

The Undergraduate Law Curriculum: Fitness for Purpose?

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Supervisors' authorisation

As the candidate's supervisors we agree/do not agree to the submission of this thesis.

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I, **Lesley Anne Greenbaum**, declare that

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Abstract

This study reviews the curriculum of the four-year undergraduate Baccalaureus Legum (LLB) degree, introduced in 1998 as part of the transformation agenda in post-apartheid South Africa. Ten years since its inception, the question is whether the vision of the originators has translated into curricula that are producing a representative supply of appropriately-educated graduates for practice as legal professionals.

The demand for the transformation of legal education resulted in the introduction of an undergraduate LLB as a single, affordable qualification for entry to legal practice. Law faculties were permitted to develop their own curricula, although there was agreement on core content. Three key principles were to inform curriculum design: (i) South African law exists in and applies to a diverse or pluralistic society; (ii) skills appropriate to the practice of law must be integrated into the degree; and (iii) faculties must strive to inculcate ethical values in students.

A decade later, stakeholders are expressing dissatisfaction with the quality of graduates. Few graduates complete the LLB within four years, and a significant proportion of African students, already under-represented in law faculties, do not complete their studies. The attorneys' profession is still predominantly white-owned.

In the first part of the study, phenomenological interviews were conducted with three members of the 1996 Task Group of Law Deans who drafted the proposals for the new degree. The data elicited described the lived experience of curriculum change. Five current Law Deans were also interviewed to develop an understanding of their experience of implementing the law curriculum.

The second component of the study was a phenomenographic analysis, in which six graduates, who are now attorneys, were interviewed, to identify their experiences of the law curriculum at one Law faculty. The graduates' employers were interviewed to ascertain their perceptions of the graduates' preparedness for professional practice.

The study suggests that reactive conservatism on the part of legal academics resulted in law curricula that replicate a cycle of disadvantage, and fail to achieve transformative learning which integrates knowledge, skills and ethical values. A focus on incorporating an ontological component in law curricula, to develop high quality legal professionals is recommended.

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This thesis has been an extraordinary journey of self-discovery for me. It meant starting off in a discipline in which I was unfamiliar, and acquiring the vocabulary and tools of a new discourse. It has also stretched me to read and explore way beyond my comfort zone of legal texts and case law. It has been an incredibly enriching experience, which has made the late nights, early mornings and hours spent in isolation at my desk all worthwhile. I would like to express my heartfelt appreciation to so many people in my life who enabled me to undertake and survive this process.

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Abbreviations

ACLEC	The Lord Chancellor's Advisory Committee on Legal Education and Conduct
ANC	African National Congress
BEE	Black Economic Empowerment
BLA	Black Lawyers' Association
CAT	Credit Accumulation and Transfer
CHE	Council on Higher Education
COSATU	Congress of South African Trade Unions
GEAR	Growth, Employment and Redistribution Strategy
GNU	Government of National Unity
HBI	Historically Black Institution
HBU	Historically Black University
HE	Higher Education
HEQC	Higher Education Quality Council
HSRC	Human Sciences' Research Council
HWI	Historically White Institution
HWU	Historically White University
LEAD	Legal Education and Development
LSSA	Law Society of South Africa
NADEL	National Alliance of Democratic Lawyers
NCHE	National Council on Higher Education
NFF	New Funding Formula
NFSAS	National Students' Financial Aid Scheme
NGO	Non-governmental Organisation
NPHE	National Plan on Higher Education
NQF	National Qualifications Authority
RDP	Reconstruction and Development Programme
RU	Rhodes University
SALDA	South African Law Deans' Association

SAQA	South African Qualifications Authority
SLTSA	Society of Law Teachers of Southern Africa
UCT	University of Cape Town
UFH	University of Fort Hare
UFS	University of the Free State
UJ	University of Johannesburg
UKZN	University of KwaZulu-Natal
UL	University of Limpopo
UNISA	University of South Africa
UniZul	University of Zululand
UNW	University of the North-West
UP	University of Pretoria
US	University of Stellenbosch
UV	University of Venda
UWC	University of Western Cape
Wits	University of Witwatersrand

Prologue

University legal education could so easily be the paradigm of university education. Law is at the intersection of the ideal and the real, of metaphysics and magic, of the actual and the possible, of ideas and power, of fact and value, of is and ought, of the past and the future, of the individual and the social, of economics and politics. With the power to communicate so much, we choose instead to have the students learn law as if it had the intellectual, spiritual and moral content of knitting pattern (Allott, 1987, p. 706).

In a study focussed on the undergraduate law curriculum in South Africa, the significance of this quotation lies in its particular resonance with the disjuncture between the social vision, the political motivation and the aspirations for legal education that were articulated in 1996, and the utilitarian content and delivery of law curricula today. In the course of exploring whether law curricula offered at law faculties in South Africa are “fit for the purpose” for which they were intended, it began to emerge that the potential for developing legal education curricula to fulfil the possibilities of educating, transforming and contributing to a vision of a new constitutional democracy, a society in which lawyers would play a leading role in enhancing access to justice for all, is a debatable issue. The combination of an “implementation vacuum” following after policy-making, a lack of a shared vision for the future of legal education and conservative influences, including neoliberal imperatives and the entrenchment of traditional lawyers’ attitudes and values have perpetuated a “knitting pattern” mentality that avoids the challenge of implementing a transformative curriculum.

This Prologue is intended to explain at the outset my personal positioning and to situate the study in the context of a personal journey of exploration. To some extent it is an historical account of my rationale and background, but this converged with the central focus of the study, which highlights the concerns voiced by Allott in the passage which serves as the epigraph for this Prologue – of “having the students learn law as if it had the intellectual, spiritual and moral content of knitting patterns” For me, there is a troubling disconnection between the law curriculum and meaningful engagement with the challenges of selecting powerful knowledge, of infusing humane values, and integrating knowledgeable practice

skills and a pervasive thread of ethical content, to support the development of transformative professional identities. In light of agreement among Law Deans in 1997 that curriculum design for the LLB degree would be informed by the following three principles: (i) South African law exists in and applies to a diverse or pluralistic society; (ii) skills appropriate to the practice of law must be integrated into the degree; and (iii) faculties must strive to inculcate ethical values in students, the lack of alignment between the current reality in law faculties and these guiding precepts is disquieting.

My passage toward this topic began long before I started trying to completely understand the current four-year undergraduate law (LLB) degree. I had been teaching law students intermittently through the 1980's, and then as a full-time lecturer from 1992 in the postgraduate LLB degree, in the undergraduate B Proc degree, and at Masters level in the LLM degree. In 1998, I was part of a team in our Law Faculty who pioneered small group teaching for first intake of "straight from high school" law students into the new undergraduate LLB. We developed materials (some of them based on assignments that I had completed towards my Masters degree in Higher Education), which blossomed into two first-year law textbooks. In the textbooks we applied many concepts of good practice from the theoretical learning I had gained. These included glossaries of legal terms, using explicit outcomes-based designs, providing clear marking rubrics and other scaffolding to support learner-centred activities and attempt to level the playing fields for students who entered the Law faculty from enormously varied educational backgrounds. We insisted on weekly writing assignments, provided extensive feedback on written work and met "one-on-one" with students to create a caring and affirming learning environment for all. The theme of diversity ran as a key thread throughout the substantive law content, which we reduced in order to emphasise the acquisition of legal reading, writing, thinking and speaking skills. A team of teachers met weekly to share insights and develop our capacity to respond to the new reality of law teaching. Tutors, selected from the best final-year students participated in an elective module where they received training in facilitating learning, providing written feedback to students and mentoring the first year class.

We believed that all these strategies would contribute to the students' smooth transition into the discipline of Law. I believed we were fulfilling the vision of creating a law curriculum

that facilitated the intersection of “the ideal and the real, of metaphysics and magic, of the actual and the possible, of ideas and power, of fact and value, of is and ought, of the past and the future, of the individual and the social, of economics and politics”, if only at first-year level. The challenges of using relevant and engaging materials to affirm all students, to extend and support them, to celebrate and value their differences, through the medium of the intellectually demanding new constitution and the values it espoused engendered heady moments of elation for the teachers.

Yet, increasingly, students failed to succeed in their subsequent years of study in the law degree. Second-year lecturers complained of students’ inability to cope with the demands of more rigorous second-year law modules and complaints about the labour-intensive nature of the small-group teaching began to surface. Students failed certain modules repeatedly, and many African students struggled to find funds to enable them to continue their protracted studies. Employment opportunities for graduates seemed to be dwindling, so that many weak students were applying to enter the Masters programme in the hope that an additional qualification would enhance their chances of obtaining employment.

During 2002, with the impending prospect of mergers in higher education, our Dean opened up a dialogue with the nearest historically black university (HBU) in the area, realising that a merger between the two institutions was inevitable. Both Law Deans were pragmatic leaders who were convinced that early discussions would facilitate the process of integration. Since there was in fact very little difference between the LLB curricula at the two institutions, it would be expedient to negotiate a joint curriculum as soon as possible. I was selected to represent our Law Faculty on a Task Team comprising a member each from the other campus of our institution where Law was taught, and from the institution with which we would merge. The deliberations were not difficult. We negotiated our way to a compromise position, where there was agreement to retain seven non-legal modules within the curriculum, when the HBU had previously followed the model of a predominantly ‘Law only’ degree, and we had originally had eight non-legal modules in the first two years of the LLB (liberal arts model). The process involved trade-offs, and the end product reflected some of the vested interests of senior staff members, who were able to apply pressure to secure the positioning of their particular areas of interest, because of their acknowledged

expertise or public profile in those areas of law. The relative size of the two faculties tipped the balance in favour of our historically white university (HWU) curriculum model when numbers determined the outcome of the final voting on some contentious issues, such as the number of non-legal modules in the curriculum.

The integration of the two faculties into one site (our campus) was in my own experience, relatively painless, especially for someone who did not have to move offices or adapt to a vastly different curriculum. Students in the “pipeline” completed their degree at the other campus and we accepted a combined intake of new students at the official home of the merged Law faculty. The most significant consequence was the expectation of producing increased numbers of graduates in the new institution.

When it was announced that our Faculty would be the first post-merger discipline to undergo an internal review for quality assurance purposes, I threw myself into the role of planning and coordinating this task. New procedures for assuring cross-campus teaching consistency, module files containing documentary records of teaching and assessment, student and staff satisfaction surveys, policies for addressing student grievances and numerous other practices were implemented or formalised, to embed the culture of the new combined faculty across two sites. The review was positive, but in the course of preparations, the absence of data to document student success and throughput rates was notable.

More and more consistently, anecdotal complaints from the legal professions, from law academics at other universities, and among lecturers in our own faculty began to develop a momentum that could no longer be ignored. Students enrolling for the LLM degree were not adequately equipped for postgraduate study, final-year students submitting written applications to faculty committees were producing letters that displayed a lack of literacy skills, and lecturers began articulating the sense that the quality of students entering their classes each year was declining. Difficulties in filling staff posts and ever diminishing resources within the Law Faculty began exerting pressure to reduce the demands of small group teaching in an environment of teacher overload and increased student enrolments.

At a personal level, as a white woman in a transforming university and society, an academic who had many years of experience teaching an increasingly diverse student body, I believed without question (or corroborating evidence) that the efforts made in our first-year law modules were the correct way of addressing the differing needs of students coming from vastly differing educational backgrounds. No one had asked students whether this was in fact the case. No one had ever pursued the question of whether our legal education was effective: whether what the students learned during their university education was valuable to them once they entered the world of professional legal practice – and now there was a deep sense that something was not working.

It puzzled me and went to the very core of what used to bring me fulfilment and give meaning to my daily work. My focus on students led me to believe that I needed to ask them what their experience was. We had only been working with lecturers' perceptions of what worked and what did not. And so the real journey began – exploring how I might access what the students' experience of the curriculum was; how this prepared them for professional practice – and this led to the further contextual enquiry of how the decision to introduce the undergraduate LLB degree had been made and what had informed that policy back in 1996.

In my role as law teacher/researcher, attempting to unravel a puzzle of why Law was increasingly losing its inspiring sense of “metaphysics and magic” for the role players involved, I began with the naiveté of a novice researcher, imagining that the study would be a scholarly one about learning and Law. I read around curriculum and curriculum evaluations and imagined that this research would produce an orderly list of recommendations, as to how the law curriculum could be improved, to better serve the needs of students and the legal profession. But the increasingly political nature of the data gradually became apparent, and I realised that this would send me off in new directions. My readings and theorising had to become more eclectic, to allow me to develop an explanation for what was emerging from the participant data.

Inevitably, although race had never been an explicit feature of the study, the voices of the participants were speaking of exclusion and inclusion in terms of socio-economic backgrounds and stratified positioning that in South Africa traces its origins to class and

unavoidably to race. The melody comes through in the excerpts from the data, and the refrain seems to echo throughout the study: that race and class have a powerful shaping influence on educational experience in a transforming society. However, in my work here I chose not to privilege those aspects; they are the starting points for another study that is long overdue and can build on the findings that follow.

In this study, my intention has been to disaggregate the influences and drivers that have shaped the law curriculum, and to understand the factors that have played their part in reducing its moral and spiritual content to the level of “knitting patterns”, particularly in the context of a transitional society, where strong currents of politics, power and vested interests should have converged to produce a transformative educational experience.

Chapter 1

Opening Statement

1.1 Introduction

In this study, the central focus is on the curriculum of the Baccalaureus Legum (LLB degree) and the extent to which it meets the needs of South African society in preparing law graduates for professional legal practice. The title interrogates the overarching concern as to whether this degree is achieving the transformative aims and objectives that were articulated by its policy-makers in 1996. Following on from the 1994 transition from repressive apartheid state to constitutional democracy in South Africa, a major re-conceptualisation of legal education was instituted in 1997. This change was intended to address the pressing demands for improved representivity at all levels within the legal professions, fulfil the constitutional imperatives of the new human rights discourse that privileged equality, social and economic justice, and enhance the possibility of access to justice for all citizens.

In 1998, a variety of university degrees which had previously qualified graduates for entrance to legal practice were replaced by a four-year undergraduate degree, aimed at providing a single, affordable route for all seeking entry into both branches of the legal profession.¹ This change in legal education was implemented in practical terms through the

¹ The legal profession in South Africa is divided into two separate branches: the attorneys' profession and the advocates' profession, which are discussed in some detail below. However, the possibility of removing this distinction through the passing of the Legal Practice Bill has been mooted by the new Justice Minister: "Attorney/Advocate Distinction to be Abolished" Mail & Guardian Online: Retrieved

development of different law curricula for the LLB degree at twenty Law faculties existing in 1997. The new degree was first offered to students in 1998. It is apposite now, after ten years, to review the current curricula, examining how they have translated the vision of the policy-makers into practice, and to explore the effectiveness of this university education from the perspectives of graduates of the LLB degree and of their employers, in order to determine whether the qualification has achieved the transformative aims which it was intended to achieve.

In this chapter the focus and purpose of the study will be clarified and the historical context will be elaborated upon in order to situate the research. My personal role as insider-researcher has been alluded to in the Prologue, and will be more fully described in Chapter 3, in order to make full disclosure regarding my positionality in the study. This deep-insider lens will be further elaborated on in section 4.2. The description of context will be followed by a review of the history of South African law and legal education to provide an understanding of the significance of the change introduced in 1997. Current statistical data will be included to add some understanding of the phenomenon of students' experiences of the new law degree. The actual implementation of the undergraduate degree will be reviewed against a background of a new post-apartheid higher education regulatory framework. Finally, an outline of the chapters in the dissertation will explain the structure of the study.

1.2 Focus and purpose of the study

The focus of the study is the undergraduate law curriculum, introduced in 1997 in response to pressures to transform legal education, the legal professions, and the entire legal system in post-apartheid South Africa. The historical and political context that gave rise to the policy shift on legal education will constitute the background to the study. An overview of

on 25th June, 2006 from <http://www.mg.co.za/article/2009-06-24-attorneyadvocate-distinction-to-be-abolished>.

the origins of South African law itself, and then a survey of the system of legal education, tracing its chronological route through from Dutch and British colonial times to the system of legal education which existed prior to 1994, will reveal how existing patterns of dominance, stratification and division were reinforced by the law and the legal education system.

The role of Law, linked with the administration of justice, was necessarily pivotal in the political and societal change because of its centrality in effecting the transition to a constitutional democracy. The central role that Law played in structuring and supporting the ideology of apartheid, through legislative measures, the interpretations of the judiciary, and constitutional enactments, cannot be overlooked as a powerful historical feature that shaped this imperative. In the preface to the Proceedings at the Legal Forum on Legal Education² the following view summarised the purpose of the forum:

The dominant theme which emerges from the presentations and discussions is that of *the structure of the basic law degree* in South Africa....[I]t is the point on which legal education, its transformation and access to justice is fundamentally anchored; *the structure of the basic law degree* became the vehicle through which, many participants argued, access to justice would be mediated, facilitated and expedited (1995, Preface to Proceedings, p. 2).

The symbolic potential that was associated with the introduction of a single new law degree is evident in the record of the discussions that took place. The vision that a qualification could bear such import conveys the weight and significance attached to the notion of what was to be the foundational qualification for the legal profession in a transforming society.

After ten years, this is an appropriate juncture to explore whether the curriculum has been implemented in ways that achieve the intended objectives of the original policy-makers, and to ascertain whether it is producing graduates who are adequately prepared for practice as legal professionals in South African society. My focus on curriculum is founded on the understanding that curriculum in higher education is the visible means through which policy is operationalised, and has historically been neglected as a key influence in the student experience. Curriculum content, the structure of curriculum and its delivery are powerful,

² Legal Forum on Legal Education: Proceedings; hosted by the Ministry of Justice, South Africa. Cape Town, 21/22 April, 1995, Preface.

value-laden manifestations of disciplinary and institutional culture, located at the interface between student engagement in higher education and the development of professional, disciplinary knowing, acting and being. Ensor (2002) notes that it has been necessary to read the implications for higher education curriculum policy from the “broad systemic policy formulations” of the 1990s, because very little explicit attention had been paid to the higher education curriculum. Barnett and Coate (2005, p. 151) refer to the “invisibility” and elusive nature of curriculum in higher education, and suggest that the reason for this is that “it would press on sensitivities” associated with the values and interests of the different stakeholders:

Curricula live in and are subject to the interpretations and intentions of those conducting the activities that in part constitute a curriculum. Curricula live in hearts and minds, it might be said; more formally speaking, in intentions. But curricula also live in educational structures (courses, programmes and the like), in educational concepts and in institutional and disciplinary cultures (Barnett & Coate, 2005, p. 151).

The “official” curriculum represents for me an entry point for understanding what takes place in legal education in South African Law faculties. As an educator who has had extensive experience in this field, it is the starting point for exploring how different faculties have interpreted the imperative to provide foundational professional education in a transforming society. Following on from this initial engagement, I shall proceed to investigate the different experiences of those who have been prepared for professional practice by means of this curriculum, in order to ascertain its effectiveness in relation to the intentions of its originators.

1.3 Purpose statement

My purpose in undertaking this study was to develop a deeper understanding of the factors that shaped the development of LLB curricula at the 17 existing Law faculties in South Africa, ten years after a major policy shift was implemented through legislation.

Further, my purpose was to obtain insights regarding the actual experience of the law curriculum from the perspectives of stake holders and role players who are involved in the everyday practice of law. Graduates from one university, who had experienced the undergraduate law curriculum and who had subsequently qualified as practising attorneys, together with their employers, provided a perspective that speaks to the effectiveness of the law curriculum. It was necessary to ascertain whether the graduates who had experienced the new law curriculum had acquired the contextualised education, skills and values to equip them to practice as competent legal professionals in our society. The focus of the research narrowed down to develop a deeper and more complex understanding of the experience of the undergraduate curriculum at one specific university. Six graduates from a single year cohort at one Law faculty were interviewed to explore their differing perceptions of the experience of studying law through the new LLB curriculum. Their perceptions of the curriculum experience were of necessity influenced by their current experience of being a legal practitioner in South Africa. Interviews with the six employers (senior partners/attorneys in each law firm/agency) of the graduate participants served to provide data that would validate or subvert the data elicited from the graduate interviews. This combined data produced a well-developed sense of the ways in which the curriculum prepared graduates for professional practice or fails to prepare them adequately. This data was contrasted with statistical data enabling me to develop a complex appreciation of the extent to which the law curriculum is achieving the intended objectives of the curriculum planners in 1996, and to assess how it prepares graduates for legal practice in post-apartheid South Africa. Because the structures and hierarchical framework of professional legal practice are an integral feature of the context of these two data sets it is necessary to describe briefly the possible career options available within the legal profession in order to locate these stakeholders within the wider landscape of legal practice.

Law graduates may enter a range of different career paths: in the private sector as legal practitioners, legal advisers, financial planners, or in the public sector as prosecutors, law officers, magistrates, judges, state law advisers, state attorneys, state advocates or legal academics. Preparation for all these different career paths is provided through the single foundational university qualification (LLB), while admission to some professional career

paths requires further professional training. It is estimated that approximately 50% of graduates become attorneys, 5% become advocates, 10% enter the public sector and 35% go into commerce (Godfrey & Midgley, 2008). In this study I chose to focus on the attorneys' profession as the largest stakeholder group which absorbs the most significant proportion of law graduates. Few educational studies are able to trace the effectiveness of university education relating the learning acquired through the curriculum to the world of professional work (Hult, Dahlgren, Dahlgren, & Hard af Segerstad, 2004; Petocz & Reid, 2003), so the opportunity to access practising attorneys who were recent graduates of the LLB degree presented an interesting and readily available data set as participants in the research.

Although I have not included an exploration of law teachers' perspectives on the law curriculum in this study, my personal "insider voice" and my knowledge of, and deep involvement with, curriculum development within my own faculty over many years, has provided me with the experience to add in this "teacher" perspective. I have indicated those points at which the commentary reflects my personal interpretation, where my voice speaks through the research. In addition, documentation from a poll of stakeholders, including the constituency of law lecturers, which was conducted by the South African Law Deans' Association (SALDA) in 2008, has been included as Appendix 1 to enhance credibility and give voice to a broader range of opinions on the LLB curriculum. The current Law Deans who were interviewed also have had considerable teaching experience and most of them are currently "teaching" Deans, whose responsibilities are not restricted to management, but include teaching of students. Thus this apparent limitation in the study has been adequately accommodated within the research design.

The objectives of the study can be broadly stated as: (i) to identify the ways in which the vision of the post-apartheid curriculum policy-makers in 1996/7 has been implemented by South African Law faculties through their curricula; and (ii) to explore how the experiences of the law curriculum at one specific Law faculty prepares its graduates for practice as competent legal professionals in South African society.

Accordingly, the critical questions to be answered by the research are:

- How has the vision for the undergraduate LLB degree, introduced in 1997, been translated into transformative education after ten years?

- What are the experiences of graduates of one South African Law Faculty and their employers regarding the manner in which the undergraduate law curriculum prepares graduates for practice as legal professionals in South African society?

The focus throughout the study will be on curriculum because it signifies a single, unifying conception that reflects the foundational legal education experience from the perspectives of all stakeholders: policy-makers, academics, students, and all practitioners. Although “curriculum” is a difficult notion to grasp in a clear and uncontested sense, this “fuzzy and elusive” notion in higher education is often deliberately left unclear because of the potential it holds to disturb existing interests (Barnett & Coate, 2005, p. 151). The multiple understandings attached to curriculum complicate the central and problematic concern in this study: to explore whether the undergraduate curriculum is achieving its intended objectives; whether it is “fit for its purpose”

The perspective on curriculum which most closely reflects my own interpretation is one that views academics as “interpreters of contemporary social and educational circumstances”, in order to develop an effective learning environment (Fraser and Bosanquet, 2006, p. 281). This reflects Habermas’s (1972) practical or communicative interest and locates the student learning experience at the centre of curriculum, which is constantly being refined by reflective practice. Fraser and Bosanquet (2006, p. 280) note that students are as much a part of the curriculum as they are the subject of it, not its object. Curricular content is selected to assist “meaning-making and interpretation”, and it is likely to be holistically oriented and integrated (Grundy, 1987, p. 76).

In order to situate the current study appropriately in context it is necessary first to review the historical background of South African law and legal education.

1.4 Background context: Higher Education policy in post-apartheid South Africa

The broad focus of the study traces the legal education curriculum in South Africa from 1994 through to 2009. However, legal education cannot be viewed in isolation from the national contextual framework of policy changes in South African higher education during this period of tumultuous social and political change. Accordingly, I shall first briefly review the policy context of South African higher education, then consider the origins of South African law, then proceed to an in-depth examination of the historical development of legal education.

The first stage in transforming higher education took the shape of “massive, participatory drives towards policy formulation” which produced a report from the National Commission on Higher Education (NCHE) in 1996 (Cloete et al., 2002, p. 87). The 1997 White Paper *A Programme for Higher Education Transformation* (Department of Education, 1997) translated the report into draft policy which identified equity, redress of inequalities, reconstruction and development as its central tenets. The Higher Education Act³ was promulgated in 1997. Higher education was seen not only as a means for individuals to attain private benefits through the development of their learning needs and aspirations, but also as contributing to the public good through the distribution of opportunity and achievement among citizens. Increased and broader participation together with responsiveness to societal interests and needs were regarded as essential features of a transformed system (Cloete et al., 2002, p. 100). Education was seen as the vehicle that would enable citizens to participate as enlightened, responsible and constructively critical participants in the new dispensation. The development of skills and expertise required for the labour market and the growth and prosperity of a modern economy were a parallel focus. This dual discourse – addressing equity and diversity through the development of democratic values in education, while at the same time developing skills for international competitiveness in the context of economic globalisation – reflects the primarily “symbolic” characteristic of educational policy at the time (Jansen, 2002; Subotzky, 2000, p. 108).

³ Act 101 of 1997.

The introduction of a regulatory quality assurance framework through the enactment of the South African Qualifications (SAQA) Act⁴ and the establishment of a National Qualifications Framework (NQF)⁵ created an integrated mechanism for the registration of quality-assured qualifications, according to their constituent components, in the form of acquired skills and knowledge. SAQA reports both to the Minister of Education and the Minister of Labour, reflecting the seemingly contradictory alignment of formal academic education with vocational training. The demands made on academics to complete module templates in accordance with outcomes-based educational criteria had a significant influence in shaping higher education programmes and curricula in the direction of education for economic development (Ensor, 2002, p. 273). Institutional audits and governmental pressure to assure that quality and relevance are evident in both curriculum content and structure have to some extent drawn attention to the historically neglected area of curriculum reform in higher education (Ian Scott & Yeld, 2009). The contested nature of what counts as quality in higher education is centred on the distinction drawn between “fitness of purpose” and “fitness for purpose” (Kathy Lockett, 2003). The former term denotes compliance with an imposed view (government’s view) of the purpose of higher education, while the latter term suggests a notion of achieving its purpose effectively and efficiently, in terms of stakeholder or client perceptions of what the purpose of higher education is. It is this latter notion that is used in this study to explore whether the undergraduate law degree is achieving its intended objectives effectively and efficiently.

The Higher Education Quality Council (HEQC) indicates its approach to quality in these terms:

HEQC approach to quality

In view of the prevailing higher education policy and educational context, the HEQC’s understanding of quality encompasses fitness for purpose, value for money, and individual and social transformation, within an overarching fitness of purpose framework.

Fitness for purpose is examined in the light of the institution’s mission and goals and definition of its identity.

⁴ Act 58 of 1995.

⁵ South African Qualifications Authority Act (No. 58 of 1995) passed on 4 October 1995.

Fitness of purpose is examined with regard to the manner and extent to which an institution's mission and academic activities are responsive to national priorities and needs.

Value for money is assessed by considering the extent to which efficiency, effectiveness and economies of scale are embedded in the quality management of the core functions of the institution.

Transformation is assessed with regard to the development of individual students as well as the country's requirements for social and economic development (HEQC, 2007, pp. 3-4).

There is an implicit assumption here that the dominant view of institutional purpose will be the view of the quality audit body, rather than the purpose as determined by institutions, a factor that continues to shape approaches to the audit process and curriculum-making in higher education. The overarching framework is indicated as "fitness of purpose"

After the second democratic election in 1999, the Council on Higher Education (CHE) was requested to undertake a general review of the institutional landscape of higher education. Their report: "Towards a New Institutional Landscape" (CHE, 2000) identified as challenges: effectiveness, efficiency and equity. Their proposed solutions were to establish a differentiated hierarchy of institutions and for government to consider certain institutions for "combination". As a response, the Ministry of Education issued a "National Plan for Higher Education" (Ministry of Education, 2001) which prioritised increased efficiency and graduate outputs and raised the possibility of reducing the number of higher education institutions. The Plan acknowledged an "implementation vacuum" that had been created by the spate of policy-making in the absence of a prioritisation of objectives (I Scott, Yeld, & Hendry, 2007, p. 3). In 2003, institutional mergers that reduced the total number of universities from 20 to 11 radically altered the landscape, with the stated objective of streamlining the range and location of higher education offerings. In this context, the further reduction of educational resources came as a severe constraint for all institutions.

The government funding formula for higher education was significantly altered in 2004, reflecting the severe budgetary constraints that persisted in hampering efforts to improve the quality of higher education. Law as a discipline was placed in the lowest quadrant of government education funding because of the low cost of offering legal education. Further

policy making related to language policy in higher education and student enrolment planning has been undertaken. The most significant recent change has been the creation in May 2009 of a separate Ministry of Higher Education, which will address the multiplicity of challenges facing this sector. This review of the higher education policy context will now consider more specifically the framework of legal education at universities and in the legal profession in South Africa.

1.5 Legal Education: framework for dominance, division, stratification

The system of legal education that exists at present in South Africa consists of two distinct phases functioning in tandem to prepare candidates for admission to legal practice either as an attorney or as an advocate. The initial or foundational phase of legal education consists of obtaining a law degree, the Bachelor of Laws (LLB) conferred by a university. The second phase of graduates' professional legal education is provided by legal professionals to prepare graduates for their attorneys' admission or advocates' bar examination, which is a prerequisite to being admitted to legal practice. Legal practitioners must elect to join one of two possible branches of the profession: attorneys or advocates. Members of the attorneys' profession generally provide day-to-day legal services to citizens litigating in the magistrates' or lower courts.⁶ Advocates function as specialists preparing opinions on more complex legal issues and arguing matters in the high courts (including the Constitutional Court) where judges preside. The primary distinction between the two branches of the profession is related to the level of the courts in which practitioners have a right to appear. However, other distinctions do exist; for example, advocates may only be accessed by clients through a referral from an attorney, while attorneys may be accessed by clients and

⁶ Right of Appearance in Courts Act 62 of 1995. Section 4(1)(b) (permitting practising attorneys who have three years of experience as a practitioner to apply for permission to appear in the high courts).

take instructions directly from a client “off the street” Advocates cannot enter into partnerships with other advocates, while attorneys may operate either as sole practitioners or partners or associates in large partnerships or firms.

This outline of the current structural features of the South African legal system prefigures the divisions, hierarchies and levels of differentiation that have dominated the landscape of legal education. Historical separateness, culminating in the explicit apartheid policy, characterised much of the texture of the legal system and continues to play a determinant role in the field of legal education, despite attempts by the democratically-elected government to redress past disadvantage. As Dhlamini observed:

[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 (Dhlamini, 1992, p. 598).

This legacy continues to impede the thrust toward equity of outcomes in legal education and can also be observed in the historical foundations of the legal system itself.

1.6 Historical origins of South African law

The legal system in South Africa has its origins in Roman-Dutch Law, which was brought to South Africa from the Netherlands in 1652 with the arrival of Dutch colonisers (Philip F Iya, 2001, p. 356). The customary or indigenous law of the African inhabitants at the Cape colony was not recognised by the Dutch colonisers other than as a subsidiary and inferior system and was applied only between the inhabitants themselves (Maisel & Greenbaum, 2002, p. 59). Roman-Dutch Law ceased to be used as a living system of law in the Netherlands in 1806 when France took control and imposed the French Code. However, in South Africa, Roman-Dutch law principles (the common law) remained in place in branches of law such as property law, contracts and wills because these were strongly grounded in equitable principles and supported by an adequate availability of authoritative text sources

both in Latin and Dutch. When the British assumed control over the colony in 1806, many aspects of English Law were adopted and shaped the existing South African procedural law and all branches of commercial law, such as insurance law, maritime law and company law (Maisel & Greenbaum, 2002, p. 60). English Law supplemented the deficiencies and gaps that had arisen in the law as it developed at the Cape, and particularly influenced the administration of justice at the Cape. A Cape Supreme Court was established in 1832 and thereafter advocates and judges had to be trained in England. This hybrid system of law at the Cape was taken to the other domains into which the Dutch colonisers extended their control and was adopted as the law of the Union of South Africa in 1909 when all four colonies: Cape, Natal, Orange Free State, and Transvaal, were united as one state (Kaburise, 2001, p. 363).

South African law developed through the application and extension of Roman-Dutch common law principles in the courts. These principles were incorporated into statutes enacted by the Cape Parliament and other Southern African legislatures – in the Transvaal and the Orange Free State, which were established as independent Boer Republics, and in Natal which became a British colony in 1843. The law increasingly played an important role in formally establishing the dominance of the minority white population over the majority of the inhabitants of the country. Statutes such as the Natal Code of 1878, the Native Succession Act of 1884, and Law 4 of 1885 in the Transvaal Republic, all served to reinforce the application of a separate body of customary law for Africans, depriving them of recourse to the courts and recognition as full citizens. A policy of depriving the indigenous occupants of their land and their right to participate in the society, through political and legal processes and through a lack of educational and employment opportunities, was consistently reflected in the developing body of rules enacted by the British administrators and Boer governments (Maisel & Greenbaum, 2002, pp. 83-85). The “foreign” nature of the official legal system engendered attitudes of suspicion and resistance to the law in the African population whose lives were negatively impacted by it, without their having recourse to the rights available under the law.

When the four colonies came together in 1909 as the Union of South Africa, racial segregation as *de facto* practice in almost every aspect of daily life was the accepted norm.

This separation of races became clearly articulated as the apartheid policy of the Nationalist Party who governed the country from 1948 until the transition to a constitutional democracy in 1994. During this period, through an accumulation of legislative enactments, the government created racial classifications ensuring that citizens of different race groups occupied separate residential areas, used separate public amenities, attended separate educational institutions where different curricula were studied, and were subject to restricted employment opportunities.⁷ This separation of the races was enforced by harsh policing and tight administrative control, severely limiting the legal educational and professional opportunities available to those outside the white male population.

The next section will review and trace the historical progression of legal education in South Africa.

1.7 The development of legal education

The earliest qualification offered in law was the Law Certificate, which was taught informally by practitioners and qualified lawyers and was made a pre-requisite for practice at the Cape in 1858.⁸ Formal university teaching of law began at the University of Cape Town (UCT) in 1859, and the LLB degree was introduced there in 1874. The UCT Law Faculty was established as an official department within the university in 1918 (Cowen & Visser, 2004). The University of Stellenbosch Law Faculty, teaching law in Afrikaans, was established in 1921. The Stellenbosch Law Faculty offered an LLB degree which focused on practice-related subjects such as Roman Law and Roman-Dutch Law, since many faculty members were practicing lawyers. Law faculties were subsequently established in other regions of the

⁷ See generally Population Registration Act 30 of 1950; Group Areas Act 41 of 1950; Bantu Education Act 47 of 1953; Reservation of Separate Amenities Act 49 of 1953; Extension of University Education Act 45 of 1959.

⁸ 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.

country, following one of two curricular models: the English “liberal arts approach” which encouraged students to obtain a varied educational background in other disciplines, or the “UNISA model” which concentrated only on law courses and included very few non-law subjects. The UNISA model was the pattern mainly followed by Afrikaans and black universities (Midgley, 2007).

In 1934, the South African Parliament enacted the Attorneys, Notaries and Conveyancers Admission Act, to regulate the practical training of attorneys.⁹ This statute required law graduates to complete two years of articles of clerkship, a form of apprenticeship where graduates would work in a law firm acquiring legal skills after obtaining a degree, prior to being admitted to practice as an attorney. On the other hand, rules relating to the professional training of advocates were not statutory in origin and varied from province to province. Graduates wishing to be admitted as advocates were required to complete a period of pupillage, which has since 2004 been fixed at one year’s duration. Pupil advocates learn advocacy skills under the close tutelage of a practicing advocate before writing a bar examination that is administered by the General Council of the Bar, the advocates’ professional association.¹⁰

By the 1970s, three law degrees were offered at South African universities. Firstly, most law faculties offered the LLB degree, which by then was a two- or three-year postgraduate degree which followed a Bachelor of Arts, Bachelor of Commerce 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), which qualified graduates for practice as attorneys only.¹¹ The B Proc degree

⁹ 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).

¹⁰ Rule 8 (*amended* 2004) of the General Council of the Bar, Uniform Rules of Professional Ethics. Retrieved on 7 July, 2009 at: http://www.sabar.co.za/ethics_rules.pdf.

¹¹ 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.

replaced the Law Certificate which remained as a qualification for practice until 1979, permitting persons who did not have a university degree to access the attorneys' profession even after the LLB degree had been introduced (Midgley, 2007). Finally, a few faculties offered the three-year Bachelor's degree, the Baccalaureus Juris, (B Juris) which qualified graduates for practice 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 persons.¹² 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). Black students were permitted to attend white universities only if they obtained permission from the Minister of Education to do so (Philip F Iya, 2001, p. 358). This separation perpetuated a sense of different quality degrees for different races and impacted graduates' abilities to obtain employment in top law firms. The all-pervasive exclusion on a systemic basis of 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 rapidly as possible, once political change had been effected.

1.8 Transition to constitutional democracy

With the transition to democracy in 1994, came an urgent call to transform the legal profession and legal education. Beyond dispute was the necessity of addressing the under-representation of Blacks, and more particularly of Africans, in all areas of the legal profession and of establishing a single, affordable academic qualification that would provide access to both branches of the profession. In 1994 the new Department of Justice and Constitutional Development called a National Consultative Forum to include all stakeholders in the debate. In the following year, a Planning Unit of the newly formed Ministry was

¹² University Education Act 45 of 1959 (*repealed*).

established to produce a strategic plan entitled “Justice Vision 2000”,¹³ setting out priorities for the transformation of the entire justice system. The guiding principles of this plan were that the justice system should reflect the new constitutional values and the policy goals of “reconstruction and development”, with regard to the provision of legal services, access to justice, the structure of the professions and the courts. This document, released in September of 1997, raised questions about the funding, the focus and the purpose of legal education, but it contained no direct recommendations on the topic (Godfrey & Midgley, 2008, p. 21). Three forums of stakeholders were arranged in the period from 1995 to 1997, to review a variety of aspects of legal practice and education and of access to justice, aimed at developing “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”.¹⁴ In a report on Law and Legal Education in South Africa presented at the second forum, a foreign academic, Madhava Menon, commented:

Increasingly Law is likely to assume a critical role in social reconstruction in South Africa. This is envisaged by the new South African Constitution....In the task of social integration of multi-cultural South Africa, ridden with Apartheid-induced social divisions, law and administration of justice have to take a creative and imaginative role....It is in this context, it is submitted, the role of law, legal education and justice delivery system has to be appreciated and organised (*Proceedings of the Legal Forum on Legal Education*, 1995, p. 96).

The debates began on developing a single qualification for legal practice in order to promote equality. This was the position that was strongly supported by the Black Lawyers’ Association (BLA), but the historically disadvantaged universities (HBUs) raised the issue of inadequate resources and facilities to train the number of law graduates required to serve

¹³ Ministry of Justice. 1995. Justice Vision 2000: Five Year National Strategy for Transforming the Administration of Justice and State Legal Affairs. Retrieved on 13 August, 2009
<http://www.doj.gov.za/policy/misc/justice2000.htm>.

¹⁴ Minister Dullah Omar, Speech made at University of South Africa Law Faculty on 2 March, 1999, page 3. Retrieved on 15 November, 2007 at:
<http://www.info.gov.za/speeches/1999/990511152p1004.htm>.

their communities.¹⁵ The low number of black lawyers and the high cost of a minimum of five years of study at university to become an advocate proved to be driving forces in the campaign to radically alter legal education.

The obstacles in gaining access to high quality tertiary education, together with the difficulty of obtaining articles of clerkship in urban white male-dominated law firms, together with the unaffordable expense of one year of pupillage for aspiring black advocates, ensured that they were effectively restricted to the lower levels of practice within the legal profession. Even if they were successful in overcoming the many structural barriers within the differentiated education and legal systems, black practitioners were geographically segregated by being restricted to practicing in “townships” or black “homelands” through the government policy requiring separate trading areas for each racial group.¹⁶ The further statutory requirement for all practicing lawyers to have passed a university course in English, Afrikaans and Latin remained as an egregious impediment to black candidates until it was removed in 1995.¹⁷ The cost and the length of time (five or six years of study) required to obtain an LLB degree in order to qualify as an advocate resulted in that branch of the profession being dominated by white males. Further, appointment as a judge could only be made from the ranks of experienced advocates. This served to reinforce the discriminatory effect that the differential qualifications had in terms of racial, gender and socio-economic bias (Godfrey & Midgley, 2008, p. 2).

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 appointed to the bench. Law curricula reflected the concerns of the economically dominant white population, with emphasis placed on commercial subjects (McQuoid-Mason, 2008). Scant

¹⁵ Professor Bongani Majola (University of the North). 1995 Legal Forum on Legal Education Proceedings, Cape Town, April 21, 22. pp. 33-35.

¹⁶ Black Lawyers Association, <http://www.bla.org.za> (last visited Jul. 6, 2009).

¹⁷ Admission of Advocates Amendment Act 55 of 1994 § 5; Admission of Legal Practitioners Act 33 of 1995 §§. 1-9.

regard was paid to issues such as customary law, poverty, social justice, or the lack of access to the legal system that affected the majority of the population, namely, black persons (Dhlamini, 1992, p. 598). Thus, the structure and regulatory framework of both legal education and the legal system contributed to and reinforced patterns of racial separation and socio-economic and political inequality that were endemic to the broader South African society.

A Task Group on Legal Education for the Restructuring of Legal Education in South Africa, selected from Law Deans representing 20 law faculties and including representatives of the legal profession was mandated by the Ministry of Justice and Constitutional Development in 1995 to develop proposals for a new legal education framework (McQuoid-Mason, 2004). This group recommended the introduction of a new four-year undergraduate qualification, to replace the postgraduate LLB degree in 1996. The draft proposals noted that there was grave concern that a shorter LLB degree would lose its quality and inevitably become nothing more than a B Proc (the old four-year attorneys' qualification). It was stated that the new premises underlying the degree were that it would be a very demanding and intensive degree. Specifically mentioned were the following objectives of legal education, based directly on the recent (at the time) Report on Legal Education from the Lord Chancellor's Advisory Committee on Legal Education in England (ACLEC, 1996): intellectual integrity and independence of mind; core knowledge; contextual knowledge; legal values and professional skills. The need for flexibility of offerings and the autonomy of law faculties was entrenched, while the option of an additional foundational year for disadvantaged students was raised. The proposals did not identify core courses, practical skills-training or non-law courses for inclusion in curricula, leaving these choices to individual faculties as a matter of preserving their autonomy. However, a list of recommended "core subjects" were appended to the proposals. The document was accepted at the conference of the Society of University Teachers of Law in January 1996.¹⁸

¹⁸ Proposals from the Task Group on Legal Education for Restructuring Legal Education in South Africa, based on agreement reached at a meeting of Deans of Faculties of Law, held at the request of

The Qualification of Legal Practitioners Amendment Act of 1997¹⁹ 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.

The changed legal framework in South Africa, founded upon a Bill of Rights as part of a supreme Constitution that enshrines the values of dignity, equality and democracy, would ensure that law curricula were infused with a pervasive human-rights discourse. The effects of section 39(2) of the Constitution, which requires that in interpreting any legislation, or in the development of the common law and customary law, courts must promote the spirit, purport and objectives of the Bill of Rights, have been to challenge the validity of many discriminatory principles and statutory provisions.²⁰ Most Law faculties have in the last twenty years introduced specialist LLM programs that cover a variety of fields, as well as doctoral degrees, in the form of a PhD or an LLD (Midgley, 2007).

Although the post-1994 democratically elected government promised to redress the historical inequity of the HBUs, the reality is that this has not materialised. HWUs continue to have better facilities and more resources, which attract more students and thus increased state funding, because state subsidies are linked to student enrolment numbers. Their superior facilities make them more attractive to students and academic staff alike (Cloete et al., 2002, pp. 397-398). 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. 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

the Minister of Justice in November, 1995. Copy of report and details supplied by Participant 1, (Chapter 5) during a conversation in Johannesburg, on April 3, 2008.

¹⁹ Act 78 of 1997.

²⁰ South African Constitution of 1996.

imperatives of skills development, quality research production and creating improved facilities (Cloete & Fehnel, 2002, p. 396).

Despite measures aimed at redressing disparity between higher education institutions which were created through the institutional racism of apartheid, 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”. Institutionally-based racism is continued through the re-construction of racialised identities and discursive spaces (Robus & MacLeod, 2006).

The new undergraduate LLB qualification, introduced at various universities in 1998, permitted graduates access to both branches of the legal profession, as advocates or attorneys, after completing the academic degree in a minimum period of four years, followed by two differing periods of practical apprenticeship, depending on whether a graduate wished to be admitted to practice as an advocate or as an attorney. Faculties could select how to sequence content, and space was left for electives and variation between various law faculties to allow for developing “niche” markets. The views of delegates to the 1995 Forum, at which the issues were debated, were strongly reactive to the recent experiences of the apartheid government’s interference with academic freedom at universities. By means of legislated racism, harsh censorship laws, draconian provisions that permitted detention of opponents without access to courts, and numerous incidents of police “spying” activities on liberal campuses,²¹ the apartheid government had imposed its dictates on higher education institutions. A prominent lawyer at the Forum warned the 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 centralized regime of university education and attempt to dictate universal curricula, whilst removing the ability of the universities to determine

²¹ Terrorism Act 83 of 1967; Internal Security Act 74 of 1982; Publications Act 42 of 1974. Article on the Police Spy List accessed at:

http://www.iol.co.za/index.php?click_id=6&art_id=ct20031207101201345L232470&set_id=1, 3 October, 2009.

for themselves what they found appropriate in particular circumstances
(*Proceedings of the Legal Forum on Legal Education*, 1995, p. 45)

Specific skills – such as analytical skills to appreciate the relationship between law and society; language skills (including indigenous languages); communication and writing skills; legal ethics; culture, race and gender sensitivity; practice management skills; accounting skills; research skills, trial advocacy skills; computer skills – were listed for inclusion in LLB curricula. These recommendations were considered to be in line with international changes to legal education, particularly since South Africa had recently been re-admitted to the Commonwealth (ACLEC, 1996; MacCrate, 1992; Pearce, Campbell, & Harding, 1987). To some extent, the new emphasis also reflected the neo-liberalist discourse implicit in concerns related to the “high skills” agenda for globalisation and outcomes-based education which focuses not only on knowledge, but also on the imparting of skills.

It was not until 2002 that the Standards Generating Body for Legal Education and Training determined a set of exit level outcomes for the LLB degree, which were promulgated by SAQA²² and which reflect the integration of skills and values into the degree outcomes. The generic LLB qualification was registered by SAQA at NQF Level 7, with an explanation stating that

The term generic means that the essential minimum-required outcomes and their assessment criteria have been identified in an abstract way, and are not linked to a preconceived curriculum (content)...The qualification does not seek to make all LLB degrees identical but rather to provide a framework within which providers can be innovative and stakeholder-driven in a liberated way...The generation of a generic LLB qualification will provide an opportunity to promote the establishment of curricula with an innovative approach to legal education in order to achieve the aims of not only inculcating knowledge in a learner, but also imparting skills and values essential for lawyers living in a democratic society (SAQA Registered Qualification and Unit Standard Home Page).²³

This statement reflects partly the reluctance on the part of academics to submit to political determination by government in curriculum making, but ironically, it also makes it easier for faculties to continue doing “business as usual”

²² Government Gazette G 23845 of 2002-09-20.

²³ <http://regqs.saqa.org.za/viewQualification.php?id=22993>.

1.9 Effect of the new LLB degree on representivity in legal professions

Ten years after introducing the undergraduate LLB degree, the pedagogical soundness of implementing this attenuated LLB degree has been questioned by law academics and practitioners (Van der Merwe, 2007; Statement on Legal Education by the Liaison Meeting between the Legal Professions and SALDA, 13 October, 2006; SALDA: Review of the LLB Degree, 2005). Law graduates were described as being “poor”, and deficient in numeracy and literacy skills.²⁴ The anticipated outcome of increasing black representation in both branches of the legal profession by offering the undergraduate LLB degree as a single, affordable qualification has not yet been met. A recent survey indicates that 80.2% of law firms are still owned by whites.²⁵

In presenting the statistical data that follows the interest is principally in the graphical illustration of a phenomenon that they provide, rather than in quantitative measurement as an important indicator on its own. Contemplating the data visually in table form sharply highlights some of the gross disparities and contrasts that immediately stand out.

²⁴ “Law Graduates ‘Poor’” Article accessed at:

http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2093220,00.html. The

Department of Justice Director-General, mentioned in the same article, criticised the drafting skills of gradates.

²⁵ National Survey of the Attorneys’ Profession: LSSA, 2008, p.6.

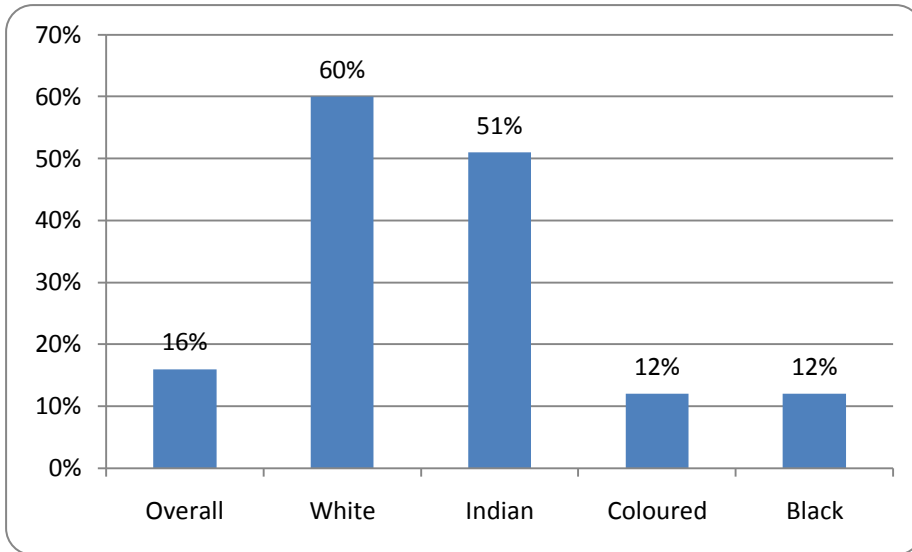


Figure 1 Participation rates: total university student enrolment in 2005 as % of 20-24 age group

(Bunting, 1994, p. 39; I Scott et al., 2007)

Data for 1994 (Figure 1) showed that gross participation rates in higher education for the 20–24 age group had been: 9% African; 60% White; 33% Indian and 11% Coloured (Bunting, 1994, p. 39). These 2005 data show that despite an increased number of African and coloured students participating in higher education, the percentage of those students in relation to the national demographics within that age group in higher education remains totally unsatisfactory.

Overall in the higher education sector, the number of African participants represents about half of the registered student population, which is a significant improvement in absolute numbers, as shown in Table 1.

Table 1 Equity profile of undergraduate degree enrolments

(Scott et al., 2007)

	African	Coloured	Indian	White	Female	Male
2000	144776	14137	26102	97846	151067	131933
	51%	5%	9%	35%	53%	47%
2001	162424	16090	28279	106259	166165	146959
	52%	5%	9%	34%	53%	47%
2002	175194	18730	31332	113224	181016	157551
	52%	6%	9%	33%	53%	47%
2003	178615	21527	34457	117669	188989	163450
	51%	6%	10%	33%	54%	46%
2004	169742	23086	36500	115409	188246	157108
	49%	7%	11%	33%	55%	45%
2005	170772	24042	37358	115654	190791	157645
	49%	7%	11%	33%	55%	45%
2006	181265	25438	36960	116208	198983	161589
	50%	7%	10%	32%	55%	45%
2007	194144	26405	35177	113690	204321	165879
	52%	7%	10%	31%	55%	45%

The identification of goals alone, such as increasing the representivity of the legal profession through the enactment of legislative policy that established one single affordable degree for access to both branches of the profession has succeeded in part only. Statistics from the Law Society of South Africa for 2008 reflect an increasing enrolment of African graduates for the LLB degree, at first-year level in Law faculties (Figure 2).

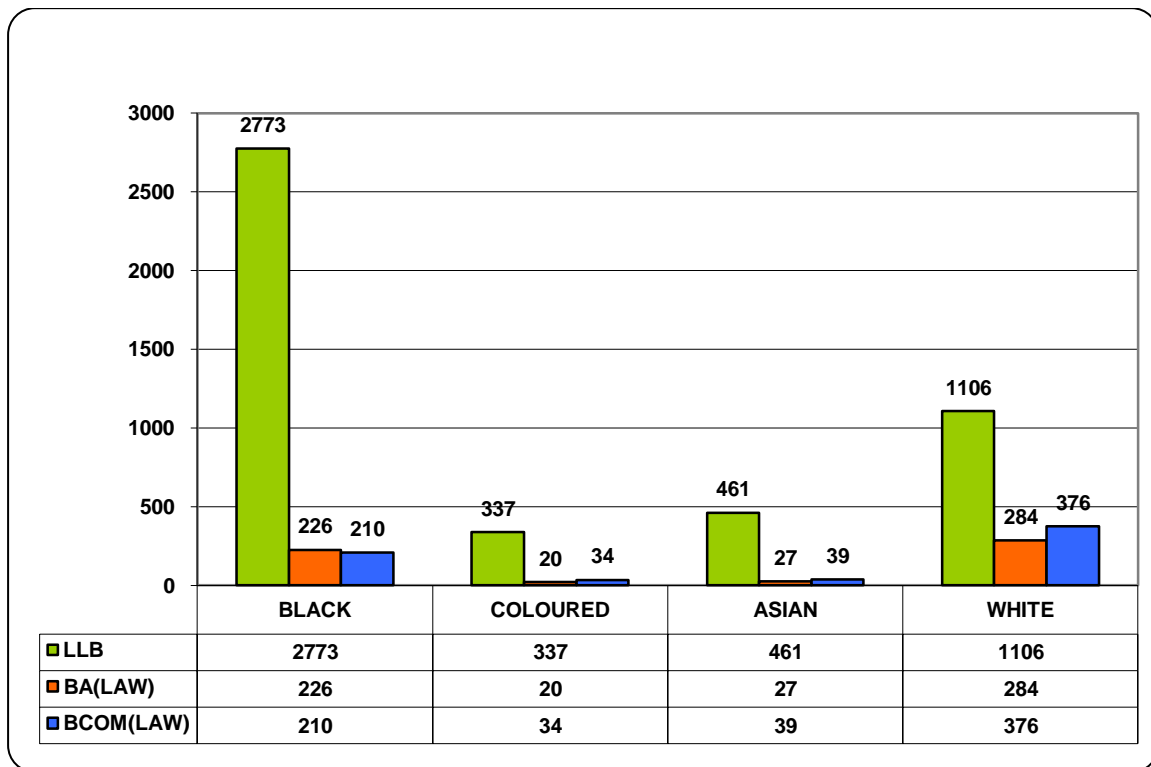


Figure 2 First time 1st-year registrations of Law students at South African universities: 2008
 (Data from Law Society of South Africa: Legal Education and Development Statistics: July, 2009)

At first glance Figure 2 suggests that the number of African students registering for Law represents a satisfactory enrolment level. Similarly, the number of African graduates from Law faculties has increased substantially, although there are still more white Law graduates than any other group as shown in Figure.

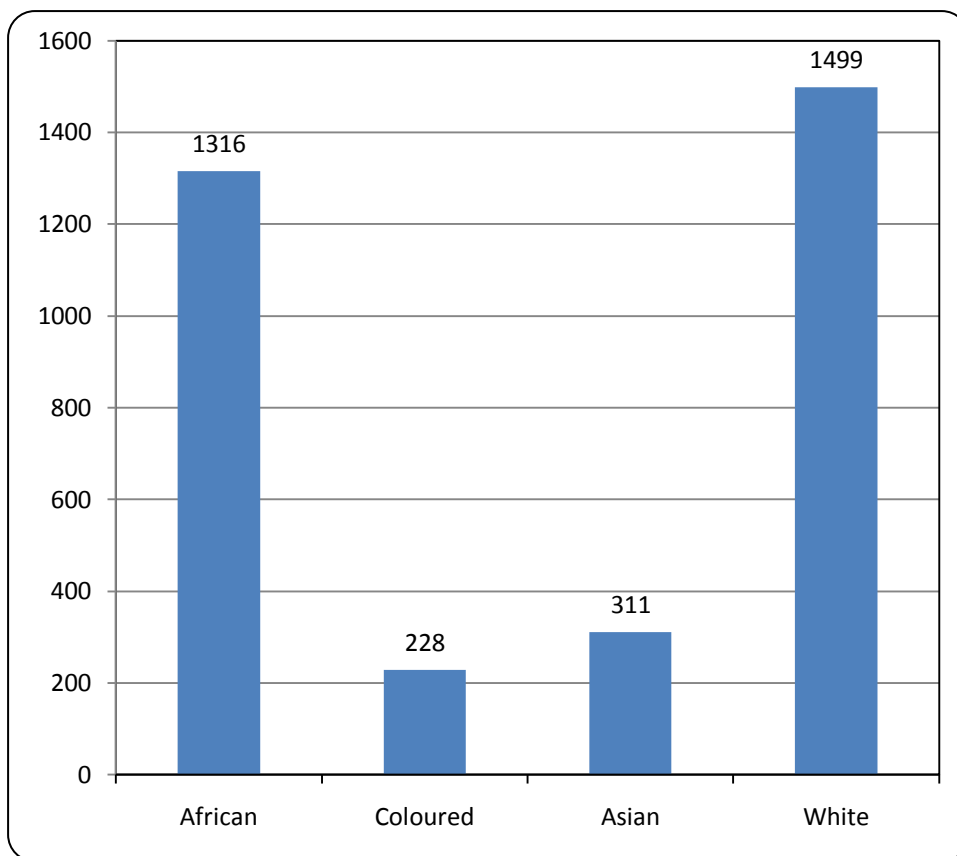


Figure 3 LLB graduates by race 2008

(Data from Law Society of South Africa: Legal Education and Development Statistics: July, 2009.)

The composition of LLB graduates in 2008 thus reflected an increasing number of black graduates (Figure 3) but as a reflection of the demographics of the total population of the country these statistics indicate a continuing over-representation of white and Indian graduates. The results of another study of higher education patterns reflect worrying trends at a national level.

Figure 4 indicates the relative distribution by race of attorneys in South Africa in 2008. This chart vividly illustrates the perpetuation of racial imbalances within the attorneys' profession which may be attributable, to some extent, to the inclusion of a significant number of ageing professionals who were in practice prior to 1994. The four sets of vertical bars represent data from each of the four regional law societies: the Cape Law Society, the Free State Law Society, the Law societies of the Northern provinces and the KwaZulu-Natal

Law Society, with the bar colours which distinguish the various race groups plainly demonstrating the predominance of white attorneys in every regional area.

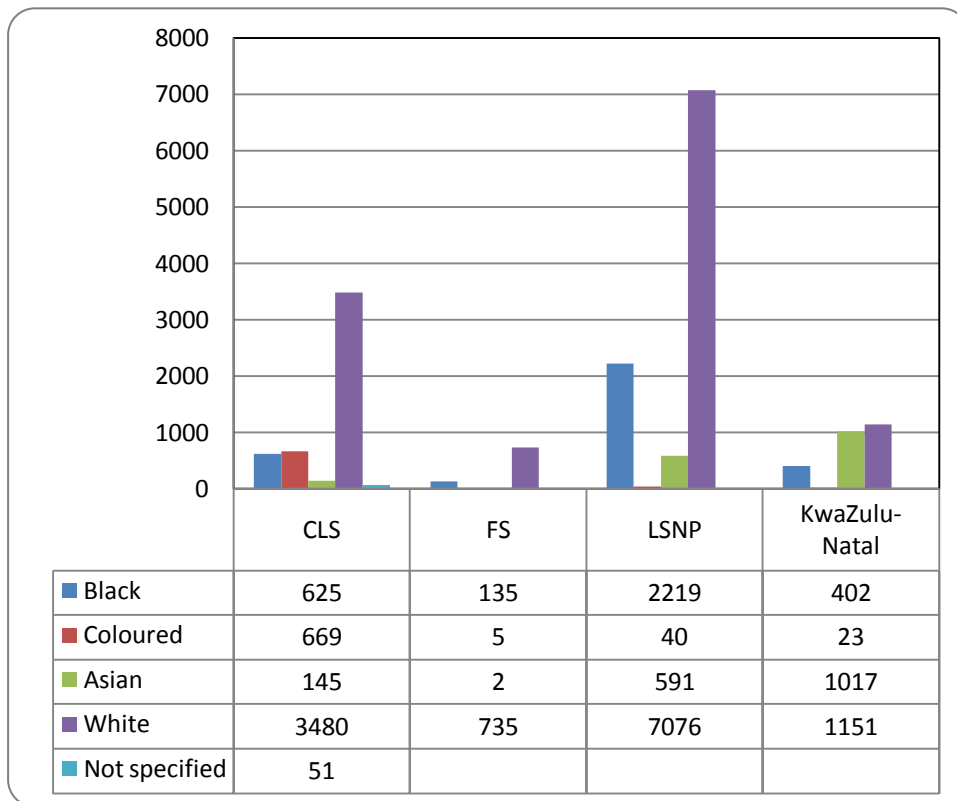


Figure 4 Practising attorneys by race 2008

(Data from Law Society of South Africa (LSSA): Legal Education and Development (LEAD) Statistics: July 2009)

A study of student drop-out rates in South African higher education, based on enrolments in 2000, determined that approximately 30% of students dropped out in their first year of university; a further 20% dropped out in their second and third years of study (I Scott et al., 2007). Of the 50% who remained studying, less than half (22%) graduated within the minimum time period for the degree (Letseka & Breier, 2008). By the end of 2004, that is, five years after entering university, only 30% of the total number of first-time entering students had graduated; a further 8% graduated after an additional year. Of the initial students 56% had left their original institutions without graduating, and 14% were still in the system. In this year cohort, 65% of African students dropped out and only 24% graduated, while 41% of white students dropped out and 48% graduated. In terms of success rates, although white students' success rate is low, African students continue to under-perform in

comparison to white students. In 2006, the success rate of African students had increased to 65%, while that of white students was 77%. Of particular concern for legal education is the following data which documents the success rate of graduates in four-year professional undergraduate degrees in 2004, according to discipline (Figure 5):

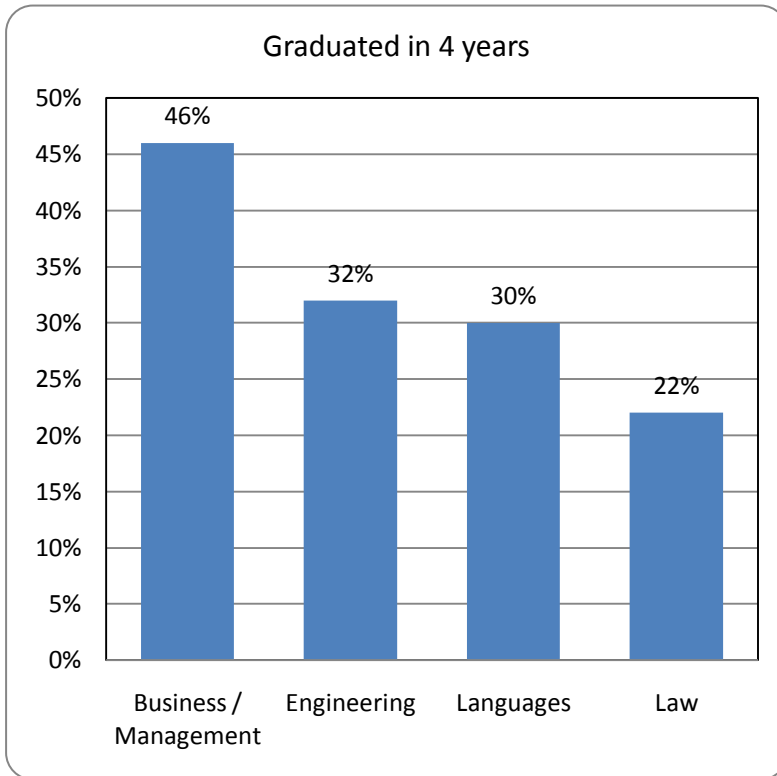


Figure 5 Graduated in regulation time: professional first B-degrees (excluding UNISA)

(I Scott et al., 2007, p. 26)

Figure 6 compares the percentages of students in those same discipline areas who took longer to complete their degrees:

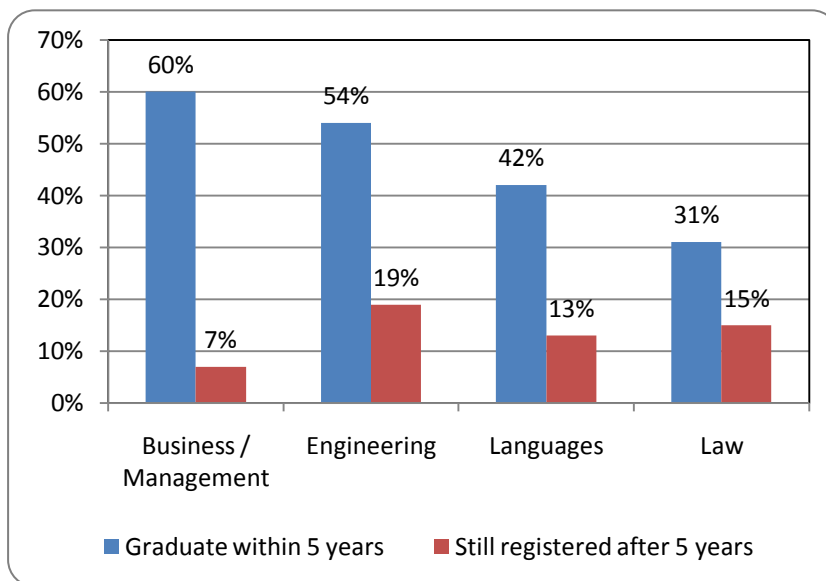


Figure 6 Professional first B-degrees, all first-time entering students (excluding UNISA)

(Scott et al., 2007, p. 13)

Fourteen percent of black law students graduated in the minimum period for the degree while 33% of white students completed their LLB degree in four years (I Scott et al., 2007, p. 26). What is evident about law students is that 46% are taking at least one year more than the stipulated minimum time period for the LLB degree, which has significant cost implications for students from poor backgrounds. This statistic undermines one of the key motivating reasons for introducing the undergraduate LLB.

Historical inequalities in students' educational backgrounds play an important role in their success rates at university (I Scott et al., 2007, p. 23). In addition, black students usually are not mother-tongue speakers of English or Afrikaans which are the two languages of instruction in higher education. Educational and socio-economic background (where continuing poverty aligns closely with race), coupled with the funding difficulties that frequently confront black students at university, tend to reinforce a cycle of disadvantage which perpetuates the racial inequalities within the legal professions. This "snapshot" of the state of legal education at universities and in the attorneys' profession puts the focus all the

more sharply on the broad question being pursued in the present study: what is the students' experience of learning at university through the undergraduate law curriculum and how does the curriculum prepare them for professional practice?

The conclusions to be drawn here are that although transformation of the legal profession appears to be taking place, albeit at a slow pace, the success rate of African students who enrol as aspiring lawyers mirrors the disturbing trends that beset the whole of the higher education sector in South Africa. Despite improved enrolment rates and increasing participation by previously disadvantaged students, in the overall climate of unsatisfactory participation and poor achievement in higher education the retention and success rates of these students at universities, and in Law faculties more particularly, is disappointing. The final success rate of law graduates who actually enter the attorneys' profession is an indication of the persistent trends that "outsider" groups are still not qualifying as lawyers in sufficient numbers. The summation of Scott et al. is disturbing:

However, since it is successful completion that really matters for individuals and the country, equity of outcomes is the overarching challenge. The major racial disparities in completion rates in undergraduate programmes, together with the particularly high attrition rates of black students across the board, have the effect of negating much of the growth in black access that has been achieved. Taking account of the black participation rate, the overall attrition rate of over 50% and the below-average black completion rates, it can be concluded that the sector is catering successfully for under 5% of the black (and coloured) age-group (I Scott et al., 2007, p. 19).

The Ministerial Report on Transformation, Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions (hereafter Transformation Commission Report, Ministerial Committee on Transformation, 2008) recorded numerous conversations with black students who identified poverty as a key feature in contributing to student attrition. The alignment of poverty with race is not coincidental in the context of South Africa's history, although recent commentary has noted that race and educational disadvantage are no longer so closely correlated. Le Roux and Breier (2007) propose that indicators other than race ought to be included as indicators of applicants to higher education who qualify as "disadvantaged". The *Transformation Commission Report* also identifies language as an obstacle to success for African students. A black student at one

university commented: “Language is a major stumbling block, especially at undergraduate level. Basic language skills are of critical importance if students want to make an impact and not just pass”. The *Transformation Commission Report* concludes:

The lack of epistemological transformation is further reflected in the role of language in higher education. The observation that “the language issue is at the heart of the education crisis in our society” may be an overstatement, as there are many other factors that contribute to the education crisis. But the language issue is undoubtedly one of the main obstacles to academic success for the majority of black students (Ministerial Committee on Transformation, 2008, p. 101).

Epistemological access, language barriers and a lack of curricular transformation to address the under-preparedness of students from poor educational backgrounds are systemic factors that demand attention. The *Higher Education Monitor* (I Scott et al., 2007) urges the need for greater articulation between the phases of learning in order to achieve continuity in student education. Closer alignment between the academic readiness of high school students at the interface with the demands of tertiary study highlights a structural failing in the education system. The report suggests that this could be addressed by the provision of appropriate support for students to make the transition successfully, as well as adjustments to educational approaches through flexible curriculum planning and pedagogical approaches.

“Equity-related educational strategies” will become a key element in contributing toward development (I Scott et al., 2007, p. 50). 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. 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 (Chrissie Boughey, 2005, p. 241). These views echo the same call for a de-mystification of legal knowledge and the way in which it is represented, particularly to “non-traditional” students in England. Sommerlad links professional status and the determination of what counts as legal knowledge as contributing

toward the “conservative pedagogies which accentuate the mystifying nature of legal doctrinalism” (Sommerlad, 2008, p. 3). Kennedy, in the United States, noted in 1983 that

The mystique of legal reasoning reinforces all these hierarchies (within law schools and the legal profession) because it makes it seem that people who have gone to law school are privy to secrets that are loaded with social value (Republished 2004, p. 48).

In the absence of any empirical evidence to substantiate whether progress is being made with curricular or pedagogical interventions to address poor student pass rates and serious writing deficiencies, academics, in my view, are caught between the contesting demands of the legal profession who wish to have “practice-ready” lawyers emerge from universities, and the real challenges faced in lecture rooms every day.

My personal interpretation is that we have reached an *impasse* that will require significant investment by government in education at schooling level and, in the immediate term, in higher education, if universities are to meet the demands of producing skilled graduates who can contribute to the national development agenda and become agents of transformation themselves. The conflicting tensions between producing more skilled graduates when students entering university are less prepared than ever before for tertiary education, in a context of massification, increased class sizes and dwindling material resources for implementing effective curricular and pedagogical strategies, cannot be resolved without a re-visioning of fundamental assumptions. Interim results from the first pilot phase of the National Benchmark Tests Project (NBTP, 2009)²⁶ state that the challenges facing universities in South Africa are “enormous”, and “strongly suggest that higher education institutions need to provide extensive support in language development for almost half of registered students.”²⁷ These features within the sector provide evidentiary

²⁶ Report from University World News, Africa Edition, Retrieved on 2009/08/17 from: <http://www.universityworldnews.com/article.php?story=20090816082047397>.

²⁷ Article: “Varsity Students Lack Essential Skills” The Star, August, 11,209. Available at http://www.iol.co.za/general/news/newsprint.php?art_id=vn20090811032838988C73. Accessed on 11/08/2009.

support for both arguments that are raised in the current debates around the law curriculum in South Africa.

1.10 Present status of curriculum debates: SALDA and the stakeholders

The replacement in 1997 of the traditional stratified academic qualifications route with a single LLB degree was seen, in the context of political pressure at that time, as the means to transform legal education. It was viewed as a vehicle to incorporate the views of previously excluded role players, such as the HBUs, the Black Lawyers' Association (BLA) and the National Alliance of Democratic Lawyers (NADEL), to widen access at tertiary level to previously disadvantaged candidates, to reduce the financial costs of entering the legal profession, and to improve the overall representivity of the profession.

Controversy and debate about the soundness of a four-year undergraduate curriculum have surrounded the degree since its inception. Crisis summits on this topic have been held,²⁸ members of the legal profession grow increasingly vocal about the poor literacy and numeracy skills of graduates, and academics meanwhile bemoan the need to telescope a substantial amount of "essential" content into four years of study (S. Scott, 2006; Van der Merwe, 2007). The attorney's profession is currently reviewing legal education,²⁹ while the South African Law Deans' Association (SALDA) has appointed a Task Team, which I was appointed to convene in November 2007, to review the LLB curriculum for purposes of re-registration of the generic qualification in 2009 with SAQA.³⁰ Complaints about the quality, even, of recently-appointed judges have evoked public scrutiny of legal education and raised debate amongst other stakeholders within the legal world. A comment from an academic

²⁸ Summit on the Competence of Aspiring Legal Practitioners, Johannesburg, 1 October, 2004.

²⁹ LSSA: LEAD Meeting at O.R Tambo Airport, 8 November, 2007.

³⁰ Meeting of SALDA at North-West University, Potchefstroom Campus, 7 November, 2007.

explains that the background to the problem of the quality of judges and how it affects the future development of the law:

the problem is in my view more fundamental and far reaching as it also concerns the standard of and approach to legal training at tertiary level. There is an over-production of legal graduates at the expense of quality and a perceived crisis as far as legal training is concerned causing a decreasing pool of adequately equipped persons for ultimate appointment to the judiciary. Incumbent judges need to be especially careful and meticulous when dealing with matters and areas of law and practice with which they are not fully familiar. After all, the development of valid and equitable law and the destiny of the law and that of all litigants are in the hands of judges. This is a duty which has to be approached with the same skill and dedication as required of a surgeon as the failure to do so usually has far-reaching consequences for the law and those concerned. (Legalbrief; 5 November 2008.³¹

A meeting was called by SALDA in June 2008, inviting all stakeholders, including representatives from the Departments of Justice and Education, to establish a Joint Task Team in order to poll all stakeholders on their views concerning the current state of legal education in South Africa.³² The Task Team met in August 2008³³ to draft assumptions and questions that were sent out to all stakeholders. The result of the poll was presented at the National Liaison Meeting (held annually between the Legal Professions and SALDA) in November 2008 (See Appendix 1).

At the same time, SALDA met with the Chief Executive officer (CEO) of the Council for Higher Education (CHE) who offered to undertake a research project focussed on legal education, as part of their wider curriculum review project. The Joint Task Team (August 2008) would form a wider reference group for consultation with the research team from the CHE, while I was nominated to head the SALDA Task Team to liaise with the research team in developing a research proposal. The draft proposal “The LLB and the Preparation of Law Graduates in South Africa” was approved in July 2009 by the wider reference group. The proposal made

³¹ Comment by Professor H Kloppers, University of Pretoria. Retrieved on 5 November, 2008. Accessible at <http://www.legalbrief.co.za>.

³² Meeting at UNISA, 5 June, 2008.

³³ Joint Task Team Meeting on Legal Education. Wits Law School, 25 August, 2008.

the point that it was not just the needs of the profession that should inform curriculum decisions; individuals' needs for self-fulfilment and national needs for social justice, too, are important considerations in curriculum design and development. This report is due for release in 2010.

1.11 Outline of the structure of the study

In this chapter, I have discussed the purpose and context of the study by elaborating on the historical, political and legal framework within which a significant change to the university phase of legal education was made in 1997. I have reviewed the current higher educational landscape to indicate the nature of the problem, which demands that I research it to explore the lived experience of the law curriculum, and how it prepares graduates for practice in South Africa today. After a decade of implementation, my question is whether this undergraduate law curriculum is fit for the purpose for which it was intended.

In Chapter 2, I review the existing literature in the field of curriculum, including curriculum change and developments in legal education, which have brought about a reconceptualisation of the field, both in the international and the national context. My aim is to highlight areas of debate that are relevant to the research problem, and to identify the silences or gaps where further research is necessary to inform curriculum choices.

Chapter 3 reviews the conceptual framework for the study, which includes theorising on various notions of curriculum and how these understandings affect curriculum development. The interplay of domains of curriculum – knowledge, skills and the development of “self” – are theorised as they relate to the integration of the three components in the design of curricula. The second body of theorising which has been drawn on, to provide a framework of reference against which the data could be analysed, is theory related to the development of professional legal identity.

In Chapter 4, the design of the research and the methodological orientations adopted is described. The positionality of the insider-researcher is elaborated upon, as is the

interpretive paradigm in which the study is located. The first set of methodological concerns discussed relate to the baseline curricular comparison which was constructed from official documentation (Appendix 2). Thereafter, the ways in which sampling was carried out, data was generated and interviews were conducted, according to a phenomenological approach is reviewed. Phenomenology seeks to achieve an “experience-near” account of the lived experience. In this study, the phenomenon of curriculum change is explored through the interviews conducted with Data Set 2 (three ex-Law Deans who were Task Group members) and data set 3 (five current Law Deans). Similar methodological concerns are then discussed in relation to a phenomenographic orientation, this being the approach adopted for Data Set 4 (graduates) and Data Set 5 (graduates’ employers). Phenomenography seeks to achieve an understanding of the qualitatively different ways in which a phenomenon (the law curriculum) was experienced by the participants (graduates). The differing perceptions of the graduates’ employers regarding the way the curriculum prepared the graduates for professional practice form Data Set 5. A certain amount of “spillage” that occurred between the methodological theory relating to phenomenology and phenomenography, across the research design and the theorising in the study, enhanced the cohesion of the research, converging to frame the various aspects in a coherence that transcends particular chapters.

Chapters 5 and 6 contain the analysis of the data sets, grouped together according to the orientation adopted: Chapter 5 considers the phenomenological sections, while the phenomenographic sections are included in Chapter 6. An extensive interpretation of each data set, supported by extracts from the data, is developed in those chapters.

In the final chapter, Chapter 7, the findings of the data are drawn together to develop abstractions and theorising that will explain what emerged in the process of the study and will identify further areas for future research and frameworks for integrating legal education, to enhance the fitness for purpose of the undergraduate law degree.

1.12 Concluding comments

The study aims to address urgent concerns within the field of legal education in South Africa, and to provide detailed information on a topic that is as yet uncharted. Its contribution to curriculum research is in the shape of an analysis of the translation of policy into practice in post-apartheid legal education. It identifies the historical factors that influenced and shaped the development of curricula, as well as providing a comparative review of current law curricula and the extent to which they reflect the original vision of the policy-makers.

In the field of exploring the effectiveness of the university Law curriculum, as a preparation for professional legal practice, the study also has as one of its objectives the careful recording of students' experiences of the law curriculum, through a detailed study undertaken at one Law faculty. Together with a survey of employers' perceptions about this law curriculum, the data contributes to the development of an interpretation, which serves to provide theoretical insights for informing future curriculum development in South African legal education.

Chapter 2

Legal curriculum policy-making: implementation; change; reconceptualising

2.1 Introduction

This chapter reviews the existing body of scholarship pertinent to the critical questions raised by the research problem, with the objective of positioning the study within the literature related to the various component areas and identifying gaps where this study may make a contribution.

The initial focus of the literature will be on the scholarship related to curriculum policy development. The specific context of South African education policy-making will then be considered. This is followed by a review of the literature on the translation of policy into curricula and the implementation of curricular changes in practice.

The review will then turn its attention to recent scholarship on the reconceptualisation of legal education, in an international context and in the national South African context, to help define the background against which the drivers shaping the legal education curriculum and the experience of curriculum-making in South African legal education can be appraised. A dominant theme in the literature is the oppositional positioning of curricula, founded either on a “liberal arts” orientation, or on a vocationalist approach that is shaped by the neo-liberal demands of globalisation, with an emphasis on skills development. The traditional doctrinal approach in legal education appears nonetheless to prevail in practice, despite mounting criticism of its inability to prepare graduates for modern professional life. I shall argue that a selective synthesis of elements from these polarities, together with the recognition of a space within law curricula for the development of reflective judgment, a

sense of professional and public responsibility and the ethical self, carries the possibility of generating a complementary position. In a South African context, the needs of law graduates can best be met by selectively combining aspects of both approaches to develop an integrated curriculum model that will address the silence about the self that exists at present.

In order to argue for such a position, it will be necessary to survey the current scholarship to identify issues raised and then to construct the argument suggested above. Curriculum policy development will provide the initial background framing for the review of scholarship on the various aspects of the study.

2.2 Curriculum policy development

As a starting point, a review of the literature on educational policy-making will provide a contextualised background against which the development of curriculum policy that took place in South Africa in the 1990s can be understood. The ways in which curriculum policy development may be viewed in terms of its purpose and process are described variously by key authors in similar yet distinct ways that each emphasise a particular feature. Policy that shapes curriculum may be regarded instrumentally, as a means designed to achieve pre-determined ends (Walker, 1990). Policy-making may also be seen as the result of political negotiation among various constituencies (Boyd, 1979; Kirst & Walker, 1971), while curriculum policy-making may be regarded as comprising a series of problems, solutions, resource bases, along with various constituencies and also various consequences. This notion of a confluence of issues culminating in the production of new curriculum policy is captured in the comment that “problems and solutions flow in more or less independent streams, and they converge, often in random ways, around critical events” (Elmore & Sykes, 1992).

Similarly, the image of “policy primeval soup”, conjured up by Kingdon (1984), which combines a varied mix of pressure groups, specialists, public opinion, administration

changes and national mood swings, is an apt metaphor to convey the amalgamation of factors that contribute to the emergence of educational policy.

Educational policy has also been described, by Ball, as “a compromise of ideas, needs and interests” (1990). He maintains that policy documents can be documents for transformation, but they are never static; they shift constantly in a process that is cyclical in nature and of which conflict is a constituent part. Ball’s influential work changed the description of educational policy analysis and emphasised the need for “new” conceptual tools to more accurately record the “discontinuities, compromises, omissions and exceptions” of policy production. White and Crump (1993) extend Ball’s perspective on ideological, epistemological, and philosophical discrepancies becoming part of the policy text and interpretation, reflecting self-interest and the interests of political survival. The texts of policy carry the meanings that are representative of the struggle and production of their production.

“Politics as process”, is a suggestive catchphrase that characterises the generative activities which precede the shaping of educational policy – often determined ultimately by “participants’ positions in the game”, according to Colebatch (1998). The game metaphor recurs elsewhere in the literature (see Gale, 2003), with expressions such as “playing the hand you have been dealt” used to describe the different strategies adopted in negotiating higher education policy: trading, bargaining, arguing, stalling, manoeuvring and lobbying, and the like. Gale’s conclusion is that throughout the policy process the dominance of politics over rationality is clear. He makes the observation that in the politics of the policy process in higher education, the values prevail of those who possess a particular kind of policy expertise, rather than those who have expert knowledge of specialist content areas (Gale, 2003). “Education people” are discredited in policy-making contexts, in favour of productive and “eligible policy actors”. Bourdieu and Wacquant (1992) also use the analogy of a game in describing the negotiation of policy between (policy) actors, where the tacit “rules” can be changed through strategies that work to discredit the form of capital of the opponents’ force. The educational policy-making process is seen as

a series of crises and settlements. The crises occur when the power and interests of dominant groups are challenged or threatened by the strategies of

subordinate groups. Educational settlements refer to those situations where crisis has been temporarily resolved through an acceptable compromise or balance of forces (Grace, 1987, p. 185).

However, Gale observes that the types of solution to educational policy conflicts are often only temporary:

These “settlements” are asymmetrical, temporary and contextual because they *contain* crises or other “settlements in waiting”(Gale, 1999).

“Value conflicts” that occur in society place pressure on education systems to resolve the ensuing tensions by changing the education of the future generation. These conflicts require political negotiation and compromises amongst policy-makers and interest groups, leading to political trade-offs. These trade-offs in turn generate unevenness in educational policy decisions that make them difficult to translate into effective change (Cuban, 1990). This kind of problematical dynamic corresponds with observations made by Majone and Wildavsky (1978), who remark on the potential for variation that is inherent in the process of translating policies into practice:

Policy ideas in the abstract...are subject to an infinite variety of contingencies, and they contain worlds of possible practical applications. What is in them depends on what is in us, and vice-versa (Majone & Wildavsky, 1978, p. 113).

These conceptions to be found in the literature of the educational policy-making process provide an important background for the particular events that took place in South African education policy development in the immediate post-apartheid period.

2.3 South African curriculum policy development during the 1990s

In the context of post-apartheid South Africa, political influences on curriculum were extremely significant. Jansen (1999) notes that there was a critical turning point in curriculum debates in 1990 when competing social movements and political actors began articulating their positions on curriculum in anticipation of a new democracy. A number of policy discourses emerged, creating competition and divergence on the question of educational restructuring (Kraak, 1998).

From 1994 onwards, education policy development in general reflected three distinct phases of restructuring, shaped by both political and economic factors. In the early transitional phase (1994–5) the priority was to operate through wide participatory and consultative processes, expunge all traces of apartheid education in the school curriculum, and focus on the policy agenda as framed by the visions of a popular liberation movement. Democratic values, redress and equity were key concerns in developing an accountable education system responsive to the needs of those who had been previously excluded. This guiding principle resulted in the creation of a single education ministry and a standardised school curriculum. The National Commission on Higher Education (NCHE), appointed in 1995, was tasked with recommending how the higher education system could be unified and modernised to respond to the new democracy's urgent need for economic and social reconstruction (Ensor, 2004). This phase was underpinned by the original ANC economic policy, the developmental Reconstruction and Development Plan (RDP), which emphasised redistribution of wealth between the wealthy white minority and the impoverished majority (Sayed & Jansen, 2001; Subotzky, 2000).

Soon, however, the economic realities of governing after 1994 necessitated a dramatic shift toward a more stringent fiscal policy, reflected in the adoption in June 1996 of the Growth, Employment and Redistribution strategy (GEAR). This policy aimed to encourage foreign investment, and stimulate growth. On a national level, the claim of South Africa to become an international player, participating in a post-modern global economy, introduced the discourse of economic rationalism, skills development and globalisation as shaping influences in the educational arena (Kraak, 2001). The discourse of competency and skills within ANC education policy has been ascribed to the introduction by COSATU of debates on competency-based education in the labour sector. Responses in policy to these claims were the introduction in 1995 of the National Qualifications Framework (NQF)³⁴, which sought to integrate education and training through a common qualifications framework (Chisholm, 2005). Concurrent with this high-skills focus – in which graduates should acquire skills for employment, particularly enhanced technological skills – were increasing economic

³⁴ South African Qualifications Authority Act (SAQA Act), Act 58 of 1995.

pressures imposed on the higher education sector to become more efficient, be accountable, increase access, and assure high quality education, all in a context of reduced state subsidies.

The Higher Education Act of 1997³⁵ attempts to balance the competing claims of redressing the overwhelming inequalities in higher education with the need to increase efficiency in the production of skilled graduates who can contribute to the competitiveness of the country in the global market. Two conflicting discourses appear in the policy documents during this period. The first reflected the pressing need to move away from the apartheid past toward equity and redress, framed in a discourse of social justice and human rights, in the face of severe resource constraints (Ensor, 2004). The second took on board the notion of transferrable credits and modularisation combined with the preparation of graduates for participation in a sophisticated global economy. This latter trend gradually translated into a neo-liberalist emphasis on globalisation and a “high skills” agenda, with the added impetus of a National Qualifications Framework (NQF), and the introduction of quality assurance measures through the South African Quality Assurance Authority (SAQA).³⁶

The way around these opposing tensions was to avoid dealing with the specifics of curriculum restructuring in higher education. In the implementation of policy however, in curriculum reconstruction terms, Ensor (2002, p. 290) observes how these two discourses appeared to compete for ascendancy. The contrasting curriculum discourses that appear in the policy documents are, on the one hand, the traditional discipline knowledge discourse, where academics espouse an apprenticeship into disciplinary ways of knowing and thinking, and on the other, the opposing discourse of credit accumulation and transfer oriented toward producing highly skilled graduates for the workplace. These conflicting emphases reflect wider oppositional objectives in the entire higher education system. Scott and Yeld (2009) argue however that these agendas have become inter-related as the thrust toward achieving national developmental needs encompasses the demand for equity of access and

³⁵ Act 101 of 1997.

³⁶ Introduced by Act 58 of 1995.

outcomes in higher education. Improved graduate output is seen as “essential for economic growth...as well as for social cohesion” (Pandor, 2006).³⁷

With particular reference to “the professional discourse, strongly associated with medical, law and engineering faculties”, Ensor (2004) comments that talk of curriculum restructuring was hardly heard during the NCHES³⁸ deliberations, since these faculties were largely unaffected by the NCHES’s policy recommendations. This “business as usual” approach is consistent with the conservatism of lawyers and is reflected in the post apartheid law curricula that were developed, despite the influence of a strong “Africanisation” discourse being voiced throughout the political deliberations preceding the changes made in legal education in 1995-6.

In considering curricular models in higher education, professional discourse is characterised as placing emphasis on “vertical pedagogic relations, an emphasis upon apprenticing students into specific knowledge domains, and limited student choice over selection of the curriculum” (Ensor, 2004). Ensor correctly classifies law as a professional discourse which has vertical pedagogic relations and emphasises an apprenticeship. The signature pedagogy of law endorses exactly this hierarchical structuring ((Kennedy, 2004; Shulman, 2005, p. 56). Further, the limited student choice over subjects is evident in the fairly consistent approach to curriculum development that displays little variation among seventeen faculties.

Modularisation, a shift toward a system of transferable credits and the market-isation and massification of higher education all served to shape higher education (and Law) curricula towards employability of graduates in the market. The presence of practice-related (skills) modules in many curricula responds to the requirements of the legal profession for semi-trained candidate attorneys.

³⁷ Speech by Naledi Pandor, Minister of Education, introducing the debate on the education Budget Vote 2006/07, National Council of Provinces, 23 May 2006. Accessed at : [http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2006%2F06052316151002.htm%40Gov&q=\(+affirmative+%3CAND%3E+action+\)&t=N+Pandor%3A+Education+Dept+Budget+Vote+debate%2C+NCOP](http://www.search.gov.za/info/previewDocument.jsp?dk=%2Fdata%2Fstatic%2Finfo%2Fspeeches%2F2006%2F06052316151002.htm%40Gov&q=(+affirmative+%3CAND%3E+action+)&t=N+Pandor%3A+Education+Dept+Budget+Vote+debate%2C+NCOP). 7 October, 2009.

³⁸ National Council on Higher Education.

The contestation over these two discourses was confirmed by Kraak (2001) who described how in higher education the further element was added of “stratification” thinking, of differentiated levels of institutions, but this was finally excluded by the National Plan for Higher Education (Ministry of Education, 2001) and replaced with the notions of mergers to rationalise the tertiary education landscape. Woolman et al (1997, p.63) identified the preoccupation in legal education with the discourse of “Africanisation,” which placed an emphasis on representivity and transformation. Ntshoe (2002) added “managerialism” to the mix of pressures imposed on higher education as part of the accountability project.

The making of education policy in post-apartheid South Africa was described by Jansen (2002) as a “politics of symbolism”, disconnected from serious concerns about changing educational practice at grass roots level. He quoted Rensburg³⁹, a pre-eminent policy-maker at the time, who described the period 1994–1999 as an “overtly ideological-political period, which reflected the shift from apartheid ideology and politics...to a democratic order marked in particular by non-racialism.” Jansen focused attention on the importance that was attached to policy statements, while little or no reference was made to policy implementation. In reality, the government lacked the material support necessary to implement much of the ambitious policy rhetoric set out in the education policy documents.

A further indicator of the “symbolic prominence of policy” was evident in the lack of coherence in the various education policy documents across different contexts, where “each process had its own agenda, its own actors and focus” (Jansen, 2002). This pattern of “political symbolism as policy craft”, the phrase coined by Jansen (2002, p.214) was echoed in the seemingly “dislocated” enactment of a major policy shift that occurred in legal education during that period. Midgley (2007) sees the absence of dialogue between the Department of Education and the Department of Justice in 1995–6 ahead of changing a variety of university legal qualifications to a single undergraduate degree as an example of this policy “dislocation”

³⁹ October, 1998: Address to National Policy Review Conference of the ANC by Dr Ihron Rensburg, Deputy-Director General, Education.

According to Jansen (2002) one of the critical consequences of this kind of symbolic political stance was that the blame for non-delivery shifts to the participants in the education process (teachers, lecturers and managers), while “policy and planning failures are exempt from scrutiny” For as long as this continued reliance on political symbolism remains in place as the framework for education policy , accountability and improved efficiency present themselves as pretexts to justify reduced expenditure by government on education. Jansen maintains further that over-investment in the symbolism of educational change impedes the real transformation and improvement of education (Jansen, 2002). It could be argued that the symbolic policy intention was to signal a clean break with the apartheid past, but beneath the surface there was an element of “disguising the nature of the strategic trade-offs necessary to win broad consensus” (Cloete et al., 2002, p. 25). I have argued that these predictions have been borne out in practice with the experience of legal education in the last decade.

