to meet the needs of the 21<sup>st</sup> century legal practitioner: a South African perspective" (2004) 1 *Obiter* 101.

customary law, poverty, social justice, or the lack of access to the legal system that affected the majority of the population.<sup>18</sup>

The debates on developing an appropriate qualification for legal practice, to promote transformation objectives began in 1995. The motivations were to reduce the cost of qualifying as a lawyer, to improve access and representivity in the professions, and to eradicate the perceived differential quality of the various law degrees. A single four year undergraduate degree was strongly supported by the new ministry of justice and the Black Lawyers' Association (BLA), while the historically disadvantaged universities (HBUs) raised the impediments of inadequate resources and facilities to train the number of law graduates required to serve their communities.<sup>19</sup>

No theoretical considerations were given to nor prior research undertaken about the pedagogical soundness of this step.<sup>20</sup> From interviews with several Deans who were involved in the participatory process, it appears there was a reluctance to embrace this new dispensation. However, anxiety about 'lowering standards' and producing inferior quality graduates was overshadowed by the groundswell of support by other stakeholders.

The Qualification of Legal Practitioners Amendment Act of 1997<sup>21</sup> required all universities to introduce a four-year undergraduate LLB degree, with agreement by Law Deans on the 26 'core courses' that would be incorporated into the curricula, to be designed by each university. It was believed that the changed legal framework in South Africa, founded upon a Bill of Rights as part of a supreme Constitution, would ensure that law curricula were infused with a pervasive human-rights and social justice discourse.

The importance of academic freedom, motivated by recollections of a recent past in which the apartheid government had imposed its dictates on all (state-funded) higher education institutions and interfered with the autonomy of university teaching, was central

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<sup>18</sup> Dhlamini. Note 10 above at 598.

<sup>19</sup> Professor Bongani Majola (University of the North). 1995 Legal Forum on Legal Education Proceedings, Cape Town, April 21, 22. pp. 33-35.

<sup>20</sup> S Woolman, P Watson, N Smith 'Toto, I've a feeling we're not in Kansas anymore. A Reply to Professor Motola and Others on the Transformation of Legal Education in South Africa' (1997) 114 (1) *SALJ* 30 44.

<sup>21</sup> Act 78 of 1997.

to this discourse. Many law lecturers had experienced incidents of police 'spying' activities on liberal university campuses and the intimidation and banning of activist academics. One prominent lawyer at the consultative forum that preceded the introduction of the new degree reminded delegates:

'One (because of the grievously attenuated system of university independence because of what happened in the 50s and 60s) had to guard against imposing a sort of centralised regime of university education and attempt to dictate universal curricula, whilst removing the ability of the universities to determine for themselves what they found appropriate in particular circumstances.'<sup>22</sup>

#### 4 PERSPECTIVES ON THE IMPACT OF TRANSFORMATIVE CONSTITUTIONALISM ON LEGAL EDUCATION

Before advancing further on how the implementation of a new vision of legal education proceeded, it is instructive to glean from some seminal texts the meaning of transformative constitutionalism and its implications for legal education.

Writing in 1998, at a time when the new LLB was being introduced, Karl Klare explained the notion of transformative constitutionalism as 'a long-term project' aimed at 'transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction... (connoting) an enterprise of inducing large scale social change through non-violent political processes grounded in law.'<sup>23</sup>

Klare's identification of a 'disconnect or chasm' between the conservative legal culture, and the transformative imperatives of a post-liberal constitution, lead him to recommend a 'transformation or leavening' of the legal culture and legal education.<sup>24</sup> By legal culture, Klare referred to the 'professional sensibilities, habits of mind, and intellectual

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<sup>22</sup> J Gauntlett: Proceedings of the Legal Forum on Legal Education, (1995) Cape Town, 21-2 April: 45. Copy on file with the author.

<sup>23</sup> Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 150-1.

<sup>24</sup> *Ibid* at 170.

reflexes' of lawyers. He identified the 'cautious traditions of analysis', 'reverence for law' and other conservative discursive practices, such as formalist, technical and literalist interpretations, which ought to be replaced with new methodologies appropriate to the transformative aspirations of the Constitution.<sup>25</sup>

Justice Moseneke similarly described South African legal culture prior to 1994 as 'homogenous, conservative and predictable', informed by 'inflexible legal positivism'.<sup>26</sup>

In an address entitled 'Transformative Constitutionalism', presented by the late Chief Justice Pius Langa in 2006, of the five challenges enumerated as obstacles to transformation, legal education and the transformation of legal culture featured prominently.<sup>27</sup> In focussing on legal education, Justice Langa stressed that the education of lawyers for the new Constitutional era must ensure that the graduates move beyond the traditional canons of knowledge of legal principles and the development of analytical arguments.<sup>28</sup> Over and above those established features of a legal education, graduates must be committed to implementing the values central to the Constitution, so that they permeate every aspect of legal practice. He specified: critical engagement with these values, rational justifications for decisions and an appreciation of law in context as part of the required 'change in mind-set'.<sup>29</sup>

The principles enshrined in this vision of legal education are summarised by Dennis Davis as: a knowledge of legal principles and skill in analytical argument; the notion that a critical engagement with inherited law, in light of Constitutional values, is required; an understanding that the legal system 'shapes the social and economic fabric of society'; and, inasmuch as law was used as an instrument of oppression in the past, its potential to transform society in accordance with the foundational values of the Constitution must be

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<sup>25</sup> Ibid at 171.

<sup>26</sup> D Moseneke 'Transformative Adjudication' (2002) 18 *SAJHR* 309 at 316.

<sup>27</sup> Pius Langa 'Transformative Constitutionalism' (2006) 3 *Stell L R* 351 at 354.

<sup>28</sup> Ibid at 356.

<sup>29</sup> Ibid.

realised.<sup>30</sup> Thus a need to transform the preparation of lawyers for practice under the Constitution seemed mandatory.

Responding to Klare and Justice Langa's challenges, a new theoretical framework for 'transformative legal education', was proposed by Quinot in 2012.<sup>31</sup> His framework posits three legs on which to establish a revised legal education paradigm: (i) a complete re-examination of the subject matter (the 'what') that is taught; (ii) the adoption of theoretical insights from the constructivist pedagogical approach, to change the 'how' of what is taught; and (iii) a consideration of the implications of the 'digital revolution' for teaching and learning in an educational context that is characterised by diversity.<sup>32</sup> An emphasis on the use of information and communication technology forms an integral element of this forward-looking approach to legal education.

