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Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with Our Educational Legacy

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Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with Our Educational Legacy

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I. 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 necessary attributes and skills to fulfill the pivotal role 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 achieve transformative legal education. The historical legacy of unequal educational opportunities and a deficient secondary school system demands creative and pragmatic approaches to harmonize the aspirational ideals of post-apartheid legal education within the context of higher education in South Africa in 2016.

In Part II of this article, I review the history and current state of legal education in South Africa to frame the racial disparities and the regulatory context in which legal education exists. Part III considers critical perspectives that have informed a vision of transformative legal education. Against this background, Part IV discusses the reality of the present state of higher education in South Africa in order to highlight the challenges of providing legal education that is equitable and fit for purpose. Finally, Part V proposes pedagogical strategies to address systemic fractures and obstacles in order to develop recommendations for the future.

II. HISTORICAL ORIGINS OF LEGAL EDUCATION

The earliest legal qualification offered 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 1858.¹ Formal university teaching of law began when a Bachelor of Laws (LLB) degree was introduced at the University of Cape Town (UCT) in 1859.² This degree was subsequently offered at a growing number of universities established in other regions of the country.³

The practical training of attorneys was regulated by the Attorneys, Notaries and Conveyancers Admission Act, enacted in 1934.⁴ Law graduates were required to

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1. The Cape Parliament passed Act 4 and Act 12 of 1858 to establish a Board of Public Examiners and to regulate the admission of candidates to practice. *See* 1 STATUTES OF THE CAPE OF GOOD HOPE 1652–1895, at 694, 704–06 (Hercules Tennant & Edgar Michael Jackson eds., 1895).
 2. *See* Reinhard Zimmermann & Daniel Visser, *Introduction: South African Law as a Mixed Legal System*, in SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA 1, 20 (Reinhard Zimmermann & Daniel Visser eds., 1996).
 3. *See* Rob Midgley, *South Africa: Legal Education in a Transitional Society*, in STAKEHOLDERS IN THE LAW SCHOOL 97, 100–01 (Fiona Cownie ed., 2010).
 4. Act 23 of 1934, *repealed by* Attorneys Act 53 of 1979.

complete two years of articles of clerkship prior to being admitted to practice as attorneys.⁵ 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.⁶

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 that followed a Bachelor of Arts or other undergraduate degree, and qualified graduates for practice in both the higher and lower courts. Second, some faculties offered a four-year undergraduate degree, the Baccalaureus Procuratoris, which qualified graduates for practice as attorneys only.⁷ Third, a few faculties offered the three-year Baccalaureus Juris, which qualified graduates for practice only as civil servants (namely, 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” (or mixed race) persons.⁸ The historically black universities (“HBUs”) were under-resourced and inconveniently located in rural areas, so the quality of the education provided was not comparable to that offered at generally urban, historically white universities (“HWUs”).⁹ The abridged law qualifications were typically offered at HBUs, while HWUs offered only the LLB degree that required a minimum five-year period of study.¹⁰

This separation perpetuated a sense of different quality degrees for different races and impacted the ability of graduates to obtain employment in top law firms.¹¹ The cost of a postgraduate education, as well as the difficulty of obtaining articles or affording a period of pupillage while not earning, excluded the majority of aspiring black lawyers from entering private practice.¹²

5. Attorneys Act 53 of 1979 § 2(1) (amended 2008). Law graduates are required to sign a contract of articles of clerkship during which they are known as candidate attorneys. Each candidate works closely with a principal, who is a qualified attorney of at least three years’ standing. *Id.* § 1. In addition, the candidate attorney is required to pass four examinations, known as the Attorneys’ Admission Examinations. *See id.* § 14(1). Thereafter, the successful candidate makes an application in a high court to be admitted to the roll of attorneys.

6. UNIF. RULES OF PROF’L ETHICS r. 8.1 (GEN. COUNCIL OF THE BAR OF S. AFR. 2012).

7. The minimum entry requirements for attorneys were promulgated in section 2 of the Attorneys Act 53 of 1979. The minimum entry requirements for advocates were promulgated in section 3 of the Admission of Advocates Act 74 of 1964.

8. *See* Extension of University Education Act 45 of 1959 (repealed 1988). A small number of black students were permitted to attend white universities if they obtained permission from the Minister of Education to do so. *See* Philip F. Iya, *The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges*, 51 J. LEGAL EDUC. 355, 358 (2001).

9. *See* Iya, *supra* note 8, at 358–59.

10. Lesley Anne Greenbaum, *The Undergraduate Law Curriculum: Fitness for Purpose?* 22–24. (Jan. 2009) (unpublished Ph.D. dissertation, University of KwaZulu-Natal, 2009).

11. *Id.* at 22.

12. *See id.* at 20–24.

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The late Chief Justice Pius Langa, in his submission to the South African Truth and Reconciliation Commission (SATRC), described the many indignities suffered by black lawyers in being prevented from obtaining chambers near the courts and being excluded from advocates' robing rooms.¹³ 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 Professor Charles Dlamini observed in 1992:

[O]ur legal education in South Africa was strongly influenced by the government 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.¹⁴

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 HWUs, it is clear from the legal academics' submission to the SATRC 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.¹⁵ The views of some notable activist academics, including John Dugard, Zachariah Keodirelang Matthews, Barend van Niekerk, David McQuoid-Mason, Anthony Mathews, and Raymond Suttner in the 1970s and later Edwin Cameron, Hugh Corder, Dennis Davis, Nicholas Haysom, Halton Cheadle, and Etienne Mureinik, ensured their unpopularity in government circles.¹⁶ Failure to criticize, 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 historically black universities, were culpable omissions for which the Law Teachers' Society apologized to victims of apartheid.¹⁷ In the SATRC Report, it was observed that:

13. *The Truth and Reconciliation Commission, and the Bench, Legal Practitioners and Legal Academics: Written Presentations*, 115 SALJ 15, 40 (1998).

14. C.R.M. Dlamini, *The Law Teacher, the Law Student and Legal Education in South Africa*, 109 SALJ 595, 598 (1992).

15. *See Iya, supra* note 8, at 361.

16. Author's discussions with Professor Hugh Corder and Judge Dennis Davis, at the University of Cape Town (Sept. 15, 2014).

17. *See* 4 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 95–97 (1998) [hereinafter SATRC REPORT].

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, however, particularly unusual in international terms and students needed to be familiar with current legal rules in order to be equipped to practise law.¹⁸

A. Transition to Democracy in 1994

The transition to democracy in 1994 came with an urgent call to transform the legal profession 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 civilised and democratic society.”¹⁹ It is estimated that in 1994, eighty-five per cent of the legal profession in South Africa consisted of white lawyers.²⁰ At that time, there were only four black judges and two female judges on the bench.²¹

Law curricula reflected the concerns of the “economically dominant white population, with much emphasis placed on commercial subjects.”²² Scant regard was paid to issues that affected the majority of the population, such as customary law, poverty, social justice, or the lack of access to the legal system.²³

The debates on developing an appropriate qualification for legal practice to promote transformation began in 1995.²⁴ The motivations were to reduce the cost of qualifying as a lawyer, to improve access and representation in the profession, and to eradicate the perceived differential quality of the various law degrees.²⁵ A single four-year undergraduate degree was strongly supported by the new Ministry of Justice and the Black Lawyers Association (BLA), while the HBUs called attention to the impediments of inadequate resources and facilities to train the number of law graduates required to serve their communities.²⁶

18. *Id.* at 96–97.