Much of the educational theorising in South Africa during the period was one-dimensional, creating polarities which led in turn to oversimplified policies that had an appeal for activists but sometimes turned out to be educationally misguided (Young, 2001). The theories that informed policy were often “overly idealistic in their applicability as a basis for policy”. The assumption that the language of democratic participation could apply in any straightforward way to achieving educational goals, and the failure to recognise the specificity of educational goals such as pedagogy and curriculum in effecting educational change, have been severely criticised (Young, 2001).

Ultimately, the adoption of neo-liberal policies within an “uncertain framework of political and moral compromise” was an outcome settled on between political players (Kallaway, 2002). Novel forms of negotiation emerged, suggesting that in the higher education context “policy formulation and change is ultimately a political process characterised by competing interests and compromises” (Badat, 1997).

Then suddenly, in 1996, indecisive leadership, the slow pace of integration in the Ministry of Education, crisis situations in many schools and universities, the “unrelenting demands from education stakeholders for transformation from universities, colleges, technikons, schools and elsewhere”, were all overshadowed by the surprise publication of a proposal to

introduce outcomes-based education. One effect of this was to open up public debate on curriculum (Jansen & Christie, 1999). The sudden shift from within the Department of Education to outcomes-based education as a basis for curriculum policy in both schools and higher education signalled a new emphasis on “accountability, vocationalism and market-value at all levels of the education system” (Jansen & Christie, 1999). It was a process of curriculum development that relied on “drawing down” knowledge, skills and values from key “critical and developmental” outcomes that were legislated.⁴⁰ The technocist and behaviourist underpinnings of this approach were inescapable and provoked a spate of critique (Jansen & Christie, 1999), but the symbolic break with apartheid education ensured support at grass roots level. In 2009, Bloch, an early advocate of outcomes-based education, has acknowledged that those responsible for its introduction were over-optimistic in introducing at schools an OBE curriculum that was unrealistic and impossible to apply. Whilst maintaining that “curriculum is at the crucial interface where pupils prepare themselves intellectually and academically for a global world”, the author admits that OBE was a tragic mistake in the context of South African education.⁴¹

Curriculum policy frameworks were developed centrally without attention to the context of implementation and how the new vision could be effected in profoundly unequal contexts (Blignaut, 2007; Christie, 1999). Harley and Wedekind (2004) observe as an anomaly that the post-apartheid curricular changes introduced as a “political project” have ironically worked, in historically-disadvantaged contexts, in a counter-productive way to undermine the transformatory social goals envisaged by the developers. According to the authors, “the fit between policy intention and curriculum effect is anything but functional”. It was assumed that changes can be effected through “ideal-type, framework visions”, which do not engage with the conditions of their implementation (Christie, 1999). Numerous studies have shown that this “top down” approach to educational policy-making has proved

⁴⁰ National Education Policy Act 27 of 1996.

⁴¹ “Lessons must be Learned” Article in The Times, Wednesday, September 16, 2009. Comments on the text “The Toxic Mix- What’s Wrong with South Africa’s Schools and How to Fix It?” (Tafelberg, 2009).

ineffectual in producing real change. Elmore (1983) explains many of the failures, or “non-events”, of educational policy translating into implementation as “the power of the bottom over the top”

In 2002 the Minister of Education declared that the apartheid legacy has “continued to burden the higher education system, which not only remains fragmented on race lines, but has been unable to rise fully to meet the challenges of reconstruction and development”⁴²

The organisational behaviour and structure of South African universities were shaped by their specific cultural rules and normative and legal frameworks; every institution sought to reposition itself as the demise of apartheid became apparent (Wolpe, 1995, quoted in Ruth, 2006). These structural disparities remain evident in multiple ways, including in the curricula that have been developed at each institution in the post-apartheid period.

The policy documents relating to the restructuring of higher education barely mentioned how curricula should be developed, other than to state that the higher education system should establish “responsive programmes, educational programmes conducive to a critically constructive civil society, advancement of all forms of knowledge and scholarship” (Ensor, 2002; NCHE, 1996). Thus, despite the creation of an extensive framework of education policy pronouncements through the 1990s and early 2000s, South African educators, particularly in higher education, had to extrapolate what was relevant for them – and respond to the national economic and policy imperatives – in designing curricula that would meet the new demands within the landscape of higher education.

In 2002 the cabinet approved a programme of reforms to alter the existing higher education landscape dramatically. Institutional mergers were proposed as a means of rationalising the uneven proliferation of institutions, with effect from January, 2004. According to Education Minister Kader Asmal, the higher education landscape reflected “the geopolitical imagination of apartheid planners” The number of universities was reduced from 21 to 11. Jansen (2002) argued that the mergers were intended to address historical racial inequalities between institutions, the downturn in student enrolments, and also “the need to incorporate the South African higher education system within fast-changing, technology-

⁴² Minister of Education, Kader Asmal in: South African Ministry of Education Report, 2002.

driven and information-based economies, described under the rubric of globalisation”⁴³ The merger outcomes, which in total, reduced 36 institutions to 21 higher education institutions, and established two new institutions, “were the product of a complex interplay between governmental macro-politics and institutional micro-politics, in a context of political transition” (Jansen, 2002).

Thus it was clear that education policy could not be regarded as a phenomenon taking place outside of or distinct from the wider political currents of the moment. The policies that were enacted reflected the tumultuous social re-structuring that was taking place as the surrounding context for educational change. However, in the implementation phase, the translation of those policies into practice was not a simple – nor a rational – linear process.

2.4 From policy to practice: developing curricula that interpret policy

The first point of significance that is made in the earlier literature, by Kirst and Walker (1971, p. 485), is that curriculum determination is often presented as if it plays down or totally ignores the antecedent conflict and accommodation characteristic of policy-making. The authors described the process of developing a curriculum from a policy document as “disjointed incrementalism” (Lindblom & Braybrooke, 1963, quoted in Kirst & Walker, 1971). In the absence of formal decision-making procedures, various default methods such as behavioural analysis, cost/benefit analysis, or empirically-derived decision-making may be engaged in. Essentially curriculum-making usually involves resolving conflicts of values among various groups or individuals. The value-conflicts are often resolved through “low profile politics”, and decisions are not based on formal decision techniques, or even on a great deal of objective data (Lindblom & Braybrooke, 1963, quoted in Kirst & Walker, 1971).

⁴³ <http://ahero.uwc.ac.za/index.php?module=cshe&action=downloadfile&fileid=30507021711704051091919> Mergers in South African higher education: theorising change in transitional contexts. Accessed on 9 October, 2009.

The process of interpreting policy in order to create university curricula that reflect the imperatives of that policy has been problematised on several levels in the literature.

Transforming the curriculum...involves more than subtracting some books and adding others...It is a serious business. It attacks received wisdom, wrenches internalised values, and contests assumptions held so deeply that to challenge them feels as if one is fighting nature (Friedman, 1996, p. 2).

The difficulty of developing a curriculum is compounded by the literature which offers so many and varied interpretations of curriculum, such as: “knowledge, content, process, structure, historical text, or official knowledge” (M. W. Apple, 2000). As Weiler observed:

curricula are not value-free or ideologically neutral constructions. They are the most tangible codifications of the objectives a society wants to reach through its education system, and of the skills and values it wishes to instil in future generations (Weiler, quoted in K Lockett, 1998, p. 1).

In constructing curricula, the contents and organisation of what is taught in educational institutions should reflect and shape the changing society (Apple, 1993; Van der Westhuizen & Mahlomaholo, 2001). Since curriculum decisions are often shaped by the understandings and the epistemological, ideological and ethical beliefs of academics, there is little or no consistency as to how this process occurs (Van der Westhuizen & Mahlomaholo, 2001). The insights of Klein (1992) and McCutcheon (1982) about the gap, the “Grand Canyon”, between curriculum theory and practice, suggest that it may be addressed by acknowledging the need for curriculum theorists and the practitioners to work together to focus on action.

The function of universities in a changing society where social, political and economic demands are made through policy is a highly contested issue, with some writers claiming democracy-building as a legitimate objective (Cloete, Cross, Muller, & Pillay, 1999). It is notable that Cochran-Smith (2005), writing about American schools, comments that to ensure equality within the education system and to overcome the deep resistance to institutional reforms that impede social change “we need teachers who regard teaching as a political activity and embrace social change as part of the job”. Teachers must not expect to “carry on business as usual” and should be critical actors in the larger struggle for social

change. The author proposed a goal of educating teachers and students to contribute knowledgeably and ethically to an increasingly diverse and democratic society.

Linda McNeill (1986), on the other hand, writing about schools, suggests that policy rooted in political ideology fails to take into account the broader educational goals of preparing citizens for democratic life.

Three approaches to curriculum change have been identified in South African education settings: (i) changes that are policy-driven; (ii) changes that are profession-driven; and (iii) changes that reflect the transformative/socially critical route, which is part of a broader societal change process (Van der Westhuizen & Mahlomaholo, 2001). Many of the post-apartheid policy changes could be categorised under the first and third approach but, as Blignaut (2007) cautions, if educators do not identify with policy at a political level, its goals may be undermined by their creating a “façade of reform”, ignoring or resisting change, or playing out the role that has been legislated, without being committed to the policy. He concludes that “continuities in education are more powerful than the complex structural changes ushered in by policy”

An analytic triangle, termed the “network of co-ordination”, based on Burton Clark’s work (Clark, 1983) was developed to understand the complex interactions taking place in a transitional society, and the trajectory

from policy to implementation and realisation in transformative goals focussed on a new complex interaction between state, society and higher education institutions, within a context of globalisation (Cloete et al., 1999, p. 72).

The authors observed the increasing influence of state involvement, which sees higher education mainly as an industry, a part of the national economy, which exposes universities to market forces and requires it to foster economic development (Gumport, 2000). This role is reinforced through funding mechanisms and fiscal stringency that encourages efficiency, effectiveness, and autonomy within universities (Bunting, 2002, p. 133).

However, it has been observed that the “radical reframing” of academic provision that necessitated significant changes in science and humanities faculties did not challenge the “core business of producing skilled graduates for employment in the workplace”. The 1996 Constitution (“Constitution of the Republic of South Africa Act,” 1996), itself a legal

document, created a significant foundational text for curriculum change in legal education (Van der Westhuizen & Mahlomaholo, 2001). The pervasive effect of constitutional change in almost every substantive law course has undoubtedly played a significant role in altering the content of the materials and decided cases included in every module, yet in most cases, the nature of these changes is likely to have been additive, and has not engaged law academics in radically re-structuring “core knowledge”, pedagogical approaches, or the sequencing of subjects.

There has been a notable scarcity of research on the undergraduate curriculum (Barnett & Coate, 2005). It has been suggested that this may be due to “the fissiparous nature of academic institutions” (Squires, 1987, p. 129). There appear to be few conversations about curriculum across discipline boundaries, even within the same institutions (Van der Westhuizen & Mahlomaholo, 2001). For most academics, disciplinary loyalty prevails over institutional loyalty and is framed through deep underlying epistemological structures of the knowledge fields which shape the values and practices of curricula (Barnett, Parry, & Coate, 2001).

The influence of policy on practice has been regarded as having minimal effect on the lives of students, due to teachers being influenced by their teaching workloads and the need to modify curriculum policies to conditions in the classroom (Lipsky, 1980). However, Wise (1979) contradicts this view by arguing that policy may have a negative and restricting force on teaching practice if it is allowed to have too heavy an influence. The analogy of curriculum policy being similar to laws, and teachers being in the position of judges who are required to interpret them in ways that will “cumulate justly in the interests of their students, the society, and humanity” is an appropriate metaphor for analysing the policy-practice relationship that could be developed with regard to the law curriculum (Shulman, 1983).

These various ways of appreciating how the process of translating policy into curricula may be understood are an attempt to trace the progress of educational policy through to the practice or implementation phase. In Chapter 3, theoretical aspects of the process of translating policy into practice are reviewed. In the following section, the literature on the

implementation of curriculum change will be surveyed to provide insights from existing scholarship.

2.5 Implementation of curricular change

As early as the 1970s, problems surrounding the implementation of educational policies and the difficulties experienced in effecting curricular change in educational settings gave rise to a body of literature focussed on understanding the complexity of these issues. In this context, the term “implementation” refers to the actual “use of a curriculum, or what it consists of in practice” (M. Fullan & Pomfret, 1977). The contradictory pressures exerted by policy-makers in demanding curriculum change presented educators with the dilemma of simultaneously changing society while at the same time preserving existing social norms and values (Boyd, 1979). Inevitably, a political act is involved in this process. The underlying irony of the policy-implementation transaction is conveyed in the observation that

The pressures [for change] seem to subside with the act of adoption followed by the appearance of implementation (Berman & Mc Laughlin, 1976).

The present study draws on the notions of curriculum implementation and educational change explicated in the work of Darling-Hammond (Darling-Hammond, 1990, 2000), who emphasised the need for “investment in the human capital of the educational enterprise” by developing the capacity of the educators, instead of trying to control the implementation of curricular innovations. The failure of policy analysts to monitor the implementation of curriculum changes down to the level of the enactment of curriculum at the teaching and learning interface, so as to appreciate how learning has or has not been transformed, has been one of the reasons for policy makers not understanding why curricular change is often not effectual (Darling-Hammond, 1990). Policy-implementation has been compared to the legislative process. Once a policy has been passed and the guidelines for implementation drafted, the process is seen as being virtually complete. The communication of policy often takes the form of directives (enforcement), rather than dialogue. In this legalistic paradigm, no method is provided for “determining how - or whether - the goals can actually be

attained” (Darling-Hammond & Wise, 1981). While Darling-Hammond (Darling-Hammond, 2000) emphasised the need for policy to be communicated effectively if it is to be well understood, she conceded that part of this communication process relates to “meaningful discussion and extensive professional development at all levels of the system.”

“Underinvestment in teacher knowledge” has been identified as a critical factor in the success or failure of achieving educational change (Darling-Hammond, 1990). Many studies at school level confirm that teachers’ decisions and actions are based on their existing knowledge-base and frameworks of reference prior to the introduction of a new curriculum (Spillane, Reiser, & Reimer, 2002). It is these that shape and inform their approach to a new curriculum. Unless changes are made in teachers’ thinking, through a lengthy process of support and teacher education, it is unlikely that well-founded transformations in the lecture hall will occur (Darling-Hammond, 1990).

The necessity for change to have “a good basis in theory”, to avoid the undermining of implementation by teachers exercising their autonomy is another critical feature of successful implementation (McLaughlin, 1976). Teachers have the power to “modify, extend or unintentionally violate the reform’s underlying theoretical basis”. Levin’s observation that change (in schools) occurs because “those who will be affected by it are able to decide for themselves the future that they will work towards” (2005), also hearkens to this theme that policy and changes that are implemented depend for their practical interpretation on the local context, and the local actors responsible for their implementation.

The successful implementation of any given policy requires those responsible for implementation to simultaneously be given support and to be put under pressure (M. G. Fullan, 2007). It is clear that an appropriate equilibrium must be achieved between these two external drivers. Oakes et al (2005) critique the neutral stance that most change literature adopts to secure “buy-in” from a wider constituency. They note that successful change processes are usually viewed as “pragmatic and politically savvy”

In a Canadian setting, Hargreaves and Fink (1998) identified features such as recognising the complexity of change, developing and strengthening local (institutional) culture in order to re-culture it, and the emotional dimension involved in educational change. Extensive

research has shown that “change is contingent”, in that local circumstances regarding students, courses, institutional and departmental pressures as well as the specific disciplinary and professional cultures significantly influence how change occurs (Hannan & Silver, 2000). Policy settles differently in different contexts and often plays out in unexpected ways, according to much of the literature: “Changes get changed as they are adopted and adapted: implementation changes plans” (Paul Trowler, Saunders, & Knight, 2003).

Fullan (2007) postulated the need for capacity building with a focus on results, to ensure that curricular change is successfully implemented. He commented that recent studies have shown “top-down” change to be unsuccessful because it fails to garner ownership, commitment or clarity about the nature of change. Fullan also cites a “bias for action” as an essential component of all successful change processes (2007).

Departments and programme teams have been identified as the critical “organisational units” in effecting change. Although “bottom-up” and top-down approaches are important, resistance to change typically is most prevalent at the discipline and department level (Paul Trowler et al., 2003). The authors recommended that change should be effected from the “middle-out”, involving and developing all staff members in a collaborative process.

Successful educational change also depends upon developing a shared understanding of the meaning of change on the subjective (individual) level, as well as on the collective (socio-political) level, in different social settings. Not only is it necessary to appreciate the personal and collective meaning, or the “**what**” aspect of educational change, but it is also important to comprehend the process, the “**how**” of implementing change. In order for change to take place Fullan (2007) identified the need for innovation to occur in three dimensions: (i) new or revised (curriculum) materials; (ii) new teaching strategies; and (iii) changes in pedagogical assumptions or theories underlying the policy change.

The South African Ministry of Education in 2001 (2001, p. 8)⁴⁴ identified an “implementation vacuum” in regard to policy. This was attributed to an earlier lack of capacity to plan, the poor quality of available information at the time, and the need for consultation, which had increased the existing inequality between higher education institutions, stimulated the growth of private higher education institutions, and driven institutions into competition with one another (Jansen, 2001a). This acknowledgement recognised many of the features mentioned in the literature as necessary aspects for successful implementation of curriculum change. Imposed change often triggers off a response of reluctance and resistance which Marris (1975, quoted in M. G. Fullan, 2007) described as the natural and inevitable sense of “loss, anxiety and struggle” that all real change involves. The “tenacity of conservatism and the ambivalence of transitional institutions” can only be acknowledged once the anxiety of loss is understood.

To situate the study within the body of literature on legal education, it will be necessary to review firstly how legal education has been reconceptualised in the international context, taking into account three influential Anglo-American jurisdictions that have a shared common law foundation, and which reflect a similar tradition to South African legal education.

2.6 Reconceptualisation of legal education: Introduction and overview

International literature on the reconceptualisation of legal education, and formal reports produced during the years preceding the time period when the new LLB degree was being introduced in South Africa (1996/7) will provide a background to the current study. Legal education has not been immune to the political and economic pressures felt by the world-

⁴⁴ National Plan for Higher Education in South Africa, 2001. <http://www.education.gov.za/Documents/policies/NationalPlanHE2001.pdf>. Accessed on 9 October, 2009.

wide changes in higher education, such as the commodification of tertiary education, massification, reduced state funding, globalisation and the market demands on a changed legal profession. The influence of the international trends will be assessed for their impact on the South African law curriculum, to contextualise the change to legal education that was made in South Africa in 1997.

Themes that will be highlighted across different jurisdictions (countries) are:

- the tension between academic lawyers and professional lawyers, that spills over into an extended debate including: the theory/practice; doctrinalism/skills; liberal arts/neo-liberal curriculum debate
- the general dissatisfaction with current legal education that is clearly articulated in the international literature variously as a need to integrate the various domains of learning, to humanise legal education and to reduce the alienating effects of preparing for a profession that has experienced a diminished sense of public confidence.

A paradigm shift, to address the perceived disjuncture between the traditional model of legal education and professional practice, is the focus of much of the legal education literature. Criticisms have been consistently directed at the emphasis on the transmission of doctrinal knowledge in the form of rules and principles, based on developing intellectual skills of analysis and synthesis, without teaching graduates legally-specific practice skills (B. R. Henderson, 2003; Keyes & Johnstone, 2004; Kift, 2002; MacFarlane, 1992; Sonsteng, Ward, Bruce, & Petersen, 2008).

A silence on the development of the ethical, reflective self is starting to be addressed in the international literature but this has not yet attracted attention in South African legal education literature. In the United States of America, the “sundering” of the three apprenticeships of legal education: conceptual knowing (cognitive), acting (practice) and moral discernment (ethical-social) demands a reintegration into the curriculum of doctrine, skills and the development of a sense of professional responsibility, according to a group of education experts (Sullivan, Colby, Wegner, Bond, & Shulman, 2007). At the same time, a group of legal academics produced a text entitled “Best Practices in Legal Education”, that

recommends the teaching of law in context, and the integrated application of knowledge, skills and values (Stuckey & Others, 2007, p. 60).

South African legal education literature in general is extremely limited and has not concerned itself with theoretical approaches or insights from education in any depth. Many law academics place scant value on their role as a teacher, preferring to regard themselves primarily as lawyers, and to achieve pre-eminence for their research and scholarship in their disciplinary field. Teaching in the discipline of Law generally is not valued as a serious intellectual task (James, 2004b, p. 9). In Australia and Britain the following views reflect common standpoints:

Few legal academics describe themselves first and foremost as teachers; perhaps this is because “lecturer” and “professor” carries greater status (Le Brun & Johnstone, 1994, p. 31).

Anecdotal evidence rather than pedagogical theory often plays a large part in the construction of lectures and tutorials; and little thought is given to any but the most basic of the pedagogical aspects of teaching (Cownie, 1999, p. 44).

Although this lack of educational input in legal education appears to be changing in other countries, often due to the imposition of quality benchmarks, corporatist accountability measures, accreditation requirements and student demand within universities, resistance to this “pedagogicalism” is a dissenting note that is also present (James, 2004b; Twining, 1996a, p. 294).

American legal education will be considered first as it reflects a significant variety of interests and often is the forerunner of educational trends in legal education. However, although American law shares its origins in a common law system, the legal education system there is somewhat different in that the qualification for practice is a single postgraduate degree, with no practical training component to prepare lawyers for legal practice, which is not differentiated into branches as it is in other Commonwealth countries. A survey of legal education debates in England, followed by a review of Australian legal education scholarship will provide the Commonwealth perspective of an undergraduate degree, which aligns closely with South African legal education.

2.6.1 American experience: disjuncture and distress

In a significant proportion of the legal education literature spanning the past twenty years, a clear dissatisfaction with the traditional law curriculum is expressed:

For several years, I have seen increasing numbers of students who are dissatisfied with legal education- both its services and its content. The source of this dissatisfaction is less clear, other than an amorphous sense that something is not quite right (Matasar, 2001, p. 16).

In 1979, the American Bar Association had appointed a commission to report on the state of legal education and suggestions for reform. The Cramton Report suggested that law schools should “work toward shaping attitudes, values, and work habits critical to a lawyer’s ability to translate knowledge and relevant skills into adequate professional experience”. The report suggested also that law schools provide integrated learning experiences to focus on specific fields of legal practice (Cramton, 1979).

Despite changes in legal practice and demographic changes in legal education, the law school remained “an island of stability” (Cramton, 1981). The increasing number of graduates produced had the effect, however, of significantly influencing the “hidden” curriculum, because students had become preoccupied with the task of securing employment. This affects their choice of subjects, as students strain to read the signals from the legal profession as to what knowledge is valued when hiring graduates. Ironically, the criteria used only serve to reinforce the dominant doctrinal-heavy curriculum, about which practising lawyers complain in that it does not provide graduates with sufficient legal skills training. These legal skills are taught in less popular and less valued “career-focused” subjects like Clinical Law.

This “trade-school” orientation of staff and students continues to isolate law schools from university scholarship and intellectual pursuits, and can be traced back to a lack of “coherent theory concerning the purposes of legal education or the nature of law” (Cramton, 1981). The law curriculum has “no perceptible structure, sequence or organisation” (Cramton, 1982); other writers mention “a [curriculum] experience loosely structured to the point of disintegration, consisting of a melange or hodge-podge

of...courses” (Klare, 1982). The “Lone Ranger” theory of legal education applies to lecturers who agree that “you do your thing in your course as long as I am permitted to do my thing in mine”, an unwritten policy which leads to ignorance and a total lack of coherence between faculty members regarding the contents of the curriculum (Cramton, 1981).

While acknowledging growing calls for a major reform of the American curriculum, some positive attempts to adapt the legal curriculum by altering the contents of courses to accommodate new concepts and trends within existing subjects have been identified. A “marginal accommodation”, a phenomenon whereby innovative reforms are added to the margin or periphery of the curriculum at very little expense, can be observed. Many first-year courses have been adapted to incorporate new methodologies such as those which facilitate skills teaching (Weistart, 1987). Considerations that affect curriculum reform were identified as: faculty autonomy and the desire to retain this against moves toward tight curricular control; the malleability and capacity of the traditional curriculum for creativity, allowing it to adapt and absorb new materials and methods; and the resource implications of implementing methodologies such as small group teaching, and Clinical Law methods.

The growing disjunction between legal education and the legal profession was voiced in a polemic from the American judiciary that criticised law schools for “emphasizing abstract theory at the expense of practical scholarship and pedagogy” (H. T. Edwards, 1992). Stanford academic, Gordon (1993), rejected the suggested solution of more intensely doctrinal teaching and scholarship because practitioners do not appreciate the value of theoretical, interdisciplinary and critical legal scholarship. Harsh words about the current state of legal practice emerged in this debate: that practicing lawyers increasingly “distort facts and law, engage in strategic manipulation of procedure, neglect public obligations, and are obsessed with making money” (Gordon, 1993).

The response of the American Bar Association was to commission the MacCrate Report, *Legal Education and Professional Development*, which advised on “narrowing the gap” between legal education and the legal profession (MacCrate, 1992). In this document, a Statement of Skills and Values, (ten skills and four values) that could be used for “curricular guidance” by law schools was published. Recommendations were also made as to how law schools could enhance professional development during a students’ academic career, by

adopting a holistic approach to lawyering that will “in the future help to avoid the perpetuation of the notion that competence is merely a matter of attaining proficiency in specified skills” (Matasar, 2002).

The gap between the purpose of legal education and the present practice in law schools has been identified as a source of dissatisfaction for the legal profession, law students, academics and administrators (B. R. Henderson, 2003). The persistent use of the distinctive “case method”, which dominates legal teaching practice, can be traced back to the need in the 1870s to enhance Law’s status and credibility as a science within the academy and as a profession. Its low cost in enabling large student groups to be taught by a single lecturer appeals to administrators. Henderson (2003) suggests that insisting on more philosophical, contextual and historical content, as well as enhancing the teaching of students’ lawyering capacities and their comprehension of professional norms would improve the relevance of legal education in America to the real world that lawyers encounter.

A minimalist approach to skills teaching – through legal writing courses that are taught discretely from doctrinal courses, and Clinical Law courses, which are given a “second-class” status – fails to equip graduates adequately for any sort of professional legal work, while ethics teaching focuses on non-contextualised learning of rules to pass qualifying professional examinations. The fact that only one American legal journal (out of 200 legal scholarship journals) is devoted to legal education epitomises the ‘anti-intellectual’ and unreflective approach adopted by legal educators about the area of their primary professional concern (Feinman & Feldman, 1985). The separation of substantive law content from skills and ethics and the lack of intellectual focus on integrating these three aspects has been a continuing theme throughout the legal education scholarship.

The debate about the integration of theory and skills had begun in 1944, when Llewellyn proposed that legal education should combine “ideals and technique” to equip lawyers adequately for professional practice. According to Cooper, the integration of doctrine, (defined as “the concepts, rules, standards principles and institutions derived from law”), theory (“those perspectives derived from outside the doctrine of law, from other disciplines”), and practice (“the skills used to apply theory and doctrine to real problems”) should be “suffused with the values of craftsmanship”, so that “craft ideals” can direct

students' idealism into practice (Cooper, 2001). This isolation of the component aspects of professional education has had a deleterious effect on coherent curriculum development and has most recently come into prominent focus again in two recent American texts.

The most recent review of legal education has been the Carnegie Report (Sullivan et al., 2007), which compares the curricula and practices of legal education in numerous American law schools. The report identifies serious deficiencies, noting among these: insufficient attention paid in law curricula to preparing graduates for practice in a world of real-life problems, and a lack of concern for lawyers' professional responsibility, which necessitate an extensive re-visioning of legal education. The report also comments on the incremental way in which legal education is improved, instead of adopting a comprehensive approach to revising curricula. The approach to a re-visioning of legal education is an *integrative* strategy (my italics) because effective educational change is best achieved by means of a holistic, rather than an atomistic approach.

The integration of the three aspects of legal apprenticeship – the cognitive (knowledge), the practical (skills) and the ethical-social (values, ontology) – must overlap, “crossing boundaries to infuse each other”, and link “so seamlessly” as to each contribute to the strength of the other. One practical recommendation is to “join lawyering professionalism and legal analysis from the start” and “weave together disparate kinds of knowledge and skill”. The construct of the ethical-social apprenticeship is explained as

[a] theoretical and practical emphasis on inculcation of the identity, values, and dispositions consonant with the fundamental purposes of the legal profession (Sullivan et al., 2007, p. 94).

Another influential contribution has been the publication of *Best Practices for Legal Education*, (Stuckey & Others, 2007), a project that was initiated by the Clinical Legal Education Association to support and encourage best educational practices. Stuckey's personal view that legal education is emotionally and psychologically harmful to many law students echoes the view of many current commentators,⁴⁵ who emphasise the negative

⁴⁵ http://bestpracticeslegaled.files.wordpress.com/2008/07/mercer_powerpoint.ppt#261,7,Slide 7.

Accessed 21 August, 2009.

consequences of a highly competitive law school environment, the devaluation of emotional matters and the sense of loss of purpose experienced by law students (Hurst Floyd, 2002; Kennedy, 2004; Sturm & Guinier, 2007). Burch and Jackson (2009) describe how the insights from the Carnegie Report and Stuckey's *Best Practices* converge and can be implemented in carefully planned teaching activities.

The blame for the lack of innovation and experimentation in American law schools is laid at the feet of the conservative gatekeeper and accrediting body, the American Bar Association (ABA), which since 1921 has prescribed requirements for legal education and admitted no variations (Gulati, Sander, & Sockloskie, 2001). Gulati et al. in their empirical study suggest three possible views of the American legal academy and legal education: (i) the "Official Story" that the status quo is fine; (ii) the "Bleak Story" which criticises the disjuncture between academia and the real-life world of professional practice; and (iii) the "Signal Story" in which law school has "a symbolic and sorting function", based on the ranking of the school where one graduates, the grades earned there and whether the student is selected to be on the published faculty Law Review – all as a means to securing lucrative employment in a prestigious law firm (Gulati et al., 2001). Kennedy's polemic (1983, republished in 2004) against the system of legal education critiqued the various ways in which hierarchical patterns are reproduced in law schools, through the pedagogy, the selection and ordering of materials and the modes of conduct. This hierarchical ordering prefigures and replicates the power structures in professional practice.

In a newspaper ranking exercise on American law schools, Butler (2006) makes the point that the law school sequence and model of curriculum has had the same format for nearly a century, and recent research has established that students are feeling increasingly disengaged. A variety of responses, represented by movements within legal education, have been directed at "humanizing" the experience of law school, in the face of an increasing sense of alienation and dissatisfaction as described in the "Bleak Story" above (Hess, 2002; Krieger, 2002). As far back as 1986, legal education in America was found to be the most psychologically distressing field of graduate study (Andrew, Benjamin, Kaszniack, Sales, & Shanfield, 1986; Goodrich, 2000). Rhode (2000) described the disappointment of aspiring

lawyers when they discovered that they do not “make a contribution to social justice” as the greatest source of discontent.

The Clinical Legal Education movement originally provoked by the American Realists in the 1930s, attempted to provide legal services in community settings and at the same time teach students practical skills in a supervised experiential learning environment (A Boon, 1998). A “second wave” of campus law clinics began in the 1960s and has flourished in the United States, aiming to encourage the use of

Clinical methodology includes supervised representation of clients, supervised performance of other legal work, and the use of simulated exercises in a variety of settings, both within law schools and outside of them, and is designed to teach skills and values important to the ethical and competent practice of law.(Clinical Legal Education Association)

In the field of ethics education within the law curriculum, fervent pleas to integrate the explicit teaching of ethics, beyond the teaching of professional codes of conduct in “stand-alone” modules, were made by Deborah Rhode as early as 1998 (D. L. Rhode, 1998; D. L. Rhode & Luban, 2004). Her views on teaching ethics in a pervasive “across-the-curriculum” approach heralded the way for “integrated ethics by continuing method”, within every substantive law module, as preparation for the moral dilemmas faced in professional practice. Experimental approaches to integrating ethics within the curriculum were adopted at other law schools such as the University of California Los Angeles, and St Louis Law School (Menkel-Meadow & Sander, 1995; Shaffer, 2002). Yet, in 2007, the Carnegie Report (Sullivan et al., 2007) recorded mixed success with the pervasive infusion of ethics in American law schools and recommended fuller implementation of pervasive ethics teaching.

Magee (2007) proposed a critical, spiritual or “humanity consciousness” approach, as a way of undermining the dominant identity norm within legal education, which is reproductive of a white male hierarchy. It positioned the human dignity of all people at its centre, and is a humanity-affirming approach to law that is committed to upliftment. In similar vein, the “humanising legal education” movement has been recognised by the American Association of Law Schools (AAL) as a separate section within the community of legal educators, committed to achieving “balance”, by providing a supportive learning environment for all

students. Its focus is on the “peace-making, problem-solving and justice work” of the law, and on emphasising values education through self-reflective practice (Glesner Fines, 2008).

A call for a “Legal Education Renaissance” in America has been made, based on the perception that

The current legal education system does not focus on effective teaching for the adult learner, does not require curriculum aimed at teaching the basic skills necessary to practice the law, and does not communicate the importance of balancing life with the stresses of a legal career. While law schools do manage to produce outstanding lawyers, the system is less than effective for the majority of its graduates. Law graduates report having learned many important lawyering skills in places other than law school (Sonsteng et al., 2008, p. 22).

In the next section, a review of legal education in England will highlight some of the key areas that resonate with the American, Australian and South African experience.

2.6.2 English legal education: statesman policy-maker or technician?

Much of the literature over the past twenty years speaks of an “impending crisis” in legal education in England. The failure of university law degrees to provide an appropriate educational foundation for the later professional vocational phase of legal education, and a failure to inculcate legal skills are two of the major criticisms stated. The context for these complaints is a changed socio-economic environment, where professional demands and student demographics have changed substantially (Sommerlad, 2008). Inability on the part of lecturers, unwillingness, and lack of professionalism in the academic phase of legal education translates into a reluctance to adopt a proactive stance to address these challenges (McAuslan, 1989).

In addition, the pressures exerted on legal academics in a much altered higher education context, teaching large classes, without adequate recompense to prevent top academics from being lured away into the legal profession, has resulted in law educators feeling beleaguered and confused (Partington, 1992; Scherr, 2005, p. 8). Cownie (1999, p. 47) describes the complacency and ignorance of legal academics about their teaching and educational theory where research is seen as a more intellectual pursuit that is rewarded in the academy.

In England, in the last fifteen years, the function of university legal education appears to have come under increasing scrutiny, as it evolves from its original purpose of training graduates solely for entry to a conservative profession, to a broader-based qualification that opens up a range of career opportunities in spheres of government and corporate life (R Burridge, Hinett, Paliwala, & Varnava, 2002, p. 319). The impact of globalisation and the neo-liberal agenda, together with the commodification of higher education, massification, and the corporatist trends in university management have all contributed to this state of affairs. The opposing models of the “statesman policy-maker” and the “technician”, or the popular media image of “superhero” versus “wage slave” have been applied to challenge the changing roles of legal professionals (Parker & Goldsmith, 1998; Scherr, 2005). The reconceptualisation of the legal profession, the new demands of globalisation on legal services provision, and the emergence of new ways of providing legal services have created pressures in addition to those imposed by an altered higher education system. Law graduates report pressure of work, lack of balance between personal and work life, pressure to bill clients, a loss of professional esteem, cynical commercialism, and organisational conformity as causes of dissatisfaction in the professional employment sphere. There appears to be a gross mismatch between law graduates’ expectations of a legal career and the realities of professional working life (Andrew Boon, 2005; Scherr, 2005, p. 12), reflecting the underlying contradictory trends of the liberal arts tradition, as opposed to the vocationalist approach to professional education. Some of the underlying notions that have perpetuated this dichotomy are founded upon epistemological and pedagogical issues related to the structure of the discipline.

In common with many other disciplines in higher and professional education, legal education tends to reflect an objectivist epistemology, regarding knowledge as a body of factual information, and associating knowledge as taught in law schools with apparent objectivity and “truth”. This is borne out in the use of lectures as the primary teaching method, assessment as testing students’ memorisation of vast amounts of factual information, and syllabuses often shaped by the perceived need to cover large quantities of information (MacFarlane, 1992). As regards curriculum content, it is evident that the more

specific professional training that there is in a curriculum, the more it is shaped by changes in the world of work (Webler, 1997, p. 81).

Government initiatives since the mid-1980s to promote key skills through higher education have resulted in a reduced emphasis in higher education curricula on “imparting deep disciplinary understandings” (Barnett et al., 2001, p. 442). As early as 1988, calls within legal education to make the direct learning of skills a central component of every stage of legal education and training were being voiced (Twining, 1988, p. 4).

The Lord Chancellor’s Advisory Committee on Legal Education (ACLEC, 1996) listed the aims of legal education as: intellectual integrity and independence of mind, core (discipline) knowledge, contextual knowledge, legal values, and professional skills. The report recommended the reconstruction of the ethical foundations of legal education, the inclusion of contextual knowledge in the curriculum, and the inculcation of transferable intellectual skills. The retention of “an independent liberal education in the discipline of law, not tied to any specific vocation” was a key recommendation. From its origins in a “trade-school vocationalist mentality”, based on an apprenticeship model, university legal education in England had attempted to create for itself the shape and form of an academic discipline, yet the report stated that law still had a reputation as “a highly instrumental, even anti-intellectual discipline”

Traditionally, Law, as a university discipline, was regarded as being outside of the general academy, while legal research had a directed and applied context toward the profession. The ACLEC report noted that legal education should become “an all-round preparation for a wide range of occupational destinations” (ACLEC, 1996). However the inherent contradiction in the suggestions of the report that law students should receive a “liberal education in the discipline of law” is inconsistent with the “vocationalist reasoning” of the report (G. Johnstone, 1999). This document was explicitly referred to and widely regarded as the foundational text for the proposals made by the Task Group of Law Deans appointed to review legal education in South Africa in 1996.

The integration of professional legal skills and ethics into the law curriculum became a challenge that was often described in the literature in England. The fact that the new

“vocational” curriculum arose out of conflict between the academy and the profession necessarily entailed compromise on both sides, with regard to the particular skills selected and the choice of methodologies employed to inculcate skills: whether an “atomistic” or a “holistic” approach in curriculum design (A Boon, 1998, p. 162). The “atomistic” approach, as opposed to a holistic curriculum model, has resulted in “a failure to develop the connections between theory, practice and values” (A Boon, 1998, p. 165). The “dearth of theoretical literature” to inform the design of legal skills education was highlighted by MacFarlane (1992), while Boon (A Boon, 1998, p. 165) added that academics failed to “harness coherent theories of lawyering” to teach skills, and avoided the importance of grounding skills in notions of professional responsibility and reflection, in their eagerness to teach “competence”

Legal educators ignored the possible application of cognitive-developmental theory to understand experiential learning, of moral development theory to appreciate the affective aspects of skills education, or the contribution of andragogy to focus attention on experience-based learning (MacFarlane, 1992). The “add-on” nature of many discrete skills modules in university curricula indicated a failure by academics to realise that skills development is “an integral dimension of generating discipline specific competence at graduate level” (Bell, 1999, p. 9 quoted in Webb, 1999, p. 242).

Johnstone (1999, p. 2) proposed a broader, more generous and flexible vision of professional education that incorporates the positive aspects of a liberal arts tradition, without the attending exclusionary aspects such as the pursuit of the intellectual ideal, separate from the world outside of universities, as an end in itself. Since the traditional apprenticeship model is no longer considered an adequate means of acquiring professional knowledge, and universities have taken over the foundational phase of professional education, it is necessary to adjust traditional perceptions of preparation for entering a reconceptualised legal profession.

One notable critique of the “legal skills movement” in Britain has been that there has not been collaboration between the legal profession, which regulates the post-degree vocational training phase, and the academy, which controls the foundational education

phase for prospective lawyers. Boon (1998) argued for a more “imaginative integration” of legal skills.

Arguing in favour of a “liberal arts approach” to legal education, Oliver (1994) emphasised the need to encourage questioning and independent thought, as well as inculcating transferable intellectual skills. This view is based on the objectives of a liberal education, which, she stated, (quoting Ramsden, 1992) are

to change the way in which students apprehend and discern phenomena related to the subject, rather than what they know about them or how they can manipulate them (Ramsden, 1992, p. 4).

The prejudicial aspects of studying law – rote learning of masses of cases and statutes, dry analysis, little theoretical, philosophical, moral or social content – produce a trained memory and inculcated skills of analysis rather than “a broadened mind” (Oliver, 1994). The liberal degree, from a student perspective, is regarded as one that is active, participatory, and critical, that facilitates the development of readily transferable intellectual skills. Obstacles to achieving this idealised vision were identified as “illiberal” professional pressures, lack of resources, the administrative burden and pressure to research imposed on staff, student numbers and poverty, and quality assurance requirements. The professions are blamed for expecting more skills in less time and for transferring responsibility for skills teaching to universities (Oliver, 1994).

It has been observed that there is

a mismatch between the ambitions of legal scholarship and the more prosaic and utilitarian expectations and desires of law students. Academics see the law and its operation as ambiguous, dynamic, and alive; a repository for ideas, values and culture, a method of practical reasoning; Janus-faced, a force for liberation or authoritarian control (Wilson & Morris, 1994, p. 109)

This relates directly to the division of legal education into two separate phases: the academic and the professional. This separation has had the effect that students express a distaste for studying anything that is not practice-oriented and academics are forced to respond defensively (Wilson & Morris, 1994).

A new vision, abandoning a pure doctrinal approach to research and teaching law in favour of a socio-legal studies approach as a means of infusing interdisciplinarity into law, has been

advocated to counteract the “dispiriting” and “disabling” effects of a traditional (doctrinal) legal education (Goodrich, 2002, p. 9). An inter-disciplinary approach to law would reduce the academic isolation of law faculties within the academic community, which has occurred as a result of the doctrinal approach that fails to extend students’ conceptual tools and inhibits the contribution that law faculties could make to university life (Bradney, 1999).

Trends toward “flexibilisation” demand that the coherence of discipline knowledge is reduced, to be replaced by “knowing how” (Webb, 1999, p. 239). More weight is attached to communication, literacy, numeracy and information technology skills (Becher, Henkel, & Kogan, 1994, p. 233). Empirical studies have indicated that employers value flexibility and generic multi-skills more highly than higher level cognitive skills (Ainley, 1998). With an increasingly diverse student body, existing curricular assumptions and traditional pedagogy require some adjustment to meet student learning requirements (Thomas, 2005, quoted in Sommerlad, 2008, p. 2). The English Law Society’s Training Framework Review (TFRG, 2001) contained “ambivalent” proposals suggesting a flexibilisation of learning that reflected a neo-liberalist individualisation emphasis, as part of a move toward a post-Fordist education system. Yet in their efforts to increase access and diversity, an emphasis on vocationalism, in preference to liberalism, was noted (A Boon, Flood, & Webb, 2005, pp. 480-486; Sommerlad, 2008, p. 3).

Research undertaken among English law graduates suggested that learning which would improve students’ critical understandings of the legal profession, through critical reflection on the profession, would assist outsider students to understand the structures and culture of the professions (Sommerlad, 2007). Students would be better able to identify the skills and attributes that are often implicitly expected, but unstated, by law firms, and could be supported in their development of a personal career strategy (Sommerlad, 2008). On a similar theme, Johnstone (1999) recommended the inclusion in undergraduate legal education of “a critical study of how legal practice interacts with wider socio-economic structures, strategies of power and cultural sensibilities and studies of ethical issues in legal conduct”, as well as historical perspectives of law, ethics and morals.

During 1993/4 the Quality Assurance Agency in Higher Education conducted a review of legal education in 69 institutions in Wales and England, reporting in 1995, amongst other

issues, that there was still a lack of an integrated approach within the learning experience, and critical and analytical skills were often neglected.⁴⁶ In 1997, as part of a national higher education quality assurance project, a report on “Graduate Standards in Law” identified four issues which ought to be addressed by institutions as part of “graduateness” in law: domains of learning, key skills, typology of different programmes, and levels of achievement (level descriptors). The Department for Education and Employment commissioned a report by the Law Discipline Network (Bell & Johnstone, 1998) aimed at disseminating and promoting good practice in the development of generally transferrable skills (Bell & Johnstone, 1998). This report included a literature review, surveys, and reports of focus group sessions, and developed a statement of general transferrable skills.⁴⁷ In 2000, the subject benchmarks for Law were published and universities were expected to map these guidelines onto their curricula.⁴⁸

The teaching of legal ethics within an education system that is described as “technocratic, individualistic and authoritarian” is not likely to enhance professional legal ethics unless teaching approaches change to include students engaging actively in more meaningful moral discourse and problem solving from the initial stage (Webb, 1998). A “reflexivity between macro, or system ethics”, which explains the values underpinning legal processes and structures, such as justice and due process, and “micro ethics”, the professional legal ethics of lawyers regulating their roles and responsibilities, is suggested as a means of activating a broad concept of ethics in the early intellectual phase of study in developing humane professionals (A Boon, 1998; Andrew Boon, 2005; A Boon et al., 2005; O'Dair, 2001; Webb, 1998). In a review of the legal ethics literature, McPhail (2001) concluded that the timing of ethics teaching is a critical aspect, which ought to be addressed in a pervasive manner through a variety of courses at all levels. Although ethics had traditionally been left to the vocational training phase, law academics appear to be showing an increasing interest in teaching values through clinical law and experiential learning approaches (R Burridge et al.,

⁴⁶ <http://www.ukcle.ac.uk/about/reports/baseline.html> Accessed on 16 January, 2009.

⁴⁷ <http://www.ukcle.ac.uk/resources/ldn/index.html?&pp=1> Accessed on 9 October, 2009.

⁴⁸ <http://www.ukcle.ac.uk/interact/lili/2000/benchmarks.html> Accessed 23 August, 2009.

2002). Burridge and Webb (2007, p. 95) proposed that the inclusion of legal ethics teaching in university curricula could lay “the foundations of moral judgment in legal practice” and move law schools beyond the ongoing debate between liberalism and vocationalism.

The Law Society of England and Wales, mindful of problems concerning an “ethical deficit” in legal education, commissioned a report in March 2009 entitled “Preparatory Ethics Training for Future Solicitors”, to address the erosion of public confidence in the legal profession. The authors suggested that “positivism and pragmatism” have been the dominant values shaping legal education, and recommended that more “head space” for ethical thought be created in teaching and the practice of law (Economides & Rogers, 2009, p. 11). Recommendations such as injecting ethical training and embedding ethical issues in both phases of legal education are unsurprising (Partington, 2009).⁴⁹

The legal profession’s struggle with the challenges of post-modernity and fragmentation between the legal profession and legal education, in the context of the government’s attempts to reform legal services and the politicised economy of higher education, as well as the effect of the new capitalism in Britain, all compound the tensions between an over-supply of law graduates, and the imposition of benchmarks for legal education (A Boon et al., 2005; R Burridge et al., 2002, p. 319). The demise of small high-street law practices or sole practices in favour of huge corporate city firms has exaggerated the strong class-related divisions between “old” and “new” university graduates. City law firms and high-street law practices continue to offer different employment opportunities that affect particularly the career trajectories of “non-traditional” law graduates and maintain the “classed nature” of Law through the reproduction of professional identity (A Boon, 1998, p. 160; Sommerlad, 2008).

Having reviewed the main debates in the literature on legal education in England, it is instructive next to compare and contrast the issues raised in the Australian literature.

⁴⁹ <http://www.ukcle.ac.uk/directions/ethics.html?&pp=1>. Accessed 23 August, 2009.

2.6.3 Australia: What lawyers must know / must be able to do?

In Australia, the 1987 Pearce Report, *Australian Law Schools: A Discipline Assessment*, for the Commonwealth Tertiary Education Commission (Pearce et al., 1987) was a critical document that emphasised the need for law students to understand the social context of law, and the necessity for the curriculum to be broadened to incorporate “practical skills”

However, in a subsequent government report, a cautionary note was sounded by the Australian Law Reform Commission (1999) that professional legal skills should not be conceived of as a “narrow technical or vocational exercise” but rather as a refinement of higher order intellectual skills, which are fully informed by theory and aimed to “inculcate a sense of ethical propriety, and professional and social responsibility”. In a report by the Australian Law Reform Commission one year later (ALRC, 2000), it was stated that legal education should be oriented around “what lawyers need to be able to do”, rather than the doctrine-laden approach centred on what lawyers “need to know” (Kift, 2003). The commission advocated the re-orientation of legal education, requiring law schools to “make explicit the nature and extent of their skills development programmes”. In their report, the commission cautioned against perpetuating “a false polarity between substantive knowledge and professional skills” (Weisbrot, 2001).

At the same time, external drivers such as globalisation, market competitiveness, information and communications technology were noted as having had a direct impact on changing the structures, methods and foci of legal practice itself, so that graduates enter a more complex work environment than their predecessors (Kift, 2003). Added to this has been the pressure on the higher education sector to adapt to massification, competitiveness, accountability to government through external quality audits, the impact of globalisation and information technology, as well as reduced state funding.

Carefully planned curricula focussing on the integrated teaching of skills in an incremental way through the development of a “skills matrix” have been developed at “new” law faculties, such as Bond University (Wolski, 2002) and Queensland University of Technology (Kift, 2002, 2003). A focus on improving law teaching is also discernible in the scholarly work of Johnstone (R. Johnstone & Vignaendra, 2003), Keyes and Johnstone (2004), and books on

legal education by LeBrun and Johnstone (1994) and by Goldring et al. (1998), indicating the level of attention attached to educational theorising. The Australian Universities Teaching Committee Report commissioned by the Department of Education, Science and Training (R. Johnstone & Vignaendra, 2003) reported extensively on developments in legal education.

Australian literature on legal education has contributed significantly to understandings of the theoretical underpinnings around legal education and the content of the law curriculum. Drawing heavily on the critical contributions of Dr Nickolas James, it has become clear how university law faculties privilege the doctrinal approach, for several reasons: legal scholarship focuses on this orientation; law teachers do not have the time, expertise or inclination to change; and law students expect to be taught rule-oriented legal doctrine. Pressures from the legal profession and universities' "expectations of disciplinary heterogeneity" contribute to this situation. The Foucauldian power-knowledge aspect of doctrine knowledge, which accords status to law teachers within the academy and the community, contributes to law being recognised as a discrete and prestigious field of expertise, a means of preserving the status quo (James, 2004b).

Criticisms of the doctrinal approach centre on its "intellectual myopia", in that it is not designed to produce understandings of the principles that underlie legal rules and revives the "thought-to-be dormant positivistic myth" that law is autonomous and disconnected from its social context. It is further observed that this technocratic approach is in line with the more recent commodification of education, as it appeals to the student-consumer by compromising the academic substance of the curriculum, offering shorter semesterised versions of courses, and leaving little time for critique and reflection (Thornton, 2004).

Legal education has been described as a "dynamic nexus of at least six relatively discrete ideologies or discourses: doctrinalism, vocationalism, corporatism, liberalism, pedagogicalism and radicalism", which compete with one another to establish dominance through texts and practices (James, 2004b, p. 167). Doctrinalism is often located at the core of the law curriculum in the documents and organisation of subjects which are taught through exposition and analysis, using the transmission method from teacher to student. Vocational discourse prioritises the teaching of legal skills for the purposes of enhancing graduates' employability.

Corporatism is defined as

the set of statements and practices about legal education...that emphasise and prioritise the accountability of teachers and students, the efficiency of the teaching process and the marketability of the law school (James, 2004b).

The statements referred to here are located in law school policy documents, dictating the form and content of many law courses.

The liberalism discourse emphasises individual freedom, social responsibility and the inculcation of an “informed rationality, i.e., an intellectual ability beyond mere doctrinal expertise or vocational skill” (James, 2004b); James sees liberalism as reflected in approaches that embrace the teaching of ethical values, teaching law with a contextual emphasis, or with the inclusion of legal theory or interdisciplinary insights.

Pedagogicalism embraces the view that orthodox education theory, which facilitates a deep approach to learning in students, should underpin all teaching and learning that takes place in the law school (James, 2004b). Although liberal in origin, pedagogical discourse has been harnessed to support the corporatist objectives of efficiency and accountability that pervade current “quality assurance” policies imposed upon universities.

Radicalism seeks to undermine the status quo within the law school and the legal system by exposing undisclosed political ideologies, gender and cultural biases, and power relations. Using feminist legal theory or critical race theory, the emphasis is on critique from the perspective of the “other”, to reveal law as a potential tool for political oppression, and not a neutral, objective and universal vehicle for ordering society and achieving justice. It is based on a view that teaching law is a political activity, in which teachers can influence students to participate in reforming and transforming oppressive features of society (James, 2004b).

Ultimately, although more law educators in Australia currently advocate a liberal approach to legal education, this rhetoric does not match the practice of most law schools (James, 2004b). The integration of legal theory throughout the curriculum has not taken root, and cross-cultural, interdisciplinary or contextual subjects are most often offered as elective modules. The factors which contribute to this resistance include the cost and difficulty of implementing liberal values in teaching, opposition by both students and employers who

favour a vocational approach, and the focus of administrators and government agencies on corporatist aims of efficiency, accountability and marketability (James, 2004b).

The traditional model of legal education has been challenged by the various Australian and international reports (ACLEC, 1996; MacCrate, 1992; Pearce et al., 1987), yet these documents assume without challenge that the most important function of the legal education curriculum is to prepare graduates for private legal practice. They ignore the options of a career in legal scholarship, or in a range of other professions (Keyes & Johnstone, 2004). A lack of a distinctive vision, an ambivalence about the function of the law degree and the tension between vocationalism and scholarship, has resulted in a replicative view of legal education rather than a transformative one (Parker & Goldsmith, 1998).

In Australia, law schools have attempted to develop “niche” markets by differentiating themselves in the following ways:

[p]erceived points of distinction are many and cover class size, city/regional/international focus, and emphases on skills training, clinical programs, international exchanges and postgraduate programs (R. Johnstone & Vignaendra, 2003, p. 167).

Following the Pearce Report (Pearce et al., 1987) it seemed as if a transition was being made toward more socially liberal law schools, which earned the epithet, from a Bar council president, of “failed sociologists” for the legal academics who were teaching socially relevant topics (“criminology, bail, poverty, consumerism, computers and racism”) ((Parker & Goldsmith, 1998). Thornton (2001, p. 42) suggests, however, that there has been a gradual swing back to neo-liberalism in Australia, following on from the social-justice orientation of legal education during the 1970s. This reflects the political shift toward a competitive market economy that brings with it entrepreneurship and massification in tertiary education, effectively shifting pedagogy back toward a technocratic, depoliticised approach to curriculum and teaching practice. The electives offered at law schools (Intellectual Property Law, International Trade Law) also reflect this market-based and applied orientation of “profits and property” (Thornton, 2001, p. 45). Doctrinally-oriented legal education is “complicit” in the neoliberalist project, facilitating the adoption of a positivist view of law that “masks the dilemmas of practice by drawing a line of demarcation

between law and morality”, allowing law to be presented as neutral and apolitical and law students to be “morally neutered” (Hart, 1961 quoted in Thornton, 2001, pp. 42-46).

The “powerful disconnect” between doctrinally-focussed law curricula and what new lawyers actually do in practice – together with the “intellectual/professional skills and approaches” they require to practice effectively – demand a new approach:

[I]n a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a deep moral and ethical sense of the role and purpose of lawyers in society (Weisbrot, 2001, p. 44; 48).

This is a recurring theme in the international scholarship but, I submit, has not yet been addressed in South African legal education because of more urgent and pressing demands for transformation. In view of current trends in a floundering local higher education system, I would argue, however, that a re-visioning of legal education might be opportune to address wider issues of transformation and inequalities in the legal profession.

In the field of legal ethics, the “value-addedness” of tertiary education in enriching society as a whole was investigated in a longitudinal study of law students. The study originally established empirically that lawyers’ aspirations are not based on shared personal and professional values, which has been the traditional assumption underlying professional legal education. The objective of the research was to ascertain whether values taught in law school have any long term effect on building or perpetuating “appropriate professional values” and whether these values develop or degrade over time (Palermo & Evans, 2004). The researchers concluded that values espoused through formal legal education appear to have scant effect on the moral development of law students, based on findings that revealed that there was little marked difference between the responses to ethical scenarios between students in their first year of a law degree, and the responses of fifth-year law students. The study reported that in some countries, such as South Africa, the role of the university as a nation builder is clearly understood.⁵⁰ Further research into how these values “carry over” into professional employment of early career lawyers produced the conclusion that values education, through “values awareness” as an educational strategy,

⁵⁰ Higher Education Act 101 of 1997.

might be a means to transform legal ethics education to make it more effective. The study also established that ethical behaviour was not uniformly enforced in the workplace (Evans & Palermo, 2006).

In 2007–8, Law was selected as an exemplar of a professional discipline by the Carrick Institute for Learning and Teaching in Higher Education (now Australian Learning and Teaching Council) for a study that would identify curricular approaches to best serve the needs of graduates in eight to ten years time. This report, *Learning and Teaching in the Discipline of Law: Achieving and Sustaining Excellence in a Changed and Changing Environment* (Davis, Owen, Coper, Ford, & McKeough, 2009), set as goals the dissemination of the findings of the 2003 report and engagement among law schools with these findings, the development of an infrastructure for ongoing consultation with key stakeholders, exploring the issue of setting formal standards and graduate attributes templates, and developing effective means to inculcate in law student the values of professionalism, ethics and service. Other goals that resonate with American law educators' concerns were the need to develop base-line data regarding the mental well-being of law students and combat the prevalence of stress and depression, and curriculum revision to address the delivery of legal education. Another key objective was the teaching of ethics and professional conduct, in a framework of developing an ethical disposition in aspiring lawyers, to develop a generic professional identity and enhanced "professionalism".

In the most recent report on Australian legal education, the 2008 Roper Report ("Coogee Sands Declaration")⁵¹ commissioned by the Australian Law Deans, the possibility of establishing benchmarks in a range of areas of legal education is thoroughly canvassed. The report draws attention to the joint requirement of professionalism and ethical behaviour, stressing the integration of principles of ethical conduct and the internalisation of values that underpin these principles of ethical conduct and professional responsibility.

In a model that described a pervasive approach to integrating ethics throughout the law degree, Robertson (2009) proposed a framework for embedding ethics in a range of substantive law modules where this is appropriate, as well as having a specific "thread" of

⁵¹ Accessed at: http://www.cald.asn.au/docs/Roper_Report.pdf Accessed on 10 October, 2009.

ethics modules linking up coherently in a vertical arrangement through the degree. He argued for providing law students with opportunities to “engage meaningfully with lawyers’ ethical responsibilities”.

The extensive coverage in the literature and the in-depth analyses of Australian legal education speak of a thorough engagement with the complex layers of philosophical and pragmatic debates in the field. The international literature revealed an engagement with the debates between theory and skills in the law curriculum, the disjuncture between legal education and professional demands, and the liberal arts approach contrasted with the neoliberal vocationalist approach in law schools. This body of literature stands in sharp contrast to the dearth of scholarship on the topic in South Africa, which will be surveyed in the next section.

2.6.4 South African legal education

The field of legal education scholarship is extremely underdeveloped in South Africa; what is published in traditional law journals is typically confined to case notes and doctrinal articles. Little value is attached to pedagogical issues by legal academics who regard themselves, as in England, as primarily lawyers and not teachers (Cownie, 1999).⁵²

In the first notable scholarly article on legal education, immediately prior to the transition to democracy, Dhlamini (1992) highlighted the structural and systemic inequalities that had previously shaped the legal profession and the system of legal education. His purpose was directed at identifying some of the factors that would need to be addressed to satisfy the needs of all students in the “new” South Africa. The positivist approach to law adopted at that time had served to legitimise apartheid by viewing the legal system through a lens that recognised the law “as it is”, without considering what it “ought to be”. The content of the law curriculum had been determined by white academics; qualitatively different teaching resources had been allocated to different race groups and the failure to include the views and aspirations of the black community in the legal system was patent (Dhlamini, 1992, p.

⁵² At the July 2009 Conference of the Society of Law Teachers of South Africa, only three sessions out of approximately 36 sessions were devoted to legal education.

598). Black students were disadvantaged by these and other issues of language, such as the requirement to pass a Latin course, when Latin was not a subject offered at schools for black learners, as well as the difficulties of learning law through the medium of a second language. Black universities struggled to provide an adequate education for law students, who had endured poor educational backgrounds and experienced severely limited resources at such institutions (Dhlamini, 1992, p. 604). This piece set the context for subsequent post-apartheid scholarship.

In an article published at that time, Woolfrey (1995), writing as an academic developer, outlined the changing nature of legal practice and the socio-economic and demographic factors then impacting on curriculum development in law. The nature of law (and law-teaching) as a discipline, in the context of the changing firmament of higher education in South Africa, created an “apparent tension” between the academic and vocational aspects of the law qualification which could be addressed by integrating theoretical content with legal skills training. This is the first piece of scholarship (by an education specialist) in the South African literature that suggested a need to synthesise aspects of the dominant discourses within legal education at that time. He noted:

Traditionally, law is taught within a broad expository tradition, characterised by a “rule-oriented, knowledge-based” approach...tied up with the notion that Law is a coherent system of rules that can be taught in an all-encompassing way. Coverage of the “core subjects” becomes the guiding ethic in curriculum design. Insufficient attention is given to the development of either general intellectual skills, or, more immediately, “lawyering skills” (Woolfrey, 1995, p. 151).

A contribution from a South African legal educator living in the United States deplored the absence of “lawyering” skills and writing skills teaching in the South African law degree (Motala, 1996). In response, Woolman et al. (1997) highlighted the particular contextual difficulties in South African universities. Their somewhat elitist argument was premised on grounds of intellectual rigour and the production of quality graduates, rather than popular political correctness. The authors were harshly critical of the ineffectual part played by Law Deans in colluding with government and the organised legal profession to facilitate the introduction of the four-year undergraduate degree in 1996. The introduction of an “Africanisation” discourse of representivity and transformation dominated legal education

debates, rather than engagement with increased resource allocation to HBUs to correct the historical deficit. This emphasis on enhancing representivity in the legal profession resulted in a direct call for the speedy production of more black lawyers to make up for the “educational backlog and production shortfall in even less time”. At a time when the allocation of funding to universities was not going to increase and student enrolments were set to escalate dramatically because of widened access to higher education the authors were highly critical of the expectation that

all law schools simultaneously admit more ill-equipped students (because the nation supposedly requires more graduates) and deal with the overall educational deficit by becoming more efficient (Woolman et al., 1997).

Further problematic issues raised were a lack of reflective teaching, the absence of interdisciplinary theory, or “intellectual malnutrition”, which is common in legal education, and the lack of research preceding the major policy transformation in legal education (Woolman et al., 1997, p. 55). The authors argued strongly for the retention of a five year “liberal arts” LLB degree, with limited numbers of students admitted and a reduction of substantive law content to balance the introduction of critical skills teaching. Their preference was for “elitism, rather than elidism” (Woolman et al., 1997, p. 63).

Past influences and current challenges on a broad national level to the South African legal system and legal education in the new democratic dispensation were underscored by Iya, with a warning that “the legacy of apartheid must not be permitted to linger on into the 21st century” (Philip F Iya, 2001, p. 362). His observations about the historical legacy of young black students, coming into university from often poor rural homes and a weak “Bantu” educational school system, drew attention to problems that would continue to affect legal education for years to come. Academic staff at universities were still “overwhelmingly white” (80%). The challenges identified were:

to improve access to justice and the legal profession for all, to adapt the Eurocentric nature of the curriculum to reflect local realities, to challenge the control of the professions by the privileged few and to restructure law curricula to reflect the demands of nation-building and establish a culture of legal education and training that must ultimately be people-centred, aimed at improving their conditions as human beings (P F Iya, 2000, p. 6).

In similar vein, Kaburise (2001) observed that there was “remarkable homogeneity” in the law curricula at the various South African universities, despite their vastly differing historical origins, student constituencies and resources. He attributes this, amongst other factors, to the conservatism of the legal profession and a “continuing culture of regimentation” upon which the apartheid ethos was based. In a review of the Critical Legal Studies Movement and its impact on South African legal education, Van Blerk (1996) outlined how this approach could be used as a tool for law teachers to identify the “class-based nature of current legal doctrines” which do not reflect the “shared moral values of the wider community”

Some of the legal education literature has addressed problems of language for African law students in South Africa. Ngwenya (2006) highlighted the effect on students’ communicative competence of studying law in a second language, while Bronstein and Hirsch (1991) recommended a multi-faceted and integrated approach to teaching Law to second language students that would involve changes to pedagogical strategies for law educators. Van der Walt (1992) argued that legal language provides a special challenge for second language learners that ought to be addressed through carefully researched courses which focus on teaching legal reading, writing and speaking. An empirical study on the language needs of law students recommended an interdisciplinary collaborative approach to support language development (Van der Walt & Nienaber, 1996). The peculiarity of legal discourse, including the power relations implicit in its formality and adversarial politeness, serve to exclude those not adept at its practice (De Klerk, 2003). The problems of language in higher education generally have been noted in the Ministerial *Report on Transformation* (2008), as has the issue of transforming the undergraduate curriculum and adopting new learning theories.

In problematising the supposed paradigm shift in higher education from a behaviourist approach to a constructivist one, based on the introduction of SAQA requirements and OBE, Field (2005) argued for the need to review law curricula to ascertain whether this shift is actually appropriate and necessary. The need for “exactness” in legal discourse seems to challenge aspects of the constructivist tradition in learning. The author argues that a whole-

hearted adoption of such an approach ought to be researched and considered before it is implemented through law curricular revision.

The challenges of achieving the intended educational outcomes of the LLB degree (SAQA Exit Level Outcomes) in four years were identified by Scott (2005) who ranked the factors contributing to the “existing unsatisfactory position” in legal education as including

the pathetic state of secondary education, the calibre of students admitted to legal studies, the relaxation of the academic standard of the LLB, *inter alia*, through the shortening of the study period, but in particular, by excluding a broader based education in which languages and other social science subjects were included, pressure from government to improve the throughput rate and the poor quality of legal practitioners (S. Scott, 2006, p. 733).

The history and motivation for introducing the new law curriculum has been reviewed in light of the political and contextual factors, noting the development by SAQA⁵³ of generic “Exit Level Outcomes”⁵⁴ for the law degree which correspond closely with the proposals related to skills that were developed by the Law Deans Task Group in 1996 (McQuoid-Mason, 2004, 2006, 2008).

In a sweeping review of legal education in a transitional society, Midgley (2007) presented a personal interpretation that foundational academic competencies are an essential component of the law degree at university. He blames the failure in 1996 of the Departments of Justice and of Education to enter into dialogue as a key factor in the diminishing quality of legal education in South Africa. Their reluctance to coordinate their transformation agendas and “pay sufficient attention to core educational issues” has meant that poorer quality graduates are being produced who lack the necessary competencies for professional practice.

A commissioned research report for the Department of Labour (Godfrey & Midgley, 2008) reviewed the market for law graduates and concluded that, while there is not an absolute scarcity of graduates, the numbers of African and female graduates are relatively low. Graduates lack critical skills such as numeracy and literacy and there “appears to be some

⁵³ South African Qualifications Authority.

⁵⁴ GG 23845 of 2002-09-20.

unevenness in the quality of graduates between universities” (2008, p. 87). There is also an uneven distribution of legal professionals between urban and rural areas (2008, p. 87).

This snapshot of the reconceptualisation of legal education in South Africa has identified the limited attention or interest that has been devoted to the scholarship of legal education. There is silence regarding the integration of ethical values, the development of reflective practice and of professional identity and discernment, and nowhere in the literature is the student experience of the law curriculum considered. It is in the area of students’ experience of the law curriculum that I intend to contribute some understandings, drawn from empirical data, and informed by theoretical perspectives from the international literature.

2.7 Concluding remarks

The first half of this chapter reviewed literature on the development of curriculum policy, followed by a survey of the scholarship related to curriculum policy development in South Africa during the immediate post-apartheid period. The symbolic prominence which policy took on during that period was a significant contributory factor in the problems of translating policy into practice. Next came a survey of the literature on the interpretation of policy and its translation into effective practice, leading on to a consideration of research on the processes of implementing educational change. Much of the literature was drawn from work carried out in schools and has had to be extrapolated for application to higher education, in relation to which the research so far undertaken is comparatively limited.

The second half of the chapter considered the literature on the reconceptualisation of legal education. Internationally, there has been widely felt dissatisfaction with the fragmentation of legal education, which fails to prepare graduates adequately for professional life. Ongoing tensions continue to exist between legal academics, espousing a liberal education that is often unrelated to skills or ethical development and laden with doctrinal content, and the demands of practising lawyers, who expect graduates to have a practical training, heavily influenced by the neo-liberal agenda of globalisation. The American, English and Australian

literature on these topics provided a rich background against which the corresponding South African scholarship can be contrasted. In this study I have attempted to draw together insights derived from both bodies of scholarship, and to extend these to encompass an understanding of the curriculum in the context of South African legal education.

The next chapter describes the theoretical conceptualisations and constructs – theorising about the possible understandings of curriculum, and theoretical insights concerning the development of professional identity – which underpin the present study.

Chapter 3

Theorising conceptualisations: curriculum and professional identity

3.1 Introduction and outline of the chapter

In this chapter, framing theory for the study has been appropriated from two bodies of conceptual theorising. The first significant body of theorising drawn on is that of current curriculum theory regarding the nature of curriculum and curriculum possibilities, curriculum seen as a fluid and elusive concept, from the work of Barnett and Coate (2005) and Fraser and Bosanquet (2006). Theoretical insights from this category address ways in which contested and varied understandings of curriculum held by different role players shape curriculum development. How curriculum is conceived of will be shown to have a significant influence on the ways in which particular curricula are developed, drawing here on the work of Eisner and Vallance (1974). This leads on to an exploration of various conceptualisations of curriculum in higher education, followed by discussion of theory related to the interplay among the domains of curriculum in professional education. A theoretical schema is presented which indicates the interrelationship among the component domains that constitute those aspects of learning which curricula may address.

The second body of theory considered in this chapter relates to the development of professional identity through the curriculum and the construct of “professional entity” (Reid & Petocz, 2004a). Theorising related to conceptualisations developed in an Australian study of law students highlights some of the contradictions and ambiguities that arise in the formation of professional identity. The theorising is separated into three sub-parts:

- (i) curriculum as possibilities
 - (ii) the interplay of curriculum domains
 - (iii) the development of professional identity through curriculum.
-

In the sections that follow in this chapter the account of curriculum theorising is prefaced by brief historical introduction. The discussion then focuses on some of the possible ways in which curriculum is understood in order to establish a framework of reference against which the data that has been elicited in this study may be interpreted. In particular, attention is given to the value orientations that can be perceived in the various ways curricula are developed, leading on to specific consideration of notions of curriculum in higher education. Investigation then follows of the interplay of the different domains of curriculum, and the chapter concludes with an exploration of theorising about the experience of curriculum as preparation for becoming a professional.

3.2 Historical background to curriculum theorising

In curriculum studies, the theory typically regarded as foundational is the “Tyler Rationale” (Tyler, 1964, first publication 1949), which characterised curriculum-making as a process of selecting and organising objectives, content and activities, and evaluating learning. Its “technical rationality” was criticised for the emphasis it placed on quantifiable, rational ways of determining appropriate learning tasks (J. G. Henderson & Hawthorne, 1995, p. 9; Schön, 1983). Its value-neutral positioning was also criticised, as were its behaviourist objectives (M. W. Apple, 1986). The Tyler Rationale resonates with the first of three positions in Habermas’s theory of knowledge-constitutive interests in curriculum (1972). The first category of interest is the “technical” interest, which manifests itself in technocist control, instrumentalism and predictability. Selection of knowledge for inclusion in curricula based on this interest tends to replicate social power, differential cultural capital and inequality (M. W. Apple, 2004). The second interest is the practical (communicative) or hermeneutic, aimed at understanding others’ perspectives, which resonates with notions of curriculum as

process. The third interest identified by Habermas (1972) is reflected in the emancipatory orientation, which promotes democracy, equality, empowerment and individual freedoms. Underpinning Habermas's third interest is an inescapable political agenda that indicates a trend toward social democracy and critical pedagogy. Curriculum is viewed as ideologically contestable terrain (Cohen, Manion, & Morrison, 2007, p. 31).

Decker's (1971) deliberative approach to rational curriculum planning produced a "naturalistic model" to illustrate how curriculum-planning takes place in practice, combining teachers' conceptions, theories and aims through phases of deliberation and design. By 1969, Schwab had declared a "crisis" in the field of curriculum studies in the United States of America. This crisis was attributable to factors such as an absence of principles being applied in the field of curriculum, decisions about curriculum being taken by non-experts, a separation between critics and practitioners, contentious debates amongst curriculum theorists, and a failure to acknowledge earlier work or develop new approaches (Wraga & Hlebowitsh, 2003).

The 1970s saw the emergence of a reconceptualised view of what curriculum is and how it functions. The "reconceptualists" drew attention to the complexity, the historical significance, the emancipatory potential and the essentially political nature of curriculum development (Pinar, 1978). Current theorising since that major paradigm shift reflects a post-structural analytical positioning that combines a complex, multi-layered approach to curriculum studies with a much greater focus on human meanings (J. G. Henderson & Hawthorne, 1995, p. 122).

Cornbleth argued for the rejection of the technocratic, decontextualised view of curriculum, and its replacement with an understanding of curriculum as "an ongoing social process comprised of the interactions of students, teachers, knowledge and milieu" or as "curriculum-in-use", as opposed to curriculum as product or plan: Put simply, curriculum cannot be grasped unless it is viewed in context: "the isolation of curriculum from its multiple, interacting contexts is an absurdity" (Cornbleth, 1990).

The political curricularists argued that curriculum development and evaluation could not exist in a politically neutral setting; ideology, as they saw it, was central to the

understanding of curriculum as political text, serving to reproduce the class structure of the workplace, and forever displacing the traditional assumptions about curriculum (M. Apple, 1979). Curriculum not only ceased to be regarded as a channel of oppression, it began, indeed, to appear as a potential site of reform (Pinar, Reynolds, Slattery, & Taubman, 2002). Postmodern curricularists continue to be challenged by patterns of social, economic, cultural and political relations that defy a unified approach to debates around race, gender, culture and class (Marsh, 1997, p. 277).

At present, curriculum studies is an extremely “complex interpretive field of study; there are multiple, competing perspectives on what ‘curriculum’ means” (J. G. Henderson & Hawthorne, 1995, p. 124). Understandings of curriculum as political text that is contextually shaped by structural and socio-cultural factors could be applied to the curricular intentions of the originators of the 1997 law curriculum which was introduced amidst the sweeping contextual and political shifts occurring in South Africa at that time, but it is doubtful whether this perception was present in their thinking at the time.

This “fuzziness” about what curriculum means, and which understanding is operating in different contexts and at different historical moments underpins much of what this study seeks to clarify and theorise within the discipline of Law. An exploration of the theoretical possibilities for curriculum will establish the groundwork for this aspect of the research.

3.3 Curriculum possibilities: what are the meanings of “curriculum?”

This section describes theory relating to the nature of curriculum, the ways in which curricula are developed, and contesting conceptions of curriculum. This is followed by a discussion of theoretical insights concerning the component parts of curricula, and the section concludes with a review of curriculum theory in the context of higher education.

The concept of curriculum is a particularly vague and multi-faceted one, giving rise to an endless range of interpretations which are often not shared, nor indeed articulated, by

academics in higher education (S. P. Fraser & Bosanquet, 2006, p. 269). Curriculum is a concept associated with “fluidity”, “instability”, “elusiveness” “invisibility” and “liquidity”, all of which underline the difficulty of grasping a single, clear understanding of what the term embraces (Barnett & Coate, 2005, p. 153). Barnett and Coate make an observation that is especially pertinent to university curricula in current times of dramatic change in higher education provision, namely that

A university curriculum is always a *curriculum in process*. It is dynamic and in flux, and is also a site of contested interpretations. A curriculum is fluid and is not- cannot- be caught by any schema or template....Curricula in higher education now have to be charged with the responsibility of encouraging the formation of human wherewithal that is adequate to an age of fluidity (Barnett & Coate, 2005, p. 51).

The authors emphasise the elusiveness, the “shadowy” nature of curriculum, based on the many different interpretations of the term, as discussed above. It is possibly that this conceptual ambiguity, the difficulty of establishing a shared meaning amongst academics in higher education, that explains why so little attention is paid to the topic at that level. Ratcliff identified a familiar misapprehension that arises in higher education circles when dealing with curriculum change:

When a committee, a Dean, or a department chair contemplates changing the curriculum, it is dangerously easy to make an assumption that everyone agrees on what curriculum is....Making this leap of faith can lead to unnecessary disputes over nomenclatures, and worse, aborted attempts at fundamental change (Ratcliff, 1997, p. 5).

Another explanation for the silence of teachers’ voices in curriculum debate is that a new vocabulary of terms has marginalised the traditional educational discourses of curriculum theory, pedagogy and learning theory. The new international managerial discourse of “consumers, providers, accountability and performance”, which has its origins in industry and commerce, appears to have swept into place curriculum changes attuned to globalisation and neoliberal agendas with scant input from teachers (Elliot, 1998, p. 34).

Curriculum embraces a multiplicity of meanings that differ from context to context, ranging from understandings of curriculum-as-designed, as opposed to curriculum-in-action, or tacit assumptions of curriculum that can be inferred from written documents that reflect the “official curriculum”. Teaching practices may reflect the “enacted curriculum”, while the

“null curriculum” is another abiding feature in law curricula, serving to omit selected knowledge from inclusion in modules (Barnett & Coate, 2005, p. 152; S. P. Fraser & Bosanquet, 2006, p. 282). In legal education, this feature intrudes to a deeper structural level in the choice of electives offered, the sequencing and credit-point weighting attached to different subjects, and the exclusion of certain subjects at some universities altogether. Subjects such as Customary (African or Indigenous) Law and Race and Gender Law are positioned at vastly different levels of study where they do appear as compulsory modules, while other universities place an inordinately strong emphasis on commercial law or criminal law subjects (see section 5.1 of this thesis).

Much has been written about the “hidden curriculum”, meaning the unarticulated rules that are communicated in a learning environment (Margolis, 2001, pp. 17-18). Through the presence of subtle and non-formal norms and practices, often serving to privilege those who are tacitly aware of them, these hidden “rules” effectively exclude anyone unable to “read between the lines” or pick up the non-verbal or non-explicit cues. I argue that the covert, hidden or implicit curriculum is a powerful means of social reproduction in educational settings. The additional difficulty, for many South African students, of speaking a mother tongue that is not that of their lecturers, or the language of instruction at university, heightens the opportunities for the hidden curriculum to reinforce their exclusion from the tacit “rules of the game.” This was an issue regarded as a matter of concern by the Ministerial Commission on Transformation:

transformation involves the informal ‘climate’ of the university – the ways in which people relate to one another on a day-to-day basis....(T)he informal climate includes both inter-personal relationships and “less tangible, but equally important aspects of transformation, as well as the traditions, symbols and customs of daily interaction which combined constitute institutional culture” In short, the latter refers to ‘the way in which we do things’, as well as to the underlying assumptions and beliefs that underpin this. (p. 35).

In my opinion, these different manifestations of the meanings attaching to curriculum underscore the complexity of interpreting the term in a one-dimensional way. This theme of the various meanings attributed to the term “curriculum” will be extended in the next section, where a range of factors are shown to affect curriculum development.

3.4 Factors affecting curriculum development

A variety of factors, including epistemological assumptions may be seen to shape and affect curriculum development. Eisner and Vallance (1974) suggested five possible orientations which reflect the underlying values of curriculum developers:

- (i) the “technological” conception (measured curriculum), which focuses on sequential learning and direct instruction
- (ii) the “cognitive processes” approach, which conceives of curriculum as content-free, emphasising thinking and problem-solving skills
- (iii) the “academic rationalism” approach, which places emphasis on a subject-centred approach, related to the organised subject matter of academic disciplines
- (iv) the “social reconstruction” approach, which focuses on real societal problems as the content of the curriculum to be studied, in order to create a more just, humane and equitable society
- (v) “curriculum as self-actualisation”, which places students at the centre of curriculum planning, co-learning with their teachers to explore and challenge themselves (Klein, 1986).

In similar vein, the American Association for Supervision and Curriculum Development (2005) set out the various elements which are subsumed under the notion of “curriculum”. Each facet of curriculum in this list can be regarded as a particular aspect that comprises part of the overall conception of curriculum: (a) specific criteria curriculum (b) taught curriculum; (c) learned curriculum; and (d) assessed curriculum. These separate elements simultaneously focus attention on the key elements of (a) the content-knowledge materials; (b) the enacted, process-based delivery of concepts; (c) the learned curriculum, which incorporates the notion of the unintended curriculum and issues of task analysis and the extent of student engagement; and (d) the assessments to evaluate whether the objectives are achieved, how these align with the outcomes, and whether they are motivational (Bowers, 2006). Ideally, attention should be paid to all of these elements when devising a new curriculum. These categories provide a useful framework of reference within which to locate styles of curriculum-making and the component parts of a curriculum. The

significance of the different associations and the different uses of the term “curriculum”, unless one is alert to its problematic nature, is that the meanings relate back to the underlying epistemological assumptions of whoever happens to employ the term (S. P. Fraser & Bosanquet, 2006, p. 282). Lecturers’ ways of thinking about curriculum play an important role in shaping the type of education that they provide:

How we conceive of curriculum and curriculum making is important because our conceptions and ways of reasoning about curriculum reflect and shape how we see, think and talk about, study and act on the education made available to our students (Cornbleth, 1990, p.12)

Approaches to curriculum-making thus are shaped by underlying epistemological assumptions and notions related to the relative significance of the constituent aspects of curriculum.

In the next section the three main conceptions of curriculum commonly held by educators are described.

3.5 Approaches and models of curriculum development

The first approach to curriculum development described above produces a technocratic **curriculum as a document, a product or plan**. It is understood as the end product of a rational design process, starting with the setting of objectives, the neutral selection of knowledge to achieve those aims, sequencing the content into an appropriate order, and transmitting it to students. This was the dominant model in education theory for many years, following Tyler’s 1949 model of curriculum design (Tyler, 1964). It outlined a precise and efficient behaviourist method for producing a “curriculum as plan or product”. This view held sway during an era that valued scientific rigour and bureaucratic accountability. The starting point for curriculum planning was the setting of educational objectives, and the planning focus was on what was intended as a prescriptive syllabus outline. What this approach fails to take into account is that proposals on paper (the official curriculum) often do not reflect the reality of the “curriculum in (as) practice”. Examples of the official

curriculum appear in faculty hand books or as module outlines, and on university websites as the “contents” or “syllabus” for particular subjects. The written or official curriculum is reflected in the organisational structure, the timetable, credit-point weighting of modules and the sequencing of subjects within degree programmes. To some extent, the introduction of outcomes-based education and a National Qualifications Framework (NQF) in South Africa in 1997, although intending that outcomes be more widely conceptualised than “learning objectives”, raised concerns regarding the starting-point of curriculum planning that it shared with the Tyler model.

“**Curriculum as content**” is another model that reflects a popularly-held view amongst many educators who have not been exposed to more recent literature on curriculum theory. The idea that there is an objective *corpus* of knowledge to be taught to students (in each subject) ignores the potential for privileging certain knowledge, the influences of personal ideological bias in selecting content, and the question of whose knowledge should be prioritised. This theorizing is particularly pertinent to the context of the present study which concerns a system of law where the selection of the subject matter of what is taught is decidedly partial and subjective. In South African law, this debate is fundamental, since there is contestation in relation to the very historical validity of an inherited legal system (Roman-Dutch law) as a part of a pluralistic legal system in which different laws apply to different citizens (customary law and common law). This approach to curriculum deliberately avoids the demand to address urgent issues of transformation in the curriculum and in the widest sense of the legitimacy of aspects of the legal system. In a discipline where the legal regulatory framework relating to new first-world transactions (intellectual property rights, internet banking) is being extended and developed daily, alongside a legislative framework committed to redressing urgent socio-economic issues of poverty, access to basic rights, such as water, primary health care and housing, the selection of materials and topics, as well as the choice of decided cases as legal precedents that are used as illustrative examples, cannot be regarded as a value-neutral exercise.

This idea of **curriculum as process** is a third model which places value on the individual learner’s autonomy, asking what processes are important for the students to develop their

potential fully (Kelly, 1989). This approach is perhaps best represented by the following definition:

A curriculum is an attempt to communicate the essential principles and features of an educational proposal into such a form that it is open to critical scrutiny and capable of effective translation into practice (Stenhouse, 1975, p. 45).

Rather than having curricular debate confined to specific subject matter Stenhouse (1975) shifted attention instead to the implications of enhancing students' understanding and judgement by inducting them into the ways of thinking and of constructing knowledge embraced within a broad conception of disciplinary knowledge. This approach, of teaching law students "to think like lawyers", has attained a level of popularity in American and Australian law schools (Weisbrot, 2001). As yet, however, in South Africa, the mindset of legal academics, seeing themselves primarily as lawyers (Cownie, 1999), indicates their often limited interest in their teaching role. The scant attention paid to the limited scholarship on legal education in South African law journals and at law teachers' conferences is evidence of this attitude (see section 2.5.4). Furthermore, the prevalent mode of delivery to students, the large class lecture, which is premised on a "transmission" mode of teaching, makes it impossible to "induct them into ways of thinking and constructing knowledge" (Tishman, Jay, & Perkins, 1992). South African law academics' focus in teaching is lecturing on what they believe to be an "essential body of substantive legal doctrine" This is further borne out in the limited number of curricular offerings on skills development and clinical law teaching, and the silence on teaching ethics in most law faculties (see section 5.1). The largely shared and similar emphasis in curricula at all South African law faculties on "core curriculum content" suggests that curriculum as process is not a commonly-held conception of curriculum.

Current views on curriculum acknowledge the socially-constructed and value-laden nature of conceptions of curriculum, curriculum-making, curriculum change and practice. A conception of curriculum as what happens in the (lecture) classroom, as "an ongoing social interaction between students, teachers, knowledge and milieu", reflects the influences of the structural context (the institution, the faculty, the ethos created by the lecturer) as well as the socio-cultural context (the social, political, demographic, economic features) impacting on the teaching and learning experience (Cornbleth, 1990). A similar awareness of

the dynamic social process encapsulated within the notion of curriculum is Grundy's idea of "curriculum as praxis", which is characterised as a "personalised and reflective" approach, rather than a contextualised orientation (1987). In the next section, the specific meanings attached to curriculum in higher education will be reviewed. Perhaps the following description captures the essence of curriculum most accurately:

[curriculum is] more than a textbook, more than a classroom, and more than teachers and students. It is all the social influences, populist crises, military campaigns and historical moments that shape our lives – when we are in school [university] and in our lives beyond the classroom (Carey, 2006, p. 4).

In the next section, a specific focus on the ways in which curriculum has been theorised in higher education will be addressed.

3.6 Curriculum in the context of Higher Education

An "invisibility" surrounding engagement with the notion of curriculum in higher education can be related to the challenge that such engagement would involve to the structures, values and interests of various individuals. Barnett and Coate (Barnett & Coate, 2005, p. 151) argue that there is "a confluence of interests" that do not want attention directed toward curriculum in an explicit or overt way, because this would affect sensitivities around the values and interests of the different stakeholders. Academics regard teaching as a set of processes that hinge around their epistemological interests, while the state and employers as consumers of higher education regard marketable skills as a priority for curricular concerns. Barnett and Coate argue that a process of curriculum change "by stealth" is taking place in higher education, to serve the narrowly-focused needs of "economically productive skills" (p. 24).

Curricula "live in, and are subject to, the interpretations and intentions" of those conducting the activities that in part constitute the curriculum. This elusive quality of curriculum that situates it within the intentions of educators and locates it in educational structures such as modules, programmes, educational concepts, and in institutional and disciplinary cultures, makes it difficult to grasp as a concrete conception (Barnett & Coate, 2005, p. 151). Barnett

and Coate expose the conundrum of curriculum: it is not obvious as an object of perception, but it does supply “boundaries and demarcation lines”, “affirming or denying the social capital of those subject to it”. Documents provide the visible or tangible evidence of curricula, but these are seldom operationalised in the way that was intended by the curriculum planners. In addition, different “epistemic communities” in a variety of disciplines across the academy tend to interpret curriculum demands differently according to their own discipline understandings. Engaging academics in thoughtful curricular activities thus presents a risk to their professional identity in requiring them to reveal their educational values (Barnett & Coate, 2005, p. 158).

In the field of higher education, we are thus left with a broad range of tacit notions of curriculum, some of which overlap each other. There is an inextricable link between these notions of curriculum and the social and historical context in which they are held (Cornbleth, 1990).

Curriculum as outcome reflects a popular current focus on quality assurance and bureaucratic bench-marking, as part of the SAQA and NQF discourse. The process of developing and registering module templates sharpened this focus for many academics working in higher education, requiring them to adopt the terminology and forms appropriate for outcomes-based education.

Curriculum as “special” reflects an understanding of curriculum that is underpinned by notions of academic freedom and autonomy which imply that “discipline experts know best”. No attempt at prescription of curriculum content has ever been made as yet, but certainly in the recent Ministerial *Report on Transformation* there are clear indications that the higher education sector will be expected to address concerns about the transformation of its curricula:

at the centre of epistemological transformation is curriculum reform - a reorientation away from the apartheid knowledge system, in which curriculum was used as a tool of exclusion, to a democratic curriculum that is inclusive of all human thought...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 (2008, Section 6.2).

Curriculum as culture emerges from the existence of disciplinary specialisations within the university, shaped by disciplinary values, norms and rules of communication that only “deep immersion” in these bounded disciplinary communities through enculturation and initiation of members will develop (Becher et al., 1994; Oakeshott, 1989). This view underlies many of the tensions between legal academics and the law professions. A particular feature of the power of knowledge fields in expert disciplines is the strong hold they appear to have on curriculum change, resisting attempts at outside interference, as evidenced in the ongoing disaccord between the Law Deans and the Law Society of South Africa.

Curriculum as social reproduction operates mainly by means of the pervasive “hidden” curriculum”, through which the powerful, non-explicit rules of the game function that students must master. This aspect of curriculum is critical in negotiating the classifications and framing that surround every pedagogical transaction (Bernstein, 1971, 1990). Bourdieu’s (1990) identification of cultural capital as a necessary asset, required by students for them to interpret the hidden rules that lead to success, reinforces this “gate-keeping” aspect of curriculum as reproductive of social classes.

Curriculum as transformation is informed by political theories of empowerment in which the university is a potential site where students’ lives may be transformed, although it is argued that this approach is founded more on pedagogical strategies than on curriculum. Mezirow’s (1997) work on transformative learning, based on Habermas’s critical theory and Freire’s (1970) writings on conscientisation is concerned with altering frames of reference through critical reflection of both habits of mind and points of view (Moore, 2005, p. 82). Cranton (1997) emphasised the role of self-reflection by students for them to experience transformative education, but Taylor et al. (2002) take issue with the predominance of theory underlying this discourse in the absence of practical teaching guidance. This creates an idealistic goal of transformative learning for empowerment, without adequate understandings of where the process will lead (Moore, 2005, p. 83). However, a new turn in this discourse can be discerned, associated with a different set of values that reflect more current concerns (Harvey & Knight, 1996, p. 8). The transformative potential of the educational experience can also be seen as enhancing the knowledge, ability and skills of graduates: an education can “add value to students’ lives”. The strong links between this

view and the “outcomes and employability agenda” (enshrined in the National Qualifications Framework), aimed at the production of “flexibly-skilled” graduates, directly contradicts the emancipatory imperative that South African politicians originally had in mind in the 1990s.

Curriculum as consumption is a perception that responds to the commodification of higher education. Governments have increasingly reduced funding subsidies and applied pressure to institutions to generate revenue and be responsive to their student-consumers, the market place, employers and consumers of research, by developing niche areas and specialisations that address these demands. Modularisation, semesterisation, and the offering of combinations of career-focussed programmes reflect the emphasis on the functionality of curriculum in a global market.

The **liberal curriculum** is a conceptualisation of curriculum that runs counter to most of the above-mentioned understandings, in its questioning of the role of curricula in higher education. The Alverno College example⁵⁵ aims to “redefine education in terms of abilities needed for effectiveness in the worlds of work, family and civic community”. Notions of expanding students’ intellectual horizons to offset the narrowness of a vocational focus, provide a balanced, general education and educate citizens for their roles in a broader society are foundational to this view (Barnett & Coate, 2005). James (2004b, p. 6) characterises the liberal approach to teaching law in Australia as one that “recognises alternative disciplines, multiple theoretical frameworks and other cultures”, and is characterised by “a worldview of liberal rationality” Yet its objective – incorporating theory, context, interdisciplinarity and cross-cultural perspectives through the ideals of individuality, responsibility and rationality – is often resisted by lecturers, students, employers and university managers.

The possibilities outlined here for curriculum exist as broad theoretical positions but they do not identify the domains that constitute the curriculum nor do they explore the

⁵⁵ <http://colleges.usnews.rankingsandreviews.com/best-colleges/milwaukee-wi/alverno-college-3832>

interrelationships between the component parts of the curriculum; these are questions to be elaborated upon in the next section.

3.7 The interplay of curricular domains

A theoretical model proposed by Barnett, et al. takes as its starting point a conception of the modern undergraduate curriculum as creating “identities that are founded in three domains: those of knowledge, action and self”(Barnett et al., 2001, p. 438). The dynamic relationship between the three domains exists as “a set of moments” in the way the student (S) experiences the curriculum (see Figure 7). Meanings accorded to the three domains include “a hinterland of contesting interests” (p. 438). The **knowledge field** includes the discipline-specific competences representing the background epistemologies of the discipline, the academic communities, professions, students, state and corporate world which determine the discipline knowledge. The **action domain** includes the competences acquired through “doing” in the discipline, while the **self domain** “develops the educational identity of the students in relation to the subject area” (p. 437).