Quinot argues for 'open engagement with substantive values in justifying legal outcomes' in the teaching of law.<sup>33</sup> He advocates the adoption of new legal methods and value-based substantive reasoning approaches, the inclusion of matters of morality, politics and policy, and an emphasis of law in the context of South African society.<sup>34</sup> In his view, a necessary awareness of legal plurality, inter-disciplinary knowledge and the fostering of creativity, should effect a change in the culture of legal educators too.<sup>35</sup>

## 5 THE CURRENT STATE OF LEGAL AND HIGHER EDUCATION

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<sup>30</sup> D M Davis 'Legal Transformation and Legal Education: Congruence or Conflict?' Paper presented at the *UCT Acta Juridica Conference in Honour of Former Chief Justice Pius Langa* 16-17 January 2014, Cape Town.

<sup>31</sup> G Quinot 'Transformative Legal Education' (2012) 129 *SALJ* 411.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid* at 411.

<sup>34</sup> *Ibid* at 415.

<sup>35</sup> *Ibid.*

In 2014, the LLB degree is offered at seventeen Law faculties.<sup>36</sup> Of these universities, five are historically Black institutions, and six formerly had Afrikaans as the language of instruction. These Afrikaans medium universities now offer instruction in various combinations of Afrikaans and /or English. All law faculties appear to offer a core curriculum of courses that are aimed at the achievement of the 'exit level outcomes' for the LLB, as prescribed by the South African Qualifications Authority (SAQA), which administers the framework for accredited degrees.<sup>37</sup> There is no accreditation nexus between the legal profession and the universities offering the LLB degree.

Criticisms of LLB graduates from all stakeholders in legal education have become strident over the past few years: the judiciary, the legal professions, employers of law graduates and academics.<sup>38</sup> Graduates' poor literacy and numeracy skills have been the focus of the complaints, which lead to a summit meeting, 'Legal Education in Crisis' in May 2013. The outcomes of this meeting between representatives of the academy, the legal professions, government legal services departments and employers of law graduates were the establishment of a National Task Team to consider options for improving legal education, and the appointment of a working group of legal academics and representatives of the Council for Higher Education (CHE), to develop a set of standards to be achieved by all LLB graduates.<sup>39</sup>

The Preamble to the standards-setting document makes clear that the constitution is transformative and seeks to introduce a new ethos that should permeate our legal system, and therefore legal education cannot be divorced from transformative constitutionalism.<sup>40</sup>

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<sup>36</sup>Georgina Pickett *'The LLB Curriculum Research Report'* (2010) 11.

<sup>37</sup> *Ibid* at 3.

<sup>38</sup> C Van Niekerk 'The Four Year Undergraduate LLB: Where to from here?' (2013) *Obiter* 533.

<sup>39</sup> <http://www.lssa.org.za/upload/LLB%20SUMMIT%20PRESS%20RELEASE.pdf>, accessed on 29 September, 2014.

<sup>40</sup> Council on Higher Education Bachelor of Laws Standards Statement (Draft, Version 5). Copy on file with the author.

The draft document enumerates a range of knowledge outcomes, skills outcomes, such as critical thinking and research capabilities, and applied competencies such as ethics and integrity, communication and literacy, numeracy, information technology, problem-solving, teamwork and skills to transfer knowledge.<sup>41</sup> The standards are being debated by academics and representatives of the professions at various regional fora at the moment.

Although the document is thought to be uncontroversial, already some academics have questioned the outcome of students having ‘a commitment to the values and principles of the Constitution’ as being impossible to assess, and perhaps in need of modification to a term such as ‘an appreciation of’ these values. Of concern is the unspoken view, also anecdotal, that the standards are unattainable at institutions which are poorly resourced, which have high student enrolments, and small numbers of staff, many of whom are relatively inexperienced educators. The challenge that besets many of these universities is that they are under pressure to increase access to ‘first generation’ students, who very often have suffered severe educational and economic disadvantage, whilst being constrained by severely limited resources.

The South African student coming into university today is typically one of the ‘born-free’ (post-1994) generation. Although many of them might not have personally experienced the dehumanising racism of apartheid, the legacy of disadvantage and the scarring effect of a dehumanising racialised past cannot be erased on multiple levels. At university level, the historical legacy of a poor and unequal public schooling system remains the most serious obstacles to success in tertiary studies. In the past, the term ‘under-preparedness’ has been used to describe the discrepancy between the standards and levels of reading, writing and critical engagement taught at schools, and the demands of a university education. This ‘articulation gap’, at the crucial interface between these two phases of education, is a more useful term which captures the complexities of the systemic problem and emphasises the need for bridging strategies to facilitate this transition.<sup>42</sup> Although the articulation gap may be infinitely more serious

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<sup>41</sup> *ibid.*

<sup>42</sup> Council on Higher Education ‘A Proposal for Undergraduate Curriculum Reform in South Africa: The Case for a Flexible Curriculum Structure’ August 2013, available at

for students who have attended resource-deprived and disadvantaged schools, most often studying in a language which may be their second or even third language, there is also a sense that, even for students who have English as a first language and have attended 'privileged' schools, the schooling system is failing to prepare them adequately for university studies.

To consider legal education in 2014 in its broader context, it is necessary to review the national higher education terrain and to consider issues of transformation of the sector and then the legal profession. Higher Education South Africa (HESA), comprising the vice chancellors of 23 higher education institutions, recently presented a critical reflection of the achievements and challenges of the sector in the 20<sup>th</sup> year of democracy to the Parliamentary Committee on Higher Education.<sup>43</sup> They highlighted the following aspects:

- In 1993, the gross participation rate, meaning the total enrolment in higher education as a proportion of the 20-24 age group, was 17%, with the participation rates skewed completely by race in that 9% of Africans of that age, 13% of coloured (mixed race) youth, 40% of Indian youth and 70% of white youth were enrolled in higher education.<sup>44</sup> At a time when black South Africans (including Indians and Coloureds) constituted 89% of the population, they comprised 52% of the total of all university students, and whites, who comprised 11% of the population, comprised 48% of all university student enrolments.<sup>45</sup>

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[http://www.che.ac.za/media\\_and\\_publications/research/proposal-undergraduate-curriculum-reform-south-africa-case-flexible](http://www.che.ac.za/media_and_publications/research/proposal-undergraduate-curriculum-reform-south-africa-case-flexible), accessed on 13 October 2014.

<sup>43</sup> Higher Education South Africa: 'South African Higher Education in the 20<sup>th</sup> year of democracy: Context, achievements and key challenges' Cape Town, 5 March, 2014, available at: [http://www.hesa.org.za/sites/hesa.org.za/files/HESA\\_Portfolio%20Committee%20Presentation\\_5%20March%202014\\_Final.pdf](http://www.hesa.org.za/sites/hesa.org.za/files/HESA_Portfolio%20Committee%20Presentation_5%20March%202014_Final.pdf), accessed on 27 September, 2014.