19. Greenbaum, *supra* note 10, at 23 (quoting Minister Dullah Omar, Address to the University of South Africa Law Faculty (Mar. 2, 1999)).

20. David McQuoid-Mason, *Transforming Legal Education for a Transformed Society: The Case of South Africa*, LEARNING ACE, <http://www.learningace.com/doc/917667/1916f6e0e94a284bda9dbe8d5d94da39/mcquoid-mason220208> (last visited Apr. 9, 2016).

21. Midgley, *supra* note 3, at 97, 102 n.33.

22. John Jeffery, Deputy Minister of Justice & Constitutional Dev., Remarks at the Prestige Lecture in Honour of Professor Carmen Nathan: 20 Years of Constitutional Democracy Exploring the Legal Education and Ethics (Sept. 19, 2014), http://www.justice.gov.za/m_speeches/2014/20140919_Lecture.html.

23. *See* Dlamini, *supra* note 14, at 598.

24. *See* MINISTRY OF JUSTICE, LEGAL FORUM ON LEGAL EDUCATION PROCEEDINGS 96 (1995) (on file with author).

25. *See* SHANE GODFREY & ROB MIDGLEY, SCARCE AND CRITICAL SKILLS: LAW PROFESSIONALS (2008), http://www.labour.gov.za/DOL/downloads/documents/research-documents/Law_DoL_Report.pdf.

26. Greenbaum, *supra* note 10, at 23–24.

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No theoretical considerations were given to, nor prior research undertaken about, the pedagogical soundness of this step.²⁷ From interviews with several deans who were involved in the participatory process, it appears there was a reluctance to embrace this new dispensation.²⁸ However, anxiety about lowering standards and producing inferior graduates was overshadowed by the groundswell of support by other stakeholders.²⁹

The Qualification of Legal Practitioners Amendment Act of 1997 required all universities to introduce a four-year undergraduate LLB degree,³⁰ with agreement by law deans on twenty-six core courses that would be incorporated into the curricula, to be designed by each university.³¹ 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.³²

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 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.³³ One prominent lawyer reminded delegates at the consultative forum that preceded the introduction of the new degree:

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.³⁴

Ironically, it is perhaps this very adherence to the notion of academic freedom that has permitted law schools in the post-apartheid era to continue to do business as usual, or at least to transform their curricula according to the dictates of their own visions of transformation.³⁵ The twenty-three courses and six skills identified by the

27. See Stuart Woolman, Pam Watson & Nicholas Smith, ‘*Toto, I’ve a Feeling We’re Not in Kansas Any More: A Reply to Professor Motata and Others on the Transformation of Legal Education in South Africa*’, 114 SALJ 30, 44 (1997).

28. Greenbaum, *supra* note 10, at 221–22.

29. *Id.* at 152, 224.

30. Qualification of Legal Practitioners Amendment Act 78 of 1997.

31. Greenbaum, *supra* note 10, at 26.

32. Interview with a member of the Law Deans’ Task Team (1995) (on file with author); see also Greenbaum, *supra* note 10, at 26.

33. See SATRC REPORT, *supra* note 17, at 102.

34. MINISTRY OF JUSTICE, *supra* note 24, at 47.

35. See Dennis Davis, *Legal Transformation and Legal Education: Congruence or Conflict?*, 2015 ACTA JURIDICA 172.

Task Group on Legal Education in 1996 have also played a role in maintaining a relatively stable set of courses retained in most LLB degrees.³⁶

III. PERSPECTIVES ON THE IMPACT OF TRANSFORMATIVE CONSTITUTIONALISM ON LEGAL EDUCATION

Writing in 1998, at a time when the new LLB was being introduced, legal studies scholar and law professor 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. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.”³⁷

Klare’s identification of a disconnect between the conservative legal culture and the transformative imperatives of a post-liberal constitution led him to recommend a transformation or “leavening” of the legal culture and legal education.³⁸ By legal culture, Klare meant the “professional sensibilities, habits of mind, and intellectual reflexes” of lawyers.³⁹ 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.⁴⁰ Justice Dikgang Moseneke similarly described South African legal culture prior to 1994 as “homogenous, conservative and predictable,” informed by “inflexible legal positivism.”⁴¹

In an address entitled “Transformative Constitutionalism,” presented by the late Chief Justice Pius Langa in 2006, legal education and the transformation of legal culture were featured as two of the five major challenges to achieving transformation.⁴² In focusing 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.⁴³ Over and above those established features of legal education, graduates must be committed to implementing the values central to the Constitution, so that these values permeate every aspect of legal practice.⁴⁴ He specified critical engagement

36. See GEORGINA PICKETT, *THE LLB CURRICULUM RESEARCH REPORT* 132 (2010) (on file with author).

37. Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 SAJHR 146, 150 (1998).

38. *Id.* at 151.

39. *Id.* at 166.

40. See *id.* at 173–75.

41. Dikgang Moseneke, *The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication*, 18 SAJHR 309, 316 (2002).

42. Pius Langa, *Transformative Constitutionalism*, 17 STELLENBOSCH L. REV. 351, 354–58 (2006).

43. *Id.* at 355–56.

44. *Id.* at 356.

with these values, rational justifications for decisions, and an appreciation of law in context as part of the required change in mindset.⁴⁵

The principles enshrined in this vision of legal education are summarized by Cape Town High Court Judge 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, the idea that, 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 realized.⁴⁶ Thus, the need to transform the preparation of lawyers for practice under the Constitution seemed mandatory.

Responding to Klare and Justice Langa’s challenges, Professor Geo Quinot of Stellenbosch University proposed a new theoretical framework for transformative legal education in 2012.⁴⁷ His framework posits three legs on which to establish a revised legal education paradigm: first, a complete re-examination of the subject matter (the “what”) that is taught; second, the adoption of theoretical insights from the constructivist pedagogical approach, to change the “how” of what is taught; and third, a consideration of the implications of the digital revolution for teaching and learning in an educational context that is characterized by diversity.⁴⁸ 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.⁴⁹ 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 on law in the context of South African society.⁵⁰ 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.⁵¹

IV. THE CURRENT STATE OF LEGAL AND HIGHER EDUCATION

Today, the LLB degree is offered at seventeen law faculties.⁵² Of these universities, five are HBUs, one is a university previously designated for “coloured”⁵³ persons, and

45. *Id.*

46. Davis, *supra* note 35, at 175.

47. Geo Quinot, *Transformative Legal Education*, 129 SALJ 411, 411–12 (2012).

48. *See id.* at 412.

49. *Id.* at 414.

50. *Id.* at 415.

51. *Id.* at 415–16.

52. The author serves on a national Task Team that developed a standards statement for the LLB degree. *See* COUNCIL ON HIGHER EDUC., *QUALIFICATIONS STANDARD FOR BACHELOR OF LAWS (LLB)* (2015).