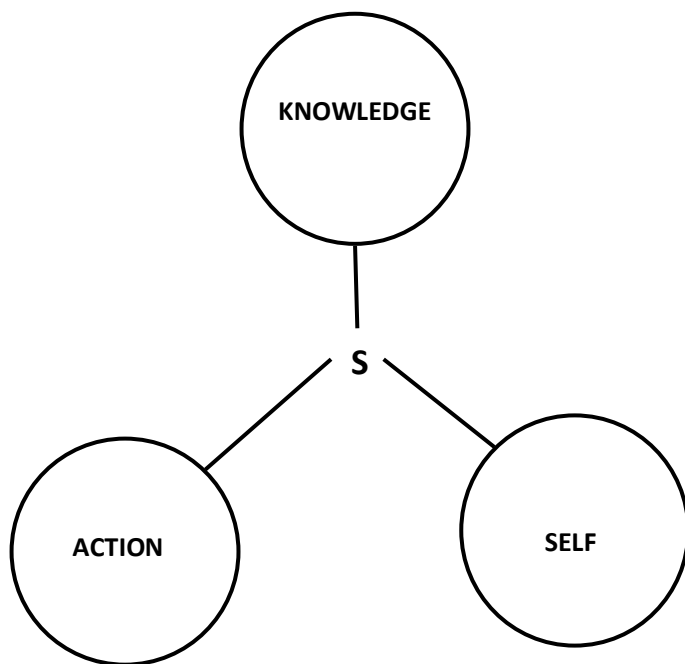


Figure 7 Curriculum: a general schema

(Barnett et al., 2001, p.438)

The general model can be varied according to the weight of each domain within the curriculum of a particular discipline field, and the degree to which the three domains are integrated or held separate. In the adapted model shown in Figure 7, the largest circle in professional disciplines is the action (skills) domain, but I have modified this to reflect the current weighting of the domains of knowledge, action and self in the South African law curriculum, which differs from the schema developed in the United Kingdom. The content-heavy nature of law curricula in South Africa is at variance with the model for the other professional disciplines described by Barnett et al. (2001) and I submit that there is only a tangential relationship between the domain of the development of the self (and in many Law faculties, even a complete separation) and the rest of the law curriculum. This is evident from the comparative curriculum table that was constructed from the official documentation of all law faculties (see section 5.1).

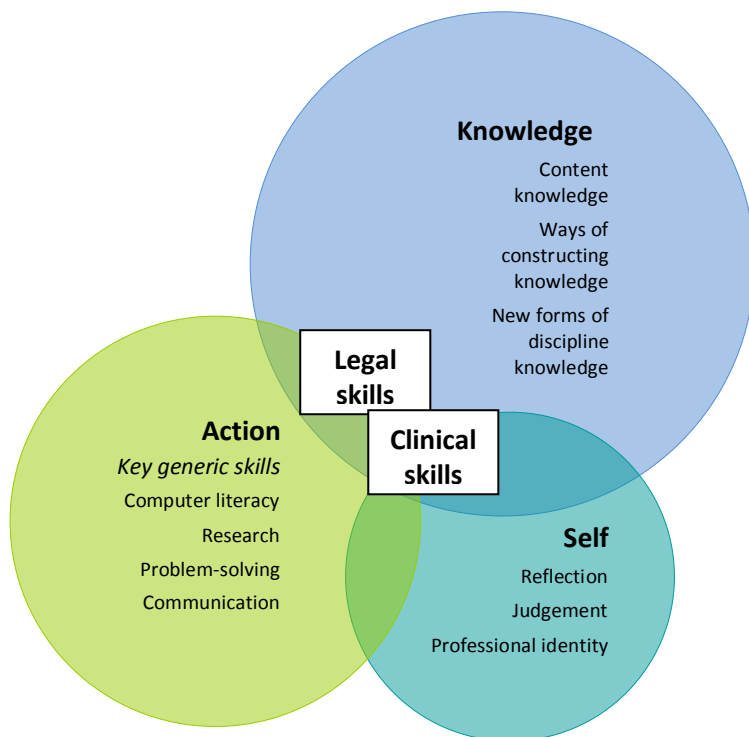


Figure 8 Curriculum domains: subject schema for current SA Law curriculum model

(adapted from Barnett et al., 2001)

The model in Figure 8 is a theoretical schema that reflects the fluid nature of curriculum change. The relative (flexible) size of each domain allows for the curriculum to respond to external drivers such as the “skills agenda” or an “ontological turn” in higher education (Dall’Alba, 2007). The knowledge domain has a dynamic structure that responds to changing interests and topics in the field, such as the emergence of new subjects. It can function to accommodate altered structures of knowledge within a discipline, as well as responding to pressures external to the discipline. Examples of such curricular responses are evident in the impact in South Africa of a Bill of Rights that has transformed the nature of much existing law, and the advent for example, of electronic banking transactions which have necessitated a range of new regulatory provisions in law. New forms of generating knowledge also affect the knowledge domain, such as researching via electronic databases and access to the intellectual property of others by means of the Internet.

Discipline boundaries are becoming “porous” as interdisciplinary influences spread across fields. However, in professional fields, Barnett and his colleagues observe that there is “more of a collective interplay between contending forces”, than the “personal space for interpretation and curricula variation that is discerned in other disciplines” (2001, p. 441). This is apparent in the continuing tension between law academics and legal professional bodies in South Africa and elsewhere over appropriate knowledge and skills in the university law curriculum. This rigid sense of a bounded discipline in Law is reinforced by the overriding homogeneity among law curricula across the many different faculties in the country, and even in England, and the ongoing tension between the skills/theory, academic/vocational debate characterised in the interactions between law academics and the organised professional bodies.

The action domain comprises the key skills which have increasingly become part of undergraduate curricula, in response to government and market demands. Explicit teaching of transferable generic skills has become a feature of most undergraduate curricula, including Law, where computer literacy, numeracy skills and electronic research skills are standard curricular components. SAQA requirements, as stated in the Exit Level Outcomes⁵⁶ for the LLB degree explicitly expect the development of graduate skills such as the ability to solve problems, apply legal research strategies, communicate effectively in writing, as well as to analyse and evaluate evidence critically.

“Practical legal knowledge” is described and defined by an academic as embracing much more than merely technical skill:

the “legal *know-how* required to operate intelligently within a world in which legal regulation figures enormously. The most obvious example of this is the knowledge of “how to do things with rules” (Twining and Miers 1976) which, surprisingly, very few undergraduate law students develop to a sophisticated level....Anyone familiar with the scholarship relating to any of these questions will know that developing such know-how involves much more than developing “mere” technical skills and knowledge. Rather, it can involve one in the most profound historical, ethical, sociological and legal inquiries. In fact, I would go so far as to say that such practical knowledge is of equal intellectual interest to the knowledge of legal principles, rules and concepts which still tends to monopolise the attention of law teachers and students (G. Johnstone, 1999, p. 5).

⁵⁶ Government Gazette No 23845 of 2002-09-20.

Schön's (1995) use of the term "knowledge in practice" captured some of the "messy swamp of practice problems" that requires a synthesis of propositional knowledge, professional craft and personal knowledge in professional development (Webster-Wright, 2009, p. 716). In his critique of the objectivist epistemology of "knowledge", Schön (1995) foreshadowed subsequent thinking about professional development that criticised the separation of knowledge from practice, or compartmentalized it for convenience as a commodity that is separate and distinct from the learner (Webster-Wright, 2009, p. 715). Clandinin and Connelley (1995) introduced the term "professional knowledge landscapes" in education to expand the conception of knowledge as being broad and complex, incorporating ethical, intellectual and social dimensions. Eraut (1994) identified the difficulty that in the "hot action" of practice, there is often little time to reflect, as Schön suggests, and thus the two domains are not easily separable.

The "self" domain (Figure 8) is generally weakly articulated in undergraduate curricula, but in theory, it incorporates ideas such as "self-reliance", developing the capacity to become a reflective practitioner or a critical thinker. This type of learning appears in clinical legal education discourse and is mentioned in the SAQA Exit Level Outcomes for the LLB degree as the acquired ability to "act responsibly and participate as a citizen in an ethical way", amongst other similar outcomes. I shall argue that in order to enhance the quality of law graduates, increasing space must be allocated in curricula (increasing the size of the circle representing SELF) for integrating this ontological aspect of students' education. By developing students' ethical sense of who they are becoming as professionals, the project of legal education as transformative education will be advanced, and will serve to prepare graduates more adequately for their role in society.

In particular, in South Africa, under our democratic constitutional dispensation, the need to educate law graduates so that each one becomes an ethical, responsible citizen has become even more pressing. There is an expectation that law graduates ought to play a role in supporting transformation within the society, not only being transformed by their education, but serving their society as agents of democracy and social reconstruction. The SAQA Exit Level Outcomes specify that a law graduate ought to have

sufficient skills and knowledge to participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law.

The supporting specific outcomes of this outcome are listed as follows:

The learner has understood that the law has to balance the competing interests of the state, individuals and groups in society.

The learner is able to promote the constitutional principles and values.

The learner is able to promote tolerance of diversity within his/her community and South Africa.

The learner is able to respect different opinions.

The learner is able to explain the functions of all the role players in the legal processes in a constitutional state.

The learner is able to accept his/her responsibility to take part in legal development at a local, provincial, national, regional and international sphere.⁵⁷

The kind of ontologisation of curriculum that is feasible would include creating space and opportunities for situated and integrated learning of critical thinking, effective communication skills, the development of reflective judgment, problem-solving skills and ethical principles in a dynamic and ever-changing response to professional practice-related demands. Engaging with students to promote their self-awareness and develop their abilities to confront ethical dilemmas, make informed decisions and effectively resolve human conflicts would shift the focus in curricula away from content-laden, doctrinal modules to an approach that is focussed on transforming the students who experience them, in preparation for ethical professional being. The model presented in Figure 9 suggests an ideal integration of the three curricular domains.

⁵⁷ SAQA Exit Level Outcomes for the LLB Degree. Government Gazette No 23845 of 2002-09-20

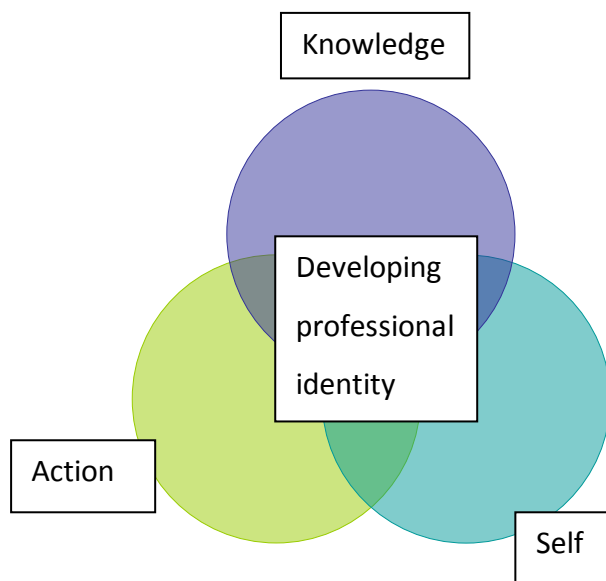


Figure 1 Suggested schema for curriculum change in law

The theoretical schema suggests a model for curricular change that would achieve an integration of knowledge, skills and the development of the ethical self, to support the development of professional identity through the foundational academic education phase.

The next section provides a review of theorising focussed on the development of professional identity.

3.8 Development of professional identity through the curriculum: “graduateness”

The concept of what it means to become a professional through experience of an undergraduate curriculum has attracted a great deal of international research attention. Schön (1987) comments that there has been a crisis of confidence in professional knowledge in the past thirty years which has challenged the status and legitimacy of the professions and professional education. Giddens (1990) described a loss of trust in experts

and their knowledge, which is echoed in the work of Barnett (1997), Eraut (1994) and Sullivan and colleagues (2007), describing the uncertainty about the purpose and function of professional education. This phenomenon runs counter to the exponential growth of professional services in developed economies, and has resulted in the complete reshaping of the nature of professional (legal) services, due to increasing internationalisation, the growth of large corporate law firms and the decline of small practices (G. Johnstone, 1999; Sommerlad, 2008). The challenge facing universities in undergraduate professional education is to prepare students for their professional lives, when the actual situations and problems they will have to face have become increasingly difficult to predict in a post-industrial, increasingly complex age (J Bowden & Marton, 1998).

Expert knowledge is said to consist of three main elements: formal, theoretical knowledge; informal, often tacit practical knowledge; and self-regulative knowledge (Eraut, 1994; Tynjala, Valimaa, & Sarja, 2003, p. 154). However, market trends and the impact of globalisation on higher education have placed emphasis on the acquisition of transferable skills and competences, and on a narrow view of “core” knowledge, which many students have internalised. A distinction between vocational (professional) skills and graduate attributes, or generic skills, has been drawn in Australian higher education (Higher Education Council, 1992, p.20, quoted in Bath, Smith, Stein, & Swanna, 2004) but it is evident that generic skills and values are most effectively acquired through the context of disciplinary or contextualised knowledge (J Bowden, Hart, King, Trigwell, & Watts, 2000). The detrimental effect of approaches that focus unduly on generic skills is that key professional attributes have been marginalised, such as affective knowledge, intuitive, critical, theoretical and contextual knowledge, which “lie at the heart of practice of any human profession” (Rochette & Pue, 2001, p. 187).

In contrast, the reflective practitioner model, which encourages the development of responsiveness to change, flexibility and professional self-growth, presents a preferable foundational education for aspiring professionals (Coughlan, 2000). Goldsmith (1998) argued for an interdisciplinary, contextualised approach in legal education, merging theory, critique, and practice to develop an awareness of the social consequences of law. Schön (1995) has pointed out the inadequacy of “accumulating specific knowledge” in preparing

professionals for future skilled practice, while Dall'Alba confirmed this through empirical research involving medical students.

This study empirically challenges the adequacy of a conventional focus on knowledge and skills acquisition as a model for curriculum design. A focus on developing understanding of professional practice, rather than accumulating a rapidly expanding body of knowledge and skills, provides one means of dealing with the current context of constant change and increasing complexity....It has consequences for the aims and objectives of courses and programmes, contexts for promoting learning, teaching and learning methods, and assessment of the practical understanding that develops during a professional programme (Dall'Alba, 2004, p. 690).

A challenge to the traditional emphasis in American law schools on “learning how to think like a lawyer” suggests that teaching students to “think like a professional” would better harmonise the ethical aspects and the social consequences of legal practice. Perry (2008) argues for the integration of the personal and professional dimensions within the curriculum, to encourage the “flourishing” of graduates, both as individuals and as professionals”. Creating “intentional, structured and sustained opportunities” for students to develop “moral imagination” would, he argues, make graduates better equipped to apply intellectual knowledge and technical skills in combination with reflection (Perry, 2008, p. 159). A liberal legal education that ignores the development of habits of self-reflection, the ability to relate to others, participate and contribute to social activities and live ethically does not provide an adequate foundation for professional life (Pring, 1995, p. 129). A vocational education, broadly conceived in the Deweyan sense (Dewey, 1916), with a central core focussed on the study of ethical issues, is presented as a means to reconcile the dichotomy between theory and practice, university and profession, liberal or vocational education (G. Johnstone, 1999).

The process of professional identity formation, centred on the development of the self, within a context of intellectual professional knowledge and professional knowing-in-action, is constructed not only during formal university education, but more obviously through the professional socialisation phase. Professional identity includes multiple dimensions such as gender, race, class and educational credentials (McMichael, 2000, p. 176) and according to “role theorists”, requires students to progress through various stages before they acquire

the confidence to become that professional (Bates, Bates, & Bates, 2006, p. 125). Sommerlad (2008, p. 216) has theorised the socialisation process of professional identity formation through internalisation of law's cultural paradigm and discourse, noting that it remains largely closed to "outsider" graduates unless they subsume their personal identity within the cultural norms expected by the legal profession.

A profession has traditionally been regarded as providing a service, "based on a systematic, scientific body of knowledge" (Barnacle & Dall'Alba, 2008), but this notion itself is no longer valid in light of conceptions of knowledge as both constantly changing over time and context, and situated within particular settings (Lave, 1993). Professional skills are regarded as "the skilfulness with which professionals engage in practice" and are traditionally acquired through "a process of accumulating knowledge and skills, promoted by practical experience" (Dall'Alba & Sandberg, 2006, p. 383); recently, however, the notion that "skilful know-how" is progressively acquired, by "passing through various developmental stages from novice, competent, to expert" has been added to this understanding.

Empirical studies across a range of disciplines have focused on a fixed sequence of stages, based on "the traditional notion of professional skill as a set of attributes" which are "identified and described in a de-contextualised manner, separate from the practice to which they refer". This approach, according to the Dall'Alba and Sandberg (2006), reflects the "container" view of practice which Lave (1993) identified when he described practice as a "container for particular forms of social interaction" that can be seen as an objective structure, consisting of institutionalised social rules and norms. Giddens (1984) argued that "practice is intersubjectively constituted through mutual understanding of a specific institutionalised order enacted by professionals", which emphasises how varied the understandings and enactments of practice may be across different contexts. One of the most influential models of skills acquisition is the "stage model" of professional development, which views skills acquisition as proceeding through five levels, leading up to "expert" (Dreyfus & Dreyfus, 1986). This model shifted current thinking in that it emphasised that professional skills are context-dependent, and that advanced skills levels can be acquired only through experience in practical work situations rather than depending on context-free knowledge and skills.

The implications of this theory are that education programmes related to professions usually focus first on the “progressive accumulation of a body of knowledge and skills” (through the official curriculum of substantive discipline knowledge), followed by the accumulation of additional knowledge and skills in the workplace, through formal and informal training.

The “stage models” of professional skills development have been criticised because they fail to focus on “*the understanding of and in, practice*”, where understanding is taken to mean an embodied understanding, an integration of “knowing, acting and being” (Dall’Alba & Sandberg, 2006). This “professional way-of-being” is constituted by the knowledge and skills learned, which are “renewed over time, while becoming integrated into ways of being in the professional in question” (Dall’Alba, 2009). These integrated attributes are essential to prepare professionals for an “uncertain and fluid world” where they will need to be able to cope with unanticipated situations and respond spontaneously to a changing global context (Barnett & Coate, 2005).

It has been said that approximately 15 years ago, “a crisis of confidence and public scepticism” about the “beneficence and practical utility of professional knowledge” materialised, as a relic of the positivist tradition of technical rationality that had been prevalent in the late nineteenth century” (Schön, 1983, 1995). Sullivan et al. (2007) mention how public perceptions of the legitimacy of the professions have reached a low point, due to factors such as “crisis, scandal, weakening of public confidence and public outrage”, which raise questions about “the point and value of the peculiar features of the professions”. Practical professional knowledge appears to have been undervalued unless it had been formalised through scientific research. This has led to an increasing dichotomy between theory and practice, thought and action, the university and everyday life, which ironically persists at a time when pressures in higher education have focussed on universities producing high quality career-oriented graduates, equipped with transferrable generic skills, through accountability measures and processes.

Coupled with legal academics’ anxiety about maintaining their position as a legitimate discipline within the academy and their status as bearers of a separate body of discipline knowledge (James, 2004a, 2004b), these factors have exacerbated the ongoing conflict

between law educators and the professions as to whose responsibility it is, and at whose expense it should be, to train graduates to effectively translate their discipline knowledge into “knowing in action”. Schön (1995) sees the types of knowledge that emerges through practice as being “knowing in action” and “reflective practice, both regarded as key professional skills. Professionals have generally been accorded heightened status and authority, are remunerated for providing a valued service, and are expected to exercise informed judgement, act ethically, and maintain confidentiality, as appropriate to their particular context (Barnacle & Dall'Alba, 2008). Unless the curriculum explicitly incorporates these aspects, it fails to address the coherence of the trilogy of professional competences: to think, to perform and for professionals to conduct themselves as such (Sullivan et al., 2007, p. 27).

In the United States, the Carnegie Foundation Report *Educating Lawyers: Preparation for the Profession of Law* (Sullivan et al., 2007) blamed the positivist emphasis on the primacy of scientific knowledge in American universities for “sundering the component parts” of a sound legal education. By reinforcing the rift between theory and practice and ignoring the craft dimension of professional practice in favour of formal legal knowledge, the report points out, it derogates from the understanding of law as “a tradition of social practice that includes particular habits of mind, as well as distinctive ethical engagements with the world” (p. 8).

These components of professionalism, or the three apprenticeships of legal professionalism described by Sullivan et al. (2007, p. 12) correspond closely with the schema presented above positing the three moments, or building blocks, of curriculum – knowing, acting and being (knowledge, action and the self) – as the three essential constituents of higher education curriculum. The emphasis on the integration of an ethical, moral component is reiterated in Shulman’s contention that

[p]rofessional education is not education for understanding alone; it is preparation for accomplished and responsible practice in the service of others. It is preparation for ‘good work.’ Professionals must learn abundant amounts of theory and vast bodies of knowledge. They must come to understand in order to act, and they must act in order to serve (Shulman, 2005, p. 53).

The way in which professional practice is understood, in an “embodied sense”, is “fundamental to how the practice in question is performed and developed, both by individuals and collectively” (Dall’Alba & Sandberg, 2006). Understandings of professional practice are developed through (our) interpretations of them, according to Heidegger (Heidegger, 1962 [1927], p. 183). They are based on something already previously understood and thus there is an “unfolding circularity” about the way in which previous understandings are reproduced in each new learning encounter. Dewey’s (1938) notion of habit and continuity of experience reflect a similar repetitive feature that reinforces earlier experience. Interpretation always takes place within the particular practice context and this too gives rise to “an unfolding circularity...both for individual professionals and for the profession as a whole” (Dall’Alba & Sandberg, 2006). Patterns of behaviour, the rituals of “knowing in action”, are internalised and applied in re-interpreting what it is to “practice” law and to be a professional.

The document “Profile of a Legal Practitioner” developed by the Law Society of South Africa in 1995, and accepted by SALDA, sets down a list of personal qualities, ethical values and competences which a qualified legal practitioner should embody.⁵⁸ The document purports to identify in advance the qualities that a person who is admitted to practice as an attorney should embody. There are many areas in common with the attributes of a graduate as described in the SAQA exit level outcomes. For legal academics, however, the end result of educating law students must be founded upon a vision of a transformative legal curriculum which equips the graduates to take up their place in a democratic South African society, adequately prepared for their professional role in the widest sense, and not just a narrow vision of a list of professional practice competences.

These insights suggest possibilities for informing the law curriculum in an endeavour to address the demands of a professional education. In the next section, the ways in which students understand what their professional role will entail are shown to affect their approach to their academic studies.

⁵⁸ Appendix 11

3.9 Theorising professional legal entity by extending conceptualisations

It is against this background of an academic education as preparation for professional practice, that a significant body of literature (Candy & Crebert, 1991; Tynjala et al., 2003) has emerged, theorising models and identifying the difficulties of integrating skills into academic learning situations which prepare professionals. Hult et al. in researching students' views on higher education, and the relevance of their studies for professional work in disciplines of philosophy, psychology, political science and engineering, highlighted problematic aspects of learning knowledge and acquiring competence, where learning is conceived of as "a change in students' ways of experiencing phenomena in the surrounding world" (2004).

Australian phenomenographic studies have identified an overarching theoretical framework of "professional entity" which links students' understanding of their discipline and their perceptions of working in that field. The tripartite hierarchy of perceptions, comprising three levels of understanding the nature of professional work, can be regarded as components of most professional fields, such as music, statistics, mathematics, theology and design (Petocz & Reid, 2003; Reid & Davies, 2003; Reid & Petocz, 2002, 2004a, 2004b). The authors have suggested that it is a unifying theory "that can be used to develop appropriate curricula for professional studies" and as a "basis for reflection on and critique of the professional values that are being passed on to the next generation" (Reid & Petocz, 2003).

A narrow technical view of professional work corresponds with a learning focus that is atomistic and instrumental, while an expansive "personal" view of professional life permits students to attain meaning through their learning. This relation suggests that encouraging students to broaden their conceptions of their future profession may facilitate access to a broader range of approaches to learning.

A further study (Reid, Nagarajan, & Dortins, 2006) investigated the specific experience of "legal professional entity", extending these understandings to show that law students'

projections into the world of professional work and the perceptions that they develop of the legal profession have an important bearing on the way they go about learning law. The implications of such research for curriculum design are significant because they provide insight into how a holistic curriculum can broaden perspectives of professional work and thus enhance learning (Reid, 2003). The way in which students understand professional practice is central to how they perform and develop their knowledge of that practice (Dall'Alba & Sandberg, 2006; Sandberg, 1994, 2000). Understanding is not limited to cognitive content but “incorporates what we do and who we are: understanding of professional practice is enacted in and through practice” (Dall'Alba, 2004, p. 680).

The part that education plays in shaping who students become, highlighted by Heidegger's insights (1962 [1927], quoted in Thomson, 2004, p. 439) into the ontological dimensions of education, also draws attention to some of the ambiguities of “becoming”, a professional. In acknowledging and exploring these openings or ambiguities, it is possible to enhance professional education, making it more meaningful (Dall'Alba, 2009, p. 38). The “folding of past into present” that characterises the continuity of the past with the certainty of future change; possibilities that open up, yet are constrained by limits; openness to new possibilities, yet held back by resistance to change; the individual operating in contexts with others, all reflect contradictory tensions that are experienced as aspiring professionals learn professional ways of being and are transformed throughout their professional life (Dall'Alba, 2009, p. 42).

Bowers (2006) suggested that the effectiveness of a curriculum can only be assessed retrospectively, when students become professional entities. In Canada, it has been observed that systematic data is “ever-absent” on the state of legal education and its relation to legal practice in a changing world (Rochette & Pue, 2001, p. 167). It is for this reason that a phenomenographic study of graduates has been undertaken. No South African study has yet been conducted on the effectiveness of formative academic learning as preparation for professional practice in the context of the legal profession. It is intended that the research in this study will contribute to a better understanding of curricular imperatives that might inform decision-making in Law faculties.

3.10 Concluding remarks

In this chapter, the theoretical framework against which the empirical data was interpreted has been described. The theoretical insights discussed relate both to the various notions of curriculum and curricular possibilities and to the interplay of the domains of curriculum. Theorising concerning the development of professional identity, and particularly the notion of professional legal entity, was then considered in order to establish a frame of reference against which the empirical data was analysed and interpreted.

In the next chapter, the research design and methodology is described. The lens provided by the interpretivist paradigm is discussed, together with the methodological orientations of phenomenology and phenomenography which were used for the two separate parts of the study. The chapter also gives a comprehensive account of the methods of sampling, data elicitation and data analysis, indicates applicable yardsticks for assessing the credibility and trustworthiness of the study and the ethical considerations governing it.

Chapter 4

Research design: phenomenology and phenomenography as research approaches

4.1 Introduction

This study presents an assessment of how the vision for the undergraduate law curriculum has been implemented in the decade that has now passed since the new curriculum was first introduced, shortly after the transition to a constitutional democracy in South Africa. In addition, it seeks to ascertain how the undergraduate law curriculum at one specific Law faculty prepares graduates for professional practice.

The findings of this study derive from a total of five different data sets assembled during the course of the research.

Adopting a qualitative approach within the interpretivist paradigm, current law curricula at all South African Law faculties were compared in order to provide a baseline curricular comparative table (Appendix 2) which constituted Data Set 1. This was followed by an exploration of the lived experience of curriculum change in Law from the perspective of three ex-Law Deans who were members of a Task Group appointed to develop proposals, in 1995-6, for a changed legal education framework. Using a phenomenological approach, three members of the Task Group of 1996 were interviewed, constituting Data Set 2, to develop an understanding of their experience of curriculum change during that period and so provide an historical context for the rest of the study. A further participant's voice, which was obtained opportunistically, was added to this data set, to add a dissonant view. Interviews with five current Law Deans yielded Data Set 3, again using a phenomenological

approach for further understanding of the experience of implementing the undergraduate law curriculum.

In the second part of the study, a phenomenographic approach was adopted to explore the qualitatively different perceptions of the actual experience of the undergraduate law curriculum on the part of six recent law graduates, now all practising attorneys, who had qualified at one particular Law Faculty. Contributions from these participants constitute Data Set 4. Their six employers were also interviewed, as Data Set 5, to identify the variations in their perceptions of how that law curriculum prepared the graduates for professional practice. In these ways, a composite representation was constructed of the undergraduate law curriculum as experienced. The data sets as a whole respond to the two critical research questions in developing an interpretation that answers the questions posed by the study.

In this chapter, the research design is introduced through a discussion of the interpretive paradigm in which the study is located. An interpretivist, qualitative approach has been adopted, since it blends coherently with the two methodological approaches of phenomenology and phenomenography which form the foundational research orientations. The objectives of the study and the research questions initially establish the context for a detailed justification of the two methodological orientations that were selected. My positionality as insider-researcher is defined and articulated, before the design of the research is explained. Thereafter, the methodological details regarding the baseline curricular comparison, the data sampling processes for the participants and the methods of eliciting participant data are explained. Finally, issues related to the credibility and trustworthiness of the research are reviewed, before ethical considerations and the possible limitations of the research are covered, in order to provide a complete methodological overview of the study.

4.2 The interpretive paradigm

The study is located in the interpretive paradigm, which has its roots in hermeneutics, the study of the theory and practice of interpretation. The choice of this paradigm was based on several features inherent in the practices and characteristics of “naturalistic” or qualitative research which make this research process essentially hermeneutic, aimed at uncovering meaning: meaning arises out of social situations and is handled through interpretive processes; behaviour (and data elicited) is socially situated, context-related and context-rich; the knower and the known are inter-related and inseparable, while meanings are accorded to phenomena by both the researcher and the participants (Cohen et al., 2007, p. 167). These features represent principles that are central to my own positioning, my worldview and the nature of the research in which I wish to engage.

The associated dimensions of enquiry in interpretive research are: ontologically, to understand the subjective internal world of human experience (Cohen et al., 2007), and epistemologically, to work with experience and understanding directly in order to build theory on it or to allow theory to emerge from the data (Glaser & Strauss, 1967). Methodologically, qualitative research techniques are best suited to this task (Terre Blanche & Durrheim, 1999).

My purpose in selecting an interpretivist approach is

to offer a perspective of a situation and to analyse the situation under study, to provide insight into the way in which a particular group of people make sense of their situation or the phenomena they encounter (Maree, 2007).

The nature of reality associated with this paradigm is the internal reality of subjective experience (Terre Blanche & Durrheim, 1999). Lincoln and Guba (1985) make the point that interpretivist researchers carry out their research in natural contexts, to reach the best possible understanding, since this paradigm implies that realities are in essence complete aspects that cannot be understood in isolation from their contexts. The researcher is often an empathetic insider, which is significant in interpreting inter-subjective meanings and facilitating interaction between the participants and the researcher. Maree comments that “the researcher becomes the instrument through which the data is collected and analysed”

(2007), a descriptor which accurately conveys the role I seek to fulfil as deep insider-researcher (B. Edwards, 1999).

Through the lens of the interpretivist paradigm, I use the analytical tools, constructs and methodological approaches that facilitate making sense of the data. In this way, the theory and its constructs support the theorising discourse that will hopefully unfold from the data analysis and abstractions, elevating them beyond the merely descriptive, revealing the complexities and significances within the findings. Two methodological approaches, phenomenology and phenomenography, are used in different sections of the study to support and develop the theorising, through the conceptual linkages between the research paradigm and the theory that underpins these methodological approaches. A review of the objectives of the study and the critical questions that are central to the study follows.

4.3 Objectives of the study; the research questions

The objectives of the research undertaken in this study are:

- to develop a deep understanding of the experience of the currents and trends that influenced and shaped both the introduction and the subsequent development of the undergraduate law curriculum. From its conception in 1996, to its inception as a lived curriculum in 1998, and through its passage to maturity, more than ten years have elapsed, corresponding to the journey of its situational context, from apartheid society to adolescent democracy. The timing is appropriate for an evaluative appraisal of the law curriculum, to explore how the vision implicit in and underpinning its introduction has been implemented.
- to investigate the “fitness for purpose” of this undergraduate curriculum. A focussed analysis is undertaken of the experiences and perceptions of graduates from one specific law faculty, together with their employers, regarding the effectiveness of the curriculum. In identifying variations in the experience of how the curriculum prepares graduates for professional practice, my aim is to reveal the functional relation

between the curriculum and the development of professional competences in order to theorise this as yet uncharted alignment, crucial for the provision of quality legal education in South Africa.

The two critical questions which are to be answered by the research are the following:

- How has the vision for the undergraduate LLB degree, introduced in 1997, been translated into transformative education after ten years?
- What are the experiences of graduates of one South African Law Faculty and their employers as to how the undergraduate law curriculum prepares graduates for practice as legal professionals in South African society?

4.4 Two methodological lenses

For more effective capture of the particular aspects of curriculum under review, separate methodological lenses, phenomenology and phenomenography, are employed to examine curriculum in each of the two main sections of the study. Phenomenology and phenomenography are allied as methodological approaches insofar as they share the root term, “phenomenon”, meaning “to make manifest, or to bring to light” (Larsson & Holmstron, 2007). In phenomenology, the suffix *-logos* signals a focus on the structure and meaning of a phenomenon (Giorgi, 1986), while the suffix *-graph* in phenomenography denotes an approach concerned instead with the various ways in which a group of people understand a phenomenon. As the object of research, a phenomenon is characterised in the literature by Van Manen as an “object of human experience” (M Van Manen, 1990, p. 163), while Willig (2007) draws on Spinelli (1989), who states that “any conscious act - such as perception, imagery, memory, emotion” can fall under investigation.

In comparing these two methodologies, one of the major differences, highlighted by Giorgi (1986), is that in a phenomenological approach, the researcher seeks to determine not only *what* concepts the participants have, but also the manner in which (how?) they arrived at the concept. This aspect was relevant to my choice of the different methods. In the first two

data sets, Task Group members and Deans, I sought to investigate what the Deans' and ex-Deans' contextualised experience was, and also how they developed these concepts of curriculum, which affected the way in which curricula were implemented.

In the first part of the study, phenomenological methodology provided a detailed and textured approach to understanding of a phenomenon: the experience of curriculum change. A significant theme in phenomenological literature and a motivation for my choice of phenomenology is the view that teaching is an orientation toward being, an "engagement in self-reflection":

The teacher's phenomenological relationship to his or her subject matter is not to a field of objectified knowledge but to the possibilities inherent in subject matter for phenomenological knowing (Sillers, 1984, quoted in Pinar et al., 2002).

The historical and contextual factors that gave rise to the generation of the undergraduate law curriculum were explored to provide an understanding of the context and background to the curriculum-making processes that were subsequently engaged in. A careful examination first of the lived experience of a group of participants who experienced the initiating conceptualisation of curriculum change (Task Group: Data Set 2) and then of participants who implemented the changed curriculum (Law Deans: Data Set 3) was undertaken using a phenomenological approach because this methodology most effectively captures the experience of a phenomenon through directly describing and interpreting the participants' "lifeworld".

The focus on curriculum in the second section of the study is concerned with the qualitatively different ways in which the curriculum was experienced by a sample of participants (Graduates: Data Set 4), indicating the appropriateness of the phenomenographic method. Phenomenography is a study of how people experience, understand or conceive of a phenomenon in the world around us, and is directed at the variation in ways of understanding rather than at the phenomenon itself, thus offering a second-order perspective (Marton, 1981). The various ways in which the graduates' employers (Employers: Data Set 5) perceived how the graduates' experience of curriculum prepared them for professional practice were likewise charted using a phenomenographic research approach. Phenomenography has been used extensively for mapping variation in

an educational context and was thus particularly appropriate for the second part of this study. In revealing different conceptions of learning law elicited from students who have experienced the law curriculum, the research methodology was able to provide insights into a range of possible ways that students might respond to it, and these insights might be used to inform future curriculum development. Phenomenography was selected as a unique and original methodology to obtain data that would give a student perspective on legal education in South Africa.

The next section clarifies and defines my own position in this research as an insider and a voice that has a shaping influence on the interpretation of the data.

4.5 My positionality as “deep insider-researcher”

In the prologue I alluded to my “deep immersion” within the field of legal education. As an “insider-researcher” it is important to disclose fully my positioning, in order to make explicit that my interpretation is of necessity a personal one. It is informed by my historical experience of lecturing within a particular law faculty and my own ontological and epistemological assumptions as a teacher, a lawyer, and a white, English-speaking South African woman.

Important biographical influences were my experiences of teaching law at an English HWU for over 15 years, engaging actively in curriculum development and particularly in writing two first-year textbooks that implemented a new model of small group teaching for first-year students in 1998, after the change to an undergraduate curriculum was made. At the time of developing the new materials I had recently completed a Masters degree in Higher Education, in which my dissertation had been focussed on teaching legal writing. I have been the chairperson of both the Faculty Teaching and Learning Committee and the Quality Assurance Committee over many years, and have thus been closely aware of the changing student demographics and language and literacy issues that have become prominent concerns in law teaching. My role as originator of a tutor training programme for final-year law students engaged in mentoring and facilitating learning for first-year students provided

additional impetus for wishing to explore the role that curriculum plays for students, whether as an obstacle or as an agent of change. In undertaking to prepare the Law Faculty for an internal review, which was followed by an institutional audit, I became aware of the tensions between the demands that quality assurance places on academics and the positive benefits to be gained by greater accountability.

Finally, in my role as “adviser-observer” to SALDA, heading the Task Team appointed by the Law Deans to redraft the SAQA template for the generic LLB qualification, and thereafter, to work with the CHE on a research project to undertake an appraisal of legal education, I have had access to an increasing quantity of documentation in this field. I have had contact with representatives of the legal professions and government role-players, who reflect wider stake-holder opinions on legal education. I have thus been exposed to multiple viewpoints, impressions and competing interest groups, who each present their case as the stronger one to determine the way forward. It was only by engaging in empirical research that would trace the foundations and roots of the current curriculum, pursuing the motivating vision through into the implementation phase, then, finally, exploring what the curriculum has meant to the products of this degree, that I thought I might approach a deep understanding of its fitness for purpose in a transitional society.

The position of the “deep insider-researcher” in a research setting raises the problem of the knowledge the researcher brings of the “history and cultures...semiotics and slogan systems operating within the cultural norms of the organisation or group” (B. Edwards, 1999). The researcher who is an existing member of a group will already have been generating some emergent theories about the group over time, and there is a risk of overlooking subtleties and nuances within a familiar field. The deep insider-researcher’s position of rapport and trust may also change within the group over time, since she is aware of history, and personal relationships interwoven in the history, that may not be accessible to an outsider. At the same time, the insider-researcher is part of the “unfolding history and may have a significant impact on that ongoing story and relationships” (Rowan & Reason, 1981).

My immersion in the legal education field means that I am aware of details about the personalities, the institutions, and the histories of many of the participants. Their familiarity with me allowed them to reveal personal opinions and viewpoints that might not have been

disclosed to an outsider. My own experience of many of the obstacles or experiences they describe represents a shared history and so provided me with data that had an “extraordinarily rich under-texture...and carries with it a potential for deeper understanding and greater insights” (B. Edwards, 1999). The risk inherent in this position is expressed in the observation that “[w]e come to recognise that there are no value-free privileged knowers who ask ideologically unfettered questions about the methods they will employ in their studies” (Kincheloe, 1991, p. 73).

In interpretive research it is the researcher who is the primary instrument for generating rich, descriptive data and for analysing the data as part of a process toward making sense of experiences and phenomena in their naturalistic social setting (Terre Blanche & Durrheim, 1999, p. 127). Therefore, it is important that I make full disclosure of my personal history and bias at this stage. I am aware that my personal background, subjectivities, and my extensive involvement with the subject matter which is the central focus of this study could have the effect of creating a particular bias. However, it also ensures that I have the necessary empathy and background knowledge to interpret the data in context. I fully appreciate the gaps in knowledge and the need to research this area to obtain empirical data that will allow me to make a meaningful contribution to the future development of legal education in South Africa. My participation in curriculum review processes through SALDA has positioned me so that I have had access to the most recent information, debates, statistics and national trends in curriculum development. I would not have had the interest in nor developed the particular research questions about the phenomenon, had I not had extensive immersion in the subject, over an extended period of time. My role as researcher, matches very closely the view of the phenomenologist as “postulating her lifeworld as central to all that he or she does, including research and teaching, and as a consequence focuses on the *biographic situation* of each individual” (Pinar, 1994).

I continued to monitor this subjectivity reflexively at each stage throughout the study, by presenting “thick description” supported by ample empirical evidence. It is recommended that a strong theoretical base, complemented with a coherent and convincing argument based on the empirical data, and evidence of the researcher’s understanding and logic will allow the researchers’ interpretation to be the meaning of the data, without losing the

voices of the setting (Henning, Van Rensburg, & Smit, 2007, p. 7). Reflexivity acknowledges that the researcher is inescapably part of the world she is researching – since no objective reality exists anyway. Rather than trying to eliminate researcher effects, it is suggested that qualitative researchers should disclose their own selves as the research instrument *par excellence* (Hammersley & Atkinson, 1983), which I have attempted to achieve throughout. Reflexivity or reflexive analysis was used regularly to check the influence of my own background, perceptions and interests during data gathering and data analysis (Kreftling, 1991). In the following section, the methods of sampling and generating data will be explained in detail to indicate how this was carefully done to avoid the imposition of personal bias and excessive subjectivity.

4.6 The five Data Sets

Data was generated by means of three strategies:

- (i) a baseline curricular comparison (**Data Set 1**, analysed in section 5.1)
- (ii) phenomenological interviews:
 - a) **Data Set 2**: three ex-Law Deans, members of the Task Group of 1996 (analysis in section 5.3)
 - b) **Data Set 3**: five current Law Deans, (analysis in section 5.4)
- (iii) phenomenographic interviews:
 - c) **Data Set 4**: six LLB graduates who are now qualified attorneys (analysis in section 6.2)
 - d) **Data Set 5**: six employers of the LLB graduates (analysis in section 6.3).

For purposes of clarification, Table 2 indicates (i) the different data sets; (ii) explains who the participants were in each data set, (iii) describes the methodological approach that was adopted when eliciting data from them, and (iv) identifies the section where the data from that data set is analysed.

Table 2 The Data Sets and the data analysis

Data Set	Participants	Methodological approach	Data analysis
1	N/A (Baseline Curricular Comparison)	Documentary Analysis	Section 5.1
2	Three Ex-Law Deans; Task Group of 1996	Phenomenology	Section 5.3
3	Five current Law Deans	Phenomenology	Section 5.4
4	Six Graduates	Phenomenography	Section 6.2
5	Six Employers of the Graduates	Phenomenography	Section 6.3

Before going on to a substantive account of how the data was generated in the various data sets, a brief outline is presented next of the way in which the baseline curricular comparison was constructed, followed by a general explanation of the methodological orientations of phenomenology and phenomenography, and a description of the sampling methods selected for each data set.

4.7 Baseline curricular comparison: methodology

The initial phase of the study began with a baseline curricular comparison, which consisted of the construction of a comparative table, containing the curricula at all 17 Law faculties in South Africa. This reflected the “official curriculum”, with details taken from formal faculty curriculum documents (websites, prospectuses, faculty handbooks). The comparative table (Appendix 2) presents an overview of the range of subjects offered in all Law faculties at each level of the four-year programme. Spiel et al. (2006) state that the first phase in an ideal evaluation process for the successful development of improvements in a curriculum is a baseline evaluation of the current curriculum to identify its weaknesses and strengths.

The baseline curriculum study was constructed by me; in this role I regarded myself as “researcher-bricoleur” or a “Jack of all Trades”, “professional do-it-yourself person”, piecing

together, adapting and putting together different types of data to formulate a deep textured sense of the phenomenon (Denzin & Lincoln, 2000; Levi-Strauss, 1966). The use of multiple data sources, which can be used to confirm findings, is a factor that creates trustworthiness in respect of findings (Maree, 2007). Mason (2002) recommends the integration of methods to answer the same research question in different ways, and to corroborate by seeking different data about the same phenomenon. Kincheloe (2001) takes the concept of a “bricoleur” or handyman/woman a step further, by emphasising the use of multiple methods and perspectives in research, attempting to synthesise contemporary developments in social theory, epistemology and interpretation. The comparative table and analysis was undertaken by me as a preliminary step, prior to the elicitation of interview data from the four participant data sets, as the information gathered for the table provided a valuable starting point. It allowed me to engage reflexively in discerning the extent to which official curricula have operationalised the guiding curricular principles that were established by agreement amongst Law Deans in 1996 (McQuoid Mason, 2004; Iya, 2001). The information from the table generated certain understandings that informed my discussion with current Law Deans during their interviews, and enabled me to explore with them some of the contradictions and complexities that arose out of the analysis of the table.

4.8 Phenomenological methodology: lived experience of curriculum change

Within the approach of qualitative, interpretive research, phenomenology is a theoretical approach that focuses on the study of direct or immediate experience, places importance on subjective consciousness, and views behaviour as determined by the phenomena of experience (Cohen et al., 2007, p. 22). It has been described as focussing on “the pre-reflective level of consciousness” (Marton, 1981). The lifeworld or everyday world that we live in, that is “already there”, with all its “taken-for-granted” attitude, without being obstructed by pre-conceptions and theoretical notions, is the world of lived or immediate experience which is central to phenomenology:

Phenomenology is a theoretical point of view that advocates the study of direct experience taken at face value; and one which sees behaviour as determined by the phenomena of experience rather than by external, objective and physically described reality (English & English, 1958).

The alignment between the interpretivist paradigm and the framing theory of understanding curriculum phenomenologically will serve to reinforce the emphasis on human perception and experience to reveal complexities, an approach that is virtually indistinguishable from hermeneutics (Willis, 1991, p. 179). The notion of understanding, for phenomenologists, is an interpretive, hermeneutical one that requires phenomenological enquiry.

Phenomenology takes expressed accounts of individuals at “face value”: these may be concrete, even naïve expressions of experience, whose meanings are then drawn out through a process of adopting a phenomenological attitude and employing a process of phenomenological reflection (Willig, 2007, p. 210).

It has been said that phenomenology is most aptly characterised by the descriptor “thoughtfulness”; research undertaken is the conscious practice of “thoughtfulness” (M Van Manen, 1984). It is with this degree of caring, empathy and cautious sensitivity that I explored and developed meanings from lived experiences, in a manner that is very carefully attuned to the lifeworld that is being investigated.

No “explanations” or “causes” are typically identified in phenomenological analysis, but rather there is a cautious presentation of what seem to be the essential features of the experience, as lived through by the participants in that specific context; “plausible interpretations” or possible “insights” may be expressed, to deepen understandings (Holloway & Todres, 2003).

Phenomenology is interested in elucidating both that which appears and the manner in which it appears. It studies the subjects’ perspectives of their world’ attempts to describe in detail the content and structure of the subjects’ consciousness, to grasp the qualitative diversity of their experiences and to explicate their essential meanings (Kvale, 1996, p. 53).

According to Willis (1991, pp. 173-174), phenomenological enquiry is a form of interpretive enquiry which focuses on human perception and the distinctly human experience of individual people; it “results in descriptions of such perceptions, which appear directly to

the perceptions of other people”, particularly on the aesthetic qualities of human experience. Consciousness becomes significant for the phenomenologist as it relates to the “multiple ways” in which events, others and objects are presented, “through the distinctly human processes of perceiving, judging, believing, remembering and imagining” (Pinar et al., 2002, p. 406). Greene (1973) described the phenomenological consciousness as “experienced context”. Phenomenology is founded on first-order experience, the “lived, basic or foundational” life experience to reflect an “insider’s experience”. Aoki explains the central interest as “communicative understanding of meanings given by people who live within the situation. The rules for the understanding of meaning are constructed actively by those who dwell within the situation” (Aoki, 1988, p. 411).

The phenomenological researcher asks how phenomena, such as the experience of curriculum or curriculum change, present themselves in the immediate lived experience of the individual, in lived time (Pinar et al., 2002). The phenomenological concept refers to the “experienced context” or “lifeworld”, as well as focusing upon the biographic situation, an approach which reflects my personal agency in the study (M Van Manen, 1982). On the use of such an approach in curriculum studies, Pinar comments that “working phenomenologically is rigorous; it requires a profound sense of what is competent and practical in educational conduct, and it requires a sense of political consequence” (Pinar, 1994).

In using the methodological orientation of phenomenological enquiry, the “disciplined, rigorous effort” required to understand experience “profoundly and authentically” has been applied (Pinar et al., 2002, p. 405).

The knowledge claim of phenomenology is about the primacy of experience: “(Phenomenology) seeks a transcending theoretical understanding that goes beyond lived experience to situate it, to judge it, to comprehend it, endowing lived experience with new meaning” (R. Burch, 1989). The use of the “first person-insider” perspective provides an “experience-near” contextual orientation, in which the terms of reference of the participants themselves are used (Terre Blanche & Durrheim, 1999). “[L]ived experience is the starting point and the end point of phenomenological research” (M Van Manen, 1978, p. 369).

According to Schmitt (1967), phenomenology aims to explicate the “essences” of the phenomenon, by which is meant the general, necessary and invariant features of the object of study. Curtis (1978) identified the following distinguishing features of the phenomenological viewpoint:

- a belief in the importance, and in a sense the primacy, of subjective consciousness;
- an understanding of consciousness as active, as meaning-bestowing;
- a claim that there are certain essential structures of consciousness of which we gain direct knowledge by a certain kind of reflection: exactly what these structures are is a point about which phenomenologists have differed (Curtis, 1978, Introduction).

Essential elements of phenomenology have been postulated as: “lifeworld” and the lived experience; consciousness of the presence of things in the world; intentionality or the “inseparable connectedness of the human being to the world;” reduction, to discover the essential pre-theoretical understanding of a phenomenon; and essence, or the essential meaning of a thing (Mostert, 2002).

Several approaches to phenomenological research and analysis are evident in the literature: there is the descriptive pre-transcendental Husserlian-type version (Giorgi, 2000); the structured approach of Colaizzi (1978); the more hermeneutic versions of van Manen (1990) and Packer and Addison (M. Packer, Addison, & 1989), and more recently, Giorgi and Giorgi’s interpretive phenomenology (2003). Interpretive Phenomenology is concerned not only with “how things appear”, but also with how phenomena “come to show themselves to us” (Willig, 2007, p. 221). In preference to adopting the strict prescription of a “Husserlian” position, where the researcher “puts the world in brackets” using a form of *epoche*, to reduce consciousness in order to free us from all preconceptions about the world, I have attempted to engage the view of Schutz (1962). By closely examining the stream of lived experiences of the participants, it is possible

to impute meaning to them retrospectively, by the process of turning back on oneself and looking at what has been going on. In other words, meaning can be accounted for in this way by the concept of reflexivity...the attribution of meaning is dependent on the people identifying the purpose or goal they seek (Schutz, 1962, p. 112).

This approach, in which meaning is attributed reflexively from an unbroken stream of lived experiences, accords better with my sense of my inextricable involvement with legal education, working reflexively to make meaning out of the “stream of lived experiences” as described by the participants as they recounted their subjective lived experiences. It also resonated with the multiple realities that exist in the world in which we live and the emphasis on subjective consciousness within the phenomenological orientation. Allowing iterative reflection to deepen meaning and add layers of complexity, working between the direct expressions of the participants, using their terms and expressions, and my own growing and increasingly nuanced understanding of the phenomenon being studied all reflected this interactive exchange. This process simultaneously cohered with the demands of my methodology and my purpose in the study of developing a richly textured appreciation of the phenomenon under review (Cohen et al., 2007).

In this study, I have chosen to adopt the particular style of interpretive phenomenology, employing a self-consciously interpretive, hermeneutic approach that goes beyond the constraints of a merely descriptive rendition. In order to “move from content to structure”, and to reveal the underlying meaning and assumptions beneath the summary of the participants’ statements, I have attempted to develop a synthesis which integrates the themes, “in some kind of story line” (Willig, 2007). This was done by linking the themes together into a coherent rendition of sequential events, joined by explanatory commentary that made overall sense of participants’ disparate statements. A new genre of qualitative research, used predominantly in psychology and the health sciences, known as Interpretive Phenomenological Analysis (IPA) (J A Smith & Osborn, 2009), aims to understand and “give voice” to the concerns of the participants, as well as to contextualise and “make sense” of their claims (from a psychological perspective) in the interpretation of the data. I have drawn on some of the theoretical rationale underlying this approach, common to all phenomenology, in interpreting and contextualising the data in both of the data sets comprising Law Deans (Task Group and Current Law Deans).

The truth of an event is subjective and knowable only through the embodied perception of individuals, which is closely examined by phenomenologists to capture the meaning and common features, or essences of experiences or events (Starks & Brown Trinidad, 2007, p.

1374). Van Manen recommended the following methodological structure for hermeneutic (interpretive) phenomenology:

- i) turn to a phenomenon that seriously interests the researcher and commits us to the world;
- ii) investigate the experience as it is lived rather than as it is conceptualised;
- iii) reflect on the essential themes which characterise the phenomenon;
- iv) describe the phenomenon through the art of writing and re-writing;
- v) maintain a strong and oriented pedagogical relation to the phenomenon;
- vi) balance the research context by considering parts and whole (M Van Manen, 1997, p. 361).

These structured stages match very closely my interest in and the procedures followed in my researching the phenomenon of curriculum change and implementation. My interest in the undergraduate law curriculum and curriculum change is of serious personal interest to me. I have sought to explore the Deans' lived experiences through the elicitation of the data, reflecting over and over on the themes raised by them, and then writing and re-writing my interpretation of the data. My orientation to the phenomenon of curriculum is strongly pedagogically related because of my daily work as a lecturer, and I have attempted to balance the research context by considering parts of the data, through individual transcripts, against the whole, the entire set of transcripts. This phenomenological tradition of qualitative research was thus well suited to achieving the purpose of the study and in answering the first research question.

It was then necessary to consider the ways in which interviews are used to elicit data in this tradition.

4.9 Participants and sampling methods: phenomenological study

4.9.1 Data Set 2: ex-Law Deans, Task Group members and Another

The selection of the sample of three 1996 Task Group members was by convenience or opportunistic sampling, to “take advantage of unanticipated events, leads, ideas, issues” (Miles & Huberman, 1994). The participants were also what I considered to be “best qualified” to provide the information that I required as they were articulate, experienced academics who were still actively involved in legal matters, even if in somewhat different roles now (Maree, 2007, p. 88). Data from a few individuals who have experienced a phenomenon and who can provide a detailed account of the experience are considered sufficient to cover “the core elements” of a phenomenon, and the sample size may range from one to ten persons (Starks & Brown Trinidad, 2007, p. 1375).

Considering that these consultative deliberations took place over ten years ago, I selected whoever was available and accessible as participants. Gaining access to the ex-Law Deans was not entirely straightforward, but was facilitated by my “insider” position as a law academic. My own Dean proved to be a helpful “sponsor”, who validated my access to important information sources (Marshall, 1984). I was able to contact a local retired Dean of Law, a former colleague, who was the chairperson of the Law Teachers’ Association of South Africa⁵⁹ at the time of the curriculum deliberations. A proponent of skills integration in law teaching for many years, and a well-known activist who had played a significant public role in opposing the apartheid regime, he took a leading role in motivating the agenda for change in legal education.

Another ex-Dean, who is currently a judge, had been an active participant in both Legal Forums as well as a leading member of the sub-committee of the Task Group, responsible for drafting the actual proposals on restructuring legal education in 1996. The third participant was another ex-Dean, an extremely well-known intellectual, and an academic leader on a national level and at his own institution where he still teaches. A doyenne of the

⁵⁹ This association is now known as SLTSA: Society of Law Teachers of South Africa.

legal academic community, a past editor of highly reputable law journals and a prolific author, this ex-Dean's views seemed to represent those of conservative White male academics. All these participants were helpful in providing documentation and verifying pieces of information that I was able to glean from various sources. All three participants from this Task Group were white, and middle-aged, or older, having been Law Deans over ten years previously, at the end of the apartheid era.

I was unable to gain access to any African ex-Deans who had participated in the deliberations on legal education during the period 1995-6. Although there had been African Deans at HBUs at that time, I was not able to trace their whereabouts at present.

For this reason, I was fortunate to obtain an opportunity, by sheer chance, through a social acquaintance, to interview a NADEL⁶⁰ activist lawyer, who had been a fairly vocal participant at the Legal Forums. Although he was neither an ex-Law Dean, nor a member of the Task Group, and therefore did not meet the criteria for my intended data set, his active participation in the debates on legal education during 1995 and 1996 had given him access to many of the same discussions in which the Task Group members had participated, but from an entirely different perspective. His voice represents a dissonant view: the "other side", both from the fact that he was and still is a legal practitioner, and due to his activist background, of being part of a "subversive movement" during the apartheid era, planning for the anticipated transition to democracy and the changes in the legal profession. His vivid depiction of the policy-making process often throws the academics' views into sharp relief, verifying and elucidating their vague suspicions about "the other side". Three participants were male, (two ex-Deans and the activist-lawyer), while one was a female.

I contacted each participant personally by e-mail, explaining the purpose of my research and what information I was seeking to discuss with them, by sending them a copy of my information sheet (Appendix 3). I requested their participation, which was given without hesitation. I arranged to visit each one at his or her office, which entailed my travelling to Johannesburg and Cape Town for two of the interviews. A copy of the interview schedule was sent to each ex-Dean a week prior to the interview date (Appendix 4).

⁶⁰ National Democratic Lawyers' Association.

4.9.2 Data Set 3: current Law Deans

My sampling with this data set was purposive, as I wished to select a range of Deans from HBUs, HWUs and both English-medium and Afrikaans-medium universities in order to obtain a varied sample (Cohen et al., 2007, p. 115). However, the sampling was also to some extent opportunistic or based upon convenience (Cohen et al., 2007, p. 114), in that it was influenced by issues of access and availability, and my personal familiarity with those Deans whom I had met at SALDA meetings. I chose to interview Deans who I imagined, from my personal knowledge of them, would be rich sources of information, able to provide textured data from a variety of perspectives. I offered to travel to meet them at their various campuses, as I considered it important to interview them in their own setting. Copies of my information sheet (Appendix 3) and intended interview topics (Appendix 5) were sent a week in advance to each of the participants both at their request and, from my perspective, to enrich the discussions by allowing for reflection ahead of the interview.

I also interviewed the Dean of the merged institution (HBU and HWU) where the graduates in the second part of the research study had been students. The predominance of male Deans is notable, although in the first six months of 2009, at least five women Law Deans have been appointed at a range of Law faculties in South Africa.

Table 3 sets out the details of the five current Law Deans who were selected as participants for the study (Data Set 3) according to the institution where they are employed and their language group, race and gender.

Table 3 Composition of Data Set 3: current Law Deans

Institution type	Language of institution	Race and gender of Dean
HWU	English	White male
HBU	English	African male
HWU	Afrikaans	White male
HBU	English/Afrikaans	White male
Merged Institution	English	White male

My access to this group was facilitated by my own Dean, who acted as a “sponsor” or intermediary, giving me access to SALDA,⁶¹ in return for which I agreed to serve as chairperson of a committee to review legal education and as Chairperson of their Task Team to work with the CHE⁶² on an appraisal of legal education. His kind of reciprocal benefit situation is akin to what Lee (1993) refers to as: the researcher “servicing” participants, as a strategy to gain access to a powerful or elite group. Walford suggested also that female researchers are often at an advantage in that they are seen to be “more harmless and non-threatening” (1994). However, the negative side of that view, that women researchers are sometimes regarded as less important, has been expressed by Deem (1994). In the context of legal academic hierarchy there was little choice open to me to interview women, given the male-dominated nature of the legal academic hierarchy at the time.

The choice to interview Law Deans was based on my knowledge that all of them are not only in positions of management but they are regularly involved in teaching activities currently within their Law faculties. Because of the small size of Law faculties relative to that of other university faculties, Law Deans are generally expected to participate in teaching activities to help deal with low staff numbers relative to large student enrolments. Thus their experiences include a perspective that is sensitive to current pedagogical practices and

⁶¹ South African Law Deans’ Association.

⁶² Council for Higher Education.

challenges in Law faculties. As a teacher-researcher, I also felt that my voice contributed to the viewpoint of law teachers on issues of pedagogy.

Again, I contacted each participant personally by e-mail, to explain the purpose of my research and to describe what information I was seeking from them, by sending them a copy of my information sheet (Appendix 3) and requesting their participation. I obtained their agreement and arranged to visit each one at his or her campus, which entailed travelling around South Africa over a period of one week so as to maintain coherence with regard to key issues in the interviews.

4.10 Planning and conducting phenomenological interviews

The interviews were planned according to Kvale's (1996) seven stages of planning interviews to elicit research data: thematising, designing, interviewing, transcribing, analysing, verifying and reporting. The themes to be highlighted were drawn from a consideration of the aims and purpose of the study, the theoretical constructs informing the study, the reasons for selecting interviews to elicit data and the perceived gaps in knowledge that I wished to address through the research (Cohen et al., 2007, p. 356). These goals were then translated into the more specific themes related to lived experience for the interviews, which were: the vision for the undergraduate law degree, how it was articulated, the process of curriculum change, what sort of consensus was experienced, and how the curriculum vision was to be implemented.

A protocol for semi-structured interviews was developed along these lines, with a focus on open-ended questions to provoke nuanced descriptions of the participants' personal experiences of the phenomenon of curriculum change. It was important to ensure that the interview was an "interpersonal encounter" (Kvale, 1996, p. 30) that allowed space to explore ambiguities and contradictions with flexibility. In developing the questions, attention was paid to issues such as ensuring that the questions were open-ended, focused on the research purpose, and were clear and unambiguous (Roulston, deMarrais, & Lewis, 2003). The questions were sent to three critical commentators for feedback and critique,

which allowed me time for modifications and improvements. A copy of the interview schedule was sent to each participant a week before the scheduled interview, to allow them time to reflect on the questions as I believed this would enhance the depth and complexity of their responses, considering that the events had taken place many years previously.

The interviews were conducted at the office of each of the three participants, within the space of three days, in three different cities, so as to achieve a sense of consistency and coherence while the key focal points were foremost in my mind. The participants were extremely articulate respondents and spoke at length about their personal experiences, reflecting on the past and recalling details. Although over ten years had elapsed since the events had taken place, this retrospectivity is not an uncommon feature of phenomenological interviews. The participants' descriptions captured vivid details of the events that had taken place and included reflection on the experience.

The power relations in these interviews between myself as researcher and the participants were somewhat skewed in that it was essentially "researching up" (Walford, 1994). LeCompte and Preissle (1993) describe these as "elite interviews". My purpose in the interviews was to elicit data in greater depth than other methods would allow, and to try to engage and motivate the participants more than could be achieved through another means

4.11 Data elicitation

4.11.1 [Data Set 2] Task Group members

Once the written consent forms had been completed, (Appendix 6) I proceeded to tape-record each interview, which each lasted approximately one and a half hours. The aim of qualitative research interviews is to "see the world through the eyes of the participant" to obtain rich descriptive data (Maree, 2007, p. 87). Semi-structured interviews were conducted, starting with open-ended questions in order to generate data that reflected each participant's personal recollections of the lived experience of curriculum change. As Maree explains:

[such an interview] does allow for the probing and clarification of answers. Semi-structured interview schedules basically define the line of inquiry...as a researcher you must be attentive to the response of your participant so that you can identify new emerging lines of enquiry that are directly related to the phenomenon (Maree, 2007, p. 87).

Follow-up probes and elucidatory questions, to clarify ambiguities and vagueness were interspersed with the pre-planned questions, to ensure that a full understanding of their experiences was obtained. Empathetic responses and non-verbal cues, such as maintaining eye contact and nodding, created rapport and encouraged participants to express themselves freely (Maree, 2007, p. 88). In interviewing the Task Group members, I was aware that these participants constituted an elite and particularly appropriately-educated group, in that as lawyers they were trained in the field of interviewing clients and cross-examination, and as ex-Deans, being interviewed on their “home ground”, they are accustomed to wielding significant power in positions of authority within the academic hierarchy. Their legal background was helpful to the extent that having been briefed beforehand as to the purpose of my research, they often did not need many prompts to provide the information I sought to elicit.

Smigel (1958) observed how in interviewing an elite group of Wall Street lawyers, he modified his interview techniques in the awareness that their occupational experience made them sensitive to eliminating irrelevant issues and provide information that met the needs of the problem. I was also conscious of the fact that the period they were discussing with me had political associations in a South African context, and this might affect their responses with an awareness of a need for “political correctness” on the participants’ part. However, the participants seemed to be open about their personal experiences and two of the three participants were comfortable in expressing how opposed they had been to the ANC government’s policy position on the law qualifications during that period.

4.11.2 [Data Set 3] Current Law Deans

The next set of phenomenological interviews was conducted with five current Law Deans.

A phenomenological approach aims to elicit data that generates “thick descriptions” and captures the lived experience of each participant (Geertz, 1973). The data that was

generated was related to the experience of designing and implementing the curriculum. The questions were directed towards eliciting information as to what was in fact happening in the various universities regarding the implementation of change in the curriculum, with a close focus on sensitivity to diversity and the integration of skills and ethical values. The purpose of these interviews was to ascertain the lived experience of legal academics in implementing the undergraduate law curriculum at a range of Law faculties.

The need to be meticulously prepared, persistent and diplomatic was a significant factor in ensuring that I obtained rich, textured data. In addition, I was conscious of the need to withhold any personal assessments and formulations I might make during the interviews because of my insider status and my reluctance to influence their perceptions regarding any possible judgments I might make regarding their faculties. This proved to be a difficult aspect that required me to exercise considerable restraint in voicing agreement or disagreement with the views of the participants, or establishing my own entitlement to give personal opinions, by means of comments and summations (Roulston et al., 2003). Deans' consciousness of possible opinions I might form of their faculty no doubt had some influence on the way in which they represented the functioning and approaches within their faculties. The transcripts of these two data sets of interviews were tape recorded. All tape-recorded interviews were transcribed verbatim.

4.12 Phenomenological data analysis

I elected to adopt the hermeneutic style of van Manen (1990), because this interpretive style achieves a more nuanced type of analysis and plumbs the levels of complexity more successfully than other descriptive styles of phenomenological analysis (Giorgi, 2000). In addition, aspects of the more recently developed Interpretive Phenomenological Analysis (IPA, J A Smith & Osborn, 2009), typically used in psychology, have been adopted to develop a narrative flow in the analysis. This emphasis allowed me to develop a deeper understanding of historical factors that shaped the progress of the law curriculum over an extended implementation of ten years, which constitutes the period under review.

The style of IPA also allows for offering an “insider’s” perspective and “giving voice” to the concerns of the participants, with the intention of understanding their claims by “making sense” of them from a psychological perspective (Larkin, Watts, & Clifton, 2006). The analysis provides for the contextualisation of individual voices within the interpretation of the data, which was appropriate considering the articulate opinions and the “high status” positions of both sets of Law Deans who were interviewed. Distinctive features of the IPA stance or perspective are “a highly intensive” and detailed, ideographic analysis of the (verbatim) accounts produced by a comparatively small sample of participants, that balances experiential claims against more overtly interpretive analysis (Larkin et al., 2006, p. 103) It aims to move beyond a “first-order analysis” which would collect and represent the voices of participants, “to explore, understand and communicate” an overtly interpretive analysis that is a second-order account, locating the initial “description” in relation to a “wider, social, cultural and perhaps even theoretical, context” (Larkin et al., 2006, pp. 103-104). The objective of the interpretation is to provide a “critical and conceptual commentary on the participants’ personal ‘sense-making’ activities” (J A Smith & Osborn, 2009).

As the first step in the analysis, I immersed myself in the data by reading through each transcript several times to obtain an overall sense of the verbatim transcripts. Thereafter I highlighted key phrases or statements that pertained to the phenomenon in each transcript with different colour pens. These statements or phrases were then copied and pasted into a new document, with a record of the speaker’s (participant’s) initials after each extract, so that I knew the source of each quotation. After reading through these lists of significant statements and phrases, I began to inductively develop a sense of common or familiar themes that appeared to be linked across several transcripts. Guba (1978, p. 53) refers to these as “recurring regularities” This discovery of themes from empirical data is similar to the grounded theorists concept of open coding (Ryan & Bernard, 2003, p. 88).

These themes were then grouped together and a descriptor was developed, such as: “political influences”, “theory and skills debate”, “negotiation process”, “academics being silenced”. These themes have variously been named: “categories” (Glaser & Strauss, 1967); “codes” (Miles & Huberman, 1994); “labels” (Dey, 1993, p. 96); “segments” (Tesch, 1990) and “units” (Lincoln & Guba, 1985); but the essential meaning for me is that they are

themes, which are then “grouped together under a more abstract, higher order concept called a category” (Strauss & Corbin, 1990, p. 61). Within each theme, a further process of contrasting the views of each participant to identify similarities and differences of expression and viewpoint took place several times, to reveal the more subtle distinctions that comprised the parts of each theme.

This dialectic movement within the themes from one part to another, and moving back and forth between the parts (extracts) and the whole (transcripts), and from one transcript to the set of transcripts continued cyclically for a considerable length of time. Creswell (2007) notes that in this process special attention is given to not only what was experienced, but also how it was experienced, and “taken-for-granted” assumptions are explored, which conveys exactly the type of questioning curiosity that is engaged in as the mental process of shifting and dawning realisations, from one transcript to the other, from themed extracts to the whole, is carried out.

After returning to the transcripts and reading each one over again several times, and reading the pages of themes listed over and over, certain categories or clusters of themes became evident, which enabled me to group the excerpts under descriptive headings such as: “Policy as Politically Symbolic”, “Political Factors: The Equity Imperative: Towards a Uniform Qualification”; “The Socio-Economic Imperative: South Africa as a Global Player”; “Process Matters: Tensions between the Legal Profession and Legal Academics”; “Gamesmanship: The ‘tug-o-war’ game that never was”, etc. These categories were then considered against the framework of the theoretical constructs, against the literature review and the research questions to develop theoretical insights, alignments and coherence across the study and to deepen my understanding of the phenomenon.

The headings became a framework to begin the descriptive outline of the interpretive analysis, fleshed out and illustrated with extracts from the transcripts. Creswell (2007, p. 61) refers to this collection of significant statements and themes which describe what the participants experienced as the *textural* description. The *structural* or *imaginative variation* description is also made up of these statements, explaining the context and setting that influenced how the participants experienced the phenomenon. After completing the first descriptive aspects of the write-up, a second more detailed iteration, back to the literature

and theoretical framework, facilitated the emergence of a more theoretically-based interpretation to “relate themes to each other in some kind of story line” (Willig, 2007). This is termed the *essential, invariant structure (or essence)* and is constituted by the combination of the earlier descriptions.

Van Manen described phenomenological analysis as primarily a writing exercise to distil meaning, writing to compose a story that “captures the important elements of the lived experience” (1990). The practice of writing cannot be separated from phenomenological research because “it is in the act of reading and writing that insights emerge” (M Van Manen, 2006, p. 715); Van Manen emphasises how in the process of writing up, “data are gained and interpreted”, producing knowledge in the form of text. The texts describe and analyse phenomena as well as evoking understandings “that otherwise lie beyond (their) reach”.

By the end of the story the reader should feel that she has vicariously experienced the phenomenon under study and should be able to envision herself (or someone else who has been through that experience) coming to similar conclusions about what it means (Starks & Brown Trinidad, 2007, p. 1376).

In order to achieve this effectively, I followed Willig’s (2007, p. 217) style of reintroducing the participants’ emotions and voices into the description, instead of allowing the “thematic dimension dominate the expressive dimension” (M Van Manen, 1997). This type of written interpretation that “evokes and intensifies embedded meaning” is what has been aimed at in the analysis of the two phenomenological data sets in the study (Willig, 2007, p. 217). Cohen et al. (2007) describe how Ball (1990) and Bowe et al. (1992) use a significant amount of verbatim data because their participants were “powerful” and “justice needed to be done to the exact words they used”. This is the same motivation that I would argue for the quantity of direct quotations that I have used from the transcripts of the Task Group members and the current Law Deans.

Phenomenologists often draw on data from different narrators to create a “blended story”, allowing the reader to feel what it would be like to have the experience (Starks & Brown Trinidad, 2007, p. 1377). By combining the data from the Task Group and interweaving it with the data from the current Law Deans, I have attempted to achieve a multi-faceted narrative interpretation that is layered and reflects the complexities of the experience of

curriculum change and implementation in what could be termed “Voices of Deans Past and Present” (chapter 5).

4.13 Phenomenographic methodology: variation in experiences of the curriculum

A phenomenographic approach was adopted in the second part of the study as it was considered appropriate for responding to the second research question: what are the experiences of graduates of one South African Law Faculty and their employers as to how the undergraduate law curriculum prepares graduates for practice as legal professionals in South African society?

Phenomenography is defined as “the empirical study of the limited number of qualitatively different ways in which various phenomena in, and aspects of, the world around us are experienced, conceptualised, understood, perceived and apprehended” (Marton, 1994).

A **phenomenographic** approach was used to elicit the voices of other stakeholders in the context of the South African undergraduate law curriculum. It was adopted to identify a limited number of qualitative variations in the experiences and perceptions of graduates and their employers from a second-order perspective. The second-order perspective aims to describe “the world as perceived”; it is one in which the experience of the phenomenon as described by others forms the basis of the researcher’s description (Trigwell, 2000). This approach employs a non-dualist ontology, in which reality is considered to exist through the way in which a person conceives of it, as a reaction against the idea of the existence of two interrelated but ultimately independent realities: a real world and a representational one (Marton & Pong, 2005). Phenomenography thus posits that reality is constructed as the relation between the individual and the phenomenon (K Trigwell, Prosser, & Waterhouse, 1999). The only reality there is, is that one which is experienced (Uljens, 1996). It is for this reason that this particular methodology has been selected to ascertain the experiences of the curriculum by graduates.

Phenomenography was developed as an empirical methodology in educational research predominantly in Sweden at the end of the 1970s and early 80s (Marton, 1981; Uljens, 1996). It developed out of common sense considerations about teaching and learning, relying on an application of the introspective method, rather than on a principled conceptual underpinning (Richardson, 1999). Phenomenography has been adopted in numerous studies of “learning-related phenomena” (Micari, Light, Calkins, & Streitweiser, 2007). Learning assumed a central importance within this framework because “it represents a qualitative change from one conception concerning some particular aspect of reality to another” (Marton, 1988). It was established that the outcome of learning and conceptions are always related to the approach the learner or person adopted in arriving at that understanding, or the way they approached that phenomenon (Yan, 1999).

This research approach is characterised by an attitude of “empathy” toward the participants, which requires a detachment from the researcher’s lifeworld and an opening up to the lifeworld of the participant, demanding an imaginative attitude and an “active engagement” with the world being described (Ashworth & Lucas, 2000). “The world is not constructed by the learner, nor is it imposed upon her; it is constituted as an internal relation between them” (Marton & Booth, 1997).

There is said to be a clear relationship between what we are looking for in research and the position or perspective from which we are doing the looking (Marton, 1981). This is particularly accurate in describing the relationship between what I was seeking in this research and the methodology selected. I wanted to identify the different ways in which graduates had experienced the curriculum, through the lens of an interpretive methodology that would allow me to identify different perceptions and experiences in a way that was closely attuned to the graduates’ own experiences.

Phenomenographers claim only to analyse the participants’ “ways of functioning” or “forms of thought” and not their lived experience (Marton, 1981, 1984). The methodology has a purely descriptive “knowledge interest” and the conceptions are described as human-world relations (Yan, 1999). The object of phenomenographic analysis always consists of “expressed experience” (Uljens, 1996). Clarity regarding the process by which the research

is conducted is of great significance in terms of determining whether the outcomes are "ontologically defensible and epistemologically valid" (Ashworth & Lucas, 2000).

Phenomenography has developed into a methodology with a set of theoretical assumptions that seek to identify variation in the way people conceive of and approach learning-related experiences (Marton & Booth, 1997). It is similar to other methods of qualitative research in that it relies on in-depth interview data and aims to reveal understanding of phenomena from the participant's perspective (M Van Manen, 1990). However, phenomenography is unique in that instead of seeking common themes as phenomenology does, variation amongst participants' conceptions of the same phenomenon is the objective, and rather than treating the phenomenon as the subject of the study, phenomenography regards the range of ways of conceiving as the unit of analysis (Micari et al., 2007). A "map of the collective mind" (Uljens, 1996) is produced from the views of the participants as they were manifested in the interview transcripts.

As an empirical research orientation, originally based loosely on Gestalt-psychology, phenomenography holds that for whatever we see or experience, we perceive a "gestalt" quality, or a signative whole entity or figure, which can be distinguished from its surroundings or background. A "gestalt" will always have a structure, to mutually support the collection of items which constitute it (Yan, 1999). Its focus is on the relationship between the person and a phenomenon in the world and it aims to understand what it means to experience, understand, or make sense of a phenomenon in different ways. This "experience" aspect depicts the internal relationship between humans and the world (Marton & Fai, 1999). This approach will provide a means to operationalise the part of the study which seeks to understand how curriculum prepares professionals for practice during their formative education at university.

Phenomenographic research is conducted in real settings and "looks at issues through the eyes of the key players". The assertion that this approach is better able to represent the complexity of educational settings and situations to "produce meaningful and useful conclusions" is based on the claim that the observer/researcher is not uninvolved or independent of the setting (K. Trigwell, 2000, p. 65). This powerful motivation for using the

particular methodology is “consistent with my everyday work”, trying to understand how my students think about aspects of the curriculum, and as Trigwell suggests:

at the methodological level, the idea of looking in a mass of (loosely constrained) data for some order, and qualitative differences and relations, is more appealing in complex situations, where at times, our knowledge seems limited, than prescribing the parameters into which data will be channelled (p. 65).

A conception is described as being “dependent on both human activity and the world that is experienced by the individual” (Svensson, 1997). A “conception” of the phenomenon refers to the meaning that is given to the relationship, or the understanding that one has of the experience through the critical aspects of the phenomenon that are discerned and focused on simultaneously (Bond & Le Brun, 1996). It includes the “meanings and understandings” of the phenomenon.

The unit of analysis in phenomenographic research is a “conception”, which is composed of two intertwined aspects: the referential aspect, which denotes the particular global meaning of the individual object conceptualised, “so as to discern it from its context”, and a structural aspect, which is the combination of features discerned and focussed upon by the subject (Marton & Pong, 2005).

People’s awareness of a phenomenon is structured according to the “what” aspect which corresponds to the object itself, and the “how” aspect which relates to the act of discerning it, in a dynamic relationship (Marton & Booth, 1997). Marton (1994) explains that phenomenography addresses the question of what a phenomenon looks like, as much as how it is seen. A conception of learning constitutes part of the student’s experience of learning: it has a structural aspect that concerns the constituent parts of the whole experience and their relationship to each other, including contextual factors, and a referential aspect which is the meaning aspect (Morgan & Beaty, 1997). This characteristic of identifying the “what” and “how” of the phenomenon will serve to capture the graduates’ perceptions regarding the experience of curriculum very effectively, in that not only will it allow space to discern the “what” aspect, the knowledge (content) that they learned, but it will also detect the “how”, as it relates to curriculum. The experience includes students’ intentions, approaches, reflections and the idea that “experiencing denotes an

internal relationship between the subject (the graduate) and the world” (Runesson, 2005, p. 70).

Thus, the methodological orientation of phenomenography accommodates the subtle processes of curriculum such as processes that constitute part of the hidden curriculum, as well as more obvious features, namely the contents of the curriculum. In the graduate interviews clear differences between the structural understanding and the referential understanding of aspects of the curriculum within each category of description will be explicated. Similarly, this duality that constitutes the employers’ conceptions will become evident in the analysis of the data.

The outcome of phenomenographic research is to produce content-loaded descriptions of the qualitatively different ways in which the subjects or participants conceive of or experience phenomena in the surrounding world (Marton, 1981). The “outcome space”, which is the final result of a phenomenographic study, is defined as the logical relations among the descriptive categories, in a hierarchical ordering. The categories are neutral, with respect to empirical subjects, the individual participants, and to the context or life-world from which they emanate. However, the notion that a hierarchically ordered set of interrelated conceptions of a particular key concept necessarily reflects the meanings of the students’ conceptions accurately “within their distinct life worlds” has been challenged by some researchers (Ashworth & Lucas, 1998, p. 427). By disconnecting conceptions from the “temporal and situational context” it is possible to compare conceptions to other expressed, decontextualised conceptions, although the hierarchically-ordered categories of the outcome space are not usually generalisable, being as they are, the unique creation of the researcher (Uljens, 1996). Phenomenographic research involves more than reporting on the different conceptions; it involves identifying the conceptions and looking for their underlying meanings and the relationships between them (Entwistle, 1997).

The need to exercise phenomenographic “bracketing” or “epoche” is emphasised, for the purposes of ensuring that the researcher enters the life world of the participants, by suspending presuppositions such as existing theories and categories (Ashworth & Lucas, 1998). The focus is essential in order to access the personal reality of the participant and to ensure that the researcher pays attention to the “subtleties of the actual life world”

(Ashworth & Lucas, 1998, p. 421). However in more recent literature this aspect of the methodology has been contested. The implications of a purist approach to bracketing are that a review of the literature should not be undertaken prior to analysing the data. Several authors concede that it is unlikely that a researcher is able to undertake a study without a background knowledge of the research literature (Ashworth & Lucas, 1998; Uljens, 1996). Theoretically the researcher should be open to “discover” the set of categories of description as they emerge from the data, without being influenced by pre-suppositions.

However, another set of researchers such as Laurillard (1993), Crawford et al. (1994) and Prosser and Miller (1989) have specifically used predetermined categories to compare empirical findings across different contexts, such as research among students in different countries or in different disciplines. Notions around “deep and surface learning” (Marton & Booth, 1997) have been pursued in research on learning to extend and develop understandings of categories of description across different disciplinary contexts, as well as the notion of “professional legal entity” (Petocz & Reid, 2001; Reid et al., 2006).

In this study, I have selected to first “discover” categories of description from the data, although it has been difficult to apply bracketing rigorously because of my position as “deep insider-researcher”, and also in view of my personal relationship with most of the graduates as an ex-lecturer. I was, however, able to engage empathetically with the participants and relate to their “lifeworld”, because of my familiarity with the curriculum and my experience in this field (Ashworth & Lucas, 2000). After discovering the categories of description I compared my categories to categories developed in a similar study, relating to law students in Australia (Reid et al., 2006). My purpose was to establish whether there were any points of correlation or dissonance between the two analyses and interpretations.

Criticisms of this approach are that the data, the constructs, the findings and even the object of the research may be reflections of the researcher’s own ideas and products of the empirically productive situation created in the interviews. A risk inherent in the approach can be a lack of reflexivity and an absence of a detailed critical analysis of the data generation and analysis (Hasselgren & Beach, 1996). This critique has been addressed in this study by adopting a consistently reflective attitude and exposing my positioning and my difficulties at each stage of the research process. In addition, recent literature in this field

has prescribed detailed guidelines and principles for ensuring the quality and integrity of the analysis, which I have attempted to apply (Åkerlind, 2002). Another significant cautionary observation made in the literature is the need to clarify the context-specific nature of the outcomes of such research, and to exercise caution in generalising the findings beyond the context within which they were derived, which I believe that I have done (Pratt, Kelly, & Wong, 1999).

The observations made above about phenomenographic methodology establish the basis for selecting this approach for the second section of the study, in preference to the phenomenological approach which better suited the data related to the lived experience of curriculum change. Phenomenography is well suited to studies related to students' experience of learning in higher education and was thus considered to be both appropriate and original in ascertaining the perspective of graduates, as well as their employers regarding the law curriculum.

4.14 Participants and sampling methods: phenomenographic study

4.14.1 [Data Set 4] Graduates

Purposive sampling was used to identify graduates, according to criteria that reflected their completion of the LLB degree in the four year prescribed minimum period, as the time taken to qualify as a legal professional was one of the central motivations for introducing an undergraduate degree in 1996-7 (Cohen et al., 2007, p. 115). Graduates who had studied in the same year cohort, beginning their LLB studies in 2001, completed their degree in the minimum time period (in 2004), and who had subsequently completed two years of articles of clerkship and been admitted to practice as attorneys in 2007, were identified as the potential sample cohort. In selecting specific participants from the potential sample cohort, I attempted to reflect the race and gender demographics within the same Law faculty (at the date of graduation, i.e., 2004) fairly closely, and also to obtain as wide a range of opinions as possible, because phenomenography places emphasis on variation rather than

uniformity. For purposes of convenience and accessibility, I had to limit the sample to graduates working in the greater Durban area, as this would also affect the location of the fourth data set of employers. The total number of graduates in 2004 who had completed in the minimum time period was 79 students,⁶³ so the sample size of six graduates, although small, was a realistic representative number.

The demographic composition for the entire Law Faculty in 2004 in percentages is shown in Table 4.

Table 4 Race and gender composition of registered Law students in 2004

Race	Female	Male	Total
African	15.00%	19.98%	34.98%
Coloured	2.76%	1.31%	4.08%
Indian	33.03%	13.09%	46.13%
White	7.84%	6.98%	14.82%
Total	58.63%	41.37%	100.00%

The race and gender breakdown of graduates who completed the degree in four years, ending in 2004, is shown in Table 5.

Table 5 2004 LLB Graduates who completed their degree in 4 years

Race	Male	Female	Total	Percentage of total
African	8	7	15	18.98%
Indian	7	40	47	59.49%
White	4	9	13	16.45%
Coloured	1	3	4	5.06%
Total	20	59	79	100%

Table 6 presents a comparison of the overall demographic table (Table 4) with the table of students who pass in the minimum time period (Table 5).

⁶³ Data provided by Department of Management Information. 03/02/2008.

Table 6 Demographics for the Faculty and for LLB graduation within minimum time

Race	% of total LLB student registration in 2004	% of 2001 cohort who graduated in 4 years
African	34.98%	18.98%
Indian	46.13%	59.49%
White	14.82%	16.45%
Coloured	4.08%	5.06%

The list of graduates who had completed the LLB degree in four years was cross-referenced against the list of admitted attorneys in the same province,⁶⁴ who had completed two years of articles (2005-2006), passed their attorneys' admission examination and successfully applied to be admitted as an attorney during the year 2007. This narrowed the list of possible participants down to 16 graduates. The total number of graduates who were admitted attorneys, and who matched the criteria in the Durban area could be disaggregated according to race and gender as set out in Table 7.

⁶⁴ Obtained from the Home page of the Law Society of the relevant province: Retrieved on 03/02/2008 from <http://www.lawsoc.co.za/default.asp?id=1468>.

Table 7 Demographics of graduate-attorneys admitted in 2007 according to sample criteria

Race and Gender	Number of graduate attorneys (minimum time period taken)
Indian Female	8
Indian Male	2
African Female	1
African Male	1
White Female	4
White Male	1
Coloured Female	0
Coloured Male	0

Thus the sample size of 16 graduate-attorneys reflected the overall demographics of the Law student registrations quite closely. I decided to approach two Indian females, (the largest demographic group in terms of law student registrations), one Indian male, one white female, one African female, and one white male to form the sample. No coloured students who had completed their LLB degree in four years had been admitted as attorneys in KwaZulu-Natal within two years of graduating. Only one African male fulfilled my pre-determined criteria, and after trying to locate him, I was advised by his previous employer that he had re-located to a large Johannesburg law firm.

I then set about trying to contact graduates according to the contact details which I had obtained from the university data base. I was successful in making telephonic contact with the six participants listed below (Table 8), and obtained their e-mail addresses. I sent a letter explaining the purpose of the interview I would like to conduct with them, a copy of my information sheet (Appendix 3) and the consent form (Appendix 6) to each of the six graduates. I also asked each of them to suggest a convenient time when I might interview him or her at his or her office, and requesting that they provide me with the name and

contact details of a senior employer whom they would be comfortable for me to interview about them. The graduates all responded positively and referred me to an employer.

The sample consisted of an African female, (Busi) (isiZulu speaker) who had attended a former white “Model C” high school in an urban area; two Indian females, one of whom had attended a former “Indian” school in a local suburban area (Fazila), the other a school in a farming community where there had been scholars of various races (Rani); one white female who had attended a former white, now integrated, “Model C” urban girls’ high school (Maria); one Indian male from a low income formerly “Indian” school (Sandesh); one white male from a formerly white (“Model C”) high school in a country area (David).⁶⁵ The sample selected met the criteria suggested in the literature.

The sample should capture as broad a range of relevant population characteristics as possible (e.g. background, prior experience, gender, age). These characteristics should be representative of the group under investigation, as well as of other similar groups in different educational settings (Stamouli & Huggard, 2007).

Table 8 sets out biographic information relating to the participants, their employer, and the type of law firm or organisation where they had completed articles of clerkship, whilst working for the employer whom I would interview.

⁶⁵ For reference purposes the graduates shall be referred to by pseudonyms.

Table 8 Biographic Profiles of Participants in Data Sets 4 & 5: Graduates and their Employers

Graduate participants	Race	Gender	Location and type of practice	Employer's race and gender
Sandesh	Indian	Male	Justice Centre	Indian Male (Vishan)
Fazila	Indian	Female	Chatsworth; small practice	Indian Male (Colin)
David	White	Male	Suburban city sole practitioner	Indian Male (Kavish)
Busi	African	Female	Central Business District, major corporate law firm	White Male (Peter)
Maria	White	Female	Suburban city, small medium-size commercial law practice	White Male (Greg)
Rani	Indian	Female	Campus Law Clinic	African Female (Maureen)

To confirm that the race and gender composition of the sample was consistently appropriate I compared it to current enrolments according to race and gender in the same Law faculty in 2009. This data is set out in Table 9: Race and Gender Composition of registered LLB students: 2009.

Table 9 Race and gender composition of registered LLB students: 2009

Race	Male	Female	Total	Percentage of Total
African	156	269	425	35.71%
Coloured	15	32	47	3.94%
Indian	133	433	566	47.56%
White	78	74	152	12.77%
Total	382	808	1190	100%

This most recent data indicates that registrations for white and coloured students have dropped over the past four years, from 14.82% to 12.77% for whites, and from 4.82% to

3.96% for coloureds. The percentage of registered Indian Law students has increased slightly from 46.13% in 2004, to 47.56% in 2009. African student registrations have also increased slightly from 34.98% in 2004 to 35.71% in 2009. This data does not reflect a significant change in the composition of the Law student body, and thus the representative sample used in the study remains acceptable.

Although phenomenographic studies normally use a larger sample (at least ten), to identify qualitative variation amongst the participants, the size of the potential sample who matched the pre-determined criteria in the study was only 16 in total. Thus six representative graduates were considered to be an adequate number based on the very context-specific nature of the study, and the fact that I would be required to interview an employer of each graduate to enhance the credibility of the study. The time-consuming nature of phenomenographic analysis also added a restriction on the number of interviews that could be managed. Trigwell (1999, p. 69) suggest that a reasonable limitation on the number of interviews be set in order to ensure that data can be assimilated simultaneously, because the process of analysis requires intensive concentration and exertion of concentrated intellectual focus to “keep a lot of ideas active at the same time”.

A copy of my interview outline (Appendix 7) was sent to each participant in the two data sets a week in advance of the interviews in order to allow them to reflect on the themes in advance of the discussion

4.14.2 [Data Set 5] Employers

Sampling here took the form of “snowballing”, as I relied upon the selected graduates to refer me to a senior attorney within their firm or organisation who had supervised them during their articles of clerkship, and who was likely to agree to be interviewed, thereby opening up entry for me to other participants (Hammersley & Atkinson, 1983). It was important that the graduates were comfortable with the choice of the employer to be interviewed as some of them will continue in a working relationship with that person after my research has been conducted.

Of the six employers, two are partners in medium to large “white collar” urban practices⁶⁶ whose work entailed mainly commercial and domestic legal matters. Another two of the employers run their own small suburban practices, one as a sole practitioner,⁶⁷ the other⁶⁸ in a small firm of his own, employing three qualified professional assistants who deal with criminal, commercial and civil law matters. The final two employers are engaged in public sector legal training of articulated clerks: one as the supervising attorney at a university law clinic,⁶⁹ the other as a supervising attorney at a government Justice Centre⁷⁰. This apparently random cross-section of employers who were engaged in a variety of practice contexts added richness to the data because they added a dimension of representivity across the employer sector that was unanticipated. The resulting identification of the graduate attorneys’ employers was beyond my control since it was entirely dependent on where each of the graduates had been able to secure articles of clerkship.

The sample of employers and the location and type of practice in which each one involved is set out in Table 8 (Biographic Profiles of Participants in Data Sets 4 and 5: Graduates and their Employers). The size of the firm and its location within the context of urban geography is often indicative of the type of legal work and the financial success of law firms. Large urban law firms tend to carry out complex commercial and maritime or insurance-type legal work, and litigation for corporate and wealthy private clients, whereas a sole practitioner seldom has the support base and resources to engage in such work. Such practitioners would more typically carry out personal family law and small business legal work for private individuals. The cost of renting office space is an obvious indicator of the size of the overheads that a firm can support, and thus the physical location of a legal office may suggest the positioning of the law firm in the hierarchy of professional practice. It is unlikely

⁶⁶ Peter and Greg are pseudonyms adopted for the purposes of this study.

⁶⁷ Kavish is the pseudonym adopted for this participant.

⁶⁸ Colin is the pseudonym adopted for this participant.

⁶⁹ Maureen is the pseudonym adopted for this participant.

⁷⁰ Vishan is the pseudonym adopted for this participant.

that the two graduates who completed their articles of clerkship in public sector organisations would have chosen to do so had they been able to obtain a position within a private sector law firm, as it is well known that there is a significant salary differential between articulated clerks working in private law practices, and those employed in public sector positions. The same could be said about the earning capacity of the employers, between the public sector and the private sector, between suburban sole practitioners and partners in large urban law firms.

I was able to contact the six employers and discuss the purpose of my study with each of them over the telephone. Thereafter I sent an e-mail with a copy of my information sheet, (Appendix 3), the consent form (Appendix 6), and a brief explanation of the purpose of the interview, requesting a convenient time when I might visit them for that purpose at their offices. It was quite difficult to find a time to meet with the employers, as they are all busy professionals who have to be flexible about their schedules when an urgent legal matter arises. Several of them postponed the appointment a few times, and I had to send several follow-up letters before being able to conclude all six interviews. Once again, a copy of the interview topics (Appendix 8) was sent to each participant in advance of the interview, in order to facilitate in-depth thoughtful discussion rather than to elicit spontaneous and less reflective responses.