<sup>44</sup> As distasteful as the use of these apartheid racial categories may be, much data available continues to employ these designations in order to provide a detailed and nuanced analysis of how different race groups have experienced equity developments that have taken place since 1994. Where necessary, I have specified the disaggregation of data into particular race categories.

<sup>45</sup> Council on Higher Education 'Higher Education in the First Decade of Democracy' (2004) Pretoria.

- By 2011, black students, that is, African, Indian and Coloureds, comprised 81% of all university students, which is attributable to increased access to tertiary education, financial aid to students who cannot afford tuition fees and a variety of redress and equity strategies. However, the participation rates of the 20-24 age group has not improved significantly: in 2011 it had reached 17.3%, with African youth participation having increased from 9% in 1993 to 14% in 2011. In contrast, the participation rates of Indian and white students in 2011 were 47% and 57% respectively.<sup>46</sup> In the 2013 matriculation exams, only 30.6% of the school learners obtained university entrance passes, which currently requires a 43% average in six subjects.<sup>47</sup> Concern is expressed that ‘the sector is not able to accommodate a higher and more equitable proportion’ of those social groups that have been historically disadvantaged and under-represented in higher education.<sup>48</sup>
- The national undergraduate success and graduation rates have yet to attain projected goals: a target national norm was set at 80%, which was exceeded by white students at 82% in 2010, while for African students the graduation rate was 72%. The throughput and drop-out rates for students by race, for a three year undergraduate degree beginning in 2005, was: 16% of African students graduated in the minimum time; 41% graduated after six years and 59% dropped out. Comparable statistics for white students showed that 44% graduated in the minimum time; 65% graduated after six years and 35% dropped out.<sup>49</sup>
- The demographic composition of university staff reveals that patterns of inequality continue: in 2012, of 17,451 academics in South Africa, 53% remain white and 55%

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<sup>46</sup> Council on Higher Education VitalStats: Public Higher Education, 2011 (January 2014), available at [http://www.che.ac.za/media\\_and\\_publications/monitoring-and-evaluation/vitalstats-public-higher-education-2011](http://www.che.ac.za/media_and_publications/monitoring-and-evaluation/vitalstats-public-higher-education-2011), accessed on 13 October 2014.

<sup>47</sup> Jeanne van der Merwe & Sipho Masondo ‘24% of matrics would have passed if pass mark was 50%’, available at [Http://www.citypress.co.za/news/24/](http://www.citypress.co.za/news/24/), accessed on 10 October 2014.

<sup>48</sup> I Scott, N Yeld & J Hendry ‘A Case for Improving Teaching and Learning in South African Higher Education’ (2007) *Higher Education Monitor no 6* Pretoria: Council on Higher Education.

<sup>49</sup> Op cit note 42.

are male, while 14% are African. The difficulty of developing a new generation of academics that is representative of the broader society remains a significant challenge for higher education.<sup>50</sup>

- A substantial improvement in equity of opportunity and outcomes for black students remains to be achieved. Much of the growth in black access has been negated by a system that is unable to effectively support and provide reasonable opportunities for success to its students.<sup>51</sup> Systemic features still replicate many of the apartheid inequalities such as gender, race and class that have implications for social mobility.

Cooper, in a paper entitled: 'Social justice and South African university student enrolment data by race' describes the progress of Africanisation of universities from being 'a skewed revolution' to a 'stalled revolution.'<sup>52</sup> During the 90s, a significant number of African students entered what had previously been universities designated for Indian or Coloured students, while a partial but uneven Africanisation of the student body at ten historically white universities took place. An absolute decline in student enrolments occurred at historically black universities located in previous 'homeland' areas.

The post 2000 higher education system, Cooper argues, 'has become more elitist than pre-1994, with class now performing a major stalling of the revolution.' The legacy of apartheid schooling carries over into skewedness in choices of universities by African students. Africans from middle and upper class families began to flow into higher-fee paying formerly white schools in previously white areas, and now prefer to enter HWUs. As one of the political compromises in 1994, the Constitution permitted every parent school board to set school fees particularly to hire additional teachers, with the result that the fees at historically privileged white middle to upper class white schools rocketed and are accessible

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<sup>50</sup> Op cit Note 43 8.

<sup>51</sup> Scott et al op cit note 43 at 19.

<sup>52</sup> David Cooper 'Social Justice and SA University Student Enrolment Data by Race, 1988-1998-2008: From "Skewed Revolution" to "Stalled Revolution" And could research-based policy interventions have made a difference to these developments?' Paper presented at Higher Education Close Up 7, International Research Conference, University of Lancaster, UK, 21-23 July, 2014.

only to upper and middle class scholars, whatever their racial designation. There is however a means-based rebate for schools who admit students who cannot afford their fees.

Cooper categorises universities into three bands: (i) Five elite 'research-intensive' universities where Africanisation appears to have slowed down and even dropped at three of the top five universities. However, the number of foreign black students from the rest of Africa has increased considerably, and thus, on campus, demographics to indicate this 'stalled revolution' are not always apparent. (ii) A middle band of seven 'average' universities, and (iii) a lower band of 11 disadvantaged universities, except for one previously reserved for Coloured students in the Western Cape, all now have a clear majority of African students. In the lowest band, the African population at these institutions is between 85% and 95%, indicating that no 'deracialisation' of their student bodies has occurred.<sup>53</sup>

## 6 LEGAL EDUCATION

Data relating to law students shows that of the number of law students who registered for the four year undergraduate LLB degree in 2006, only 27% completed in the minimum four year period; a further 14% took an additional year, and 6% took six years to complete the degree. 54% of students who enrolled for the degree left without obtaining a qualification.

What this data reveals is that the purpose of decreasing the duration of the LLB degree to reduce the cost of studying to students has not been realised. The reality is that the majority of aspiring lawyers who register for the LLB drop out, while only 26% of them complete the degree within the minimum four year period.

The burden of student loans and the concomitant need for students from disadvantaged backgrounds to gain employment immediately after graduating, often to support family or community members, who have made enormous sacrifices to enable them to study, imposes significant pressure on students to graduate as quickly as possible.

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<sup>53</sup> Ibid.

These financial obligations also operate as a factor determining many students' post-university career trajectories.

Statistics reflecting first year, first time registrations of LLB students in 2014 indicate that 70% of the students are African students and 59% are women.<sup>54</sup> Of the 2013 LLB graduates 54% are African while 56.4% are female. For the current year 58.5% of students enrolled in their final year are African, while 57.3% are women. 15% of the students registering for the degree are white, while 28.9% of graduates in 2013 were white. This data shows a significant improvement in the demographic composition of law students. However, it would appear that African students are not as successful in completing their studies, but there is a time lag of four years in these data, so it is likely that the completion rates of African students should improve, considering the high enrolment numbers of African students in 2014.