53. Racial classifications that were used under apartheid continue to be used only for the purposes of redress and equity. As distasteful as the use of these apartheid racial categories may be, much of the available

six universities formerly had Afrikaans as the language of instruction.⁵⁴ Most of these Afrikaans-medium universities now offer instruction in Afrikaans and English, or in various combinations of the two languages. 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 degree, as prescribed by the South African Qualifications Authority (SAQA).⁵⁵ However, there is no accreditation nexus between the legal profession and the universities offering the LLB degree.⁵⁶

Criticisms of LLB graduates have grown over the past few years from all stakeholders in legal education, including the judiciary, the legal profession, employers of law graduates, and academics.⁵⁷ Graduates' poor literacy and numeracy skills have been the focus of most complaints, which led to a summit meeting, "Legal Education in Crisis," in May 2013.⁵⁸ This meeting between representatives of the academy, the legal profession, government legal services departments, and employers of law graduates resulted in the establishment of a national task team to consider options for improving legal education.⁵⁹ Additionally, the meeting led to the appointment of a working group of legal academics and representatives of the Council on Higher Education (CHE), to engage in a peer-driven process to develop a set of qualification standards to be achieved by all LLB graduates.⁶⁰ The product of this working group, a draft document submitted by the CHE according to the Higher Education Qualifications Sub-Framework ("Standard"), makes clear in its preamble 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.⁶¹

The Standard enumerates a range of knowledge outcomes and skills outcomes, such as critical thinking and research capabilities, as well as applied competencies, such as ethics and integrity, communication and literacy, numeracy, information

data 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 in this article, I have specified the disaggregation of data into particular race categories.

54. See generally PICKETT, *supra* note 36, at 4.

55. See COUNCIL ON HIGHER EDUC., *supra* note 52, at 3. The South African Qualifications Authority administers the framework for accredited degrees.

56. See *Mandate*, COUNCIL ON HIGHER EDUC. S. AFR., http://www.che.ac.za/about/overview_and_mandate/mandate (last visited Apr. 9, 2016). Law faculties in South Africa are not accredited by the legal profession, but rather by the Council on Higher Education, through the Higher Education Quality Council. This is distinct from other professions in South Africa, such as engineering, architecture, and accounting, for which university curricula are accredited by their professional regulatory bodies.

57. See Carmel van Niekerk, *The Four-Year Undergraduate LLB: Where to from Here?*, 34 *OBITER* 533 (2013).

58. *Id.* at 538.

59. Leon Dicker, *The 2013 LLB Summit*, *ADVOCATE*, Aug. 2013, at 15, 16–20.

60. *Id.* at 20.

61. COUNCIL ON HIGHER EDUC., *supra* note 52, at 7.

technology, problem-solving, teamwork, and skills to transfer knowledge.⁶² The qualification standards set out in the Standard have been debated by academics and representatives of the profession at various regional fora, and their feedback has been incorporated into the final version of the Standard that was approved by the Higher Education Quality Council in September 2015.⁶³ The next step will be a national review to re-accredit institutions offering the LLB, provided they meet the criteria developed by law academic experts. Institutions that fail to meet the accreditation criteria may be given an opportunity to address such deficiencies prior to being de-accredited.

Although the final Standard is thought to be uncontroversial, some academics have already questioned the goal 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 looser standard, such as “an appreciation of” these values.⁶⁴ Of concern is the unspoken view, also anecdotal, that the standards are merely aspirational and unattainable at institutions that are poorly resourced and have high student enrollments and small numbers of staff, many of whom are relatively inexperienced. The challenge that besets many of these universities is that they are under pressure to increase access to first-generation⁶⁵ students, who very often have suffered severe educational and economic disadvantage, while being constrained by severely limited resources.⁶⁶

The South African student entering university today is typically one of the born-free (post-1994) generation. Although many of these students might not have personally experienced the dehumanizing racism of apartheid, the legacy of disadvantage and the scarring effect of a racialized past is impossible to erase on multiple levels. At the university level, the historical legacy of a poor and unequal public education system remains the most serious obstacle to success.⁶⁷ 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 primary and secondary schools and the demands of a higher university-level

62. *Id.* at 7–11.

63. The author is a member of the Task Team that drafted the Standard. The author also participated in the final amendment process, and is now a member of the National Review Reference Group. The National Review Reference Group is responsible for drafting the criteria for the accreditation process of all law schools that offer the LLB degree. This review process, conducted by the Council on Higher Education, is taking place in 2016.

64. The author personally discussed this issue with regional fora participants in February 2015.

65. The term “first generation” students refers to students who are the first in their family to ever participate in post-secondary school education. See L. Heymann & R. Carolissen, *The Concept of ‘First-Generation’ Student in the Literature: Implications for South African Higher Education*, 25 S. AFR. J. HIGHER EDUC. 1378 (2011).

66. *Id.* at 1389–90.

67. COUNCIL ON HIGHER EDUC., A PROPOSAL FOR UNDERGRADUATE CURRICULUM REFORM IN SOUTH AFRICA: THE CASE FOR A FLEXIBLE CURRICULUM STRUCTURE 54–55 (2013).

education.⁶⁸ The “articulation gap” at the crucial interface between these two phases of education is a more useful term that captures the complexities of the systemic problem and emphasizes the need for bridging strategies to facilitate this transition.⁶⁹ Although the articulation gap may be infinitely more serious for students who have attended resource-deprived and disadvantaged schools—most often studying in a language that may be their second or even third—there is also a sense that, even for students who speak English as a first language and have attended privileged schools, the education system is still failing to prepare them adequately for university studies.⁷⁰

To consider legal education in 2016 in its broader context, it is necessary to review the national higher education terrain and to consider issues of transformation within the education sector, and then the legal profession. Higher Education South Africa, comprising the vice chancellors of twenty-three higher education institutions, recently presented a critical reflection of the achievements and challenges of the sector in the twentieth year of democracy to the Portfolio Committee on Higher Education.⁷¹ For example, in 1993, the gross participation rate (meaning, the total enrollment in higher education as a proportion of the twenty- to twenty-four-year-old age group) was 17%, with the participation rates distorted 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.⁷² At a time when black South Africans (including “Indians” and “Coloureds”) comprised 89% of the population, they comprised 52% of all university students; whites, who comprised 11% of the population, comprised 48% of all university student enrollments.⁷³

By 2011, black students—that is, “Africans,” “Indians,” and “Coloureds,”—comprised 80% of all university students, which is attributable to increased access to higher education, financial aid to students who cannot afford tuition fees, and a variety of other equitable redress strategies.⁷⁴ However, the participation rate of the twenty- to twenty-four-year-old age group has not improved significantly: in 2011, it had reached 17.3%, with an increase in the African youth participation from 9% in 1993 to 14%.⁷⁵ In contrast, the 2011 participation rates of Indian and white students were respectively 47% and 57%.⁷⁶ In the 2013 matriculation exams, only 30.6% of the school learners obtained a university entrance pass, which currently requires a

68. *Id.* at 57–59.

69. *Id.* at 60–62.

70. *See id.* at 59.

71. HIGHER EDUC. S. AFR., SOUTH AFRICAN HIGHER EDUCATION IN THE 20TH YEAR OF DEMOCRACY: CONTEXT, ACHIEVEMENTS AND KEY CHALLENGES (2014) [hereinafter HESA].

72. *Id.* at 1.

73. *Id.*

74. *See* COUNCIL ON HIGHER EDUC., VITALSTATS: PUBLIC HIGHER EDUCATION 2011, at 2 fig.3 (2013).