4.15 Planning and conducting phenomenographic interviews

The most often used method of generating data in this approach is the semi-structured interview (Svensson & Theman, 1983). The interview may be seen as “a conversational partnership”, in which maximum use of open-ended questions is made, using prompts to encourage reflection that clarifies and responds to the participant’s own line of thought, rather than remaining bound to questions prepared in advance (Ashworth & Lucas, 1998). The method of discovering the participants’ understandings, conceptions or perceptions is usually an “open, deep interview”, without a definite structure (Marton & Booth, 1997), which distinguishes it from other types of semi-structured interviews.

However, in this study, in order to ensure that I obtained the requisite degree of depth that I sought in the interviews with the graduates and their employers, I worked from a rough interview schedule which outlined the key areas that I needed to discuss, but allowed for deviation from the questions.

Kvale (1996) characterises the phenomenographic interview as having the following features: the interview is focused on the interviewee's lifeworld and on certain themes; the participant's understanding of the phenomenon being studied is sought during the interview; the researcher should hold no preconceived ideas about the phenomenon during the interview; questions are open-ended; and the interview should be as positive and interpersonal as possible. These were the guiding principles that I kept foremost in mind, while at the same time ensuring that I focussed on expressions related to conceptions of the phenomenon and explored the participants' delimitation and experienced meaning of these objects (Marton, 1994). The questions are intended to encourage participants to think about why they experience the phenomenon in certain ways and how they constitute the meaning of the phenomenon.

Data collection in this methodology is exploratory in nature, because of the relational character of the conceptions and the uncertainty of this relationship (Marton, 1994). It was important to be sensitive and empathetic to hear how each participant delimited and described the phenomenon as a whole, exploring the specific aspects and the "parts of the whole" experience, so as to determine the features of variation and awareness of the phenomenon (1994).

The objective of phenomenographic research is to develop a typology of the different qualitative conceptions of students based on descriptions of their experience as related by the participants after reflection. Thus it reflects a second order perspective, attempting to investigate variation in experience and reveal how a person's awareness is structured (Rovio-Johansson, 1999). One strand of the research methodology pursues students' conceptions of learning and the processes within a specific disciplinary context (Ashworth & Lucas, 1998). In relation to curriculum and learning, this "experience" would include "perceiving, conceptualising, apprehending, understanding and so on" (1998). The transcription of the interviews should aim at accurately recording the emotions and

emphasis of the participant, as these factors are likely to affect the interpretation of meaning (Svensson & Theman, 1983). The transcripts are then subjected to phenomenographic analysis. The results are a set of “categories of description” which form an “outcome space” (Marton & Booth, 1997).

4.15.1 Data elicitation (Graduates): experiencing the Law curriculum

In planning the interviews I had a set of pre-ordained questions, but these were used more as prompts during the actual interviews, as there is a possibility that the presuppositions that informed the design of the questions would tend to generate data that fitted the mindset of the researcher. My identification of three key issues within the law curriculum (sensitivity to diversity, integration of skills, and ethics) were key concepts determined from background literature that to some extent shaped the progress of the conversations with the participants. During the interviews it became clear that these concepts were often not central to the participants’ own experience of the phenomenon of experiencing the curriculum. In addition, the participants’ often scant recollection of some aspects of the curriculum that were mentioned by the researcher lead to a realisation that these were not always significant features in the participant’s life world. Therefore their responses necessitated moving on to other topics which their comments raised.

I interviewed the graduates in their own milieu, so that there were no preconceived power relations in effect. I met each of the graduates at the office where he or she worked on the appointed day, and after obtaining their signed consent, I proceeded to explain the purpose of my study before beginning to tape-record the interview. In order to develop data that responded to the second research question, I conducted in-depth phenomenographic interviews that aimed to elicit their perceptions about how the law curriculum prepared them for professional practice, using the three themes of sensitivity to diversity, integration of legal skills and ethical values, as specific reference points.

Phenomenographic studies seek to identify variation in ways of understanding a phenomenon amongst a sample group that is selected for maximum variation, based on the premise that individuals experience the same phenomenon differently. In the literature it is

stated that phenomenographers “seek the totality of ways in which people experience...the object of interest and interpret it in terms of distinctly different categories that capture the essence of the variation” (Marton & Booth, 1997).

All of the interviews were recorded and then transcribed verbatim.

4.15.2 Data elicitation (Employers): graduates’ preparedness for professional practice

Semi-structured interviews, following a general outline, with an employer of each of the graduates (a senior attorney), conducted in their office, elicited the final set of data. In the public sector, the Justice Centre and the Campus Law Clinic, I interviewed the candidate attorney supervisor of the two graduates, who in both cases was also the Director of the organisation where the graduate had worked. Both graduates who had qualified as attorneys at public sector organisations had subsequently left to become self-employed since qualifying. In the other law firms, I interviewed a senior partner of the law firm who had supervised the graduate throughout their period of articles of clerkship.

Despite experiencing some difficulty in setting up the interviews with the employers, at the interviews I found them to be particularly talkative and willing to give their opinions very easily. I began with a general question to elicit their conception of the graduates’ preparedness for professional practice through experiencing the law curriculum. Most interviews went on for well over 90 minutes as the lawyers were excellent communicators and fluent and articulate participants who made the interview very easy to conduct. My only problem was, often, in drawing them back to the areas in which I had an interest, such as their perceptions about the graduates’ preparedness for practice and their conceptions about the law curriculum. It often required effort on my part to prevent them from discussing their own personal “hobby-horse”, which ranged from the changing legal profession, to the financial stress of running a successful practice and the quality of lawyers, judges, clients and magistrates. It was often necessary to draw them back to my focus on their perceptions of graduates’ preparedness for practice **as a result of experiencing the curriculum**. During the progress of the interviews I found myself having to shift their attention back to the data that I wished to obtain, and to avoid the discussion going “off on

a tangent". As legal professionals, I found that all participants were particularly garrulous and easy to draw into a conversation. Each participant expressed strong views on many topics and produced many hours of recorded data for transcription. As Dortins (2002) notes, the verbal data are in fact re-contextualised in the process of transcription, as their conversational context is de-emphasised, while their context in the text (both the individual as well as the group of transcripts) takes on a new emphasis.

4.15.3 Analysis strategies for Data Set 4: Graduates

The data comprised verbatim transcripts of six tape-recorded semi-structured interviews with graduates, each taking approximately 90 minutes, which generated 147 pages of text. Detailed reading and re-reading of each transcript was undertaken until differences and similarities related to several themes or key topics emerged from the data. Critical variations in meaning across transcripts were the key aspects that I sought out in the reading of phenomenographically-derived data. Quotations were then selected from each transcript and put into a "data pool". The decontextualised "pool of meanings" was then sorted and re-sorted, searching for categories of description that seemed to capture the collective experience of the graduates. Within the categories the utterances displayed a commonality, but the categories were distinguishable from each other in their variation. Clear criteria for each category were gradually clarified and refined. The categories were neutral, with respect to empirical subjects (individuals) and to the context or life-world from which they emanate; by disconnecting the conceptions from the "temporal and situational context" it was possible to compare conceptions to other expressed, decontextualised conceptions in the "data pool" (Uljens, 1996). Phenomenographers claim only to analyse the participants' "ways of functioning" or "forms of thought" and not their lived experience, so the words used are of critical importance (1981, 1984). Uljens (1996) stated that the object of phenomenographic analysis always consists of "expressed experience", so the expressions used by each participant were critical when inferring meanings. The actual words, or the way in which the experience of curriculum and its various constituent parts was articulated by each participant, were also important for the identification of the referential aspect (what does it look like?) and the structural aspect (how is it seen?) of each conception.

Although every effort was made during the process of analysis to bracket knowledge about approaches to learning, and my personal understanding of graduates' lived backgrounds, it was difficult to set them aside completely. In the result, the categories might have reflected some of my previous understandings about learning law and the particular curriculum that was the phenomenon under scrutiny. As a deep "insider-researcher", I have great familiarity with the sub-cultures that operate within the Law faculty and so I was sensitive to the nuances of meaning in the data (cf. B. Edwards, 1999). I was able to treat the graduates in an empathetic manner, knowing the terrain which they described, but I had to exercise extreme caution in not reading my own interpretations or imposing my own understandings on their expressed experiences. The precautions taken by me, in separating my preconceptions from the realities within the data, are more thoroughly canvassed in Chapter 4 (above). It is notable, however, that in phenomenographic analysis, there is "an unavoidable relationship between the researcher and the phenomenon that is investigated". The researcher of necessity must have a "thorough knowledge and understanding" of all aspects of the phenomenon that she is analysing. This is essential to enable the researcher to "discuss and query the learner about the various facets of the phenomenon" (Stamouli & Huggard, 2007).

Morris (2006) following Bowden and Walsh (2000) highlights two possible approaches to data analysis in phenomenography: either the neutral discovery of categories from the data, or an imposed "construction" of categories of description. Researchers such as Laurillard (1993), Crawford et al (1994) and Prosser and Millar (1989) discussed above (page 160) have specifically used predetermined categories to extend, replicate or compare empirical findings across different settings or in different disciplines. The imposed "construction" approach to producing an outcome space is associated with a structure of hierarchical relationships between the categories of description, such as Saljo's (1979) conceptions of deep and surface approaches to learning, followed and extended by Marton et al. (1993). "Discovery" of categories appears to mean a faithful capturing of conceptualisations that emerge from the data, similar in process to grounded theorising. It is unclear whether all the content of the data must be included or only selected data that "fits" the emerging categories. Bowden and Walsh recommend an inclusive approach, which incorporates all

data “even if the result is untidy, so that for example, the results do not have a logical structure” (2000).

It is notable, however, that cultural beliefs and practices have been shown to exert a role in learning and thus conceptions of learning in studies of “non-Western” students, e.g. Chinese and Nigerian, paradoxically do not align closely with the constructed categories of such typologies (Boulton-Lewis, Marton, Lewis, & Wilss, 2004; Cliff, 1998). In the context of student diversity that is represented in South African institutions it was thus preferable to follow a “discovery” approach to developing categories of description from the data, and to remain open to the possibility that a hierarchical relationship between these categories may emerge from the data. Both methodological approaches could be accommodated within the ambit of “variation” that is typically a feature of phenomenography, but the implications of each approach relate to the credibility and reliability of the research as discussed below.

During the process of analysing data, it is crucial to attempt to maintain an open mind, minimising any predetermined views, and by maintaining a focus on the transcripts and the emerging categories of description as a set (Åkerlind, 2005). The researcher will be better able to maintain focus on the collective experience rather than on individual transcripts and categories. There is a need to “bracket” the researcher’s presuppositions throughout the research process, to ensure that the focus remains on the participants’ (students’ and employers’) experienced world, acknowledging however that the researcher cannot suspend her commitment to certain guiding notions concerning the starting point or shared topic of the researcher and the participant (Ashworth & Lucas, 2000).

The interpretive role of the researcher must be acknowledged, in that the final outcome space represents a partial understanding of the phenomenon, reflecting the analysis of the data as experienced by the researcher (Svensson & Theman, 1983). It is however essential that the results of the research, the outcomes, are firmly based upon the empirical data (Åkerlind, 2002). This attitude was uppermost in my mind throughout the analysis. Although my personal interest and knowledge of the topic informed my interpretation of the data, by using many direct quotations from the transcripts to support my analysis, I was able to add credibility to the interpretation.

The stages in the analysis of the data began with several careful readings of the transcripts as a “sensitisation” to the data, before beginning the search for meaning. The initial data exploration seeks critical variations in meaning, looking for expressions that reveal how the phenomenon appears to the participants across interview transcripts. It is imperative that a focus is maintained on the transcripts as a set, rather than as individual transcripts (K Trigwell et al., 1999, p. 70). The search for structure should be delayed in the early stages of the process, until the aspects of meaning are fully appreciated (Åkerlind, 2002).

The analysis of each data set was treated as a separate process and was carried out in sequence, i.e., the graduate data (Data Set 4) was analysed completely into an outcome space before the employer data (Data Set 5) was analysed at all. Bowden (1995) recommends at least six readings, to focus on a different perspective each time, so as to clarify what the interviewee meant in relation to key elements of the phenomenon. His approach is to treat the entire transcript as a set of interrelated meanings, best understood in relation to each other. In practice, transcripts are allocated to the emerging categories, which can result in an overemphasis on an individual focus in analysing the data, rather than a collective one (Åkerlind, 2002). I preferred to adopt Marton’s approach (1986) which is to first undertake a “selection process”, during which quotations from transcripts are identified and marked as being of interest to the questions under investigation. These quotes are added to a decontextualised “pool of meanings” from which the researcher begins to develop categories, based on similarities between the utterances. The categories must be distinguishable from each other based on the differences between them (Marton, 1986). This approach has the advantage of ensuring greater clarity on key aspects of the phenomenon and facilitating the management of the data, yet it may lead to the researcher not giving sufficient weight to the context within which the selected quotes are made.

The time-consuming and complex nature of the process of phenomenographic analysis, juggling concepts, parts and whole in one’s head, is effectively captured by Trigwell, who comments:

I find the analysis very demanding, and I tend to put it off as long as I can...but the only time I can do the analysis effectively is when I have absolutely no interruptions....Having to keep a lot of ideas active in your head at the same time (is demanding)...you try to hold two, three, and so on...getting started is very

hard...the parts and the whole define each other dialectically...There are times when the focus is, and has to be, on the parts. But in order to see whether these parts are, in fact, parts of the same category, the focus has to be on all the transcripts (Trigwell, 2000, p. 70).

This resonates exactly with the process I experienced in constantly shuffling between the transcripts and relevant excerpts that expressed aspects of the phenomenon under review. The procedure entailed selecting quotes from the transcripts that were relevant to particular key aspects of the phenomenon of experiencing the law curriculum and how it prepared a student for professional practice, focusing on finding the “dimensions of variation” for each aspect of the phenomenon (Marton & Booth, 1997). The quotes were interpreted in two contexts: the interview from which they had been selected, and in the context of the “pool of meanings”. Following Marton’s (1986) approach, the quotes were gradually allocated to categories on the basis of their similarities, and the categories were distinguished from each other. This allowed the criterion attributes for each category to become clear.

Thereafter, an iterative process of moving between the emerging themes and the original data, to confirm, contradict or refine the categories, as well as searching for structural relationships between meanings, continually sorting and re-sorting the data took place (Åkerlind, 2005, 2008). The key qualitative differences between the categories were refined, which entailed grouping and regrouping selected quotes from transcripts, to develop hierarchies in relation to given criteria, until there was “a decreasing rate of change and eventually the whole system of meanings is stabilised” (Marton, 1986).

Bowden and Walsh caution that there is a risk that researchers may explicitly reflect their own professional judgement in imposing categories, and thereby potentially ignore aspects of the data in their interpretation, so as to create a “tidy construction that is useful for some further explanatory or educational purpose” (2000). This cautionary note was heeded in the analysis, to avoid developing too “neat” an outcome space.

It is imperative that the writing up of the research be explicit about the nature of the process engaged in, as issues such as the researcher imposing her own presuppositions, or insufficiently “bracketing” her conceptions of the forms and concepts within her discipline

may intrude on the accurate reflection of the participants' conceptions (Ashworth & Lucas, 1998). This caveat was adhered to in the data analysis to enhance the validity of the study.

A "conception" of a phenomenon is developed through the relationship, or the understanding that a participant has of the experience, through simultaneously discerning and focussing on critical aspects of the phenomenon (Bond & Le Brun, 1996). In this study, the critical aspects of curriculum that were discerned by each participant were identified and used to develop an understanding of the collective experience of the graduates, and then of their employers.

Each conception is composed of two intertwined aspects: the referential aspect, which denotes the particular global meaning of the individual object conceptualised, "so as to discern it from its context" (Marton & Fai, 1999); as well as a structural aspect, which is the combination of features discerned and focussed upon by the participant. Awareness of a phenomenon is constituted by the "what" aspect, which corresponds to the object itself, and the "how" aspect, which relates to the act of discerning it, in a dynamic relationship (Marton & Booth, 1997). This distinction between the "*what*" and "*how*" aspects is, however, merely an analytical tool that is only used by the researcher to assist in the analysis (Stamouli & Huggard, 2007, p. 183). Students' experiences of curriculum had a referential aspect, which is the meaning aspect (what does it look like?), which relates to the direct object under scrutiny, the curriculum, as well as a structural aspect that concerned the constituent parts of the whole experience and their relationship to each other, including contextual factors (how is it seen?) (Morgan & Beaty, 1997). The graduates' different experiences of curriculum were described in terms of the dynamic relationship between discerning the "*what*" (referential) aspect, which refers to their understandings of the global meaning of curriculum, and discerning the "*how*" (structural) aspect, which is the act of discerning curriculum through focussing on the constituent parts that comprise it. The "*how*" aspect can be further broken down into how they went about experiencing the curriculum: the act of experiencing it, as well as the indirect object of the curriculum experience, such as their goals and motives for experiencing curriculum. Figure 10 indicates the analytical structure by which awareness of a phenomenon can be deconstructed in phenomenographic analysis. In analysing the data it was helpful to use the tools of this

theory of awareness to distinguish the various component parts of the experience and conceptions of curriculum.

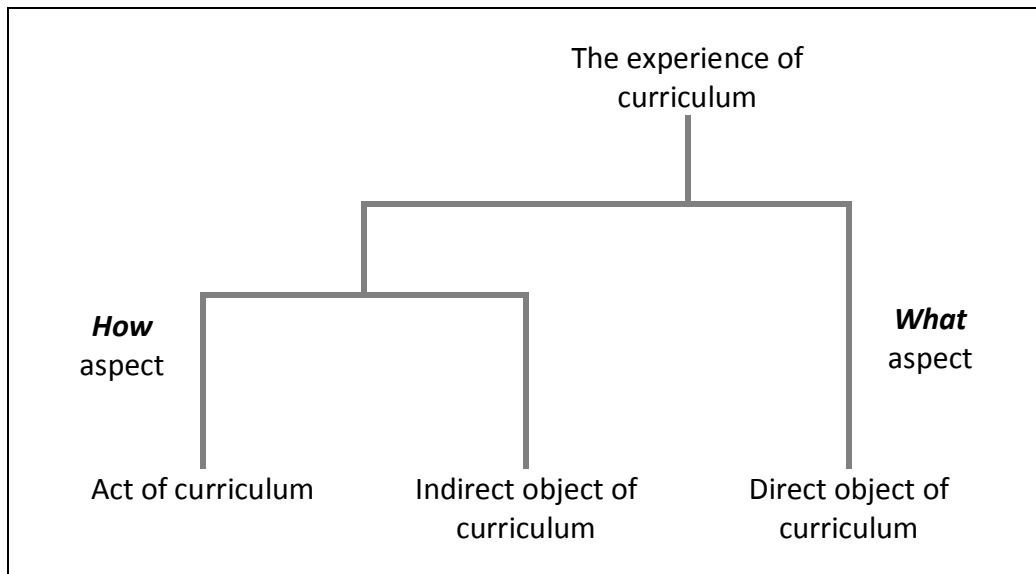


Figure 10 The experience of curriculum

(adapted from Stamouli and Huggard, 2007, p.183)

The phenomenographic analytical tools which take account of *how* awareness is developed accommodated the nuances of curriculum such as the hidden curriculum, as well as more obvious features, such as the contents within its ambit of analysis, the participants' motives, and their goals. In the six graduate interviews clear differences between their structural understandings and their referential understandings of aspects of the curriculum were identified in the course of developing the categories of description in the hierarchically-ordered outcome space. Similarly, the corresponding duality inherent in the employers' conceptions became evident in the outcome space where their different perceptions were described.

Figure 11 indicates how the phenomenon cannot be seen in isolation. The focus of the study is the way the phenomenon was understood and experienced by the graduates. The aim of the research was to discover this object that was experienced, by analysing the relationship between the graduates and the curriculum, the phenomenon which is being studied (Stamouli & Huggard, 2007).

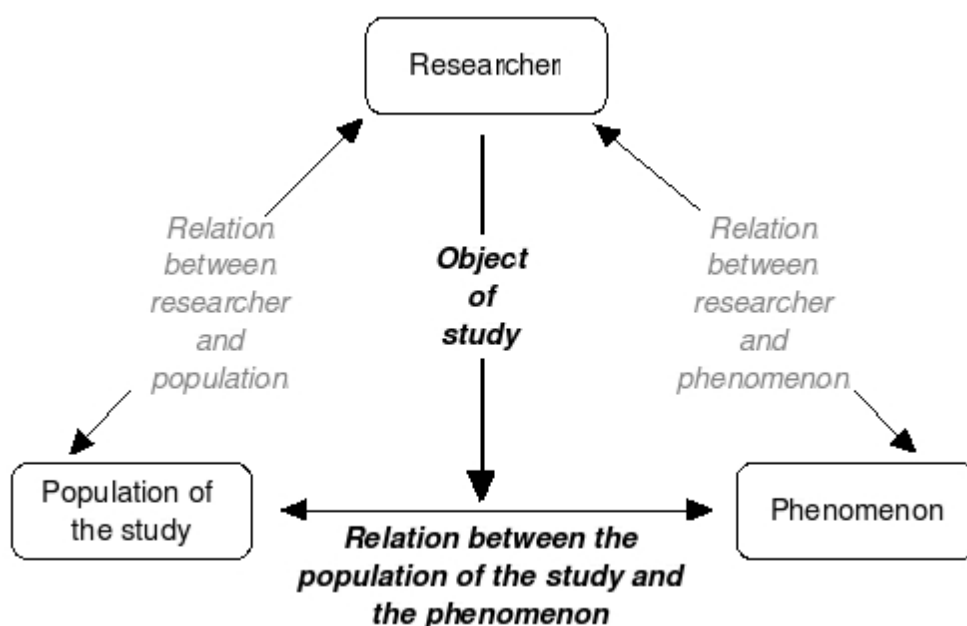


Figure 11 Object of the study in a phenomenographic study

(Bowden, 2005)

In order to access the personal reality of the participant and to ensure that the researcher pays attention to the “subtleties of the actual life world”, “bracketing” or epoche is recommended in phenomenographic analysis (Ashworth & Lucas, 1998, p. 421). However, the contrary approach of using existing categories and applying them in different contexts, in different countries, or across different disciplines, has emerged as a strong trend in phenomenography (Crawford et al., 1994; Laurillard, 1993; Marton & Booth, 1997; Prosser & Millar, 1989; Saljo, 1979).

It was virtually impossible to apply bracketing in an absolutely rigorous way as the completion of a prior literature review, which provided the necessary background for the study, by its very nature, planted the seeds of ideas that are likely to have influenced my approach to the analysis, albeit to a limited extent. I was conscious throughout of the need to develop categories that reflected the empirical-derived descriptions of the experiences and conceptions of the participants. Thus, I have used quotations from the data to support the characterisations I have developed for each “category of description” in the analysis.

I chose to first “discover” categories of description from the data, before comparing my outcome space with an Australian study that also related to law students and learning at university (Reid et al., 2006) in Chapter 7. The purpose of contrasting my study with the Australian study was to establish whether there were any points of correlation or dissonance between the two analyses and interpretations, after I had developed my own analysis of my data.

Within each category of description, which together comprises, in effect, “empirically-derived characterisations” of the key aspects of the participants’ experiences of the phenomenon, I have expanded on the range of ways participants within each category experienced the component parts of the phenomenon, so as to develop a sense of the whole and the parts of the phenomenon (Åkerlind, 2002). The purpose of this was to develop a deep, textured interpretation of the various categories which might provide insights for improving curriculum development in legal education. The map of the collective mind will thus have contours and rich topographic detail to add to the understanding of the legal education landscape.

4.15.4 Analysis strategies for Data Set 5: Employers

The interviews were recorded and then transcribed. Thereafter the transcripts (153 pages of text) were read repeatedly. In employing phenomenographic methodology, it was important to enter the “lifeworld” of the participant. In this case, it involved a complete shift for the researcher to hear the voices of the “other side of the working relationship” and to make the “mindset move” away from listening to the experience of curriculum, to one of hearing perceptions about the products or outcomes of the curriculum.

Phenomenography searches to identify the “qualitatively different” ways in which a phenomenon is perceived by a group of perceivers. The methodology employed was the same as that described in section 4.15.3 above, resulting in the production of an outcome space after going through the process of analysis. The dominant differences thus assist in developing the categories of description which constitute the outcome space. By focussing closely on the differing views that were expressed, a collection of extracts from the

transcripts was put into a “data pool”. Working backwards and forwards between the quotations and the whole set of transcripts, in order to keep the parts and the whole in mind, gradually categories of description emerged from the data. These categories were considered over and over in an iterative fashion, until they developed into an ordered structure that seemed to encompass the qualitatively different conceptions across the group of interviewees. The outcome space was developed by reading the employers’ transcripts to “discover” categories that reflected the different conceptions that the participants had of graduates’ preparedness for practice. At different points in each transcript the participants expressed views that were not necessarily consistent with one particular category, so these had to be iteratively reconciled, and the categories amended and adapted, until I felt satisfied that the categories reflected their different positions and were hierarchically structured without representing an artificial positioning

In the next section, the questions relating to validity and reliability of the study are discussed, in the context of the qualitative research tradition, which employs different terms and presents different bases for evaluating the credibility and generalisability of research.

4.16 Credibility and trustworthiness in qualitative interpretive research

In regard to the issues of validity and reliability in qualitative research, this section considers first why the preferred terms should instead be credibility and trustworthiness, and goes on to explain how these apply in the study, as they relate to both phenomenology and to phenomenography. In addition, methodological triangulation and reflexive engagement with my own positionality are central threads in further procedures to enhance the validity of both sections of the study.

To ensure the quality of research, questions of validity and reliability must be confronted. A plethora of definitions for each term exists in the literature, making clarity on these aspects a challenge (Creswell & Miller, 2000). However, in the context of qualitative research, these

terms have been replaced with other more appropriate terms, such as credibility and trustworthiness, because consistent and replicable results will not be possible, as “human nature is never static” (Merriam, 1998).

Qualitative research is generally conducted in naturalistic contexts, aimed at describing a particular phenomenon or experience, and thus is often unique and impossible to generalise. Generalisability in qualitative research can be interpreted as meaning comparability and transferability, in the sense that the findings from one context could be generalised to another similar area, or the development of theories could be transferred to another context. It is not the researcher’s task, however, to provide “an index of transferability”. By providing sufficiently thick data and description, readers and users of the research should determine whether transferability is possible (Lincoln & Guba, 1985).

“Internal validity” may be seen as akin to the “truth value”, relating to the researcher’s confidence in the truth of the findings for the subjects or informants and the context of the study (Lincoln & Guba, 1985), or the fact that the findings or explanations can be sustained by the data (Cohen et al., 2007, p. 150). This aspect in qualitative research is most often interpreted as “credibility”; i.e., that qualitative researchers need to demonstrate that their studies are credible (Creswell & Miller, 2000) or are aimed at gaining knowledge and understanding of the nature of the phenomenon being studied (Kreftling, 1991). The abundant use of quotations from the data in this study, together with the “cross referencing” between data sets, served to achieved this confirmatory function in the analysis.

Validity attaches to the accounts, or the meanings and inferences drawn from the data, and the “utmost fidelity” is required from the qualitative researcher in the self-reporting of the researched (Blumenfeld-Jones, 1995). Lincoln and Guba (1985) propose methods such as prolonged engagement in the field, persistent observation, triangulation, peer debriefing, negative case analysis and member checking as strategies to improve the credibility of qualitative research. Winter (2000) recommends addressing this aspect through the honesty, depth, richness and scope of the data achieved, the participants approached, the extent of the triangulation and the disinterestedness or objectivity of the researcher. I believe that my extended engagement in the field, my honesty in disclosing my positioning,

the richness and scope of the data elicited through the access I have had to participants who have enriched the quality of the data all provide evidence of my “utmost fidelity” and reinforce the validity of the study.

Denzin’s (1997) “methodological triangulation” was employed to compare data from the (phenomenological) interviews with the Deans, with the curriculum documents from the various universities, so as to focus on the same object of study, the law curriculum as it has been implemented, from different perspectives. The preliminary baseline curricular comparison was used to develop the interview schedules for the Deans’ interviews, during which I was able to confirm or refute the data in the comparative table. Similarly, the data from the ex-Deans (Data Set 2: Task Group members) often aligned closely with and confirmed the data from the current Deans (Data Set 3). In the phenomenographic interviews, the same “cross referencing” about various aspects of the data was possible between the data elicited from graduates and the data elicited from their employers. If findings are said to be “artefacts of a specific method of data collection”, then the use of contrasting methods reduces the chances of any consistency being attributable to similarities of method (Lin, 1976).

Specifically in phenomenographic research, the emphasis is placed on communicative and pragmatic validity (Kvale, 1996). The former concept relates to the researcher being able to argue for a defensible interpretation, selected from a range of possible interpretations, and based upon appropriate research methods and an appropriate final interpretation which is adjudged by the research community or the intended audience for the findings (Kvale, 1996; Uljens, 1996). Booth (1992) states that the validity of phenomenographic studies concerns the researcher’s justification for presenting the outcome space and claims based on those results as credible and trustworthy.

Cope (2000) adds that the justification of validity lies in a full and open account of a study’s methods and results, whilst the judgement of credibility and trustworthiness then lies with the person reading the study. He details the factors that should be disclosed fully: the researcher’s background (Burns, 1994); the characteristics of the participants; the design of the interview questions must be justified; the steps taken to collect unbiased data must be included; attempts to approach data analysis with an open mind, not imposing any

preconceived notions must be described; the data analysis methods should be carefully detailed; the process for checking and controlling the interpretation must be described by the researcher (Sandberg, 1997) and the results must be presented in such a way, illustrated by selected quotes to support the descriptions of the categories, so as to permit informed scrutiny (Cope, 2004). Each of these considerations has been specifically addressed at the various stages in the phenomenographic study.

Sandberg (1997) has proposed the practice of “interpretive awareness”, in which the researcher describes how she has controlled and checked her interpretation throughout the process as a means of enhancing validity: this requires researchers “to acknowledge and explicitly deal with our subjectivity through the research process instead of overlooking it”. This guideline was followed as closely as possible at each stage in the process.

Pragmatic validity checks in phenomenographic research include the extent to which the research outcomes are regarded as useful (Kvale, 1996) and how meaningful they are in providing “knowledge” to their intended audience, such as providing “insights into more effective ways of operating in the world” (Marton & Booth, 1997). Entwistle (1997) explains that “[f]or researchers in higher education, however, the test is generally not its theoretical purity, but its value in producing useful insights into teaching and learning”.

This has been particularly important for me, since I have already been asked to participate in and comment critically on the future projections for legal education through SALDA deliberations and my role in the research project with the CHE on the LLB curriculum. I have assisted their researchers by directing them to relevant literature and presenting my work-in-progress to two conferences already.

Reliability has been variously defined as: “reproducibility of the measurements...stability” (Lehner, 1996). Reliability in phenomenographic studies does not mean replicability of results, because this would mean that categories in the outcome space could be replicated, when it is unlikely that two researchers, given the same set of data, would interpret it according to the same categories. Johansson, Marton & Svensson comment that although broad methodological principles are followed,

the open, explorative nature of data collection and the interpretive nature of data analysis mean that the intricacies of the method applied by different

researchers will not be the same. Data analysis, in particular, involves a researcher constituting some relationship with the data (1985).

A form of reliability check that can be carried out is, once again, for the researcher to make her interpretive steps clear to readers, fully detailing steps in the interpretive stages and providing illustrative examples (Kvale, 1996). This prescription was followed, by the adoption of a critical approach toward my own interpretations, and consistently holding in check my own assumptions and presuppositions (Åkerlind, 2002). Not only do these practices enhance the reliability aspect, but they add to the depth, detail, verisimilitude and richness of the study.

The sources of the data in the second phase were from interviews with graduates, as well as interviews with their employers. The aim of using these two sources of data was to enable me to compare the graduates' perceptions of the how the law curriculum prepared them for professional practice with their employers' perceptions of the same issue. Thus, I employed the technique of crystallisation, which Merriam (1998) recommends, a term that Richardson prefers to "triangulation" in qualitative research, because

the crystal combines symmetry and substance with an infinite variety of shapes, substances, transmutations, multi-dimensionality and angles of approach. Crystals grow, change, and alter, but are not amorphous....Crystallization provides us with a deepened, complex, thoroughly partial understanding of the topic (Richardson, 1994, p. 934).

By reviewing the data constantly, through the theoretical lens I had selected, interpreting reflexively, and paying attention to the "multiple constructed realities" (Lincoln & Guba, 1985), I was able to develop insights and an interpretation that provided an understanding of the topic in a multi-faceted way, which also served to validate the research.

4.17 Ethical considerations

Ethical clearance was obtained prior to conducting the empirical research (Appendix 9). It was necessary to obtain the informed consent of all participants who were interviewed. Informed consent involves: "competence, voluntarism, full information and comprehension" (Cohen et al., 2007, p. 52). Since the participants were all competent adults, a detailed letter

complying with the four elements mentioned above sufficed to ensure their willing and informed consent to be interviewed. In the phenomenographic data sets, the participants were all attorneys, so scrupulous care was taken to attend to these details, so as to avoid the risk of exposing myself to the possibility of litigation. The benefits to be obtained from all participants' involvement in the study were represented in a wider sense, as contributing to the development of knowledge regarding the future of legal education.

Graduates were informed that a senior partner of their firm was to be interviewed, but the selection of that partner was based upon the suggestion of the graduate. I assured graduates that I had obtained an undertaking from the participant partner that there would be no negative implications for their career prospects following upon the interviews.

I undertook to ensure the complete anonymity of all participants throughout the research, and to guarantee that full transcripts would not be made available to anyone. The data was kept securely in my possession throughout the study. Beyond having access to the empirical data that was specifically elicited for the study, I have had access informally to numerous relevant data through my continuing association with the South African Law deans' Association (SALDA), where I have been given honorary observer status.

At a meeting of SALDA⁷¹, to explain the purposes and outline of my study, I was given the support and co-operation of the Law Deans and asked to convene a Task Team to review the LLB degree. My role as researcher within the legal education community was acknowledged to the extent that my study is regarded as informing an official committee who are reviewing the issues confronting South African legal education. In addition, I am presently chairperson of the SALDA committee that is working closely with the CHE on a curriculum review project that focuses on the undergraduate law curriculum. I have been able to support their research with referrals to stakeholders and the provision of a literature review and identification of key international debates in legal education.

Formal permission to undertake the study was obtained from the Dean of the specific law faculty which was the subject of an in-depth investigation in the second phase of the

⁷¹ Potchefstroom, 8 November, 2007.

research. Graduates of this university and their employers were interviewed about how the law curriculum offered at the institution prepared them for professional practice. The benefit to that Law Faculty in obtaining the results of the study will be significant in respect of quality assurance.

I intend that the audience for the study will benefit from an enhanced understanding of curriculum issues that are being perceived as reaching a “crisis” level in both legal education and in a wider context of South African higher education.

4.18 Concluding remarks

In summary, the methodological approaches in both parts of this study have been justified and described here in detail. These create a coherence with the theoretical framework described in Chapter 3, because “curriculum as phenomenological text” (Pinar et al., 2002) has been widely theorised in a body of literature developed by authors such as Aoki (1984), Van Manen (1990), and Eisner (1994). The research design lays the foundation for the discussion of the empirical data analysis which follows in the next two chapters. I have argued for the credibility and trustworthiness of the study and have provided an account of the ethical considerations that formed a necessary background to the study. Chapters 5 and 6 elucidate the analysis of the empirical data that was elicited through the methods described above.

Preamble to data analysis in Chapters 5 and 6

In Chapter 5, analysis of the baseline curricular comparison (Data Set 1) leads on to the data analysis from two data sets which were elicited using a phenomenological approach (Data Set 2 and Data Set 3). In section 5.1 a commentary on the baseline curricular comparison that was constructed analyses the various typologies and variations evident in current law curricula at the 17 existing South African Law Faculties. In sections 5.3 and 5.4, the phenomenological data elicited in response to the first research question is analysed and interpreted. The phenomenon under scrutiny in both participant data sets (Data Set 2: Task Group members [section 5.3]; Data Set 3: Law Deans [section 5.4.2]) is the experience of a reconceptualisation of legal education through curriculum change and its subsequent implementation in practice.

In Chapter 6, the phenomenographic data that responds to the second research question is analysed. Both sets of participants in the second part of the study (Data Set 4: Graduates [section 6.1]; Data Set 5: Employers [section 6.3]) were interviewed regarding their relationship to and perceptions of the curriculum, which, being from a different second-order perspective, called for the alternative (phenomenographic) methodology.

The data analysis in section 5.1 was developed using documentary analysis of the official curriculum documents from Law Faculties, from Faculty handbooks or from websites.

Section 5.3 begins with an explanation about the voices of Law Deans “past and present”, the data in question having been elicited from three members of the Task Group of Law Deans in 1996 (Data Set 2), who experienced the turbulent events that preceded the introduction of the undergraduate law degree in 1997. In the analysis of this data I shall argue that the convergence of a plethora of factors, beyond the jurisdiction of legal educators, inevitably lead to a reconceptualisation of legal education. External drivers on both a global and a national level swept the process along a pre-determined route that was not unique to the legal profession in South Africa. The interplay of powerful protagonists, motivated by interests outside and beyond the academic curriculum, lead to a symbolic yet hollow victory, which continues to resonate ten years on – but with an empty ring. The

informing “vision” that inspired the change appears to have been clouded by vague, atheoretical interests, founded upon gestures and unarticulated premises. Ironically, it is the very “fuzziness” of the vision which created space for a varied range of curricula to develop and be implemented, to the satisfaction of legal educators who regarded this as a fair “trade-off” for being “out-voted” during the policy-making process (Barnett & Coate, 2005). Finally, process issues that determined the eventual outcome will be interpreted since these provide an understanding of the forces that shaped the curriculum upon which agreement was finally achieved.

Section 5.4 analyses the data elicited from five current Law Deans (Data Set 3); the analysis is prefaced by a brief overview of phenomenology as analytical framework which also serves to extend the methodological orientation. The data in Data Set 3 responds to the first research question which focuses on the how the vision for the new law degree in 1996 has been translated into transformative legal education ten years later. The vision for legal education emerged as a contested one: was it the “remarkable milestone in transforming legal education along democratic principles”, as proclaimed by Iya (2001), or was it a technocist re-curriculation process, by often unwilling academics, who carried out superficial “tinkering at the edges” to achieve an appearance of compliance? McQuoid Mason (2004, 2006, 2008) and Iya (2001) stress the point that the Law Deans all concurred, in April 1997, that

in formulating curricula and deciding on course content, all law schools and law teachers should take into account that South African law exists in and applies to a pluralistic society, should endeavour to ensure that students acquire skills appropriate to the practice of law, and should strive to inculcate ethical values (Philip F Iya, 2001, p. 359).

The starting point for interpretation of the data is the lived experience of those participants (Task Group members in 1996) who were part of the historic process when the postgraduate LLB degree was replaced with a single qualifying law degree, a four-year undergraduate LLB. Interwoven with their voices are insights into the historical events that created the contextual setting for the policy change that took place within the field of legal education. The data from the Task Group members establishes the context within which the vision for a new curriculum emerged. Their experiences present us with an

interpretation of the events that generated the curriculum change and focussed its objectives and future trajectory.

Various features that emerged from the data serve as key reference points around which the interpretation has been developed. These include the political and socio-economic imperatives for change, the silence on pedagogical theorising, tensions between academics and legal practitioners reflected in the theory-practice debate, and the pretence of a “negotiation process”. The data from both sets of Deans (ex-Deans who were Task Group members and current Deans) was blended at various points to provide a complex and textured analysis of the experience of curriculum change and the translation of curriculum policy into curriculum implementation.

Section 5.3 traces a time-line from the transition to democracy in South Africa onwards through an ensuing decade of legal education that has witnessed a flux of external and internal influences shaping curriculum development in higher education. It then goes on to describe the lived experience of the data set of current Law Deans (Data Set 3), who have implemented the new curriculum and who experience it as a daily phenomenon. Next comes an appraisal of the extent to which the guiding principles formulated by the Law Deans in 1996, of integrating skills and ethical values and sensitising students to diversity, have informed law curricula. The themes of curricular choices that were made, historical legacies, institutional influences and the reality of everyday lecture room experiences are central to the analysis. Section 5.3 concludes with a review of the current state of legal education.

Chapter 5

Law Faculties and Deans, past and present

5.1 [Data Set 1] Baseline comparison of current LLB curricula

This section begins with an analysis of the table in Appendix 2, evaluating the law curricula from 17 Law Faculties against the standards prescribed by the generic SAQA LLB template. The analysis includes a review of the typologies of the degrees, indicating whether or not modularisation has been implemented. The emphasis within each faculty on various aspects of the curriculum was considered, i.e., the range of flexibility of subject choice within the degree structure, the number of skills modules and the extent of the inclusion of non-legal modules.

In general, it appears that the institutional history of each faculty, whether it be an HBU or an HWU, and whether it be a formerly English-medium, or Afrikaans-medium institution, dictates the type of curriculum adopted. Typically the formerly “liberal” universities (predominantly English, with the exception of Stellenbosch University (SU), have adopted a “liberal arts” emphasis in the four-year undergraduate degree (University of Cape Town (UCT), Rhodes University (RU), University of KwaZulu-Natal (UKZN), and Stellenbosch). It is interesting to note that both UCT and RU have in fact adopted deliberate strategies of setting extremely high intake criteria, to discourage students other than the highest achievers among incoming applicants from attempting the four-year degree. Generally the HBUs have followed the pattern adopted by most Afrikaans universities of following a “pure law” model that appears to be vocationally-focussed, attributable to the historic influence of Afrikaans academics at “homeland” universities. The influence of the philosophical approach of “fundamental pedagogics” at Afrikaans universities has been suggested as the basis for this vocational emphasis (Ruth, 2006).

Some faculties have attempted to differentiate their offerings by integrating a strong skills component within the curriculum (University of the Free State (UFS), UKZN, and the University of Pretoria (UP), while there seems to be a general absence across curricula on the explicit incorporation of ethics teaching, contrary to the original consensus principles for curriculum-making that were agreed upon by Law Deans in 1996. Essential “core curriculum” remains largely uncontested within a conservative discipline that appears to acknowledge a substantive element of doctrinal knowledge as essential content. The regulatory mechanisms within each curriculum, whether that is the rules that establish pre-requisite modules, restrictive flexibility or the inclusion of a significant number of elective choices from wide-ranging lists of offerings, reflect the interplay of historical, contextual and political choices.

In this section, I compare the curricula from all Law Faculties, as they appear in Faculty handbooks or websites, as of August 2008. A tabular comparison (Appendix 2) was constructed in order to arrange the material effectively. Curricula were assessed against the standards of the generic LLB qualification, which was registered on the NQF in 2002.⁷² The curricula have been analysed according to (i) the overall typologies (emphasis in each curriculum) paying attention to the proportion of legal and non-legal modules; (ii) the addition of skills modules; (iii) the incorporation of the explicit teaching of ethics within the curriculum; (iv) the degree of flexibility permitted through the inclusion of elective modules; and (v) the significance of the sequencing of topics, the inclusion and omission of particular topics in compulsory as well as elective modules.

In reviewing curricula from documentary evidence a preliminary understanding must be that the documents might not reflect what is implemented in practice. The approach of comparing “official curriculum” documents is a practical one that has to some extent been correlated by interviews with current Law Deans (section 5.3) and by my extensive personal experience and knowledge of the field. Through moderation of examinations from other institutions, conversations at SALDA meetings, regular participation at the Society of Law

⁷² See Government Gazette G 23845 of 2002-09-20. Available at:

<http://regqs.saqa.org.za/viewQualification.php?id=22993>. Last accessed 17 August, 2009.

Teachers of Southern Africa (SLTSA) conferences, and collegial relationships with other law academics at various institutions, my understandings go beyond a mere analysis of documents and thus the analysis presented is not entirely unreliable.

The SAQA registered template states that the LLB qualification aims to produce law graduates who have:

a systematic and coherent body of knowledge and an understanding of relevant concepts and principles;

a high level of cognitive and other generic skills including problem-solving and the practical application of principles; written and spoken communication, numeracy and computer literacy; and competence in applying knowledge through basic research methods and practice (SAQA Registered Qualification and Unit Standard Home Page).⁷³

Further aims are to produce graduates who are capable of postgraduate research and life-long learning and who display initiative, responsibility and the requisite ethical standards. Emphasis is placed on empowering graduates to play a role in developing legal institutions in South Africa, directed towards realisation of a just society based on constitutional democracy and the rule of law. The broad guidelines set by this template clearly allow for an extensive variety of interpretations, providing no prescription as to rules of sequencing or levels of complexity of knowledge. The conclusion has to be that such a vague and general description leaves space for almost any permutation or selection of content to be justified, within such expansive parameters. It would be difficult to argue that any one of the curricula in the table fails to meet these aims, such is their non-specificity.

The first notable distinction when comparing curricula across faculties is between those faculties that chose to retain year length modules, thereby avoiding “semesterisation”, as opposed to those in which every subject was modularised according to the dominant vision of the National Qualifications Framework (Ensor, 2002, p. 271). This framework prioritised credit accumulation and transportability of credits as an “appropriate response for higher education to globalisation” The idea of transferring credits and student mobility was founded on a notion of “equivalence of knowledge, which is established through the specification of outcomes” (Ensor, 2002, p. 273). This *credit accumulation and transfer* (CAT)

⁷³ <http://regqs.saqa.org.za/viewQualification.php?id=22993>

discourse aimed at relevance in the context of preparing graduates for the globalised workplace and was in accordance with outcomes-based educational principles. In the opposite camp stood the traditional *disciplinary* discourse in higher education, which regards education as an apprenticeship into disciplinary ways of knowing, and reflects an inward focus (introjective orientation). The disciplinary discourse emphasises analysis and critique, while vertical pedagogical relations are a characteristic feature (Ensor, 2002, p. 274). The policy documents (SAQA Act,⁷⁴ Higher Education Act⁷⁵), according to Ensor (2002), created ambiguity in allowing both discourses to co-exist, although the former Act is founded on the concept of credit transfer. This also created space for some faculties to assert their right to retain year-long modules, thus opting to emphasise the disciplinary discourse, while others “toed the line” by compacting all modules into semester-long blocks. Ideological assumptions appear to underpin these choices and the retention of year-long courses speaks of subverting one thread of the imposed outcomes-based framework.

Professional discourse (Law, for example) is identified as sharing “vertical pedagogical relations” in its emphasis on apprenticing students into its specific knowledge domain and allowing students only a limited degree of selection over curriculum. Typically, Ensor asserts, the professional/vocational discourse has a projective orientation, facing outwards, and displaying a preference for the credit exchange discourse in curriculum (2002, p. 274). In general, this assessment reflects my interpretation, yet there appears to be some subtle distinctions between law faculties. It is interesting to observe, from the comparative table (Appendix 2), how different faculties chose opposite approaches to modularisation. The trio of Western Cape universities (University of Cape Town (UCT), Stellenbosch (SU) and the University of the Western Cape (UWC) share little in terms of their historical institutional culture (white, English-medium; white, Afrikaans-medium; HBU) yet all chose not to adopt the semesterised approach to curriculum. It seems possible that their perceptions relating to regional competitiveness lay beneath their adoption of a common approach. A similar regional alignment is evident in Gauteng where the University of Witwatersrand (Wits) and

⁷⁴ Act 58 of 1995).

⁷⁵ Act 101 of 1997.

the University of Johannesburg (UJ), formerly Rand Afrikaans University, also historically focussed on different constituencies, but sharing a geographical market, elected not to divide their modules into semester-length courses.

There does not appear to be much dissension among faculties on the core components of the qualification, echoing Ensor's (2002, p.181) view on the limited selection of subjects available to students in professional discourse. In the 1996 proposals drafted by the Task Group of Law Deans (and representatives of the profession) there was agreement that the following were to be considered as core subjects for the LLB: Constitutional Law (including fundamental rights), Corporate law, Criminal Law, Law of Contract, Law of Delict, Law of Persons, Family Law, Law of Succession, Property Law, Criminal Procedure, Civil Procedure, Evidence, Interpretation of Statutes, Administrative Law, Law of Insolvency, Law of Negotiable Instruments, Mercantile Law (including Sale, Lease, Insurance, Suretyship and Consumer Protection), Labour Law, Conflict of Laws, African Customary Law, Public International Law, Jurisprudence, Roman Law, Legal History, Legal Skills (including language, communication, writing and legal reasoning skills). In England, this "core knowledge" in law curricula has been described as "a matter of myth and ritual, a rite of reproduction, founded in contents pages of prescribed textbooks (Ward, 2009, p. 1).

But selecting knowledge is "not a neutral, uncontested or fixed task" (Barnett & Coate, 2005). A tendency can be observed in universities toward discipline specialisation, which works toward keeping discrete knowledge bases separate. Personal bias is often evident in the selection and sequencing of materials, which reflects an exercise of power since these choices influence student ideas of key texts, concepts, views and approaches to a topic by the types of cases and examples used. Sommerlad comments that in England, despite the fact that widening participation in higher education and diversity within the legal profession have become explicit national goals, "overt closure strategies" continue to operate in law schools, reinforced through curriculum choices:

Law curricula generally continue to embody the classed, raced and gendered nature of the legal profession, and few law schools have taken on board the stricture that to embed widening participation they must "know (their) students...their interests, demographic background, motivation for undertaking

the subject, level of knowledge, and previous learning experiences (Sommerlad, 2008, p. 3).

It is interesting that in South African law curricula, Roman Law is taught as a “stand-alone” module only at the Law faculties of SU, UJ, and UFS, all of which were previously Afrikaans medium HWUs. Roman Law, for many African students, carries with it the negative associations of a remote, historically-imposed system. In general, although most faculties have included the agreed “core modules” with the same or similar names, it is clear that some faculties over the past ten years have chosen to accept or reject whatever they choose from this list of agreed subjects. Modules are sequenced at a variety of levels as an indication of the importance attached to such knowledge. African Customary Law (or Indigenous Law) is still taught predominantly at first-year level (nine universities); six faculties teach African customary law at second-year level (University of Pretoria (UP), the University of the North-West (UNW), University of South Africa (UNISA), Walter Sisulu University (WSU), University of Zululand (UniZul), and University of Fort Hare (UFH)); and UKZN and UFS teach it at third-year level. Only one university, UCT, places Customary Law in fourth year. It is not included as a compulsory subject at RU or Nelson Mandela Metropolitan University (NMMU). The listing of core modules alone thus gives no indication of the level of complexity at which the material ought to be taught, and faculties are at liberty to determine the weight which they attach to “core modules” by the sequencing arrangements within their own curriculum. Brownsword suggested that the sceptical view of curriculum design in Law is that although it appears as if there is progression in the gradual and incremental building up of core knowledge, in fact essentially the same black-letter exercise is repeated time after time, with “varying doctrinal content” (1999).

Cloete and Fehnel (2002, pp. 378-405) map out some of the institutional shifts that emerged as a consequence of increased market responsiveness in higher education and training sector. Four new archetypal responses to differentiation can be identified in association with, respectively, the following four institutional categories:

- (i) **Entrepreneurial institutions:** mainly former Afrikaans, historically advantaged institutions that are successfully acquiring new and lucrative learner markets, particularly among non-traditional students through distance education,

telematics and flexible programme offerings. This can be seen particularly in the curricula developed at UP and UFS, where a focus on practice-related modules aims to attract students who seek to obtain practical and vocational skills to enable them to enter employment expeditiously. Afrikaans universities offering lectures in English, such as UP, SU and UNW may be seen as seeking to attract black students by this means.

- (ii) **General formative (liberal arts) institutions:** these stress the broad development of the individual and the production of informed citizens; consciously non-vocational and concentrating on the undergraduate experience. UCT, RU and SU could be seen to form part of this category, whilst UKZN straddles this category and the following one.
- (iii) **Professional/technological institutions:** known for the strength of their professional schools- especially in the fields of medicine, engineering, architecture, law and commerce. UP, UFS and UKZN to some extent meet this description.
- (iv) **Vocational institutions:** with a focus on career education that provides preparation for direct entry into the job market but at a lower level than the prestigious professions; these tend to be universities of technology rather than academic institutions.

Along these different lines of response, the curricular choices made by Law faculties display two primary typologies: the first reflects a conceptualisation of the qualification as providing a broader education incorporating several “non-legal” components, while the second has a specific professional (vocational) Law-only focus. The typologies are:

- (i) **The old (HWU English language) “liberal arts” tradition:** this includes a selection of non-legal elective modules in the early years of the degree, in an attempt to replicate the former pattern of a broad undergraduate (usually humanities) degree prior to a postgraduate law qualification (Midgley, 2007). Ramsden describes the objectives of a liberal education as being to change “the way in which students apprehend and discern phenomena related to the subject, rather than what they know about them or how they can manipulate them” (1992). Prejudicial views of

studying law include features such as “rote learning of masses of cases and statutes, dry analysis, little theoretical, philosophical, moral or social content, or any interest”; the focus is on developing a trained memory and inculcated skills of analysis rather than a broadened mind (Oliver, 1994, p. 79). Militating against a liberal arts curriculum are “illiberal professional pressures, lack of resources, student choice, the impact of quality assurance measures, staff administrative burdens, pressure to produce research, student numbers and poverty” (Oliver, 1994, p. 80). Oliver adds that the professions expect more skills in less time and are effectively transferring the responsibility for skills teaching to universities.

UCT, RU, UKZN and SU furnish examples of this type of curriculum, each with a minimum of four “non-legal” modules to be taken in the first and/or second year. UCT, RU and UKZN are English medium HWUs regarded formerly as liberal institutions, with a strong bias toward the traditions of Oxbridge, while SU, although an Afrikaans HWU, has traditionally been recognised as the bastion of the enlightened Afrikaner intellectual tradition. UCT, RU and SU all have set extremely high intake criteria for students who wish to complete the four-year undergraduate degree, in an endeavour to ensure that only those students who are academically strong will attempt it. RU achieves this objective by not registering law students for the LLB in the first year. All law applicants must complete a first year of the BA or B Comm degree, and only if they obtain 65% in their law modules there are they admitted into the four-year degree in second year. UCT sets particularly high entrance requirements for admission to the four-year degree (42 points) and thus restricts their student intake, while admitting that 10% of their first year students are excluded after the end of first year. Students proceeding from an undergraduate degree to do law must obtain 65% in their first year law module in order to proceed with law in second year. These structural features appear to be attempts to subvert the intention of the policy-makers who introduced the four-year undergraduate law degree, in that they discourage students from pursuing the shortest route to graduation.

UKZN, on the other hand, accepts all students who meet the stated entrance requirements, which are noticeably lower than those of RU and UCT. In addition, 50 places are reserved in first year for students from designated groups who are underrepresented demographically; these students are admitted on the basis of their achievements in an alternative access test, where they do not qualify for admission to the Law faculty on the strength of their matriculation results.

(ii) **The law-focused (Afrikaans language) model:** in this model law modules begin from the first semester of the first year, with little or no space for non-legal subjects, and typically there is a proliferation of elective (law) modules in the final year. This model is also referred to as the UNISA model, adopted by the only distance learning Law Faculty at the University of South Africa (Midgley, 2007). Ironically, when the HBUs were established in homeland areas, many of the staff appointed during the apartheid regime were Afrikaans academics, who introduced the UNISA/Law focussed curriculum at HBUs. These institutions have invariably continued to adopt this pure law model.

Ruth (2006) explains the typologies of South African universities according to their historical origins. In this view, the HBUs had been established and staffed largely by Afrikaans academics, who were influenced by Fundamental Pedagogics and shaped by those specific “cultural rules and normative and legal frameworks”. This is why these institutions continue to follow a similar curricular framework to the formerly Afrikaans institutions. Historical institutional culture appears to play a significant role in curricular choices. UJ and UniZul do not offer any elective modules to students, preferring to prescribe a fixed curriculum. Examples of curricula that permit greater flexibility are: Wits, with four elective modules in third year and five or six in fourth year; UNISA, which allows for five elective modules; and RU and NMMU, which allow for a choice of four electives each in the fourth year.

Another variable in curriculum design for the LLB degree has been the addition of specific “skills” modules within the degree structure, as suggested in the categories affected by “institutional shift” described above (Cloete & Fehnel, 2002). The UFS has adopted a curriculum that has a Legal Practice module in each year of the degree, while UKZN and UWC also trace a skills “thread” through each of the four years. The first two universities

include a compulsory module on Accounting for Legal Practice, reflecting an orientation towards practice-related, commercial interests, while UWC retains Accounting as an elective fourth-year module. The cost of including the skills modules and Accounting for both UFS and UKZN is a reduction in flexibility for students. At UFS there is one elective module choice in final year, and at UKZN students may choose two final-year elective modules. UP similarly provides for students to make only two elective choices in final year, despite offering a most impressive and diverse range of optional courses. However, in scrutinising the curriculum at UP more closely, it is apparent that this faculty also attaches weight to compulsory practitioner-related subjects, such as two modules of Legal Skills in first year, two modules of Legal Practice in third year, two Criminal Procedure modules in fourth year, and the inclusion of other practice-oriented courses such as the Law of Damages, Third Party Compensation Law, and two modules of Criminal Law. The skills modules are examples of an “additive” approach to skills, in that they avoid the contextualised integration of practical legal skills into appropriate substantive or doctrinal courses.

Within the choices and number of elective modules on offer at each faculty is the further fine discrimination that can be made as to the emphasis upon particular subject groupings, e.g., commercial law subjects, procedural subjects, technology-related subjects, which generally reflect the special expertise of staff members at each faculty. This emphasis is often followed through to the offerings at Masters level, which reflect the same strengths of particular staff members. There appear to be limited categories of elective options at most Law faculties, predominantly grouped around business law subjects such as Income Tax or Revenue Law (nine faculties; it is a compulsory credit at UFS, Limpopo, UNISA, SU and UJ); Banking Law (seven faculties) and an increasing range of offerings including Internet Law, International Trade Law and other subjects that respond to the globalisation agenda. More currently challenging, yet more esoteric subjects, such as Gender Law are offered at only UWC, UKZN, Wits, UP (Critical Race and Gender Theory), WSU, and the University of Venda (UV). Although HIV/AIDS is a critical issue facing South African society, the Law relating to HIV/AIDS is offered as an elective only at six Law faculties: UWC, Wits, UCT, UKZN (Bioethics), UP, and at UFH as Medical Jurisprudence. These subjects appear not to advance

the high skills project or contribute to national economic growth and employability of graduates and therefore do not attract as many students.

Clinical Law, which is often deployed as a vehicle for skills or ethics teaching appears infrequently in curricula. Only two universities, WSU and at UV, offer modules explicitly named "Ethics", but it is my submission that other universities teach ethics to a limited extent in other practice-related modules, such as Legal Practice (UFS and UP), Professional Training (UKZN), Legal Skills (UNW) and Preparation for Law in Practice (UWC). Law Clinics have been established at most universities but the teaching of Clinical Law, presumably because it is a labour-intensive exercise, requiring intensive teaching by expert practitioners, is not often a prescribed module for all students. The reason for the marginalisation of Clinical Law, according to Kennedy, is that it is presented as not "truly relevant to the 'hard,' objective, serious, rigorous analytic core of law" (2004). Street Law, a community-related project, is offered only at UKZN, UV and WSU.

Gordon (2007) identifies several factors that contribute to curricular change in law schools. "Topicality" or the prominence of an area of law in the world outside of the law school, in the courts, in the legal profession, in politics or in the media will impose its mark on the determination of curricular inclusions and relegations. Changes in the social world are reflected in the contents and emphasis of text books, e.g. poverty law, issues of gender and sexual orientation, information technology and intellectual property protection. Gordon notes further that "topicality" will always be filtered through the "perceptual lenses and conceptual preoccupations and agendas of legal academics", (2007, p. 366) which ironically do not adhere closely to the real world of professional practice. The fact that practical topics, such as the calculation of damages awards, often are deficient in interesting underlying theory means that these are often glossed over in law school curricula. Gordon correctly suggests that internal curricular changes often depend on "internal intellectual change" (p. 367) or changes in theory, most often introduced by individual teachers who are receptive to inter-disciplinary insights and able to assimilate them into legal thinking and scholarship. External influences such as funding grants and student demands to have certain subjects taught may also exert some influence. In South Africa, I would argue that student demand coupled with national pressure from government to address issues of high skills

and economic growth have together played a critical role in determining curricular choices, notably in the range of elective subjects offered.

UCT appears to be the only Law Faculty where community service forms part of the official curriculum, in the third year, and in fourth year an integrated assessment project appears as a unique feature, despite the specific inclusion of this form of assessment in the SAQA generic LLB template (Associated Assessment Criteria, 10).⁷⁶

The failure of curricula to respond structurally and in terms of content to the changed landscape of higher education in South Africa has been identified as one of the key areas which impedes the success and epistemological access of students to higher learning. In the Ministerial Committee *Report on Transformation and Social Cohesion and the Elimination of Racism in Public Higher Education Institutions* the point is made in the section on Knowledge:

6.2 The growing awareness of the need for higher education institutions to 'provide intellectual leadership to society', including the recognition in some institutions, as raised during the Committee's visits, of a need for epistemological transformation, has not translated into any significant shifts in the structure and content of the curriculum to date. 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". This is not surprising, as epistemological transformation, according to one academic, "goes further than the curriculum; it is about *a priori* assumptions and a world view" (NMMU meeting with staff). In this sense 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. And it is certainly not conducive to the Africanisation of the curriculum (2008, p. 67)

In their Recommendations, the Transformation Commission Report suggests that undergraduate and postgraduate curricula be reviewed in the context of post-apartheid South Africa, asking the question: **does the curriculum prepare young people for their role**

⁷⁶ <http://regqs.saqa.org.za/viewQualification.php?id=22993>

in South Africa and the world in the context of the challenges peculiar to the 21st century?

(2008, p. 21, my emphasis).

It is in the context of this background that I wish to obtain a deep and nuanced understanding of the interplay between the original curricular vision that emerged in 1997 and the law curricula that were implemented at law faculties around South Africa. An in-depth examination of the dialectic between the academic qualification and the professional competency which graduates are expected to attain through this curriculum, along with the issue of “fitness for purpose”, particularly with reference to the three imperatives of diversity awareness, skills integration and ethics teaching, implicit in the vision of the curriculum planners in 1997, should provide data that will permit the development of theoretical understandings for enhancing this match.

5.2 Phenomenology as framework for analysis of experiences

In the analysis of the two data sets that follows, phenomenology is used as the analytical framework, providing both conceptual tools and a methodological approach. The methodological approach was consistently applied during the interviews, which sought to obtain “experience-near” data through extended personal discussions, based on trust and familiarity that facilitated subjective disclosures of “immediate experience”. The conceptual tools of phenomenology were originally the philosophical tools developed by Husserl, such as “epoche”, “intentionality” and “reduction to essences” and Heidegger’s notion of “*dasein*” meaning that human nature is always one of “being there”, amidst and involved with some kind of meaningful context (Larkin et al., 2006, p. 106). These constructs were intended to enable phenomenologists to make meaning from the immediate experiences of the world of others:

Husserl simply presupposes that we are in experiential contact with the world, and he declares that this contact, though certain enough, still needs to be understood on some fundamental level (1970, 187). Through a careful study of immediate experience, it is precisely the job of phenomenology to provide us with this understanding (Overgaard, 2008).

With the growth of phenomenology as research methodology, other variations such as IPA (Interpretive Phenomenological Analysis), (J.A. Smith & Osborn, 2003) have extended the repertoire of tools and the methods used. The conceptual tools are an “explicit and coherent existential anthropology, an ontology of the world as a network of meaningful relations” and “a method that is consistent with this ontology“(Brooke, 1993). Phenomenology’s concern with the “intrinsic meaningfulness” of things and, the “existential situatedness” of experience provides the conceptual tools

necessary to understand and articulate experience and insights which are both revealed and concealed in the movement from experience to theoretical formulation (Brooke, 1993, p. 4).

The notion that reflexively interpreting others’ subjective experiences must be done in a “sensitive and responsive” manner comes from Heidegger (1985), and recognises that the researcher, and the participant, is a “person-in-context”, who can only do the best job she can, given the personal constraints of her inherent epistemological and methodological capacity (Larkin et al., 2006, p.108). Throughout the analysis and interpretation my positioning has been disclosed and consciously placed in the foreground, to create the awareness that the constructed interpretation inevitably bears the impression of my own “situatedness.” I have also drawn attention to the fact that I can only access the experience of a particular person in a particular context, and that participant’s “relatedness to the phenomenon at hand”, i.e. I can only relate the experience of curriculum change by a specific group of individuals in a particular temporal and physical context (Madill, Widdicombe, & Barkham, 2001).

The strategic position I adopted for the analysis and for developing my interpretation is captured very well by Kidder and Fine:

Whether we agree with the word of informants or not, whether we even like them or not, we have an obligation to surround their words with analyses for which we are the authors....Partial, temporary and tentative, we have a responsibility to position ourselves in relation to our data and our position will not necessarily be the same as our informants (have no illusions- they will not agree with each other either) (1997, pp. 48-49).

Adopting this strategy also partially explains my reluctance in sending my interpretation back to the participants for review. My sense was that the political sensitivity surrounding

such a topic might become problematic if I were to ask the participants to confirm my interpretation of the experiences and events.

The goal of phenomenological analysis is to clarify the meaning of all phenomena (Giorgi, 2005, p. 77). Giorgi describes how the researcher has to adopt “a disciplinary attitude” to allow her to express the essential meanings of the phenomenon as expressed by the participants in the descriptions of their lived experience, through the disciplinary perspective. This entails clarifying the meaning of everyday experience by describing its disciplinary meaning (Giorgi, 2005, p. 81).

Two schools of thought on phenomenology present different emphases in the analysis of empirical data. The descriptive school (Dahlberg & Dahlberg, 2004; Giorgi, 1997) relies on Husserl’s and Merleau-Ponty’s work to claim that explicating a phenomenon’s general structure is a description of its essence rather than an act of interpretation, while van Manen (1997) and Willig (2007) follow a tradition of an interpretive-hermeneutical tradition that is tending more towards providing narrative interpretations and meaning-making, viewing phenomenology rather as “an investigative attitude that is informed by phenomenological theory” (Willig, 2007, p. 223). This attitude will be predominant in elucidating and theorising the data from Law Deans, who were part of the Task Group who experienced curriculum change in 1997, and from current Law Deans who engage in the curriculum implementation as part of their daily “lived experience.” It will guide and inform the process of eliciting and analysing data, as well as providing a conceptual frame within which to conduct the research.

In the context of legal education, this would mean interpreting the descriptions of the Deans’ and ex-Deans’ lived experiences in the context of, and from the situated perspective of a law educator. However, in using phenomenology as an interpretive tradition, it is recommended that the researcher bracket her preconceived notions and prejudices, to “give up manipulation of the phenomenon in favour of allowing this to show itself by an intimate communion with it” (Kruger, 1979). This delicate balance, between adopting a disciplinary attitude to interpret the data and bracketing preconceived notions and prejudices, meant that I had to constantly check that I retained an openness to the ideas

expressed by the participants, without imposing a personal judgement on the experiences described. Creswell (2007, p. 62) suggests that a new definition of bracketing may be appropriate if one is using the interpretive phenomenological approach of van Manen, which makes it “impossible for the researcher to become separated from the text” (1990) LeVasseur suggests a useful new definition of “epoche”, such as “suspending our understandings in a reflective move that cultivates curiosity” (2003).

As regards data analysis, in the literature on phenomenological hermeneutic research it has been stated that

In order to “understand” one must foreunderstand, have a stance, an “*anticipation* and a *contextualisation*”. This is what is known as the “hermeneutic circle”: one can only know what one is prepared to know, in the terms that one is prepared to know (Lye, 2003).

Because of the symbolic and self-reflective nature of our being, the hermeneutic circle does not close off, but opens up, as we revise our fore-understanding in terms of what there is before us. The constant process of new projection while reading is not a rational process, but is “an investment of the range of meaning practices”, which Lye (2003, p.5) describes as the movement of understanding and interpretation by the researcher. It is unavoidable that the text will embody the style of the author, the inscription of his/her individuality, the unconscious as well as the conscious understanding of and orientation toward the world and the subject area, known as “intentionality” in a broader phenomenological sense (Lye, 2003). While phenomenological research does not aim to generate theory, the production of theoretical formulations can be accommodated by the interpretive hermeneutic approach (Willig, 2007, p. 221).

5.3 [Data Set 2] Law Deans 1996 Task Group data

5.3.1 Overview and background of Law Deans’ Task Group data

The three participants interviewed contributed to the development of the proposals upon which the legislation initiating the four-year undergraduate law degree in 1997, was based.

All of them had attended the Legal Forums, where intense consultation among stakeholders and government officials, including the Minister of Justice, had taken place, in Cape Town in November 1994 and April 1995. Thereafter the government requested the Law Deans to appoint a Task Group representing legal academics and stakeholders from the legal professions to develop proposals regarding the change to a single undergraduate law degree. The proposals were to be considered by the Department of Justice as the basis for legislation that would effect the change in legal education.

The three participants' voices represent "elite informants", a researcher issue which is discussed in the research design and methodology chapter (section 4.9.1). When interviewing elites in a policy setting, the researcher should be aware that the policy arena is like

a game board upon which organized groups vie for control....They play chess with people, programs and institutions...and they delight in the strategising, bargaining and posturing of policy-making (Marshall, 1984, p. 236).

Although I was conscious of the elite status of the participants as Law Deans (and the activist lawyer as a leading articulate role player) the "policy setting" was not immediately obvious to me until I had begun the interviews. From the start, there was a defensive tone that ran through the data, or else the political significance of the events communicated itself as a negative reluctance, a sense of loss on the part of the academics. Only one of the ex-Deans had been an active proponent of the new legal qualification. Even though more than ten years had elapsed since the time of the deliberations around the change to legal education, feelings and emotions were clearly aroused in re-telling the events.

This "policy setting" aspect was brought into sharp focus by the contrasting views of two of the participants (ex-Deans; Participants 1 and 3) and an activist-lawyer informant, who I came across serendipitously (see section 5.3.1). The ex-Dean who had supported the ANC-government's positioning (Participant 2) adopted a much more conciliatory tone of optimism throughout his interview, as although he had been aware of the conflict and tensions at the time he saw his role as that of a mediator who had "tried to move things forward". In the main sections of the analysis, I have adopted a technique of inserting the comments of the activist lawyer within a text box whenever it contradicts or confirms the

opinions of the participants, so that there is a form of internal verification or a triangulation device operating alongside and within the interpretation of the data.

Despite the apparent participation of the Deans' Task Group in the process of policy making, the words of the two opposed ex-Deans describe their experience as one in which they were marginalised and their voices were muted. Participant 3 stated that⁷⁷

*X and Y (ANC politicians) were all making these huge speeches that anyone who dares to say that they want a five year LLB is against transformation and wants to have the old South Africa back. You know then, that was a very good rhetorical device to shut people up. Ja, I know a lot of people who were against it; they all muttered about it, but really at the meetings very few people actually spoke up against it, you know (Participant 3).*⁷⁸

These events appear to have been dominated by symbolic political imperatives rather than a concern for addressing substantive issues implicit in transforming legal education. The academics' inability to play a meaningful part in the process, due to the effectiveness of the political strategies of powerful political bureaucrats and activists who steered the process, led ultimately to compromise. Participant 3 was aware of the outcome of the "policy negotiations:"

Ja, it was quite clear it was going to happen (Participant 3).

The settlement, however, reflected some "give-and take" on both sides in that the law educators were left to resolve the curricular and implementation issues of a new shorter undergraduate qualification, with few constraints, allowing them to effectively do "business as usual", or in some cases even to subvert the intentions of the policy-makers.

The vision that informed the new dispensation was neither a shared, nor a particularly well-articulated vision, which left the possibility of multiple interpretations open to law faculties.

⁷⁷ Italics indicate that the exact words of the participants are used.

⁷⁸ The Task Group Participants (Data Set 2) are referred to by numbers (Participants 1, 2 and 3); while the current Law Deans (Data Set 3) are identified by letters: Participants A, B, C, D and E. Some use of quotations from both data sets has been made to cross-reference data where this is appropriate in the analysis of the two data sets.

The lack of shared understandings had significant consequences regarding the successful implementation of the change that was made from the “top down” (M. G. Fullan, 2007).

I think there is was basically the idea of academic freedom, that people should be able to teach what they want, you know, that there shouldn't be a central [ahhh, um], except on the most general level, of what the LLB should be. That each university should be free to decide what is important and I think also [um] just the sheer impossibility of getting all 20 law faculties to agree to what exactly should be in there, because there were very different views so in the end people thought well, look, we can, if I remember correctly, we can all say that our core subjects must be in the curriculum (Participant 3).

The new vision for legal education was not informed by any research findings or theoretical model, and no plans were ever considered for any appraisal of legal education at the time (Woolman et al., 1997). Asked whether there were any discussions about curriculum or pedagogical implications, Participant 3 replied:

I don't think at these meetings of the Minister and Liaison Committee, I don't think there were any discussions at that kind of level (Participant 3).

Arguments in favour of an undergraduate degree has been made by a group of legal academics from other African countries, where the schooling systems had been based on the undoubtedly superior model of the English “A level” standards. One of the current Deans (Participant B⁷⁹) mentioned that a lobby of “foreign” Deans in the period 1994 to 1996 had been strong proponents of a shorter law degree at the consultative forums. He commented,

the academics from Africa who all had three-year LLB degrees and therefore they could not see why we had to go (the postgraduate route)...and they were all, if you look at all the leadership at that stage, in Black Universities, were mostly foreign...East African and West African....And they then pushed extremely hard to get to this three-year LLB because that is what they had, which then legitimises their own qualifications. But what one forgets is that they came out through A Levels (at school) (Participant B).

These foreign academics from other parts of Africa constituted a sizeable enough group to provide “a sectoral opinion” (Ruth, 2006). In legal education this was certainly the case in

⁷⁹ Participant B was one of the current Deans from Data Set 3, whose comments were brought in at this point because of their particular relevance.

terms of securing additional support for change. Participant 2, an active proponent of change added,

I pointed out that in Commonwealth countries that is the model; although they have a different educational system and they have a higher standard, where kids do an extra post-matric year...but they have this undergraduate law programme; so it wasn't a highly revolutionary thing we were doing in terms of legal education....We could join the Commonwealth guys and we can do an undergraduate law degree, and not just a B Proc, but one that is going to focus on proper skills that turn out a better all round student (Participant 2).

This type of policy borrowing, in which international referents are used to legitimise policy adoptions, is one of the defining features where policy plays a powerful symbolic role, particularly in a state that has only recently joined the global community (Spren, 2004).

No data or researched projections about the state of schooling in the context of South Africa in the 1990s had been taken into account when deciding on an undergraduate LLB. The legislation that effected the new policy on legal education simply provided the bare statutory regulation without specifying curricular details, which were left to individual faculties to determine and implement.

The vagueness around implementation issues invites the question ten years later of whether the aims of the leading policy actors have been achieved. Participant 1 described the nature of the consensus and the motivation for the agreement that was attained.

We agreed on the four-year degree for a number of reasons: the one was that it was clear that one had to get uniformity and it was clear that every law school had to clean up its degrees and we had to stop throwing in these bits and pieces, that there should be some sort of interchangeability (Participant 1).

The aims of the policy-makers had been clearly articulated as: increasing the number of African graduates, creating a uniform legal qualification that would dispel the notion of the quality of lawyers being related to the length of time that they had studied at university, and the important economic question of reducing the cost of studying to qualify as a lawyer. These factors were all intended ultimately to enhance access to justice for all citizens in the new democracy, as well as to effect social justice in the widest sense. The data, particularly from Law Deans ten years later, suggests that there are serious reservations regarding the

quality of the graduates who have experienced this new curriculum and concern over student success rates in the degree.

The guiding principles that were to inform curriculum development for the undergraduate LLB were: skills were to be integrated into the curriculum, ethical values were to be explicitly taught and students were to be sensitised to living in a pluralistic society (Philip F Iya, 2001; McQuoid-Mason, 2004, 2006, 2008). The varying extent to which these themes have been translated into official curricula was canvassed with each of the Law Deans, to develop coherence with the data developed from the comparative curriculum table in Appendix 2. After ten years, these principles seem to have been implemented with limited success and in isolated “pockets” at a few law faculties.

The Justice Ministry’s thrust was to transform the justice system entirely, in order to promote equity and protect human rights, and to enhance its own credibility within the newly democratic society. Constitutional values, such as equality, access to justice, the right to education and the assumptions that all societal institutions should reflect the demographics of the society, underpinned the demand to transform the judiciary, legal education and the profession.

5.3.2 A dissonant voice

A significantly different voice, representing an alternate view of the proceedings, emerged from a conversation with a NADEL activist lawyer who had also attended the Law Forums. He had not originally been identified as part of my sample, but I elected to pursue an interview with him, after an opportunistic social introduction to him.⁸⁰ I believe it added balance, as a conflictual voice who could relate the events through a different lens from that of the middle-aged white ex-Deans. He had been a youthful activist-lawyer, engaged in subversive activities prior to the unbanning of many anti-apartheid organisations. He had travelled to Sweden and other European countries as part of a delegation of lawyers, to review possible models for the future legal system in anticipation of an ANC victory at the polls in South Africa. This dissonant voice was elicited as a foil, or sounding board, against

⁸⁰ Interview held on 20 May, 2008 in Durban.

which to contrast their views and interpretations of the policy-making process. His view provides an alternate lens through which to understand the data. All comments from this informant have been set in text boxes to indicate that his voice was not part of the sample of participants.

As set out in the government documentation establishing the Legal Forums, this body was not envisaged as

a decision-making forum; neither was the intention to emerge with a set of resolutions arising from it. Nor did it replace the ongoing consultation between the Ministry and the various role players. Rather, it was an integral part of the broader process of democratic consultation in the transformation of justice in South Africa (*Proceedings of the Legal Forum on Legal Education, 1995*).

According to my activist-lawyer informant, the focus was:

to look at the existing legal education programmes in the country. The status quo, the old, and look at whether this was serving the purpose of the new South Africa and what would have to be done to redress all the shortcomings, disadvantages and difficulties that were in place from the past.

The political imperative was endemic to numerous societal institutions including education. In law particularly, an articulate lobby of professional politicians, themselves often legally trained, had anticipated the watershed moments of transforming education on a grand scale and were well prepared for the generally reluctant academics, who were silenced in the process. A crisis in the form of the under-representation of African lawyers, due to the cost of qualifying as a law graduate, and difficulties of access into the legal professions, had to be urgently addressed in a tangible way which would also signal a clear symbolic break with the past. This summarises the powerful political forces in the 1990s that were harnessed to reshape legal education in a way that addressed societal needs and responded to external global pressures, without regard for pedagogical concerns. Each of these three aspects: the political imperative, the social or socio-economic drivers and the pedagogical domain will be discussed in turn. They emerged from the data of the Task Group members as central themes, which have been woven into my interpretation of events, combining the “insider perspective” (borrowed by Smith from Conrad, 1987), “informed by engagement

with theoretical constructs”, whilst remaining focussed on the experiential claims and concerns of the participants (Larkin et al., 2006, p. 104).

5.3.3 Policy as political symbol

From the conversations with the participants, it appears that the decision to introduce a shorter undergraduate law degree as the only qualification for entry to the legal professions was widely canvassed and contested at, and even before, those large gatherings at the Legal Forums. There was a build-up from as early as 1991, exerting pressure for a changed legal education system, that lead up to the final denouement (Midgley, 2007). The naiveté of the academics was in believing that they would influence policy-making and effectively challenge the political tide. Carefully planned strategic tactics had already been devised which led to a “no contest” situation. The *Proceedings* of the 1995 Legal Forum specifically notes that the disputed terrain of legal education divided the participants down the middle:

The discourse throughout the forum...was determined by what appeared to be quite clear differences of opinion between what may be called the “mainstream” law associations, some universities and the “progressive” law associations. These differences...were generally symptomatic of the nature of our historical legacy in the field of law,...the perceived role of the “mainstream” law associations in the past and what appeared to be in the view of these associations, an attempt to nullify the good and to lower standards (Preface, *Proceedings of the Legal Forum on Legal Education*, 1995, p. ii).

The participants clearly expressed a sense of optimism and enthusiasm at the original idea of a consultative forum, where open and inclusive discussion would take place amongst all stakeholders. This process reflected a complete schism from the approach of the previous justice authorities in South Africa’s past.⁸¹ A large gathering of politicians, activists,

⁸¹ The history of the Minister of Justice in South African politics carried particularly sinister associations from the apartheid regime. John Vorster, prior to becoming one of the most disliked Nationalist Prime Ministers of South Africa in 1966 had formerly occupied the office of the Minister of Justice. <http://www.britannica.com/EBchecked/topic/632925/John-Vorster>

This role during the years of the apartheid regime had been a key position, from which had originate many pieces of draconian legislation that violated human rights and imposed harsh racist policies – such as the Prohibition of Mixed Marriages Act, Act No 55 of 1949; Natives (Abolition of Passes and

government bureaucrats, practitioners, non-governmental organisations (NGOs) and academics were brought together to “negotiate” concerns about the entire justice system at a national level. The emergence of new possibilities and options in designing a law curriculum to meet the needs of a new society generated eager anticipation and promise. This sense of excitement at the novelty of the situation is almost tangible in Participant 1’s comments:

It was an invitation to come and talk about the profession and how to deal with legal education and it was the first time in many, many years that there had been any sort of communication. I thought that the Law Fora were wonderful. I found it a bit chaotic; nothing much was achieved... now suddenly there was Dullah Omar (then Minister of Justice), not only was he listening, but he was there. He was present, greeting everybody. He made sure who everybody was and there were huge bodies...all the faculties, the professions. These were big conferences and Dullah Omar was at every one...It was actually wonderful to have a Minister of Justice who was willing to consult (Participant 1).

The underlying sense of the Minister as an astute politician, strategically “working the crowd” surfaces in comments made by the pro-government activist lawyer:

Short of decreeing things, you know, at a cost that might well cause tensions, the ANC stopped there, and said look, we have brought you to these things, we heard you and we wanted you to put your views and listen to others and we are working on consensus and if you see that, if you are part of this new South Africa, you have got to move forward with us...(Activist-lawyer Informant)

It was clearly a critical and historic moment, drawing together previous opponents: political activists, old guard bureaucrats, academics and all possible stakeholder constituencies. The type of political posturing that was evident in the deliberations is described by Yeatman (1998) as the type of politics that is “internal to the policy process and is shaped by it”. As

Co-ordination of Documents) Act, Act No 67 of 1952; Terrorism Act of 1967; Reservation of Separate Amenities Act, Act No 49 of 1953; Group Areas Act, Act No 41 of 1950 to name just a few. Thus the contrast in 1995 was peculiarly notable. <http://africanhistory.about.com/library/bl/blsalaws.htm>. Accessed on 14 September, 2009.

he explains: “Policy occurs when social actors think about what they are doing and why, in relation to different and alternate possible futures” (quoted in Gale, 2003).

Participant 2 (a supporter of the undergraduate curriculum) recalled in an almost wistful tone, sensing a need to convince or persuade the listener, while reminiscing about past optimism and hope,

No, you know those were hellava optimistic years. That really was the mood (Participant 2).

The initial optimism and an expectation that change was necessary were described by the participants – “most universities knew that change was needed” (Participant 1) – while Participant 2 foreshadowed the compromise conclusion in the early stages when he commented that,

what everyone realised (was): that it was going to have to be changed; there was a call for transformation, so let’s do it in a way where we get all the Deans on board, even if we have to make compromises on both sides, and I think that was really what came about (Participant 2).

The period 1994-96 in South Africa saw some of the most dramatic social changes materialise as newly negotiated policies were generated to eradicate the traces of apartheid. Sweeping changes began to affect every area of life. Significant legislative enactments addressed the most glaring inequities: the constitution, the establishment of the commissions on human rights, gender equality and the dismantling of institutionalised apartheid. However, in its ongoing development of policy to the further reaches of social interaction, the ANC-dominated Government of National Unity (GNU) had to be constantly mindful of the fragile stability of a country that had narrowly avoided an escalation into a violent conflagration. This GNU was in effective control from the first democratic election on April 27, 1994, until 1999, when the term of office of the first Parliament came to an end.⁸² National reconciliation, often explicitly endorsed by Nelson Mandela,⁸³ was made the first

⁸² [http://en.wikipedia.org/wiki/Government_of_National_Unity_\(South_Africa\)](http://en.wikipedia.org/wiki/Government_of_National_Unity_(South_Africa)). Accessed on September 14, 2009.

⁸³ “Mandela reassures whites in plea for conciliation” Article in *Sunday Times*, Sunday 1 May 1994.

state priority, with the aim of “forging unity and common agreement on what constituted the central tasks of social reconstruction and transformation” (Kraak, 2001).

The symbolic function of law as part of the mechanism, or as one of the key structural features employed by the apartheid government to enforce their ideology and to block access to justice and to the legal profession by black citizens, played a powerful role in the eyes of the new pro-government role players:

Law was the instrument of apartheid and if this is what it delivered then you know it needed a complete overhaul (Activist lawyer-informant).

The stakes were high: transforming the legal profession, the judicial system and legal education presented a threat to powerful interests in the existing legal order. The task presented an enormous challenge, both in real terms and in metaphysical terms to the new power elite. According to Midgley (2007), government had always been indirectly involved in legal education, while law faculties had produced graduates who met the demands of the legal professions. After 1994, the Department of Justice became the “lead stakeholder” with the formally marginalised Black Lawyers’ Association (BLA) and National Alliance of Democratic Lawyers (NADEL) in support. The urgency for transformation and the subsidiary impetus “to dilute the control and influence of the pre-1994 elites” required a total revision of the legal system (Midgley, 2007). Tracing the history of the “negotiated process” which introduced the new law curriculum in 1996 is a first step toward understanding the current situation.

Jansen (2001b) identified the importance that was placed on formal participation and consultation in the process of policy-generation, regardless of its final outcomes, especially in education. According to Lodge (2002) in his review of policy processes within the ANC and the Tripartite Alliance (African National Congress; South African Communist Party; Coalition of South African Trade Unions (ANC-SACP-COSATU)), policy-making was participatory and even democratic in character up to the 1994 election. Participation was regarded as a source of legitimacy, although Jansen (Jansen, 2001b) observed that while groups were invited to participate, their views did not necessarily prevail. Even where broad participation in debates had initially been encouraged, the final policies might not have been widely

discussed and criticised; participating groups had unequal power and expertise in different policy forums, and participation sometimes emerged at a point where the policy framework had already been decided (Jansen, 2001b). Maassen and Cloete describe this aspect as the multiplicity of stakeholders, “clusters of interest groups”, amongst whom

the dominant mode of decision-making is one of negotiation and consultation, with an extensive use of ‘sounding-out.’ Societal participation takes place through organised interest groups. There is little co-ordination across policy sub-systems and the domain of government interference is dependent upon power relationships (Maassen & Cloete, 2002, p. 25).

These features capture the seemingly ineffectual effects of the participation of legal academics in the revision of legal education. However, the Ministry seemed to have been acutely aware of not raising too much animosity. The activist lawyer commented:

Many law academics were very worried but the Government at the time and Dullah Omar, the Minister of Justice, was also very careful. He was radical in ideas but I would say very moderate in some cases, conservative, in his application in that he didn't want to upset any of the institutions and I think that it was a political strategy too...

This pro-government activist reflected the need for broad consensus: the Minister was cautious not to destabilise the fragile political equilibrium, and he had many other pressing challenges to which he would have to dedicate energy. This NADEL activist-lawyer went on to explain that the Minister had to be selective in “picking his battles” and to a certain extent had to rely on good will, and substantial or sufficient consensus, to move the issue forward. Once the airing of opposition views had taken place, the programme of change had to progress.

The initial euphoria of “having their say” soon wore off for the participants when the opposing positions became apparent. Participant 2 commented that

right from the beginning, there was almost that schism...that BLA guys tended to be pushing that integrated type of agenda. The NADEL guys were okay for sort of, a mixed, some sort of training maybe - a reduced level of doing things and then the traditional white universities: some of them didn't even want to change...they wanted to stick with the way things were and they wanted to make sure they could retain the five year (qualification)...at that stage there

was quite a schism between the historically black universities and the historically white universities (Participant 2).

The field had been cleared for the inevitable confrontation that would resolve the details of the policy shift. The teams appeared clearly defined on both sides, and the play-offs could begin. Beneath the surface of a “negotiated change”, the authentic imperatives that shaped the legal education agenda emerged as: political factors such as the equity imperative; (socio)-economic factors, and the professional-pedagogical tensions that continue to exert an influence in legal education.

5.3.4 Political factors: the equity imperative: towards a uniform qualification

The vision of a new society, based upon an empowering Bill of Rights at the heart of a constitutional democracy, required effective lawyers to enact the new values. The view of proponents of change was vividly depicted in the statistics, to justify their consequent urgent demand to increase the number of African practitioners. In 1996, “85% of the legal profession was white, while 85% of the population was black” (McQuoid Mason, 2006).

What we had to recognise then was the fact that we had approximately 12 0000 white lawyers and less than 2000 black lawyers around 1994/95 in South Africa, in a population of just below 40 million then, and so the vast majority of people didn't have access to legal services....(we had to)...fast track as many students from a practical timeframe of action, so that we would have more black lawyers in South Africa at a much quicker rate because...it would have taken 50 years to try to bring some level of semblance, of say levels, or equity, about the numbers and black lawyers being empowered (Activist-lawyer Informant).

Recent statistics included in Chapter 1 reveal that ownership of law firms in South Africa is still predominantly in the hands of whites. The inclusion of data here once again is merely to illustrate information graphically rather than importing a quantitative approach into the present enquiry.

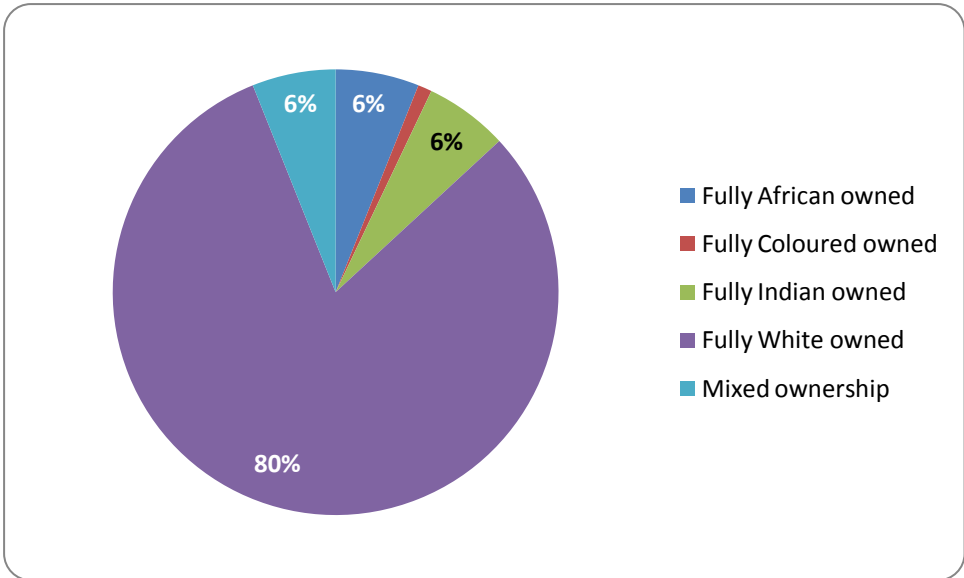


Figure 12 Equity ownership of law firms by race

(National Survey of Legal Profession, 2008: LSSA)⁸⁴

The participation of rates of students in the 20-24 age group was also shown to be racially skewed and unsatisfactory in terms of achieving equitable access for all race groups Table 1. While graduation rates for students enrolled in four-year degrees are unsatisfactory across the entire higher education sector for all population groups, the participation and success rates of African and coloured students reflect particularly poor success rates.

The overall number of law graduates in South Africa in 2008 is given in Table 10.

Table 10 South African Law graduates disaggregated by race: 2008

(Data provided by LSSA: LEAD National Statistics, 2008)

Race of Law graduates 2008	African	Indian	Coloured	White
Number graduating from all Law faculties	1316	311	228	1499

⁸⁴ <http://www.lssa.org.za/Index.cfm?fuseaction=home.page&PageID=6599779>

This latest data represents a significant increase in the number of African graduates, in that there is almost parity between the number of African and white graduates. However, in real terms, the number of African graduates has not nearly reached the expectations and needs of our transformed society by reaching approximate parity with the number of white graduates after ten years. The activist-lawyer informant's comments about equity (above) have been confirmed by the empirical data, now available ten years after the introduction of the attenuated LLB degree.

In terms of the composition of the South African population, this number of African law graduates remains disappointingly low, when the composition of the total population in, for instance, the province of KwaZulu-Natal is:

African: 84.9%

Indian: 8.5%

White 5.1%

Coloured: 1.5%⁸⁵

The politicians' focus was on speedily addressing the skewed demographics of the legal profession, establishing a single uniform degree to facilitate access into the professions for all lawyers and in the process reducing the cost of a lengthy professional education. The "conservative" alliance based their resistance to change on pedagogical foundations, such as maintaining academic standards, preparing quality graduates for professional practice through a liberal arts foundational education and the difficulties experienced in teaching students in a reduced time period who had suffered the disadvantage of apartheid schooling. Not only were the differences between these opposing views based on past legacies, but they related also to the new dominant group's essentially pragmatic approach to appearing to address the requirements of the new society. Jansen's (2002) thesis about over-investment in the symbolic value of educational policy suggests it rested partly on the

⁸⁵ http://www.elsenburg.com/provide/documents/BP2005_1_5%20Demographics%20KZ.pdf

government's inability to deliver on the multiple promises made to address a plethora of social issues once they had opted for the economic policy of GEAR (2002), which will be expanded below.