The demographics of the legal profession reflect quite a different reality: in the attorneys' profession in March 2014, 63% are white, while 21% are African; 36% are women. In the advocates' profession 71% are white, 16.9% are African and 24% are female. In summary, while registration of LLB students appears to be increasingly more representative of the population demographics, the current membership of the professions remains racially skewed.

Judge Mojapelo in an address to the Limpopo Law Council in 2012 reviewed the transformation data in terms of the legal profession, noting that the overall representation of black lawyers in the legal profession has moved in the past 20 years from 10% to 33%.<sup>55</sup> Racial transformation of the judiciary however has gone much faster: black judges constitute 66%, and whites 34%. (71.7% are males, 28.7% females).<sup>56</sup>

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<sup>54</sup> Law Society of South Africa, Legal Education and Development (LEAD) 2013/ 2014 Statistics.

<sup>55</sup> Judge Phineas Mojapelo 'Transformation, independence and "Poor Products of the LLB"', Address to the AGM of the Limpopo Law Council in Polokwane (2012), available at <http://www.saflii.org/za/journals/DEREBUS/2012/101.pdf>, accessed on 13 October 2014.

<sup>56</sup> Ibid.

The judge commented that although he had been a proponent of the attenuated LLB degree, he now openly acknowledges that it has not worked and has not produced the products that were expected. He states that we have produced quantity, but not quality, with many lawyers being 'barely able to utter a few coherent sentences', and unable to 'articulate the case of their clients'.<sup>57</sup>

In similar vein, Judge Bosielo, an acting Constitutional Court judge at the time, at a summit meeting of stakeholders on the 'Crisis in Legal Education' (May 2013) commented:

'While I participated actively in the wide-ranging debates that took place in the late 90s, which culminated in...the four year LLB, there has been a "chorus of complaints" from various quarters about the poor quality of current LLB graduates....Unless we take drastic measures to remedy these problems our fledgling constitutional democracy underpinned by our Bill of Rights and the Rule of law will be seriously imperilled.'<sup>58</sup>

In the submission of the South African Law Deans' Association (SALDA) to the same LLB Summit: Legal Education in Crisis in 2013 the following statement was made:

'The four year LLB was designed to serve an empowering purpose for a transitional period, but the evidence indicates that the degree does not enable students to achieve the requisite graduate attributes within the minimum time period.'<sup>59</sup>

## 7 CHALLENGES FOR HIGHER EDUCATION

The Higher Education Act 101 of 1997 described education as a 'transformative tool', to educate students for transformation.<sup>60</sup> Transformation of the individual is seen as a

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<sup>57</sup> Ibid.

<sup>58</sup> Acting Justice Bosielo Address to the LLB Summit: 'Crisis in Legal Education' 29 May 2013, Johannesburg, available at [http://www.lssa.org.za/upload/Report%20on%20LLB%20Summit%2029%20May%202013\\_amended.pdf](http://www.lssa.org.za/upload/Report%20on%20LLB%20Summit%2029%20May%202013_amended.pdf), accessed on 13 October 2014.

<sup>59</sup> SALDA *Position Paper on Legal Education* (2013) 2, unpublished submission to the *LLB Summit: Legal education in Crisis?* 29-05-2013 (copy on file with the author).

<sup>60</sup> Preamble to the Higher Education Act 101 of 1997. S Rutherford-Smith & A Bauling 'Aiming for Transformation: Exploring Graduateness in South Africa' (2013) *Stell L R* 3 601 at 604.

necessary component of achieving an overall transformation of our society. The Higher Education Monitor of 2007 specifically recommended that, in order to address the disparities in the socio-economic and educational backgrounds of the diverse student intake, 'equity-related educational strategies' will become a key element in contributing to development.<sup>61</sup> Improving formal access to universities without enhancing epistemological access, which in this context implies 'more than introducing students to a set of a-cultural, a-social skills and strategies to cope with academic learning and its products', will not be sufficient to improve the success and retention rate of students in higher education.<sup>62</sup> Morrow describes epistemological access as 'becoming a successful participant in an academic practice'.<sup>63</sup>

Unless students are explicitly made aware of the conventions and rules of what counts as academic knowledge, including the use of appropriate academic language, the current inequities will no doubt persist.<sup>64</sup> Included in this concept of epistemological access, is the notion that the interpretation of knowledge within the academic field, as well as the production of knowledge involve an understanding and development of the rules which govern how knowledge is organised in a field, what can and cannot be presented as evidence and how argument is typically chosen and presented.<sup>65</sup>

The post-1994 democratically elected government undertook to address the historical inequity of the historically black universities (HBUs) in its early educational policy

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<sup>61</sup> Scott, Yeld & Hendry op cit note 47.

<sup>62</sup> C Boughey "From equity to efficiency: Access to higher education in South Africa" (2003) *Arts and Humanities in Higher Education* 2, 65.

<sup>63</sup> W Morrow 'Bounds of Democracy: Epistemological Access in Higher Education' (2009), available at <http://www.hsrcpress.ac.za/product.php?productid=2254&freedownload=1Morrow>, accessed 30 September 2014.

<sup>64</sup> C Boughey 'Epistemological Access to the University: An Alternative Perspective' (2005) 19(3) *Journal of Higher Education* 230.

<sup>65</sup> Catherine Hutchings & James Garraway *Beyond the University Gates: Provision of Extended Curriculum Programmes in South Africa* (2010), available at <http://ahero.uwc.ac.za/index.php?module=cshe&action=downloadfile&fileid=19508134212996635763037>, accessed on 16 September 2014.

documents.<sup>66</sup> However, these broad policy statements were characterised by an absence of implementation strategies for institutional redress and development.<sup>67</sup> Historically white universities continue to have significantly better facilities, resources and staff to student ratios, which attract more students and thus increased state funding.<sup>68</sup> Many of the historically disadvantaged institutions continue to be plagued by the structural and agential legacies of the past, such as poor management, funding crises and declining student enrolments.<sup>69</sup> Although these universities were often the site of resistance to the apartheid regime and the focus of political opposition to the Nationalist government, since 1994, their appeal to black students and staff has diminished as they have not been able to develop strength in meeting the new imperatives of skills development, quality research production and facility improvement.<sup>70</sup> Many of these universities do not have adequate computer facilities, access to the Internet and legal data bases available for law students' use. Deans at such law schools lament the paucity of their library offerings, the limited practical experience and qualifications of their staff members and the literacy levels and general preparedness for tertiary education of their first generation students who come predominantly from text-deprived, poor, rural homes<sup>71</sup>. The tension of 'white space', as the desirable urban centre, and 'black space' at HBUs, as the undesirable rural periphery, continues as a racial discourse of 'white excellence and black failure'.<sup>72</sup>

## 8 CHALLENGES FOR LEGAL EDUCATION

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<sup>66</sup> J C Mubangizi 'Government Funding of Universities in the New South Africa: Some Reflections on Legal Issues and Implications' (2005) 19(6) *Journal of Higher Education* 1120 1122.