75. HESA, *supra* note 71, at 2.

76. *Id.*

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43% average in six subjects.⁷⁷ There is concern 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.⁷⁸

The national undergraduate success and graduation rates have yet to attain projected goals. A national target for graduation rates was set at 80%, which was exceeded by white students at 82% in 2010, while the graduation rate for “African” students was 71%.⁷⁹ The throughput and drop-out rates for students by race for a three-year undergraduate degree beginning in 2005 revealed that 16% of “African” students graduated in the minimum time, 41% graduated after six years, and 59% dropped out.⁸⁰ Comparable statistics for white students showed that 44% graduated in the minimum time, 65% graduated after six years, and 35% dropped out.⁸¹

Moreover, the demographic composition of university staff reveals that patterns of inequality continue. In 2012, of 17,451 academics in South Africa, 53% were white, and 55% were male.⁸² The difficulty of developing a new generation of academics that is representative of the broader society remains a significant challenge for higher education.⁸³ 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.⁸⁴ Systemic features still replicate many of the apartheid inequalities relating to gender, race, and class, which have implications for social mobility.⁸⁵

Professor and higher education scholar David Cooper, in a paper titled *Social Justice and South African University Student Enrolment Data by ‘Race’*, describes the progress of Africanization of universities from being “a skewed revolution” to a “stalled revolution.”⁸⁶ During the 1990s, a significant number of “African” students entered what had previously been universities designated for “Indian” or “Coloured” students, while a partial but uneven Africanization of the student body at ten HWUs

77. See *24% of Matrics Would Have Passed if Pass Mark was 50%*, NEWS24 (Jan. 12, 2014), <http://www.news24.com/Archives/City-Press/24-of-matrics-would-have-passed-if-pass-mark-was-50-20150430>.

78. IAN SCOTT ET AL., COUNCIL ON HIGHER EDUC., HIGHER EDUCATION MONITOR No. 6: A CASE FOR IMPROVING TEACHING AND LEARNING IN SOUTH AFRICAN HIGHER EDUCATION 11 (2007).

79. HESA, *supra* note 71, at 2.

80. *Id.*

81. *Id.*

82. *Id.* at 8.

83. *Id.*

84. See SCOTT ET AL., *supra* note 78, at 19.

85. See NAT’L PLANNING COMM’N, NATIONAL DEVELOPMENT PLAN: VISION FOR 2030, at 262 (2011).

86. David Cooper, *Social Justice and South African University Student Enrolment Data by ‘Race’, 1998–2012: From ‘Skewed Revolution’ to ‘Stalled Revolution’*, 69 HIGHER EDUC. Q. 237 (2015).

took place.⁸⁷ An absolute decline in student enrollments occurred at HBUs located in previous “homeland” areas.⁸⁸

The post-2000 higher education system, Cooper argues, “has become perhaps even more élitist than it was prior to 1994, with social class now acting as a major ‘stalling’ force on the revolution.”⁸⁹ The legacy of apartheid schooling manifests itself in African students’ choices of universities.⁹⁰ 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.⁹¹ As a political compromise, the Constitution permitted every school governing board, which includes significant representation by parents, to set school fees, particularly to hire additional teachers, with the result that the fees at historically privileged middle- to upper-class white schools increased significantly and were affordable only to upper- and middle-class scholars, regardless of their racial designation.⁹² There are, however, enforceable exemptions and fee waivers for students who cannot afford their school fees, provided a school is not full.⁹³

Cooper categorizes universities into three bands. First, there are five elite research-intensive universities; at three of those universities, Africanization appears to have slowed down.⁹⁴ However, the number of foreign black students from the rest of Africa has increased considerably at UCT.⁹⁵ Second, a middle band is comprised of seven average universities, except for one previously reserved for “Coloured” students in the Western Cape; all now have a clear majority of African students.⁹⁶ Third is a lower band of eleven disadvantaged universities, in which the African population is between 85% and 95%, indicating that no “deracialisation” of the student bodies has occurred.⁹⁷

A. 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

87. *Id.* at 244–47.

88. *Id.* at 246.

89. *Id.* at 248.

90. *Id.* at 247–48.

91. *Id.*

92. See JOHN PAMPALLIS, CTR. FOR EDUC. POLICY DEV., ISSUES IN EDUCATION POLICY NO. 3: SCHOOL FEES 24–25 (2008).

93. *Education Policy: Admissions and School Fees*, EDUC. & TRAINING UNIT (ETU), <http://www.etu.org.za/toolbox/docs/government/education.html> (last visited Apr. 9, 2016). The determination of whether or not a school is full is a factor that is decided by a school principal, and may include the Education Department officially declaring the school full. *Id.*

94. Cooper, *supra* note 86, at 255–56.

95. *Id.* at 256.

96. *Id.* at 257.

97. *Id.* at 257–59.

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the degree in the minimum four-year period, a further 14% took an additional year, and 6% took six years to complete the degree.⁹⁸ Moreover, 54% of students who enrolled for the degree left without obtaining a qualification.⁹⁹

The most recent data compiled by the CHE shows that of the law students registering in 2008, only 28.2% graduated in the minimum four-year time period for the LLB degree, while 37.6% had dropped out after four years.¹⁰⁰ After six years, the graduation rate rose to 49.5% and the drop-out rate rose to 50.5%, which is an alarming figure.¹⁰¹ The data per race group reflects the following statistics:

Figure 1¹⁰²

Race group according to Higher Education Management Information System (HEMIS) 2014	Number of Students Registering in 2008	Graduation Percentage After 4 Years	Drop-out Percentage After 4 Years	Graduation Percentage After 6 years	Drop-out Percentage After 6 Years
“African”	1610	25.4%	40%	45.5%	54.5%
“Coloured”	304	16.8%	43.4%	41.1%	58.9%
“Indian”	261	36%	35.2%	57.9%	42.1%
“White”	729	36.4%	30.6%	58.8%	41.2%

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. These financial obligations, referred to now by many African students as “black tax” also operate as a factor determining many students’ post-university career trajectories.¹⁰³

98. See SCOTT ET AL., *supra* note 78, at 26.

99. See *id.*

100. COUNCIL ON HIGHER EDUC., 2008 COHORT - LLB (4YR) (2014) (on file with author).

101. *Id.*

102. *Id.*

103. See *id.* at 175.

Statistics reflecting first-year, first-time registrations of LLB students in 2015 indicate that 70% of the students were African students and 55% were women.¹⁰⁴ Of the 2014 LLB graduates, 56% were African, while 58% were female.¹⁰⁵ In 2015, 60% of students enrolled in their final year were African, while 58% were women.¹⁰⁶ Twenty-eight per cent of graduates in 2014 were white, while 16% of the students registering for the degree in 2015 were white.¹⁰⁷ This data shows a significant improvement in the demographic composition of law students. It would appear that African students are not as successful in completing their studies, but there is a one-year time lag in this data, so it is likely that the completion rates of African students will improve, considering the high enrollment numbers of African students in 2015.¹⁰⁸

The demographics of the legal profession reflect quite a different reality. In April 2015, 62% of attorneys were white while 23% were African; in March 2015, 37% were women.¹⁰⁹ In 2014, 71% of advocates were white, 16.9% were African, and 24% were female.¹¹⁰ Thus, while registration of LLB students appears to be increasingly representative of the population demographics, the current membership of the attorney and advocate professions remains racially skewed.