Structural and systemic features were identified as operating as impediments to black graduates wishing to enter the legal professions. A central tenet of the "left" (pro-government) lobby was the elimination of historical inequities within the professions, which related to the differing qualifications with which practitioners entered the profession. The government's insistence prevailed, despite a range of alternate options proposed by some academics, such as a "ladder" system of various exit points. Midgley (2007) describes a National Conference on Legal Education in October 1991 where a call for rationalisation of the various legal qualifications was made, but nothing came of the proposals. He contends that the initial target of the government and BLA/NADEL group at the Legal Forums had been to scrap the professional entrance examinations which "sustained the hegemony of the professional practitioners" (2007). The goal had been, following the pattern of other African countries, to have a single four-year university qualification which would include a strong practical component, preparing graduates to go straight into practice without having to pass any additional examinations, or complete a period of articles or pupillage. According to Midgley, the politicians believed that the professional bodies were carrying out "gate-keeping" functions by setting requirements such as the unremunerated period of pupillage for advocates, followed by a bar examination which was notoriously difficult to pass. Attorneys were required to secure articles of clerkship for two years before passing a professional admission examination.

The legislative requirement of passing a module in Latin, and two other language courses, in order to enter the legal professions, had for many years been regarded as a further obstacle or "bottleneck" to impede the progress of aspiring black lawyers. This is endorsed by my experience as a lecturer of many years' standing. This aspect of the informal or hidden curriculum (Kelly, 1989) conveyed a clear message to marginalised black law students. The perceived inequality between the five-year graduate who emerged with two degrees, as opposed to the B Proc graduate who obtained a four-year qualification (or a three-year B

luris graduate) which only entitled her to practice as an attorney, was seen as correlating closely with the racial distribution of candidates entering the profession, and also with the profits to be gained in practice. Typically black graduates took on criminal law and legal aid work, in small, often “one-man” practices, while white graduates entered the lucrative world of large corporate law firms or practiced as advocates. As the NADEL activist lawyer explained:

So then there were these, almost institutional, that is, obstructions to black lawyers as well, because they were confined to doing the dregs of the legal work: that is ambulance-chasing, legal aid and criminal work. So criminal lawyers: that was what you were earmarked for. It was a handful of civil lawyers who managed to get into that field and survive.

Systemic limitations of this nature served to sustain and reproduce the power relations within the legal profession. Ten years later, the effect of a single qualification, coupled with the imperatives of employment equity legislation has ameliorated the potential for a limited number of black graduates who have not been too severely disadvantaged by a schooling system that still represents a major impediment to their academic success.

Another thrust that came through forcefully in the consultations was an attempt to standardise the LLB curriculum, despite the fact that traditionally each university had determined the content of its degree. This was resisted by most of the academics who negotiated a compromise of identifying “core” subjects which were agreed upon. Participant 1 stated:

There was also a strong cry for a uniform degree. Every faculty, every school must offer the same courses and very, very different views on what those courses should be. What I recall of them (the meetings) was just a sort of strong, strident demand...for equality; one level of education and making access to the profession easier (Participant 1).

No consideration appears to have been given to the capacity of any institutions to offer the shorter qualification to more students, since no discussion of the specifics of educational quality or implementation were engaged in at this point. Although the challenges faced by HBUs were raised at the Legal Forums, again no constructive plan was put in place to address historical inequities or to support disadvantaged institutions in implementing the new qualification.

A prescribed curriculum would never have been acceptable to the academics: in order to gain their co-operation, the government protagonists conceded on this aspect and had to rely on the good faith and judgement of the educators to adapt their curricula to respond appropriately to a changed higher education context and constituency.

5.3.5 Socio-economic exigency: South Africa as global player

A critical shift in focus occurred: from an elitist academic emphasis in legal education to a demand for a new breed of lawyers, possessed of a practical grasp of the emerging societal realities, reflective of market trends within the context of a developing democracy. Participant 2 alludes to this shift as:

The move was that most guys were going into the attorneys' profession and needed to get all the necessary skills and those skills have got to include literacy, numeracy all that sort of stuff (Participant 2).

The activist participant was well aware of the confluence of economic imperatives and the new societal demands that resulted in the need for a shorter degree with a strong skills component:

when you left university, you had very little practical, if any; no knowledge of how the courts work, how you would practice as a lawyer in terms of civil and criminal procedure (Activist-lawyer Informant).

An unexpected alliance between the pro-government lobby/HBUs and the attorneys' profession during the negotiations on legal education appears to have been a pragmatic trade-off, in response to a totally different economic interest and concern. In order to secure the support and favour of the new Minister, and to guarantee their continued status and modes of operating, the attorneys supported his proposals and threw their weight behind the demand for a single, shortened academic qualification.

A cynical view of the organised (White male-dominated) attorneys' profession from the "leftist" lobby placed an interesting slant on the motives of the attorneys' profession:

The profession was under serious pressure because of the collaboration with the apartheid regime. The establishment was on the run; they were virtually now reduced to mice...because they could have been legislated into a servile position if they bucked the system. But being clever lawyers and realizing it was their bread and butter; money was the issue for all these lawyers. As long as you don't interfere with their money-making opportunities they will say apartheid was evil and I am sorry we will fix this, we will do everything (Activist lawyer-informant).

This evocative image of mice scurrying to avoid detection hints at the vulnerability of the profession in a rapidly changing environment where powerful men had to safeguard their personal interests by aligning themselves in the most strategic way with the new power elite. The same activist pointed out that along with democracy came the return of multi-national corporations into the commercial sector of the South African economy, bringing for lawyers the potential for lucrative new legal work, particularly in fields such as intellectual property law, trademarks, copyright and franchising law. The changing nature of professional legal work and the “internationalisation” of legal services on a global scale which became apparent in South Africa at that moment have been referred to in the review of scholarship in Chapter 2.

The academic participants described the attorneys’ rationale for supporting the government standpoint as being based on their claim that graduates emerged from university without adequate practical legal skills. This was then forcing the profession to reluctantly take responsibility for the skills training phase of legal education. The attorneys’ profession would support the Department of Justice’s proposals for change, provided that skills were to be given greater emphasis in a shortened degree. The academics’ opposition to this model of “trade school” training is consistently articulated in the international literature and was expressed by Participant 3 thus:

I think legal education is always going to have this dichotomy between universities who want to do more than just create legal practitioners and the profession who think well the university is there exactly to do that. Why else would they want to do this? Why would they want to teach law etc? If it isn't to create practitioners, you know, so that is why there is a natural assumption in the practicing profession is to put more practical subjects in there... which is, you know, I suppose it is to be expected but it is a bit short sighted but it works like

that all over the world and where universities don't resist that then they do become just vocational training services (Participant 3).

A clear “mismatch” exists between the ambitions of legal scholars and the “prosaic and utilitarian expectations and desires” of law students. Legal academics tend to see the law and its operation as:

ambiguous, dynamic, and alive; a repository for ideas, values and culture, a method of practical reasoning; Janus-faced, a force for liberation or authoritarian control: a worthy object of academic study in its own right (Wilson & Morris, 1994, p. 101).

This contradiction is echoed in the rhetoric of the academics who wish law to be seen as an intellectual discipline, part of the established academy, rather than a vocational training school. A broad liberal arts degree as a pre-requisite to a postgraduate law degree, focussing heavily on academic inputs, was favoured by most legal academics. Participant 3 explained it thus:

So my view has always been that we have students for four or five years and it is the only time we have to teach them the actual substantive law. In other words, to think, and the skills to handle the law...the skill of finding law, reasoning in law, reasoning creatively (Participant 3).

According to the government proposals, to ensure that appropriate skills training was standardised during their period of articles of clerkship, all candidate attorneys would be required by law to attend the Practical Legal Training Schools (established by the Law Society of SA) to prepare for the admission examinations set by the LSSA⁸⁶. It remains a matter of contention still between the academics, represented by SALDA, and the LSSA as to whose cost and whose responsibility it is to develop graduates’ “practice-ready” professional skills – a theme which will be developed in Chapter 7.

Within the legal professions, the equality/efficiency debate was extended to the theory/practical skills dichotomy. In this dualism, a narrow technocist perception of skills is set against theoretical, contextualised learning of legal doctrine and principles. “Skills”, in the technocist perception, are not the same thing as “knowledgeable practice” in the sense

⁸⁶ Law Society of South Africa.

of transferrable intellectual capacities that equip graduates to think critically and creatively and enable them to act on those judgements with discernment (G. Johnstone, 1999, p. 2); “practical knowledge” and professional “know-how” remain distinct from this conception of “legal skills”

The “legal services revolution” which Johnstone describes refers to the changing demands made on lawyers in modern society as a result of increased access to legal services for more citizens, the challenges of professional specialisation, and the internationalisation of law (1999, p. 4). His critique of a liberal legal education which is polarised against a “vocational training school” approach to legal education can be directed at several features of a “liberal” education:

- (a) while it may develop students’ intellectual capacity, it fails to address aspects of personal development included in conceptions of self-reflection, relating successfully to others, living according to ethical principles;
- (b) it would exclude “practical knowledge” and skills founded upon thoughtful intellectual challenges;
- (c) it fails to address the inculcation of appropriate attitudes in students that encourage them to make a beneficial contribution to their society;
- (d) it perpetuates the pedagogy of teacher-directed doctrinal topics, which fail to engage the interest of students (G. Johnstone, 1999, p. 6).

Government economic policy had a significant impact on the new shape and contours of higher education. From the original emphasis on equity and democracy, characterised by the early RDP, a shift occurred, once the ANC was entrenched in the seats of government, to GEAR, a strategy focussed on the economic imperative of South Africa re-entering the global economy (Kraak, 2001). The effect of this policy re-alignment on education policy was reflected in the competing discourses of equity and efficiency which were evident in the Higher Education Act of 1997.⁸⁷ The equity agenda emphasised education as a powerful means of securing social justice, moving away from an apartheid past toward entrenching human rights and effecting equal access for all to socio-economic rights, including education. In direct contrast, the high skills agenda looked outward toward education as a

⁸⁷ Act of 1997.

means to equip graduates for contribution toward national economic development and participation in a global economy, and set a premium on ensuring “efficiency, accountability and quality in education, in the face of resource constraints (Ensor, 2004; Ntshoe, 2002). Viewed another way, there is an apparent contradiction between the market-led economic policy orientation of the state and the dominant discourse of rights, social justice and nation-building in education, underpinned by values diametrically opposed to those of apartheid (Chisholm, 2005).

The NQF provided a structural platform for this trend (one which was echoed in the international literature from Australia and England) through the neo-liberal discourse of education as developing vocational skills to produce a labour force that could compete in the global market. Higher education internationally has had to adjust its focus to meet government-imposed quality assurance measures, accountability demands, increased student enrolments, and changed expectations from state and students regarding skills integration, all in a context of reduced funding (Scherr, 2005; Thornton, 2004).

In summary, through the data it had become clear that the economic imperative in the form of the skills discourse was shaping the direction in which education policy was moving; a shorter skills-focused qualification was more cost-effective; and the result would satisfy some of the demands of two key stake-holders.

5.3.6 The cost factor at the level of individuals

At the individual level, the cost of a lengthy university education was one of the priorities established as a fundamental driver for curriculum reform during the legal education consultations. Two participants referred to a postgraduate law qualification as a “luxury”, anticipating that this economic issue was to be a sensitive, contested matter that was at the heart of the opposing views. As Participant 2 (a Law Dean who supported change) records the debate,

It was that many kids (sic) could not afford that extra year of a five year programme: that was really what the debate was about...what we were picking up, particularly from the black practitioners and the historically black universities and everybody else, was that four years

was what we needed and we needed to reduce articles because of the burden on the disadvantaged (Participant 2).

In Participant 3's account,

the historically Black universities, they believed that the LLB was a luxury because it was a five year postgraduate degree (Participant 3).

But the academic participants' apparent detachment and their emotionless statements stand in stark contrast to the impassioned representations from a proponent of the shorter qualification, the activist-lawyer informant:

That's how it was...so seven years for a black person who comes from generally an impoverished background – what a long journey that is. And it was a hopeless journey because after five years or four years of study, if you did the B Proc, it was really not going to help you at all because only when you started doing your articles do you really learn the practice.

This core theme for the policy-makers, reducing the time period for aspiring African law students so that qualifying became an affordable possibility, was fundamental to the vision for the undergraduate law degree. But recent data indicating the small percentage of graduates who complete the degree in the minimum time, clearly implies that this objective is not been fulfilled. In 2004, the National Plan for Higher Education reduced the benchmark expectation for the percentage of students who should complete a four-year undergraduate degree in the minimum time from 20% to 18%, in response to poor graduate rates in the sector (Breier & Mabizela, 2007, p. 288).

The high cost of a university education has become a key causative factor in the failure of many African students to complete a degree, according to (Breier & Mabizela, 2007). The Transformation Committee Report (2008, p. 16) recorded that the financial assistance provided to students through the National Students' Financial Aid Scheme (NFSAS) is clearly insufficient, and recommended that the Ministry of Education consider leveraging resources to provide additional residence accommodation. Scott et al. (2007) emphasised the fact that socio-economic factors profoundly affect performance in higher education. They observe that research into the complex relationship between student funding and academic success is necessary to ensure that the government's efforts to assist socio-economically

disadvantaged students, the majority of whom are black, will ultimately enhance the cost-effectiveness of NFSAS, because this is directly linked to equity of outcomes. Thus economic factors played and continue to play a significant role in higher education, affecting students' academic success and their access to the legal professions.

5.3.7 Pedagogical considerations

There was a notable silence throughout the deliberations in relation to pedagogical considerations and the question of the educational soundness of reducing the period of study for the LLB degree. As Young notes, pedagogy was “not a central theme” (2001) in the debates of the early 1990s, when the focus was understandably on more systemic issues. His contention is that issues of pedagogy only became more significant once the process of implementation of educational policy-making had to be undertaken.

The changed academic environment, addressing the needs of students from disadvantaged schools and academic literacy issues in particular for students whose first language was not English, was mentioned by each participant. In different ways, they raised the challenges inherent in the changed higher education landscape in their conversation, yet none of these significant problems and the question of adequate resourcing for their redress, played any part in the government's decision to reduce the number of years for the LLB degree. Participants 1 and 2 stated the case in the following terms:

A lot of that [literacy, numeracy skills]...was lacking when the kids were coming from the education system itself. [There were]...huge problems with undergraduate teaching which the law schools hadn't encountered previously because of the number of students coming from disadvantaged backgrounds (Participant 2).

We were admitting people to our LLB from historically disadvantaged universities and even where they had BAs, B Comms, even LLBs, we found that they were hopelessly unsuited to studying the LLB at [our] University; they just couldn't cope. So we knew that there was something really rotten in the system of education throughout the country (Participant 1).

We had been talking for some time about ways to deal with this and we had offered bridging courses and academic support classes, and academic support mentors and all the rest. None of these was working very well; I think it is going to take decades before law schools will really

have a consistent group of students who have the ability and the necessary educational background, linguistic skills (Participant 1).

The honesty inherent in these latter remarks is inescapable, although the politically correct discourse of a deficit model that prevailed and continues to prevail in many HWUs underpins the comments. In 2008, the veracity of these comments remains indisputable:

As for success, despite the ongoing efforts to provide academic development and support programmes, the throughput and graduation rates of black students remain low. However, as the cohort analysis (in Table 8) indicates, although white students do better than their African counterparts, this is relative and the fact that 41% of white students drop out without graduating, suggests that the problem is wider than merely the poor preparation of black students. It raises questions about the quality of schooling as a whole and its impact on the gap between school and higher education. This requires that a systemic solution is necessary to address the problem (Ministerial Committee on Transformation, 2008, p. 64).

All participants responded in the negative when asked about the discussions concerning pedagogical issues, stating that such issues were never raised. A comment by Participant 3 indicates this:

I think there was much creating of curricula at the last round [1996]; it was very much driven by non-intellectual principles; you know it was about increasing access and things like that. It wasn't about what the training should be about (Participant 3).

It was made clear, too, that there had been no communication between the two Departments of Justice and of Education as to the possible changes (Midgley, 2007). This type of isolated planning and lack of coherence is perhaps indicative of the inexperience of the new government officials, and their failure to grasp the mechanics of functional change implementation. Jansen (2004) explained the lack of coherence in policy-making at that time as typical of a pattern of “political symbolism as policy craft”, which was followed by the “implementation vacuum”, which describes the lack of capacity and baseline information to foresee the consequences of implementing policy. Participant 1 elaborated:

Each Dean of course would take it [the new qualification] back to the faculty for approval, for the creation of a new curriculum, get university approval of course, and then it had to go

through the Department of Education. It had to go back to the Department of Justice which had to rewrite the law (Participant 1).

Various academic objections to shortening the period of study for lawyers were articulated by some of the HWU Law faculties, on the grounds that a postgraduate student presented as a better candidate to be trained as a lawyer. Participant 3 elaborated:

We were against it because we thought it would not really...it is not the optimum way of teaching lawyers....it is better if somebody knows something about something – they have a vantage point from which to actually evaluate law...what we actually prefer is people who come to us with a degree in something else...you have to have people who are formed already, and they have done a major at university, in English or History or psychology, up to third level or whatever, you are a person with views (Participant 3).

And as Participant 1 explained,

the attitude of the ...Law School, and certainly my attitude, was that the ideal situation was to have an undergraduate degree that preceded an LLB; an undergraduate degree without any law subject; that was the ideal. A broad education...for all the reasons that are so obvious one needs that as a lawyer. And the whole notion of a broad education was something...well, it was being lost and we realised it was a luxury. And certainly there were people...even in the faculty who were dead against the four-year degree and who also wanted to retain the status quo. If I had been given a choice, as I said, I wouldn't have even allowed a five year curriculum.... I would have preferred six. That was a personal preference (Participant 1).

Misgivings amongst some academics, like Participant 3, about the pedagogical soundness of a change in legal education were represented as a focus on academic excellence and the competency of lawyers:

We were sceptical about (a) whether it would be good for the students and (b) whether we could get good enough students who could actually keep up with the, the...with the pace, because we were determined to keep the level the same, so we thought we would allow them in but they must cut it with the others- (Participant 3).

The direct reference to retaining standards and the process of “othering”, implicit in “letting them in” resonates with the comment by Midgley (2007) that the profession and the academics’ position appeared to be “defensive” about maintaining academic and

professional standards and the status quo, but could partly be attributed to a desire to maintain the status of the profession in society. Their stated reasons were that the public should be protected from lawyers who were inadequately trained. The implications of this type of education were the cost of additional years of education, studying predominantly theoretical or doctrinal subjects and emerging without vocational legal skills. The graduate would then embark on further legal training specific to whichever branch of the profession s/he choose to enter, provided s/he was interviewed and hired by a firm of attorneys, or accepted for pupillage by the local Bar Council.

5.3.8 Process matters: tensions between legal profession and legal academics

In reality the battle lines were historically drawn largely along lines of class, race and privilege, between, on one side, the previously advantaged white universities and the advocate's profession, and on the other the historically black universities who found a surprising ally in the attorneys' profession, thus blurring the seemingly clear-cut race-based divide. The traditional rift between the attorneys' profession and the Bar reflected the assumed superior status of advocates. Historically, they had been required to have a postgraduate LLB qualification, in addition to the financial means to undertake pupillage without any salary for at least six months, and then to bear the overhead costs of starting up in practice without partners. The individualistic nature of their work, their right to appear in all high courts, the more academic nature of their work, and their potential for higher income generation set their interests apart from those of the attorneys' profession.

Participant 3 recalls:

There were differing views. I remember at one meeting X [name omitted] from the Bar opposing the four-year LLB. So, you know, in a way, the people for and against were more or less as one would expect...typically trained themselves by means of an LLB, who thought that the academic training was very important. Once you start practising at the Bar you will probably use your academic training more...because you have to think up arguments (Participant 3).

However, the surprise in the legal education deliberations had certainly been the support given by the attorneys' profession for the introduction of an undergraduate LLB. The

tensions which this provoked between legal academics and the LSSA (the professional association representing attorneys) continues to reverberate more than a decade later in the form of the ongoing SALDA/LSSA debates over the appropriate content of LLB modules, the nature and extent of skills taught in the university curricula and the quality of graduates.

5.3.9 Gamesmanship: the “tug-o-war” that never was

In all Western countries, law schools are typically in a tug of war between three aspirations: to be accepted as full members of the community of higher learning; to be relatively detached, but nonetheless engaged critics and censors of law in society; and to be service-institutions for a profession which is itself caught between noble ideals, lucrative service of powerful interests and unromantic cleaning up of society’s messes (Twining, 1982, p. 2).

This tug of war metaphor aptly captures the conflicting demands that were felt by the participants as they engaged in the legal education deliberations of the 1990s in South Africa. Gale (2003) also employs a game metaphor– “playing the hand you have been dealt” – in describing the different negotiation strategies adopted by policy-makers in higher education. Bourdieu & Wacquant (1992) refer to the “tacit rules” of the game in policy negotiations, while Colebatch (1998) refers to policy role-players as having “positions in the game” The irony of this imagery is that it suggests that the legal academics had a part to play, and were engaged in the negotiations, whereas the reality as I interpret it is that the joke was on them. They were never part of the “game”. Data that describes the strategies employed by the politicians, publicly engaging the legal academics in debate, and then muting their voices, to arrive at a symbolic (pre-determined) outcome that satisfied the political constituencies of the policy actors speaks to an astute mastery of this “craft” or “game”

This sense emerges from the academics’ comments as they relate their narratives of the consultative process. The discrediting of the legal academics’ standing or legitimacy for input to policy-making was effectively achieved through a number of clear manoeuvres. They were labelled as gate-keeping reactionaries, insensitive to the hardships suffered by black students and black graduates attempting to access the rewards of the white (male)-dominated legal profession, and they were accused of producing graduates who were ill-

equipped to meet the demands of the new society, and of seeking to retain white privilege by supporting the apartheid old guard.

This theme is echoed throughout the participants' descriptions of the unfolding process. Their enthusiastic naiveté turns into the dawning realisation that they have been out-manoeuvred, out-played, and relegated to the margins of policy decision-making, which in fact has already been determined before this "charade" of consultation began. The air of resignation and reluctant acceptance of being beaten and having to accept a compromise resolution intrudes gradually as the process unwinds.

5.3.10 Compromise and consensus: "Get on the train or get left behind"

From open consultation and optimism the path descended to outright confrontation. Alliances were formed along new lines and strategies deployed to discredit views that clashed with those of the new policy role players. Some mediation efforts sought to secure a working agreement that would allow both sides to "save face", by making concessions to the opponents. Finally there was an overwhelming sense of "stalemate", of having to reluctantly concede, since it became clear that the policy decision had already been made. Thus "broad consensus" in the form of compromise on both sides allowed a "settlement" to be achieved. This impression of the situation is confirmed in the comments of the activist lawyer:

It was aggressive. Some kept quiet because if they said things they would be embarrassed because they were conservative....Then you had all the other progressive, radical, liberal people. It was a confluence which liberated the liberal, creative radicals, all of them. They had the run of these conferences because all of these ideas came out freely....And they were so strong...I think the others realised: look, as the phrase is used...the train is leaving the station and you had better get on the train or get left behind.

This type of interaction during the policy-making process is accurately captured in Ball's (1994) view that "particular policy actors tend to dominate particular contexts". Despite the overt enthusiasm for open consultation in a spirit of congeniality, the emerging reality seems to have been that the new power elite were able to chasten opponents, the former

“heavyweights” or powerful role players, into reluctant submission in an atmosphere of new political correctness.

Academics sensed the shifting “balance of power” during the consultative process. Some of the comments convey an initial optimism: acknowledging that the Department of Justice was clearly driving the process at the forum, but conceding that issues were “properly canvassed”; others give the impression of some political naïveté in the confidence that correct procedures were being followed: *“I don’t recall any hidden agendas”, “I don’t think...in relation to legal education that they had a particular agenda”*.

Another participant realised that the process was underscored by a well-planned strategy: deployed by the proponents of change, through the Minister, the officials in the Justice Department and other pro-ANC organisations, this strategy was to characterise opposition to a new four-year undergraduate law degree as a reactionary standpoint set against any change to the status quo. Participant 3 expressed a clear sense of this:

and so we tolerated the abuse as much as possible....even people who were in their hearts against it, found it very difficult to argue against it because...[names omitted] were all making these huge speeches that anyone who dares to say that they want a five-year LLB is against transformation and wants to have the old South Africa back. You know then, that was a very good rhetorical device to shut people up. I know a lot of people who were against it; they all muttered about it, but really at the meetings very few people actually spoke up against it, you know...but people did raise things, but not very forcefully and I think this dynamic of the protagonist, managed to introduce into it that “don’t dare to say that, because then you are the old guard,”...I thought that stifled the opposition to it (Participant 3).

This feature of the change process, in which the policy-makers who have the power to impose change merely explain what is to happen, and then respond with disdain, “shrugging off as ignorance or prejudice” the position of those who do not accept their view, is indicative of the “crisis of reintegration” which Marris (1975) describes as inevitable in implementing change. The policy-makers have themselves assimilated the changes during the planning phase, and they have had time to make sense of them, whilst those who are required to accept the innovation have not. Treating the implementers as “puppets dangling by the threads of their own conceptions” is how the conduct of such reformers can be

described. It represents a failure on the part of policy-makers to acknowledge the time needed for others to experience the “impulse of rejection”, followed by a meaning-making phase (Marris, 1975). This dichotomous response, encompassing both rejection, loss and anxiety, followed by attempts to respond and make sense of change, is also conveyed in Schön’s (1971) term “dynamic conservatism”, which I have adapted for this context as “reactive conservatism”. The innate conservatism of lawyers, coupled with their need to develop some response to change, produced a “knee-jerk” response, which is reflected in reactive defensiveness, intentional subversion of change intentions, or cosmetic, surface appearances of change that belie the objectives of the innovation.

Woolman, Watson and Smith (1997), a group of South African legal academics, blame the “compliance of so many academics who seem perpetually fearful of being labelled “anti-transformationist” as contributing to:

the irreconcilable tension between the immediate redistributive demands of a hugely ambitious social reconstruction programme and the costs of educating and training the group of professionals required to make this process of reconstruction work (1997, p. 57).

The fact that opposition to change was interpreted purely as a reactionary stance, with no consideration given to the educational realities or pedagogical implications, signalled the overtly political nature of the exercise. Reporting on a similar higher education policy-making process in Australia, where government confronted academics, a Sydney newspaper report described the failure of the academics as “a failure to understand modern policy making which is a public phenomenon, and if you haven’t got the skills or drive to engage publicly, you lose” (Sydney Morning Herald, quoted in Gale, 2003).

The activist lawyer recalls the capitulation of the academics in the following terms:

So with the academics, it wasn't easy to make any serious, radical changes, but there was a buy-in...in the spirit of: that's okay, let us compromise, and the compromise was they would chop it down to a four-year LLB.

The colourful image of “chopping” down a degree (tree?) once more suggests the distinct sense of secret delight that this activist lawyer took in seeing the conservative academic

lawyers having to capitulate to political pressures. An air of resignation is apparent in the expression of Participant 3, who opposed the changes and who identified the deliberate political strategy, when he added (with regard to the pro-government lobbyists):

I think they were very strong. They had a mission and they were going to introduce the four-year LLB, and well, they just had the meetings, as it were to ...where they succeeded (Participant 3).

The general tone of resignation in the recollections of opposing academics is clear. The notion that capitulation was unpalatable and distasteful, a bitter pill to swallow, is clear in the comments of Participant 1:

A realisation came after several of these consultative meetings had taken place that the way forward was clear:...there was a strong view that had been solidified around the notion of an undergraduate law degree....My view was that it was something that had to be swallowed, but that a minimum of four years of study was required and that one had to insist on the stringency of the qualification and the rigor of the courses (Participant 1).

Participant 3 expressed the view that

there was no one who said: "Wow! We are really doing a fine thing here; now we are moving forward. We are making legal education better". We had the sense that it was being forced on us in the sense, in the sense of you know, well, forced; that everyone was doing it so you couldn't really not do it (Participant 3).

The isolation and marginalisation of the "liberal" white academics, who during the years of apartheid had most likely been critics of the Nationalist Party regime, must have come as a surprise to them. Midgley reported that: "not all universities spoke with one voice" (2007), in the sense that the opposition was clustered around the English (liberal arts) universities and some Afrikaans universities whose "degrees were more academic and suited to the five year qualification route". Now that a constitutional democracy had finally been realised without armed confrontation, a particularly desirable outcome from the perspective of intellectual liberally-minded lawyers (left-leaning, in a South African political context), the irony was that they were not going to be taken seriously in their contribution toward establishing a new order. Their input into the process was either sidelined or disregarded.

From the perspective of the ANC lobby, clearly very little distinction was made between representatives of HWUs, whether they had supported apartheid or been liberal opponents of it. This positioning reflects Ball's view that "only certain voices are heard at any point in time" (1994). Power shifts at critical moments in policy-making are captured in the view that

Changes in government are telling moments for policy actors. They can result in the repositioning of policy actors within policy contexts, a reduction in their status and/or legitimacy as policy producers and sometimes their exclusion from policy-making contexts altogether (Gale, 2003).

The process inevitably led to compromise on both sides: the "old guard" from HWUs having to reluctantly accept that there would be one degree, of four year's duration, for all lawyers. The government had to accept that for this concession, they would permit universities to continue to offer two "streams" – including the option of the LLB as a second degree – and they would have to rely on each faculty to implement the curricular changes as they saw fit. The BLA had originally insisted on a three-year qualification, so for them too, the agreement on a four-year qualification reflected a compromise. As Adler, Maller and Webster point out in their analysis of the compromises made during the period,

A compromise requires a mutually shared sense of stalemate. It also requires the parties to accept that the costs of not compromising outweigh the benefits to be had from standing firm (Adler, Maller, & Webster, 1992, p. 308).

So, the "negotiation" phase ended with the Law Deans being given a mandate to draft proposals which would function as the basis for legislation to introduce a single four-year undergraduate law degree.

5.3.11 The written proposals: "sting in the tail"

Once general consensus had been achieved, the Minister delegated the writing of the proposals that would be submitted to the legislative drafting team to a Task Group selected by the Law Deans (chaired by an academic) and including representatives from the legal professions. The Task Group was given a wide mandate to develop proposals in line with the general "consensus" view that had emerged at the end of the Legal Forums.

As the activist lawyer perceived this,

The Minister just said: "Look, we are in transition now and we need to transform – we have all agreed that the education has to be transformed. These are some of the guidelines that have been raised. You guys go away and see how you are going to do it" He wasn't directive about it (Activist-lawyer Informant).

The Proposals of the Task Group (Appendix 10) contain no reference to any research on educational matters which might have informed the change to an undergraduate law degree, nor was there any mention that detailed research with regard to the state of legal education was to be commissioned and conducted before decisions were taken about the structure of the degree:

We find it difficult to understand how legal academics in this country could embark on a policy transformation of such magnitude without first making an organized effort to collect and to make sense of the relevant data (Woolman et al., 1997, p. 55).

The mandate of the Task Group was, in the words of Woolman et al., "to amplify agreements already reached and to suggest models for implementation of those agreements" (1997). They argue that with such an extensive mandate it seems remiss that the Task Group never engaged others in "sophisticated discussion, as well as some research, with regard to competing models of transformation". The mandate elevated the status of their task to a level far higher than producing "just reports" about the "deliberations and proposals of a disparate group of people". But considering the urgency with which the Minister was driving this project it does seem unlikely that the Task Group would have been empowered or resourced to undertake prolonged research or engage in intellectual debates on "competing models". Reading between the lines, the Task Group seems to have determined to tackle their task as expeditiously as possible in an attempt to produce a document that would consolidate what were considered to be critical issues in legal education in the future.

The task seems to have been achieved without much haggling, and the result was a document which emphasised academic freedom, autonomy and the integration of skills and ethical values into the new LLB curriculum. In merely stating these terms, the proposals reflected wording that is very close to the ACLEC Report (1996), paying “lip service” to generally accepted views at the time. The extent to which these principles were in fact to be integrated into curricula at each law faculty, or inform a vision for the new LLB was open to a variety of understandings, always predicated on the positioning of the participant *vis-à-vis* the perceived position which their institution occupied in the legal education landscape.

Participant 1 mentioned that,

at most, there was a vision of better teaching and of incorporating skills training in the degree...Yes, I suppose there were grand ideas about inculcating the values of democracy and of the constitution. You know, having human rights course in every degree...but we already were...long before, long before, from '94 (Participant 1).

Participant 2, who consistently had supported the new project, expressed the following view:

I was hoping that what we would do is we would send out kids also who would be more sensitive to diversity and all the rest of it and have basic skills which they could use. So I really thought or hoped that we were going to change the whole culture if you like. You know, the culture in a way was designed for white sort of public school kids basically, and they had all the moral values and everything else, and that type of thing; but when you live in a diverse society, a lot of kids are not exposed to those sorts of things. Even some of those are questionable – their values must be examined and so, you know, it's something that everybody should be exposed to. I was hoping that we would not try social engineering, but conscientise our kids, so that they come out with something useful (Participant 2).

Participant 1's hopes for the degree were rather vague and nebulous:

that universities generally would offer a rigorous four-year degree, would actually do more law teaching than there had been in the LLB previously, and less of the four years were devoted to other subjects. Rigorous teaching, some kind of...I don't think I had any great hopes for legal education as a whole, as that was always up to the individual universities. For [my university], what I hoped for, was more teaching by skilled people and a better calibre of student. I think there was a feeling that that [African Customary Law] was something that

should be in every curriculum – that that was transformative, plus the ethical values (Participant 1).

The sense that elitist HWUs would continue to do “business as usual” is evident in this view. There is a cursory nod to the idea of curriculum change but clearly no intention to fundamentally transform the curriculum or legal education in a profound way, and certainly no intention at such an institution to increase access for students from poor educational backgrounds. “Rigorous” is used in a sense that conveys an increased degree of difficulty, where only “a better calibre of student” might succeed. And so, the ground rules for curriculum change already seem to have been laid.

Participant 3, also from an elitist HWU, shared the view that individual institutions would retain their positioning and was clearly disdainful of the new degree. He commented on the vision for the undergraduate degree as follows:

well, it depends on, I suppose, visions, individual visions developed in the faculties where, you know...what they wanted out of the four-year LLB, you know, how one would create the students that you wanted. What kind of a product you were producing? But I think, from the Ministry of Justice’s point of view, there wasn’t a vision about what they wanted out of it. Well, or let me put it...the vision was “practising lawyers” – that is people who are minimally qualified to practice. The bare minimum that you need, because I think the philosophy was “shorter is better,” because that gets more people into the profession, so it means that the driving force and the philosophy was to open up the profession, you know. Give people licences to practice (Participant 3).

Academic freedom, which in this particular context would imply the freedom to teach the new degree according to your own vision, was touted as a guiding principle in the final proposals. According to Participant 1:

I think you might have gleaned from the report that one of [our] greatest fears was the infringement of academic freedom. And so [we] spent a lot of energy in defending the right of each school or each faculty to determine what was in the curriculum. There would be flexibility, and there would be autonomy and there would be the possibility for each law school to do its own thing, but there wouldn’t be or there shouldn’t be degrees to call “Mickey Mouse” degrees or “Mickey Mouse” courses offered, and that couldn’t be dictated (Participant 1).

The “business as usual” agenda was set in the foreground of the proposals. This message to government was that Law Deans would go along with the new degree, but they were not going to be dictated to by government or the professions as to how they structured their degree or what proportion of the curriculum would be devoted to substantive law, skills or ethics. “Academic freedom” and “autonomy” thinly disguise the intention to carry on “doing their own thing”. This “sting in the tail” was in my view, the Law Deans’ way of retaliating after losing the “game” at the negotiating table. Their revenge was in securing for themselves “carte blanche” to devise new curricula and continue to do what they wish, within the confines of a four year undergraduate degree structure.

The option to retain the LLB as a second qualification for students who had already graduated with a Legal Studies major (two years for an LLB), or for students who had any other undergraduate degree (three years to complete an LLB) was firmly entrenched, to appease those academics who had reluctantly agreed to compromise on the four-year LLB. Participant 2, in his mediator role, explained the compromise, which clearly indicated the intention already of some faculties to continue with “business as usual”:

*So **they** said: “Okay you guys, we are going to reluctantly go along with this four year degree, but we want to keep the option to keep the five year degree...”*

*And so **we** said: “Look okay you guys, you can do that, but your pre-eminent one [degree] has to be the four-year [LLB]. You can’t say you are only going to accept students for the five-year programme; you have to offer them the four-year degree, make it available. Those students who want to do that...but, you can’t shut the door and say we are not going to offer the four-year degree”*

***We** sort of kept it open for University A and B and those sort of guys who wanted to do that...I thought we would get a nice integrated degree...but I am sure some of them thought this was a complete encumbrance “**We** will pay lip service, **we** will agree but **we** will just carry on doing as usual (Participant 2, my emphasis).*

This participant had anticipated the response of those HWUs who planned to subvert the project. Participant 1 was clear from the outset:

We resolved at the time that we would counsel students to do an undergraduate degree first (University B) (Participant 1).

Participant 3 expressed a similar view:

because we had to introduce the four-year LLB, we introduced it. Of course we had to create the curriculum, in which we tried, as much as possible, to preserve the idea of our BA LLB (Participant 3).

The proposal document itself reflected the possibilities that were left open for individual faculties:

(the report) was insistent that universities who wanted to could still offer the three streams: the plain undergraduate degree, plus the three-year LLB; and the combination degrees and then the four-year undergraduate degree (Participant 1).

What happened when the legislation was passed introducing the new degree was that each Law Faculty was obliged to offer the new shorter degree and so a flurry of activity took place at each institution, devising what should go into the four-year curriculum. Although many academics clearly had resisted the idea of the shorter qualification, it is interesting to note that all participants were in agreement that the task of curriculum design was fruitful and positive in terms of individual faculties. Participant 3 recalls the process in detail:

most people here, everyone was very reluctant; there was no person who was really enthusiastic about the four-year LLB and in the end you know. We had various meetings and then, unfortunately, we started on the restructuring of the curriculum, and we had endless faculty meetings and breakaways and workshops to work through it. So those were the kinds of things we did; so it was a positive process but, as I said, the negative shadow was that we were doing it in order to, well, you know, compromise. You know with something that we really didn't think was really a good thing on the whole, but we, because in the process of making the four-year LLB curriculum, we also made the whole curriculum for all the other stream as well, so that was a new approach to that...the academic staff spent a long, long time rethinking what had to be done and changing the curriculum. The new curriculum was determined, I think, in about 1998...there were constant refinements on what we taught (Participant 3).

Participant 1 explained the re-curriculation process in similar terms:

There was in fact real engagement and I think within faculties themselves, but certainly amongst academics. It was very valuable. There were long discussions about what should be taught regionally...within the Law School there was very heated debate, over a long period

about what the new curriculum should look like. Whether there should be Arts and Commerce subjects, and whether there should be electives (Participant 1).

Thus what emerges is in each context, the curricular response that developed out of the historic moment reflected the individual histories, cultures, values and ethos of each institution, each faculty, and even the individual departments, fulfilling the prophetic words of Trowler (2003): “expect different outcomes in different locales”. The way in which the “vision” of the originators of this law curriculum for a democratic dispensation was interpreted and implemented varies according to the pre-existing understandings, political willingness and contextual settings.

By quickly delivering a set of proposals that were in line with the Department of Justice’s intention to introduce a new law qualification, the Task Group solidified their claim to “academic freedom”, which, translated roughly, meant “leave us alone to do whatever we traditionally do”. By strategically following the terms of the ACLEC Report, they secured the autonomy for each Law faculty to determine its own future:

The authors of the ACLEC Report are keen to place control of the curriculum in the hands of the law schools because they believe that law schools will use this control to ensure that the curriculum is vocationally relevant....We expect that in practice law schools will respond to the market, that is to the demands made by students and the providers of legal services. The providers will be able to keep law schools informed of the areas of law which they consider to be essential or important....[T]hat law schools should be left to decide for themselves, in the light of their own objectives, which areas of law will be studied in depth, which only in outline, which (if any) shall be compulsory, and which optional, provided that the broad aims of the undergraduate law degree are satisfied." (ACLEC, 1996, p. 64).

Thus the Task Group could justify their approach, relying on the legitimacy of the English report, which, ironically, would satisfy the globalisation thread that was starting to run through the discourse in South African higher education at that time. Becoming “a global player” implied following the trends that were clear in other Commonwealth countries and adapting them to the local context.

5.4 [Data Set 3] Current Law Deans' data

5.4.1 Introduction and overview

Section 5.4 of this chapter presents data from five current Law Deans: interview material from a representative cross-section of historically advantaged and disadvantaged, English-speaking, and Afrikaans-speaking universities. The focus in these interviews was on their experience of implementing the four-year undergraduate law curriculum at their respective universities as a transformative curriculum for a democratic society. Emphasis was also placed on the way in which the guiding principles for the new curriculum – integration of skills and ethical values and sensitivity to diversity – were incorporated into their resultant curricula (Philip F Iya, 2001; McQuoid-Mason, 2004, 2006, 2008).

In the following sections the question of whose vision informed the changes is discussed in relation to the law curricula that were developed, following on from the legislative enactment in 1997 that all Law faculties must offer an undergraduate law degree.⁸⁸ The responses of different faculties reflected a “reactive conservatism”: reluctance, and, in some cases, even an attempt to subvert of the aims of the policy-makers. Other faculties attempted to integrate skills teaching into their curricula in additive ways. The processes of developing curricula, and then reviewing and refining them, emerged as key themes in the data. Thereafter, the extent to which the three key principles that were intended to inform curriculum development – integration of skills, developing sensitivity to diversity, and the explicit teaching of ethics – were explored with the participants. A final appraisal of how the curricula have been implemented at various institutions and the ways in which these curricula translate the vision for the undergraduate law degree concludes the chapter.

⁸⁸ Qualification of Legal Practitioners' Amendment Act 78 of 1997.

5.4.2 Change and resistance

In conversations with the Deans, it became clear immediately that there was no shared meaning of a re-visioning or a re-conceptualisation of legal education or the necessary processes that should have been associated with it:

It [a vision for the LLB degree] was not mentioned during those discussions when the whole four-year LLB was discussed before legislation came into play. Those things were mentioned but as I have already stated why I think we do this four-year programme. It wasn't because of this grand dream but these things obviously were mentioned. Obviously, as I mentioned, the legal profession still does not reflect very accurately the demographics as far as race is concerned and gender. But I do not think it is correct to say it is all a product of this grand philosophical vision. It was part of the political force at that stage that we have to undo the apartheid system (Participant A).

Jansen's observations about the power of curriculum as a means to achieve social reconstruction did not feature in the discourse of the Deans:

The power of curriculum as a political phenomenon in which a dominant group regards the curriculum as embodying the values and interests that sustain and reproduce its hegemonic control. Curriculum planners must avoid treating curriculum as purely an educational phenomenon because, in so doing, powerful understandings of the socio-political purposes and potential of the curriculum are lost. The current political climate has brought to the foreground the need for social reconstruction (Jansen, 1990, p. 197).

Social reconstruction was indeed an intended outcome of the new curricular vision, but in not planning for implementation, not planning further than the formal legislative policy-making process, the Department of Justice missed the opportunity to instantiate a substantive transformation of legal education through the legal education curriculum. Chisholm, commenting on curriculum change (in schools) in post-apartheid South Africa, notes that "for many, curriculum carries the burden of transformation and change in education" (2003).

In the conversations with the participants it became apparent that their perceptions of the change were not of a pervasive shift or a profound reform in legal education that would alter the nature of their work. The lack of attention to detail and to implementation issues

ensured that the Deans treated the change as an inconvenience, a political ploy to which they responded with an equally instrumentalist or even a negative approach.

I just felt that the opportunities for a foundational academic development of the law graduate had been seriously compromised or at least diminished (Participant C).

Although some faculties engaged in workshops where the “re-arrangement” of core substantive content was debated, there is a sense that in reality it was a process of “re-arranging the furniture”, rather than re-visioning a curriculum, informed by a holistic or reformist vision. The notion of developing curricula that would result in transformative education does not seem to have been a central concern in most Law faculties. Participant A (from the Task Group) stated clearly that they would attempt not to change the curriculum too radically:

well, of course, we used the opportunity: because we had to introduce the four-year LLB, so we introduced it. Of course we had to create the curriculum, in which we tried, as much as possible, to preserve the idea of our BA LLB (Participant 3).

What in fact took place is exactly what Darling-Hammond and Wise (1981) described as change situated within “a legalistic paradigm”, in which educational changes are framed and communicated in the form of “directives and admonitions”. Enactment of a law providing that a new qualification shall be the only requirement for entry to the legal profession is insufficient as a means of introducing a significant educational policy change. This implies that policy-makers do not yet have the tools for legislating about educational change, or else they imagine that behaviour modification can be treated as “a question of compliance or enforcement” according to a legislated framework. Once the policy legislation has been passed, according to this legalistic approach, that alone is sufficient to make the educational change occur. Policy transmission is given scant attention, and planning and implementation concerns are barely addressed (Darling-Hammond, 1990). In the South African legal education reform, once the legislation had been passed it was left to individual faculties to interpret the change as each saw fit. Even the way in which the legislation was introduced suggested an element of “directives and admonitions”, according to Participant 3 from the Task Group, who recounted this detail:

In April 1997, the Minister of Justice produced the first draft of the legislation which facilitated the introduction of a four-year degree...My recollection is this: the first draft, that last draft that I saw of the legislation introducing the four-year LLB, did not have the clause in it that every university must have it. But the next year, 1998, when the Act was actually published and passed and when I saw it again, and thought I would look at it again, I saw this clause and I thought: what is this? You know? And then I phoned JD (govt. official), and I said to J: "what is this?" And then he said, "Oh no, we thought that was the consensus status", so he just put the consensus in...So I said: "That is the University of B clause; you put it in because you were scared that we wouldn't do that. That's why you put it in!" (Participant 3).

The "top down" approach to educational change, together with a lack of shared understandings, or a lack of a shared vision as to exactly what the change entails, often results in a change becoming a "non-event" (Elmore, 1983; M. G. Fullan, 2007). This "power of the bottom over the top" phenomenon aptly describes how policy legislation and regulations passed by policy makers (at the top), tend to result in the enactment of different policies (at the bottom). Features of this phenomenon are policies that are unsupported by engagement with academics (teachers), and a close examination of local contextual factors that could affect implementation, These aspects are borne out in the data that emerged from the interviews in this study. Participant 1 explained the situation at his university:

Look, between you and me [the curriculum did not change]...not so much. It differed in the sense that the non-law subjects were sacrificed – that whole things that you had to major in, a non-law subject. That was very important,...but there are also good things in the sense that now only with the four-year LLB we have the subject "Legal Skills", which is a whole first year course, two semesters. Everything now is semesterised (Participant 1).

In the interpretation which now follows, the vision that informed the new curriculum is first elucidated from the perspective of the participants, the current Law Deans. The responses that emerged in reaction to this curriculum change are then described, followed by an explication of processes of curriculum revision that were engaged in across the various law faculties. Thereafter, a focus on diversity within law school curricula, and the teaching of skills and ethics highlights the extent to which the key imperatives intended to influence the design and implementation of the new LLB degree were integrated.

5.4.3 Visionaries or reluctant pragmatists: whose vision?

It is noteworthy at the outset that the Deans collectively did not have a shared understanding of a “vision of social reconstruction” informing the change to a four-year law curriculum. Although they did not dispute that the key principles (integration of skills, ethical values and sensitivity to the context of a pluralistic society) underpinning this so-called “vision” played a role in shaping the curricula at the various universities, they tended to reject the notion that government policy-makers had any “vision” other than political motivation. The Deans’ impressions speak of a more cynical and instrumental political strategy, imbued with the political symbolism described by Jansen (2002) in relation to education policy, without any forethought given to implementation or pedagogical realities.

Participant A declared unequivocally:

If you ask me honestly, [it] was introduced because of political correctness. It was a political thing and that was openly discussed at these meetings and workshops....[T]he point was, it was obviously that the heritage of apartheid within the legal profession was so awful...It wasn't because of this grand dream...this grand philosophical vision. It was part of the political discourse at that stage that we have to undo the apartheid system (Participant A).

The politicians had engaged in politically symbolic activities (Jansen, 2002) and were equally complicit in failing to think through the necessary implementation strategies or communicate a clear vision of social reconstruction that might have given shape and structure to the process. This allowed the academics who controlled the curriculum-making process to exercise their personal agency without outside interference. Each faculty was empowered to translate the curriculum according to what it considered to be in line with its own institutional mission and its perception of its “niche market” positioning, while the outside stakeholders continued to have minimal input into the formative educational phase.

The emphasis on the symbolic nature of change was clearly appreciated. Asked about an informing “vision of social reconstruction”, Participant D responded:

There would be some [truth] in the sense they wanted transformation....They had political agendas and there is nothing wrong with that. Governments must have. I mean they had to try and transform (Participant D).

Participant B commented, on the other hand, that

I think [this description of a vision is] pretty close. Certainly, for me, the big thing is that there was a social reconstruction that took place, and the decision to go the four-year route was politically driven out of the Department of Justice and Constitutional Development and they were going to push that through come hell or high water (Participant B).

This indicates a realistic appraisal of the convergence of circumstances: historical, political, economic, as well as external pressures for change in higher education on both an international and national scale were compelling drivers of the change. Participant E agreed that the description was “fairly accurate”

It is notable that both of these Deans who agreed broadly with the accuracy of this “vision” are Deans at English-speaking law faculties (HWUs), where they have attempted to retain a “liberal arts” emphasis in their curriculum. Their four year curricula represent a contracted version of what was previously an undergraduate primary degree followed by a postgraduate law qualification. Their acknowledgement of the existence of an informing vision of social reconstruction possibly speaks to their English colonial heritage, which tends to espouse a more liberal public viewpoint, in line with a sense of political correctness, in contrast to the more blunt evaluation of the Afrikaans-speaking Deans and the alternate positioning of the Dean from an HBU.

The point that successful change is usually viewed as “pragmatic and savvy” (Oakes et al., 2005) resonates with the views expressed by the English-speaking Deans, who would like to appear to have accepted change, in order to avoid having to confront the deep underlying ideologies prevalent in their institutions. However, Blignaut (2007)) cautions that merely creating a “façade of reform”, ignoring or resisting change, or appearing to fulfil the role that has been legislated, without being committed to the policy, is a risk in situations where role players do not agree with the political goals of a policy. He warns that educational continuities can be more powerful than structural changes introduced by a policy.

The approach just outlined clearly bears out how this appearance of compliance can be maintained when practice has changed very little and implementers are covertly resisting change. The academics’ reactions were often simply pragmatic:

However, when it became clear that all the other universities would support the introduction of this degree, the likelihood of University B losing out on an important niche in the student market, as well as the opportunity to recruit very good students directly from school, persuaded University B's representatives to go along with the proposal. University B's representatives however, insisted on the retention of the five- and six-year combined degree option, as a condition of the introduction of the four-year LL B (Participant 3).

Post-apartheid South African universities were required to re-position themselves (Wolpe, 1995), to meet the challenges of adapting their institutional cultures in a newly framed and highly politicised environment (Badat, 1997; Ruth, 2006). After all the time that has elapsed, there is a sense of holding on to the past ways of functioning while at the same time, appearing to have adapted, which is aptly described in the observation that “the “tenacity of conservatism and the ambivalence of transitional institutions can be acknowledged, once the anxiety of loss is understood” (Marris, 1975).

The vague and apparently contradictory understandings of what the change would mean on a subjective and a collective level resonates with Fullan's (2007) view that successful educational change depends on a shared understanding and appreciation by implementers of both the “what” aspect and the “how” aspect of educational change. Some Deans were quite open about the fact that they were able to subvert the intentions of the policy-makers.

So we were dead against that. We realised the political aspects; that was why in the end, we compromised; but we fought extremely hard for flexibility... And the right for each university to determine its own rules and we actually cheated the system (Participant C).

Traditional views of curriculum, such as those of Tyler (1964), focussed on “technological rationality” as the basis for curriculum and characterised by an ahistorical, bureaucratic approach, are typical of the view held by many law academics. These notions of “curriculum engineering” as a mechanical process, invoking terms such as “design, construction, dimensions, domains, alignment”, carry echoes of a past technocist era, yet ironically they resonate with the language of outcomes-based education that was introduced as the panacea for the multiple ills of apartheid education in South Africa (Barnett & Coate, 2005;

Jansen, 1997). The tension between the equity discourse in higher education and the “efficiency” discourse of SAQA and the NQF, between institutional accountability and quality assurance, tended to confuse the issue even more for legal academics. The notable absence of curriculum theorising in any of the discussions focussed on curriculum change within the legal stakeholder community and legal academic community echoes the trend in higher education in general:

University teachers must be the most surprisingly unreflective of all professional practitioners. While happy to theorise about every last corner of the human and natural world, the core activity of our professional work – teaching – remains wonderfully unproblematised. It is difficult to find an academic who has a clearly articulated theory of learning, or who would even believe it to be their business to have one (Laurillard, 1993, p. 9).

An extended description of the responses of universities across the spectrum of the higher education landscape follows, to expand on this notion.

5.4.4 Responses: resistance and reluctance

In discussing the old postgraduate route of a three-year undergraduate degree followed by a postgraduate law degree, there is a clear sense of loss expressed, that “the old” was preferable and the change was resented in all HWUs. It was regarded as a forced imposition on Law Deans, whose attitudes reflect their varying degrees of reluctance. This holding on to the “familiar, reliable construction of reality” is a phase during the adjustment period, moving toward making sense of change, which provides assurance prior to mastering something new. According to Marris (1975), it is not inimical to growth and forward progress. This social phenomenon of “dynamic conservatism” in the context of the social systems is evident when change represents a threat to the social system (Schön, 1971). Before individuals can “pass through the zones of uncertainty”, there is typically a period of angst, loss and anxiety that is experienced. My sense in this particular context of the phenomenon described by Schön is that the term “reactive conservatism” would be a more accurate descriptor.

Participant E expressed his opposition to the new degree thus:

I was eminently opposed to the four-year LLB. I felt that we had been “steam-rolled” into it; I felt that politicians were playing politics, that there was a lot of political correctness about a number of people who simply accepted it (Participant E).

There is a tangible sense of loss expressed by Participant A:

The old LLB degree was a very good programme. I mean every programme can be improved. You know it has a history, but the point is when you compare that to what we have now, most people feel what I thought, and that it was a good programme and that there are serious problems with the four-year LLB (Participant A).

Participant B expressed a kind of covert resistance, finding a way around the “problem” of an undergraduate law degree by engaging in a manipulative strategy that would encourage students to complete a primary degree in humanities or commerce, before undertaking the law qualification (see above, “cheating the system”). He explained how they had decided at his university to dissuade students from doing the four-year degree by not registering first-year students in the Law Faculty at all. The reasons put forward by this Dean were that the “academic ethos” at his institution was directed toward a broader “liberal arts” tradition, in which Law focuses primarily on teaching problem-solving skills, using the lens of a variety of disciplines such as economics, philosophy and politics to add a nuanced approach to legal issues. This idea of a “liberal” law degree in which active learning develops transferable skills of analysis, critical thinking, synthesis and lateral thinking finds support in much of the English literature. Oliver (1994) argues strongly for this approach, based on the notion that it equips students for any future employment and requires understanding and deep learning which inculcate reflective practice that is necessary in any profession. This “ontological turn” will be developed in the concluding chapter as a cornerstone that is vital in any professional curriculum.

The idea of the instrumentalist new degree was disliked by Participant B, who shared the sense with his faculty that academically it was “a step backward” and more akin to vocational training. He commented:

so if you have got only law as the tool in your toolbox then you can only solve things with a hammer. Whereas if you have got another tool or another set of glasses [spectacles] through which you can look, or view things, you have two tools which you can use in order to problem

solve. We realised the political aspects; that was why in the end we compromised, but we fought extremely hard for flexibility (Participant B).

The participants from HWUs described the reaction amongst law lecturers in their faculties, when they realised that they would have to offer the new degree, as extremely negative. Change is generally resisted vehemently amongst law academics for reasons of fear of the loss of privilege and power (James, 2009). Participant A's comments regarding his staff members represent this view:

Oh they were terribly opposed. Lawyers are conservative, in general and some were opposed for very good reasons, and others were opposed because it meant change....I mean they are lawyers, they are academics and that equals "prima donnas" (Participant A).

Throughout the Deans' data there is a sense of severe loss and negativity that pervades their experiences related to curriculum change. Schön (1971) described the reaction of loss and anxiety as "dynamic conservatism" in the context of a change to the social systems within which individuals make sense of their lives. In situations where change represents a threat to the social system individuals respond with anxiety and ambivalence before "passing through the zones of uncertainty". This familiar reaction was observed in the experience of curriculum change for legal academics, prompting what I have termed "reactive conservatism". This inability to respond other than in a reactive, "knee-jerk" manner to a challenge made possible the surface changes to curricula that were acceptable within a framework of compromise and conciliation during a time of significant social reconstruction. Seen in this setting, the theoretical notions of curriculum in higher education played an important part in their very absence: in the academics' lack of engagement with deeper understandings around curriculum, and in the policy-makers underestimation of its political potential.

A different view was voiced by a current Dean (Participant C) from one of the historically disadvantaged institutions, who had himself completed a four-year law degree in another African country. His initial attitude toward the change in 1997 had been positive, but then changed to concern when he realised that the curriculum at his institution was "loaded with a lot of skills courses at the cost of academic subjects". His view was that the opportunities

for the foundational academic development of law graduates had been “*seriously compromised or at least diminished*”. In his view the foreign four-year law degrees have much more of a liberal arts emphasis, which better prepares graduates for critical engagement with the law.

For a variety of reasons then, Deans had reservations about change right from the start of the implementation phase. The “bare bones” of a major educational shift had been put into legislation. Beyond that, an agreement amongst Deans at the time as to what would be “core courses”, and some general principles in the proposals document⁸⁹, which were couched in terms taken almost directly from the ACLEC report on legal education, left the working out of curricula up to individual faculties.

The flexibility which the legislation permitted to law faculties allowed space for the development of curricula which resulted in a variety of offerings. The process reflects Ball’s description of the translation of policy into practice as an “overall haphazard process”:

Most policies are ramshackle, compromise, hit and miss affairs, that are reworked, tinkered with, nuanced and inflected through complex processes of influence, text production, dissemination and, ultimately, re-creation in contexts of practice (S. Ball, 1998).

The political “trade-offs” that produce educational policy shifts are often originally based on value conflicts in a society. The hope of resolving these social tensions, as was evident in South Africa in the 1990s, is invested resolutely in reform of education for the next generation, but the political process in which the policy is developed often has to reflect compromises that result in an unevenness in the resultant policy, making it difficult to implement (Cuban, 1990).

On the positive side, flexibility is frequently mentioned as a constructive feature of the processes that faculties embrace to develop their individual curricula. The National Higher Education Plan (NHEP, 2001) had explicitly encouraged a differentiated sectoral approach in their opening up the possibility of institutional “niche” areas of specialisation. The possibility existed for developing a unique flavour for the curriculum at each faculty:

⁸⁹ Proposals of Law Deans’ Task Group: 1996 (Appendix 10).

All these things are extremely complicated and have their good and bad spin-offs...

Okay so then they came back with this four-year [degree] but they still allowed you flexibility...

Yes, you see that is a good thing. I believe in the autonomy of universities...we in law are not used to the idea that the profession prescribed the content of the degree (Participant A).

It is remarkable that in the legal field, unlike the accounting, architectural and engineering professions, no attempt has been made by the professional bodies to impose any form of accreditation as regards university qualifications. In the United States all university law schools are accredited by the American Bar Association on a regular basis. South Africa (as with other Commonwealth countries) follows the English common law system, in which there is a separation between the academic phase and the professional (practice) phase of legal education. This has the negative consequence that a failure to align the two phases of legal education often arises and there is ongoing contestation and often direct conflict between those responsible for each of the phases. A similar tension has been documented in England (Kerrigan & Plowden, 2008), and the debate continues to play out locally in the ongoing wrangling between SALDA and LSSA.

The participants clearly were gratified by the possibility of developing differing approaches to the curriculum, which they continue to do. This autonomy had been a major factor in securing the compromise agreement that introduced one single qualification for all lawyers. Deans explained how they had been able to devise strategies to “*cheat the system*”, develop their own rules, “*play around with it*”, select as many electives as you want, or adopt a nuanced approach to professional skills development and developing niche areas of expertise. There is evidence of direct attempts to subvert the policy-makers intention of having a single affordable qualification for all aspiring lawyers.

Participant B justifies the choices made at one historically white university:

We could remain autonomous. We were not prepared to go against history. We were quite happy to offer the four-year , but we felt that we owed it to our graduates to give them the best route to follow rather than the “quick and dirty, easy out the system” (Participant B).

The issue of “**fitness of purpose**” and “**fitness for purpose**” which had been central to the quality assurance debate in the Higher Education Quality Council (HEQC), also facilitated this

trend toward institutionally specific purposes. As Midgley (2007) notes, the LSSA, through its educational branch LEAD, continues to exert most influence as a stakeholder, through its funding of university projects aimed at enhancing students' practical skills (numeracy, client counselling) and its running of the Practical Legal Training Schools for candidate attorneys. In addition it engages with government and other role-players through careful lobbying and the holding of a sponsored annual National Legal Education Liaison Committee Meeting between the legal professions and SALDA. However, the historical attempts of LEAD to prescribe curriculum content to legal academics has been strongly resisted over many years, in ongoing debates between SALDA and representatives of LEAD.⁹⁰

Securing for the academics the option of retaining different routes into the LLB meant that certain universities set extremely high entrance criteria into the four-year LLB, to deter most applicants from attempting it. Another Law Faculty refused to enter first-year students for the four-year LLB, requiring them instead to achieve satisfactory results in an equivalent first-year degree course in other faculties before applying to be admitted to the second year of the LLB degree. Thus policy was translated differently in different contexts, depending largely on the institutional culture, departmental structures, and their history and vision of their student market (Spillane et al., 2002; Paul Trowler et al., 2003). Participant A described how particular influences shaped the curriculum in each context:

So a question was, for instance, should Intellectual Property Law be compulsory for an elective? We created it as compulsory from 1998. Fortunately, we had a very strong commercial section in the LLB. Our Commercial Law would be very strong. Those people make a very good argument for Intellectual Property and well, that is why there are those subjects. They are the biggest department in the Faculty. So such things as Intellectual Property Law,

⁹⁰ Minutes of National Liaison Committee Meeting, November, 2007, detail the contestation over improving the quality of LLB graduates and the failure of the academics and the attorney's profession to reach agreement over the attributes of a legal professional. The academics resistance is based on their perception that they are preparing graduates for many other careers besides that of the attorneys' profession and that they will not be dictated to by one branch of the legal profession (Midgley, 2008).

*Tax Law, Insurance...are all compulsory And my own subject collapsed during that fight.
Roman Law and Legal History became one. One subject.*

The powerful notion of academic freedom that had been highlighted in the proposals for the undergraduate LLB degree was an inducement for legal educators to accept the necessity for the well publicised change, knowing they would be able to continue with “business as usual” or whatever version of change they chose, should they so arrange their affairs. Members of the Deans’ Task Group in 1996 (above) had alluded to this option right from the start. Many of them had made clear that they intended to pursue a route of “encouraging” students to complete an undergraduate degree first by various means. Although teachers and students should be educated to contribute knowledgeably and ethically to an increasingly diverse and democratic society, it seems that teachers in law faculties did not all share that objective (Cochran-Smith, 2005).

A predominant view in the implementation literature has traditionally treated resistance to change as an oppositional positioning that is inevitable, when reform is attempted, but this too has been challenged by more recent views that suggest that resistance can be a resource for change and can contribute constructively to the process (Ford, Ford, & D'Amelio, 2008). No evidence has been recorded as to whether this might have occurred, which suggests an area of research in legal education that could produce further insights.

5.4.5 The process of curriculum development: the “concertina effect”

Describing the contested passage of the new curriculum at each university, participants spoke of the struggles that were experienced during an iterative process:

because of this concertina of subjects into the four year thing, we had to make it an acceptable workload for the students...because that is the other aspect...How do you take five years and input them into four? And that was never considered. They [attorneys] still wanted the same thing and no matter how we were talking about how we wanted better skills etc. what they actually wanted was [students] to rote learn modules (Participant B).

The reaction in law faculties to designing and implementing the new degree seems generally to have been a negative one, bringing with it competitive struggles for establishing the predominance of certain approaches.

The views of two participants described the contestational process thus:

They [the faculty] just took out the non-legal subjects and squeezed the whole of the other curriculum into four years. Obviously it also involved a huge fight for territory, which subjects were going to be in the four-year programme and which not. We held workshop after workshop, you know the old awful "bosberaad" idea; we went away from the faculty, to some other place where we sat for two or three days to start working on this and flesh it out that is where you know the whole territory thing came in and what should be compulsory and what left out and what should be electives (Participant A).

So we had to go through faculty boards and through our academic planning and staffing committee and those battles were not easy. They threw my curriculum out on a number of occasions and we had to go back and negotiate because of these things (Participant B).

Typically the content of the "old" two degree programme was condensed into four years, in a contestation where individuals fought for the position (and pre-eminence) of their subject specialisation within the degree, without much concern for the academic soundness of the decisions that were made. However, intertwined with the negativity was a positive thread which did emerge finally: in the process of developing a new four-year model there had actually been significant debate and constructive engagement around curriculum in the various faculties. Although no explicit theorising about curriculum seemed to have informed the deliberations, what emerged was a reflection of the ethos of the particular institutional context. It is clear that to some extent the contestation and territoriality challenges that took place during the negotiation of curricula served the purpose of what is referred to as: "meaningful discussion and professional development at all levels of the system" at departmental and Faculty level (Darling-Hammond, 1990).

From the processes described in reaching agreement on a new curriculum it is apparent that very little attention was paid to anything more than cutting, combining and moving subjects around. The other two dimensions of change implementation which are considered essential for innovation to occur in curriculum change situations – new teaching strategies

and changes in pedagogical assumptions or theories underlying the policy change, mentioned by Fullan (2007) – appear to have been neglected. Given the flexibility that law faculties had in implementing a new curriculum – and with no particular attention being paid to developing new understandings, or to any theoretical underpinning for change beyond an agreed list of “core courses” – it is clear that the intended outcomes of the policy change were unlikely to be realised. No effort seems to have been made to relate the fundamental shift in the policy objective to the subjective realities of individual law faculties and law educators. No consideration was given to providing support particularly to HBUs, which were left to struggle on with often inadequate library facilities, minimal technological resources and limited teaching capacity in relation to professional skills development. The symbolic adoption of change cannot achieve pervasive and meaningful change without a framework of implementation and dissemination strategies, and mechanisms for evaluation (Jansen, 2002).

5.4.6 Positive side effects and consequences

At a later point in the discussion, the same Dean (Participant B) acknowledged the positive aspects of the newly-structured LLB (for entry to which that university still encouraged prior completion of another undergraduate qualification). He described how they had focused on ensuring a sequential arrangement of learning and attempted to include skills teaching where it was appropriate. The process in which this was achieved seems to have been fraught with frustrations and challenges:

There were many battles there...in terms of the design of our curriculum...So we went through....we workshopped it within the faculty. We then got our academic development training unit to...come in and workshop OBE...and we had close on a year's worth of workshops. We had extensive workshops and we had people from the Education Faculty coming to show us what this whole OBE was all about and how we could then design our curriculum accordingly. But the process was torturous (Participant B).

At another HWU the process of incorporating non-legal modules was described by Participant E. Again, there is a vivid sense conveyed of “squeezing more into less time”, in an endeavour to retain the liberal arts notion of an undergraduate preceding degree.

He [Dean at that time] invited all the others...a whole host of departments, and it was very interesting because they came with presentations and said this is how we feel we can advance the cause of legal education, bearing in mind we realised that at that stage, we now had less butter...we had to spread it symbolically but there was a lot less space, in regard to saying to students you go off and you choose Economics, you can choose Politics, you can choose English (Participant E).

Workgroups (communities of practice or activity systems) (Wenger, 1998) play an influential role in determining what teachers will risk and can achieve (Paul Trowler et al., 2003). Teachers' existing knowledge-base and frameworks of reference prior to the introduction of a new curriculum indisputably play an influential role in shaping and informing their approach to a new curriculum (Spillane et al., 2002). Investment in teacher support to change and expand their thinking through a process of teacher education is essential for achieving "well-founded transformations" in the lecture hall (Darling-Hammond, 1990).

A far less consultative process seems to have taken place at HBUs, where one participant recalled that the Dean or a small planning committee had taken the lead in determining the new curriculum. The process appears to have been a lot more confrontational at institutions that were not favourably disposed toward the introduction of the new degree. Possibly they had not contemplated the actual implementation process, hoping it would not materialise. Whereas at those institutions where the Deans had been well disposed to the new degree, they had anticipated its introduction and seem almost to have "presented" the new curriculum to their faculty as their own creation, as a "fait accompli". This would confirm the typologies of South African universities, as explicated by Ruth (2006), according to their historical origins. HBUs had been established and staffed largely by Afrikaans academics, influenced by Fundamental Pedagogics,⁹¹ shaped by those specific "cultural rules and

⁹¹ South African discourse of fundamental pedagogics was closely allied with Christian National Education and functioned as a powerful educational doctrine in the service of the South African policy of apartheid education; it bracketed political discourse and promoted an authoritarian approach to education. Because didactic pedagogics and fundamental pedagogics were so intimately intertwined, South African didactic thinking also was used to serve and perpetuate the policy of apartheid education (Yonge, 2008, pp. 409-410).

normative and legal frameworks” which suggest that their internal operating style would have been less democratic and more authoritarian. A “top-down” managerial style was described by Participant C from an HBU, who reflected:

There was not much negotiation with these things. Yes, what they did was to set up a Planning committee. The faculty had a standing Planning committee that had just been dealing...always with all the rules...they got charged and I think they might have added on a few members. I know the Dean, the then Dean himself was the chair (Participant C).

What is evident is that the style of the change process often reproduced the complex tensions and the institutional culture of the institution and its members, in moving forward to adapt to the new policy imperative.

5.4.7 Reviewing and refining the curriculum

Most of the participants described the review of the curriculum as an ongoing process, a “work in progress”, entailing refinement and reconfigurations over the past ten years. The main focus of such curricular change once more seems to have been directed toward sequencing modules and re-arranging credit points. Comments such as the following speak to this ongoing revision:

Yes, we changed the sequencing amongst other things (Participant A).

We have a get-together every second year where we look at and just revise it [the curriculum]. About five years ago we did another re-look and we actually found that what we were doing was okay. Three years ago we introduced a new legal skills – with the numeracy course; it was tweaking rather than changing the fundamentals. Because the fundamentals, I believe, are correct (Participant B).

We tried to step down the number of credits in our first four-year LLB, which forced us into reviewing the modules and their credit load, so we have been trying to reduce the number of courses in our LLB. The feedback we get – we have had real concerns like I said, concerns about the number of skills courses, so we have also been reducing those, (Participant C).

We had a review in 2000 or so and after that we changed (the curriculum). The LLB review we did in 2000 was the one that prompted us to change slightly with outsiders from P and M Universities (Participant D).

These reflections are indicative of the ongoing modifications and “fine-tuning” that continued to reflect responsiveness to the changing demands of context and the student profile, as well as to the effects of the market and globalisation on legal education (Ensor, 2004). This view of curriculum resonates with Stenhouse’s (1975) view of “curriculum as process” Although the changing nature of professional legal practice was one of the key external drivers that endorsed the need for change in legal education, resistance to the imposition of professional requirements or prescriptions by the academics has been an ongoing source of tension between the two stakeholders.⁹²

5.4.8 Implementation issues: “at the coal face”

Once the curricula had been formulated on paper, the question of how these “official plans” continue to be enacted in classrooms as between lecturers and students is an issue for debate that is not unique to law teaching at university. In general, the impact of quality assurance on practice at universities has been pervasive and mostly positive, but it relies mostly on documentary evidence of self-evaluation and processes. Deans expressed their positions, procedures and difficulties about ensuring that the enacted curriculum mirrors the official curriculum, in the following ways:

You can only trust people [lecturers]. Sometimes you hear horrendous and awful stories that certain lecturers didn’t have time or comply with the faculty policy. For instance, we have a whole thick, thick document on the LLB policy. We have an LLB committee where all the departments are represented and there is a chairperson. They will try to check whether lecturers comply with the LLB policy (Participant A).

Discussing the relationship between the written curriculum and the enacted curriculum Participant B responded:

What we have tried to do and it is still not being properly done is to check. You know academics also get a little bit twitchy when you get a little bit too close to what they are doing...It usually happens with new lecturers coming in and then they don’t do what the collective consensual contract was, so now you come in and you teach differently. I don’t sit in all the classes, so I can’t give you an exact answer but my sense is there is a strong correlation (Participant B).

⁹² Minutes of National Legal Education Liaison Meeting. (LSSA: LEAD) November, 2007.

This description hearkens back to Cramton's (1981) epithet of law lecturers adopting the "Lone Ranger" approach to curriculum, in which each agrees to pursue their own teaching and not question colleagues as long as the isolationist attitude is reciprocal. The introduction of quality assurance procedures at most institutions ensured minimal alignment between the contents of modules, as stated in faculty handbooks, and the outlines of each subject, given to students. Deans complained about the burden of balancing the monitoring of academic staff members for the purposes of quality reviews, and the claims of academics to a right to academic freedom in their selection of teaching materials.

Participant B was unequivocal in his views on the uneven quality of education across the landscape of law faculties. He expressed anger together with a critique of political correctness which has prevented a realistic appraisal of universities that are failing to produce high quality law graduates. His allusions seem to suggest that it is HBUs who are not "delivering the goods"

I am critical of those universities who followed a curriculum that did not have non-law courses; that felt that they could be pumping out trade school graduates. But there are some universities that might have already been closed down – because they are the ones where the problem lies, and unfortunately there isn't the political will of those who criticise to turn and point a finger and say: "X, it is your faculty that is not producing the goods..." Because they know that immediately, society is going to be split between the haves and the have-nots, and it is going to come across – and they haven't got the guts to stand up and say what ought to be said (Participant B).

In a similar vein, an article by Makgoba⁹³ advocates the adoption of an international trend towards "differentiation" in the funding and accreditation of tertiary institutions. The failure of government to address historical differences in the resources and facilities of HBUs has reinforced differences in "academic productivity, new knowledge creation and innovation relative to the rest of the world". This treatment of all universities as being the same destroys academic merit and innovation and "produces equal misery and mediocrity",

⁹³ Sunday Times, 7 September, 2008.

according to the author. This harkens back to the stratification discourse of the 1990s, which had fallen away in the wake of mergers in the early 2000s but is being resurrected in the light of low performance indicators in the higher education sector.

5.4.9 Sensitivity to diversity: institutional and historical imbalances

The “one size fits all” abbreviated LLB did not, however, take into account the deteriorating secondary school system from which students were coming into this degree. Participants comment on the deficiencies of school leavers entering a professional degree which demanded that more material be covered in a shorter time frame, as well as differences between the student profile, resources and the markets they serve. This failure to take into account the educational context in the implementation of policy ignores “considerations of resources, student needs, community expectations and competing priorities and ideologies (Darling-Hammond, 1990). In addition, an important understanding that seems to have been overlooked was that different pre-existing situations and histories will determine differing responses to change (Paul Trowler et al., 2003). This was very accurately captured in the comments of a Dean from an HBU:

because the profile of our students might beso different....What may be valid at your school and my school and what could be valid for the part-time programme, and what is valid in the full-time programme...is very different. One would concede that significant numbers of those graduating with the LLB now are probably not suitably prepared for practice. They have an LLB, so they can access practice, but are they seriously prepared to enter practice in terms of their maturity, in terms of their basic communication skills? I can't answer that confidently (Participant C).

This participant went on to describe how many of his students, coming directly from high school, do not read newspapers and do not regularly listen to news broadcasts. He questioned the appropriateness of the shortened degree for such academically immature students. Participant C also complained that students do not engage in robust debate in lectures and have difficulty in coping with a critical approach to law teaching.

Across the board, participants registered the “academic immaturity” of young students entering a professional discipline. Participant B commented:

We felt that a person coming straight out of matric didn't have the academic maturity to do law courses. You cannot produce quality graduates like that. And so what we wanted was an academic maturity (Participant B).

Participant A, too, remarked on the immaturity of the graduates after a four-year degree. He mentioned how top law firms are impressed with the academic achievements of their best graduates but they are at the same time reluctant to employ such young graduates to interact with their senior clients.

Participant C (from an HBU) mentions that the aspirations of his students are not being met with this shorter qualification:

the market is looking for people who are fairly solid, and if we just keep producing people who just have technical knowledge – I just feel sometimes that we are short-changing the kids – especially for the poor parents. For the parents who are sending them to us for four years, they do so in the hope and belief that at the end of the four years, their kids will be sufficiently empowered to enter the profession and function competently in the profession, and I wonder if we are doing that – and I wonder if we are not letting them down? (Participant C).

The assessment of the situation by Participant A was that the “problems” with law graduates cannot be blamed entirely upon the structure of the four-year degree; rather,

it lies at school level. The product that we get from secondary schools: that is a major problem...I think that is no secret. You read in every Sunday newspaper that the South African Education system at school level is in a shambles and even Kader Asmal said “yes, it is true, but it is for you at the university level to fix it”. Can you undo what went wrong at school level or can we achieve what you want to achieve to bring them up to standard in one year? (Participant A).

Participant B agreed that the problems of law graduates’ literacy and numeracy skills could be laid at the door of the schooling system. The results of pilot National Benchmark Tests measuring the performance of school-leavers in reading, writing and mathematical literacy suggest that the majority of students in their first year of university are not adequately equipped to cope with the demands of tertiary education. Boughey comments that schools in South Africa still serve different sectors of the population unequally and thus universities will have to continue to teach the specific ways of reading and writing required in university

disciplines.⁹⁴ Research has shown that attempts to develop language and literacy skills outside of mainstream discipline contexts have been unsuccessful, and thus teaching of such skills should be theoretically grounded and the skills must be taught by experts within each discipline.

While university enrolments increased between 1990 and 1994, by 1998 applications had dropped severely due to the decrease in the number of matriculants produced by the secondary school system and also to government's inability to fund tertiary students (C Boughey, 2003). Boughey reports that the institutions most affected by this decline in enrolments were the HBUs, which lacked both facilities and resources. Consequently, an emphasis in university curricula on vocationally-oriented skills held sway, on the assumption that this strategy would secure graduate employment, and would comply with the discourse of the NQF and outcomes-based education in schools.

Participant E, an early proponent of skills integration in the curriculum, made the point that although these fundamental skills must be imparted, it is untenable that students earn academic credits for basic skills which they ought to have had at entry level to university. His candid view on the quality of graduates from his faculty was that the degree is appropriate for the "good student". However, he noted that weak students who obtain an overall average of less than 50% for all their modules do not deserve the qualification when they eventually graduate, adding that such students acquire few skills during their academic studies.

An extended programme (five years instead of the minimum four-year degree) is being recommended for many students who have come from disadvantaged schools. In effect this feature increases the cost and restores the time period to what it was previously.

Participant B (from a HWU) comments:

I have got to find a post-matric year in some way; I am tending to work that way to a bridging year, to a foundational year (Participant B).

⁹⁴ University World News: South Africa: University Students Can't Read? Accessed at: <http://www.universityworldnews.com/article.php?story=20090827173247724&mode...> on 20/09/2009.

Deans from HBUs and HWUs concurred with this approach: that students entering the university are “streamed” into either the four-year degree or an extended programme, in order to remedy the deficit of poor schooling. However this mode of addressing “academic immaturity” translates as the additional cost of spending an extra year at university – an obstacle for students from disadvantaged backgrounds who lack the requisite financial resources, as well as creating a stigma for educationally-disadvantaged (usually African) students. The Ministerial Commission on Transformation (2008) has recently recommended that the possibility of extending all three-year bachelor’s degrees be investigated by the CHE, in order to consider “the desirability and feasibility” of introducing a foundational year for all university entrants. The CHE had mentioned this possibility in its “Size and Shape Report” (2000, p. 32), which had been supported by the National Plan for Higher Education (2001, p. 32). The Minister of Education had already requested the CHE to undertake this review of all three-year degrees, given the “context of schooling in South Africa, and given the acknowledged gap between school and higher education. This task would include “reviewing the role of academic development programmes and their integration into a new four-year formative degree. It may also provide the framework for addressing the curriculum recommendations proposed by the Committee” (Ministerial Committee on Transformation, 2008).

The perspective of Participant C (from an HBU), reflecting on the economic imperatives that precipitated the undergraduate LLB, was that government had succeeded in making the law degree more accessible to “poor people” in the sense of making it more affordable, because of its reduced duration. He acknowledged that the objective of graduating more students from disadvantaged backgrounds had also been achieved. However he commented:

I am still sceptical about the quality of the LLB graduates. Except for those who have an excellent schooling background and also students who naturally have an ability to be critical about society, about the economy, in the sense, they have thoughts outside the classroom (Participant C).

It seems that one of the perennial issues that continue to plague legal education was the failure to consider educational inputs during the policy-making process. This point was

mentioned several times by participants. They reported that the educational implications were never discussed. Participant B states:

The main thing was when we went into this new LLB thing that the Department of Education never featured in any of those debates that we had in the 1990s. Yes, they should have. Their biggest mistake was not to include the educators in the curriculum plan because there was a total void of proper educational considerations in the planning of that curriculum (Participant B).

Some of the unanticipated problems, particularly for an HBU, must be laid squarely at the door of the schooling system. Students coming from declining secondary schools, who then attend universities where the funding of facilities and teaching resources have not been vastly improved since 1994, are at a double disadvantage from the truncated degree period:

Maybe what we are doing now in South Africa is now transformative. I think the issue of duration will still need to be addressed: that we do not prescribe a five-year programme; that we should not generalise a prescription – not the same for everyone...we are well on our way to transformative education because it is accessible. It is efficient for those people who can manage...who are ready for it...Yes, so you ask me if we are providing transformative education, I struggle...to answer that question in the affirmative, I struggle with that. I think our capacity to deliver transformative legal education, is itself questionable....You see, I think the market is looking for people who are fairly solid, and if we just keep producing people who just have technical knowledge...(Participant C).

There is a sense here of frustration in that it is even more difficult for the very students whom this educational innovation, the reduction of the time period for qualifying as a lawyer, was intended to benefit, to take advantage of it:

the challenges we face, both in terms of the product, the four-year LLB, and also in terms of most of the delivery and resource levels and the profile of the students...because the kids are much younger, and the resources are much fewer, and there is not the time that you have to spend with them; it is lesser and you just wonder how much you can do within these...fixed...within the space that you have them.. so it seems as if there is a conspiracy of forces that are rendering you ineffective...this conspiracy of forces that are causing law teachers to feel increasingly ineffective in producing the types of law graduates that they would like – and then you also have -- a diminishing morale (Participant C).

In a hard-hitting critique of the transformation agenda for higher education, Kadalie (2009)⁹⁵ observed that transformation has become "racial bean-counting" at white universities, and that no one cares about issues of diversity facing black universities, or whether their throughput rates are increasing, whether their racial targets are being met, or whether they are producing competent professional graduates to meet the needs of the economy. This lack of attention to HBUs, whether in the form of redress, equity or educational concern, has become an increasingly permanent feature of the higher education sector.

5.4.10 Integration of skills

Participant D reacted to the criticisms of the profession and their inability to understand the challenges of operationalising the kinds of demands they make:

They [the professions] give these general, "stroke of a pen" kind of statements and things that we can't translate into something specific within the universities (Participant D).

A familiar "trade school" or vocationalist critique is employed by Participant B, who also blamed the professions for producing the situation where graduates who are emerging from the four-year degree have neither the requisite skills nor the academically desirable liberal arts education as a foundation for their professional careers.

The attorneys wanted more practical skills and they wanted more skills to be taught. They then climbed into bed with the government because they wanted the four-year route and obviously they wanted more practical skills, wanted the training and all those things. And I personally think that the chickens have come home to roost because the attorneys are now moaning about the quality (of the graduates). But it is their complaining, their doing...that was because, what they did was, they wanted the mechanics not engineers. They wanted draftsmen not architects. And that is what is coming home; so they haven't got the skills yet ...and that is a major difficulty (Participant B).

Participant E echoes this sentiment:

⁹⁵ University World News: South Africa: Transformation needs to be transformed. Accessed at <http://www.universityworldnews.com/article.php?story=20090912221731811>, on 13/09/2009

It is going to be just as costly and that at the end of the day, you know, there you are expecting us to do the impossible which is to train somebody who is adequately able to train in five years, in four years: I am an ardent disciple of the fact that we are not just training legal technicians. We must be training academics who have that basic, that basic, academic training. What you are telling us to do is to take four years and expect the students to reach a certain level that up until now we've given them five years in which to do this; often six. Secondly, that while you are doing this, we have to recognise that what is happening in schools is creating all kinds of problems and so in effect you are asking us to do the impossible. Thirdly, I can guarantee you that most of the students that you want to benefit through this four years will take longer than four years. They will take five years and sometime six years. What they were saying is they want to reduce costs where students shouldn't have to go through five years; they should only go through four years (Participant E).

The discourse of vocational training and skills integration had been a powerful one at the time of the transition to democracy in 1994, brought into the educational arena from the COSATU alliance and its association with organised labour. In educational circles, the emergence of a generic transferable skills thread – academic literacy, numeracy, life-long learning and computer skills – ran alongside a specific professional skills link which was particularly strong in the context of legal education (Ensor, 2004; Kraak, 1998). This discourse had already appeared in international legal education literature through the Pearce Report (1988) in Australia, the Mac Crate Report (1992) in the United States, and the ACLEC Report (1996) in England. Australian universities, under pressure from the state to integrate skills, had developed various coherent and innovative approaches in legal education (Kift, 2002, 2003; Wolski, 2002), as had the “skills movement” in England (A Boon, 1998; MacFarlane, 1992; Webb, 1999)

Participant A expressed a view that is critical of the often cited dichotomy between an academic education and the vocational training that he views as being the proper focus of the legal professions. His justification is based on equity issues that he suggests would have the effect of creating another a “gate-keeping” mechanism:

Now they want us to introduce numeracy and bookkeeping skills as a compulsory subject, which would serve the very same purpose that they said Latin did in the past [hindering the success rate of black students]. They want, although they are not saying it, but the argument in the sub-text is that they want ready-made, fully-rounded lawyers, attorneys, not lawyers –

to come out of university. If we had to change that then they must cut legal philosophy and legal history and then have a trade school. I think we often, in this country teach people to be legal mechanics (Participant A).

Participants remarked on the positive impact of integrating skills into the new curriculum, but only in the limited context of academic skills. The necessity to include foundational skills such as academic literacy and numeracy, as well as generic cognitive skills such as articulating an argument, critical reasoning and analysis and research training was not controversial, but most participants were opposed to an excessive emphasis on professional skills that were aimed solely at preparing graduates for the attorneys' profession. The struggle to balance generic and professional skills with academic content was expressed in the form of a reluctance to take up limited "academic" time with the theoretical, decontextualised teaching of skills. The professional education phase was seen as the appropriate context for developing professional skills. In addition it was clear that at some faculties academics were not themselves adequately prepared to teach legal skills and resisted the notion on the basis of it lacking sufficient intellectual grounding. This confirms the same attitude that underpins a similar resistance to skills integration reported in the international literature (R. Johnstone & Vignaendra, 2003; Kift, 2002; MacFarlane, 1992).

Much of the criticism of law graduates has come from the attorneys' profession. One articulation of this criticism which caused significant reaction appeared in an editorial in the attorneys' monthly journal, *De Rebus*, entitled "The trouble with LLB graduates...":

There is much discussion nowadays about the poor quality of law graduates. The topic even featured at the ninth and final provincial consultative workshop on the Legal Services Charter...The Department of Justice Director-General, Menzi Simelane, referred to the poor quality of many law graduates who were said to be unable to draw affidavits and pleadings....In addition to specific legal knowledge, there are two general areas of skills deficit that practitioners mention most – numeracy and literacy (Van der Merwe, 2007).

Summits and meetings between SALDA and the LSSA have failed to resolve consistent complaints about graduates' deficient skills, poor literacy, and numeracy competency. The response of Law Deans has been that blaming universities for these inadequacies fails to take into account a number of factors such as the educational levels of school-leavers, the

reduced time period spent at university studying law, the expectations of lawyers regarding the professional skills of graduates, the abdication of the professions from their responsibility for teaching professional skills, and the core function of universities in providing a broad foundational education rather than narrow vocational training.⁹⁶

Participant C discussed the impasse that has been reached between the academics and the professional bodies, and the need to re-open the conversation. He explained how, by 2008, SALDA had opted not to invite LSSA representatives to their meetings. His personal view was that all stakeholders should hold frank discussions to move forward, but that legal academics cannot simply accede to all the demands of the profession or submit to the contents of the curriculum being determined by the profession; nor, on the other hand, should they be entirely dismissive of legitimate complaints and requests. An example of contested terrain is the demand to include basic business management principles within the law curriculum, which gives rise to vehemently opposing views among the academics.

To some extent these comments reveal the anxiety of the educators about being expected to “deliver” on more skills in four years than was expected of graduates from two degrees in the past. The employability of these graduates was also brought into question by Participant B who said,

what you do is have this massification idea of pumping graduates out there: so now, instead of having unemployable matrices, you have unemployable graduates (Participant B).

A further question raised by Participant D from an HBU was whether legal academics are in fact adequately equipped to teach the transfer of professional skills. The academics express the opinion that it is the responsibility of the professions to undertake this more practical aspect of professional training, which is increasingly being abdicated by the professionals. In the previous data set, of ex-Deans, Participant 2 had mentioned the difficulty of finding academics who were equipped to teach professional skills. Part-time practitioners are often used in American Law schools as “adjunct” staff, to teach more practice-focussed subjects, such as legal writing, but in South Africa this model is not popular because academic salaries

⁹⁶ SALDA Review of the LLB degree

are not comparable with income earned by professional practitioners like they are in the United States.

In summary then, the current Deans were not enthusiastic about the integration of skills teaching in law curricula. Their reluctance is based on the following explicit reasons: an anxiety that law degrees become too vocationally-focussed and might lose their academic emphasis; students have less time during the undergraduate law degree in which to acquire essential legal knowledge; students coming into university are academically immature and underprepared for tertiary study, so that a significant amount of academic time is now spent teaching literacy and numeracy skills; and the professions are better equipped and should take responsibility for teaching professional skills.

Underpinning this resistance are two possible rationalisations. The first is the notion of “academic freedom”, for which the sub-text might read that academics do not wish to be dictated to by their major employer-stakeholder constituency, the attorneys’ profession, nor do they wish the state to set the agenda for higher education. Linked to this is the opinion that a law degree must be viewed as preparing graduates for a wider range of career options than professional practice, which essentially is a marketing tool for law faculties to appeal to a wider range of students. Ironically this trend responds to state pressure to enhance their appeal and to generate additional revenue for their institutions by increasing student enrolments. The second argument underpinning the opposition to skills teaching stems from academic resistance to the state having a role in setting the high skills agenda for universities – through the discourse of efficiency, accountability and quality assurance that dictates that graduates be equipped for employment in a global economy. Thus despite promises to integrate skills, in addition to external pressure from the state, and internal pressure from institutional management to do the same, most faculties have resisted a coherent integration of skills into their law curricula.

5.4.11 Integrating ethics explicitly

The explicit teaching of ethics within law curricula has always been a controversial issue: it is considered by university teachers to be part of the professional development that is more

appropriately dealt with by the two professional bodies responsible for training graduates once they elect whether to enter the attorneys' profession or the advocates' profession. The rationale is that these are specific areas of learning that differ for each branch of the profession and the content is not considered to be sufficiently theoretical or academic.

Participant C was clearly opposed to the integration of legal ethics into the foundational law degree:

Ethics? No – the United States has shown that those are things that students can learn fairly well after varsity.....so why make them learn things at varsity that they can learn in the outside world? (Participant C).

However, the fundamental issue of the underlying "moral/ethical" values inherent in the professional learning of a discipline was specifically seen to be part of the new LLB curriculum at the time when the undergraduate degree was introduced (Philip F Iya, 2001; McQuoid-Mason, 2004, 2006). This reflects partly on the discourse of democracy, equity and human rights that had been a pervasive influence in the post-democracy educational changes, and nowhere more so than in the area of law and constitutional imperatives.

Participant B expressed a somewhat ambivalent view on ethics teaching, preferring to emphasise values, and expecting "ethical" graduates to emerge, without explicitly teaching those ethical principles to all students:

Yes, I think values have [a place]; ethics, not necessarily. I think ethics have always been there but it has been legal ethics, and there has been a standard of...the honesty, the ethical services etc. has always been there in our courses. One hopes so...Ja, we offer an elective in Ethics but those who don't do it must also be ethical people. I think that ethics is not deliberate in the curriculum...(Participant B).

There is an implicit sense that through the "hidden curriculum" students will be socialised into what is acceptable ethical and professional conduct without any conscious or explicit understandings being communicated to students. Participant E expressed a similar vague commitment to ethics teaching that lacks the specificity which, ironically, he senses is necessary:

We do offer an ethics course, but you know the point is that everybody said: “you can’t just do a course...a course as with literacy. You can’t just do a little course”. At age 20, it [ethics] is a big issue, and it should be something that just follows...and I just hope that people do see the logic and the equity and the ethics in law (Participant E).

He continued:

I think definitely one has to watch out for professional ethics because professional ethics can be extreme “tick boxing”...and a lot of that is very technical and unless you kind of cascade that down into the reason why we have all these...[ethical rules], it is meaningless. We [lawyers] have to operate at a certain level and people must have confidence in us and we must make sure that we are doing what is right and what is moral (Participant E).