<sup>67</sup> HESA op cit note 43 10.

<sup>68</sup> Ibid at 11.

<sup>69</sup> N Cloete & R Fehnel 'The Emergent Landscape' in N Cloete, R Fehnel, P Maasen, T Moja, H Perold & T Gibbon (eds) *Transformation in Higher Education: Global Pressures and Local Realities in South Africa* (2002) 396.

<sup>70</sup> Ibid.

<sup>71</sup> Greenbaum op cit note 8.

<sup>72</sup> D Robus & C McLeod 'White Excellence and Black Failure: The Reproduction of Racialised Higher Education in Everyday Talk' (2006) 36 (3) *South African Journal of Psychology* 463.

(a) Curriculum

These environmental factors create a background to the specific challenges to be confronted in legal education. The curriculum presents the first stumbling block to transformative education, in that within the milieu of the law school curriculum, the tacit practices, the hidden curriculum and other obstacles inherent in the institutional and departmental culture operate to convey certain subtleties. The term 'curriculum' is used here in the broadest sense as including the official (written) curriculum, the curriculum as it is implemented in lecture rooms (enacted), the hidden curriculum (or 'unstated norms and values communicated to students) and the null curriculum (what is not taught).<sup>73</sup> Many features of hierarchy and power relations perpetuate a hidden curriculum of a Eurocentric (often white) normative ethos. This harkens back to Duncan Kennedy's 1982 critique of legal education as a form of 'training for hierarchy'.<sup>74</sup>

The freedom for each law school to decide on their formal curriculum ironically permitted the retention of the content and structure in courses.<sup>75</sup> In many Law faculties, the fact that the new Constitution and the effect of the Bill of Rights automatically filtered through into many substantive law modules, allowed them to avoid addressing issues of diversity, racism and social justice explicitly with students.<sup>76</sup> Davis observes that at many universities the choices of traditional text and case-books, and the syllabi followed, reflect a 'business as usual' approach.<sup>77</sup> Judge Davis, himself a legal academic, asserts that students are 'subjected to a Constitution-free zone of private law teaching', as well as an absence of 'engagement with a legal method by which to meet the transformative legal challenge.' In light of the responsibility of law schools to train the judges of the future, and to equip tomorrow's lawyers to be able to bring constitutional challenges before the courts, this is a troubling view.

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<sup>73</sup> R Barnett & K Coate *Engaging the Curriculum in Higher Education* (2005) 33-37.

<sup>74</sup> Duncan Kennedy 'Legal Education as Training for Hierarchy' (1982) 31 *JLE* 591.

<sup>73</sup> Davis op cit note 30.

<sup>76</sup> Greenbaum op cit note 8 at 317.

<sup>77</sup> Davis op cit note 30.

The failure of university curricula to respond structurally and epistemologically to the changed landscape of higher education in South Africa has been identified as one of the key areas that impedes the success and epistemological access of students to higher learning. In the Ministerial Report on Transformation, Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions (2008) (hereinafter the Transformation Commission Report) the point is made in the section on Knowledge:

‘More often than not, where the relevance of the curriculum was raised in the context of institutional responsiveness to national goals and objectives, it tended to be narrowly defined in terms of the skills and competencies required by graduates in a technical sense, rather than a deeper engagement with the social, cultural and political skills that are essential if graduates are to function as enlightened, responsible and constructively critical citizens....The curriculum is inextricably intertwined with the institutional culture and, given that the latter remains white and Eurocentric in the historically white institutions, the institutional environment is not conducive to curriculum reform.’<sup>78</sup>

This Commission Report further noted that one of the most difficult challenges that the sector faces is a transformation of what is taught and learnt.

‘In the context of post-apartheid South Africa, given the decontextualized approaches to teaching and learning at virtually every institution reviewed, the question is: does the curriculum prepare young people for their role in South Africa? Are students being sensitized to issues of poverty, inequality and social justice?’<sup>79</sup> This question bears particular relevance for legal education, in light of the central

role which law and lawyers are required to play in transformation and the operationalisation of constitutional values.

The disconnect between the formal knowledge taught in the curriculum (constitutional jurisprudence) and the everyday interactions in classrooms was also noted in Transformation Commission Report as a disjuncture between official policies on transformation and lived practices in classrooms, staff rooms and residences.<sup>80</sup>

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<sup>78</sup> Ministerial Report on Transformation in Public Higher Education Institutions (2008) Department of Higher Education and Training 102.

<sup>79</sup> Transformation Commission Report 21.

<sup>80</sup> Ibid.

In an empirical study of law graduates from one historically white university in 2009, it was observed that a 'cycle of disadvantage' was replicating students' previous educational and socio-economic backgrounds, through their participation in a law curriculum that was untransformed.<sup>81</sup> Their career trajectories aligned closely with their personal backgrounds prior to entering university.<sup>82</sup> The respondents' prior educational experience and socio-economic backgrounds typically underscored their approach to learning, their motivation for becoming a lawyer and their conceptions about being a professional.<sup>83</sup>

The looming financial burden of re-paying student loans after graduation serves to bolster many disadvantaged students' existing approaches to learning, which often focus on surface rote-learning to which they were accustomed in disadvantaged schools where resources and teaching expertise are often less than optimal.

The discipline of Law employs an epistemology that emphasises the acquisition of facts and principles, which students are expected to recall and apply, which to some extent perpetuates rote-learning. Subjects are typically taught as discrete units of knowledge, with infrequent attempts made to create links across modules. The demands of a curriculum which is heavily committed to covering a significant amount of content, and which at the same time assumes a level of proficiency in English, accompanied by adequate academic reading and writing skills and some framework of reference related to commercial concepts are regarded as necessary to meet professional standards. A matrix of interactions in which there is a complex alignment between the curriculum and those who experience it serves as a barrier to success for many students.<sup>84</sup>

### *(b) Language proficiency*

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<sup>81</sup> Greenbaum op cit note 8 321. An 'untransformed' curriculum in this study was a curriculum characterised by hierarchical structures, a white male-dominated staff where the ethos was notably Eurocentric, and issues of legal pluralism, constitutional values and diversity were seldom incorporated into black letter law courses. One outlier in the study, an African female, overcame past disadvantage through being accepted by a large (white) law firm as part of the employment equity initiatives at a large law firm.