In an address to the Limpopo Law Council in 2012, Judge Phineas Mojapelo reviewed the transformation data in terms of the legal profession, noting that the overall representation of black lawyers in the profession had increased from 10% to 34% in the years between 1990 and 2012.¹¹¹ Racial transformation of the judiciary, however, has gone much faster: black judges constitute 66%, and white judges constitute 34% (72% are males, while 29% are females).¹¹² Judge Mojapelo acknowledged that although he had been a proponent of the attenuated LLB degree, it had not produced the expected results.¹¹³ He stated that educators 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 his or her client.”¹¹⁴

104. LAW SOC'Y OF S. AFR., LEGAL EDUC. & DEV., STATISTICS FOR LEGAL PROFESSION 2014/2015, at 17–18 (2015).

105. *Id.* at 20–21.

106. *Id.* at 23.

107. *Id.* at 17, 20.

108. *See id.* at 17.

109. *Id.* at 27–28.

110. LAW SOC'Y OF S. AFR., LEGAL EDUC. & DEV., STATISTICS FOR LEGAL PROFESSION 2013/2014 (2014) (on file with author).

111. Deputy Judge Phineas Mojapelo, Address to the AGM of the Limpopo Law Council 2, 4 (Sept. 7, 2012), http://www.derebus.org.za/wp-content/uploads/2015/06/Judge_Mojapelo_speech.pdf.

112. *Id.* at 5.

113. *Id.* at 18–19.

114. *Id.* at 18.

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In a similar vein, Justice Lebotsang Bosielo, an acting Constitutional Court Justice at the time, commented at a summit meeting of stakeholders on the crisis in legal education in May 2013:

I believe that I am not exaggerating to say that there has, in recent times, been a chorus of complaints from various quarters about the poor quality of current LLB graduates. . . . [U]nless 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 imperiled.¹¹⁵

In their submission to the same summit, the South African Law Deans' Association (SALDA) made the following statement: "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."¹¹⁶

B. Challenges for Higher Education

The Higher Education Act 101 of 1997 outlined a framework to educate students for transformation.¹¹⁷ The Higher Education Monitor of 2007 specifically recommended that, in order to address the disparities in the socioeconomic and educational backgrounds of the diverse student intake, "equity-related educational strategies" will become a key element in contributing to development.¹¹⁸ 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.¹¹⁹ Professor Wally Morrow describes epistemological access as "becom[ing] a successful participant in an academic practice."¹²⁰

Unless students are explicitly made aware of the conventions and rules of what counts as academic knowledge, including the use of appropriate academic language,

115. Acting Justice Bosielo, Keynote Address, at the LLB Summit (May 29, 2013).

116. S. AFRICAN LAW DEANS ASS'N, POSITION PAPER ON LEGAL EDUCATION (2013) (on file with author).

117. See Higher Education Act 101 of 1997; Sarah Rutherford Smith & Andrea Bauling, *Aiming for Transformation: Exploring Graduateness in South Africa*, 24 STELLENBOSCH L. REV. 601, 604 (2013).

118. SCOTT ET AL., *supra* note 78, at 41. Equity-related strategies in the context of South African higher education are specific programs or interventions aimed at redress for past educational disadvantage. These include extended curriculum programs for black students and differentiated admission criteria for students from diverse backgrounds, together with additional academic support interventions. *Id.* at 43.

119. Chrissie Boughey, *Epistemological Access to the University: An Alternative Perspective*, 19 S. AFR. J. HIGHER EDUC. 230, 240 (2005). By enhancing epistemological access, academic developers aim to provide explicit instruction in academic and legal literacy, explicating the ways in which knowledge is constructed and acknowledged within the discipline of law, and making transparent the ways of knowing in law. *Id.*

120. WALLY MORROW, BOUNDS OF DEMOCRACY: EPISTEMOLOGICAL ACCESS IN HIGHER EDUCATION 78 (2009).

the current inequities will no doubt persist.¹²¹ 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, involves an understanding and development of the rules that govern how knowledge is organized within a field, what can and cannot be presented as evidence, and how an argument is typically chosen and presented.¹²²

The post-1994 democratically elected government undertook to address the historical inequity of the HBUs in its early educational policy documents.¹²³ However, these broad policy statements were characterized by an absence of implementation strategies for institutional redress and development.¹²⁴ HWUs continue to have significantly better facilities, resources, and staff-to-student ratios, which attract more students and thus increased state funding.¹²⁵ 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 enrollments.¹²⁶ Although these universities were often the site of resistance to the apartheid regime and the focus of political opposition to the Nationalist government, their appeal to black students and staff has diminished since 1994 as they have been unable to fully meet the new imperatives of skills development, quality research production, and facility improvement.¹²⁷ Many of these universities do not have adequate computer facilities, or access to the Internet and legal databases. 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 higher education of their first-generation students who come predominantly from text-deprived, poor, rural homes.¹²⁸

C. Challenges for Legal Education

1. Curriculum

These environmental factors create a background for the specific challenges that legal education must confront. The curriculum presents the first stumbling block to transformative education. Within the milieu of the law school curriculum, the tacit

121. See Boughey, *supra* note 119, at 240–41.

122. James Garraway, *Field Knowledge and Learning on Foundation Programmes*, in *BEYOND THE UNIVERSITY GATES: PROVISION OF EXTENDED CURRICULUM PROGRAMMES IN SOUTH AFRICA* 31, 31 (Catherine Hutchings & James Garraway eds., 2010).

123. John C. Mubangizi, *Government Funding of Universities in the New South Africa: Some Reflections on Legal Issues and Implications*, 19 S. AFR. J. HIGHER EDUC. 1120, 1122 (2005).

124. See HESA, *supra* note 71, at 10.

125. *Id.* at 11.

126. Nico Cloete & Richard Fehnel, *The Emergent Landscape*, in *TRANSFORMATION IN HIGHER EDUCATION: GLOBAL PRESSURES AND LOCAL REALITIES* 245, 257–58 (Nico Cloete et al. eds., 2006).

127. *Id.*

128. Greenbaum, *supra* note 10, at 257.

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).¹²⁹ Many features of hierarchy and power relations perpetuate a hidden curriculum of a Eurocentric (often white) normative ethos.¹³⁰ This hearkens back to Duncan Kennedy’s 1982 critique of legal education as a form of “training for hierarchy.”¹³¹

The freedom for each law school to decide on its own formal curriculum ironically permitted the retention of outmoded content and structure in certain courses.¹³² The fact that the Constitution and the effect of the Bill of Rights automatically filtered through into many substantive law modules allowed law faculties to avoid explicitly addressing issues of diversity, racism, and social justice with students.¹³³ Judge Davis observes that at many universities, the choices of traditional text and casebooks, and the syllabi followed, reflect a business as usual approach.¹³⁴ 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.”¹³⁵ 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.

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 Committee Report on Transformation, Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions of 2008 (the “Transformation Committee Report”), the following point is made in the section on knowledge:

129. *See generally* RONALD BARNETT & KELLY COATE, *ENGAGING THE CURRICULUM IN HIGHER EDUCATION* 33–37 (2005).