It is ironic how the interpretations of the implementers of the new curriculum were so vague and unspecific about an issue which should have been of central significance to any debate around law. The variety of interpretations that emerged confirms the view of Spillane et al. (2002) that personal values and emotions are an important aspect of the social sense-making process in change implementation. In a study of curriculum-design work involving teachers and university researchers the authors reported an avoidance of making “hard calls” that were necessary to change the status quo. The views expressed by the participants mirror this type of resistance to change.

In the Carnegie Report, Sullivan et al. (2007, p. 28) highlight the confusion that exists between teaching students the “codes and rules” of professional conduct, and developing an “ethically-sensitive perspective”. An “ethical-social” apprenticeship, through which students’ professional self can be explored and developed, involves bringing to the surface, making explicit, the objectives of developing “professional purpose and identity”

It is thus evident that the centrality of ethics in the curriculum has not been a key feature of post-apartheid legal education, despite the educational discourse that was infused with the spirit of incorporating democratic and humane values during the policy debates in the 1990s. The very “fuzziness” about what the notion of ethics teaching includes and the failure of legal academics to engage in debates on the topic, in South Africa, reveals their lack of commitment to ethics teaching. Most often ethics teaching is viewed as students learning a code of professional conduct rules, without an appreciation of broader

conceptions of moral principles or ethical values that support and inform professional judgement, in the wider context of moral dilemmas that are frequently raised in professional legal practice.

In an Australian study (Evans & Palermo, 2006) that investigated the values that might be influential to ethical decision-making for law graduates, the researchers suggested that a values awareness process could enhance the chances of law graduates and lawyers understanding their own values base, through the use of explicit framework options. Hypothetical but realistic practice scenarios could be integrated into the curriculum and the results of empirical research on value preferences and intentional choices could be used as “teachable moments”. Robertson (2009) deplored the lack of coherence in developing a consistent ethics thread throughout the law school curriculum, proposing a model for developing such a pervasive emphasis.

In the United States, Rhode (2000; 2002) argued persuasively for a pervasive teaching of legal ethics, as has Menkel-Meadow (2004), but the Carnegie Report (Sullivan et al., 2007, p. 139) added a fresh dimension to the ethics conundrum by suggesting that law school offers a “powerful moral apprenticeship, whether or not this is intentional”. The report makes the important point that students’ understandings of their professional roles and responsibilities as lawyers are implicitly imbibed through the curricular emphasis on analysis and technical competence, “at the expense of human connection, social context, and social consequences”, all of which are reinforced by the broader culture in most law schools. Thus, even where law educators do not expressly teach ethical values, their silence could be interpreted by students as conveying a particular message which shapes and influences the value systems of those aspiring lawyers. In a South African context, given the lack of attention that is attached to the ethical dimension of lawyering in Law faculties, this raises serious questions about the possibility of legal education becoming a transformative experience for law students or for exerting any positive influence on the future of the legal profession.

5.4.12 Transformative education

The question of whether the implementation of this new approach to legal education has had the effect of being transformative was “side-stepped” in a legalistic way by most of the participants. The nostalgia for a postgraduate “liberal arts” qualification and the belief that it would create a better quality graduate is fondly expressed by Participant A:

Transformative for me is the need to move away from that [technocist] approach in education...No it is not a quick fix. Lawyers are supposed to be pillars in society and I would like them to be wise people and wisdom comes only with exposure to many disciplines etc. That is why I say it should be more than just being socially conscious in South Africa. It asks for a humanistic renaissance, a full rounded person, well rounded approach and we will never get that. Because that is why I said the ideal would be the American approach, where you have done Maths and History and Egyptology and religion and whatever...liberal arts (Participant A).

The term “transformative” carries a multiplicity of meanings and was often seen in a narrow technocist way as the study of democratic and constitutional values, the pervasive influence of post-apartheid jurisprudence, rather than in its broadest interpretation as an agency for changing students, or for making an impact on society. The debate can be treated on two levels, the public or the personal domain: whether transformation is regarded as the opening up of the legal professions and increasing the numbers of black lawyers, or whether it is seen in the individual context of being a life-changing educational experience. In the broader political context, of a non-racial, post-apartheid society in South Africa, “transformation” carries with it the notion of fundamental change in facing a number of challenges, including equity of access, fostering values of democracy, tolerance and respect and equipping graduates with skills and competencies for life-long learning.⁹⁷

⁹⁷ The transformation agenda contained in the *Education White Paper 3: A Programme for the Transformation of Higher Education* (DoE: 1997) explained that transformation “requires that all existing practices, institutions and values are viewed anew and rethought in terms of their fitness for the new era” (WP: 1.1). At the centre of the transformation agenda in terms of ‘fitness’, is the White Paper’s vision for the establishment of a single national coordinated higher education system that is ‘democratic, non-racial and non-sexist’ (Ministerial Report on Transformation, 2008, p.24).

Thinking of the South African context, ideally it should be an education that would provide a lawyer who is in touch with the full realities of the South African political and social situation. To instil an approach among our students that you would expect people who work at the Centre for Human Rights and the Legal Resources Centre, the George Bizoses and the Arthur Chaskalsons of this world and that. That would be the obvious answer – the political one, but I think transformative can also mean a way, a new way to approach law, also problem-solving in general. Do we take any responsibility for doing our own research, to know how to approach the law, the typical American way? (Participant A).

Participant B seemed to interpret transformation merely as a narrow change to the curriculum and content, but not as an all-encompassing social shift in the minds of students or within the larger body of the legal profession:

There is a lot more value in terms of constitutional – the constitution is just everywhere in the thing [new curriculum] and the students believe it and so that there has been an improvement. But there have been negative aspects in the transformation. I think that our students are now academically less mature and so, therefore, that is a major issue for me (Participant B).

A Dean from an HBU seemed more positive, viewing transformation as a wider concept affecting the institution, demographics and curricular content:

So I think we have come a long way. We have been transformed, become transformed....The transformative ideas should permeate the curriculum (Participant C).

This new “humanistic” vision hearkens to a strong trend emerging in legal education in the United States (Cohen et al., 2007; Glesner Fines, 2008; Magee, 2007) where the role of the legal profession has been denigrated and vilified to such an extent that the current response is to “re-humanise” the education of lawyers.

This perspective from a Dean at a former HBU indicates a very different enthusiasm that the new constitutional dispensation has brought. Yet, this participant also remarks on the consequences of the policy change that was made in the name of political symbolism, without careful consideration of the pedagogical soundness of an abbreviated period of study:

I think it [the reconstructionist vision of the creators of this programme] has been met, but perhaps not in the way that they anticipated it – or it has been met, but it's created quality problems that they probably did not envisage.... hence the emergent debate around the credibility and sustainability of the four-year LLB, because now we are seeing the fruits of the programme, and we are seeing that there are probably unintended consequences of fast tracking (Participant C).

The current round of summit meetings and the proliferation of task teams established by SALDA and LSSA to address concerns about the law degree speak to this dissatisfaction with the quality of graduates and the “fitness for purpose” of the qualification.

This chapter has presented an interpretation of the lived experience of two sets of Deans: the former who participated in the 1996 consultations that resulted in the proposals that dramatically changed legal education; the latter as curriculum developers and implementers who currently see the curriculum enacted daily, since its introduction a decade ago. The way in which policy was “negotiated”, to achieve apparent consensus in the context of massive political and social change, as well as the motivations behind the policy, shaped the context for the next phase. In the implementation phase, the interaction of factors affecting curriculum development determined the resultant experiences of law school which will be interpreted from the data elicited from graduates in the following chapter.

5.5 Concluding remarks

In summary, the contextual setting for the emergence of educational policy in the 1990s in South Africa laid the foundations for the subsequent translation of policy into practice in a particular way. The largely symbolic nature of educational policy-making and the processes of policy-making that were engaged in, in the newly-democratic country, at that historical moment, produced trade-offs that gave curriculum policy-developers and implementers autonomy to interpret policy as each saw fit, in their own local and institutional contexts. This autonomy gave them the freedom to respond with predictable “reactive conservatism” that translated into curricula that reflect an approach of “business as usual” in an abbreviated time period. Principles that were supposed to inform curriculum development

were largely ignored, in the general failure to engage in pedagogical theorising or critical curricular debates. In the result, it is still very much a moot point whether the “vision” or aims and intentions of the policy-makers in 1996 have been translated into transformative legal education in the ensuing decade.

In the next chapter, the perceptions of graduates who experienced the four undergraduate curriculum and their employers’ perceptions of the graduates’ preparedness for professional practice were analysed to investigate the issue of how the law curriculum at one specific university prepares graduates for practice. The chapter explores the effectiveness of a university education in preparing graduates with the requisite knowledge, skills and values that are required for being a legal professional.

Chapter 6

Law graduates in professional employment

6.1 Phenomenographic data analysis

The previous chapter offered an interpretation of the lived experiences of two sets of Law Deans: those who were part of the process of curriculum policy change in 1996–7, and a current group of Law Deans, tasked with implementing the law curriculum ten years on in the process. The purpose of the analysis was to understand how the intentions of the policy-makers aligned with current curricular practice.

In this chapter the research approach shifts to phenomenography for response to the second research question, which concerns the experiences and perceptions of graduates and their employers in relation to the experience of the law curriculum at one South African Law Faculty. Data elicited from six graduates who experienced the undergraduate LLB, and data from their employers, are analysed to develop an interpretation of the experiential aspects of the LLB degree. Using a phenomenographic orientation as analytical framework, outcome spaces for both data sets were developed. This lens takes a “second-order” perspective, which is characteristic of the phenomenographic approach. Two sets of participants were interviewed about their “expressed experience” and their perceptions of how the curriculum prepared graduates for professional legal practice.

Section 6.2 describes the analytical framework of mapping the “lifeworld” of the participants, discussing categories of description discovered in the data generated from the graduates that reflect their qualitatively varied experiences of the phenomenon being investigated – the various aspects of the phenomenon as experienced and perceived by the participants. Some theoretical abstractions that emerged from the data, such as the

epistemological and ontological assumptions underpinning professional education are described for the purpose of substantiating the development of an “outcome space” for each set of participants (graduates and employers), using the phenomenographic orientation.

In section 6.3, the data elicited from the graduates’ employers are interpreted to produce categories of description that characterised their perceptions, relating to the preparedness of the graduates for professional practice in consequence of experiencing the law curriculum at one particular law faculty. An “outcome space” for the employers’ data, in which these categories of description are hierarchically ordered, is then articulated. The perceptions regarding the experience of the curriculum are the unifying conceptions that respond to the second research question: how does the law curriculum prepare graduates for practice as legal professionals in South African society? The interpretation of this data is intended to present a textured analysis, leading on to the insights developed in the concluding chapter.

6.2 [Data Set 4] Graduates’ data

6.2.1 Introduction

In this initial section of the chapter, some theorising about phenomenographic analysis that frames the interpretation is introduced. Six graduates’ descriptions of their experiences of the law curriculum at one South African Law Faculty are then interpreted, to develop an “outcome space” that emerged from the data. In phenomenographic research an “outcome space” is a “map of the collective mind”, or a set of hierarchically ordered categories that are logically related and which attempt to represent the qualitatively different ways in which a phenomenon, in this study, the law curriculum was the object or phenomenon experienced (Uljens, 1996). The focus then narrows down to consider the actual experiences

of graduates of the new law curriculum who had “lived through it” at one particular South African university.

6.2.2 Phenomenographic analysis: mapping the collective mind on the law curriculum

The object of a phenomenographic analysis embraces not only the researcher’s previous or past experience, but also empirical data requiring the researcher to repeatedly engage with its semantic content which reflects manifestations of the participants’ experience, so developing categories of description that do justice to the content as experienced by the participants (Uljens, 1996). Rather than seeking to record individual experience, the objective of this approach is to produce a “map of the collective mind”, based on the second-order “expressed experiences” of all participants within a data set. It facilitates the production of content-loaded descriptions of the qualitatively different ways that the participants conceive of or experience the phenomenon, which in this study was the curriculum. In using the term “experience”, which includes students’ intentions, approaches and reflections, phenomenographers are referring to the “internal relationship between humans and the world” (Runesson, 2005, p. 70).

Three criteria for assessing the quality of a phenomenographic “outcome space” have been proposed:

- (i) each category should reveal something distinctive about a way of understanding or experiencing the phenomenon;
- (ii) the categories should be logically related, typically as a hierarchy of inclusive relationships; and
- (iii) the outcomes are parsimonious, in that as few categories as possible should emerge from the data, to represent the critical variations in experience (Marton & Booth, 1997).

It is important to distinguish the categories of description, which emerge from the data and are the empirically-derived characterisations of the key aspects of the experiences

described, from the ways of experiencing the phenomenon, described by the participants (Åkerlind, 2002).

In this study the three categories related to the graduates' experiences of the law curriculum are distinct characterisations, separate from the descriptions of how they experienced aspects of the phenomenon, but within each category a range of ways of experiencing the curriculum is subsumed.

The categories that emerge from the employer data characterise their conceptions of the graduates' preparedness for professional practice and are distinct from the varied ways they expressed their conceptions of all the various aspects of the phenomenon studied.

Variation in ways of understanding, conceptualising or experiencing the phenomenon emerges from key or critically distinct patterns that arise across transcripts during the data analysis (Åkerlind, 2008). However, the analysis does not aim to explain "inner psychic processes" but aims, rather, at describing manifestations of forms of thought or ways of functioning which reflect the participants' experienced world (Uljens, 1996).

6.2.3 Graduates' experiences of the Law curriculum: the Outcome Space

Six law graduates were interviewed, from one particular South African university, all of whom had completed their degree in the minimum required time and were now admitted attorneys. Bowers (2006) suggests that the effectiveness of a curriculum can only be assessed when students become professional entities, so this was a background assumption that to some extent pre-determined the nature of the questions asked. These graduates had been scholars at the time of the historic transition to democracy in 1994 in South Africa. Fourteen years later, in reflecting on their experience of the four-year undergraduate law curriculum, they expressed a variety of positions related to the law curriculum, which seem to reflect their historical, social-economic and educational heritage.

The three categories that emerge from the pool of data are each characterised by a descriptive term:

A. instrumental strategist

B. pragmatic generalist

C. transformed vocationalist.

These characterisations are juxtaposed to determine if any relationship existed among them, and a logical relation is observed that reflects a hierarchical ordering. Each category reflects a progressively deeper level of identification with, and engagement in, the law curriculum. I choose to present the “outcome space” of these three categories, and then expand on the criteria that define each category of description by way of quotations taken from the data. These “parts of the whole” also identify the referential and structural features of the phenomenon and serve to highlight the variations in the graduates’ experience of the curriculum. The rationale for this approach is that the principal focus was on identifying variation in the outcome space, but the awareness of the phenomenon through the structural and referential aspects required further elaboration.

With this in mind, the graduates’ descriptions of their “experience of curriculum” must also be seen as coloured and influenced by their expressed recollections of personal interactions with individual lecturers on innumerable occasions. Each graduate brought a multiplicity of factors to the learning experience, including a personal history, many background affective influences, previous educational experiences, conceptions of law and of being a professional, and a plethora of socio-economic and motivational pressures that emanate from sources external to their university lives (Vermunt, 2005). Inherent personality traits and influences attributable to class, race and gender cannot be excluded from the equation.

In this particular institutional context in which I am a deep “insider-researcher”, it is notable that students come from a range of backgrounds, many of which could be seen to be less than ideal in terms of preparedness for and supportiveness of tertiary study (McLean, 2001). The discipline of Law employs an epistemology that emphasizes the acquisition of facts and principles which students are expected to recall and apply. Subjects are taught as discrete units of knowledge, with infrequent attempts made to create links across modules. The contending 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, some framework of

knowledge related to commercial concepts, and an ultimate outcome of meeting professional standards, together constitute a matrix of interactions in which there is a complex alignment between the curriculum and those who experience it.

The next section describes the outcome space for the data set of the graduates (Data Set 4), characterising their experiences of the law curriculum. This is followed by the detailed sub-categories within each category of description, to reveal the structural and referential aspects of awareness of the phenomenon of experiencing the curriculum.

6.2.4 Qualitative variation in graduates' experiences of curriculum

In answering the second research question – what are the experiences of graduates from one university as to how the undergraduate curriculum prepares graduates for professional practice – the phenomenographic analysis produces an “outcome space” consisting of three categories, (with my additional positioning of each *vis-à-vis* the law curriculum) that characterises their different experiences of the law curriculum:

- A. The instrumental strategist: [outsider]
- B. The pragmatic generalist: [in comfort zone]
- C. The transformed vocationalist: [engaged insider].

Categories of description are “the researcher’s abstractions of the different ways of understanding”; they refer to a collective level and describe the different ways the phenomenon can be described (Larsson & Holmstron, 2007, p. 56). The categories together constitute the outcome space, while the object of the study is the relation between the graduates and their experiences of the law curriculum.

Reflecting back now as legal professionals, the graduates’ experiences focussed on varying aspects of curriculum: their personal motivation for studying law; the way in which they approached the study of law; their perceptions about the link between theory and skills in the curriculum as preparation for professional practice. The categories were identified, followed by a discussion of each aspect of the whole, supported by quotations to illustrate the different positions. To some extent, the open-ended questions that were used as the basis for the semi-structured interviews had a determining effect on the themes that

emerged, since part of the interview schedule was initial question about each theme: the integration of skills; ethics; sensitivity to diversity. Where the questions generated little response, I moved on to other aspects of the phenomenon to focus on themes that appeared to be significant for each participant.

In Table 11 (“Outcome Space”: Qualitative Variation in Graduates’ Experiences of Curriculum) the component parts of the law graduates’ awareness are labelled in the leftmost column as an ordered progression of experiential subcategories under each of the three descriptive categories (instrumental strategist; pragmatic generalist; transformed vocationalist) that signal three differing outcome spaces (outsider; in comfort zone; engaged insider).

Table 11 “Outcome Space”: qualitative variation in graduates’ experiences of curriculum

	“Outcome space” A Instrumental Strategist (outsider)	“Outcome space” B Pragmatic Generalist (in comfort zone)	“Outcome space” C Transformed Vocationalist (engaged insider)
Referential aspect			
Experience of curriculum			
(What is it?)	A qualification to earn a living. “Learning about other people’s lives”. Sense of being “outsiders”.	A generalist education. Acquired knowledge to be utilised in various contexts; not internalised.	Fulfilment of a personal vocation. Personal change; focus on academic seriousness and continuous learning.
Structural aspects			
(How is it seen?)			
(Act of experiencing curriculum: the component parts)			
Reason or motivation for studying Law	Qualifying to earn a living; make money; effect democratic changes as an agent of change.	A romantic notion; empowering you to know “how things are supposed to operate”.	Passionate about taking proactive steps to make changes; using “people skills” to listen to others’ problems and advise.
Approach to learning Law			
(Indirect objects of experiencing curriculum)	Repetitive memorising; reproductive, strategies to pass exams .	Challenging, questioning until achieve clarity in concepts; developing frameworks of understanding.	Spending time to absorb, engaging actively with texts to create own summaries; Continuing to learn new law daily.
Theory/Skills Dichotomy	A clear dichotomy between academic theory and practical “lawyering” skills. The curriculum is too academically oriented and deficient in preparing graduates for litigation and professional practice.	A university education is academically-based; practical skills can be acquired once a graduate is practising and learning how to be a professional in context.	An academic grounding is an essential foundation for learning practical skills; whilst research and thinking skills were adequately taught, more practical “lawyering” skills should be included in the curriculum.
Ethics	Not included in the undergraduate curriculum; not an integral part of the professional training. It is a personal choice whether to act ethically or not.	A “blurry” distinction exists as to what conduct of attorneys is ethical and what is not.	Ethical and moral values are inherent qualities but the standards of conduct expected by the profession should be made explicit to students from the early stages of their careers.
Sensitivity to Diversity in the Experience of the Curriculum	Staff were often not sensitive to diversity; materials in the curriculum were not reflective of a diverse society; students too resisted mixing with different cultural and race groups.	Engaging in debates and arguments with students from different backgrounds facilitated an awareness of the views and values of a diverse student body; Law and the Constitution provided a vehicle to debate issues.	The experience of learning together with students from diverse backgrounds over four years exposed students to different views and provided valuable preparation for the real world of professional work beyond university.

6.2.5 Outcome Space A (strategic instrumentalist): “learning about other people’s lives”

A distinct sense of alienation and being an “outsider” was expressed by the students whose experience of law curriculum could be described as “strategic instrumentalist”

Sandesh explained:

During my youth, and growing up, a lot of people were being taken advantage of because of lack of knowledge...not being able to assert themselves in a way that insiders do (Sandesh).

It is as if his background situated him differently from those who are in possession of this “knowledge” He explained that he regarded the degree as being “very structured”, which provides the student with the necessary discipline “to get somewhere in life” The underlying assumption of a degree as facilitating upward social mobility is clear.

Elaborating on the value of this self-discipline, Sandesh explained that the “pressure” (workload) imposed by the degree gives you “*focus, the drive and the ambition*”:

...the degree...says to you: you have a powerful degree in your hands; do something with it (Sandesh).

It is as if the degree takes on a life of its own, extraneous or foreign to, outside of the graduate. There is a sense of obligation, a duty to your community and to yourself that demands that you step up and use the knowledge gained. He mentions that law is about “righting wrongs”. In his study of adult learners in South Africa, Cliff identified this type of conception of learning “as a moral obligation or service to the community” (1998). Sandesh’s description also conjured up an image of the qualification as an extrinsic object in one’s life, exerting control and providing direction, rather than internalised learning that has changed the learner’s perspective.

In Rani’s account of her experience of the law curriculum she often mentioned the disjuncture between her life world and the world of the law curriculum:

The cases were not about...did no connect with us.... We were learning about other peoples’ lives – you need to have a passion and interest for other people (Rani).

She used the analogy of it being like “two worlds”, in reference to lecturers who focused on high court procedures, making students

grapple to read judgments by learned judges and constitutional memoranda...things we were never going to see (Rani).

Her view was that this “*did not make us feel like this was any part of democracy*”

In a study of contextualised problem-solving for law students, Nagarajan (2002, p. 5) noted that “students find it difficult to engage with subject matter because it is not relevant to their lives”

The difficulty with the development of South African common law as a system is that its historical foundations are in Roman-Dutch law, a colonial importation from Europe, which was strongly influenced by English law during the period of British colonisation. Its subsequent development was dependent on the accretion of principles over many years of court decisions, based on the English law doctrine of precedent, or “*stare decisis*”, meaning that courts are bound to follow previous decisions. In a South African context, the fact that persons of colour were excluded from the mainstream application of the common law in civil law matters (between private individuals) for many decades during the apartheid regime, and before that, during the periods of British domination and the Union (post 1909), implies that much of the case law, other than criminal law, does not include persons of African descent as actors in the case reports. Many of the commercial transactions focussed upon in the curriculum today may be unfamiliar to students who have not historically had exposure to the world of finance and investment, e.g., shares, letters of credit, mortgage finance and insolvency proceedings.

Sandesh also mentioned that the curriculum prepared students more for the high courts, when in fact most graduates were likely to become attorneys, who do not go into the high courts at all. He knew of only one student from his year cohort who had become an advocate. Recent data from another South African Law faculty suggests that out of a year cohort of 138 graduates in 2008, approximately 70% entered the law professions: 81 as attorneys, and 12 as advocates.⁹⁸ Data from the LSSA-LEAD statistical report⁹⁹ relating to

⁹⁸ Communicated in a form completed by a Law Dean, May, 2009, which the author collated for the CHE-SALDA curriculum project.

⁹⁹ National Legal Education Liaison Committee Meeting; Johannesburg, 7 November, 2008.

2006 law graduates identifies that of the 2735 graduates, 1871 registered their articles as candidate attorneys in 2007, i.e. 68% aspired to become attorneys.

Rani mentioned a lecturer who told students that they would never survive in private practice; they should become prosecutors in the public service domain:

You know, [he] put us into those stereotype boxes and I think because we had the backgrounds...[that we had] come from, we knew that those people place us in those boxes, that was something we were used to our entire life and the fact that we had made it to varsity meant that that box was not for us. So we understood; it annoyed us- that when someone presumes to say who you are – it would annoy us and frustrate us. It would have an impact on how we assimilated that subject (Rani).

It is clear that the curriculum that is being enacted here by the (white, male) lecturer aims to reproduce existing social stereotypes and is entirely insensitive to the race, background and gender of the students. Rovio-Johansson (1999, p. 3) quotes Patrick (1998) as proposing that teachers should be regarded as cultural agents who make curriculum, not as mere interpreters or implementers of a curriculum that has “been fixed outside the classroom”. The implications of this are that curriculum-making is an “extended process...a practice in the cultural and ideological context of the classroom”. The further point is made that as such, curriculum can affect students’ experiences and their knowledge formation and the reconstitution of their knowledge”. McLean (2001, p. 401) noted how factors such as the relevance of the curriculum, the workload, and assessment practices of individual lecturers shape students’ approaches to learning and affect their learning experience.

Rani also felt aggrieved that certain skills in the law curriculum which students were assumed to have learned at school, such as debating, were dependent on the type of school and the background of each student. Students coming into higher education from schools in disadvantaged communities would have had no experience of computers, mathematical numeracy and formal debating or public speaking (also often in a language other than their mother tongue).

Sandesh was critical of the “distance” between staff and students, saying that the only social or personal contact he had enjoyed with his lecturers was at the Law Students’ Ball at the end of his final year. He mentioned how intimidated he and his friends had been to

approach staff members. Although faculty equity plans and policies are aimed at increasing the demographic representivity of law academics, in professional faculties, where academics' salaries cannot compete with those outside of higher education, the problem of attracting qualified black professionals is exacerbated, resulting in an unrepresentative staff profile in many law faculties. The transformation of teaching staff has simply not progressed much at all.¹⁰⁰

The difficulties of experiencing a curriculum in a language that is not one's mother tongue is another perspective on the theme of feeling like an "outsider". This is captured in Busi's vivid description of her sense of alienation as an isiZulu speaker, confronting the challenge of every reading task:

You know also coming from a background, coming from Zulu schools, every paragraph that I read, I had to go to a dictionary to look up the words. It would take me forever just to complete one particular task, because I can't make sense of what is being said, and I needed the dictionary, and by the time I have looked at the dictionary for the fourth time, I have forgotten what it said in the first paragraph...The thing that pulled me back was the language – it pulled me back badly (Busi).

Her poignant account of how she arrived to register at university, and after looking around, decided she would not cope and returned home, speaks volumes. Her mother accompanied her the following day, telling the faculty officials: "listen, this girl must go to varsity" She experienced a strong sense that she would not manage and maintains now, in retrospect, that some form of bridging support, encompassing writing and communication skills, prior to starting first year studies, would have boosted her confidence from the start and made a difference to her experience.

6.2.5.1 Instrumentalist understandings of the curriculum

Rani made the following comments:

Most of the students that come through these doors are not wealthy students who can afford tuition by parents ...they afford tuition by student loans, by the bank, or via family most of them actually come from far and wide to this institution....They want to come and do something, be taught that thing so that when they leave they can earn money, get a job....You

¹⁰⁰ Information disclosed by Deputy Dean at a Faculty Staff Meeting, June 2009.

want to get a job at the end and you don't want to think you still have to do other things to specialise....The goal was passing, getting my degree (Rani).

From the outset, Busi too made the point that becoming a lawyer was a means of earning a living:

I thought of law, to be honest as more about making money than justice (Busi).

Sandesh mentioned at three different points, how he was hoping “to go somewhere in life” with his law degree. He emphasised that his experience was of an overtly academic focus in the curriculum that failed to prepare graduates adequately for professional practice:

It was a very theoretical degree; the curriculum was too theoretical, unrelated to the demands of practice; a lot of courses I did have no relevance to practising. I think the problem is...it is still too academically based. In a lot of classes there was some sort of practical application But not enough over a sustained time to gain any skilful knowledge (Sandesh).

These comments all reflect an approach to studying law that has at its core an instrumental functionality. It is viewed as a professional qualification that ensures the employability of a graduate as its ultimate purpose and goal. This critique of the failure of the curriculum to provide adequate exposure to practical legal skills was expressed in varying degrees by most of the participants, including those whose motivation for studying law and whose approach to learning law were different from the views of these three participants. These comments resonate powerfully with the discourse of globalisation and the high-skills agenda, mentioned in government policy (Ministry of Education, 2001; Ntshoe, 2002). For those who had been disadvantaged by a poor apartheid education and socio-economic barriers, widening access to higher education had a particular meaning: obtaining a degree as a guarantee of employability and upward social mobility (I Scott et al., 2007).

Fazila, whose “passion” for law was evident throughout noted that

There should have been more practical training in your LLB. I don't know, probably incorporate a course of the sort that would provide you with the skills to actually go out there and say “this is actually how it can be” and “this is what you should be doing”. I mean preparation for practice...preparing for trial, researching, things like that, are actually what you would require (Fazila).

Even Maria, coming from a family of lawyers, who chose to study law because she is “a caring person”, who wanted to change the world, commented,

It was purely academic I found. The courses need to be restructured from a practical point of view (Maria).

Having a close understanding of what it means to be a lawyer, from personal, family connections or associations with professionals, as opposed to being an “outsider” gleaned that understanding from (usually American) television programmes, has been shown in an English study to be a significant factor differentiating graduates’ expectations about professional life (Sommerlad, 2007). The author recommends that class and background positioning be addressed openly in legal education so that graduates are aware of the hidden cultural and social barriers, and are in a position to develop strategies for securing employment and dealing with issues of their personal identity, and the class-based notions of professional identity (Sommerlad, 2008).

Consistently, in each category, the views expressed suggest a partial notion of “curriculum as consumption”, of which modularisation has become a “key signifier” (Barnett & Coate, 2005). In the competitive landscape of higher education institutions, this emphasis has been communicated to students through the “packaging” and marketing of career-focussed degrees by universities, so as to attract the student-consumer (Ensor, 2004). The effects of this external market influence on curriculum decisions cannot be ignored, and is extensively described to in the local and international literature (Kift, 2003; Subotzky, 2000; Thornton, 2004; Webb, 1999). Stakeholder demands, such as the strident complaints from the LSSA about law graduates’ skills, or lack thereof, in South Africa add further pressure from the market on law curricula.

6.2.5.2 Approaches to learning Law: “the swotting thing”; not knowing how to learn

In discussing graduates’ approaches to studying law the structural aspects of the experience of curriculum were addressed. This section asks: *how* did the graduates experience the law curriculum? The question addresses two different aspects: the first is the act of experiencing the curriculum, and is related to the graduates’ approaches to learning

through the curriculum; the second aspect is the indirect object of their experience, which concerns their motives and the goals that they were attempting to achieve (Stamouli & Huggard, 2007, p. 183).

In the approaches to learning, a steady increase in the learners' levels of self-confidence was discerned. This feature impacted significantly on the way in which the students learned at university. Unfamiliarity, or lack of self-confidence in the strategic instrumentalist category resulted in the need to adopt surface learning strategies, involving memorisation and repetition. In the second category, the pragmatic generalist, the learner was comfortable and sufficiently confident to ask questions and engage actively, while in the third category, the transformed vocationalist, the students were self-directed and took responsibility for their own learning

The graduates in the first category recounted how they memorised material:

learning questions from past papers, "swotting", learning by heart to regurgitate law, because I am a swotting person (Rani).

Fazila commented: *"it was mostly memory work, 80% of it was"*. Being passive learners, expecting lecturers *"to feed it to you"*, *"to transfer knowledge"* echoes the expectations of a transmission teaching style that is not uncommon in the discipline of law (Shulman, 1983). Sandesh told how he was able to negotiate his way successfully through his degree by adopting a strategic (surface) approach, memorising answers to questions for the previous five years' examination papers. The type of assessments experienced by law students often signals that this approach is what is required. The nature of assessments, and particularly the assessment of skills in law schools, clearly signals to students which knowledge is most valued within a discipline (O'Brien and Littrich, 2008).

Rani stated:

I passed by doing the "swotting" thing; my goal was just to pass exams (Rani).

These comments reflect an instrumental approach to learning that is teacher-centred and premised upon an unbalanced relationship between learner and teacher. The expectation is that legal knowledge is transmitted by experts to waiting recipients (Ramsden, 1992). This acquisitive notion of learning is often the norm in schools where there is a lack of resources,

unsatisfactory pupil-teacher ratios, dominant cultural views related to acceptance of authority, and teaching styles that rely on rote-learning as a substitute for knowledge-construction in the classroom. In Vermunt's (2005) study of the correlations between contextual factors and academic success, law students most often used patterns of reproduction-directed learning. This learning style is closely associated with contextual factors of previous academic history, the nature of the discipline, and application-directed learning patterns. These were all dominant among law students in Vermunt's research and were confirmed in the data in this study.

Shulman (2005), describing the "signature pedagogies" of various disciplines, explains that the importance of such a "signature pedagogy" for law students is that it signals, as part of the enacted curriculum, what counts as knowledge and how things become known in that discipline. It speaks of "how knowledge is analysed, criticised, accepted, or discarded". The way in which teaching is carried out in a professional discipline typically has a surface dimension: the "operational acts of teaching and learning, answering questions, interacting and approaching". The "deep structure" is based on assumptions about how best to teach that knowledge, and the "implicit structure" is founded on a set of underlying beliefs about professional attitudes and values. Shulman argues that the pervasive and routine way in which legal education is presented (large lectures, controlled by an authoritative lecturer who poses questions which students are expected to answer by means of coherent claims that can be substantiated) provides a familiar context to which law students become accustomed. This "routine" avoids unfamiliarity, and in its very predictability it facilitates engaging with increasingly complex cognitive material in an incremental way. It also serves the purpose of inducting students into acceptable modes of legal thinking and argumentation.

The pedagogy resembles the familiar rituals of court room conduct, and reinforces the notion of how professional practice is interpreted through the curriculum, based on existing understandings of what is acceptable and "how things are done" This echoes the "unfolding circularity" (Thomson, 2001) of pedagogy and professional practice which will be elaborated upon in the concluding chapter. This pedagogical style is the type of teaching practice that is widely enacted in South African law faculties. It has a particularly deleterious impact on

students who lack confidence and are not first-language English speakers. For students from disadvantaged schools where fluency in English is not common, responding to teachers in a critical or argumentative way, in English, is a challenge in itself, and for many students is also likely to be not a culturally acceptable mode of interaction (Ngwenya, 2006, p.24).

Rani and Busi both mentioned how they did not know “how to learn, how to study” at university. Busi explained:

You need a bridging year; you are not prepared: it's difficult understanding and managing your time and yourself- it's easy to get lost (Busi).

Rani described how she and her friends had to teach themselves how to study at university because they fared so poorly at first, despite having been high achievers at their schools.

From these comments, it was clear that students arrive at university unprepared for independent learning and deficient in the metacognitive awareness necessary for successful post-school study. Underpreparedness of first-year students entering higher education is a national problem that has been regularly identified in the literature on higher education in South Africa. In the diagnostic section on “indicators of the need for systemic change” in the *Higher Education Monitor* (I Scott et al., 2007) the authors identify, as a structural obstacle, the lack of effective articulation between consecutive phases of education such as transition from school to university, suggesting that appropriate support is essential to ensure continuity and tackle poor output and retention rates.

Bouhey (2009) comments that reading in university disciplines and fields is qualitatively different to many other kinds of reading because it involves the reader in taking up positions in relation to the text – positions that derive from the values and attitudes within that discipline as to what counts as valued knowledge, and how that knowledge can be known. She argues that only discipline experts can assist students to appreciate “the ways of reading and writing which underpin knowledge production in their own fields”, as a starting point for facilitating learning in a discipline. This hearkens back to Busi’s comments about the difficulties she experienced in reading law texts as an isiZulu speaker.

6.2.5.3 Reason for studying Law: making money and effecting change

Graduates expressed various positions regarding what motivated them to study law. In the strategic instrumentalist category, the contradictory tensions or dual discourses in higher education of efficiency and equity were mirrored in the graduates' apparently conflicting reasons for studying law: making money or transforming society.

There was a sense of urgency about becoming qualified to earn a living, becoming sufficiently skilled to "make money", tempered by an awareness that lawyers may effect change in a transforming society. The "massification" of higher education and the discourse of "high skills" were necessary to promote national economic growth and increased productivity in South Africa, yet the cost implications for individual students undertaking higher education imposed enormous personal financial pressure. Despite the provision of loans for university fees through the National Students' Financial Aid Scheme (NSFAS), the affective issue of incurring a mounting debt is a significant cause of students' failing to complete degrees (I Scott et al., 2007).

Sandesh commented that more often than not, "*people*" enter this business (of law) seeing it as a means to make money, based on what they perceive as glamorous and exciting representations of lawyers in the media. He admitted that he thought he would be driving an "*SLK*"¹⁰¹ in two years time, but in reality that was not the case, and he does "*a lot of pro bono work*"¹⁰² He described how he had imagined legal practice as "*glamorous*" with a large support staff, and had seen himself "*playing golf every day*" – expectations that bear no resemblance to his current lifestyle.

Busi, too, frequently alluded to the perceived financial rewards, but concedes that "*it is a long journey*" to become a partner, requiring you to meet fee targets for several years

¹⁰¹ A luxury Mercedes Benz sports model vehicle.

¹⁰² Sandesh explained that he regularly takes on legal work for those unable to afford a defence attorney in criminal cases, at no charge to the accused. The KwaZulu Law Society Rules of Conduct, Rule 27 encourages attorneys to complete no less than 2 hours of *pro bono* legal services per month. Accessed at <http://www.lawsoc.co.za/default.asp?id=1815> on 24 September, 2009.

before a promotion is considered. She commented that her first salary had been “*half of my Mom’s salary – and my Mom is a nurse.*” She now concedes: “*there is no money in law!*” Busi complained about the pressure in large law firms to generate income upon which increments and promotions depend:

I just do not like the idea of having to chase money...it’s about making money, because if you get a fee target and you don’t meet it, it affects your salary and a raise in salary and the length of time it takes to reach partnership (Busi).

Her motivation for studying law had been partly personal – to remedy a miscarriage of justice perpetrated against her sister, as a result of which she was never awarded compensatory damages following a motor vehicle accident – but Busi’s primary aspiration was “*to make money*”. The issue of law as a profession where financial reward plays a significant role in many decisions was emphasised by several participants. Maria commented at one point:

A lot of firms are business orientated and they want the person who is going to produce the most money (Maria).

Rani explained how two incidents were critical in shaping her choice of law as a career: in 1994, when her school teacher (an activist) walked into their classroom and wrote the word “*Democracy*” on the board, and then later at a special school assembly held to celebrate the inauguration of President Mandela, where, she recalled, it felt “*so exciting*” This was when she decided she wanted to study law. She explained how she wanted to be “*part of something in the law*” and said that she was influenced by the idea that “*we thought we could change everything*”.

The second “*moment*” for Rani was in her first year at law school in 2001, when the first ever Racism Conference was held in Durban. She and a group of friends were interviewed on campus by a reporter for CNN¹⁰³ and complained that they were residents of Durban but could not obtain access to the conference sessions. The following day the CNN reporter arranged for the students to attend; Rani described the event in the following terms:

¹⁰³ CNN (Cable News Network): the most prominent international (American) TV news channel.

Then I came back and I realised that it is a few people that can change things...lawlessness; and it is up to us [lawyers], to ensure that those few people don't succeed...and that was life-changing (Rani).

Rani expressed disdain for the approach of the Law Faculty in representing the law degree as a generalist qualification to equip graduates for a variety of careers. She was critical of this disregard for its primary constituents who wish to be practicing lawyers. Her view was that such marketing dilutes the focus on practical skills that are necessary for the purposes of earning a living as soon as a student graduates.

6.2.5.4 Conceptions of theory/skills dichotomy: practical and appropriate skills lacking

This section explores perceptions from graduates in, respectively, each of the three outcome space categories of the interrelationship between theoretical knowledge and practical (lawyering) skills. Conceptions of the curriculum on the part of graduates falling into the strategic instrumentalist category were that it does not include appropriate legal skills. In the second category, pragmatic generalist, the view was that the academic curriculum provided a “skeleton” of ways of thinking and understanding which could be built on in a contextualised setting of professional practice. In the third category, transformed vocationalist, the view was that skills could be easily learned if the theoretical foundations have been acquired.

In the strategic instrumentalist category, a clear dichotomy between academic (theoretical) learning at university and professional (practical) skills was perceived as the major shortcoming in the LLB curriculum. The skills that are mentioned in the globalisation discourse relate to employability and are focussed on graduates being “creative and innovative,...able to cope with change, and...able to fit into organisational cultures” (Swartz & Foley, 1996). In a study of two cohorts (1991 and 1995) of Australian law graduates (Vignaendra, 1998), communication skills were identified as the most frequently used skills in practice. Generic skills such as time and document-management skills were also rated as more important than professional skills such as advocacy and negotiation.

In an Australian pilot study on graduate skills (Peden & Riley, 2007) the most important skills that employers expected graduates to have been taught at university were placed in four categories. In the first category were **generic skills**: behave ethically; effective communication skills (write grammatically; speak confidently; collect, correlate, display, analyse and report observations); ability to work as part of a team (think independently; work cooperatively; adhere to deadlines consistently; work independently). The second group of skills were **legal research skills** which were ranked in the following order: electronic research; reading and understanding cases; finding cases and secondary material; knowledge of legal principles; applying and distinguishing cases to facts; awareness of and ability in paper research. The most important **legal reasoning skills** were: critical skills (criticise judgments, think across different areas of law, understand legal theory); communication skills (argue positions in writing and orally, interview clients, write legal advice, draft basic clauses). The **legal practitioner skills** were: knowledge of court procedures; how to mediate disputes; negotiate contracts; act as an advocate in court. Surprisingly, this fourth group, legal practitioner skills, were met with “neutral or lukewarm” responses on the part of law firms and government agencies – possibly, the researchers suggest, because law firms do not expect these particular skills to be taught at university, or because they prefer to teach their graduates “in-house”, in the context of practice.

Strong views were expressed by the participants in this study: that theoretical subjects unrelated to practice should be removed from the curriculum. A need for practical skills to be included from first year was reiterated by several participants. Sandesh explained:

The problem is we learn so much theory and you ask anybody it is just a matter of swotting and regurgitating (Sandesh).

He described how he had felt “let down”, unprepared for court, for running a trial, when his “principal left [him] cold and said run a trial...” His practical trial skills were learned: “sitting in court and watching experienced attorneys; you get an idea as to how they do things”. Elaborating on this, Sandesh said that cross-examination was a very difficult skill to grasp, but something that he had learned by practising, improving his expertise with time. He commented:

I am in court just about every day but like I said, at the beginning, the whole moot [court] aspect, to me, it didn't prepare you for the outside world and that was I suppose a bit of a let down (Sandesh).

None of the participants regarded participation in a “moot” case in their final year as being particularly valuable. It did not provide a realistic learning simulation of litigation and students were not prepared adequately to undertake the assessment, unless they had been to “schools where debating had been part of the curriculum” (Rani). This view is borne out by research carried out at another Law Faculty in South Africa, where the authors concluded that participation by students in moot court arguments did not improve their overall learning of legal concepts, and acted as an even more complex challenge for those students whose first language is not English (Watson & Klaaren, 2000).

Maria, a student with first-language English who had attended a well-resourced local government school, added:

You are totally unprepared for your moot...going back to the moot, I had no clue what to do...absolutely no clue (Maria).

Vishan (an employer) explained that second language candidate attorneys’ ability to “stand up and speak in court” is often related to the type of schooling they have experienced:

for instance, if you get a black candidate attorney who is from an “old” school, a normal government school, and has gone to university, has been average at university, not because he or she doesn't have the intellect, but because she or he was not exposed to speaking English like a black student who went to an ex-Model C school, or a private school...and that is where the difference comes in, because you will find those candidates who go to K College (private school), W Girls High (ex-Model C), D Girls' College (private school), they come in and express themselves very well – they speak excellent English. They are confident. Yet if you get someone coming from the rural areas, from H (a nearby suburb) even, and he or she is very closed, afraid. They don't want to, or have difficulty in expressing themselves (Vishan).

The obstacle presented by the need for fluency in English for a legal professional is a critical feature of the hidden curriculum that is only marginally addressed within the formal curriculum and in ways that do not develop essential language skills that are expected and required by employers. Even for first-language English speakers, the intimidating experience

of appearing in court creates anxiety because it has to be learned quickly “on the job”. Maria expressed a concern (echoed by David and Sandesh) that these rudimentary oral “lawyering” skills were not explicitly included in the university curriculum:

Trial skills are lacking: standing up before a magistrate and appearing; knowing how to address the magistrate; knowing how to put forward the argument in a logical manner. Your opponent will reply to your argument. You have to know to write it down and rebut it and you have to know to pick up and think quickly and you are not taught that (Maria).

Rani recollected how on her first day of articles, she had to borrow a black gown to appear in court when her principal was too busy to go with her. She was required to defend a homeless man who had been arrested for creating a public disturbance by urinating in a public place on the bedding of another homeless person. She recounted:

That was my first trial I had...[laughter] so you “land on your feet” This was my first court appearance. I thought that I would have great mentorship but, in fact, [laughter] it wasn’t like that (Rani).

Maria added that “it depends on your firm: how much guidance and support you get helping to teach you professional skills”. She explained that while some firms may teach you and take you to many trials before you have to “do it yourself”, other firms do not. Fazila added that “you are thrown in at the deep end” when starting out in practice.

The traditional view of academics that these aspects of professional skills training are best taught by professionals does not take into account the uneven quality of professional mentoring that occurs in different firms. It also fails to address the question of whether basic lawyering skills should be included in the academic degree. It harkens back to the difficulty, raised by at least one member of the 1996 Task Group (Participant 1), and also by a Dean at an HBU (Participant C), of finding lecturers who are adequately trained and competent to teach such skills:

We struggled for years to find people with the requisite skills to teach, people that had both teaching skills and the professional experience....(Participant 1)

That’s my concern...whether those skills courses are done effectively within the context of varsity – a serious question is whether we can teach them effectively? They say where students are not surrounded by the practical legal work, it’s not that effective, and so we are teaching skills in a very theoretical way (Participant C).

This same Dean (Participant C) considered that the teaching of professional skills within the university curriculum would result in duplication and repetition if graduates were then to attend the Practical Legal Training Schools. Academics tend to assume that these skills are taught during the vocational training phase by practising attorneys, but Sandesh and David both mentioned that the training received at the Practical Legal Training School had been a somewhat cynical account from some practitioners of what to expect: “*rather a put down*” as David explained. Sandesh remembered the “*ridiculous stories*” that some attorneys had regaled them with during the training course. The alignment between the two phases of legal education seems to be in need of reappraisal if it is to achieve the objectives for which it was intended. The point has been made in the United Kingdom too (ACLEC, 1996; Maharg, 2007).

Sandesh also believed that book-based research skills were not emphasised enough. His personal experience as a sole (criminal law) practitioner now, operating outside of an urban area, is that he does not have assistants and resources to support his preparation for trials. He spends hours researching for each trial and struggles to keep abreast with recent case law, with a small library of reference texts and no electronic resources on hand.

This speaks to the type of preparation for practice given in law faculties at HWUs, where possibly there is an anticipation that graduates will be involved in the type of practice that the lecturers experienced: well-resourced, white law firms, with easy access to a law library or electronic data bases. It adds another dimension to the focus on high court practice and procedure in the law curriculum.

The unanswered question is: what skills are relevant for graduates? The answer in terms of informing curriculum development would be to consult stakeholders and prospective employers; on this point, Cloete and Bunting are critical of employers’ perceptions as being typically pessimistic that higher education can teach these skills, adding that employers tend to “extrapolate curricular prescriptions from their current preoccupations”, which results in a focus on narrow work-related competencies (2002, p. 46).

6.2.5.5 *Conceptions about ethics: a personal issue*

The paucity of comments on the aspect of ethics would seem to indicate “null data”. Participants had limited views and did not express much interest in the topic. This in itself appears to me to be a serious silence in a curriculum that is training future lawyers. Some variations did nonetheless present themselves: the strategic instrumental conception of ethics in the curriculum was that this is a personal issue; the pragmatic generalists thought ethics is “a very blurry thing”; the transformed vocationalist position was that little was taught in the official curriculum that related to ethics, and that they had learned the rules of professional conduct once they were in practice – which was effectively “too late”. No clear distinction was made in any of the categories between personal morality and the formal rules of professional conduct.

Strategic instrumentalist participants stated that ethics had not been incorporated into the law curriculum in their undergraduate degree but had been learned during their period of articles of clerkship. They had studied the Law Society Code of Ethics at the Practical Legal Training School in order to pass the professional admission examinations. All agreed that ethics form an important component of being a professional, but they are a “*personal issue*”. Whitear-Nel (2009) notes that the ethics section in the attorneys’ admission examination has been reduced from constituting a separate paper on its own some years ago to, currently, just a small section of one paper. She further observed that the ethics section in the attorneys’ journal *De Rebus* has fallen away entirely, due to lack of interest in the section on the part of practitioners.

Sandesh related how fellow law students had regularly committed fraud by signing class registers on behalf of their friends without realising that they were committing an ethical breach. He expressed the view that whilst many colleagues charged grossly unethical fees, practising law in an ethical manner by charging “*decent fees*” and explaining to a client how these were made up allowed you as a practitioner to

build yourself up on those basics and slowly get somewhere in life
(Sandesh).

Curricula should be viewed as “educational vehicles for developing the student as a person” (Barnett & Coate, 2005, p. 108). In the domain of ethics, the authors comment that these are not readily assessable or quantifiable in the discourse of benchmark, globalisation and quality assurance yet they are undeniably one of the key qualities sought by employers, a view confirmed empirically by Peden and Riley (2007) in a survey of law employers in Australia.

Pedagogies can play a powerful part in communicating professional and ethical values (Shulman, 2005) and can also serve to reinforce students’ sense of dependence on “learning the rules” by emulating what is modelled for them by lecturers. However, if curricula can develop in students a sense of autonomy, of independence and engagement in the disciplinary practices and values, this would reflect the “ontological turn” that could foster transformative education and nurture innate ethical being.

The need to introduce a pervasive thread of ethics throughout the law curriculum has been persuasively argued by Rhode (D Rhode, 2000) in the United States, Webb (1998) in England, and Robertson (2009) in Australia, but it seems that these arguments have not yet borne fruit in law curricula. Robertson proposes that the focus in law curricula should be much wider than teaching students the codes of professional conduct: it is feasible for the curricula to coherently incorporate a more pervasive emphasis on the requisite ethical and moral values for production of lawyers with integrity, honesty and the good of the society as a guiding interest in their professional behaviour. Whitear-Nel (2009) in South Africa notes that while, as previously mentioned, the local attorneys’ publication *De Rebus* has discarded its “Ethics” section for lack of interest, there are ever-increasing reports in the same publication of attorneys who have been prosecuted or struck off the attorneys’ roll for ethical violations of the code of conduct.

6.2.5.6 Sensitivity to diversity in the curriculum: stereotypes and theoretical learning

Variation in perceptions about experiencing sensitivity to diversity in the curriculum was reflected once again in the three different outcome space categories. In the first category, the strategic instrumentalist view was that learning about diversity, in the form of

theoretical and stereotypical profiles, continued to play out through the hidden curriculum in the way that students were treated by staff and in the choice of curricular content. The pragmatic generalist view was that through informal mixing and debate students learned “*where others were coming from*” The “othering” between race groups was present in the subtext. The “caring” aspect of the transformed vocationalist category was expressed as “respect” for others, which was learned through extended interaction with students from different backgrounds.

Rani conveyed an opinion that staff members were insensitive to diversity in their selection of materials and their stereotyping of students according to race and gender, as well as being “unapproachable” She stated that students only began to interact with peers from different cultures and race groups when they were in their third year of the degree, studying Legal Diversity. She acknowledged that attempts to encourage students to engage with others from different cultures had been made at first-year level, but that the students themselves tended to thwart and undermine those intentions by preferring to mix with familiar friends. She also mentioned how some students manipulated their membership of tutorial groups to avoid attending classes taught by tutors who were from a different race group.

Busi’s experience of the module Legal Diversity mentioned how it had been interesting as theory, but

It wasn’t so much about teaching you what happens if you get a client from a different ethnic group and how you deal with that. No. Everything was theory; teaching you what happens if you get a client from a different ethnic group and how you deal with that? No. (Busi)

Sensitising students to living in a diverse or pluralistic society was identified in 1997 as one of the guiding principles that should inform the development of law curricula (Philip F Iya, 2001; McQuoid-Mason, 2004). This emphasis reflected the national educational policy discourse of transformation and diversity in post-apartheid South Africa. According to *White Paper 3: A Programme for the Transformation of Higher Education*, transformation “requires that all existing practices, institutions and values are viewed anew and rethought in terms of their fitness for the new era” (Department of Education, 1997, para. 1.1). With this in mind,

modules ought to have been developed to heighten students' awareness of the constitutional imperatives regarding equality and diversity.

Some departments within universities developed modules based on gender, race and identity issues as "a way of raising students' consciousness on issues of citizenship and democracy" (Bawa, 1999, quoted in Cross, 2004, p. 399), but as Cross notes, this avoids the challenge of "hot "cultural issues. Many law faculties appear to have adopted an instrumentalist approach that classifies "skills and values" teaching (life skills, computer skills, numeracy) as part of diversity curriculum content. 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, was thought to be an adequate response to addressing diversity issues. This allowed them to avoid addressing issues of diversity, racism and social justice explicitly with students. This disjuncture between the formal knowledge taught in the curriculum (constitutional jurisprudence) and the everyday interactions in classrooms has been similarly recorded in the Ministerial Report on Transformation in Higher Education Institutions (2008) as a disjuncture between official policies on transformation and lived practices in classrooms, staff rooms and residences.

Cross (2004) notes that there is no single model or conception of diversity that will work equally effectively across all contexts. What this has meant is that at South African higher education institutions responses have been varied, and particularly in the field of curriculum development where different assumptions guide and inform those responsible for this task. It has been proposed that universities should be the pre-eminent site for facilitating tolerance, inclusion, access, and addressing structural inequities (Cross, 1998, p. 202), but the meaning of diversity has in itself become a highly contested issue (Harper & Badsha, 2000, p. 16).

It seems that there has been a shift towards interpreting diversity as *embracing* or *accommodating*, or *engaging* differences, which requires not only "diversity as curricular content" but also developing capacities for "engaging differences" (Schneider, 1997, p. 128). Initiatives tend to be fragmented and dependent on individual faculties as there is an absence of a holistic theoretical framework to guide initiatives and no unified view on

whether evolutionary change or managed change is preferable (Cross, 2004, p. 396). The Ministerial Committee on Transformation reported that

the transformation of what is taught and learnt in institutions constitutes one of the most difficult challenges this sector is facing. In light of this, it is recommended that institutions initiate an overall macro review of their undergraduate and postgraduate curricula, so as to assess their appropriateness and relevance in terms of the social, ethical, political and technical skills and competencies embedded in them. This should be done in the context of post-apartheid South Africa and its location in Africa and the world. In short, does the curriculum prepare young people for their role in South Africa and the world in the context of the challenges peculiar to the 21st century? (Ministerial Committee on Transformation, 2008, S10.1, p. 21).

The key drivers for curriculum change that have determined the ways in which particular higher education institutions engage with diversity are identified as: (i) market pressures, such as financial constraints and survival in a globally competitive environment; (ii) changing modes of knowledge production; and (iii) moral and cultural concerns related to transformation (Cross, 2004, p. 393). The first pressure tends to result in “add-on” modules, related to diversity being incorporated into academic programmes, while the labour market remains the primary concern from a graduate’s perspective. This is evident in the Customary Law/African Law or Legal Pluralism offerings in many law curricula, which address diversity in “stand-alone” theoretical ways. The other two approaches to curriculum change for diversity are the affirmative approach, which includes the voices and experiences of other social groups being incorporated into curriculum content, and the critical transformative approach, which challenges the structures and assumptions of apartheid curricula, facilitating the viewing of concepts and problems from different perspectives (Cross, 2004).

A useful distinction can be drawn between affirmative remedies and transformative remedies within the diversity curriculum debate. The former remedies aim at surface changes that acknowledge, validate, affirm and foster inclusiveness, but do not challenge underlying structural patterns. The latter remedies are directed at restructuring the frames of reference, such as the “cultural-valuational structure”, in order to correct inequitable practices (F. Fraser, 1997). Cross (2004, p. 403) argues for a close-up examination of biases inherent in curricula, the educational philosophies underlying curriculum choices and the pedagogical practices that enact them. This resonates with Fullan’s (2007) imperative that one of the dimensions of change must be new materials and new practices. It is unlikely that

this type of scrutiny has ever been applied in many law faculties, based upon the nature of the curriculum negotiations that took place before the implementation of the new curriculum in 1998.

6.2.6 Outcome Space B (pragmatic generalist): “Law is just a tool”

In contrast to the strategic instrumentalist perspective, the pragmatic generalist position reflected a comfortable ease, a sense of finding a comfort zone where the student’s sense of self prevailed over the surrounding milieu. The law degree was seen as “empowering”, giving him/her control over his/her destiny. David described how he became more and more confident about asking lecturers to explain if he was not following what was being discussed.

I would ask questions and say: “listen go over it again please; go over it again”. Everyone in the lecture was saying: “don’t ask him questions!” Ja, and I mean I actually stopped caring that everyone else said that. I mean I didn’t disrupt the lectures but if I didn’t understand something and I would need clarity on it, I would ask (David).

David recalled the way many students remained silent during lectures, yet at the tutorials it was clear that the entire class had not understood anything about the topic. In this pragmatic generalist category, the student saw the learning as an acquired body of knowledge to be utilised in different contexts as an adaptable, generalist tool. There is neither the sense of urgency to become skilled in order to earn a living, nor the passion for changing oneself to become a professional:

[Law] is just a tool. We are doing something and we use the law as a tool to get certain results to assist people and use the tool, so to speak, in different ways...whatever I do must be a general degree to have if I want to go into business or do anything and that’s where the whole empowerment thing comes from. You have got an idea of how things work and how you protect rights etc. so whatever I do, I am going to have this basis of knowledge that I am working from. So I did it as a general degree (David).

This approach echoes one of the strong arguments raised by SALDA in resisting the teaching of vocational legal skills throughout the law degree. Their view is that the LLB degree provides a solid foundational education for many careers. Students who wish to continue in

the law professions will undergo further specific vocational education during their articles of clerkship or pupillage. In a recent statement, this view was expressed clearly:

- i) Although a significant (although undetermined) percentage of university law graduates practise law in one way or another – as attorneys, advocates or as participants in the criminal justice system, these are not the only avenues open to such graduates and a substantial number enter e.g. the commercial world or the general civil service, either direct from university or a few years after qualifying as legal practitioners. Universities must therefore be cognizant of the needs of the professions, but not exclusively so – their prime loyalty should be to the discipline of law, and to equip students with universal skills.
- ii) Universities are not vocational training institutions. The responsibility for training lawyers lies with the professions. The requirements for each branch of legal practice, whether public or private, are different, and while there is some overlap in activity, professions generally acknowledge that training for one profession is not sufficient for practice in another.
- iii) Any attempt to situate vocational training as a core activity of a university faculty of law should be resisted. Universities and their teaching staff are obviously not equipped to provide such training and it would be an impossible task to decide which specific profession universities are to serve in this regard.
- iv) SALDA believes that universities should remain true to their core function, which is to provide relevant legal education to students who can then use such an education in a variety of ways, the practice of law being a significant but not exclusive field of activity.¹⁰⁴

The sub-text in this viewpoint is the safeguarding of academics' interests: their privilege and status, their academic freedom to teach whatever they choose, and their insistence on a law degree as a general foundational degree, enhancing the marketability of the qualification.

6.2.6.1 LLB a generalist education; a particular approach to thinking and understanding

In this category of description the experience of curriculum was regarded as the acquisition of “ways of thinking” In describing his understanding of the law curriculum, David alluded to his expectations and the outcomes of the law degree:

I wasn't sure of what I wanted to do – the LLB was a general degree, so I could get an idea of business, how things work, quite a romantic notion, an element of power, an empowerment thing....it is empowering that you are going to know about law and how things operate and how things are supposed to operate you have got the skeleton you received at varsity, how to learn, how to think about certain things and all the rest of it (David).

¹⁰⁴ SALDA: POSITION PAPER ON LEGAL EDUCATION (25 August 2008).

At another point he commented:

We use the law as a tool to get certain results, to assist people and use the tool, so to speak, in different ways but it is not a “pie in the sky” thing either. Varsity is not a practice place, it is an academic place. You are getting a knowledge base; you have a way of thinking, a way of learning, you have a skeleton by which to reason, and you know how to do something in principle (David).

Maria, too, referred to a “way of thinking” when she mentioned that

You have to find things, so it develops your mind to think in a certain way...ways of thinking (Maria).

There is almost a sense of surprise in David’s comment near the end of the interview:

It’s a nice feeling when starting now...people are coming in and they have disputes and you can sort the matter out very quickly and they come and say thank you very much...God bless you and your family (David).

The expectations of curriculum by graduates whose expressed experiences matched this category align partially with the idea of curriculum as liberal education (Barnett & Coate, 2005). The three goals typically associated with the liberal education agenda are: developing a sense of responsibility for learning and the ability to continue learning (life-long learning skills); the ability to assess critically one’s own performance (critical self-reflection, Schön, 1987); and an understanding of the application of knowledge in different contexts (Barnett & Coate, 2005, p. 39). Aspects of this type of education overlap with other categories of description and cohere with theorising that develops the notion of ontological values within a curriculum, an issue which will be developed in the concluding chapter.

6.2.6.2 The confidence to question

The pragmatic generalist approach to learning law through the curriculum reflected a self-confidence that enabled a more active engagement in and control over learning:

Students blame lecturers for not preparing them for exams or marking in a particular way, instead of taking responsibility for their own learning, questioning.... You have all the resources at university; you need to make it work for you; it’s no one else’s fault, other than your own. Law is grounded in logic; you follow step by step logically; read up and go and speak to the lecturer, I asked questions if I needed clarity (David).

These comments from David reflect the confidence that emanates from a student who is familiar with independent learning styles. He is comfortable asking questions or challenging lecturers. He explained how he would persist in this until he was satisfied that he understood concepts. He admitted to “*cramming before exams*” but explained that it was easier to understand and (then) memorise than to learn “*parrot fashion*”. In his own words, his approach allowed him to acquire a “*skeleton*” of knowledge and taught him how to learn and to think. Despite his peers teasing him and recommending that he stop asking questions, his approach was to insist on approaching lecturers and querying concepts, to ensure he understood a topic to his satisfaction. This position relates less to the curriculum he experienced than to his personal approach to the learning opportunity available. His attitude again reflects that as a white male he is in a comfort zone where his voice is heard and he feels able to question, to challenge and to successfully negotiate the hidden curriculum, or the tacit rules, because of his familiarity with the language of the lecturers and the discourse of the institution.

6.2.6.3 An empowering general education

The data elicited from graduates who expressed a pragmatic generalist experience of curriculum unfolded to suggest that there is no sense of a commitment to law, social reconstruction, the legal profession or personal transformation. Studying law was not so much a choice as a default option. The degree was seen as a means to extend an education to a level where it provided a number of career choices, and “empowered” graduates with generic skills, that are broad enough for a range of commercial enterprises. It did not speak to a pressing financial necessity to earn a living, nor did it reveal a passion to become a legal professional.

6.2.6.4 Learning skills in a contextualised setting

Conceptions about the dichotomy between theory and skills were viewed by the pragmatic generalist category as providing a “*skeleton*” or “*framework*” of principles and concepts, the theory that is “*quite academic*”. An adequate separation of academic skills, from university education, and practical lawyering skills, acquired once graduates are “*working*” in

professional practice was regarded as acceptable. Participants stated that graduates develop understanding and a background basis of knowledge during their degree studies, which is a good foundation for practice. David and Maria explained how: “*it teaches you how to learn, how to think (like a lawyer)*” which is “*absolutely invaluable*”. David elaborated:

[University] is not an institution for gaining practical experience; practical skills in the real world are completely different to what you learned at university; how you negotiate with people, what you say when you get to court – you pick these up very quickly; you need to watch someone and then try it yourself...and your practical skills are completely different to what you learned in university, in terms of what you do every single day (David).

This model works well provided the candidate attorney receives adequate exposure to working with an experienced practitioner, in an environment where there is time to learn by watching. Peter, Busi’s employer, advocated a type of “learning your craft” as a long-term project of experiential apprenticeship, which is possible in the sort of law practice that can afford this indulgence in terms of time and mentoring. Maria’s view (above) resonates with this model of development.

Mentoring young graduates as a means of addressing any deficiencies in legal education and equipping law graduates with practical skills has always been a contentious issue. In the United States, Cooper comments that reliance on mentoring favours

[e]lite students, good students and students with social and family connections; it did not favour average and below average students, students without connections, or traditional outsider students who may have been the victims of discrimination (Cooper, 2001, p. 52).

The quality of mentoring and apprenticeship-type learning of craft skills once graduates enter employment varies considerably, depending on the positioning of their employer in the professional legal landscape. This point will be elaborated upon in section 6.3.

6.2.6.5 Ethics: “a very blurry thing”

From the perspective of the pragmatic generalist, graduates recalled learning a little about ethics towards the end of the degree: about attorneys being struck off the roll, but as David

commented, “quite what the bounds of ethics are for an attorney, well...it’s a very blurry thing” (David).

6.2.6.6 “Understanding where others are coming from”

Engagement with students from different backgrounds who had different perspectives on most topics, as part of the experience of university, is the overriding experience described by the pragmatic generalist position. David recounted participating in discussions and arguments with fellow students, based on differences of opinion that often corresponded with cultural differences. A positive view of these “*vigorous arguments*”, according to David, was that you began to understand “*where others were coming from*”, which has been helpful to him in dealing with clients from different race groups. The law and cases, particularly those about constitutional values facilitated debate, which gave you “*a formal training, for want of a better word*” in diversity awareness.

6.2.7 Outcome Space C (transformed vocationalist): “giving it my all”

The third category of description, in outcome space C, was the transformed vocationalist perspective on the law curriculum experience. The term “vocation” is adapted from Dewey (1916) and encompasses the “full range of wider social and political connotations of “vocation”, to avoid viewing a vocation as a trade or specific job (G. Johnstone, 1999):

A vocation means nothing but such a direction of life activities as renders them perceptibly significant to a person, because of the consequences they accomplish, and also useful to his associates (Dewey, 1916, p. 307).

In fact, “vocation”, in this sense, captures a completely different range of meanings to the term as it has been used so far in other sections of the study, where it has a negative technocist connotation of “vocational” skills or “trade school” agenda. Dewey’s ideal of a democratic education that combined liberal and vocational aspects resonates with the Carnegie report (Sullivan et al., 2007) and with the Australian (Dall’Alba, 2009) and English literature (Barnett & Coate, 2005) that advocates the embedding of transferrable intellectual skills within the knowledge domain, in professional education.

In this category, views expressed represented a serious commitment to, and a personal focus on becoming a law professional; there was a sense of changing as a person. Expressions like "*making sacrifices*", "*I really think I gave it my all*", "*taking it so seriously*", "*it was really, really hard work*", all suggest putting in a tremendous effort and an acceptance of the rigorous academic endeavour required to achieve this goal. Maria acknowledged the personal change and the concomitant obligations that followed in progressing from being a graduate to being a professional:

being out there with other colleagues – the way you have to treat them and the way they treat you and your status: you are elevated a bit from being a student to now being a professional. It is difficult when you start out being young and also female but you earn a lot more respect, and it is just being a professional. I am aware that you have to behave in a certain way and I like to check because I am aware that there is a certain standard (Maria).

There is another aspect that is emphasised in this category: life-long learning and the need to remain abreast of changes within the discipline. Maria mentioned how important it is to research recent cases so that she is well prepared, especially when she is arguing an opposed motion. Fazila, David and Sandesh too, speak of "*constantly increasing their knowledge*", and the hard work required to be "*on your game*", keeping up to date with new case law all the time:

I think the fact that you have a constant learning process ...that you are learning on a daily basis....You have the law that is changing regularly (David).

Sandesh explained the importance of keeping up to date in his sole practitioner criminal law practice, where a failure to know the latest legal development could have serious consequences for a client:

I think that one thing with a law degree is you never stop learning because every single day there is a new act, there is a new bill and if you are not abreast with that you are going to sit there and you are not going to know what is going on. You have your client's life in your hands sometimes (Sandesh).

Theories of "curriculum as transformation" often include the notion of curriculum as empowerment, for those who have been traditionally excluded from higher education. In

the context of South Africa's history this embodies the idea of higher education challenging the cultures of inequality which continue to feature in category A (Instrumental Strategist). In that group, students from disadvantaged backgrounds were still made to feel like intruders in pedagogical interactions and through the selection of curriculum content; yet a shift in the understanding of curriculum as transformation has seen a move toward empowerment and an incorporation of current concerns, that "educational experiences enhance the knowledge, ability and skills of graduates" (Barnett & Coate, 2005; Moore, 2005). In this way, we detect a sense of the possibility of developing a transformative curriculum in ways that could "add value", by producing "flexibly skilled graduates", who become empowered to conduct research, and continue their own life-long learning process beyond the university.

Cooper (Cooper, 2001, p. 62) suggests that the unifying concept of integrating theory, doctrine and practice in law schools ought to be the notion of "craftsmanship", first used by some legal realists, notably Karl Llewellyn in 1948. The notion of mastering law as a craft would serve as a means to demonstrate to graduates how they could put their idealism into practice, encourage pride in their work, an acceptance of their ethical obligations to society, and include even an aesthetic appreciation for quality work where profit is not their overriding concern. The Carnegie Report (Sullivan et al., 2007, p. 14) uses the term "professional identity" to include the notion of social responsibility or ethics as the third aspect of legal apprenticeship, together with legal analysis and practical skills. Johnstone (1999) invokes a similar conception when he adopts the construct "vocational preparation", as used by Dewey (Baker, 1994; 1916), to incorporate the integrated understanding of both knowledge and practical skills.

The "unfolding circularity of practice" noted by Thomson (2001), and developed from Heidegger's writings, appears to work counter to this notion of the transformative agency of curriculum. Professional practice is shaped and influenced by outsiders joining professions, yet they are shaped in the process, and give up some of their personal identity, to change themselves, in order to meet the hidden expectations of practice (Sommerlad, 2008). Aspiring professionals' practices are to some extent moulded by their own histories and experiences, and thus there is a constant reciprocal effect between the "insiders", and

“new-comers” or “outsiders”, who have a mutual impact on the collective practices of all members of a professional community.

6.2.7.1 *A law degree represents the fulfilment of a personal vocation*

In discussing the transformed vocationalist’s understandings about curriculum, it must be emphasised that the term “vocation” in this context connotes its widest range of meanings (Dewey, 1916, p. 307).

Maria spoke with fondness of her experience of the curriculum:

I really love studying and I loved the law degree at university and all that work that I had put into it, I couldn’t throw my files of notes away. It is like a part of me, it really is...a part of who I am, those four years of studying. I loved it, you work hard and you give it your all and you achieve what you want to achieve; you look back, you are proud and you do enjoy it when you look back. Your personality changes a bit. I mean I look at myself as a caring type of person who wants to help but when it comes to law you have to not let your emotions get in your way (Maria)

Similar comments from Fazila convey her “passion” for law that shaped her experience of the curriculum:

Like growing up with “LA Law” and things like that, you think: this is what I am actually to come to university to actually do. I would never give it up for anything...so it is basically something that I wouldn’t give up...You have to have a passion as well. You must. It must be something that you actually want to do. I believe in that strongly because when you have a passion about something you tend to work harder and you tend to enjoy what you are doing. You put your heart and soul in it because you enjoy what you do, which is important.

It is a make or break profession: it is what you make out of it. You must have a passion for it: it must be something that you actually want to do”¹⁰⁵ or else you might be inclined to leave practice (Fazila).

At one point Rani expressed her feeling about law in these terms:

¹⁰⁵ Peter, Busi’s employer makes a similar comment about being a lawyer, speaking of the “passion of doing this work”.

I love it. I absolutely love it and I don't know...it is the way I think about the law...but if you have a good argument, if you believe in what you are going to say, if you are passionate about what you say and it is based on the rule of law, there is no-one that can deny you rights and that is what I have believed in ... I still believe that (Rani).

The “passion” for their vocation is a critical indicator of total engagement of the person, which combines more than knowledge and skills in practising their profession. The ontological component, the embodied knowledge, is communicated through these expressions of emotional commitment.

6.2.7.2 Learning independently and reflectively

In the category of the transformed vocationalist the approaches to learning law were expressed as an awareness of being reflective about learning. New ways of thinking about law as a discipline and taking pleasure in developing intellectual skills were a notable feature of the experience of curriculum. Maria explained her approach in the following terms:

I used to take notes and go home and work with the textbook to think about it, absorb it; I loved the law degree at university....The cases give a framework to build on, and you have to work really hard at it, summarising and extracting principles. You begin to see the reasoning; – I really use that now....You learn a way to think; reading cases develops your mind, challenges you; you need to reflect on your understanding; you teach yourself. I would read work over and take time to absorb it (Maria).

Boulton-Lewis suggests that the more complex the students’ conceptions of learning are, the more likely it is that they are “associated with more sophisticated reasons for study and study strategies” (1994, p. 394).

Fazila, too, described how she developed her own study techniques and would go home every night and work hard to consolidate her lecture materials. It was constant hard work and it continues to be: she continues learning on a daily basis as a professional now. Becoming a professional is the focus of academic endeavour in this category. The curriculum in this sense can be seen as empowering students to develop that professional identity. Independent learning and taking personal responsibility for their construction of knowledge is the defining characteristic of this category.

In the next section, the graduates' motivations or reasons for studying law were explored. Analytically this aspect constituted the indirect object of the experience, which is a structural feature of awareness in phenomenographic terms, a constituent part that makes up the *how* aspect of the phenomenon.

6.2.7.3 *Caring and helping others*

In this transformed vocationalist category, the graduates expressed an anticipation that their work as lawyers would enable them to help others in a caring way, although their reflections now do not necessarily suggest that this is the case in practice.

I think one of the things that really attracted me about law was obviously, you know, you have to have people skills and I am type of person where I would like to sit down and listen to your problem and obviously then advise you...I like the interaction (Fazila).

The aspect of helping and caring about people (clients) is a strong motivational factor in this category. David was surprised that people were so appreciative of the advice and assistance he was able to provide. Maria commented that she considered herself a *"caring type of person who wants to help"*, but she concedes that she has become somewhat cynical and has learned that she cannot be *"an emotional lawyer"*. As she explained, judgments are based on legal principles and the legal rules, and not, as she had naively thought, *"what is fair or just"*. She has had to develop a detachment when acting on behalf of a client, to prevent her *"emotions getting in the way"*, in situations when a conflict of personal and professional values is experienced. Maria used the example of having to evict people from their homes:

You can't look at it from a personal point of view; you have to look at it as: this is the law and they haven't paid (their rent) (Maria).

Sandesh expressed a similar sentiment about his practice, which mainly involves criminal law cases. He discussed the ethical dilemma he faces of whether or not to advise a client to plead not guilty to a charge, and then whether he can go through with defending them. He encounters *"lots of moral issues"* and struggles to separate his work from his personal life.

Their comments in both cases suggest that as students the graduates were not prepared by the curriculum for dealing with professional ethical dilemmas.

6.2.7.4 *Theory to underpin practical skills*

The theory/practice dichotomy in this category of description was regarded as appreciating the “*groundwork*” of theoretical or foundational understanding, prior to entering professional practice. Maria’s view was that the practical skills cannot be learned unless you appreciate the theory, because they “*go hand in hand: it is twofold*”. Fazila also mentioned that the “*communication and people skills*” learned at university, were important in building self-confidence, as part of a maturation process in becoming a professional.

Although graduates were consistent in their view that more skills as preparation for practice ought to be included in the curriculum, they commented that the “*research and thinking skills*” for professional practice were acquired through the rigour of academic discipline. Many subjects were viewed as “*purely academic*” and practical courses were not taken seriously because of the absence of formal or rigorous assessments in those modules. This notable feature – that assessment is often read by students as indicating the relative importance of materials and influences their learning as part of the “*curriculum-in-action*” – shapes the way in which they respond to skills modules (Albon, 2003; Popkewitz, 1994). O’Brien and Littrich (2008) make the further point in regard to skills assessment that the hidden curriculum, as it affects skills modules, communicates a “*negative message*” about the value of skills and that these modules “*do not merit [the students’] best work*” The same may be said about the traditional “*second class status*” of clinical legal education and legal writing pedagogy in the United States (Stuckey & Others, 2007).

Students must engage in active learning experiences that translate theory into action in “*role-sensitive, experiential or contextualised instructional activities*” if they are to learn skills and integrate doctrinal knowledge (Baker, 1994; O’Brien & Littrich, 2008). Fazila mentioned how candidate attorneys teach themselves many of the professional legal skills by watching trials in court and asking friends for advice, because principals often do not have time to teach or explain things.

The next section focuses on the integration of ethics in the curriculum, from the perspective of the transformed vocationalist.

6.2.7.5 Learning the code of practice too late

Graduates' understandings in this category reflected a well-defined understanding of ethics as a critical aspect of professionalism. A view was expressed that morals and values are inherent to a person, but the objective professional standards of integrity, knowing what is expected of attorneys by the Law Society, ought to be made explicit throughout the degree. Participants recalled having learned what constituted a breach of the ethical codes – and the possible repercussions – after graduation, from the partners in their firm and for the Board examinations, but never as students. Graduates were critical of the fact that students were not made aware at an earlier stage in their career of what standards of behaviour are expected of legal professionals.

6.2.7.6 Values and learning respect through the "hidden curriculum"

In response to the question of how the curriculum prepares graduates in respect of sensitivity to diversity, the prevailing experience of the participants who expressed views in the transformed vocationalist category was that it had been valuable to mix with people from diverse cultures daily at university: this sustained interaction prepares lawyers for the working world. Maria mentioned how they had learned to respect the views of other students through the arguments and debates at law school. Her view was that the daily interaction within a diverse student body, over a period of four years (the hidden curriculum) was more significant than formal learning. This was conveyed in her comment that "*Legal Diversity is only one course; how much can one course teach you?*"

In the discussion of the three positions identified as constituting the outcomes space of graduates' experiences of the law curriculum, it thus became clear that a hierarchical relationship existed between the three positions, with each category reflecting a more engaged relationship between the graduate and the experience of the law curriculum.

The graduates' socio-economic backgrounds and previous educational experience appeared to play a significant role in shaping this engagement with curriculum – through their

approaches to learning law, their motivation for becoming a lawyer, their understandings of the theory/skills debate and their notions of acquiring professional identity. The existing curriculum appears not to effect transformative change unless the student enters higher education with a predetermined disposition to achieve this type of learning. Thus, in its present state, the curriculum replicates a “cycle of disadvantage”, perpetuating the socio-economic positioning of the students who come in to experience the law curriculum. Ultimately their learning through the curriculum influences their post-graduation employment opportunities, their positioning within the legal profession, and their long-term career trajectory. There will be in due course be more to say on this theme in the concluding chapter, but there was one notable exception that emerged from the data: the case of the outlier whose trajectory undermines the “cycle of disadvantage” in an optimistic and original way.

6.2.8 The Outlier: Busi’s Story

In Chapter 7 I develop theorising based on a model of a cycle of disadvantage which emerged from the data, but that is not to suppose that the law curriculum developed all its “products” along a uniform trajectory. As Barnacle and Dall’Alba (Barnacle & Dall’Alba, 2008, p. 684) mention, higher education programmes promote particular ways of knowing, acting and being. Within the data an exception to the “pattern” emerges in the form of Busi’s personal narrative.

As an isiZulu mother-tongue African female, from an educationally-disadvantaged background, who was classified (on the basis of her expressed experience) predominantly within the category of the strategic instrumentalist orientation to curriculum and learning in law, Busi was able to succeed in obtaining articles of clerkship at arguably one of the most prestigious law firms in the city. She stated clearly that she wishes to be a partner there in seven years’ time and has planned her career trajectory accordingly.

In order to understand her exceptional story and explain her “outlier” status, disturbing the “pattern” of cyclic disadvantage, there were two primary factors at work. The first element was that, as Busi herself explained, she had lacked confidence, burdened with the

“language barrier”, and had never imagined that she would cope at university because she did not know *“how to learn”*. However, in her personal life, her mother, a nurse, had consistently moved her from school to school (rural to township; township to previously “coloured” school; then to previously Model C urban girls’ high school) to improve her fluency in English. In her first week at university she met a Zimbabwean man who subsequently became her husband. He was completing his Masters degree in another discipline, which meant that Busi spent her weekends with him while he studied. She was struggling to read texts and constantly interrupted him, asking for his assistance in translating words into English for her, until he bought her a set of dictionaries (English, Latin/English, Law) and encouraged her to spend time reading.

Busi described how the dictionary use, and many hours of reading books in English, enhanced her academic reading. Her husband’s encouragement and his facilitation of her academic reading skills took her to the point, after about three years, where she could enjoy reading novels for pleasure and also engage critically with law texts. Busi never failed a single module in her four-year degree. Her own agency in overcoming a literacy barrier that could have excluded her from success in her degree was remarkable.

The second factor that distinguished Busi’s career trajectory was that she was probably a beneficiary of affirmative action policies. Although the Legal Services Sector Charter¹⁰⁶ has not yet been promulgated, most law firms have been attempting to improve their equity profiles. As an African female, who completed her degree in the minimum number of years, successfully passed her attorneys’ admission examination (following six months of full-time

¹⁰⁶ The Legal Services Sector Charter was finalised by the legal profession and handed to the Minister of Justice and Constitutional Development in December 2007. During 2008 the scorecards for the attorneys’ profession were drafted by an LSSA Task Team, circulated to the LSSA’s constituent members for comment, finalised and handed to the Department of Justice and Constitutional Development in October 2008. The Charter and Scorecards have yet to be gazetted by the Department. <http://www.lssa.org.za/Index.cfm?fuseaction=home.page&PageID=2242858>. Accessed on 20/09/2009.

study at the Practical Legal Training School), is ambitious and an effective communicator, Busi was no doubt a sought-after applicant. Her employer, Peter, acknowledges that academic results rank highest in his firm's criteria for selection of candidate attorneys, but this was always subject to their recognition of the need to be demographically representative. Busi's case testifies that serendipitously converging factors can prevail over patterns, and personal agency can destabilise expectations.

6.2.9 Concluding remarks

Section 6.2 sets out an interpretation of graduates' experiences of the law curriculum at one Law Faculty, and how it prepared them for professional practice as attorneys. The three different categories of outcome space reflect the qualitative variation that emerged from the empirical data that had been generated through interviews conducted according to the phenomenographic mode. In section 6.3, data from the employers of the same graduates is analysed, again using the phenomenographic approach. The aim in including this further data set is to validate the data from the graduates by providing a different perspective on how the curriculum at one university prepared graduates for professional practice as attorneys.

6.3 [Data Set 5] Employers' data in the landscape of legal practice

6.3.1 Introduction: Employers in the landscape of legal practice

In section 6.3 the outcome space which emerged from the data serves to convey the qualitatively varied conceptions held by the employers of the same graduates. The employers' perceptions relate to how the law curriculum as experienced by graduates at one particular university prepared those graduates for professional practice.

The interpretation of these two data sets aims to present a textured analysis in response to the second research question: What are the experiences of graduates of one South African Law Faculty and their employers regarding the manner in which the undergraduate law curriculum prepares graduates for practice as legal professionals in South African society?

With this in mind, the interviews were designed to capture their perceptions of the experience of the curriculum. The insights developed in the course of the interpretation are extended and elaborated on as theorising in the concluding chapter.

Semi-structured, phenomenographic interviews were conducted with six employers of the same graduates who were participants in the previous data set.¹⁰⁷ The employers were practising attorneys who had supervised the articles of clerkship of the six graduates in the sample over a two year period prior to the graduates becoming admitted attorneys.

The sections that follow offer an account of the employers' outcome space, setting out the different perceptions of the employers about how the curriculum prepared the graduates for practice according to three categories of perception that emerged. The link between how employers perceived the role of newly-qualified graduates in legal practice and the employers' perceptions of the graduates' preparedness for practice was explained. Thereafter, a review of the employers' conceptions regarding the theory and practice dichotomy; the acquisition of practical skills, and sensitivity to diversity in the curriculum was described. Finally, a summary of the analysis concludes the chapter.

¹⁰⁷ Sandesh completed his articles under Vishan; Busi worked for Peter; David was employed by Kavish; Rani worked for Maureen; Maria was employed by Greg; and Fazila worked for Colin.

6.3.2 Employers' conceptions of graduates' preparedness for legal practice

The data elicited from the participants expressed the individual employers' conceptions of how the undergraduate law curriculum at one university prepared its graduates for becoming practising legal professionals. Most of the participants reflected on the difficulty of giving a general opinion in circumstances where their particular personal experience of individual graduates dictated how they regarded the competence of candidate attorneys. Several of the participants specifically mentioned that the individual attitude of a graduate to the work environment, to the learning experienced whilst completing his or her articles of clerkship, and his or her personal work ethic, were determining factors in the employers' perceptions.

It is necessary to mention here that after completing their degree, and before writing the Attorneys' Admission (Board) examinations, candidate attorneys are required during their two years of articles of clerkship to attend lectures at the Practical Legal Training School, either as part-time students for a concentrated period of approximately six weeks (depending on the requirements prescribed by the particular provincial Law Society), or full-time for a period of six months, which reduces their period of articles to one year. This period of practical learning is regulated by the legal education branch (LEAD) of the attorneys' profession, LSSA.¹⁰⁸ The intention is that this learning will build upon the theoretical knowledge of law subjects obtained during the LLB degree, equipping students mainly with practical skills training. Graduates thus are expected to learn generic skills, and a few legal practice skills, during their undergraduate degree, and to continue this practical training while they complete their articles of clerkship. To some extent, this professional training does affect the conceptions of the employers regarding the practical skills' competency of the candidate attorneys.

¹⁰⁸ Legal Education and Development Division of the Law Society of South Africa.

6.3.3 Employers' Outcome Space: varied perceptions of readiness for practice

The three categories which emerged in the employer outcome space are described next in general terms, following which specific topics, including the integration of skills in the curriculum, teaching ethics, and sensitivity to diversity are addressed from the perspective of each of the three categories that were developed. This is in keeping with the phenomenographic method, which is to explore the whole and the parts of the phenomenon as experienced – so as to maintain focus on the whole but also explore parts within that whole – and to identify the structural and referential aspects of the phenomenon.

Table 12 Qualitative variation: how employers see graduates' preparedness for practice

	Perception Category A	Perception Category B	Perception Category C
Referential Aspect (what?)			
Graduates' Preparedness for Legal Practice	Graduates as educated apprentices are acceptably prepared	Graduates as immediate Income-generators are adequate	Graduates as " ready-made " lawyers are deficient; lacking ethics and appropriate knowledge; unable to link theory to practice
Understanding of Graduates' Roles	Educated apprentices learning their craft	Able to generate income as soon as they are qualified	"Practice-ready" lawyers as soon as they complete their university degree
Structural Aspects (how?)			
Theory/Skills Dichotomy	A lack of legal literacy skills	Practical skills are best taught at the Practical Legal Training School	Unable to make the link: Applying Theory in Practice
Ethics	It is not feasible to teach legal ethics in a de-contextualised setting	Ethics teaching should be integrated and pervasive	Pessimism and a devaluing of Professionalism
Sensitivity to Diversity	"There is no issue"	Diversity spilling over from university into practice	Diversity is not being confronted in the curriculum: theoretical knowledge is different from lived practice

Table 12 gives an abbreviated outline of employers' responses, according to the three categories of employers' perceptions of the graduates' preparedness for legal practice which emerged in the hierarchically-ordered outcome space.

For **Category A**, graduates' preparedness for practice through the law curriculum is of an acceptable standard, when graduates are regarded as educated apprentices, starting out, learning their craft.

For **Category B**, graduates' preparedness for practice through the law curriculum is limited, when they are regarded as income-generators who are required to assume a professional role and responsibilities immediately.

For **Category C**, graduates' preparedness for professional practice through the law curriculum is deficient, in that they cannot "make the link" between theory learned at university and the demands of practice; their sense of professional ethics and conduct is not adequate for the demands of practice, and the curriculum content is not focused on the real needs of average practitioners.

For further elaboration on the categories that emerged from the employer interviews, the next section provides descriptions of each category, with illustrative quotes from the data, and indicates where employer responses in relation to the issues of skills, ethics and sensitivity to diversity in legal practice are positioned within each category.

6.3.4 Perceptions about graduates' roles shape perceptions about curriculum

The (perception group) categories developed out of the data as characterisations of the qualitatively various ways in which the employer participants expressed their perceptions about graduates' preparedness for legal practice as a result of experiencing the law curriculum. The characterisations in the categories of description indicate a relation between how employers saw the role of candidate attorneys per se, and how they perceived the curriculum had prepared them for professional legal practice.

Category A: Graduates considered as having an acceptable level of preparedness, when regarded as educated apprentices, starting out, learning their craft

The overriding conception held by two partners at sizeable commercial law practices was that graduates learn their craft once they begin practising. Hence, there is no expectation that they should emerge as "ready-made" for professional work, with a practical grasp of

professional skills and ethics. Their conception of the competency of the candidate attorneys whom they have employed was a positive one – of having formatively-educated trainees, who would acquire professional skills in the course of learning their professional craft.

It appears that these firms have the “pick of the crop” when it comes to employing graduates. Their perceived role, consequently, is that they will mentor and develop the graduates so that they will acquire practical “craft knowledge and skills” This is premised upon the graduates having the necessary generic skills and above-average intellectual ability. These partners view their role as being to guide and induct their employee-clerks into a profession, which significantly influences the way in which they understand the competency of the graduates they employ.

In addition, the quality of the graduates whom they are able to select relates to the fact that they attract the “best” applicants on the basis, presumably, of the prestige that is attached to working in large, well-established, commercial firms, located in plush office suites, and also to the salaries they can afford to pay. There is an easy acceptance of the graduates’ capabilities when they first start out:

I think that it is a given and everyone accepts that you only really start law, practising law, learning about law when you start practicing it yourself. You only really learn law once you practice it and one needs to be exposed to the general principles, I believe...coupled with that, you need to know how to investigate further and to research the law...I think the degree is very, very practical now. They seem to have a broader view of law...and there seems to be more integration of skills; they are doing smaller modules of more diverse subjects ...so they gain a broader picture of the law (Greg).

Having recently been interviewing new applicants for positions, Peter, a partner at a large law firm in the city centre where Busi works, commented that the current candidates appeared to be “*some of the best we have ever seen*”. He explained that his firm can be selective as it is “*a question of supply and demand*”. From the numerous applications they receive at his firm, the partners interview six or seven of “*academically, the best*” candidates. They finally select one or two applicants as articled clerks, bearing in mind that “*broader issues of demographic correctness*” come into their selection process. Impressed

though he was with the calibre of the applicants, Peter admitted nonetheless that their level of maturity and the degree to which they were *"worldly or street-wise"* is often found wanting. He regards the process of becoming a professional as a life-long learning acculturation.

They are young, very "bright-eyed and bushy-tailed" and are clever, articulate; but they are just entering the profession at an early age. You have got to think of every phase as a stepping stone, and so one moves to the next level, and you have to approach it: your legal philosophy must be that you are learning all the time and learning how to be a professional. I still believe that you really only properly start to learn and understand (that) as you move through your practice (Peter).

The notion of a gradual process, a continuum of acquiring the attributes of what it means *"to be a professional"*, came up several times when Peter was commenting on the way that, under supervision, graduates are mentored and taught how to be a practitioner:

Obviously, one should be given guidance in your early years but even I learn every day in my practice-life and you learn through experience; and you do something that causes something and it goes that way or this way. Because you remember and you know you are being taught as you work on the job. You are still going to learn something new every day. I learn something new every day. ...(T)he passion...is that you actually don't ever know it all and what you are doing is learning on a daily basis (Peter).

He referred to the *"passion of doing this work"*, that needs to be instilled in graduates. This idea of becoming a professional as meaning more than acquiring disciplinary knowledge or mastering professional skills will be developed in Chapter 7, as a central component of developing an ontological *"way of being"* in becoming a professional (Dall'Alba, 2009). Barnett and Coate refer to it as a focus in curriculum on developing the self: the reflective practitioner, becoming or being, self-realisation, self-confidence, the developing inner self (2005, p. 63). It hearkens back to the words of Fazila when she says *"you have to have a passion for it"*. She also explicitly mentioned that *"self confidence"* is something that should be built up every year through the procedural skills curriculum. There is resonance between the graduates who share a sense of a transformative vision of becoming a professional, of a life-long learning process, a vocation, and the employers who perceive legal practice as

developing craft skills and knowledge, learning to become skilled over time and sharing this “passion”. Dall’Alba and Barnacle comment:

Educational approaches that focus on the intellect render irrelevant or invisible the necessary commitment, openness, wonder or passion that are integral to learning, or to taking action more broadly. These are among the dimensions of learning that we believe need to be revitalised through an ontological approach to higher education programmes (Dall'Alba & Barnacle, 2007, p. 681)

Category B: Graduates’ preparation as income-generators, who are required to assume a professional role and responsibilities immediately, is adequate

Colin, who had completed an undergraduate degree before obtaining his law qualification, considered the graduates of the new degree to be “*very competent*”, because “*they have had a little bit more practical teaching than I had*”. He explained why this was needed:

You must understand that as principals we don’t have time to teach them everything. And I always say to them: ‘Listen, you are coming in here and you are part of the workforce. The object of any business is making a profit and that is it. It is up to you to try and eat up as much knowledge as you can and learn as much as you can. We don’t spoon-feed, we will assist you’ (Colin).