<sup>82</sup> Greenbaum op cit note 8 at 291.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

Language proficiency, in a discipline which is possibly one of the 'most literate of all professions', and academic literacy are closely related to the reality of low retention and throughput rates in higher education.<sup>85</sup> For many students who are at risk of failure, coming from disadvantaged educational backgrounds, and poor, possibly rural, homes, English may be their second or even third language. The obstacle of instruction, reading and writing in a language other than one's home language cannot be underestimated.<sup>86</sup>

Recent theoretical insights from Applied English Language Studies claim that academic success is somehow related to earlier enculturation and that is in turn related to social class and race.<sup>87</sup> A deficit view of what second-language speakers do not bring to the academic experience has resulted in many law schools insisting on students' participation in remedial de-contextualised language courses, which are out-sourced to English literature departments. Thereafter, a focus on English for academic purposes became fashionable for second language Law students.

However, it is now well established that literacy practices are embedded in a socially constructed discourse community, and are best taught by experts in the discipline.<sup>88</sup> The language of law has to be explicated to all new members of the discourse community, to facilitate their enculturation into the language community.<sup>89</sup> At South African law schools, this is still a new theoretical paradigm that has to be taken on board by the majority of law lecturers.<sup>90</sup> Teaching legal English has become the responsibility of law academics who must teach the specific language of law to all students, be they mother tongue English speakers or not.

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<sup>85</sup> PM Tiersma *Parchment Paper Pixels* (2010) 1.

<sup>86</sup> Scott, Yeld & Hendry op cit note 33.

<sup>87</sup> JP Gee *Social Linguistics and Literacies: Ideology in Discourses* (1995); B Street *Social Literacies* (1996).

<sup>88</sup> C Jacobs 'Towards a Critical Understanding of the Teaching of Discipline-specific Academic Literacies: Making the Tacit Explicit' (2007) 41 *Journal of Education* 59.

<sup>89</sup> B Bangeni & L Greenbaum 'The Acquisition of Legal Writing Skills by First Year Law Students' (2013) 29 *Per Linguam* 72.

<sup>90</sup> L Greenbaum *Teaching Legal Writing in a South African Context* (unpublished M Ed thesis, University of Natal, 2001) 32.

Social exclusion and inclusion extends to academic and institutional culture in higher education institutions.<sup>91</sup> For many African students, their status as ‘outsiders’ – both within the historically white university and beyond it, once they enter the realm of the legal profession along with their personal history and expectations, may lead to identity dissonance, which has been observed as creating a distracting struggle that can lead to academic underperformance by such students.<sup>92</sup> The personal identities of ‘outsider’ students may be at odds with the dominant perception of professional identity and institutional culture in many law schools, which generally privilege middle-class (often male, and in South Africa, white) viewpoints. In order to be successful, students have to internalise appropriate professional identities that require a suppression of their personal identity and value system.<sup>93</sup> Diverse cultural, religious, linguistic and socio-economic values jostle for acceptance within an historically middle class, white English- (or Afrikaans-) speaking male cultural ethos. Although the celebration of diversity is a constitutional principle, as well as being intellectually enriching in academia, the everyday reality for many black students tells a different tale<sup>94</sup>.

In order to achieve improved access to tertiary education for black students, as well as offering them the possibility of success, there is an obligation in principle and in practice on HWUs to implement redress policies, redesign curricula and adapt pedagogical approaches to include students who come with a range of diverse knowledge worlds, life experience, literacy practices and cultural paradigms, if the dream of a transformed and equitable society is to be realised. Models that reflected a ‘deficit’ view of educational disadvantage have been replaced with a recognition of the richness that diverse perspectives bring to the learning transaction, although it is unsure whether these understandings have percolated down to the level of most university teachers. A culture of orality, so important in advocacy, and “ubuntu” are examples that come to mind. ‘It is

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<sup>91</sup> HESA op cit note 43 7.

<sup>92</sup> H Sommerlad ‘What are you doing here? You should be working in a hair salon or something: Outsider status and professional socialisation in the solicitors’ profession’ (2008) Web Journal of Current Legal Issues, available at <http://www.bailii.org/uk/other/journals/WebJCLI/2008/issue2/pdf/sommerlad2.pdf>, accessed on 13 October 2014.

Yang Costello The Professional Identity Crisis: Race, Class, Gender and Success at Professional Schools (2005) 8.

<sup>93</sup> Ibid at 8.

<sup>94</sup> Transformation Commission Report op cit note 70 at 43.

reasonable to ask the higher education sector to be willing to review and modify its structures and processes, to adjust to the social and educational conditions of the country by coming to terms with the realities of the student body it needs to serve.’<sup>95</sup>

## 9 DEVELOPMENTS WITHIN LEGAL EDUCATION

Of particular personal interest to me is one of the interventions that has been used to address systemic obstacles to equity and student success: the academic development programmes, which are now generally termed extended programmes. They represent an opportunity for limited curriculum reform that creates space to enable ‘talented underprepared students to achieve sound foundations for later academic success.’<sup>96</sup> The duration of the degree is extended by a year to address the secondary-tertiary ‘articulation gap’ through substantial foundational provision.<sup>97</sup> Access is provided for students from educationally disadvantaged backgrounds, to historically white research-intensive universities, where relatively few black students have in the past been competitive on standard entry criteria.<sup>98</sup> Current funding provision allows for only about 15% of first time entering students to benefit from such programmes. This has the unfortunate side effect of according these programmes a minority, low-status and even academically and administratively marginalised position within faculties.<sup>99</sup> Of 17 law faculties offering the LLB, only six faculties offer such extended programmes, which seems an under-utilisation of a funding opportunity that directly addresses equity and redress imperatives.<sup>100</sup>

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<sup>95</sup> Council on Higher Education Task Team on Undergraduate Curriculum Structure: *A Proposal for Undergraduate Curriculum Reform in South Africa: The Case for a Flexible Curriculum Structure* (2013) 57-59.

<sup>96</sup> *Ibid* at 70.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid* 73.

<sup>99</sup> *Ibid* 72.

<sup>100</sup> Results of an email survey, conducted by the author, September 2014.

The 2013 Task Team on Undergraduate Curriculum Reform has proposed a major structural change to all undergraduate degrees, to improve graduate output and outcomes.<sup>101</sup> Their proposal is that additional curriculum space for the majority of students, which would entail lengthening the duration of undergraduate degrees by a year, will enhance the effectiveness of the teaching and learning process and improve the quality and success rates of students.