130. *See* Greenbaum, *supra* note 10, at 86–88. Prescribed jurisprudential readings most often focus on theories of law derived from Western traditions. The history of South African law is framed as a Roman and Dutch system, influenced by English law, without much attention given to African law. African customary law is taught as a standalone course, instead of aspects of customary law being woven into the substance of doctrinal courses. Many law schools focus predominantly on commercial law subjects, partly in response to student perceptions about their employability. The architecture of many law schools consists of large lecture theaters that place lecturers at the front of the classroom, where students are seated in schoolroom-type rows removed spatially from the instructor on the stage.

131. Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54 (David Kairys ed., 3rd ed. 1998).

132. Davis, *supra* note 35, at 182–87.

133. Greenbaum, *supra* note 10, at 306.

134. Davis, *supra* note 35, at 186.

135. *Id.* at 187.

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.”

. . . [T]he 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.¹³⁶

The Transformation Committee Report further noted that one of the most difficult challenges that the sector faces is a transformation of what is taught and learned: “[I]n the context of post-apartheid South Africa . . . [the question is] does the curriculum prepare young people for their role in South Africa . . . ?”¹³⁷ This question bears particular relevance for legal education, in light of the central role that lawyers are required to play in the transformation and operationalization 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 the Transformation Committee Report as a disjuncture between official policies on transformation and actual practices in classrooms, staff rooms, and residences.¹³⁸

In an empirical study of law graduates from one HWU in 2009, it was observed that a “cycle of disadvantage” was replicating students’ previous educational and socioeconomic backgrounds through their participation in a law curriculum that was untransformed.¹³⁹ Their career trajectories aligned closely with their personal backgrounds prior to entering university.¹⁴⁰ The respondents’ prior educational experience and socioeconomic backgrounds typically underscored their approaches

136. DEP’T OF EDUC., REPORT OF THE MINISTERIAL COMMITTEE ON TRANSFORMATION AND SOCIAL COHESION AND THE ELIMINATION OF DISCRIMINATION IN PUBLIC HIGHER EDUCATION INSTITUTIONS 90–91 (2008) [hereinafter TRANSFORMATION COMMITTEE REPORT].

137. *Id.* at 21.

138. *Id.* at 29–30.

139. Greenbaum, *supra* note 10, at 320–21. An “untransformed curriculum” in this study was a curriculum characterized by hierarchical structures, a white male-dominated staff whose ethos was notably Eurocentric, and an overall failure to incorporate issues of legal pluralism, constitutional values, and diversity into black letter law courses. One outlier in the study, an African female, overcame past disadvantage by being accepted by a large (white) law firm as part of the firm’s employment equity initiatives. *Id.* at 321–23.

140. *Id.* at 351–52.

to learning,¹⁴¹ their motivations for becoming lawyers, and their conceptions about being a professional.¹⁴²

The looming financial burden of repaying student loans after graduation serves to bolster many disadvantaged students' approaches to learning, which often focus on the surface rote learning to which they were accustomed in disadvantaged schools, where resources and teaching expertise are often less than optimal. Moreover, the discipline of law employs an epistemology that emphasizes the acquisition of facts and principles that 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 that 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 frame 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.¹⁴³

2. *Language Proficiency*

Language proficiency and academic literacy are closely related to the reality of low retention and throughput rates in higher education, especially in a discipline that is possibly one of the most literate.¹⁴⁴ 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 obstacles of instruction, reading, and writing in a language other than one's home language cannot be underestimated.¹⁴⁵

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.¹⁴⁶ A deficit view of what second-language speakers fail to bring

141. See generally Grace Idahosa & Louise Vincent, *Joining the Academic Life: South African Students Who Succeed at University Despite not Meeting Standard Entry Requirements*, 28 S. AFR. J. HIGHER EDUC. 1433 (2014); Michelle McLean, *Can We Relate Conceptions of Learning to Student Academic Achievement?*, 6 TEACHING HIGHER EDUC. 399 (2001). Both articles describe the dependency on teachers and emphasis on rote learning for students from such backgrounds. In this author's experience, students who have attended poorly resourced, disadvantaged schools tend to have previous learning experiences characterized by factors such as unfamiliarity with reading texts that present contradictory arguments, as well as difficulty with critical reading and research skills.

142. Greenbaum, *supra* note 10, at 320–21.

143. *Id.* at 284.

144. See PETER M. TIERSMA, PARCHMENT PAPER PIXELS: LAW AND THE TECHNOLOGIES OF COMMUNICATION 1–8 (2010).

145. See SCOTT ET AL., *supra* note 78, at 39.

146. See JAMES PAUL GEE, SOCIAL LINGUISTICS AND LITERACIES: IDEOLOGY IN DISCOURSES 179–85 (1996); BRIAN V. STREET, SOCIAL LITERACIES: CRITICAL APPROACHES TO LITERACY IN DEVELOPMENT, ETHNOGRAPHY AND EDUCATION 115–18, 126–27 (1995).

to the academic experience has resulted in many law schools insisting on students' participation in remedial, de-contextualized language courses, which are outsourced to English literature departments.¹⁴⁷ Thereafter, a focus on English for academic purposes became fashionable for second-language law students.¹⁴⁸

It is now well established, however, that literacy practices are embedded in a socially constructed discourse community and are best taught by experts in the discipline.¹⁴⁹ The language of law has to be explicated to all new members of the discourse community in order to facilitate their enculturation into the language community.¹⁵⁰ At South African law schools, this is still a new theoretical paradigm that has yet to be embraced by the majority of law lecturers.¹⁵¹ Teaching legal English has become the responsibility of law academics who must teach the specific language of law to all students, whether they are native English speakers or not.

Social exclusion and inclusion extends to academic and institutional culture in higher education institutions.¹⁵² For many African students, their status as “outsiders”—both within the HWU and 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.¹⁵³ 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 internalize appropriate professional identities that require a suppression of their personal identity and value system.¹⁵⁴ Diverse cultural, religious, linguistic, and socioeconomic values jostle for acceptance within a 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.¹⁵⁵

147. Lesley A. Greenbaum, *Teaching Legal Writing in a South African Context 1* (Dec. 1, 2001) (unpublished M.Ed. thesis, University of Natal) (on file with author).

148. *See id.* at 1–3.

149. *See* Cecilia Jacobs, *Towards a Critical Understanding of the Teaching of Discipline-Specific Academic Literacies: Making the Tacit Explicit*, 41 J. EDUC. 59, 59–60 (2007).

150. Bongzi Bangeni & Lesley Greenbaum, *An Analysis of the Textual Practices of Undergraduate and Postgraduate Novice Writers in Law*, 29 PER LINGUAM 72, 72 (2013).

151. Greenbaum, *supra* note 147, at 1.

152. HESA, *supra* note 71, at 8–9.

153. *See* Hilary Sommerlad, “*What Are You Doing Here? You Should be Working in a Hair Salon or Something*”: *Outsider Status and Professional Socialization in the Solicitors’ Profession*, WEB J. CURRENT LEGAL ISSUES (April 2008), <http://www.bailii.org/uk/other/journals/WebJCLI/2008/issue2/sommerlad2.html>; *see also* CARRIE YANG COSTELLO, *PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS* (2005).

154. Sommerlad, *supra* note 153.

155. *See* TRANSFORMATION COMMITTEE REPORT, *supra* note 136, at 19–20, 37–38.