Colin’s suburban practice is a busy one in Chatsworth, a predominantly Indian area where high crime statistics have resulted in burgeoning criminal law opportunities for law firms.¹⁰⁹ Colin employs four qualified attorneys, with a full complement of candidate attorneys (three per principal) at any time. He explained how the nature of practice in his area has changed since he first started out, becoming competitive as more and more attorneys have opened up practices there and started undercutting fees to attract clients. His approach is that

¹⁰⁹ A task team investigating drive-by shootings has declared war on the "glorified thugs" who have terrorised Chatsworth. The crack troopers from the Durban Organised Crime Unit this week issued a warning through the Tribune Herald that they would meet "force with force. We have a few surprises for the criminals. It's the end of the reign of terror in Chatsworth", said unit commander Senior Superintendent Rajen Aiyer. "We are prepared to meet force with force. If these criminals use violence on us, we will do what it takes to protect ourselves. Constant death threats, said Aiyer, would not stop the unit from investigating the drive-by killings in Chatsworth. Accessed at: http://www.iol.co.za/index.php?set_id=1&click_id=15&art_id=vn20080720101914508C745096. 6 May, 2009.

graduates must start at the beginning and learn every task in the practice so as to develop pride in their work and an awareness of ethical and professional conduct:

The very first day that a candidate attorney starts they come into my office and I say to them: "Listen, forget about candidate attorneys, you are now an attorney because whatever you do in this office, people are going to look upon you as an attorney. You are not here to be a student. The client sees you as an attorney so start thinking like an attorney, behave like an attorney. These are the rules of the office: there is no 8 to 5. There are days when you start at 6 o'clock. There are days when you finish at 10 o'clock at night. The work gets done. You rest after the work gets done. That is it!" and I insist on that and I have never had a problem (Colin).

With this approach, he said, he finds that he has had no problem of graduates being immature. Graduates were expected to learn fast, work extremely long hours and deliver results. His employee, Fazila, told of the extremely hard work she puts in, running trials and keeping abreast of the recent cases, researching and preparing for litigation. Colin's approach required the graduates to learn every practice skill, from the lowest level of office administration upwards:

So they start and come in during the first two weeks, and it is almost as if they are secretarial staff.... 'You type your ledgers; you answer the phone; you take messages; you do filing; all those things; you diarise; taking messages, returning calls.' So the first few weeks there is a lot of administration. Once you have done that, then you are ready to move on, otherwise you are not (Colin).

Colin's view of the curriculum was that it is "far too theoretical", and was "not practical enough or prepared me as it should have". It was only at the Practical Legal Training School that he began to feel what it would be like to be a lawyer.

Category C: Graduates' preparation for professional practice is deficient, in that they cannot "make the link" between theory learned at university, and the requirements of practice; their sense of professional ethics and conduct are not adequate for the demands of practice, and the curriculum content is not focussed on the real needs of average practitioners

Maureen, an attorney-supervisor at a campus Law Clinic, complained about the lack of competency of graduates of the attenuated curriculum in being unable to "make the link

between theory and practice” She attributed this difficulty to the abbreviated time period spent learning only theoretical concepts during the undergraduate degree. This is precisely the type of difficulty that has been documented in empirical research, indicating that a primary focus on knowledge transfer or acquisition, and a concomitant narrow emphasis on intellectual growth is inadequate in promoting student learning (Ramsden, 2003). This attention to knowledge acquisition leaves students lacking the know-how to integrate the knowledge into practice, without the requisite support or scaffolding. The “situating and localising of knowledge within specific manifestations of practice” is not mediated, and thus often simply does not occur (Dall’Alba & Barnacle, 2007, p. 680). In South African institutional settings, where language can act as an additional obstacle to students’ capacity to transfer learning across contexts, there is a heightened need for explicitly making the link. Vishan, an attorney-supervisor at a government Justice Centre which provides free legal services to indigent persons, covering a limited range of subject areas, was the most outspoken critic of the current LLB curriculum. He viewed it as: “*far too theoretical*”, although he admitted that the theoretical aspects were adequately covered in the curriculum. He complained that his candidate attorneys did not know how to put the theories into practice:

They need to know how to speak in court...you will see how they struggle to speak using ‘court language.’ More emphasis needs to be placed on how we work, how we [professionals] use case law...the problem comes in when they need to express themselves...when they need to show the court that they can stand up and express themselves....communication skills need to be worked on (Vishan).

The university curriculum focused on the theoretical learning of high court procedures when, as Sandesh and Rani noted, most graduates tend to practice in magistrates’ courts (p. 297 below). In the undergraduate curriculum there is scant opportunity for students to practice court presentation skills, develop oral arguments or even observe modelling of such procedural routines. The curriculum is laden with content, classes are normally large, lectures are the usual format for conveying vast amounts of information to students, and staff-student ratios are typically far too high (Shulman, 2005). Academics rely upon the expectation that professional skills will be honed during the candidate attorneys’

professional training phase through mentoring or through formal teaching of practice skills at the Practical Legal Training Schools.

Vishan explained that, at present, he takes on his full complement of ten candidate attorneys per qualified supervisor, which clearly represents an overload. He suggested that this rule regarding articulated clerks should be amended by the Law Society – because of the calibre of legal professional it is producing by this route, and more so, in light of the calibre of candidate attorney he employs. This correlates with the comments of Maria (see p. 358) about the variable quality of mentoring that graduates receive while completing their articles. Vishan admitted that he has to take almost all the graduates who apply for positions at his agency, thus implying that he does not have the luxury of selecting the best candidates (as Peter and Greg do). He is obliged to employ too many candidate attorneys, who are generally the weakest graduates.

Because such graduates are not able to obtain articles in more prestigious firms, which base their selections on academic merit, it is the public bodies such as the Justice Centres and Campus Law Clinics that are obliged to accept all applicants, despite their often poor academic results and additional years spent studying. To address the shortcomings in the graduates' competencies, the Justice Centres have instituted a structured teaching programme for their articulated clerks, but a huge administrative burden, completing reports and bureaucratic record-keeping which is part of the supervisory workload, impacts on the quality of the output. Vishan presented a pessimistic vision of the declining standards of professionalism, both in court, and in terms of integrity, professional etiquette, and serious ethical breaches that occur daily. He added that the attitude to a professional career on the part of many of their weakest candidate attorneys was “*very negative, very pessimistic...*”¹¹⁰

¹¹⁰ Sandesh explained that most of his male African peers in his class had taken longer than four years to complete their degree, and many had then not been able to obtain articles; they were then obliged to attend the full-time Practical Legal Training School in an attempt to enhance their chances of employment. Many such graduates were completing their articles at Justice Centres because they could not find better positions and were “disillusioned” The fact that I was unable to identify any African males who met the criteria for the study indirectly confirms this explanation.

I think it has a lot to do with attitude as well. Because you have a guy who is here to work, observe, learn – but you have others who do what they want to do; they come in at quarter to eight and leave here at four, and whatever happens between those times...they don't really care. So individual attitude is important and it comes out in what you want as an individual...where you see yourself in the future....They don't like to be told what to do (Vishan).

This speaks directly to the theorising of Barnett and Coate (2005), Dall'Alba (2009) and the Carnegie Report (Sullivan et al., 2007) about the need to develop the dimension of “self” in the curriculum, to encourage the engagement with the ethical dimension, through the integration of an ontological dimension into curriculum. Heidegger argues for the essential link between education and ontology: “When our understanding of what beings are, changes historically, our understanding of what “education” is, transforms as well” (Heidegger 1962/1927, quoted in Thomson, 2001, p. 248).

Peter, too, commented that the current graduates are “*less well-rounded*” since they do not have a broad base of knowledge (from an undergraduate degree) before coming into law. “*These other subjects may or may not have been an advantage to you ultimately in a legal career*”, but Peter’s view is that they added to the maturation process of the graduates. Whilst he understood the reasons for truncating the degree, he commented:

When you are squeezing [the learning] into that period of time [four years] things are going to start popping out (Peter).

Kavish, who runs a sole practitioner office, discussed how he thought the previous system of completing an undergraduate degree, as he had done, had been a “*waste of time*”. His view was that the four-year undergraduate degree is “*more focused on law*”, as Greg also noted. “*They are doing smaller modules of more diverse subjects ...so they gain a broader picture of the law*” (Greg). This is due to the omission of many “non-legal” subjects from the curriculum, to make way for core law modules (see Curricular Comparison, section 5.1 above; Appendix 2), particularly at former Afrikaans universities and HBUs which followed the vocational law-intense model of curriculum.

But despite this supposed advantage of the undergraduate degree, Kavish also complained of graduates' youth and immaturity.

I think maturity plays a very big part in it...I think that is a serious problem from the point of view of maturity and experience and ability to assimilate and use whatever you have studied. The other problem I find – you don't have an opportunity of really getting into the nuts and bolts of things (Kavish).

Maureen, too, mentioned the problem of the immaturity of the four-year LLB graduates compared to the postgraduate students who “*knew they wanted to practice law*”. They had completed an undergraduate degree, often with a law major, and consciously chose to continue studying law by undertaking a postgraduate law degree. She stated that the current graduates had no idea of what they were going to study when they began an undergraduate LLB degree, which meant that their motivation to become professionals was not as strong as it was in the past.

Many of the current Law Deans had commented on the immaturity of law graduates who came straight from school to study a discipline to which they have had no previous exposure. Reid et al. (2006) suggest that student learning is significantly affected by what they understand as “the professional legal entity”. Without a clear understanding or inspiration as to what it means to become a professional, it is a challenge to motivate them to engage deeply with the curriculum and to be transformed by it. The acquisitive notion of learning something that does not affect the “being” of the student, something that is not integrated as a part of who that student is becoming, falls short of what is required to “become a professional”. This also raised the question of whether students received information and support through the curriculum and in dialogue with lecturers on what the nature and meaning of their professional work would entail.

In explaining the “ambiguity” of learning to become a professional, several features appear to contradict each other, particularly during “the period of transition from aspiring professional to practising professional”. Continuity with change, exemplified in using the past to interpret the future continues throughout the professional's life (Dall'Alba, 2009). Kavish's comments conveyed a desire for continuity while endorsing some changes. New

possibilities present themselves but are at the same time constrained by limitations of our own construction, while openness is often met with resistance. Kavish and Vishan relied on the familiar routines in their critique of new practitioners, yet they continued to find positive aspects of innovation.

Kavish's impression was "*there seems to have been a large drop in the calibre of the person, in the students themselves*". He noted that "you [the universities] have lowered the bar". In the past, he explained, students had been "*whittled down*" during an undergraduate degree, so that only those who were really committed to practising law completed the postgraduate qualification. His experience as a lecturer at the Practical Legal Training School created this perception:

Students may know enough to attend a lecture, do a tutorial on it, write the exam and pass it, but they didn't really understand the concepts of it. I am not sure if it was a shortcoming with law schools, or whether it was a shortcoming of students, whether it was an attempt now to get people through the system because, like in any country where you have social changes, people start gravitating towards Law (Kavish).

Kavish's discourse about lowering of standards is a familiar "gate-keeping" dialogue, engaged in by Participant 3 from the 1996 Task Group when he mentioned that "*we were determined to keep the level the same, so we thought we would allow them in but they must cut it with the others.*" Both these males appear to be "members of the club" who could be regarded as resisting transformation in order to maintain their perceived "status" as legal professionals. This reproduction of hierarchy in legal education and in the legal profession was the key focus of a polemic produced by Duncan Kennedy (2004) in the United States. Kennedy argued that law schools were intensely political places, where students were trained to become willing servants in the "hierarchy of the corporate welfare state" (2004, p. i).

Another important critique of the curriculum from Maureen was that students are taught the various branches of law without any appreciation of the socio-economic context in which they might be required to apply the law. Thus poverty law did not feature in the curriculum, even indirectly or informally. As a result, when graduates who have studied Property Law are required to address issues of land redistribution or dispossession as it

affects homeless persons or labour tenants they find themselves completely unfamiliar with those aspects of the law. Maureen commented:

If you looked through their files you would find that they have no idea of poverty law...They have no idea; or they were not specifically taught from a poverty law perspective (Maureen).

Maureen explained how students were aware of the law on ownership and legal rights to property, but did not know how to react when a client simply could not afford to pay his rental or mortgage bond. This deficit speaks to the superficial way in which diversity and transformation have been addressed (if at all) in the law curriculum. In similar vein, Vishan discussed the “*wonderful document called the constitution*” which provides rights to protect impoverished persons,¹¹¹ yet when he attempted to use this mechanism to assist a client, he was informed by the municipal manager that he did not have the resources to make the right effective. There is a sense that the curriculum taught at the university does not relate to the socio-economic realities of the vast majority of citizens, who do not have access to private sector legal services.

According to Kavish, graduates emerge without a solid grasp of key foundational knowledge that attorneys require for practice because the year of practical training has become an extension of university education, aimed primarily at “*getting students through*” their board examination. Sandesh had precisely this point about the Practical Legal Training School:

I actually found that to be a giant waste of time. It was more of a socialising session because the group that I was with met every Thursday for an entire day. In the case of the Board Exam I did exactly the same thing: I looked up past papers, anticipated the questions, swotted and wrote. You know, it is very hard to teach someone the practicality of drafting a will because you can only experience it once you are doing it and the complexity of drafting a will [is impossible] (Sandesh).

Kavish identified the problems in the curriculum and the profession as “*two-fold*”:

one, the universities haven't cottoned on to what is happening in the real world – being in an ivory tower and I don't mean it as only in academia; I mean you forget that, as a lecturer, you are doing a certain type of job, but as an attorney you are doing another type....This comes to

¹¹¹ Section 26 Declaratory order.

the second point that I have: that is, why lots of our colleagues don't stay in the profession. And very good graduates come out, but they can't make out, can't make money out of it, and [they] go and join the corporate world and they are lost forever and we are lacking. We get mediocre attorneys, who only specialise in areas of law that get them money, but they don't practice law; and it's purely a financial thing why they do that. It is a big shift and it is a financially-driven shift (Kavish).

These responses suggest that employers' positioning within the landscape of professional practice significantly influences both their expectations of what graduates should be qualified to do, and how they perceive their own role as supervising attorney of new graduates. The "unfolding circularity" is once again evident in the repetitive patterns that influence professional development and mentoring.

6.3.5 Employers' conceptions of graduate preparedness: legal skills

How employers conceived of graduates' preparedness in respect of appropriate legal skills acquisition can be categorised as follows: Category A focussed mainly on graduates' lack of literacy skills; Category B believed that the full spectrum of legal skills were best acquired at the Practical legal training Schools; Category C considered that graduates were unable to make the link between theory and practice, to apply what they had learned in the curriculum.

Category A: As educated apprentices, preparedness is acceptable / "a lack of legal literacy skills"

In almost every employer's conceptions about graduate competencies the issue mentioned as a problem area was graduates' English language skills. Whether considered as a problem of "language" or of literacy skills, the written and oral skills of graduates were regarded as deficient, whether or not English was their first language. Australian graduate studies have identified these "communication skills" as key graduate attributes (Peden & Riley, 2007; Vignaendra, 1998).

Included in the data is a comment by Peter that it was the “*small things*” and the “*fundamentals*”, which were lacking in graduates; matters that they did not master at university, not realising their importance for the purposes of practice, like

being able to write a decent letter...that is really the bread and butter of being an attorney....To be able to string a sentence together, write sensibly, to be able to communicate orally, sensibly, and just really get those basics right; it is about having the fundamental building blocks in place...The ability to do proper research and write...is really important; communication, because you communicate with people every day...what we would like to see are people coming out of university with the basic building blocks there (Peter).

Many professional legal skills are premised on an ability to write and speak with fluency, such constructing an argument, drafting a clause, arguing a case.

In reviewing the importance of language skills for law students Ngwenya (2006) points out that one effect of apartheid schooling on non-English speakers in South Africa was to emphasise the uncritical rote-learning of words and sentences for regurgitation, even when learning English. For students whose first language is not English, this makes the task of acquiring “legal literacy skills” at university that much more difficult. Learning law becomes a matter not only of acquiring new concepts, but also of mastering the language of law with its discipline-specific style. It is tantamount to acquiring a foreign language in order to read and interpret texts and to write and speak successfully within that field. Ngwenya explained the way that legal language has a specific “register” which conveys and encodes meaning:

Law practitioners construct and apply legal texts. The texts are not constructed arbitrarily; choices are made in order to serve the intention of the legal documents, i.e. mainly to regulate society and meet law practitioners’ needs. This choice is the ideology made manifest in the language. The special knowledge that law practitioners acquire creates a solidarity and group identification for those that have the privilege. And those that do not are often excluded and this is usually made uncontested through language (Ngwenya, 2006, p. 24).

Bhatia (1987), writing about the difficulties of teaching legal discourse to British law students, argues that the language of law

demands a subject-specific and a narrow-angled approach...because the relationship between the language used in law and its content is exceptionally close (in Bronstein & Hersch, 1991, p. 162).

In explaining the overriding significance that language has in law, De Klerk argues that

This linguistic complexity plays a very important part in establishing and maintaining the power imbalance that exists between legal professionals and lay people (Cutts, 1995). Words count in law and legal language exerts a considerable influence because it is through language that the intentions of the law giver are made clear, judgments are pronounced and social behaviour is regulated (de Klerk, 2003).

In most societies the language of law presents an obstacle to outsiders, preventing them from understanding written law and documents, and from representing themselves within the oral forum of the courts where spoken legal discourse is ritualised and formalistic. Law is a profession “which specialises in discourse and words”, with its “elaborate forms of address and extreme politeness”, such as “My Lord”, “Your Worship”, “my learned friend” (de Klerk, 2003). Compounding this are the rules as to who may speak, what they may say, and what they may not say in courts, all of which present obvious barriers to those attempting to enter this discourse community, and particularly to those whose South African mother tongue is neither English nor Afrikaans¹¹².

Van der Walt and Nienaber make the observation that

The language of law has been recognized as a potential tool of oppression and exploitation, especially where it is used as an L2 [second language] by the majority of the population (1996, p. 75).

Peter did not place much value on the integration of practical legal skills into the university curriculum. He commented that trying to learn practical things in theory “*doesn't actually help that much*”. His view of how candidate attorneys acquired practical legal skills “*on the job*” placed emphasis on contextualised learning:

There is no substitute for handling a matter yourself, under the supervision of a partner; being involved in a consultation with counsel (an advocate) and a client; and then and there,

¹¹² Court proceedings are conducted in either English or Afrikaans, despite the fact that there are 11 official languages recognized in the Constitution (section 6). An experimental project in KwaZulu-Natal and Transkei in 2009 is attempting the use of isi-Zulu and isi-Xhosa in magistrates' courts in rural areas, where the magistrate and all litigants and their legal representatives are mother-tongue speakers of either one of these languages and all parties consent.

counsel starts drafting an affidavit and you listen, and it is a kind of “hands-on” approach that really teaches you in the best way (Peter).

He commented that students emerge from university without having seen many frequently-used legal documents (e.g., a summons, revenue stamps) but his opinion is that well-educated graduates “*pick these (practicalities) up quickly*”

Category B: As income-generators, preparedness is adequate / practice skills from the Practical Training School

Colin’s view was that graduates who had attended the full time Practical Training School for six months prior to commencing articles required much less effort on his part to support them in acquiring practice skills. His criticism of graduates’ practical skills was that the academics who teach them are not practitioners, and so the graduates were often not aware of the implications of current constitutional law changes for practice.

Category C: As “practice-ready” lawyers, preparedness is deficient / “unable to make the link”: applying theory in practice

Vishan stated that the “*language barrier*” as it affects oral skills was the most significant problem with the graduates whose first language is not English:

The candidate attorneys cannot speak properly; [they] cannot explain themselves, cannot express their views. The language barrier I would say is the most significant thing: the problem comes in where they need to express themselves, when they need to show the court that they can stand up and speak. When you have a graduate coming from the rural areas, from Hillcrest even, he or she is very closed, afraid to speak. They don’t want to, or have difficulty in expressing themselves. We had a couple of candidate attorneys who had difficulty in understanding what we were trying to say (Vishan).

Maureen, whose mother tongue is not English, also commented on the problems related to black graduates’ oral skills,

which is why black graduates cannot get articles: because they are too inarticulate themselves; [they are] not articulate enough to be able to sell themselves (Maureen).

Vishan, like Peter, lamented the inability of graduates to draft an appropriate letter or legal argument. These skills, he commented, have become particularly critical now that magistrates expect practitioners to present arguments which explore the impact of constitutional provisions in the Bill of Rights¹¹³ on everyday criminal law. Vishan's view was that the students did not develop their practical court skills at university because the Moot court experience was limited to the students' final year. If Moots were included in the curriculum from first year and care was taken that the arguments engaged in were not "*too theoretical*" but were such that they prepared students for the practical types of issues that they would encounter in magistrates' courts, the majority of graduates would be better prepared for professional practice.

Data from Australian studies certainly presents a strong case that contradicts this view (Peden & Riley, 2007), and an article on the moot court experience in South African law schools (Watson & Klaaren, 2000) similarly is not optimistic about the value of this practical exercise. Without adequate preparation and practice in presenting moot court arguments, it seems that, particularly for second language learners, the experience (and assessment) represents an intimidating aspect of the law curriculum.

Maureen considered that graduates who had participated in a Clinical Law module were far better prepared for practice than those who had not done a module involving experiential learning of legal skills. They were better equipped to "*make the link, applying theory in practice*". She complained that when they did use their research skills graduates were unable to do so selectively, to provide answers for clients. Vishan's, Peter's and Greg's perceptions about graduates' research skills were positive, particularly regarding their abilities to conduct research electronically, using the latest data bases.

6.3.6 Employers' conceptions of graduate preparedness: ethical values

There was a consistent pattern of variation in the employers' conceptions of how the teaching of ethics in the curriculum had prepared graduates' for practice. In Category A the

¹¹³ Chapter 2 of The Constitution, Act 104 of 1996.

perception was that ethics are best taught in the context of a practice setting. Category B held the view that ethics teaching should be integrated into every module, and be pervasive throughout the curriculum to avoid the ethical misconduct that is increasingly tarnishing the image of the legal profession. In Category C the perception of graduates' ethics was that there were no longer shared values and that professionalism was being devalued, although some "old boy networks" still were evident in professional cliques.

Category A: "De-contextualised Teaching of Ethics is Not Feasible"

Peter commented that de-contextualised teaching of ethics is not feasible since the type of practice issues that arise, such as conflicts of interest, are not easy to simulate in an academic setting when students have had little or no exposure to real situations. Peter's conception about the graduates' awareness of ethics from the law curriculum was that they are not familiar with this important aspect of being a legal professional:

it is a good idea to try to hammer home the points about ethics...it is a cornerstone of the profession. I think it is very important...and it may well be debatable whether it (teaching ethics in the curriculum) was a success (Peter).

His criticism regarding ethics in the curriculum focused on the failure to include practice management skills in the law degree, because, whether through ignorance or criminal intent, this seems to be the area where most attorneys "trip up". One of the factors, he suggested, that hinders the adequate teaching of ethics, is that it is difficult to "fast track", and "squash what used to be taught over six years, into four years"

Greg and Maria (a graduate who was employed by Greg) were also sceptical of the value of teaching professional legal ethics "theoretically in a vacuum" before one enters practice. Greg commented:

I am sure there are limited things that you can teach at the university, but you can't actually teach ethical values. You know "dipping into trust funds" is theft, and if you are prone to theft, whether you teach it at university or not, will not change things (Greg).

Participants did not generally distinguish clearly between legal ethics and personal ethical values, until this was specifically clarified in the interview.

Category B: “Ethics Teaching should be Integrated and Pervasive”

Colin felt that ethics should be taught “*as soon as somebody walks in at university and says ‘I want to study law’*” He suggested that ethics teaching be integrated into every module so that students related it to specific legal areas:

There must be ethics in all your subjects. It must come in every aspect. They must know how to translate it, so that when they get into practice; immediately they come up with a situation, it is not a question of asking themselves: is this right or is this wrong? They know immediately. So it must be on very close relationship (Colin).

The participants’ main concern was that graduates do not appreciate the importance of not “*meddling with (clients’) trust accounts*”, this being why the legal profession is “*losing its status*” in the eyes of society at large. Vishan, Greg and Colin all expressed concern about the lack of awareness of professional ethics amongst recently-graduated attorneys. The participants mentioned the declining reputation of the profession, due to the increasing frequency with which attorneys are being disciplined for abusing clients’ funds in their trust accounts. Colin mentioned attorneys whom he knows who engage in unethical practices and exceed the fee tariffs, some of whom have chosen to practice as para-legals in order to avoid the disciplinary code imposed on attorneys by the Law Society.

One subject that deals with these things together would make it easier for the graduate to understand. In my practice when candidates start here, one of the things that I do is I say to them: ‘you are going to learn how to go to court and those things, and how to receipt monies in a trust account. You are going to learn about how long you have to deposit trust monies, you are going to learn everything, so that when you run a practice one day you know what is going on’ (Colin).

Category C: Pessimism and Devaluing of Professionalism

As a public sector employer, Vishan offered a dismal impression of graduates’ ethical and professional values, which he interpreted in a broad sense. His perceptions were shaped by the fact that he is, on his own admission, “*from the old school*”. His frustration was clear

when he complained that graduates flaunt court etiquette and are unfamiliar with legal ethics:

I think discipline should be restored within the legal profession. I think our profession has lost its discipline. I ask them [candidate attorneys]: “do you know what court ethics are?” And they look at me blankly...and you try to explain to the person...[there are] court ethics, ethics, professionalism, honesty, loyalty. Ethics should be included in the curriculum because you get inter-colleague ethics, office ethics, court ethics, then you get magistrate-attorney ethics (Vishan).

Kavish, too, mentioned that certain professional ethics and “courtesies” must be learned, although he admitted that “a lot of posturing comes with the territory”. Vishan recommended that a specific ethics curriculum be developed and incorporated through each of the four years of university, because he believed that ethics need to be dealt with “at grass roots level”.

Kavish, who had taught graduates at the Practical Legal Training School, added his observation that

The problems that I found with the students as they came through, was that their understanding of legal ethics, their understanding of the need for attorneys to be ethical, had changed. I came from historically a politically-motivated type of thing (background). Attorneys came out and wanted to change the world. The other problem that I have is that students are not taught about ethics in our profession (Kavish).

Kavish’s criticism of the current law curriculum (echoed by Peter, a partner in a large law firm) was directed at the fact that it is out of touch with the realities of professional practice, and that graduates are still not being educated on how to run a practice as a business:

It is seriously lacking. It is a shortcoming on the part of the universities and (professional) training and it is overlooked, completely overlooked, to the extent that people come out and they have no idea how to get around running a practice which is in essence a business (Kavish).

Both Kavish and Colin expressed sadness at the changing image and nature of the legal profession: that the traditional belief that conducting an ethical practice would provide an attorney with a comfortable living, no longer prevails.

The Carnegie Report (Sullivan et al., 2007) in the United States lamented the sinking reputation of the legal profession there too and recommended a re-integration of three apprenticeships: legal analysis (knowing); practical skills (acting) and ethical conduct (being). Competitive marketing strategies, community perceptions that lawyers are dishonest, and the prevalence of unscrupulous practitioners derogate from the professionalism of practice. Colin's perception of graduates' values is that they are not adequately prepared for "being proud to be an attorney", while Kavish complains that the profession has lost its value because it is open to almost anyone to qualify as a lawyer.

Vishan's understanding of graduates' lack of ethical values is that in our new democracy, there is no shared understanding of ethical or professional norms:

We need to create universal norms, standard norms which are applicable to everybody within South Africa. You must say what is current, because our socio-economic backgrounds are very different...what works with the South African cultures. South Africa has to create its own culture, distinct from America, from the UK, and I think what we do when we do that is take our day to day activity: what is our cultural background? What [are] our socio-economic backgrounds? Try to fuse all of those into one universal mould that is applicable to everyone (Vishan).

He appeared to be confronting issues of establishing shared professional norms that are made explicit to graduates who come from widely-differing backgrounds, whether the differences in life experience be attributable to cultural, socio-economic, language, class or racial factors. Vishan and Greg (and Maria) initially were of the opinion that students cannot be "taught" ethics; that these are derived from the person's home environment and background.

Kavish, however, a sole practitioner commented that the quality of practice ethics and legal skills learned during the period of articles is variable depending on the type of firm where the candidate attorney is employed – which Maria had also alluded to:

they [candidate attorneys] learn the professional ethics from your principal [with] who[m] you serve articles. The difference in the type of articles that you get: from the one man Joe Soap, down the road, to the big corporate firms [three prominent law firms mentioned] – it is such a major difference. For example, you may work in a criminal practice and never see the inside of a civil court or a high court....I mean there was a joke that used to go around in the larger corporate firms: ‘what do you do if you enter court and you don’t know the judge: how do you deal with it?’ And the answer was: ‘Stand the matter down and do this and that and the other.’ You had to get an adjournment and go meet the judge or the magistrate or whatever (Kavish).

Plainly implied here is that within the legal profession there is a distinct hierarchy, or “old boys’ club” approach that still carries weight amongst those who consider themselves as “insiders”. They are familiar with the judges and socially at ease with the system. The quality of the training that graduates receive may depend on whether their employer can afford the luxury of a slow enculturation, a craftsman-like apprenticeship process for their clerks and also whether the graduates are accepted into this network of associates that I suspect aligns closely along lines of class and race. This resonates with the “unfolding circularity” of practice that Dall’Alba (2009) described.

To summarise the employers’ perceptions of ethical training in the curriculum: generally these were negative, with the first category still believing that ethics could be taught in a practice context; the second category conveyed the perception that ethics had to be taught in a coherent and intensive way to improve the reputation of the profession; the third category was pessimistic about graduates’ ethical values, attributable to a lack of shared values and norms that were not being taught to new graduates. An old school type “unfolding circularity” reared its head in the continued existence of “old boy networks” in practice contexts, where unarticulated rules exclude some and preserve established hierarchies.

6.3.7 Employers’ conceptions of graduate preparedness: sensitivity to diversity

This section indicates how employers perceived graduates’ sensitivity to diversity, once again falling into three categories. The view reflected by perceptions in Category A was,

“there is no issue”. The perception in Category B was that social interaction at university between members of different races is now spilling over into benefits in legal practice, where a diverse client base can now be established. The perception in Category C was that diversity issues are not being confronted in the law curriculum: students learn about constitutional values and diversity in theoretical terms but this does not translate into lived practice.

Category A: “There is No Issue”

Peter brushed aside any questions related to an awareness of diversity amongst graduates, by expressing the view that *“living in the society we live in today”*, all graduates and clients, no matter what their race group, seem to

get on with one another, and it is not a major issue...we are all South Africans and deal with it on that basis (Peter).

Category B: Diversity Spilling over into Practice from University

Colin’s personal experience of gradually mixing and socialising with peers from different race groups when he was at university had lead to the unexpected advantage that he has acquired clients from race groups other than his own. His candidate attorneys have studied Legal Diversity at university and seemed completely at ease in dealing with a diverse client base.

Category C: Diversity is Not Being Confronted; Theoretical Knowledge is Different from Lived Practice

Maureen commented that sensitivity to diversity is not being dealt with in the LLB:

Even the way...when we came in [to a meeting or a lecture] the students had organised themselves; and the white students were all in front and the blacks were all sitting at the top, with the Indians in the middle...because all through their LLB they were given permission to be separate (Maureen).

Maureen gave a vivid account of an emotional incident which took place when she asked an official from the Department of Trade and Industry to come in to discuss Black Economic Empowerment (BEE) issues with her candidate attorneys:

It became such a volatile situationit became a situation of people coming from different socio-economic backgrounds ...because the black people had a sense of entitlement...that I felt was not really correct; the whites felt like they were being punished. And some of them thought I was "getting them back" and why should they suffer? ...it got so emotional (Maureen).

She went on to remark that although graduates appear to have a theoretical appreciation of diversity issues, the reality in their own lived practice is somewhat different:

They can tell you the constitution backwards; they are doing well in Constitutional law and they can tell you about it from back to front, but they don't apply it to their own lives. We concentrate maybe too much on the theory and the knowledge base but I think what is more important is that when it comes to them applying the theory it is so vital that they can work with different people with real issues (Maureen).

The employers were reluctant to comment and indicated difficulty in conveying what they thought about the graduates' sensitivity to diversity. Their perceptions were based on what they saw of their employees working together with members of other cultural, language and race groups. Vishan and Greg thought that since the current graduates have all had the opportunity to attend "open" government schools where pupils of all races mix together, there are "no problems of diversity" in the workplace. However, Vishan distinguished the language abilities of non-English speakers who had attended rural schools from those who had attended urban schools where the teachers were first-language English speakers.

Kavish made the interesting observation that class distinction between educated graduates and less educated clients were now more obvious in practice, and are based less on lines of race and culture, and more on shared or common interests that relate to aspirations and education levels.

6.4 Concluding remarks

In this chapter, the phenomenographic representation of the data in the form of outcome spaces as a framework for interpretation reveals the variety of conceptions held by graduates about the experience of the law curriculum. A second outcome space captures the perceptions of the employers of those graduates, in three categories, related to the graduates' preparedness for professional practice. Three key themes were identified as the guiding principles that were to be taken into account when the new law curricula were designed by law faculties in 1997/8: the integration of skills, the explicit teaching of ethics and sensitivity to diversity in students. These themes were explored from the perspective of each of the categories of description that emerged from the two data sets. The extent to which the law curriculum at one university incorporated these features in its curriculum and how these aspects prepared graduates for professional practice have been analysed at a detailed level through the data, to reveal some central theoretical insights that will form the basis of the concluding chapter.

Chapter 7

Closing argument

7.1 Introduction

In the previous two chapters (Chapters 5 and 6), two interpretive analyses have been described. In Chapter 5, a phenomenological analysis and interpretation of the experience of curriculum change presented an impression of legal academics being swept along, amidst a powerful convergence of local and global forces, in a process of politically symbolic policy-making, yet retaining for themselves local autonomy over the curriculum-making process to do “**business as usual**” The experience of implementing the law curricula, from the perspectives of a representative sample of current Law Deans, was characterised by a “**reactive conservatism**”, a process of tinkering on the periphery of existing curricula that was neither informed by nor based on theoretical insights. The resulting curricula may be characterised as either untransformed or, at best, transitional.

Chapter 6 then shifted the focus to the experiences and perceptions of graduates and their employers as to how the undergraduate law curriculum at one South African university prepared its graduates for professional practice in South African society today. In the course of developing a hierarchically-ordered outcome space for each data set, guided by phenomenographic practice, three positions were identified for each set and the following significant abstractions emerged from the data. A “**cycle of disadvantage**” is replicated through students’ experience of the current law curriculum and the professional legal education process of socialisation. Previous educational experience and socio-economic disadvantage tend most often to pre-determine students’ engagement with the law curriculum, thereby reinforcing patterns of alienation and epistemic exclusion which in turn dictate the graduates’ vocational learning experience and their career trajectories. The

“**unfolding circularity of practice**”, shaped by students’ past experience and the existing structural and systemic features in the profession, continues to sustain replicative patterns of professional engagement.

Linked closely to this, was the outcome space developed from the employers’ perspectives. Their perceptions suggested that the positioning of lawyers within the hierarchical structure of the legal professions shapes their understandings of the role of professional learning and the socialisation which takes place during the professional learning phase. Employers’ perceptions of the extent to which the curriculum prepares graduates for professional practice are directly related to the extent to which they are able to afford to expend effort and time on mentoring and developing the aspiring professional. The stratified nature of professional practice and the established process of enculturation of aspiring professionals into the legal profession often reproduces the hierarchical patterns of race, class and socio-economic positioning of graduates. These two “circles” of learning seem to connect to each other at the interface where the graduates’ transition from university learning connects to the professional learning phase.

Thus the insights from the data could be represented as three principal abstractions:

- **reactive conservatism** characterised the responses of legal academics to curriculum change in a context of multiple shaping influences on the process of curriculum development (Figure 14).
- **a cycle of disadvantage** (Figure 14) is replicated through an untransformed law curriculum in South Africa; the socio-economic and educational background of students entering higher education is perpetuated through the ways in which they engage with the curriculum, and through their experience of the curriculum itself, when it fails to have a transformative effect on students; this in turn, determines the nature of the graduates’ employment opportunities, their induction into professional practice and their career trajectories
- **an unfolding circularity of practice** (Figure 14) is discerned in the professional socialisation of law graduates, who are limited by their own background experience yet are both affected by and have an effect on professional practice.

In this chapter, the themes that emerged from the data, as discussed in Chapters 5 and 6 and summarised above, provide a starting point for developing two theoretical models which reflect the insights derived from the data. Selected insights from the literature will be referred to where these underpin the theorising that developed out of the significant findings.

The first schema (Figure 13) indicates how curriculum policy-making in higher education, in the context of a transforming society such as South Africa, is subject to a variety of shaping forces that reflect historical and contextual legacies, global trends and the cognitive frameworks of the implementers. In translating symbolic curriculum policy into curricular practice, autonomy at the local level permits curriculum planning that can be characterised as “reactive conservatism”

The second framework (Figure 14) shows how the law curriculum in its untransformed state fails to be transformative: it replicates students’ previous educational experience and socio-economic positioning, creating an ongoing “cycle of disadvantage” A curriculum that has remained largely unchanged in post-apartheid South Africa fails to provide graduates with the requisite preparation for becoming skilled, ethical, legal professionals in a newly-democratic society. This approach to curriculum deliberately avoids the demand to address urgent issues of transformation in the curriculum and in the widest sense, of the legitimacy of aspects of the legal system. In a discipline where the legal regulatory framework relating to new first-world transactions (intellectual property rights, internet banking) is being extended and developed daily, alongside a legislative framework committed to redressing urgent socio-economic issues of poverty, access to basic rights, such as water, primary health care and housing, the selection of materials and topics, as well as the choice of decided cases as legal precedents that are used as illustrative examples, cannot be regarded as a value-neutral exercise.

This type of curriculum engagement, in turn, in a pattern of cyclic repetition, affects the type of employment which graduates obtain within the hierarchy of the legal professions. The further phase of professional legal training and enculturation adds another layer to the complexity of the legal education system, in that a reproductive pattern of stratification

operates within that context too, shaping the graduates' ultimate trajectory into the professional legal landscape.

Contrasting South African graduates' ways of experiencing the law curriculum with the construct of "professional legal entity" identified in an Australian study of law students enables international parallels to be drawn which usefully highlight socio-historical and contextual similarities and differences (Table 13).

Leading on from these considerations, the chapter then presents an argument for the ontologisation of the law curriculum to address the findings from the data and suggest a way forward that could infuse the curriculum with transformative learning opportunities. Insights drawn from the international literature give support to this suggested approach to a re-visioning of the law curriculum to enhance its "fitness for purpose" in South African society.

With the effectiveness of the LLB curriculum as the overarching concern in the study, section 7.2 (following) explores the contextual background of how educational policy was translated into practice, theorizing how the law curriculum was shaped in the South African context of a post-apartheid democracy.

7.2 Reactive conservatism: symbolism, to implementation, to "business as usual"

The passage of educational policy from symbolic plan in the form of legislated policy to implementation of curriculum change in an era of societal transformation is influenced by numerous contextual factors. In the absence of theoretical insights and understandings, or of lecturer-support or monitoring, the drivers (external and internal, international and national) and the contradictory tensions that shape and influence curriculum change fail to produce curriculum transformation appropriate to a context of diversity and social reconstruction (M. G. Fullan, 2007; Spillane et al., 2002; P Trowler, 2002).

The policy-making process set the tone for the emergent policy change in legal education in 1996-7. In answering the question of how, after the passage of ten years, the vision for the four-year undergraduate degree has been translated into transformative legal education, one significant issue became immediately apparent. Although consultative participation in the policy-making process was indeed considered necessary to give legitimacy to the re-visioning of legal education (albeit a surface, politically-symbolic change), if participants lack a savvy grasp of the participative policy-making process, their voices are lost in the clamour of competing interests. Invariably, the ultimate policy decisions have been made in advance. The naiveté of (white) legal academics allowed their objections (which may or may not have been pedagogically well-founded) and their accumulated experience of their own educational context to be rejected as reactionary or “old guard racism” This political inexperience of the majority of legal academics from HWUs led to their capitulation in a change to the system of legal education which had no underpinning educational foundation or implementation plan. From having seen themselves as “liberals” who had promoted the struggle for a transition to democracy, they suddenly found they were being re-cast as “conservative reactionaries.”

In their reaction to change, the legal academics responded with varying degrees of reluctance. Their sense of loss and concomitant anxiety about the challenges they would face was palpable in the data. Schön (1971) refers to this social phenomenon as “dynamic conservatism” in the context of change to the social systems within which individuals make sense of their lives. When change represents a threat to the social system it is understandable that individuals react with anxiety and ambivalence, before “passing through the zones of uncertainty” This anxiety permeated the comments of Deans when they described the policy negotiation process. The next phase of curriculum design within their faculties extended this anxiety through into the progression toward uncertainty that Schön describes. In the curriculum reform deliberations, the uncertainty and lack of clarity or of shared vision as to how knowledge should be sequenced and re-ordered can be attributed to a failure to consult foundational educational insights. This response to policy is characterised by the term “**reactive conservatism**”, which I have adopted to describe the Law Deans’ approach to curriculum-making in 1997-8. Barnett and Coate (2005, p. 151)

explained this failure to engage in open curriculum debate in higher education as avoiding “pressing on sensitivities” of stakeholders, particularly the epistemological interests of academics.

The conservatism of lawyers generally is recorded in much of the literature (Kronman, 1993), and in the volatile political context of South Africa in the 1990s legal academics reacted almost mechanically in a predictably conformist, illiberal tradition.

In the analysis of the curricula that were implemented, it becomes clear that as lawyers, who are traditionally conservative, legal academics’ response to change was “reactive” They had to respond to the new curricular imperatives, but their “knee-jerk” rejoinder was to rearrange the sequence of modules, effect cosmetic changes or add peripheral modifications, or even, as the data suggests, thinly disguise the fact that they were manipulating the system to deliberately avoid implementing change. “Tinkering around the edges” aptly characterises the additive and superficial changes that were made to the underlying traditional curriculum models of the institutional categories identified in Chapter 1. Curriculum-making often involved “trade-offs” and strategic negotiations amongst staff members rather than a rigorous systematic process informed by understandings of pedagogical theory.

Only one current Dean who was interviewed (Participant B) mentioned bringing in outsider “experts” to conduct workshops and professional development seminars for his staff to engage them over a sustained period in the development of a new curriculum. Ironically, that same faculty opted to discourage their students from completing a four-year undergraduate degree by registering all first-year students in other faculties before admitting students to law on the strength of their first-year results.¹¹⁴ The introduction at other universities of support or educational inputs for academic staff, such as professional development workshops, would have been a means to alleviate the lack of theoretical conceptualisation and could have introduced substantive engagement with curricular issues.

¹¹⁴ The same university (HWU) also admits that approximately 10% only of its student body come from disadvantaged educational backgrounds, and that only 5 -10% of its LLB graduates come through the four year undergraduate degree route.

The “fuzziness” and “invisibility” surrounding curriculum development in higher education “make elusive what goes to the heart of cultures and institutional structures, that either “hinder or facilitate access” to the students, who are obliged to engage with them (Barnett & Coate, 2005, p. 151).

No longer a means to achieve the ends of the previous apartheid regime, law was to be re-directed in the new post-apartheid dispensation as an emancipatory tool. That legal education afforded a means to produce more lawyers and so deliver equity, to enhance access to justice for all and support national developmental goals in the process, was an underlying assumption of government policy. This double expectation of that equity and redress in education and the professions would go hand in hand with development of “high skills” in professional education to meet the demands of a nation re-joining the global economy, was inherently contradictory. Expecting that a change in tertiary curricula could achieve these transformative but opposing objectives was unrealistic from the outset. As Jansen (2002) noted, this type of symbolic policy-making serves to satisfy the political imperatives of activists, but without the necessary economic means to translate policy into effective practice, without plans for the implementation of policy at the level of grass-roots change, it creates the potential for subsequently blaming the implementers for failing to deliver what was envisioned. Symbolic policy-making justifies the reduction of funding when the anticipated outcomes do not materialise. An additional risk with this type of policy-making is that it creates an environment that overlooks the need to theorise, plan, and build capacity, in order to effect real change (M. G. Fullan, 2007). Without implementation plans, or the means (or political will) to insist on a national conference, or monitoring mechanisms to problematise curriculum planning, 20 law schools were, in effect, given the freedom to conduct “business as usual”. The task of developing curricula was devolved to each faculty. The pervasive “implementation vacuum” in earlier post-apartheid educational changes was noted in subsequent educational policy documents (National Plan for Higher Education, 2001). No procedures were suggested to ensure that there was consistency or even contestation in the re-visioning of the new LLB curricula, nor was there any mention of changed pedagogical strategies to address a more diverse student body.

The autonomy given to faculties to design their own curricula notwithstanding, the relative consistency of LLB curricula across law faculties in South Africa (based on agreement as to “core subjects”) speaks to the conservatism both of lawyers and of academics trapped in the competitive market of higher education in a globalised world. As Twining (1996b, p. 1012) explains so aptly, Law faculties responding to the flattening effect of the market display the “football league syndrome” and behave “as if they are all playing exactly the same game in a single hierarchically organised league” In the South African context where vast disparities continue to exist between HBUs and HWUs this feature of law school curricula is notably incongruent.

Curriculum planning in higher education is “largely a private activity undertaken by individual academics”, in institutions where disciplinary loyalty to the “deep underlying epistemological structures of the knowledge fields” prevails over broader institutional or national concerns (Barnett et al., 2001, pp. 435-436). Curricula have been shaped by the values and practices within the knowledge field of Law, to the extent that there is a strong degree of consensus on the basic epistemological content of what should be taught. Curricula remained untransformed, or at best transitional, instead of becoming transformative.

It is to a large degree textbooks that define official curriculum content and set the agenda for what is accepted as the “essential knowledge content for each discrete subject” (M. W. Apple, 2000). Curriculum development or change is still regarded by many law teachers an additive exercise, developing new modules as electives, or providing students with more flexible delivery modes, such as uploading notes onto the Internet (S. P. Fraser & Bosanquet, 2006, p. 274). The demands of quality assurance, SAQA templates, a National Qualifications Framework, and neo-liberalist trends that were expressed as globalisation and corporatisation in higher education also had a “homogenising” effect (Thornton, 2001, p. 47).

Coupled with the innate conservatism of the legal profession, which has remained predominantly in the hands of white males,¹¹⁵ law teaching in South Africa continues to reflect a strong emphasis on doctrinal or substantive law content. It has not made the necessary adjustments to curriculum and pedagogy so as to successfully retain and ensure effective access to the professional world for the diverse student body it now attracts. The models of curriculum which developed after 1997 reflect the historical origins and institutional culture of their pre-apartheid typologies, remaining loyal to their disciplinary core, despite enormous contextual variation between HWUs and HBUs. The official curricula indicate superficial compliance with the three guiding principles that were to inform curriculum design (Philip F Iya, 2001; McQuoid-Mason, 2004). From the data in the present study it is clear that established patterns, peripheral adaptations, and to some degree, deliberate measures to avoid change were implemented.

The absence of a shared vision that was articulated or debated created the space for unevenness; lacking theoretical foundations, it is questionable how far the original intentions of the Task Group of 1996 have been translated into transformative education. Failure to acknowledge or appreciate the politicised nature of curriculum choices, and failure to problematise the conception of what constitutes legal knowledge, delivered curricula that are perhaps not fit for the purpose for which they were intended. The goal of significantly increasing the number of black graduates to serve the wider community as lawyers has not been realised by offering a shorter, more affordable undergraduate qualification where no actual educational question comes into consideration other than mere formal access to courses.

At the same time, the external drivers which impacted on curriculum change were powerful and often contradictory. The national priority of increasing access and widening participation in higher education (massification) to include predominantly black students who had previously been excluded, imposed structural problems of dealing with increased numbers of students from a failing secondary school system. It is notable here that funding

¹¹⁵ National Survey of the Attorneys' Profession: Law Society of South Africa. September, 2008, hereinafter "LSSA National Survey"

of law students in higher education was significantly reduced by the New Funding Formula (NFF) introduced in 2004/5,¹¹⁶ a feature which echoes Jansen's earlier prediction referred to above (p.368) (2002). The "input subsidies" are supposedly based on the cost of teaching such courses, but also "reflect perceptions of how important or valuable training in a specific field is" (Le Roux & Breier, 2007). The lowest subsidy in the four quadrants of higher education is paid by the state to universities for students studying education, law, public administration, librarianship and psychology. Thus law faculties were faced with ever-increasing staff-student ratios, in the context of increasing numbers of students from impoverished educational backgrounds whose first language was most often not the language of instruction. The tension between the demands of external stakeholders, students as consumers, and these internal educational realities continued to exert relentless pressure to accommodate a variety of interests within the four year curriculum.

7.3 Complexities of curriculum change: whose business?

The external drivers of curriculum change all played a role in shaping curricula; at an international level: globalisation, massification of higher education, the information technology revolution; at a national level: the national imperatives toward equity and redress, democracy, a National Qualifications Framework, modularisation and outcomes based education, and continuing historical educational disadvantage for many students enrolling in higher education.

Direct stakeholders in the legal profession were consistently vocal in support of including skills development in the curriculum. Matching the demands of an ageing white-dominated legal profession, steeped in traditions of commercial enterprise and a business milieu of "profits and property" (Thornton, 2001), with the interests of legal educators (again predominantly white males) who perceived their role quite differently, continued to be a

¹¹⁶ Govt Notice No 2003 "Funding for Public Higher Education", November 2003, discussed in the "Ministerial Statement on Higher Education Funding:2005/6-2007/8 of 15 April, 2005.

complex task. The legal professionals would ideally prefer “practice-ready” lawyers, while legal academics cling to the notion of law as an academic discipline, providing a foundational liberal education. This theory/practice debate has played out in both international and national debates, reflecting an ongoing tension between the liberal arts tradition and the phenomena of neo-liberalism and globalisation concerning the essential purpose of legal education in higher education. Ironically, the marginalisation in curriculum considerations of traditionally “outsider” students (female and black students), who have now become the largest student constituency of law students in South Africa, and between these two contesting groups of white males adds another layer of complexity to the challenges. Subjects such as Gender issues, Feminist Legal Theory and the integration of African Customary Law within substantive law modules were not considered to be critical in curricular choices, since these did not appear to align with the demands of employers in the professional workplace, whilst, in addition, the globalisation discourse emphasised international trade and commercial transactions law.

The expectations of a law student body that increasingly reflects the demographics of the “new South Africa” create particular dissonances between and within the enacted curriculum. These students find themselves located in the context of a system that in many ways reflects its “white” origins, the concerns of the dominant stakeholders and the affluent. They represent a constituency who have accessed tertiary study despite having suffered an impoverished (secondary) educational experience, socio-economic disadvantage, and often scant familiarity with commercial transactions. These features, together with unrealistic expectations of what it means to be a legal professional – largely gleaned from American media portrayals in television and film – complicate the question of whose interests are being served. Students from disadvantaged backgrounds are motivated by urgent financial pressure to obtain employment and reduce as far as they possibly can their student loan indebtedness. This pressures them to focus on acquiring practical lawyering skills and studying commercially-oriented subjects to enhance their employability in the market. These competing tensions impact with varying degrees on the curricular designs adopted at the different Law faculties.

Historical and context-related understandings of student demand, the demands of professional employers, and their own institutional positioning in higher education appeared to play a role in shaping academics' responses to the need to develop their curricula. As a result, the autonomy that was given to individual faculties produced models of four-year undergraduate degree curricula that were barely-modified versions of postgraduate LLB curricula. A sense of "business as usual" is the overriding conclusion in the comparative analysis of official curricula.

The schema in Figure 13 indicates the process by which curriculum policy was translated into practice in legal education in post-apartheid South Africa. The schema highlights how the progression in legal education from policy-making to curriculum development and implementation was characterised by a reactive conservatism – reinforced by the law academics' securing of their own autonomy to "do business as usual", subsumed within the rhetoric of academic freedom. The ensuing untransformed curricula effectively continue to replicate patterns of socio-economic and educational disadvantage in the society.

Section 7.4 will go on to examine the repercussions of untransformed curricula in their failure to address the needs of post-apartheid South Africa and a more diverse student constituency.

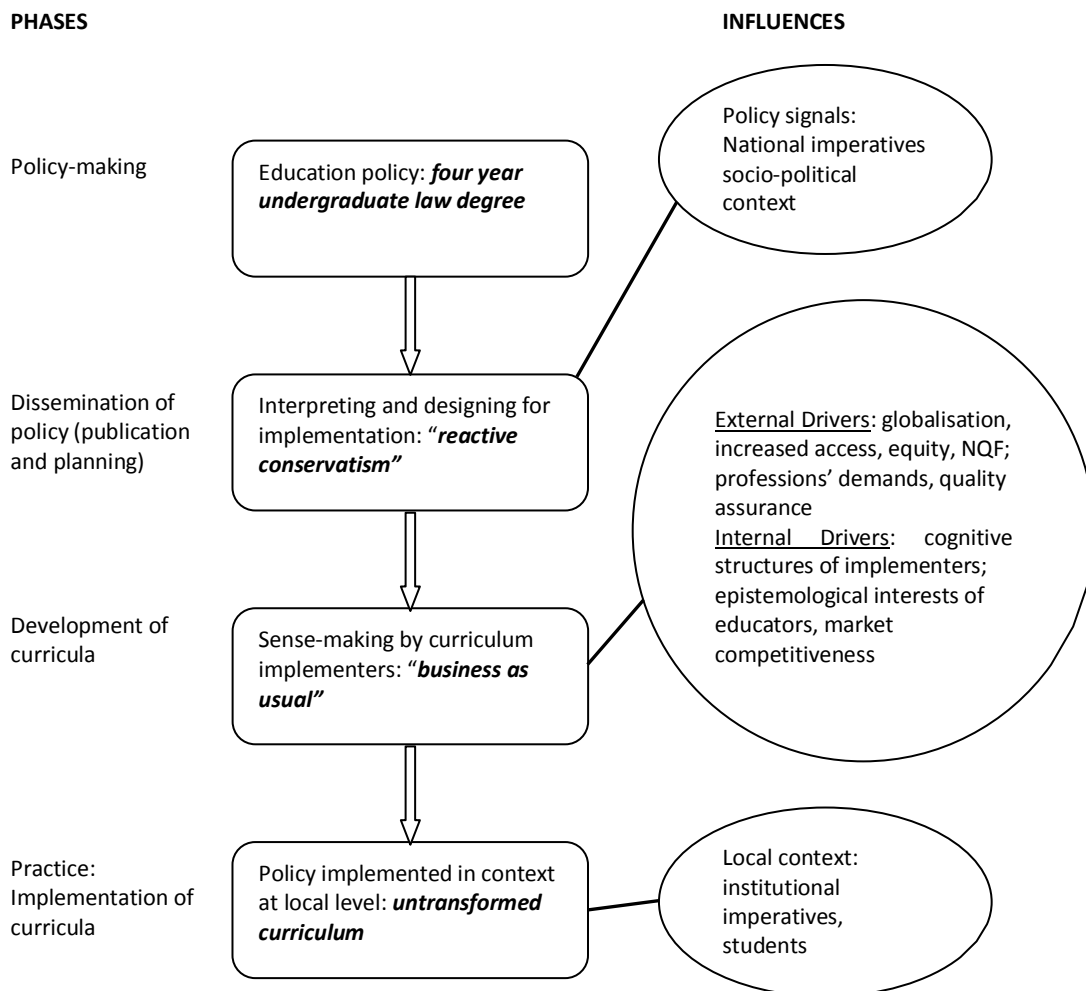


Figure 13 Law curriculum change in post-apartheid South Africa

(Schema adapted from Spillane et al., 2002)

7.4 Circles within circles: patterns of cyclic replication

The motif of the circle took on prominence as the analysis and interpretation of the phenomenographic data progressed. It began to take on a multi-layered dimension in the interpretation of the data, representing professional education curricula in a schema that integrates the three overlapping circles of knowing, acting and being that are implicated in the ontologisation of curriculum (Barnett & Coate, 2005), (see also section 7.11 below). Another circle: the "cycle of disadvantage", emerged from the data as a representation of the replication of historical disadvantage through the curriculum. I identified a pattern of

graduates' previous educational experience and socio-economic backgrounds that underscored their approach to learning, their motivation for becoming a lawyer and their conceptions about being a professional. In turn these factors interacted within the milieu of the law school curriculum, the tacit practices, the hidden curriculum and other obstacles inherent in the institutional and departmental culture, to determine the training experience, the professional opportunities and career trajectories of the graduates. An "unfolding circularity" was evident, once graduates entered professional practice (Heidegger 1962/1927, in Dall'Alba, 2009), in the way in which professional practices were reciprocally shaped and reinforced by the existing understandings and personal experience of the graduates and their employers (Thomson, 2001). A motif of circles-within-circles has been used to highlight the effect of curriculum on graduates' developing sense of themselves becoming professionals, how they integrate knowledge and action within themselves, and on their developing sense of professional practice, through exposure to the law curriculum and to practice itself.

In this section of the study, the term "curriculum" is used 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) (Posner, 1992) as explicated in Chapter 3. Criticisms of curricula in higher education often resonate with Heidegger's views that curricula have become "instrumentalised, vocationalised, corporatised and technologised" (Thomson, 2001). These trends appear to be in response to increasing pressures on universities from external (government) agencies, couched in the neo-liberal globalisation discourse, aimed at improving quality, throughput and the acquisition of de-contextualised graduate vocational skills. Ironically, it is this very emphasis in law curricula which seem to subvert the possibility of curriculum as transformative educational experience. The curriculum acts to reproduce existing inequalities rather than serving as a transformative vehicle for students. In English law schools, a similar "cyclical disadvantage" of non-traditional or ethnic minority students is observed, in that such students are more likely to obtain places at post-1992 universities which rank lower on the "largely unspoken

prestige structure” and negatively pre-determine the graduates’ employment opportunities (Sommerlad, 2008; Webb, 1999).

In order for curricula to have a transformative and lasting effect on graduates, changing learners from students into professionals, they should reflect a concentration not only on epistemological aspects, in the form of the acquisition of knowledge and skills, but also on an ontological component, as imparting an awareness of a way of being or becoming a professional, particularly at universities where the teacher (lecturer) develops the enacted curriculum in a situated context. The ontological focus serves to develop a sense of knowing that is not “exclusively cognitive, but is created, enacted and embodied” (Dall’Alba, 2005).

When an ontological component is integrated into professional education programmes, it extends and develops the “ways of being” of a profession, addressing not only the necessary knowledge and skills required – the cognitive, intellectual and practical aspects of professional education – but also the additional dimension of transforming the aspiring professional as a human being (Dall’Alba, 2009). Thomson (2001, p. 453) highlighted the “ontologisation of education” in Heidegger’s work as a means of “transforming the self” The motif of the circle is used by Thomson to explain the purpose of transforming the learner through education:

to bring us full circle back to ourselves, first by turning away from the world in which we are most immediately immersed, then by turning us back to this world in a more reflexive way (2001, p. 254).

These conceptions of curriculum and its ontologisation connect with the notion of unifying the three apprenticeships of professional education (see section 7.11 below) identified in the Carnegie Report (Sullivan et al., 2007).

7.5 Education as a pathway to social mobility

The popularity of law as a pathway to social mobility was a notable motivational feature in the data, where several participants (Sandesh, Busi and Rani) referred to their intention to “do well” in life through becoming a professional. As Letseka and Breier (2008, p. 92) note:

“graduating has significant financial benefits for the individual concerned” The part that such motivation and market-related influence plays in shaping students’ conceptions of curriculum are expressed in their expectations of learning “practical skills” that will equip them with the means to secure employment. The need to begin earning an income further impels this consumerist orientation toward the undergraduate degree. Student poverty and the gap between the funding provided by the National Student Financial Aid Scheme (NSFAS) and the actual cost (including food and living expenses) of students in tertiary institutions are identified as key features contributing to the high attrition rate of African students in the Student Pathways Study undertaken by the Human Sciences Research Council (HSRC) (Letseka & Breier, 2008, p. 99). The looming financial burden of re-paying student loans after graduation serves to bolster many disadvantaged students’ existing approaches to learning, which typically focus on surface rote-learning to which they were accustomed in disadvantaged schools where resources and teaching expertise are often less than optimal:

A notable theme is the complexity of factors that affect learning. Apart from personal circumstances, these include a range of cognitive factors, including ‘learning style’ and orientation, and different understandings of purpose and the requirements of the learning process. In South Africa key issues include the nature of prior educational experience as well as the level of achieved performance, and language background in relation to the medium of instruction (I Scott et al., 2007, p. 39).

The data thus suggests that students’ engagement with curriculum is often founded on strategic ways of “getting through” and not seeking anything more than the qualification at the end. For many aspiring lawyers, their family background and educational history does not prepare them for the experience of becoming a professional: Fazila revealed that her ideas about what it meant to become a lawyer came from popular television images. Thus for many “non-traditional” students, their status as “outsiders” – both within the university and beyond it, once they enter the realm of professional enculturation – along with their personal history and expectations, tends to replicate their social positioning. Identity dissonance amongst “outsider” students in professional degree programmes has been identified as creating a distracting struggle which can lead to academic underperformance by such students (Sommerlad, 2008; Yang Costello, 2005). The outsider students’ personal

identities are at odds with the dominant perception of professional identity in law schools, which privileges middle-class (often male, and in South Africa, white) viewpoints. In order to be successful, students may have to internalise appropriate professional identities that require a suppression of their personal identity and value system. Diverse cultural, religious, language and socio-economic values jostle for acceptance within an historically middle class, white English-speaking, male cultural ethos.

Although the study was located in an interpretivist paradigm, once the phenomenographic data was analysed the interpretation seemed to push toward a more critical emancipatory framing, which called for additional theorising. Thus it was necessary to move beyond the original lens and introduce theoretical insights which would provide analytical tools to more accurately explain and interpret the unanticipated outcomes. This approach bears some resemblance to constructivist grounded theory as described by Charmaz (2002, p. 675), in that the researcher is lead from studying “concrete realities” to “conceptual understandings” I take a slightly different line in that I introduce existing theory that supports and deepens understandings of realities that emerged from the data, but which had not formed part of the original theoretical framework. From the data, it became apparent that a reproductive pattern of graduates’ socio-economic status was effected through their engagement and relative degrees of success in relation to the untransformed law curriculum. This aligned closely with Bourdieu’s (1973, cited in Nash, 1990) explanation of the ways in which relationships of social inequality are reproduced, particularly through the education system. In Bourdieu’s sociology, members of social groups acquire a set of dispositions, which reflect central structural elements that are reproduced through their social behaviour. These structural elements enable successful cultural reproduction to occur and achieve the inter-generational transmission of social and cultural capital (Nash, 1990).

According to Bourdieu, schools are to be seen as sites that generate a specific “habitus” or system of dispositions, themselves products of history, that are reflected in individual and collective practices. “Habitus” gives rise to patterns of thought which organise reality by directing and organising thinking about reality. The practices produced by “habitus” set boundaries within which agents are “free” to adopt strategic practices; the practices serve an orienting function rather than being strictly deterministic of action (Harker & May, 1993,

p. 174). Bourdieu's construct of a dialectical relationship between institutions and individual agency is mirrored in the graduates' engagement with the law curriculum, and also in the particular agency of the outlier graduate, Busi, who was able to overcome the structural influences to shape her own career trajectory through various strategies. Bourdieu observed that:

The continual cultural cycle – produced culture, internalisation through socialisation, cultural production – is not one of eternally closed and determined reproduction (Nash, 1990, p. 433).

Culture is seen as a system of meaning, organised by a generative principle. Bourdieu explained that if the culture of a school (educational institution) is essentially conservative and middle-class, then working-class learners find themselves in a culturally alien setting, and are unable to benefit to the same extent as middle-class students. Schools (educational institutions) actively generate "habitus", and provide learners with a "set of basic, deeply interiorised master patterns (Bourdieu, 1971, pp. 192-193). Implicit in this is a theory of disadvantage, which provides a basis for rationalising socially-differentiated academic achievement (Nash, 1990, p. 436). This matches the discourse and the patterns of academic success and failure in South African higher education, which adhere closely to lines of class division.

Students from a particular class are seen to have "cultural capital", which appears in three forms: embodied as a disposition of the mind and body; objectified as cultural goods; and in its institutionalised state as for example, educational qualifications (Nash, 1990, p. 432). "Social capital" is a resource which integrates the various relationships of mutual acquaintance and recognition, within a "network of social connections" (Bourdieu, 1986, p. 248). "Non-traditional" students would be regarded as having a "deficit" if they do not have the requisite cultural capital for tertiary studies. They are considered to be lacking the necessary levels of preparedness or "readiness" for higher learning. In a South African context, the relevance of these insights to students from disadvantaged educational (and socio-economic) backgrounds is significant, echoing as it does the replication of a "cycle of disadvantage" through a range of educational sites, from school to university, to professional practice, which was identified in the study.

In 1983 the Critical Realist scholar Duncan Kennedy published a polemic against American law schools (republished 2004), in which he railed at their reproduction of hierarchy in the legal profession through teaching law students “to think like lawyers” This method of reasoning, emphasised by the traditional Socratic pedagogical style used in law schools and the content of courses, served to prepare aspiring lawyers for the hierarchical structures of the legal profession.

A similar perpetuation of social inequalities and class hierarchy has been documented in the allocation of differential “educational capital” that takes place through the selection of students by American higher education institutions. Tsui (2003, p. 318) reports how students from disadvantaged socio-economic backgrounds are more likely to be selected for institutions where certain valuable cognitive skills such as critical thinking are “less pursued” than at prestigious colleges which select students from the upper ranks of social power and privilege. Whilst schooling serves a preliminary “sorting function”, higher education further replicates the inequalities into adult life and work opportunities by developing different educational capital.

In this study, the graduates’ employment opportunities were largely influenced by their level of academic success at university and their socio-cultural positioning. Rani and Sandesh who had attended government schools that were previously for Indian students only, and which are located in what I as researcher would know are lower income areas, lacked any family or personal contacts to secure employment within the private sector, and so were left with little option but to complete their legal training phase in public sector employment. Fazila and David who had attended suburban government schools were able to secure articles of clerkship at small one-man practices. Maria, who had attended a top quality former “Model C” school in an affluent, previously predominantly “white” suburb, achieved impressive academic results and obtained employment in a successful urban firm, albeit possibly through her cultural (religious) affiliation, which I, as a deep insider-researcher, was aware was likely to have played a part.

The *Higher Education Monitor of 2007* (I Scott et al., 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. 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. 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 (Chrissie Boughey, 2005, p. 638). This hearkens back to Bourdieu’s (1971) notion of the cultural capital which middle class students coming into the education system already have, making them better prepared to benefit most from the learning. The hidden curriculum in higher education plays a significant role in perpetuating the inaccessibility to non-traditional (non-middle-class) students of the rewards offered by education, and this aspect of curriculum aligns closely to the situatedness of professional learning and practice.

7.6 “Situatedness” in the complexities of the curriculum cycle

In this section, the significance of the graduates’ positioning in terms of their social and educational experience will be related to their experience of the law curriculum and their resultant employment positioning within the hierarchy of professional legal practice. Ways in which the repetitive cycle of disadvantage may be disrupted will be considered in the shape of an “outlier” who emerged from the data as breaking the replicative patterns. Finally the construct of “professional legal entity” which was identified in an Australian phenomenographic study will be contrasted with the data in this research to highlight commonalities and dissonances.

The three categories of the graduates’ positions vis-à-vis their experience of the law curriculum at one university that emerged from the phenomenographic data (Chapter 6) reflected a hierarchically-ordered “outcome space:”

- A. Strategic instrumentalist
- B. Pragmatic generalist

C. Transformed vocationalist.

The significance of the three categories that were discovered in the data is that they align consistently with the graduates' socio-economic and educational experience prior to entering higher education.

Heidegger's (1962 [1927]) view of "situatedness" implies that as historical creatures whose views of the world are always and already informed by "parameters of intelligibility", which are inherent in one's life experience in a particular social and historical context, learning or knowledge functions as a pivotal life point. In knowing, we are able to open ourselves to possibilities of the future, even though these may be shaped by our own personal past. We are already "being-in-the-world" which cannot be separated from "knowing" Our future (and present) being is thus shaped by what we choose to pursue: a particular type of knowledge (profession or project). Thomson explains:

Our very "being-in-the-world" is shaped by the knowledge we pursue, uncover, and embody. [There is] a troubling sense in which it seems that we cannot help practicing what we know, since we are "always already" implicitly shaped by our guiding metaphysical presuppositions (Thomson, 2001, p. 250).

Learning thus has the capacity to be transformative on the individual level. Knowledge is always located or situated within a "personal, social, historical, cultural setting, which can transform not only as a way of opening up the subject to possibilities about new thinking, but also to new ways of acting and being, developing "embodied ways of being" a professional (Dall'Alba & Barnacle, 2007). "The folding of the past into present into future ensures continuity with change", which creates a range of possible career trajectories, and is central to the life-long learning that every professional must undergo throughout their professional and personal life (Barnacle & Dall'Alba, 2008; Webster-Wright, 2009).

Another dimension of circularity and the replication of social stratification is observed in the data related to the situation once graduates are employed. The nature of their employment (type and size of law firm/agency) tends to pre-ordain the quality of the professional training they receive while learning to be professionals in the work-place. The quality of the mentoring they receive relates directly to the cost to a firm of affording the time to train and develop candidate attorneys. In Busi and Maria's firms, where only one candidate

attorney is articulated to a single partner, the experience they received was no doubt significantly different from Sandesh's experience of working with nine other candidate attorneys for one supervising attorney at a Justice Centre. Fazila's principal reinforced this impression when he described how candidate attorneys are expected to manage trials and work long hours almost from their first day at work in his small firm. The employers' conceptions of what professional training entails related to their understandings of professional development and their socio-economic positioning within the cultural milieu of legal practice, which itself reflects the stratification implicit in most South African institutional hierarchies, along lines of race, class and socio-economic positioning. As Grosz notes:

Life is becoming beyond what it is because of the past, not fixed in itself, never fixes or determines the present and the future but underlies them, inheres in them, makes them rich in resources, and forces them to differ from themselves (Grosz, 2004, p. 255).

The "unfolding circularity" of professional practice operates to shape practices by imprinting the personal influences of neophyte practitioners on that practice, and by each of them being influenced and shaped by the practice (Thomson, 2001). This identity formation aspect of professional socialisation in an increasingly diverse profession has the effect of creating hidden barriers for "outsiders", which Sommerlad (2008) has identified. She suggests that even when firms increase the diversity of their student intake the cultural practices within law firms serve to effectively erase diversity, as aspiring lawyers learn to dress, speak and "internalise the law's cultural paradigm", conducting themselves to fit the "professional template" (Sommerlad, 2008, p. 6). Outsiders who do not have a network of contacts and the necessary cultural capital to secure employment, often lack the intuitive understandings of what the legal profession requires, having acquired their understandings from film and television programmes, as Fazila did. Acquiring knowledge and expertise (epistemological change) entails participation in relationships and a new community that will always effect ontological change (M. J. Packer & Goicoechea, 2000). In seeking to join a community of practice, there is a cost to the person seeking recognition and identity in the new community, which requires a separation from the individual's intuitive identity. A "mutual constitution" of the outsider shaping the community and herself being transformed

by the new community echoes Thomson’s “unfolding circularity of practice” (2001) in the way in which membership of a profession entails a search for a new identity and the attendant ontological transformation of the individual (M. J. Packer & Goicoechea, 2000, p. 234). This type of knowledge and critique of the legal profession’s structure and culture could be incorporated into the formal curriculum to support students who do not emanate from middle-class backgrounds, in focussing on their developing strategies to secure employment, on planning their career trajectory, and to make explicit many of the implicit and “unstated expectations” that employers have of law graduates (Sommerlad, 2008).

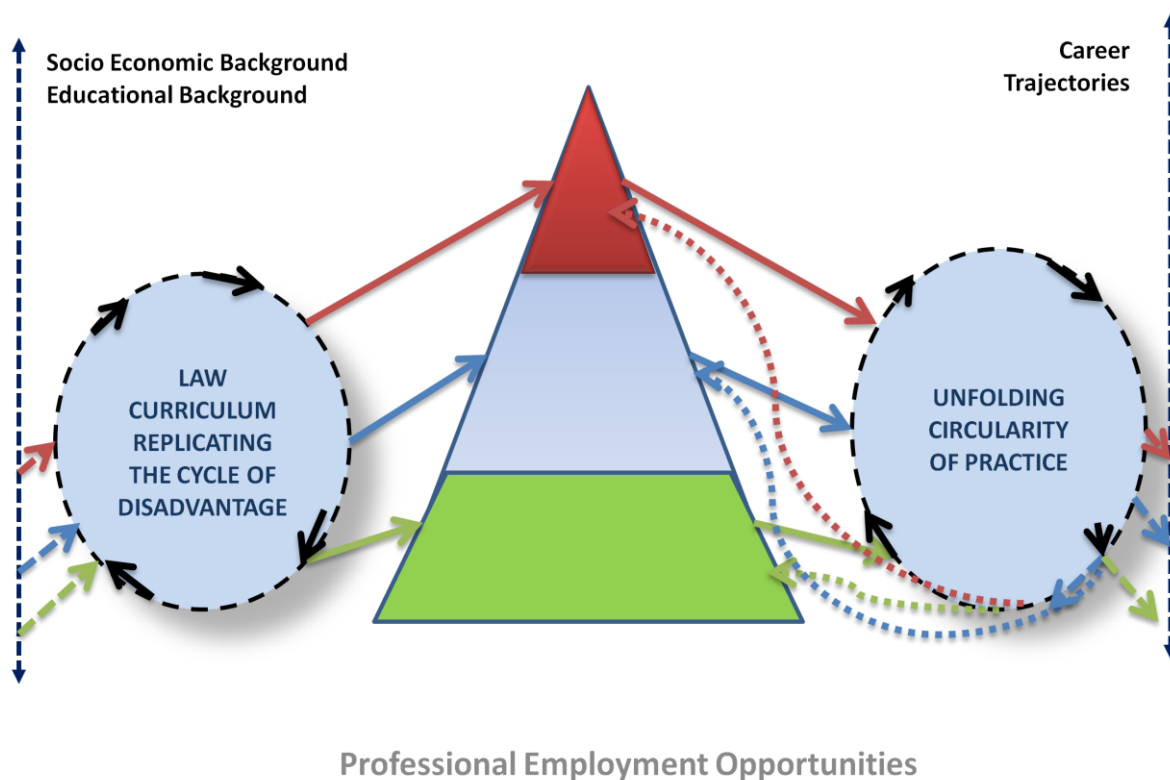


Figure 14 Cycle of disadvantage and circularity of practice in legal education

The circularity extended a stage further to the student/graduates’ professional employment opportunities which relate back to the graduates’ academic success in respect of the curriculum, as well as their socio-economic positioning. Another phenomenon that reinforces the circular replication is the positioning of employers within the hierarchical structure of professional legal practice. This can be reflected in the shape of a pyramid, with

the lowest level being public sector legal work; above that is the level of small “one-man” practices and at the apex of the triangle, the elite, affluent firms, who act on behalf of large corporate entities and engage extensively in commercial matters. The location of graduates’ employers within this ordered space determines the employers’ perceptions of the nature of the professional apprenticeship, and shapes the type of mentoring and practical training that the graduates experience while completing their period of articles of clerkship. The career trajectory of the graduates following on from the phase of professional “apprenticeship”, where they first gain direct experience of the socialisation into the world of professional legal practice unfolds with an imperceptible circularity. Graduates find themselves situated within a particular range of practice opportunities and are exposed to specific types of professional work. This experience typically determines their trajectory as qualified professionals into the wider professional landscape as independent practitioners. A comparison with an Australian study of law students’ perceptions of legal practice and their approach to studying law will be made to explore similarities and differences across international contexts. The conundrum in South Africa is that the underlying premise of the undergraduate law degree was that it would rapidly increase the number of black graduates entering the legal profession; however, the replicative pattern of legal education appears to be distorting and impeding that possibility.

7.7 Breaking barriers: the “outlier”

The example of Busi as an “outlier” reveals a set of factors that can affect the experience of education, where barriers can be broken and cyclic patterns disrupted, as suggested by Bourdieu (1973). Through her own agency, and the intervention of individuals (her mother and her husband) as well as serendipitous, extraneous events (the policy of affirmative action) which influenced her educational progress, Busi was able to achieve the upward mobility she sought and has already moved into a career trajectory that will alter her socio-economic and professional status permanently. Cyclic patterns tend to reproduce themselves but this exception establishes that individuals can disrupt the replication.

Thus the data in the South African study revealed that the convergence of a multiplicity of factors such as students' approaches to learning, their educational history, their socio-economic positioning and their expectations and motivation for studying law generally have the effect of determining their response to the curriculum and ultimately their employment and career opportunities in the legal profession. In the next section, these findings will be contrasted with a study of Australian law students that sought to explore their conceptions of learning in law and how these were shaped by their conceptions of what it means to be a legal professional. The study identifies a construct given the term "professional legal entity" which highlights some of the similar perceptions around learning law held by the graduates in this study. The value of this construct is in the contribution it makes toward developing a theoretical model that can inform curriculum design to enhance the development of legal professionals.

7.8 Australian law graduates' experiences: "professional entity" across borders

Several phenomenographic studies carried out in Australia (also replicated with English students) have identified a construct, termed "professional entity", which is a tripartite hierarchy of perceptions, comprising three levels of understanding the nature of professional work, and which can be regarded as a component of most professional fields, such as music, statistics, mathematics, theology and design (Reid & Davies, 2003; Reid & Petocz, 2002, 2004b). The authors suggest that it may be a unifying theory "that can be used to develop appropriate curriculum for professional studies" and as a "basis for reflection on and critique of the professional values that are being passed on to the next generation" (Reid, 2003).

A further study (Reid et al., 2006) investigated the specific experience of "legal professional", extending these understandings to show that law students' projections into the world of professional work and the perceptions that they develop of the legal profession have an important interaction with the way in which they go about learning law. The

implications of such research for curriculum design provide insights into how a holistic curriculum can broaden perspectives of professional work and thus enhance learning (Reid, 2003).

The categories of description that related to students' understanding of professional work as a lawyer, the "professional entity" construct, as a unifying way of viewing understanding of professional work were:

- extrinsic technical level: students conceive of professional work as technical components that can be used when the work situation demands;
- extrinsic meaning level: professional work is about understanding the important characteristics of the professional discipline; and
- intrinsic meaning level: students perceive that professional work is related to their own personal and professional being. These outcome spaces emerged from two related sets of categories that were developed directly from data (Reid et al., 2006).

Of particular relevance to this study were the ways in which Reid et al. (2006) classified the law students' experience of learning law. The five categories they distinguish, although expressed in quite different terms to the categories of the graduates' approaches to the law curriculum in this study, reflect closely aligned patterns of how law students perceive their relationship between their own learning and the body of knowledge of Law:

- | | | | |
|----|---|---|---------------------------------------|
| 1. | learning is about acquiring a qualification | } | <i>acquisitive orientation</i> |
| 2. | learning is about acquiring legal tools | | |
| 3. | learning is about acquiring the context of legal tools | | |
| 4. | learning is about critiquing the law | } | <i>discursive approach</i> |
| 5. | learning is about constituting a reflective and engaged idea of law | } | <i>reflective approach</i> |

7.9 Orientations/approaches to learning: acquisitive, discursive, reflective

Reid et al. (2006) suggest that the first three of the five categories they distinguish describe an “*acquisitive*” orientation to learning. The first classification (learning is about acquiring a qualification) correlates closely with the strategic/instrumentalist category identified in the present study, where students felt they had to complete their studies as fast as possible, learn practical skills to secure employment and often felt alienated from the curriculum content. My generalist/pragmatic category overlaps with the description of the second category in the Australian study in the sense that both have in common the notion of “using law in a somewhat mechanical fashion”, a conception founded on a utilitarian grasp of discipline knowledge as external to the learner. The vocational/transformational category in my study includes aspects in common with categories three, four and five in the Australian study, where learning facilitates an internal change in the learner, enabling her to be reflective and to internalise the knowledge. The connection in the South African students between their socio-economic positioning, their motivation to study law and their experience of curriculum is embedded within a highly stratified society, struggling to come to terms with a history of deep divisions along lines of race, class and the concomitant economic rewards of privilege and disadvantage.

In the Australian study (Reid et al., 2006) students’ perceptions of working as a legal professional were classified into three groups according to their expressed opinions about what Law is and can do. The three categories each reflect a different emphasis founded upon a sense of how the students relate to the body of discipline knowledge. These categories once more appear to have close parallels in the study of South African graduates and their experiences of the law curriculum, especially as they perceive how to succeed in the legal profession and how they envisage what their role as a legal professional in society will entail.

A: content view: law is a collection of rules and regulations [*Strategic instrumentalist*]

B: sociological view: law is a dynamic system [*Pragmatic generalist*]

C: personal view: law is an extension of self [*Transformed vocationalist*].

Once more, there is a striking alignment between the strategic instrumentalist viewpoint and the view of law as content, something extrinsic that will equip a graduate to earn a living. The pragmatic generalist viewpoint aligns fairly closely with the sociological vision of law as a dynamic system, animated by the people involved in it. The transformed vocationalist positioning has real congruence with the third classification in the Australian study: a perception of law as becoming part of the self, an internalised aspect of one's ontological being – which I shall argue for as a guiding principle to re-vision the law curriculum.

Table 13 represents a comparison between the conceptions of Law, and how these are related to both the ways in which the Australian students approached learning in law, and to their conceptions of professional legal entity (Reid et al., 2006, p.95). Learning law is cross-referenced to those ways in which students perceive of law, and these classifications are then categorised into conceptions of being the legal professional entity, which are: being a legal professional is an extrinsic, technical “addition” to self; the conception of the legal professional entity as extrinsic meaning implies an understanding that although the professional knowledge is extraneous to the self, it has developed meaning for the learner; while the category of intrinsic meaning reveals a transformation of the learner where the knowledge is both internalised and gives meaning to the new conception of self.

Table 13 Conceptions of the legal profession and of learning Law

(based on Reid et al., 2006, p. 95)

Law as a profession	Learning Law	DISCURSIVE	REFLECTIVE	Professional entity
<i>Strategic instrumentalist</i>				
A	Content view : Law is a collection of rules and regulations	Learning is about acquiring a qualification Learning is about acquiring legal tools		Extrinsic, technical
	<i>Pragmatic generalist</i>			
B	Sociological view: Law is a dynamic system	Learning is about acquiring the context of legal tools	Learning is about critiquing the law	Extrinsic meaning
	<i>Transformed vocationalist</i>			
C	Personal view : Law is an extension of self		Learning is about constituting a reflective and engaged idea of law	Intrinsic meaning

The significance of the Australian study for our context is two-fold. Firstly, it serves to highlight the similarities that occur amongst students’ experiences of the law curriculum in respect of the way in which they relate to law as a body of learning. In the South African study, socio-economic and background factors were considered in order to appreciate the

different approaches of students to the curriculum. The second notable feature is that the Australian study draws attention to the need to re-vision curriculum in such a way that it extends students' perceptions of law as a body of fixed rules, extrinsic to their personal sense of being. The way in which curriculum is presently constructed (and delivered) emphasises the heavy doctrinal knowledge content at the expense of skills and internalised ethical values. It neglects the central project of legal education as facilitating an embodiment of knowing, acting and being a legal professional. This in turn reinforces a static notion of legal rules and practices as technical and rigid, unresponsive to the fluidity and uncertainty necessary for successful "being" in the world today (Barnett & Coate, 2005). Critical legal knowing, which is founded on theory, translates into informed action (skills) and changes the person, is the type of transformative curriculum that is better suited to developing professionals for our society today.

7.10 Employers' replication of the stratified professional structures

Three hierarchically related categories of description as regards the employers' perceptions of graduates' preparedness for practice were identified in the previous chapter:

- graduates as educated apprentices starting out to acquire their craft-skills, are of an acceptable standard;
- graduates as practice-ready income generators have limited competence; and
- graduates as professional practitioners lack the ability to translate theory (knowledge) into skills (action) and do not have the requisite ethical standards (sense of being) required for practice: these deficiencies are blamed on the failure of the curriculum to focus on the needs of average practitioners.

It is notable that the vision of what a graduate should be in these three categories correlates closely with the nature of the professional work engaged in by each of the employers. There are underlying assumptions that translate into stratification amongst the practitioners,

based on economic factors and life-opportunities, which influence the employers' perceptions of what it means to be a law graduate and a candidate attorney.

Dewey's conception of vocational education would include exposing students to the ethical dilemmas that arise in legal practice, the moral and cultural possibilities, the moral and ethical implications of different perceptions of the role of lawyers and an understanding of the "social and ethical bearings of the law machine" (1916, p. 317). Such a broad vision would achieve a reconciliation between the dualism inherent in the theory/practice debate, which employers and legal professionals seek to emphasise for their own interests.

The possibility of developing an aspect of the legal curriculum as a vehicle to challenge conventional understandings of professional modes of socialization is suggested by Sommerlad (2008, p. 10). Whilst discourses of equity and access have proliferated in legal education on an international scale, in England, the "cultural practices (of socialising lawyers into the professions) remain exclusionary" Johnstone (1999) in similar vein, recommends that university legal education should seek to develop a critical understanding of the "law machine" (Berlins & Dyer, 1986) which includes an awareness of the social functions that it actually performs. In addition, Johnstone specifically addresses the circularity of professional training which fails to provide transformative education for law students:

Law has always contained within it the ideal of making the lives of others better worth living. The reality, of course, is often very different. Too many pursue a career in law solely for the money reward that accrues, and so end up as "hired guns" placing their technical expertise in the hands of the highest payer, regardless of other considerations. As a result, the law machine perpetuates social inequalities rather than living up to its higher ideals, and lawyers deprive themselves of opportunities for deeper forms of satisfaction (G. Johnstone, 1999, p. 7).

The replicative nature of legal education, through students' engagement with curriculum and through the process of professional socialization, continues to produce graduates who will be caught up in a cycle that is strongly influenced by their own personal history and socio-economic positioning. The failure of the curriculum to address and effect personal transformation, combined with the structural features of the process of professional socialization, result in patterns of stratification that persist as obstacles to upward mobility for individuals and also to the wider process of social reconstruction.

Cogent reasons abound for developing a curriculum that not only enhances students' ability to think critically in general terms, but also specifically develops a critical understanding of law and the legal profession through an emphasis on developing moral and ethical sensitivity in law graduates. Many ambiguities arise during the transition phase from aspiring to practising professionals: continuity over time (the self, the knowledge) set against change in ways of being (identity) and status; possibilities in the new ways of knowing and being, set against new constraints (on conduct, dress code); openness in taking up the possibilities, with resistance to doing so (learning cultural practices of the profession, while suppressing old aspects of personal identity); individuals adapting to becoming professionals, working with others themselves involved in the process (shaping and being shaped by practices) (Dall'Alba, 2009, p. 38). By addressing these ambiguities within the process of becoming professionals, a clearer understanding of expectations could be developed in students, enabling them to confront these often unarticulated obstacles that can affect their career trajectories. Such curricular developments would support the process of personal transformation through each student's experience of higher education and professional enculturation, as well as contributing toward the wider national project of transformation. This theme will be extended in the next section which focuses on how features can be incorporated within the curriculum to develop the ontological aspect of legal education.

7.11 A vision of transformative education: the “ontologisation of curriculum”

In this concluding section I bring together the significant emerging themes which have been developed through the literature, which have been articulated through the data, and which now point forwards towards developing insights for transformative legal education that would actively seek to achieve some of the original objectives of the four-year undergraduate law degree.

The objective of increasing the number of African law graduates is slowly being addressed, but only in terms of relative enrolment numbers and not in real terms reflected as a percentage of the participation rate of African students in higher education, relative to their demographic representation. The poor throughput rate of South African law students and their underperformance measured by success rates and graduation time indicates the failure of the four-year undergraduate degree to serve as an affordable and attainable access route into the legal profession for many students from poor educational and socio-economic backgrounds.

The dissatisfaction of members of the legal profession with the quality of law graduates also suggests that those graduates who attain the qualification are not equipped with the knowledge, skills and values that are required in present-day society. The sense of alienation and the cycle of disadvantage both replicated through the legal education process (discussed above) demand that some fundamental changes and re-visioning take place throughout the phases of legal education to ensure that not only are aspiring lawyers given both epistemological and formal access to legal knowledge and “the law machine”, through their experience of the curriculum, but also that the education they receive equips them to become the kind of professionals who have real capacity to address the needs of our society.

Johnstone gives a useful outline of the ideals that should inform the law curriculum:

University law schools should seek to turn law students, not just into more able lawyers but into more able persons. University legal education should seek to promote personal development by cultivating knowledge and understanding, intellectual virtues, imagination, intellectual skills, self-reflection, moral virtues and habits, a capacity for social and political involvement, and a sense of responsibility for the values one espouses and the relationships into which one enters. Some of these capacities may make one a better lawyer or more able for other high level careers. But, they might not and that is not their value. Rather, personal development is an educational and social value in itself (1999, p. 9).

The traditional separation of the transfer of knowledge and the acquisition of skills, echoed in the higher education discourses of quality assurance and module templates, and in professional development, between theory and skills, reveals an epistemology that speaks to de-contextualised learning of distinct aspects of education, which can be isolated from their world of practice. Curricula which position substantive (law) modules as separate from

“skills” modules reinforce this notion. The failure to problematise conceptions of what is “foundational” or “essential” content, or how it is to be acquired by students, leaves students without support or explicit guidance as to how to integrate this acquired knowledge with practice skills, in a professional practice context (Barnacle & Dall'Alba, 2008, p. 680). The contention that an emphasis on intellectual learning is founded on an understanding of information being accumulated within “a (disembodied) mind”, ignores the connection between epistemology and ontology. As Barnacle and Dall'Alba comment, “learning is not confined to the heads of individuals, but involves integrating ways of knowing, acting and being within a broad range of practices”. Epistemology must be “in the service of ontology” in higher education (Barnacle & Dall'Alba, 2008, p. 686). Heidegger’s view (1998 [1967], p. 167) that real education “lays hold of the soul itself and transforms it in its entirety” vividly captures the extent of the need for transformative higher education in South Africa. The circularity motif appears once again in Thomson’s description of how education serves to

bring us the full circle back to ourselves, first by turning us away from the world in which we are most immediately immersed, then by turning us back to this world in a more reflexive way (2001, p. 254, explaining Heidegger)

The “ontological turn” would entail including transformative aspects within the curriculum that specifically address the meaning of what it is to be a professional, that develop the ethical and human qualities of careful discernment, critical reflection and expert judgement, within a context of interpreting the law according to the “spirit and purport and objectives” of the values contained in the Bill of Rights,¹¹⁷ such as equality, dignity and democracy.

The concept of the ontologisation of curriculum creates the possibility of integrating the three components of curricular knowledge in Law. The need for continual renewal of universities, through incorporating the “reflexive and ontological turn”, in curricula is argued for by Barnett and Coate (2005). Their models (Chapter 3) represent the way in which the three domains of curriculum in higher education may overlap, to achieve a balance between knowing, acting and being. Insights from community education, which view learning as a

¹¹⁷ Section 39 of Constitution of South Africa of 1996.

transformative holistic process involving the whole person and drawing on the individual's personal and past history as adult learner, while accepting his/her different learning styles, could be applied to address social justice and equity issues between students and clients (Sullivan, 1995; Webster-Wright, 2009, p. 706). Magee (2007) presents an approach to legal education, based on the tenets of "humanity consciousness", which supports notions of inclusivity for non-traditional students, the "spiritualisation" of law, to address the dispiriting and dehumanising effect of law, and a heightened appreciation of lived experience, as a guide to acting ethically. This holistic approach is already a feature of clinical legal education that could be extended to many more substantive law modules to incorporate outreach and community projects, peer mentoring activities and varied pedagogy, including assessments that would explicitly focus on ethics, reflection and critique of the structures and practices of Law. Sturm and Guinier (2007, p. 535) complain about the "disaggregation" and segmentation of law students' intellectual, professional and personal development in American Law schools by way of classroom teaching that de-emphasises "the importance of context and the relevance of personal reactions and goals" Students are rarely encouraged to "make sense of their learning in relation to their values, histories and personal qualities" The Carnegie Report (Sullivan et al., 2007, p. 12) referred to the "sundering of the component parts" of professional apprenticeship, in the separation between the three elements of legal professionalism: conceptual knowledge, skill and moral discernment.

The three categories of description that were identified in the graduate data reflect the importance for law students of appreciating the "professional way-of-being" in approaching learning in law, and as an aspiring professional. Similarly, the employers' attitudes to their graduate-employees are coloured by their own sense of "professional being" The "stage models" (Dreyfus & Dreyfus, 1986) of developing professional expertise are inappropriate for legal professionals, in that they do not integrate the three curricular components necessary for the holistic preparation of professionals.

It has become clear that in order to meet the challenges and uncertainty of global change, sweeping societal changes in our own country, and a world-wide reconceptualisation of legal professional services there is a need for legal education to integrate a range of

interests, far more expansive than either the narrow neo-liberal model of transferrable practical lawyering skills, or the traditional liberal arts notion of an academic education for its own sake. Instead a vision that unites these polarities by modifying them, and is grounded in a central focus on ethical being as the key constituent thread that weaves these three strands into a coherent professional education, will better serve our society (G. Johnstone, 1999).

In this chapter I have drawn together the findings of the empirical data, reflected against the key insights from the literature, beyond those included in Chapter 3, in order to support the historical and current documents that cohere as an argument for a re-visioning of legal education in South Africa, after ten years of the undergraduate LLB degree. The research suggests areas for further study and provides some theoretical possibilities to inform the development of transformative curricula in an integrated framework for legal education in South Africa in the years ahead.

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Appendix 1: Poll of Stakeholders' Opinions

POLL OF STAKEHOLDERS ON THE CURRENT STATE OF LEGAL EDUCATION AND VOCATIONAL TRAINING

Assumption 1: There was sufficient evidence for the view that legal education and training was approaching a state of crisis.