Flexibility in starting points and progression is put forward as a means to address the diverse educational, socio-economic and linguistic backgrounds of students. Students who are able to complete the degree in three years will be able to do so. However, the norm for the majority of students will provide additional curriculum space to establish important foundational knowledge and skills, but not for an increase in the content of the degree. It is argued that this structural change would better meet the learning needs of the majority of the student intake across the country (as indicated in the performance patterns, which show that only one in four contact students currently follows the curriculum as it is designed). The proposal would allow for lengthened curricula to be designed as coherent programmes, 'avoiding the gaps, step changes and limited reach that affect many current extended programmes'.<sup>102</sup> In addition, the curricular structure would provide recurrent funding for the additional provision that the majority of the intake need.

It is clear that there will have to be the political will on the part of the government to take on the obvious funding implications of this far-reaching reform. At present the report is being debated, but concern has already been expressed about the potential for creating two different streams of students which would again replicate class distinctions. The consequence for law faculties is that there exists the possibility that the current four year undergraduate degree will become a five year degree- a solution which may address the complaints being levelled at the quality of graduates. A decision was taken in principle at

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<sup>101</sup> Op cit note 94 at 91.

<sup>102</sup> Ibid.

the crisis summit of all stakeholders in legal education last year that a five year degree was preferred as the way forward.<sup>103</sup>

Another recent suggestion has been that universities could cooperate at a regional level, 'rethinking degrees beyond institutional boundaries'.<sup>104</sup> A differentiated model of higher education might more effectively respond to the diverse and multiple needs of the society and the economy. Thus the successful completion of a proportion of a degree at one under-resourced university might facilitate direct entrance into one of the top research-intensive universities at a middle level, allowing students from disadvantaged educational backgrounds a two-tier access mechanism to enable them to graduate with a degree from a top tier institution.

The funding of legal education in South Africa has proven to be a major obstacle to the implementation of progressive pedagogies, which emphasise small group, experiential and clinical educational approaches. Law as a discipline is located in the lowest band of government funding for higher education, premised on the assumption that law teaching through the medium of large class lectures is cost-effective and does not require expensive capital investment.<sup>105</sup> At most universities there is cross-subsidisation of science and engineering faculties from the fee income generated from law and commerce faculties. Lobbying for increased resourcing to develop the skills and attributes of law graduates to enable them to play a role in transforming the social fabric of South Africa through law, is essential in the national interest.

Another systemic tension that permeates the teaching of law is the historic divergence of the expectations of the legal profession to produce 'practice-ready' graduates

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<sup>103</sup> Report of LLB Summit: 'Crisis in Legal Education' 29 May 2013, Johannesburg, available at [http://www.lssa.org.za/upload/Report%20on%20LLB%20Summit%2029%20May%202013\\_amended.pdf](http://www.lssa.org.za/upload/Report%20on%20LLB%20Summit%2029%20May%202013_amended.pdf), accessed on 14 October, 2014.

<sup>104</sup> Peter Mbatl & Mahlo Mokgalong 'An Integrated Varsity System is the Way Forward' *Sunday Times*, 21 September at 2.

<sup>105</sup> Ministerial Report on University Funding 2014/15 2015/6, November 2013 1 8, available at <http://www.dhet.gov.za/SiteAssets/Latest%20News/Report%20of%20the%20Ministerial%20Committee%20for%20the%20Review%20of%20the%20Funding%20of%20Universities.pdf>, accessed on 13 October 2014.

and the aspirations of academics to ensure that we produce well rounded graduates who are critical thinkers, who have been exposed to a broader range of interdisciplinary thinking.<sup>106</sup> The influence of the neo-liberal, 'high skills' and 'employability' discourse has played a significant role in the development of South African higher education policy, focussing on priorities of economic growth and being globally competitive. This has filtered through into the discourse of graduate attributes and sustains the call from the legal profession to include practical drafting skills into the curriculum.<sup>107</sup> The academic perspective in legal education appears to be moving towards embedding values of social justice, ethics and integrity in the law curriculum. This theory-practice divide is not unique to South Africa, having been explored extensively in the literature of numerous jurisdictions including Australia and England.<sup>108</sup> There are more complex roots to the debate than a simple binary divide suggests, and amongst both academics and practitioners, there seems to be an increasing acknowledgement of the need for a broader-based qualification that prepares law graduates for a number of career opportunities, and not just the legal profession.<sup>109</sup> It has been estimated that no more than 50% of law graduates enter the professions.<sup>110</sup>

The question to be answered by legal educators was posed by Judge Bosielo:

'Are we training and producing future lawyers who have an understanding and affinity for concepts like fairness, equity and justice, or mere law technicians or technocrats whose driving philosophy is arid legalism?'<sup>111</sup>

While legal education in South Africa comprises two distinct phases: the theoretical academic phase and the vocational practical phase, it is important that academics and practitioners collaborate to ensure a seamless interface between these two

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<sup>106</sup> J Campbell 'The Role of Law Faculties and Law Academics: Academic Education or Qualification for practice?' (2014) 25 *Stell LR* 15.

<sup>107</sup> L Greenbaum 'The Four Year Undergraduate LLB: Progress and Pitfalls' (2010) 35(1) *Journal for Juridical Science* 1 12.

<sup>108</sup> L Greenbaum 'Current Issues in Legal education' (2012) *Stell L R* 16 23.

<sup>109</sup> *Ibid.*

<sup>110</sup> Campbell *op cit* note 105 at 19.

<sup>111</sup> Bosielo *op cit* note 57.

‘apprenticeships’: the doctrine (cognitive) and the skills (practice) components, as they are referred to in the Carnegie Report.<sup>112</sup>

Campbell proposes that the promotion of a two- degree programme will ‘go a long way towards addressing many of the[se] challenges,’ and play an important role in better preparing graduates for practice.<sup>113</sup> However, whatever the creative solutions that acknowledge the particular sphere of expertise of the two components of a lawyer’s education may be, they will need to embrace the common vision of a transformed legal culture to advance the project of transformative constitutionalism.

The latest regulatory legislation affecting legal education is the Legal Practice Act 28 of 2014, passed in September. The purpose of the Act in the Preamble is ‘to provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives, so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic.’<sup>114</sup> This explanation of the objectives of the Act is extended in section 3: ‘to provide a legislative framework for the transformation and restructuring of the legal profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld.’

In respect of legal education, the Legal Practice Council, representing both branches of the profession in one body, must create a mechanism: ‘to—promote high standards of legal education and training, and compulsory post-qualification professional development;<sup>115</sup> promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;<sup>116</sup> ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners.’<sup>117</sup>

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<sup>112</sup> WM Sullivan, A Colby, JW Wegner, L Bond & LS Shulman *Educating Lawyers: Preparation for the Profession of Law* (2007) – the ‘Carnegie Report’.

<sup>113</sup> Campbell op cit note 105 at 16.

<sup>114</sup> Preamble, Legal Practice Act 28 of 2014.

<sup>115</sup> S 5(h).