In order to achieve improved access to higher education for black students, as well as offer them the possibility of success once engaged in the profession, there is an obligation in principle and in practice for HWUs to implement redress policies, redesign curricula, and adapt pedagogical approaches to include students who come with a range of diverse knowledge worlds, life experiences, literacy practices, and cultural paradigms, if the dream of a transformed and equitable society is to be realized. 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,¹⁵⁶ although in the author's view, it is uncertain whether these understandings have percolated down to the level of all university teachers. A culture of orality, so important in advocacy, and *Ubuntu*¹⁵⁷ are examples that come to mind. "[I]t is 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."¹⁵⁸

D. Developments Within Legal Education

Academic development programs, now generally termed extended programs, are one of the interventions that have been used to address systemic obstacles to equity and student success. They represent an opportunity for limited curriculum reform that creates space "to enable talented but underprepared students to achieve sound foundations for success in higher education."¹⁵⁹ The duration of the degree is extended by a year to address the articulation gap between secondary and university level education through substantial foundational provision.¹⁶⁰ The extended programs provide students from educationally disadvantaged backgrounds with access to historically white research-intensive universities, where relatively few black students have been competitive in the past on standard entry criteria.¹⁶¹ The current funding provision allows for only about fifteen per cent of first-time entering students to benefit from such programs.¹⁶² This has the unfortunate side effect of according these programs a minority, low-status, and even academically and administratively marginalized position within faculties.¹⁶³ Of seventeen law faculties offering the

156. SALEEM BADAT, *THE CHALLENGES OF TRANSFORMATION IN HIGHER EDUCATION AND TRAINING INSTITUTIONS IN SOUTH AFRICA* 5–6 (2010).

157. See generally Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 1 POTCHEFSTROOM ELECTRONIC L.J., 1998, at 1–3, http://www.nwu.ac.za/sites/www.nwu.ac.za/files/images/1998x1x_Mokgoro_art.pdf (describing *Ubuntu* as the potential for being human, a philosophy of life which in its most fundamental sense represents personhood, humanity, humaneness, and morality).

158. COUNCIL ON HIGHER EDUC., *supra* note 67, at 68.

159. *Id.* at 70.

160. *Id.* at 70–72.

161. *Id.* at 73.

162. *Id.*

163. *Id.* at 72.

LLB, only six offer such extended programs, which seems to be an under-utilization of a funding opportunity that directly addresses equity and redress imperatives.¹⁶⁴

The 2013 Task Team on Undergraduate Curriculum Structure has proposed a major structural change to all undergraduate degrees, to improve graduate output and outcomes.¹⁶⁵ Their proposal is that additional curriculum space for the majority of students, which would entail lengthening the duration of undergraduate degrees by one year, will enhance the effectiveness of the teaching and learning process and improve the quality and success rates of students.¹⁶⁶

Flexibility in starting points and progression is also suggested as a means to address the diverse educational, socioeconomic, and linguistic backgrounds of students.¹⁶⁷ Students who are able to complete the degree in three years should have the opportunity to do so.¹⁶⁸ However, the norm for the majority of students will be additional curriculum space to establish important foundational knowledge and skills, but not an increase in the content of the degree.¹⁶⁹ It is argued that this structural change will better meet the learning needs of the majority of the student intake across the country (as indicated in performance patterns, which show that only one in four contact students currently follows the curriculum as it is designed).¹⁷⁰ The proposal would allow for lengthened curricula to be designed as coherent programs, avoiding the “step changes in pace, volume and difficulty that commonly lead to poor performance or failure.”¹⁷¹ In addition, the curricular structure would provide recurrent funding for the additional resources that the majority of the intake needs.¹⁷²

Clearly, political will on the part of the government is required to address obvious funding implications of this far-reaching reform. The report has been debated at all universities, and submissions have been made to government, but concern has already been expressed about the potential for creating two different streams of students, which would again replicate class distinctions.¹⁷³ The potential consequence for law faculties is that the current four-year undergraduate degree will become a five-year degree—a solution that may address complaints about the quality of graduates. At

164. Results of an e-mail survey conducted by the author, September 2014 (on file with author); *see also* PICKETT, *supra* note 36.

165. COUNCIL ON HIGHER EDUC., *supra* note 67, at 91.

166. *Id.* at 27–29.

167. *Id.* at 91, 97.

168. *Id.* at 97.

169. *See id.* at 151.

170. *Id.* at 104–05.

171. *Id.* at 42.

172. *Id.* at 140.

173. For example, the author’s colleagues in academic development units have commented to the author about this potential issue and expressed concerns about creating two distinct classes of students.

the crisis summit of all stakeholders in legal education in 2013, a decision was made that a five-year degree was the preferred way forward.¹⁷⁴

Another recent suggestion is that universities cooperate at a regional level, “rethinking degrees beyond institutional boundaries.”¹⁷⁵ A differentiated model of higher education might more effectively respond to diverse societal and economic needs. 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, creating a two-tier access mechanism for students from disadvantaged educational backgrounds 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 emphasize small group, experiential, and clinical approaches to education.¹⁷⁶ 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.¹⁷⁷ At certain universities, there may even be cross-subsidization of science and engineering faculties from the fee income generated from law and commerce faculties. Lobbying for increased funding to develop the skills and attributes of law graduates, and to enable them to play a role in transforming the social fabric of South Africa through law, is essential to the national interest.

Another systemic tension that permeates legal teaching is the historic divergence of expectations for the legal profession to produce practice-ready graduates who are critical thinkers and who have been exposed to a broad range of interdisciplinary thinking.¹⁷⁸ 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, focusing on priorities of economic growth and being globally competitive.¹⁷⁹ This effect has filtered through into the discourse of graduate attributes and sustains the call from the legal profession to include practical drafting skills in the curriculum.¹⁸⁰ The academic perspective in legal education appears to be moving towards embedding values of social justice, ethics, and integrity in the law

174. Mapula Sedutla, *LLB Summit: Legal Education in Crisis?*, DE REBUS, July 2013, at 8, 10.

175. Adam Habib, Peter Mbatia & Mahlo Mokgalong, *An Integrated Varsity System is the Way Forward*, SUNDAY TIMES, Sep. 21, 2014, at 18.

176. Geo Quinot & Lesley Greenbaum, *The Contours of a Pedagogy of Law in South Africa*, 26 STELLENBOSCH L. REV. 29, 58–59 (2015).

177. DEP’T OF HIGHER EDUC. & TRAINING, REPORT OF THE MINISTERIAL COMMITTEE FOR THE REVIEW OF THE FUNDING OF UNIVERSITIES 121–22, 130 (2013).

178. See Jonathan Campbell, *The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice?*, 25 STELLENBOSCH L. REV. 15, 16–18 (2014).