<sup>116</sup> S5(i).

<sup>117</sup> S5(j).

Section 6(5)(a) provides that the Legal Practice Council may conduct visits to any educational institution which has a department, school or faculty of law; and (b) may advise the Council on Higher Education...regarding matters relevant to education in law, including the desirability of including in the LLB curriculum a form of community service to be undertaken by all law students.

What are the implications of these provisions? It seems that a relationship between this new professional body and law schools is envisaged. The possibility of some intervention in curricular decisions could arise, although the desirability of law students completing community service in the South African context is undisputed.

## 10 WHERE TO FROM HERE?

We are at a juncture now where there has to be some hard thinking around legal education. We are obliged to meet the challenge of producing graduates who will advance the project of constitutionalism and play a central role in effecting transformation.

We acknowledge the imperative to change our legal culture by inculcating in our students critical thinking about law and approaches to legal reasoning that focus on ensuring substantive justice, providing justification for every claim, by placing “the constitutional vision as the heart of legal education”.<sup>118</sup> We can agree to expect graduates to emerge with a commitment to, or an appreciation of, constitutional values and social justice issues.

The shift in legal culture which Klare advances as a necessary pre-condition for transformation must be inspired by the daily experience in law schools, the teaching and learning that takes place there and through the research emanating from academics.

However, in order to embed the knowledge, skills and values that transformative legal education demands, there is some preparatory groundwork to be done. The first challenge of transforming the demographic profile of law students has to be met with policies that increase access to students who have suffered educational disadvantage. Admission policies that provide for redress reflect an understanding of the values of

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<sup>118</sup> Davis op cit note 30.

substantive equality and diversity, and give recognition to the need to contribute to national equity and development goals.

Nevertheless, access without the possibility of success makes meaningless an increase in the number of black students registering in law faculties. A commitment to deploying additional resources, to include teaching methodologies, such as small group teaching, which instantiate collaborative and cooperative learning and values diverse learning styles, is one strategy that could be adopted. Making explicit the conventions of legal argument, reasoning and knowledge construction, as well as surfacing tacit understandings that rely on a notion of students coming with heterogeneous life experiences and social and cultural capital, are key factors to facilitate the enculturation of students into the discipline. Embedding the learning skills that are discipline-specific at appropriate times in the curriculum could support understandings of the integration of knowledge across courses.

An increase in extended curriculum, foundational, preparatory or bridging programmes, which cut across lines of race and class, and which equip all students for university study is warranted, but this is contingent upon a commitment of additional state and university funding for legal education. No longer can it be assumed that students, from all backgrounds, enter university prepared for the demands of tertiary study. In so-called 'mainstream' classes, there is an increased need to adopt methodologies that support the development of writing and critical reading skills, to bridge the articulation gap between the two phases of education.

The current pedagogy practised in most law classes seems to be inadequate and does not address the challenges that face the higher education sector. Other possibilities to consider are the offering of a third term as a form of summer school where students can benefit from augmented classes and the re-taking of courses. The establishment of a system of colleges, similar to community colleges in the United States, could be a feasible bridging step between school and university, but again the cost implications of introducing a second tier of post-secondary education may be unaffordable for the state.

Bursaries and scholarships are essential to facilitate the participation of students from poor socio-economic backgrounds in higher education. Increased provision of funding

for students seems a priority; however, recent budget cuts in the National Students' Financial Aid System (NSFAS) are blamed on 'wastage' as the reason for new stringency measures.<sup>119</sup>

The reform of curricula seems to be essential to integrate the constitutional vision in a pervasive way. An impetus to generate a national conversation among law schools could emanate from the South African Law Deans' Association (SALDA).<sup>120</sup> National colloquia for law teachers and the establishment of a repository of innovative teaching materials, informed by teaching and learning theory, could serve to challenge law schools to interrogate the content of the courses they offer.<sup>121</sup> However, academic freedom remains central to the academic enterprise, so such an initiative may only benefit those who already revise the substance of their courses regularly.

Lack of experience and confidence on the part of some law lecturers around the country may impede the realisation of such substantive revisions, so it may be timeous to consider a national project for law teachers to engage in collaborations on best practices in legal pedagogy. Short-term teaching exchanges between universities with the objective of exposing colleagues to possibilities for revision of teaching materials, methodologies and assessments would reflect a commitment to infuse law with renewed energy to advance the project of transformative legal education teaching on a national level. Incentives for law lecturers to enhance their repertoire of teaching strategies, by participating in online programmes or discussions would be another way in which to extend the ambit of co-operation across law faculties. Exchanging ideas and offering support to law schools that might be starting out with the use, for example, of digital learning technology could develop collaborative networks amongst legal educators. The sharing of innovative and creative pedagogies and online interventions that might address large class teaching, taking into account the resource constraints experienced at many law schools, could be achieved through virtual workshops and roadshows.

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<sup>119</sup> Op cit note 43.

<sup>120</sup> G Quinot & L Greenbaum 'The Contours of a Pedagogy of Law in South Africa' (2014) Research Report for the South African Law Deans' Association 36 (copy on file with the author).

<sup>121</sup> Ibid.

I am less optimistic about the implementation of the third prong of Quinot's theoretical framework for transformative legal education, which advocates a move away from 'a linear step-by-step approach to learning, to a more relational or networked approach.'<sup>122</sup> This may be premature, considering the vast disparities existing among law faculties across South Africa, and the variety of levels of digital immersion among students entering university and among law teachers.

In conclusion, it is my contention that a re-visioning or at least, a review of legal education is necessary twenty years after the transition to democracy. The guiding principles informing this re-evaluation should be to enquire whether it meets the challenge of producing law graduates equipped to advance the project of transformative constitutionalism. The ongoing movement across the bridge from 'a culture of authority to a culture of justification' entails critical and creative participation by law graduates and teachers in the development of a changed legal culture.<sup>123</sup>

However, the attainment of these aspirational ideals through legal education is confronted with the challenge of overcoming historical educational disadvantage, academic under-preparedness and difficulties of vast socio-economic disparities. Equitable access by all to potentially succeed in this educational enterprise must be interwoven with the apparently contradictory strand of needing to produce extraordinary lawyers who will play a leading role in the transformation of our law and society whether as judges, litigators, state legal advisors, or human rights and public interest activists. Legal education must accommodate these seemingly divergent obligations, in a pedagogy that instils the promise of transformative constitutionalism, but is responsive to and inclusive of all aspiring lawyers. In my view, the harmonisation of these two imperatives can only be achieved when legal education is firmly rooted in and embodies the values enshrined in the Constitution.

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<sup>122</sup> Quinot op cit note 31 at 135.

<sup>123</sup> E Mureinik 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR* 31 35.