179. Greenbaum, *supra* note 10, at 307.

180. Lesley Greenbaum, *The Four-Year Undergraduate LLB: Progress and Pitfalls*, 35 J. JURIDICAL SCI. 1, 12 (2010).

curriculum.¹⁸¹ This theory-practice divide is not unique to South Africa, having been explored extensively in the literature of numerous jurisdictions, including England.¹⁸² There are more complex roots to the debate than a simple binary divide suggests, and there seems to be an increasing acknowledgement among both academics and practitioners of the need for a broader-based qualification that prepares law graduates for a number of career opportunities and not just the legal profession.¹⁸³ It has been estimated that no more than fifty per cent of law graduates enter the legal profession.¹⁸⁴ The question to be answered by legal educators was posed by Justice Bosielo: “[A]re we training and producing future lawyers who have an understanding and affinity for concepts like fairness, equity and justice or mere technocrats whose driving philosophy is arid legalism?”¹⁸⁵

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 apprenticeships: the doctrine (cognitive) and the skills (practice) components, as discussed in the Carnegie Report.¹⁸⁶

Professor Jonathan Campbell proposes that the promotion of a two-degree program “will go a long way towards addressing many of these challenges,” and play an important role in better preparing graduates for practice.¹⁸⁷ However, whatever the creative solutions that acknowledge a lawyer’s particular spheres of expertise 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 (the “Legal Practice Act”), passed in September 2014.¹⁸⁸ The purpose of the Legal Practice Act, described in the Preamble, is “[t]o 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.”¹⁸⁹ 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

181. Greenbaum, *supra* note 10, at 304.

182. Lesley Greenbaum, *Current Issues in Legal Education: A Comparative Review*, 23 STELLENBOSCH L. REV. 16, 23–24 (2012).

183. *See id.*

184. Nicola Jenvey, *Legal Training Uncertainty as University Scraps Degree*, U. WORLD NEWS (May 2, 2014), <http://www.universityworldnews.com/article.php?story=20140424114611428>.

185. Bosielo, *supra* note 115.

186. 2 WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 24–26 (The Carnegie Found. for the Advancement of Teaching, 2007).

187. Campbell, *supra* note 178, at 31.

188. Legal Practice Act 28 of 2014.

189. *Id.* at pmbl.

profession that embraces the values underpinning the Constitution and ensures that the rule of law is upheld.”¹⁹⁰

With respect to 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;”¹⁹¹ “promote access to the legal profession, in pursuit of a legal profession that broadly reflects the demographics of the Republic;”¹⁹² and “ensure accessible and sustainable training of law graduates aspiring to be admitted and enrolled as legal practitioners.”¹⁹³

Section 6(5)(a) of the Legal Practice Act provides the Legal Practice Council with the ability to conduct visits to any educational institution that has a department, school, or faculty of law.¹⁹⁴ Section 6(5)(b) states that the Legal Practice Council may advise the CHE regarding matters relevant to education in law, including the desirability of requiring a form of community service as part of the LLB curriculum.¹⁹⁵

What are the implications of these provisions? They seem to envisage a relationship between this new professional body and law schools. 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.

IV. WHERE TO FROM HERE?

There has to be some hard thinking about 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, and placing “the constitutional vision at the very heart of legal education.”¹⁹⁶ 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 take place there, and the research emanating from academics.

However, in order to embed the knowledge, skills, and values that transformative legal education demands, some preparatory groundwork must be done. The first challenge of transforming the demographic profile of law students has to be met

190. *Id.* § 3.

191. *Id.* § 5(h).

192. *Id.* § 5(i).

193. *Id.* § 5(j).

194. *Id.* § 6(5)(a).

195. *Id.* § 6(5)(b).

196. Davis, *supra* note 35, at 182.

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 substantive equality and diversity and recognize to the need to contribute to national equity and development goals.

Nevertheless, access without the possibility of success makes an increase in the number of black students registering with law faculties meaningless. A commitment to deploying additional resources and including teaching methodologies, such as small group teaching, which instantiate collaborative and cooperative learning and value diverse learning styles, is one strategy that could be adopted.¹⁹⁷ 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 learning skills that are discipline-specific at appropriate times in the curriculum could also support understandings of the integration of knowledge across courses.

An increase in extended curricula, foundational, preparatory, or bridging programs, which cut across lines of race and class and equip all students for university study, is warranted but contingent upon the 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 higher education.¹⁹⁸ In so-called “mainstream” classes, there is an increased need to adopt methodologies that support the development of writing and critical reading skills in order to bridge the articulation gap between the phases of education.¹⁹⁹

The current pedagogy practiced 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 offer of a third term as a form of summer school in which 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 bridge between secondary school and university. Again, however, the cost implications of introducing a second tier of post-secondary education may be unaffordable for the state.

Bursaries or scholarships are essential to facilitating the participation of students from poor socioeconomic backgrounds in higher education. Increased funding for students seems to be a necessary priority.

Curriculum reform seems essential for integrating the constitutional vision in a pervasive way. An impetus to generate a national conversation among law schools could emanate from SALDA.²⁰⁰ National colloquia for law teachers and the establishment of a repository for innovative teaching materials informed by teaching and learning theory could challenge law schools to re-examine the content of their

197. See Quinot & Greenbaum, *supra* note 176, at 43–44, 47–48.

198. See *id.* at 33.

199. See *id.*

200. *Id.* at 61.

course offerings.²⁰¹ 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 realization of such substantive revisions, so it may be timely 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 programs or discussions would be another way in which to extend the ambit of cooperation across law faculties.²⁰² Exchanging ideas and offering support to law schools that, for example, might be starting out with the use of digital learning technology, could develop collaborative networks among legal educators. The sharing of innovative and creative pedagogies and online interventions that might address teaching large classes, taking into account the resource constraints experienced at many law schools, could be achieved through virtual workshops and roadshows.²⁰³

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 largely linear conception of knowledge to a more relational or networked paradigm."²⁰⁴ This may be premature, considering the vast disparities existing among law faculties across South Africa, and the varying levels of digital immersion among students entering university and among law teachers.

My contention is that a re-visioning, or at least a review, of legal education is necessary twenty years after the transition to democracy. This re-evaluation should inquire whether legal education 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.²⁰⁵

The national review of the LLB degree by the CHE is a first step toward requiring law schools to engage in self-reflection and to produce a self-evaluation report, which will be assessed against the criteria developed by a National Review Reference Group.²⁰⁶ These criteria for accreditation are based upon the Standard,

201. *Id.*

202. *Id.*

203. *Id.*

204. Quinot, *supra* note 47, at 427.

205. Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 SAJHR 31, 32 (1994).

206. See COUNCIL ON HIGHER EDUC., 2015 NATIONAL REVIEW REFERENCE GROUP: TERMS OF REFERENCE 1 (2015).

and the CHE criteria for program accreditation. The second phase of the review process will be site visits by expert review panels to each law school, with the purpose of interrogating and considering the evidence provided to substantiate the claims made in the self-evaluation report. The final decision to accredit or de-accredit law schools will be taken by the Higher Education Quality Council, based on the recommendations of the CHE.²⁰⁷

However, the attainment of the aspirational ideals of the Standard through the legal education offered at law schools throughout South Africa is confronted with the various challenges in overcoming historical educational disadvantage, academic under-preparedness, and difficulties of vast socioeconomic and resource disparities. Equitable access by all to 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 advisers, or human rights and public interest activists. Legal education must accommodate these seemingly divergent obligations in a pedagogy that instills the promise of transformative constitutionalism but is responsive to and inclusive of all aspiring lawyers. In my view, the harmonization of these two imperatives can only be achieved when legal education is firmly rooted in and embodies the values enshrined in the Constitution and when there is a recognition of the need to invest in excellent legal education for all aspiring South African lawyers.

207. *Id.*