JUDICIARY	UNIVERSITIES	ATTORNEYS	ADVOCATES
<p>Supreme Court of Appeal</p> <p>It is impossible to assess whether there is a crisis in legal education without being given hard facts. We think that the universities are all different, with some producing better law graduates than others. We fear that at some universities the 4-year LLB is nothing more than a disguised B Proc. But we are not in a position to assess this properly.</p>	<p>To my knowledge there has not been a detailed empirical study to provide adequate data to justify this assumption; I believe that such research should be a first step toward identifying the nature of the concerns and to interrogate from whose perspective this "crisis" exists: whether it is a question of academic through-put rates, the quality of graduates entering the professions, or the quality of the candidate attorneys who have completed their articles or pupillage.</p>		
	<p>I believe it has been in a state of crisis for a number of years.</p>		
	<p>Ek is baie besorg oor die gehalte van die studente wat ons die wereld instuur met LLB's. Die studente word so met die lepel gevoer en berei hulle net vir eksamens voor dat hulle geen selfstandige werk kan doen nie. Hulle kan geen basiese navorsing doen nie, hulle kan nie regstekste selfstandig interpreteer nie en kan nie skryf nie. Hulle taalvaardigheid is nul. Dit geld vir sowel Afrikaanssprekendes as Engelstaliges. Die LLB behoort na my mening weer 'n vyf-jaar graad te word. Dit sal die beste wees as hulle 'n breër voorgraadse opleiding kry, bv, 'n BA en dan die LLB. Hulle behoort dan ook na hulle BA gekeur te word. Die studente wat hulle deesdae vir regstudie aanmeld, hoort nie op universiteit nie. Daar word in die LLB leerplan te veel keusevakke ingevoer en daar word nie genoeg aandag aan die basiese vakrigtings gegee nie.</p>		

Assumption 2: Improvement of legal education and the provision of suitable vocational training for lawyers were matters of national interest.

JUDICIARY	UNIVERSITIES	ATTORNEYS	ADVOCATES
	<p>Yes.</p>		

Assumption 3: Legal education in its present form (four year LLB) was too short, did not have sufficient non-legal content, did not consistently produce sufficient knowledge of the law and of generic skills; nor was there consistent quality control in place.

JUDICIARY	UNIVERSITIES	ATTORNEYS	ADVOCATES
<p><u>Constitutional Court</u></p> <p>We should describe at the outset our experience in relation to graduates: our law clerks are drawn from universities around the country, and from both undergraduate and postgraduate LL.Bs. However, not surprisingly, nearly all our law clerks are graduates who have performed well as students. Our experience is therefore skewed in that we have little experience with weaker students. The comments we make should be assessed in the light of this experience.</p>	<p>This assumption should also take into account the entry level skills (particularly literacy and numeracy) of secondary school-leavers, who are being admitted to first year LLB. It is my contention that shifting the "blame" entirely for the poor quality of LLB graduates onto deficiencies within the LLB degree, overlooks the role of the education system that is failing to provide students who are equipped to undertake tertiary education.</p>		
<p><u>Supreme Court of Appeal</u></p> <p>The consensus [among the justices] is that there should in principle be a minimum of five years of study before a student can graduate with an LLB but are conscious of the factors that led to the introduction of the undergraduate LLB and believe that these have not changed over the last few years. If the universities were able to reintroduce a minimum of five years of tertiary education for lawyers we would be delighted.</p> <p><u>Regional Magistrate S H Mundhree, Ingwavuma</u></p> <p>The present LLB degree is a joke. One cannot be proud to obtain such an incomplete law degree. In order to be properly equipped, we must immediately revert to the previous practice viz. before studying for LLB degree, an initial degree must be obtained.</p>	<p>I do not believe too much should be made of the fact that the LLB is now a four year degree. It depends on what is done during the four years available to law faculties. If too many modules are slotted into the four years, with the emphasis on recall of facts instead of problem solving, research and writing, it means that students do not acquire much of value during the four years. They rush from test to test, "spot" or "cram", with little retention of the information in the textbooks.</p> <p>If the classes were smaller and if assessment focused on analysing problems, research and writing, much could be achieved in four years.</p>		

Question 1: What overall goals and purposes should be accomplished by legal education in the academic context?

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<p><u>Constitutional Court</u></p> <p>In our discussion, colleagues were generally of the view that the success of the four-year LL.B. degree needs to be assessed bearing in mind the following considerations:</p> <ul style="list-style-type: none"> • The poor quality of primary and secondary education in South Africa remains a challenge for tertiary institutions. The result of this poor quality education means that many students admitted to university are not fully ready for tertiary education. • South Africa's tertiary education sector has different quality levels. • Many, if not most, students find the cost of university prohibitive. This cost arises not only from paying fees and living expenses; but also from not earning wages while studying. • The need to be careful to avoid introducing "second-class degrees" as happened with the B.Proc. • The need for any decision to be taken after comprehensive research into the problems to avoid a knee-jerk reaction that may have harmful consequences. <p>Given the above considerations and our limited experience of 4 year LLB graduates, we would like to make the following comments:</p> <ul style="list-style-type: none"> • Some graduates of the four-year programme are well prepared to enter the legal profession. In stating 	<p>Ideally a broad foundational education, incorporating a variety of "ways of seeing and thinking" about the world- (a liberal arts approach) should provide the basic generic knowledge and skills which would enable law students to proceed to a more sophisticated grasp of the specific concepts and analytical thinking required for the more challenging law modules. A careful incremental approach moving students from their initial entry level capabilities to the development of higher level cognitive skills must be founded on sound pedagogical theory, and not on an ad hoc approach of faculties to "shuffling" around modules depending on the interests of their staff members.</p> <p>An integration of ethical values should permeate every module taught as part of developing students' professional identity. Generic skills teaching must be incorporated into the teaching of law modules where they are appropriate. A review of the teaching methodologies and assessments applied in legal education could enhance the quality of teaching and learning and greatly facilitate the development of well-rounded, holistically educated graduates.</p> <hr/> <p>1. The Rhodes Law Faculty believes that the main goal and purpose of legal education in the academic context is to provide students with a sound theoretical basis for their law studies. We believe that theory, if correctly taught, provides access to many of the practical problems that students will encounter in the work environment. Together with a mandatory legal practice and legal skills course, such theoretical grounding prepares the student for vocational training in his / her articles.</p> <p>2. In the October 2006 Prestige Lecture at Stellenbosch University ("Transformative Constitutionalism"), Langa CJ commented: "The way we teach law students and the values and philosophies we instil in them will define the legal landscape of the future." We agree and add that we believe that the five year LLB is preferable to a four year route given the importance of legal education in "defining the legal landscape."</p> <p>3. Following this sentiment, we believe that proper preparation for the work environment (especially, but not limited, to the legal profession) requires a wide knowledge and skills base - legal and non-legal. Non-legal experience (ie. courses in economics, philosophy, sociology etc) is central to the development of reflexive practitioners. Such experience assists students to regard law "as part of the social fabric of society" (as per Langa CJ above). It also links to the importance of teaching students not only about the content of law, but also about the role and application of law in society. This is particularly important in the light of the Legal Services Sector Charter's focus on access to justice as well</p>	<ul style="list-style-type: none"> • Reaffirm that which was taught at university with emphasis on those areas of the law which a legal practitioner will encounter in the first years of practice. • Inspire critical thinking in students as to the overall role of law in society, provide students with a sound knowledge of the historical and jurisprudential development of our law. Provide students with a sound knowledge of the basic principles of the main areas of S.A. law Provide students with basic professional skills. • To prepare candidates for practical application and interpretation of the law to assist in their job/vocation content. • Students should have a sound knowledge of the law and rules of practise! This is the outcome that is NOT negotiable. • The academic training of law students should ensure that they are equipped with sufficient theoretical knowledge of the law and an appropriate understanding of how the legal system functions within society. • I find that that the legal education of the university has been "watered" down. • Emphasis should be placed on reading of law reports. • Equip the students to practice law. • A sound and in-depth knowledge of law and procedure and its application should be created. • Solid and good foundation of applicable legislation and the law as it stands during pre-graduate studies and deeper practical application thereof during post-grad studies. • Should provide sufficient knowledge of the law. Should raise standard of degree to serve as sifting process. Avoid the flood if incapable people streaming into the legal profession. • Fewer subjects to be offered but in greater depth. Greater practical exposure provided. Perhaps lawyers should be appointed to teach. • Professionalism, ethics and integrity, foundation degree 	<p><u>Pretoria Bar</u></p> <p>A sound knowledge of the principles of the South African law.</p> <p><u>Adv JF Mullins SC</u></p> <p>A good theoretical knowledge of the law: practical knowledge is only required for areas such as civil procedure and evidence.</p>

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<p>this, we observe that determining factors for this are the quality of their primary and secondary education, coupled with the quality of the actual four-year degree they have obtained.</p> <ul style="list-style-type: none"> The corollary of the first observation is that law graduates from poor secondary education and from weaker law schools are less prepared to enter the profession. There remains a marked difference in range of ability in recent law graduates which tracks to some extent poverty, language, urban/rural divides and the quality of primary and secondary education. On the other hand, we observe that the reintroduction of a rule that law degrees may only be obtained as postgraduate degrees may deter good students from impoverished backgrounds to proceeding to a law degree because they will be able to enter the labour market with their first degree; and they may be compelled to do so for financial reasons. The very students that we would like to attract into law may be lost to the profession. Some colleagues felt strongly that writing skills, in particular, were generally (but again not without exception) less developed in lawyers who had obtained an undergraduate LL.B. The need to improve written skills in law graduates is seen as crucial. There is an overall concern that it 	<p>as recent issues around the independence of the judiciary and the rule of law. In this regard, we agree with Robert Cover ("The Supreme Court, 1982 Term - Foreword: Nomos and Narrative" (1986) 97 Harvard Law Review 4, 10) who notes:</p> <p>"To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the 'is' and the 'ought', but the 'is', 'ought' and the 'what might be'"</p> <p>Very broadly speaking, if someone has acquired an LLB degree, it should indicate to the outside world that that student is able to analyse a problem, identify the live issues, find the relevant sources in the library, reflect on the available information, and draft a well-written, well-structured "answer" to the problem.</p> <hr/> <p>Students should obtain detailed knowledge of and insight into each area of the law which they study at pre -graduate level. The present system is insufficient in the sense that too many courses are presented at a less detailed level than before which leads to students being ill prepared for the complex legal problems which they might face in practice. Knowledge, application, insight, logic....Additional subjects such as political science, psychology could be introduced.</p> <hr/> <p>Emphasis must be placed on core modules and students must have time to absorb the skills necessary to practice law- it is a case of "less is more". Enable a student to understand what it truly means to master a subject in depth and he/she will have the ability to apply the acquired skills to other areas of the law. In a system where numerous modules are forced into semesters no "ripening" can take place.</p> <p>Law students who graduate should more or less have the same basic knowledge. The content of core courses could therefore be standardised, but individual lecturers should also have the freedom to add as they seem fit.</p> <p>On the other hand, it is suggested that the nature of a specific module should also be kept in mind. For example, if it is decided that a course in legal history or legal philosophy is necessary, then each faculty should be able to deal with it as they seem fit. It would for example be much easier to establish a core content for the law of contract, law of evidence, criminal and civil procedure etc, but it might be difficult in others. Provision should be made for academic</p>	<p>like BA Law before LLB with management accounting and project management.</p> <ul style="list-style-type: none"> To produce high calibre, independent thinking students geared for easy vocational transition. To empower learners to handle legal matters competently and independently. A thorough knowledge of the common law and acts of parliament but also common sense, numeracy and literacy. The student should be ready to practise for his own account from day one. Enough knowledge and skills. Students should be given a suitable overview of legal principles with reference to a multitude of practical examples. The basic knowledge and skills necessary for the practice of law. Sound analysis of legal concepts as applicable to day-to-day scenarios that arise in practice. Academic grounding to prepare for a practical environment and numeracy skills. Ability to read the law. Provide the student with essential knowledge arming the student with good, theoretical background to tackle clients' problems. There must be concentrated on the theoretical aspects of the law need to be covered, starting with the basics. Students need to understand how the theory is applied in practice. To give you a solid knowledge of the law in-house training and L.E.A.D seminars should teach you how to practice it. A balance of theory and practice. Proper knowledge and understanding of the law, appreciation of rule of law principle. A good level of literacy coupled with an ability to reason and to understand and apply legal principles. Academic knowledge of the law, business, inter personal 	

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<p>may be the very students that need more time at university (because of the quality of their secondary education) who undertake the undergraduate LL.Bs.</p> <hr/> <p><u>TPD</u></p> <ul style="list-style-type: none"> • To provide practitioners who can apply their academic knowledge in practice. • To produce good lawyers to serve the public. • Students should understand the basic legal principles and be able to articulate their ideas in simple English. <hr/>	<p>freedom.</p> <p>It was also stated what the outcomes of a LLB programme should be:</p> <p>On successful completion of the LL B programme students should</p> <ul style="list-style-type: none"> • have acquired a coherent understanding of the fundamental legal and related fields of knowledge, rules, concepts, principles and theories and their relationship to values ; • have the ability to deal with complex legal issues in practice (be able to apply their knowledge to practical problems); • have basic litigation skills • have the ability to critically and analytically engage with the law; • be capable of doing legal research and of applying the acquired knowledge and skills in any branch of the legal profession (this implies that they should be familiar with legal resources, which includes textbooks); • have communication and argumentation skills (orally and in writing) • be able to function in a value-driven and ethical manner as a jurist in the context of the South African constitutional state. <p>Daar's niks waarmee ek verskil nie, ek sou wel voorstel dat ons dalk aanbeveel dat 'n landwyse studie wat bepaal watter vaardighede / eienskappe 'n suksesvolle regstudent / regsgeleerde moet hê, gedoen word. Dit sal gebruik kan word as keuringsmeganisme. Ons weet reeds uit ervaring dat skoolpunte en belangstelling nie die enigste determinante is nie.</p> <hr/> <p>Students should be so trained that they will be able to see different aspects of the curriculum in context with others. I heard an interesting idea from Dr? Rachel Prinsloo at the recent ODL conference: students need not necessarily be assessed after each module, but after they have mastered a whole group of modules, eg, my interpretation of her idea, after delicts and some procedure have been studied, give them an assessment that consists of the substantive law on delict together with how they would address the matter. Dus proses sam met die subst issue. Hoe mens 'n remedie kan gebruik om 'n problem op te los, maw die proses. Dis die tipe ding wat mens eintlik in die praktyk of by die regskool leer. En dan sommer bietjie bewysreg by, ens, ens. I think this is an "integration" problem. We teach them the branches separately, and seldom teach them to see the whole tree.</p> <p>Maar die subst law is NB, en dis asof die 1e generasie tersiêre studente nie genoeg abstrak kan dink nie. Dis my ervaring dat die high-risk course dié is wat</p>	<p>and communication skills. Practical knowledge.</p> <ul style="list-style-type: none"> • Equip learners with practical and relevant knowledge. • Universities must teach legal principles and produce jurists. • 1. To teach law students important principles of the different law subjects and how to access current law through available sources 2. legal ethics. • Legal education should be aimed not only at teaching the theory of the law but the practice of law. • A sound knowledge of the principles of the South African law. • Students should at least have knowledge of basic principles in all areas. • Producing a rounded legal practitioner. • The primary purpose of training in law should be to provide the learner with a solid and broad background in the law sufficient to enable the learner to decide what particular avenues he or she would ultimately wish to specialize in (and hence earn his or her income) as well as to communicate effectively both orally and in writing. • Very broadly speaking, if someone has acquired an LLB degree, it should indicate to the outside world that that student is able to analyse a problem, identify the live issues, find the relevant sources in the library, reflect on the available information, and draft a well-written, well-structured "answer" to the problem. • A sound knowledge and understanding and grasp of all essential legal concepts with particular reference to the Roman Dutch Common Law and other sources of law, including current legislation. An ability to write and communicate accurately and effectively and the ability to provide a reasoned argument to a set of facts. • Universities must educate i.e. firstly transmit knowledge of legal principles; secondly contribute to the formation of a developed individual; and lastly lay the groundwork for subsequent practical/vocational training. • A general knowledge of general principles should be 	

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	<p>abstrakte denke vereis. Hoe kan mens nou bv Negotiables verstaan, as jy, en niemand in jou familie 'n tjekboek het nie, en miskien nie eers genoeg geld het vir die basics nie. Maw cash voor negotiable! Jare gelede het UJ, toe nog RAU, 'n studie gedoen en bevind dat 2e en 3e generasie Universiteitsstudente baie beter presteer as dié wat die eerste in hulle families is om te gaan studeer. Vra Jean daaroor. Hy weet dalk die detail vd studie. Hoekom dit so is, behoort insae te gee in hoe om die gebrek aan te spreek: dalk gesindheid, meer boeke beskikbaar in huis, voorafbepaalde verwagtings, bewus wees vd moeilikheidsgraad van studies, kultuur van skouer aan die wiel sit, groter realisme oor eie potensiaal, of watookal.</p>	<p>achieved.</p>	
	<p>A legal education should equip a student with sound academic knowledge of the most important areas of the South African law. Furthermore, it should provide students with problem solving skills and writing skills which are essential in order to work in the legal field. Unfortunately students today are ill equipped to cope with the demands of the profession and it is the duty of law faculties to cultivate a work ethic that reflects the ethos of the law.</p>		
	<p>Legal education should aim at producing well-rounded jurists with the necessary theoretical and analytical skills to enable them to provide legal services that will reflect an understanding of constitutional values, ethical decision-making and the importance of the rule of law for state and society.</p>		
	<p>What overall goals and purposes should be accomplished by legal education in the academic context?</p> <p>Academic legal education serves three purposes. Firstly, the purpose of academic legal training is to provide general legal training over a broad range of subjects to candidates who aim to enter the legal profession as attorneys or advocates. The aim is to provide basic knowledge of the general principles in a wide range of legal subjects to produce general legal practitioners. Secondly, academic legal training should provide an opportunity for a legal practitioner to specialise in a particular legal field through Master's study. Thirdly, academic legal training should provide an opportunity to a lawyer to become an expert on a particular topic through doctoral research.</p>		

Question 2: What overall goals and purposes should be accomplished by vocational legal training in the professional context?

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<p><u>TPD</u></p> <ul style="list-style-type: none"> To provide practitioners who can apply their academic knowledge in practice. To produce good lawyers to serve the public. To produce practitioners who can make a contribution and be of at least <u>some</u> value to their clients. <hr/> <p><u>Regional Magistrate</u> <u>S H Mundhree, Ingwavuma</u></p> <p>Firstly, the Tutor must have an appropriate law degree together with a sound knowledge, experience and a thorough background in the field of law that he/she has to teach because a blind cannot lead a blind. Secondly, the student must complete his final year by attending a Law Law Clinic and exposed to the Court rooms.</p>	<p>Specific professional skills to equip graduates for professional practice should be focused on during the vocational training phase- developing and extending the core generic and limited professional skills that were inculcated in the foundational degree. It is imperative that the training be aligned with the academic skills and knowledge that is taught in the university phase in order to avoid repetition and gaps in both knowledge and competencies. Closer cooperation between the planning of these two phases would improve this interface.</p> <hr/> <p>1. Rhodes Law Faculty prides itself on the quality (and mandatory!) clinical legal education it provides to its law students. Students are also required to complete a generic legal skills course (in their penultimate year) and have the opportunity to choose an 'isiXhosa for Law' elective in their final year. All these activities assist the development of a student's ability to translate theory into practice.</p> <p>2. However, we do not believe that such activities supplant the important vocational training students will receive in their articles. It is not the central purpose of a university law school to provide comprehensive vocational legal training. As such, we believe that the profession (ie. Law Societies, GCB etc) is responsible for vocational legal training.</p> <p>A stronger emphasis on training in "technique" than would have been the case at university - the details of court procedure, advocacy skills, case management, client management, etc.</p> <hr/> <p>To create ethical legal practitioners who are aware of their responsibilities and duties towards their clients. Procedural rules and laws must be emphasized along with a broader knowledge and understanding of the political arena in which one functions. The nature of state departments and the skills needed to deal with people of all walks of life should also receive attention.</p> <hr/> <p>Vocational training should not be the main objective of tertiary institutions. All law students do not become attorneys or advocates. Although they should be exposed to practical legal training to a certain extent- the core responsibility of vocational training rests on the shoulders of the professional bodies.</p>	<ul style="list-style-type: none"> To improve practical skills in the handling of factual content. Provide students with values, knowledge and skills necessary for legal practice, with particular focus on the skills component. To develop professionalism and astuteness in the candidate and overall integrity in person and knowledge. Again, they should know the rules of practise!!! Vocational training should ensure that candidates are able to make the transition from students to practitioners equipped with the skills to apply their academic knowledge to practical situations. To marry the theory and practical in such a way that the 3 or 6 week winter school and summer school falls away. Students should attend courses in public speaking. To equip students to practice law. A practical framework should as far as possible be created to give effect to the knowledge base. Application of theory to practise and make sure theory "fits the job". Provide sufficient knowledge of the law combined with practical issues regarding litigation. Better quality products need to be determined. Emphasis on community service, access to justice and ethics. Accounting for attorneys is very impractical and challenging if one does not have account at high 	<p><u>Pretoria Bar</u></p> <p>Sound practical application of the law.</p> <p><u>Adv JF Mullins SC</u></p> <p>A good practical knowledge of the practise of law.</p>

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	<p>An independent survey should be undertaken to determine how many law students actually end up in legal practice - either as an attorney or advocate. Then only it would be possible to determine whether more emphasis should be placed on professional training or whether students should be exposed to a wide variety of subjects to allow them to have different career paths.</p> <p>More firms could introduce internships where students could work during holidays, providing practical knowledge which students could not always obtain in the lecture halls. In this manner the professions could assist to prepare the students for their time as candidate attorneys or pupils at the bar.</p> <hr/> <p>Same as above: if we can't accomplish that during the LLB, the vocational training should attempt this. They need a map: if this is the problem, walk through the different aspects of the law, and see which "subjects" are relevant to the problem, and use those. Attention must also be given to the language skills of the students. Once they have identified a valid idea (always the first step), they must be empowered to express this in clear language. We must encourage clarity of thought and then clarity of expression.</p> <hr/> <ul style="list-style-type: none"> • Zero tolerance of unprofessional conduct. • Strict screening of candidates to meet the "fit and proper" criteria • More emphasis on language skills <hr/> <p>Vocational legal training serves two purposes. Firstly, the aim is to enhance the practical lawyering skills of practitioners and legal advisors. Academic legal training will always have limitations because of time constraints and the wide range of subjects that should be covered. Vocational training supplements academic training by filling some of the gaps that are inevitably left by academic training. Secondly, vocational legal training provides basic legal skills to non-lawyers who, by the nature of their work, engage in activities with significant legal implications, such as police officers, human resource officers, compliance officers, auditors, accountants, engineers, etcetera. In this regard, the aim is to enable non-lawyers to appreciate the legal implications of their conduct and to assist them in making informed decisions to avoid unwanted legal difficulties.</p>	<p>school.</p> <ul style="list-style-type: none"> • To ensure that practitioners are kept up to date with relevant and new changes to our law. • To teach ethics and professionalism. • Practical training in collections, litigation (criminal and civil), office management, ethics, and plain good manners. • Better skills be learnt to speak and write properly and to the point. • Candidates should be exposed to as many practical aspects as possible. • Practical skills / practical application of skills learnt at varsity. • Ability to communicate facts and corresponding laws effectively; comprehensive quality control. • Each year all students to work 3 months for government department, the courts and S.A.P.S. • A marrying of the theoretical and practical application of the law. • Practical training. The law school is not enough for this. • To keep abreast of changing requirements. • An ability and knowledge to choose fields of expertise. • Ability to properly apply the law, ability to take proper instructions from clients, correct interpretation of instructions, drawing pleadings and documents, presentation of bases, ability to do research. • Practice and procedures and the drafting of legal documents. • Thorough practical exposure to a wide variety of law with proper training and mentoring. • Students are to become professional adults with practical training and proper guidance from seniors. • 1. Legal ethics. 2. To teach prospective legal practitioners the practical skills and requirements needed to practice effectively. • Vocational legal training should enhance practical legal skills. • Sound practical application of the law. • Students should be able to formulate legal argument, consult with clients and do 	

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		<p>research.</p> <ul style="list-style-type: none"> • Sharpen the competence of the candidates and give them practical experience. • Practical training to prepare prospective practitioners for realities of practice. • It should provide skills training rather than transactional knowledge. • Vocational legal training should equip the law graduate with- the practical skills required to effectively pursue his or her chosen specializations in practice; a sound knowledge of the profession and its ethics; and the confidence to practice successfully. • A stronger emphasis on training in “technique” than would have been the case at university – the details of court procedure, advocacy skills, case management, client management, etc. • The ability to apply principles of law to every day practice in a legal environment with particular reference to the requirements of the vocation in question and to be able to exhibit an acceptable level of competence in the chosen vocation. • Vocational training (which is assumed to compromise practical experience and structure learning) should convey legal skills rather than transaction knowledge and emphasize ethical and professional aspects of practice. Courses would emphasize generic skills and article/pupilage more specific aspects. • Practical skills should be mastered i.e. drafting affidavits, notices etc. 	

Question 3: How has adjudication, the practice of law and legal scholarship and teaching changed in recent years and what could the impact of such changes be on legal education and training?

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<p><u>Supreme Court of Appeal</u></p> <p>While there is anxiety about the calibre of pupil advocates, the view is that little has changed in this regard for at least a decade.</p> <hr/> <p><u>TPD</u></p> <p>Standards have dropped. Linguistic standards have deteriorated. Quality of papers filed is getting worse. Particularly among junior counsel (only some of them) and younger attorneys there is a shortage of dedication and discipline.</p> <hr/> <p><u>Regional Magistrate S H Mundhree, Ingwavuma</u></p> <p>The shortening of the LLB degree has caused a grave injustice to a student studying for a Law degree. It is clear that the Law Advisors had made a blunder in interfering the status quo thus producing legal men and women with</p>	<p>The impact of globalisation, the enormous impact in law of technology as regards legal research, the multiple trends toward transformation throughout the legal sector in South Africa and changing conceptions of what it means to be a professional have created enormous challenges for legal education and training. New forms of knowledge production and different market forces have altered traditional ideas of what is required to be a successful professional. The diversity within the constituencies of law students, legal practitioners and the judiciary require fresh approaches to be considered, so as to meet the needs of a society that has changed dramatically over the past ten years. A review of how best we prepare aspiring lawyers for these changed roles ought to be thoroughly interrogated: from a perspective of teaching methodologies, curriculum design and skills training. Developing clarity around a vision, based on a "humanitarian" approach, to developing knowledgeable, skilled, ethically sensitive change agents could inform these separate imperatives (Carnegie Report, 2007).</p> <p>1. We believe that the following factors have radically changed adjudicative methods, the practice of law and legal scholarship:</p> <ul style="list-style-type: none"> * the introduction of the Constitution of the Republic of South Africa, 1996; * the internationalisation of legal matters (regional and global); and * the move from common law to statute law. <hr/> <p>(1) Introduction of the Constitution</p> <p>1.1 In particular, we agree with Langa CJ once again (see above) when he states: "A truly transformative South Africa requires a new approach that places the Constitutional dream at the very heart of legal education."</p> <p>1.2 The Constitution has had major ramifications for adjudicative methods and legal practice - as noted by both Klare and Kennedy of the United States. In particular, Klare comments in his well-known article: "Legal Culture and Transformative Constitutionalism" SAJHR (1998) 146 at 147:</p> <p>[T]hat South Africans opted to accomplish a significant portion of their law-making through adjudication is a decision fraught with institutional consequences.</p>	<p>The adjudication and assessment students have declined and needs to be urgently addressed.</p> <p>S.A. law has been profoundly affected by globalization as well as the transformation of S.A. society and the introduction of the constitution. The scope of the LLB has expanded exponentially in recent years, but at the same time it has been reduced to a 4 year undergraduate degree. Also, student numbers have exploded.</p> <p>Departure from rigidity influence of constitutionalism – movement towards a broader socio-economic perspective rather than protection of the weak.</p> <p>Personally, I believe articles have become shorter to the detriment of candidate attorneys. Should be 2 years minimum, whether attending law school or not. Make longer courses compulsory for those who cannot attend the law school.</p> <p>My impression is that the truncation of the LLB program into four years has created a situation in which students who do not yet have the necessary insight are exposed to academic and practical situations and knowledge which is beyond their comprehension. In other words, while a student studies certain academic legal principles, these are foreign to the student because he or she has not yet had an opportunity of exposure in life which would enable him or her to appreciate the significance of the concepts being studied. I would consider that in order to avoid a perpetuation of such a lack of insight, the LLB program needs to be extended.</p> <p>It has changed in the last years with the summer and winter compulsory schools. However it seems to me that the article clerk no less theory – as if the academic standard is not as high as it was. Impossible to say.</p> <p>Training / facilities improve and this should impact the students.</p> <p>It has become too accommodating and student-centred. It needs to be more robust and standards should be elevated.</p> <p>Principles do not look after, train, lead, inspire their article clerks. They use them as cheap labour. Regulate the duties of principals. There is no more passion for the law in the industry. Instill leadership and mentorship programmes.</p>	<p><u>Pretoria Bar</u></p> <p>The Constitution changed everything. A sound knowledge of constitutional principles is vital.</p> <p><u>Adv JF Mullins SC</u></p> <p>[illegible]</p>

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<p>insufficient experience to conduct and advise in litigation matters. Law is a field that requires intensive background and knowledge otherwise it would infringe on rights and liberty of an accused, victim or plaintiff and defendant in any given matter.</p>	<p>Seen in its most extreme form, Kennedy (in A Critique of Adjudication: (fin de siècle) (1997) Harvard University Press at 2) comments that:</p> <p>[t]he diffusion of law-making [in adopting a constitutional democracy] ... empowers the legal fractions of intelligentia to decide the outcomes of ideological conflicts amongst themselves, outside of the legislative processes.</p> <p>1.3 The impact of such change is enormous and requires legal education to focus on substantive rather than on formal legal reasoning (see in this regard, Froneman 'Legal Reasoning and Legal Culture: Our "Vision of Law"' (2005) 16 Stell LR 1). This links to the need to give students both legal and non-legal experience in their law degree (as per answer to question 1 above).</p> <p>(2) The internationalisation of legal matters (regional and global)</p> <p>More so than ever, legal education has to prepare students for a regional and global marketplace. It is difficult for Rhodes Law Faculty, being so small, to provide students with adequate exposure to specific international issues. However, we believe this can be ameliorated by providing students with the general principles and tools to enter into this marketplace (ie. giving students a proper theoretical grounding).</p> <p>In general, we believe that post-graduate work in this area should be emphasised and supported.</p> <p>(3) The move from common law to statute law in South Africa</p> <p>3.1 This move has made teaching more complicated and technical with a potential to reduce teaching time on general principles and values. This links in with our proposal that the five year LLB gives time in the curriculum to develop legal and statutory interpretation skills - in 'education-speak', such learning should be based on the principle of "scaffolding" knowledge.</p> <p>I can only respond to teaching, and only at UP. I joined UP in 1999 and I cannot say that teaching has changed, or that the challenges have changed. Since I've joined UP's law faculty in 1999 I have been faced with large classes, large numbers of students ill-prepared for the demands of tertiary education, and an inability to meaningfully assess students' skills. If university management will continue to view the law faculty as a source of revenue, it means that classes will remain large, pressure will remain to keep the "throughput rate" at a high level, the quality of students will remain average to poor, and the "products" will remain average to poor. There are obviously exceptions - our good students are very good, but there are not many of them.</p> <hr/> <p>Adjudication has become more equity based than before. The values of the constitution strongly influence the judges decisions and carry more weight than</p>	<p>Standards of legal degrees have dropped dramatically, resulting in a flood of incapable people trying to find their way in one of the most demanding professions.</p> <p>The standards have been lowered which negatively inputs on quality of legal service.</p> <p>Before we had strong NGO's like Lawyers for Human Rights, NIPPILLAR, including LRC and CA's doing articles and with strong community and social responsibility service. Now commercialisation of everything is killing the law.</p> <p>The factors mentioned have gone through a revolution in a post-apartheid S.A. Legal education and training must be thorough in both contexts where it is relevant, to include pre-change and post-change law.</p> <p>The internet and e-mail has meant more learners can be reached – an internet based teaching programme needs to be considered.</p> <p>The lawyers' office is a business – principles relating to a business should be addressed but keeping ethics in mind.</p> <p>Less work and competition by outsiders makes profession not professional any more.</p> <p>There is a greater perception generally of incompetency on the bench, particularly in the magistrate's court. Too little emphasis is placed on practicality in teaching methodology.</p> <p>Nothing much as changed, however – candidate attorneys should be made ready / prepared to represent client efficiently and effectively.</p> <p>It has become crammed and pressurizing for young attorneys who choose to practice generally, rather than specialize.</p> <p>Legal technicalities on pleadings have eased. However many more laborious laws and rules have arisen in over-protection of deemed innocent parties.</p> <p>It appears that standards have been lowered and it might result in substandard graduates with little or very limited background knowledge.</p> <p>Attitude needs to be changed, I think the profession has lost a lot of respect, young lawyers do not have respect for seniority and legal expertise. Courts do not enforce respect for its orders and have lost face due to political attacks.</p> <p>Teaching – there must be more emphasis on own research, less</p>	

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	<p>strict legal provisions. The practice of law has become such that clients require more specialised advice from their clients than before. Clients also demand personal attention and quick service</p> <hr/> <p>Law curricula already place more emphasis on practical training as well as the enhancement of skills. However, large classes make it impossible to give individual attention to students. The four year LLB did adapt to the changes that followed on the introduction of the Constitutions. New modules were developed and new fields of study became important. However, it also placed pressure on Law Faculties as well as students to master more subjects in a shorter period of time. South Africa's re-emergence in the international field, also led to the introduction of more courses in international aspects of law than was previously regarded as necessary. Moot courts were introduced to assist students in their practical training. Subjects such as legal practice and moot courts, however, placed an additional burden on the lecturers responsible for it, impacting on their own academic development.</p> <p>There should always be a balance between what is expected of students to be professional lawyers and modules that provide them with the skill to think more widely than only the narrow scope of law or to be mechanical appliers of the law. To only train students as professionals, with the skills to interpret the law, to apply the law as it is to be found in rules and court decisions, may lead to a new generation of positivists. What we need in this country are not positivists but students that have ethical standards, could apply the law in context and that could see to it that the law fulfill its role and is not used as a political tool. If we do not ensure that our students are critical thinkers and have a broad knowledge of the purpose of law and the Constitution, people's perspective of the law as a deteriorating discipline would only be enhanced.</p> <hr/> <p>Because of numbers we often assess by way of multiple choice questions, and students don't get enough opportunity to get clarity of thoughts and expression. I am always hoping that good English will rub off onto the students, but it doesn't seem to do so. It will therefore have to be taught expressly.</p> <p>See also Woolman 1997 South African Law Review article entitled "Toto, I've a Feeling We're Not in Kansas Anymore: A Reply to Professor Motala on Legal Education in South Africa".</p> <p>Dit blyk in die praktyk dat 'n wesenlike persentasie van studente nie voldoende analitiese vaardighede aanleer om op 'n selfstandige wyse met juridiese materiaal om te gaan nie. Ek verwys hier bloot na basiese deduktiewe vaardighede en ek laat meer gesofistikeerde induktiewe vaardighede hierby buite rekening. Laasgenoemde</p>	<p>spoon-feeding. Brink back professionalism adjudication – more mentoring, less fast tracking.</p> <p>Command of court language is becoming poor. General lack of respect for the law and authority figures even by officers of the court, law is becoming “just another job” rather than a calling.</p> <p>In education – low levels of literacy and a decline in the ability to reason and apply principles. In training – an improvement on the past.</p> <p>Law is a business like any other. Law students need)basic) knowledge of how business works. Academic training is great, but it must be practical.</p> <p>The standard has dropped. Language skills are extremely poor and as a result the profession is flooded with ill-adapted students who cannot express themselves linguistically. Students are also too academically inclined with little for no business knowledge and understanding.</p> <p>It seems common knowledge that school leavers do not have adequate literacy, numeracy and financial skills. Given the entrance requirements, four years is inadequate to produce a jurist. Universities are accordingly not teaching enough law or life skills. The better legal principles are taught/learned the quicker practical knowledge can be acquired. The disappearance of much maligned serving as a “messenger” results in serious gaps in ability to practice. The period could be very short. Legal practitioners who consult with the public and those who practice as a referral profession do not need the same training.</p> <p>Among other changes, adjudication and the practice of law have become driven by the constitution and human rights while common law and customary law as well as legal ethics and practical skills seem to get less attention.</p> <p>In the past most law graduates completed an undergraduate and post-graduate degree. The four year LLB has changes this. Consequently many graduates commence practice without the necessary levels of maturity and life experience.</p> <p>The constitution changed everything. A sound knowledge of constitutional principles is vital.</p> <p>Standards of academic level have dropped significantly and would impact on quality of graduate entering the profession.</p>	

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	<p>is egter essensieel vir studente wat 'n LL.M- of LL.D-graad wil onderneem en 'n oorspronklike bydrae tot die regs wetenskap wil lewer. 'n Langer blootstelling aan juridiese opleiding mag die gebrek hieraan gedeeltelik ondervang. Ek wil gevolglik die roep uit die professie ondersteun om terug te keer na 'n vyfjarige opleiding vir juriste. Die mark het waarskynlik ook behoefte aan minder-opgeleide regspraktisyns bv om in die landdroshoue as aanklaers op te tree. Die probleem kan ondervang word deur die ou B Luris terug te bring as 'n drie jaar-kwalifikasie. Die LLB sal dan 'n nagraadse kwalifikasie op honneursvlak wees en twee jaar neem om na die B Luris-graad te voltooi. Al die Strafrege- en Prosesrege-georiënteerde vakke moet in die drie jaar aangebied word, tesame met die basiese privaat- en publiekregvakke (dit is al die vakke wat huidiglik in die eerste drie LLB-jare aangebied word). 'n Mens sal wel die personeelimplikasies moet oorweeg aangesien meer regsvakke waarskynlik aangebied sal moet word.</p> <hr/> <ul style="list-style-type: none"> • It has become much easier to study law and practice, especially as an attorney. Law schools process a huge amount of candidates who are not ready to work in the profession. • Law schools encourage students to become "legal mechanics" by lowering their standards and by, for example, allowing final year LLB students to attend law schools. These students lack the maturity, cannot cope with the work load of a final year LLB and law school and do the minimum that is required in order to obtain their law school certificates. This does not serve the purpose of practical legal training at all. 	<p>Adjudication these days has become reflective of the society we live in – diversified. Indeed legal practice and education become dynamics in essence.</p> <p>University entries need to be screened. Learners accepted to study must have logic, greater reasoning skills and be more committed. Do away with 4 year LLB.</p> <p>I can only speak for labour lawyers : a lot has changed due to stare decisis.</p> <ul style="list-style-type: none"> • Today there is less predictability in the outcomes of litigation (What will the court decide). There is also the challenge of meeting the standards of the Constitution which means that there is a specific need to learn the “logic of the Constitution” and litigation related to it which in turn demands almost extra-ordinary research capabilities. There are also new specialist areas of law (E-commerce; credit regulation; consumer legislation; rental housing legislation etc each with its own hierarchy of tribunals, regulatory authorities etc). The “solid and broad background in the law” which the LL B should provide would be inadequate to equip a candidate with knowledge of all the above or with the ability to practice successfully without (1st) later specialization and (2nd) vocational training appropriate to his or her specialization. Unless training changes to (1st) equip candidates with greater research capabilities; (2nd) equip them with improved communication (oral and written) skills and (3rd) maintain high academic standards, the quality of the profession and the cost of “going to law” will continue to be adversely affected. <p>A reasonable degree of computer literacy is required.</p> <p>Ever greater reliance has been placed on the abilities and competence of practitioners in recent years and particularly in the case of conveyancers and notaries public as a result of the substantial drop in standards of competence in public officers including the Courts, Master's Office, Deeds Registries and other state institutions.</p> <p>The replacement of the 4-year B.Proc and 5 year LLB has created a degree which produces neither practitioners nor jurists (the start excluded!) given the product received from schools. The largely short-term requirements of employers put pressure on vocational training to emphasize technical knowledge more suitable to para-legals.</p>	

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		I am not convinced it has changed. (adjudication and practice).	
	<p>The new constitutional dispensation has introduced a different legal order which permeates almost every legal subject. As a result adjudication, legal practice and legal scholarship are now often confronted with growing legal complexities and the progressive codification of the law by means of an enlarged legislative programme prompted by the need to give effect to the new constitutional dispensation, South Africa's international law obligations and concomitant government policies. The new legislative framework, for it to be effectively implemented and enforced, will need a highly qualified legal fraternity (and maternity) with diverse skills and a high level of professionalism to take the country out of its current downward spiral. Moreover, the need for reconsidering the future role of legal practice, legal scholarship and teaching is in large part prompted by the universal concern with good governance in both the public and private sector, the dangers presented by the powerful spread and influence of organized crime, the institutional weakness of public and private entities in facing up to the challenges presented by the United Nations development goals, and, perhaps most importantly, by the urgent need of conceptualizing a legal framework aimed at making sustainable development work and putting in place the legal mechanisms for its effective enforcement.</p>		
	<p>Legal scholarship is dead, or at least, it is dying. If one compares the eloquence and poetic imagery with which judges of yesteryear delivered opinions, rich with references to Roman and Roman-Dutch law, opinions of academic writers, precedents and comparative analysis, with the lean judgments of today, it is clear that the judiciary no longer has the absolute command of the law which was a hallmark of judges in the 18th, 19th and first half of the 20th Centuries. This tendency is also evident in academic legal writing. Much of what is published today makes little or no contribution to the development of the law. Too much emphasis is placed on the volume of publication at the expense of quality. The result is also that law students are more and more exposed to newer judgments and writings and less and less to the excellent work of days gone by. This means that students do not acquire the skills and sophistication which characterised the legal profession in days gone by.</p>		

Question 4: What should be done to meet the challenges currently encountered in legal education and training?

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<p><u>Constitutional Court</u></p> <p>We do not have any firm recommendation to make to SALDA. It appears from your letter that SALDA is undertaking careful research to determine the proper way forward, and we commend the initiative. It seems to us that it might be interesting to obtain results from attorneys' admission examinations, as well as bar examinations, to assess the relative calibre of the graduate and undergraduate programmes. We urge, however, that the financial position of students should be carefully considered. In particular, it is necessary to look at the possibilities of student finance to ensure that good students from poor backgrounds are not lost to the profession because they are compelled to abandon law studies in order to earn a livelihood.</p>	<ul style="list-style-type: none"> * A dialogue among all stakeholders, including educational inputs, ought to be opened. * As a starting point, the shortcomings of the secondary schooling system must be addressed since this factor impacts significantly on the planning and design of tertiary education curricula. * Additional time to improve students' academic skills has to be made available- whether in the form of a bridging year or an additional degree year- although the cost implication of this has to be acknowledged. * Expert support, in the form of academic developers, could play a critical role in assisting legal educators to improve students' academic skills. This too has resource implications for tertiary institutions. * Government funding of higher education for law students is an obstacle to enhancing teaching resources and improving all important staff-student ratios. * Professional development of legal educators would also serve to enhance the teaching and learning interaction at law faculties. * National workshops aimed at addressing curricular and teaching challenges in a constructive manner could facilitate improvements to legal education. * Closer alignment and regular exchanges between the two phases of legal education and training should address the perceived roles and functions of each. 	<p>Reassess where the emphasis should be in what subjects should be taught and the content of such subjects.</p> <p>More staff, or fewer student numbers, more resources for law faculties, more time for academic staff to research instead of just "processing" vast numbers of students as quickly as possible.</p> <p>More emphasis on practical training, solely be it on a bed-rock of solid knowledge.</p> <p>More of the senior attorneys should make themselves available to be part of the legal education system.</p> <p>Students should, during the course of their academic training, be given more exposure to life in practice. This can be achieved by means of a greater degree of participation in teaching by practicing professionals and also by an increased exposure of students to practice on an annual basis. Programs which may be suitable in this regard could include a month's secondment to practicing professionals in each year of academic study.</p> <p>A 4 year academic degree and 1 year practical school – compulsory.</p> <p>More practical training such as School for Legal Practice.</p> <p>Increase the emphasis on numeracy and negotiation skills.</p> <p>Standards should be elevated and students should realise they have to achieve academically and in the field of accounting, numeracy and practically, to be granted admission as an attorney.</p> <p>Extend training to include a year of studies presented by practitioners.</p> <p>Make sure lecturers are assisted by practitioners in their preparation of lectures.</p> <p>"Workshop" more</p> <p>Set the high educational standard that was in place ten years ago in place again.</p> <p>The return to a basic degree like BA Law which includes life skills and management including financial office management, human resources and project management, before LLB degree.</p> <p>Syllabus improvement to promote critical and complex thinking at varsity level; then similar model to be adopted in practical training in law school.</p>	<p><u>Pretoria Bar</u></p> <p>Ensure that proper standards are attained/maintained.</p> <p><u>Adv JF Mullins SC</u></p> <p>We must improve standards and our training must be aimed at helping trainees to improve standards.</p>
<p><u>TPD</u></p> <p>The academic training should include much more practical training to enable a graduate to deal with the difficulties of practice.</p> <p>There should be discipline on campuses. Strikes, violence and side issues which detract and intimidate bona fide students should be eliminated. Punctuality and discipline should return to the classrooms.</p> <p>The standard of education at universities should be raised several notches and there should be a national standard.</p>	<p>1. We believe that (1) the five year LLB should be the primary route followed by students wanting to practice law and (2) a course in Ethics and Professional Responsibility should be compulsory in every law degree.</p> <p>(1) Five year LLB as primary route</p> <p>The five year LLB (ie. 3 year undergraduate plus 2 year postgraduate study) should be encouraged, if not made the primary route, for a person wanting to practise law. The five year LLB route at Rhodes Law Faculty has been designed to encourage students to choose this route. Our experience over the last few years is that the five year route is educationally more sound than</p>		

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<p data-bbox="188 371 412 395"><u>Supreme Court of Appeal</u></p> <p data-bbox="188 427 544 475">Some empirical research should be done before any changes are made.</p> <hr/> <p data-bbox="188 655 501 715"><u>Regional Magistrate S H Mundhree,</u> <u>Ingwavuma</u></p> <p data-bbox="188 751 566 847">Legally qualified and with at least five years experience in the law field should be the norm in order to be a lecturer in disseminating legal knowledge</p>	<p data-bbox="598 253 1173 539">a four year LLB degree since it provides students with the space to progress and develop their academic abilities through a scaffolding process. The five year LLB also exposes students to other academic disciplines, critical thinking, and societal issues so integral to the practice of law. Our experience of the four year route is that only the academically strong students cope with the programme and its volume. The five year LLB also provides space in the curriculum and in the student's personal development to prepare them for drafting and numeracy skills - issues which are constantly being referred to by the law societies and practising attorneys as needing attention.</p> <p data-bbox="598 552 1120 600">(2) Ethics and professional responsibility should either be compulsory or re-emphasised in the LLB degree</p> <p data-bbox="598 612 1173 660">Wasserstrom comments (R Wasserstrom "Legal Education and the Good Lawyer" 34 Journal of Legal Education (1984) 155-156):</p> <p data-bbox="613 673 1158 801">[t]hose engaged in educating others must have and justify a conception of what their students can and want to do once they are no longer students. In the case of legal education this question is largely about those graduates that will go on to be practicing lawyers.</p> <p data-bbox="598 813 1173 1174">In the context of greater class numbers, a crammed curriculum and the inevitable rote-learning by students, law faculties and schools need to think seriously about what our students can and want to do when they go on to be practising lawyers. As evidenced by a recent Supreme Court of Appeal judgment (The Law Society of the Cape of Good Hope v Peter [2006] SCA 37 (RSA), many students and young attorneys are ill-prepared to deal with the high levels of responsibility and ethical conduct which is required from legal practitioners - even (and especially) in the face of personal and financial crisis. While the problem relates to a lack of exposure to handling books of account, numeracy skills, and general knowledge of handling trust accounts, more importantly, it relates to the conduct which a student thinks is or is not ethically sound (if they think about it at all?).</p> <p data-bbox="598 1187 1173 1315">The spectre of unprepared, "amoral ciphons" in our legal system must be closely guarded against. We believe that a substantive course in legal ethics, going beyond the simple rote-learning of a professional code, may go some way to producing graduates who actively and consciously take responsibility for their conduct.</p>	<p data-bbox="1202 309 1720 357">More funding and resources required – law firms should be encouraged to actively participate.</p> <p data-bbox="1202 427 1778 475">Increase 4 year LLB to 5 years and practical training to 2 years plus law school.</p> <p data-bbox="1202 545 1778 616">Better trainers, study material and more practise specific training. Honours or LLM degree as minimum requirement and 2 years articles in approved firms.</p> <p data-bbox="1202 686 1794 734">Return to undergraduate degree with 2 years intensified LLB as post grad study material.</p> <p data-bbox="1202 804 1794 852">A more practical approach eg. at law school students should do a lot of moot courts and mock trials.</p> <p data-bbox="1202 922 1767 938">Involve members of the judiciary to provide educational content.</p> <p data-bbox="1202 1008 1778 1078">All students should follow the German training. State sponsors students in other fields of business before allowing the doctorates to be awarded.</p> <p data-bbox="1202 1149 1794 1197">Increase the length of the degree, incorporating a course/s that deal with practical applications of the theory studied.</p> <p data-bbox="1202 1267 1789 1283">○ Bring back dual degrees in BSA or BCOM and then LLB. This will</p>	

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	<p>Macro-level: A high-level meeting should take place between SALDA and the Ministries of Education and Justice. It should be made clear to government that if the emphasis will remain on the massification of Higher Education, we must accept that we will continue to turn out large numbers of average to poor LLB graduates.</p> <p>Micro-level: Assessment practices must change. If students cannot write well, and cannot perform adequate research, they should fail until they acquire the ability to write well. Law deans should make it clear to management that if "quality" and "excellence" are given priority, the throughput rate for law faculties will be low, and will remain low, for a substantial number of years.</p> <hr/> <p>Perhaps add one year to the current LLB program in which one or two additional subjects referred to above are introduced and a return to more detailed legal programmes at pre-graduate level in order to assure that high quality of academic contents is matched with well rounded candidates who are sufficiently prepared to function in the working environment be it in legal practice or elsewhere.</p> <hr/> <p>More time should be allocated to attain the LLB degree. A basic first year should be incorporated to serve as a bridge between school and university as many first year students do not have adequate reading, analytic and/or writing skills. Students must be taught to think!</p> <p>Other ideas:</p> <ul style="list-style-type: none"> * Cut some subjects from the curriculum or introduce more electives in the final year allowing students to specialize. * Concentrate on core subjects and spend more time thereon, rather than teaching too many modules crammed into 4 years. * Identify certain crucial subjects and present these over a one year period. * Elevate the importance of teaching. * Concentrate on the basics so far as module content is concerned. 	<p>broaden the base of legal education. Start with moot courts for all students from 1st year, this will point out which skills a lawyer needs in practice. Students can then obtain these skills or change the degree they are studying.</p> <p>Not to give into the pressures for a quick fix.</p> <p>Continuous updates.</p> <p>More rigorous testing, new attorneys to undergo practical training on running a practice before they may practice on their own, more mentorship programs, compulsory oral testing to check command of court language and etiquette.</p> <p>Raising the level of school and post school education. We must revert to making the LLB a post-graduate qualification.</p> <p>Articles should be monitored carefully – clerks are often cheap labour and do not get proper training. Lookat eg. CA’s for guidelines on proper, thorough, training.</p> <p>Latin should be compulsory. The LLB should be a post-graduate degree. A BCOM LLB should be pushed instead of a straight LLB. I am 23 years old and am an article clerk.</p> <p>A more holistic approach to the needs of prospective lawyers, i.e. provision of effective academic and practical training of candidates through better co-ordination between all role-players.</p> <p>LLB should once again become a post-graduate degree. Practice orientated teaching should become the focus of legal training.</p> <p>Ensure that proper standards are attained /maintained.</p> <p>Standards should be raised, less “spoon-feeding” and more individual work should be required from students.</p> <p>Please see the last sentence. None of the proposals contained in it are capable of realization</p> <ul style="list-style-type: none"> • without a broadening of the non-legal content (How else is one to understand the “logic of the Constitution” or communicate more effectively?); • unless academic standards are maintained at the highest possible level; and • unless specialization is also encouraged. 	

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	<p>* More emphasis on ethical issues.</p> <p>* More emphasis on communication skills.</p> <p>* Adopt a more practice orientated teaching programme where possible.</p> <p>* Students should write an admission test.</p> <p>* Student numbers should be limited, which will result in smaller classes.</p> <p>* Add another year for more contact time.</p> <p>* It should be regarded as a professional degree - similar to engineering, dieticians, pharmacy. It seems that law students do not take their studies seriously. It might be that law students do not have a future perspective.</p> <p>* Students need to be taught self discipline, how to take responsibility for their own studies, how to think and not be spoon fed and babied at university. This can be done by creating a culture of high ethical and work standards.</p> <p>* Ek ervaar dat die studente eers regtig in staat is om die groter prentjie van waarmee ons / hulle besig is in LLB, raak te sien in hul vierde jaar. Integrasie van kennis en vaardighede vind plaas aan die einde van hul studie en meestal laat ons die studente dan los voordat hulle werklik hierdie vaardighede behoorlik ontwikkel het. Soos jy laas gesê het sou dit ideaal wees as ons op daardie vlak sou kon voortbou vir nog 'n jaar - dus sal 'n vyfde studiejaar verseker dat ons 'n baie beter 'eindprodukt' lewer. Ek voel sterk dat ons nie die massa-produksie van graduandi ten koste van kwaliteit moet steun nie. Ongelukkig werk universiteite op befondsingsformules wat sê meer is beter, maar is dit noodwendig?</p> <hr/> <p>Stricter qualifying criteria for first year law students.</p> <ul style="list-style-type: none"> • More emphasis on skills, especially communication skills • Emphasis on the work ethic that is required from a lawyer. Zero tolerance of dishonesty, late submission of marks and multiple sick tests. • More assignments that test a student's ability to do legal research. 	<p>These comments apply only to the conveyancing and notarial practice course as I have no experience with the other aspects of legal education.</p> <p>As far as conveyancing and notarial practice are concerned, the entire course needs to be restructured and the notes need to be redrawn in their entirety. Many candidates attend the course and write the examination without the requisite level of education, understanding or experience. These problems have been canvassed by me and Mr Bob Wynne in correspondence with LEAD over the years and I do not intend to deal with those in great detail here – except to say that two courses need to be offered: An introductory course lasting at least 1 year and an examination course designed specifically with a view to passing the examination. No candidate who has not previously done the introductory course should be admitted to the exam preparation course. The information required to pass the conveyancing and notarial courses can simply not be conveyed in courses lasting 10 or 20 lectures or, in the case of notarial practice, 5 lectures. It is clear that there are different levels of ability in the different provinces and each province faces its own peculiar difficulties. The course in Kwazulu Natal, in particular, should be structured and designed for the particular needs of Kwazulu Natal.</p> <p>Assuming the idea cannot be achieved, realistic steps would include:</p> <p>Not accepting law students who are not both literate and numerate unless prepared to undergo extended bridging training;</p> <p>The LLB should either become a post-graduate degree or be restructured to create an exit point for those who may wish to change their career choice;</p> <p>LLB should concentrate on producing jurists but provide limited electives to cater for different career choices;</p> <p>Structured training should shift emphasis from transactional knowledge to generic legal skills;</p> <p>Practical experience could place more emphasis on transactional knowledge but be subject to monitoring/assessment.</p> <p>The admission examination should have two components: (i) assessment at vocational courses; (ii) present admission with less written but more extended oral assessment.</p> <p>Only admitted attorneys and advocates should be eligible for</p>	

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	<p>• Integration between subjects offered in the LLB. I will go as far as to suggest a paper in every year of study in which the subjects taught in that year are integrated with each other.</p> <hr/> <p>Anyone who believes that the current, ill-conceived 4 year LLB, will produce educated jurists with the skills necessary to assist this country in finding solutions to the challenges we face, will also believe in little red riding hood. Amongst the various options, a return to the 5 year, postgraduate LLB is worth considering. My personal view is that no one should be allowed to enroll for an LLB degree without having obtained an undergraduate baccalaureus qualification comprising subjects such as political science, philosophy, economics, and languages. Without this grounding, we will remain a pseudo-educated society.</p> <hr/> <p>The current LLB-programmes are too cramped. Students are not taught all the core skills which they require to be effective attorneys or advocates. The language requirements have been watered down so that students lack the most important skill which any lawyer must have. The matter can only be rectified if the current LLB programmes are extended to cover more subjects and cover the subjects in more detail. More room should also be made for language courses, which should include some basic Latin skills.</p> <hr/> <p><i>Knowledge Production and Transmission in a Changing Society: Challenges Facing Law Lecturers in a Distance Education Environmnet in South Africa 2006 (5) SAJHE 731-743</i></p> <p>In this article I highlight the challenges facing a law lecturer in a multicultural society in transformation where the student is being prepared to serve society in different occupational fields as a professional person.</p> <p>I indicate that the law itself cannot effect change. For this we need properly trained lawyers. For an effective transformation of the society we rely heavily on previously disadvantaged groups to take responsibility in all fields of the legal profession. The</p>	<p>magisterial posts. I am sick of the general incompetence encountered in the lower courts everyday.</p> <p>Mr G A Pentecost:</p> <p>I find it would be far easier merely to provide you with a memo on my thoughts on this matter as opposed to responding to specific questions.</p> <p>I have for the last 15 years or so lectured at the School for Legal practice to persons who have just finished their law degree as well as to candidate attorneys in preparation for the practice and procedure exam. I also, many years ago, lectured at the University of KwaZulu-Natal in Civil Procedure.</p> <p>My immediate thoughts are that, whilst there is no doubt a need to provide students with some academic background, I find that people leaving the university with a law degree have absolutely no practical knowledge whatsoever. Those who commence their articles of clerkship having finished an under-graduate degree followed by an LLB or who have done a straight LLB have not concept of the law and for the first few months are virtually useless within the office. Those who go straight from the university to do the 6 month course at the School for Legal Practice have little or no knowledge whatsoever of the practice of law and one finds it extremely difficult teaching them on the practice of law from a very very low base.</p> <p>There is no doubt in my mind that the majority of persons who undertake law ultimately will practice as an attorney or an advocate and clearly a very good grasp of civil procedure is necessary. One find that it is a 6 month course and they leave with little or no concept of the subject whatsoever. To me the essential courses are the substantive ones which deal with delict, contract, company law and persons and those should be given lots of emphasis. Unfortunately I believe that there are many subjects which are peripheral which are dealt with at the university and which may be of interest but in the context of law have very little practical application. Those subjects should be electives and some of those can be chosen by students but the important subjects should be given far more than just 1 semester of work. A huge problem is language and the writing and verbal skills are extremely poor and this has an adverse effect on their performance. In addition, subjects such as income</p>	

JUDICIARY	UNIVERSITIES	ATTORNEYS	ADVOCATES
	<p>requirements exacted from lawyers are very high.</p> <p>I furthermore focus on the tension between the kind of graduate we are expected to produce and the students presenting themselves at our institution. Particular attention is paid to the kind of skills that we have to transmit to students, as well as the obstacles in the way of achieving this at a distance education institution.</p> <hr/> <p>There is evidence of a substantial need for a broader humanities-based training as a foundation for legal training - some commentators pointed to the necessity of including majors in for instance psychology, criminology and penology. Other commentators also emphasized the lack of a broader foundation in non-legal fields such as Latin, mathematics, politics, philosophy and even English as a prerequisite for entry into legal studies. This presupposes a return to the original point of departure where the LLB was a postgraduate degree and entry to the LLB was only possible after completion of a first degree. The current doubtful academic status of school leavers due to the outcomes based education approach for school leavers tend to emphasise the need to return to the postgraduate LLB.</p> <p>This would encourage a more "mature" student to study law when there is generally a greater commitment and understanding of what the study of law entails. The experiment of "short-circuiting" the degree for whatever political purposes will ultimately lead to a legal system which is weak and vulnerable to abuse as there is little depth in the current study of law.</p>	<p>tax law, accounting and administration of law form an integral part of the practice of law but are often not even offered as subjects. One finds that students who have studied medicine, architecture or engineering are of far more use when they leave the university as opposed to their counterparts who have studied law.</p> <p>I do not profess to have the necessary knowledge to answer the questions posed by you but record that when I did my LLB it was a post-graduate course and was, in my view and with the greatest respect, far superior to the degree which is now conferred upon students. My view is that the old system (which was a total period of 6 years) should be reinstated and those persons who have this qualification are also in possession of a rounded education. The primary degree could be made up of subject which would, in addition to the educational content, expose the student to legal subjects and a taste of what law is all about.</p>	

Appendix 2: Curricular Comparative Table

TABLE OF UNDERGRADUATE LLB CURICULA OFFERED AT SOUTH AFRICAN LAW FACULTIES: 2008

Faculties:	UCT Not semesterised	UWC Not semesterised	Stell U Not semesterised	Wits University Not semesterised	Univ. of JHB Not semesterised
Year 1	Persons & Marriage Foundations of SA Law Comparative Legal History English module Quantitative Literacy 2 non-legal modules	Intro to Legal Studies 111 Law of Persons 111 Legal Systems 111 EED (Law) 101 Intro to Legal Studies 121 Family Law 121 Customary Law 121 1 non-legal module	Intro to Law Persons and Family Law Criminal Law Indigenous Law Information Skills [Year Modules] Choice of 2 or 4 modules with a total of 24 credit points (languages or non-legal subjects)	1 English module Customary Law Foundations of SA Law Intro to Constitution- al Law Intro to Law Persons & Family Law	Intro to Legal Studies Law of Persons & Family 2 Language modules 2 non-legal modules Indigenous Law
Year 2	Constitutional Law International Law 2 language modules Law of Property 2 second level modules	Criminal Law Constitutional Law Criminal Procedure Critical Legal Analysis Law of Things Delict Succession Legal Interpretation	Succession and Law of Things Roman Law Constitutional Law Criminal Procedure [Year Modules] Interpretation of Enacted Law Choice of a 32 credit point module: at second year level	Contract Criminal Law Legal Information Literacy Delict Succession	Law of Things Law of Succession Constitutional Law Criminal Law Roman Law International Law Theory of Interpretation
Year 3	Corporation Law Criminal Law Criminal Procedure Interpretation of Statutes Succession Delict Contract Civil Procedure Community Service	Contract Civil Procedure Insolvency Jurisprudence Introduction to Advocacy Administrative Law Labour Law Negotiable Instruments Public International Law	Contract Delict Civil Procedure [Year Modules] Legal Philosophy Labour Law and Commercial Dispute Resolution Insolvency and Sequestration International Law Negotiable Instruments	Administrative Law Business Entities Constitutional Law Property Civil Procedure Public International Law 4 Electives: List D	Contract Delict Civil Procedure Evidence & Litigation Techniques; Criminal Procedure Administrative Law
Year 4	Commercial Transaction Law Evidence Administrative Law African Customary Law Jurisprudence Integrative Assessment Project Research Component	Preparing for Law in Practice Law of Evidence Corporate Law 6 elective modules: see List B	Law of Business Entities Law of Evidence [Year Modules] Private Law 411 Administrative Law Legal Skills Taxation	Criminal Procedure Evidence Administrative Law Jurisprudence Practical Legal Studies Electives: 2 modules	Law Clinic Business Enterprises Law Private International Law Bill of Rights Jurisprudence Tax Law Labour Law

Faculties:	UCT Not semesterised	UWC Not semesterised	Stell U Not semesterised	Wits University Not semesterised	Univ. of JHB Not semesterised
	Elective modules –total of 5 points (3 modules min.): List A		Choice of 4 elective modules: List C	from List D Electives : 3-4 modules: List E	Insolvency Negotiable Instruments Enrichment & Estoppel

UCT Electives**List A**

Specific Offences (Examination) or (Paper)
 Criminology
 Conflict Resolution
 Moot (various depts.)
 Medicina Forensic
 Understanding Financial Statements
 Revenue Law
 Labour Law LLB
 Maritime Law (Examination) (Not on offer in 2008)
 Insurance Law (Not on offer in 2008)
 Trusts & Estate Planning
 Electronic Law (Examination) or (Paper)
 Competition Law
 Global Economic Law (Examination) or (Paper)
 Conflict of Law
 Unjustified Enrichment and Cession
 Legal Practice (previously Legal Aid and Legal Practice)
 Current Issues in Private Law
 Intellectual Property Law
 Law in History
 Dignity, Equality and Freedom – Fundamental Rights and Fundamental values
 HIV/AIDS, Bioethics and the Law
 Introduction to American Law
 Environmental Law (Examination) or (Paper)
 European Union Law
 Refugee & Immigration Law
 Constitutional Litigation
 Current Issues in Constitutional Law
 International Human Rights Law and the Constitution

UWC Electives for Final Year**List B**

Accounting
 Advanced Criminal Justice
 Advanced Criminal Law
 Advanced Family Law
 Advanced Labour Law
 Advanced Law of Delict
 Advanced Legal Interpretation
 Alternative Dispute Resolution
 Comparative Law
 Conflict of Laws
 Environmental Law
 European Community Law
 Gender Law
 HIV/AIDS and the Law
 Intellectual Property Law
 International Business Law
 International Human Rights Law
 Internet Law

Jurisprudence
 Juvenile Justice
 Land Law
 Law of Agency and Cession
 Law of Banking
 Law of Insurance
 Law of Sale and Lease
 Law of Trusts
 Law of Unjustified Enrichment
 Legal Pluralism
 Legal Process
 Muslim Personal Law
 Research paper
 Social Security Law
 South African Bill of Rights
 Street Law
 Tax Law

Stellenbosch U Electives**List C**

Accounting for law
 Advanced Company Law
 Advanced Constitutional law
 Advanced Family Law
 Advanced Human Rights
 Advanced Labour law
 Advanced Law of Delict
 Advanced legal Philosophy
 Alternative Dispute Resolution
 Competition Law
 Competition Law
 Conflict of Law
 Conflict Resolution
 Constitutional Litigation
 Credit Agreements
 Criminology
 Current Issues in Constitutional Law
 Current Issues in Private Law
 Dignity, Equality and Freedom – Fundamental Rights and
 Electronic Law (Examination) or (Paper)
 Environmental Law (Examination) or (Paper)
 European Union Law
 Fundamental values

Global Economic Law (Examination) or (Paper)
 HIV/AIDS, Bioethics and the Law
 Insurance Law (Not on offer in 2008)
 Intellectual Property Law
 International Human Rights Law and the Constitution
 Introduction to American Law
 Labour Law LLB
 Law in History
 Legal Practice (previously Legal Aid and Legal Practice)
 Maritime Law (Examination) (Not on offer in 2008)
 Medicina Forensic
 Moot (various depts.)
 Refugee & Immigration Law
 Revenue Law
 Specific Offences (Examination) or (Paper)
 Trusts & Estate Planning
 Understanding Financial Statements
 Unjustified Enrichment and Cession

Wits University electives

Year 3

List D

Democracy & Citizenship
Insolvency
Insurance
Intro to Human Rights Law
Labour Law
Negotiable Instruments & Banking Law
Sale & Lease
Security
Taxation

Year 4

List E

Adv Cheque & Banking Law	Comparative Law	International Trade
Advanced Admin Law	Competition Law	Islamic Law and human Rights
Advanced Civil Procedure	Conflict of Laws	Legal History
Advanced Constitutional Law	Consumer Protection	Moot
Advanced Delict	Criminology, Penology & Sentencing	Prospecting and Mining
Advanced Evidence	Environmental Law	Race and Law
Advanced Labour Law	Estoppel	Sexual Orientation and the Law
Advanced Moot	Forensic Medicine	Street law
Advanced Property	Gender and the Law	Telecommunications Law
Advanced Public International Law	HIV/AIDS and the Law	Theories of Justice
Advanced Roman Law	Human Rights Perspectives	Unjustified Enrichment
Appropriate Dispute Resolution	Independent Research Report	
Business Accounting	Intellectual Property Law	

Faculties	6.UKZN	7.Univ. of North West (Potch) And 8. [Mafikeng]	9.Univ.of Pretoria	10.UNISA
Semester 1	Intro to Law & Computer Skills 1 English module 2 non-legal modules	1 Language module; [Communication/Language Skills 2] Intro to Law Language Skills in Legal Context History of Law Persons & Juristic Persons Computer & I S Learning & Reading Skills [1 elective module: English Studies or Textual Analysis]	Computer Literacy Legal Skills 110 Family Law 110 Historical Foundations of SA Private Law Persons Intro to Law 1 Language module	Intro to Theory of Law 101 1 Language module Skills Course for Law Students The Origins of SA Law Persons
Semester 2	Foundations of SA Law & Numeracy 1 English module 2 non-legal modules	Indigenous Law Legal Skills Contemporary Foundations of SA Law Succession 1 Language Module [Elective Module 4: Intro to literary Genres/Grammar Awareness]	Information Literacy Legal Skills 120 Family Law 120 Historical Foundations of SA Private Law Intro to Law 2 non-legal modules	Intro to Theory of Law 102 Foundations of SA Law Criminal Law 101
Semester 3	1 non-legal module Delict Interpretation of Law Criminal Law Persons Constitutional Law	Criminal Law Criminal Procedure Constitutional Law Entrepreneurial Law Family Law Interpretation of Statutes	Constitutional Law 210 Labour Law Contract 210 Succession 211 Legal Interpretation 210 Legal Pluralism 210	Family Law Criminal Law 201 Succession Entrepreneurial Law Civil Procedure 1 Criminal Procedure 201 Administrative Law Constitutional Law Fundamental Rights Interpretation of Statutes Intro to Indigenous Private Law 201
Semester 4	Human Rights Family Law Property Legal Writing, Research & Reasoning	Specific Offences Criminal Procedure Labour Law Delict Property	Constitutional Law 220 Consumer Protection Human Rights Contract 220 Succession 221 Specific Contracts	Property Insolvency Intro to Indigenous Public Law 202

Faculties	6.UKZN	7.Univ. of North West (Potch) And 8. [Mafikeng]	9.Univ.of Pretoria	10.UNISA
Semester 5	Contract International Law Specific Offences Legal Diversity Accounting for Legal Practice	Civil Procedure-Magistrates Courts Intro to Jurisprudence Evidence Contract Public International Law Elective module: either Alternative Dispute Resolution/Taxation/ Legal Accounting [Comparative Law]	Administrative Law Entrepreneurial Law Evidence 311 Law of Things Legal Philosophy Legal Practice 310	Civil Procedure 301 Criminal Procedure 301 Contract Evidence 301
Semester 6	Evidence Succession Jurisprudence Labour Law & A D R Criminal Procedure Professional Training 1	Administrative Law Civil Procedure-High Courts Fundamental Rights Evidence Insolvency Specific Contracts Elective: Development & Local Govt/Legal Pluralism/Religious Systems/Legal Accounting [Tax Law/Law of Punishment]	Insolvency Law Insurance Law Intellectual Property Law Delict Evidence 321 Negotiable Instruments Legal Practice 320	Delict Negotiable Instruments, Intellectual Property & Competition Law Evidence 302 Tax & Labour Law
Semester 7	1 Public Interest module: [either Clinical Law/Street Law/Teaching Legal Skills (Year module)] Sale, Lease & Credit Agreements Professional Training 2 Civil Procedure Administrative Law	Negotiable Instruments & E Commerce Legal Practice & Clinical Law Research Methodology Road Accident Compensation & Insurance Law of Damages Elective: Environmental Law/Moot Court/Intellectual Property/Socio-Economic Rights [2 Elective Modules: see List G]	Civil Procedure 410 Criminal Law 410 Criminal Procedure 410 Essay & Seminar International Law Law of Damages Tax Law 1 elective from List H	International Law Legal Philosophy 3 elective modules: List I
Semester 8	Insurance & Agency Security and Insolvency Corporate Law; 2 Electives :List F	Administration of Estates Legal Practice & Clinical Law Enrichment & Estoppel Jurisprudence Mini-dissertation Electives: Private International Law/Land & Land registration Law [See List G]	Civil Procedure 410 Criminal Law 420 Criminal Procedure 420 Third Party Compensation Law 2 electives: List H	5 elective modules: List I

UKZN Electives-

List F

Bio-Ethics
Environmental Law
Income Tax

Univ of North West, Mafikeng 4th Year electives

List G

Semester 1	Semester 2
Advanced Obligations	Accounting for Legal Practice
Environmental Law	International Economic Law

Maritime Law
Intellectual Property
Research Project

Forensic Medicine
Intellectual Property Law
Intro to Accounting
Moot Court
Street Law

Law of Trusts
Private International Law
Street Law

Univ of Pretoria Electives- 4th Year

List H

African Human Rights	Law & Literature
African Human Rights Moot	Law of Education
Alternative Dispute Resolution	Law of Securities
Anthropology of Law	Legal Problems of HIV/AIDS
Comparative Law	Media Law
Critical Race & Gender Theory	Medical Law
Cyber Law	Moot Court
Deeds & Notarial Practice	Municipal Law
Environmental Law	Philos Perspectives of Legal Problems
Fundamental Labour Law	Practical Law
Insolvency Practice	Social Security Law
Int Private Law	Sources of R-D Law
Int protection of Human Rights	Sports Law
International Humanitarian Law	Statutory Crimes
Land & Land reform Law	Street Law
	Tax Practice
	Transnational Bus Law
	Trusts & Estates

UNISA Electives- 4th Year

List I

Private law	Constitutional, International & Indigenous
Advanced Contract	Adv Const Law & Fundamental Rights
Agency & Cession	Advanced Admin Law
Enrichment & Estoppel	Education Law
Land Ownership & Reform	Environmental Law
Advanced Succession	Indig Law of Persons & Family
Advanced Family Law	Indigenous Private Law
Planning & Housing Law	Interpretation of Legal Docs and Texts
Damages	Security Services Law
Conveyancing & Notarial Practice	Criminal & Procedural Law
3 rd Party Compensation	Adv Crim Procedure & Evidence
Problems Advanced Delict	Adv Criminal Law
Short	Forensic Medicine
Mercantile law	Legal Practice (Year module)
Adv Cheques & Bills of Exchange	Media Law
Banking Law & Usage	Medical Law
Company Law	Selected Private & Crime Law princs: Intern
Competition & Trade Marks	Sentencing
Insurance Law	Specific Crimes
International Trade Law	Jurisprudence
Labour Law	Adv Legal Philosophy
Legal Aspects of E-Commerce	Comparative Law
Patent & Copyright Law	Conflict of Laws
Social Security Law	Professional Ethics
Tax Law	
Dissertation	

Faculties	11. U of Free State	12. Walter Sisulu Mthatha	13.Unizul	14. Univ of Fort Hare
Semester 1	Criminal Law Family Law Intro to Legal Science Legal History Legal Practice 1 Language module	English module African Law Legal History Legal Skills Computers &the Law	Intro to Law Classification of Law Foundations of SA Law Sources of Law Basic Reading & Writing Intro to Computers Persons	Intro to Law Criminal Law A African Customary Law A English for Special Purposes
Semester 2	Criminal Law Intro to Legal Science Persons Legal Practice Roman Law 1 Language module	Interpretation of Statutes English module Legal Pluralism Constitutional Law Legal Skills II	Husband & Wife Parent & Child Indigenous Private Law Indigenous Public Law Functional English English for Law Wordprocessing Intro to Constitutional Law	Persons & Family Law African Customary Law B Criminal Law B English for Special Purposes Legal & Numeracy Skills
Semester 3	Criminal Law Labour Law Succession and Admin of Estates Legal Interpretation Legal Practice Accounting for Law	Criminal Law A Mercantile Law Persons Succession & Admin of Estates Property	Contract Criminal Law Criminal Procedure	Evidence A Criminal Procedure A Succession Contract A Constitutional Law 1 non-legal module
Semester 4	Criminal Law Criminal Procedure Labour Law Contract Evidence Criminology for Law	Criminal Law B Negotiable Instruments Accounting Insolvency Family Law	Sale & Lease Credit Agreements Interpretation of Statutes Specific Offences Trial Procedures Judgment & Sentencing Civil Procedure-High Ct	Evidence B Criminal Procedure B Juridical Interpretation Contract B Administrative Law 1 non-legal module
Semester 5	Business Enterprises Law Delict Legal Pluralism Legal Practice Commercial Law Contracts Consumer & Insurance Law Public Law	Company Law A Criminal Procedure A Evidence Labour Law Contract A Civil Proc A	Business Entities Succession Delict Environmental Law Intro to Labour Law Property	Delict Jurisprudence Mercantile Law A Labour Law Civil Procedure A Legal Research Methodology
Semester 6	Negotiable instruments & Immaterial Property Law Business Enterprises Law	Company Law B Crim Procedure B Evidence B	Insolvency & Liquidations Specific Delicts &	Property Mercantile Law B Civil Procedure B

Faculties	11. U of Free State	12. Walter Sisulu Mthatha	13.Unizul	14. Univ of Fort Hare
	Law of Things Legal Practice Public Law Tax Law	Civil Proc B Public Int Law Contract B 1 Elective: List M	Damages Labour Law Administrative Law	Accounting Professional Skills 1 Law elective module: List O
Semester 7	Selected Private Law Topics Civil Procedure Jurisprudence Legal Practice Public Law 1 Elective: List J	Jurisprudence Administrative Law Delict A Constitutional Human Rights Research Project Conflict of Laws 1 Elective: List M	Negotiable Instruments Evidence Constitutional Law Public International Law Legal Practice	Legal Profession Public International Law 1 Law elective module: List O
Semester 8	International Law Jurisprudence Insolvency & Liquidation Third Party Compensation Legal Practice Mini Thesis Public Law 1 Elective : List.K	Alternative Dispute Resolution Ethics Delict B; 2 Electives: List N xxx below Constitutional Litigation Legal Practice	Intellectual Property Evidence Legal Philosophy Fundamental Rights Legal Practice	Human Rights Social Security Law 2 Law elective modules: List O

UFS Electives		Walter Sisulu Electives			Univ. of Fort Hare Electives	
4 th Year Sem1	4 th Year Sem2	3 rd Year	4 th Year Sem1	4 th Year Sem2		
List J	List K	List L	List M	List N	List O	
Financial Planning Law	Business Crimes	Income Tax Law	Conveyancing	Environmental Law	Admin. Of Estates	Insurance
Insurance Law	Comparative Law	Int Trade Law	Local Govt Law	Street Law	Advanced Admin.Law	Intellectual Property Law
International Private Law	Electronic & Internet Law	Revenue Law	Media Law	Forensic Medicine	Advanced Constitutional Law	International Trade Law
Damages	Environmental Law	Banking Law	Gender & the Law	Sentencing	Advanced Crim.Law & Procedure	Legal Aid Studies
Forensic Medicine	Financial Planning Law	Intellectual Prop Law	Consumer Protection	Comparative African Law	Advanced Delict	Legal Pluralism
Sectional Title & Share Block Schemes	Competition Law	2 Non-legals	Law		Advanced Family Law	Local Government Law
	Trusts				Alternative Dispute Resolution	Media Law
	Legal History				Comparative Law	Medical Jurisprudence
	Forensic Medicine				Competition Law	Securities Regulation
	International Economic Law				Conflict of Laws	Tax Law
					Consumer Law	Taxation & Estate Planning

Faculty:	15.Univ. of Venda	16.Rhodes U	17. Nelson Mandela MU	18.Univ of Limpopo
Semester 1	Intro to Theory of Law Foundations of Law Scientific Method & Theories of Knowledge Persons African Civilization English Communication Skills Legal Research Methodology Non-legal module	Foundations of Law (part of Legal Theory 1) Register for 3 non-legal modules in another faculty	Legal Skills 1 Constitutional Law 1 Persons 1 language module	Intro to SA Law A Historical Foundations of SA Law A Legal Communication African Law 1 Persons
Semester 2	Intro to Theory of Law Scientific Method & Theories of Knowledge Family Law Intro to Practical Legal Skills African Civilization English Communication Skills for Lawyers Legal Research Methodology Non-legal module	Introduction to Law (part of legal theory 1) Register for 3 non-legal modules in another faculty	Legal Skills 2 Constitutional Law 2 Intro to Law Family Law 1 language module Computer Literacy	Intro to SA Law B Historical Foundations of SA Law B Legal Communication B Family Law Computer Studies
Semester 3	Indigenous Law Criminal Law Property Interpretation of Statutes Insolvency & Partnerships 2 nd level non-legal module	Constitutional Law A Contract A Persons Legal Interpretation Law of Property and Security A	Criminal Law 1 Criminal Procedure Contract 1 Succession Customary Law	Criminal Law 211 Criminal Procedure 212 Business Entities (Company Law, Close Corporations, Partnerships) Constitutional Law Contract A
Semester 4	Indigenous Law Criminal Law Succession Matrimonial Property & Divorce Companies & Close Corporations 2 nd level non-legal module	Constitutional Law B Customary Law Law of Contract B Law of Life Partnerships Law of Property and Security B	Criminal Law 2 Human Rights Interpretation of Statutes Contract 2 Law of Things	Criminal Law & Procedure 212 African Law 2 Labour Law Administrative Law Contract (incl. Estoppel & Enrichment) Things
Semester 5	Labour Law Criminal Procedure Constitutional Law Evidence Contract Sale & Lease	Administrative Law A Business Structures A Civil Procedure A Criminal Law A Criminal Procedure A Legal Skills Public International Law	Delict Specific Contracts and Estoppel Lease and Sale of Land Insurance Law Private International Law Unjustified Enrichment Business Entities Law	Civil Procedure- Magistrates' Court Evidence A Succession Insurance Tax Law Interpretation of Statutes

Faculty:	15.Univ. of Venda	16.Rhodes U	17. Nelson Mandela MU	18.Univ of Limpopo
Semester 6	Labour Law Criminal Procedure Constitutional Law Evidence Delict Negotiable Instruments & Insurance	Administrative Law B Business Structures B Criminal Law B Evidence A Forms of Payment Jurisprudence Legal Practice	Law of Evidence Public International Law Law of Damages Motor Vehicle Accident Law Labour Law Company Law	Civil Procedure- High Court Evidence B Bankruptcy Law Delict Negotiable instruments
Semester 7	Civil Procedure Jurisprudence Public International Law Professional Training Trial Advocacy 1 Elective: List P	Civil Procedure B Criminal Procedure B Delict A Individual Labour Law Law of Lease and Agency Choice of 2 elective modules: List Q	Civil Procedure Legal Practice Agency Law Property Law Insolvency Law 2 Elective modules: List S	International Law Jurisprudence A Practical Legal Course1 /Research Report Elective module: List U
Semester 8	Civil Procedure Jurisprudence Professional Training Administrative Training Trial Advocacy 1 Elective: List P	Evidence B Insolvency and Winding-up Companies Delict B Sale & Insurance Succession and Administration of Estates 2 elective modules: List R	Administrative Law Jurisprudence Legal Practice Payment Instruments 2 Elective modules: List T	Conflict of Laws Jurisprudence B Environmental & Mining Law Practical Legal Course 2/Elective: List V

**Univ. of Venda
4th Year Electives**

List P
Medical Jurisprudence
Gender and the Law
Planning & Environmental Law
International Trade Law
Advanced Criminal Law
Advanced Delict
Social Security Law
Human Rights Law
Tax Law
Advanced Labour Law
Advanced Indigenous Law
Advanced Constitutional Law
Comparative Law
Constitutional Litigation
Street Law
Conflict of Laws
Research Project
Competition Law

Rhodes Electives 4th Year

First Semester	Second Semester
List Q	List R
Copyright and Trade Marks	Arbitration
International Trade Law	Advanced Corporate Law
Intro to Conveyancing	Advanced Jurisprudence
Legal Accounting	Collective Labour Law
Negotiation and Mediation	Environmental Law
Mineral Law	Intellectual Property Law
Research Paper	Info Systems and Law
Patents & Designs	x
Research Paper	

NMMU Electives 4th Year

First Semester	Second Semester
List S	List T
Advanced Criminal Law	Moot Courts
Forensic Medicine	Law of the Sea
Criminology & Penology	International Criminal Law
International Humanitarian Law	Environmental Law
Attorneys Practice 1 A	Attorneys Practice 2 A
Attorneys Practice 1 B	Attorneys Practice 2 B
Land Law	Advanced Family Law
Expropriation Law	Competition Law
Tax and Estate Planning	Ethics and Prof Responsibility
IT Law	Taxation Law
International Business Law	Tourism Law
Accounting 1	Accounting 2
Legal Research (assignments)	Legal Research

U Limpopo 4th Year electives

First Semester	Second Semester
List U	List V
Admin of Estates	Adv Criminal Law
Adv Labour Law	Comm.Dispute Resoln.
Banking Law	Soc Security Law

Appendix 3: Information Sheet

Information Sheet regarding Study:

“The Undergraduate Law Curriculum: Fitness for Purpose?”

I am conducting the above research project as a PH D study in the Faculty of Education at the University of KwaZulu-Natal (UKZN). My objectives in undertaking this research may be broadly stated as: (i) evaluating the extent to which the social reconstructionist vision of the post-apartheid curriculum planners in 1996 has been effectively implemented by South African law faculties; and (ii) to explore how the law qualification offered at one specific law faculty prepares its graduates for practice as competent legal professionals in South African society.

The research questions which I shall endeavour to answer through the eliciting and analysis of empirical data are:

1. To what extent has the vision of social reconstruction for the four year undergraduate LLB degree introduced in 1998 been translated into transformative legal education after ten years?
2. How does the undergraduate law degree at one specific South African university prepare its graduates for practice as legal professionals in South African society today?

I am asking you to participate in this study as:

A participant at the Legal Fora, convened by the Ministry of Justice in the period 1994-5, which recommended the introduction of a four year undergraduate LLB degree.

Your participation in the study will involve agreeing to be interviewed at your office (or other location that is convenient to you) during 2008, for approximately 90 minutes, at a time convenient to you. I shall be using a semi-structured interview technique to elicit from you information regarding:

the experience of achieving consensus on the recommendations to introduce a four year undergraduate LLB degree in 1996.

I shall ask that you agree to the interview being recorded for the purposes of transcription. The data will be kept securely by me during the period of the study, and for a period of five years after the conclusion of the study, in the Faculty of Education at UKZN. Thereafter the data will be shredded. Neither your identity nor your affiliation to a university or legal firm will be revealed at any stage in this research, nor indeed at any future date, should you agree to participate. Your participation should be entirely voluntary and at any stage during the study, you will be at liberty to withdraw.

I believe that that potential benefits to the legal academic community, as well as the legal profession, to be gained by this study are significant and should have an important bearing on the improvement of legal education in South Africa, since no research has previously been conducted in this area. I ask that you consider my request favourably and that you sign the attached declaration, indicating your willingness to be a participant in the study. Should you have any further enquiries regarding the conduct or nature of the study, please do not hesitate to contact me or to contact either one of my supervisors at the School of Education Studies, UKZN.

Prof Reshma Sookrajh or Dr Martin Combrinck.

Tel: 031-2607259

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Sincerely,

Lesley Greenbaum BA LLB M ED

Tel: 082-8257057

greenbau@ukzn.ac.za

DECLARATION

(to be completed by all participants; a signed copy to be retained by each participant and by the researcher)

**I..... (full names of participant)
hereby confirm that I understand the contents of this document and the nature of the
research project, and I consent to participating in the research project.**

**I understand that I am at liberty to withdraw from the project at any time, should I so
desire.**

.....
SIGNATURE OF PARTICIPANT

.....
DATE

Appendix 4: Interview Schedule: Task Group Members

Questions to Members of the Curriculum Task Team (Law Deans) of 1996

Introductory Background:

1. Tell me about the part you played in the restructuring of legal education in South Africa, during the period 1994 -1996.
2. What did you think about the law curriculum in 1994?
3. What happened at the consultative forum on Legal Education held in November 1994? And at the forum in April 1995 in Cape Town?

Law Deans' Meeting, Bloemfontein, November 1995:

4. How did the Deans feel about the meeting, called by the Minister of Justice in Bloemfontein in 1995, for the purpose of restructuring legal education?
5. What were the instructions to the Law Deans?
6. Who facilitated the process?
7. What did you imagine the new curriculum would look like?
8. Tell me about the process.
9. Why do you think the change to an undergraduate degree was made?
10. The Deans agreed not to prescribe a law curriculum for the LLB; what were the factors that influenced this choice?
11. What are your views about the interpretation and the implementation of that new curriculum?

A Vision for Curriculum?

12. Did the new qualification include focusing on a curriculum vision?
13. Do you think the new curriculum facilitated social reconstruction?

14. It has been written that when the new law curriculum was implemented, faculties should take into account three critical principles (McQuoid-Mason, 2004):

- a. South African law exists in and applies to a diverse or pluralistic society;
- b. Skills appropriate to the practice of law must be integrated into the degree;
- c. Faculties must strive to inculcate ethical values in students.

How would you respond to these principles?

15. Have these principles been influential in shaping legal education in South Africa since 1996?

Is there anything you would like to add, or to ask me?

Thank you for your time and participation

Appendix 5: Interview Schedule: Current Law Deans

Topics to be discussed with the (four) Law Deans in their Interviews:

I will introduce myself, establish my interest and insider position and discuss the research topic, explaining the purpose of my study and confirming the ethical issues of confidentiality and anonymity.

1. Tell me about your Deanship in the Faculty of Law atUniversity.
2. What position did you occupy when the undergraduate LLB degree was introduced in SA in 1998?
3. How did you feel about the new degree at that time?
4. Universities were given great flexibility in choosing how each faculty structured their 4 year degree- what is your view on this approach?
5. Could you describe the process by which a new curriculum was negotiated at your university? [*Who made decisions around curriculum? What factors shaped the curriculum choices?*]
6. Tell me about how the new curriculum differed, if at all, from the previous LLB curriculum at your university?
7. The new LLB was based on a social reconstructionist vision of curriculum (an orientation that views education as an active agency of social change, and curriculum as having a direct impact on its human and social context), focused on three key principles, according to McQuoid-Mason (Obiter, 2004):
 - (i) South African law exists in and applies to a diverse or pluralistic society;
 - (ii) Skills appropriate to the practice of law must be integrated into the degree;
 - (iii) Faculties must strive to inculcate ethical values in students.

How would you respond to this representation?

(This should give rise to a very wide-ranging discussion, requiring follow up questions with probes to elicit meanings and understandings relating to each of the three principles.)

8. How did these three principles translate into the new curriculum and how was this managed? *(A discussion of specific modules and their content should be generated here. What were the challenges?)*
9. Tell me about your faculty's curriculum review process. *(How often does this occur? New modules being introduced?)*
10. How does the written curriculum and the enacted curriculum compare?
11. After ten years of the undergraduate LLB, what are your views on whether the social reconstructionist vision had an influence on the present curriculum?
12. Tell me what transformative legal education means for you. Has the new curriculum brought about the expected transformation?
13. Do you think the graduates are benefiting from this curriculum?
14. With hindsight, what could curriculum planners do differently?
15. In your view, how does this undergraduate curriculum prepare graduates for professional practice?

Is there anything you would like to add, or to ask me?

Thank you for your time and participation.

Appendix 6: Consent Form

DECLARATION

(to be completed by all participants; a signed copy to be retained by each participant and by the researcher)

I..... (full names of participant) hereby confirm that I understand the contents of this document and the nature of the research project, and I consent to participating in the research project.

I understand that I am at liberty to withdraw from the project at any time, should I so desire.

.....

SIGNATURE OF PARTICIPANT

DATE

Appendix 7: Interview Schedule: Graduates

Interview Guide for Graduates' Interviews:

How does the undergraduate law curriculum at one specific South African university prepare its graduates to practice as competent legal professionals in South African society?

I will introduce myself, establish my interest and insider position and discuss the research topic, explaining the purpose of my study and confirming the ethical issues of confidentiality and anonymity.

1. Tell me about when you were a student, what were your ideas of what LAW is? *What meaning did LAW have for you?*
2. How did you go about learning law during your undergraduate degree? *How did you experience learning law? What did LAW mean to you at that time?*
3. Now that you are a legal professional, do you think about LAW in the same way? *Has its meaning changed for you? Explain.*
4. What were your ideas, if any, about working as a legal professional when you were a student?
5. What ideas, if any, did you pick up from your lecturers at university about being a legal professional?
6. How, if at all, did those ideas of your own, or from your lecturers, influence the way in which you went about learning law during your degree?
7. Now that you are a legal professional, has your idea of "being a legal professional" altered? *In what way?*

When the undergraduate LLB degree was first introduced in South Africa in 1998, the designers based it on a social reconstructionist vision, meaning that they viewed education as an agency of social change, which must be relevant both to the student's interests and to society's needs. In this orientation, curriculum is regarded as an active force having direct impact on the whole fabric of its human and social

context. It focuses on reconstructing society to make it more democratic and displays through education a concern for participatory democracy.

The vision for the LLB curriculum was said to be based on three key principles, [mentioned by McQuoid-Mason in an article (Obiter, 2004)]:

- (iv) South African law exists in and applies to a diverse or pluralistic society;
- (v) Skills appropriate to the practice of law must be integrated into the degree;
- (vi) Faculties must strive to inculcate ethical values in students.

8. Tell me about whether your experience of studying law included paying attention to these three aspects (above).
9. To be more specific, how, if at all, did your LLB studies deal with sensitivity to and an awareness of diversity in our society?
10. How, if at all, did your LLB studies address the integration of skills into the academic curriculum?
11. How, if at all, were ethical values taught explicitly as part of the LLB curriculum?
12. If you were asked how your formative legal education (LLB degree) prepared you for professional practice, how would you respond?
13. Tell me about what you learnt in your undergraduate degree that you have found valuable in your professional work. *What type of learning?*
14. What, if anything, do you think was lacking in your undergraduate education? *What skills/subjects/aspects could have been included to better prepare you for professional practice?*
15. Looking back at your undergraduate studies, how do you think your approach to your studies might have been different, if you knew then what you know now, about what it means to be a legal professional? *What would you do differently, or what, if anything, would you change?*

Thank you for your time and participation.

Appendix 8: Interview Schedule: Employers

Interview Guide: Employers of Graduates (Senior Partners in Law Firms)

to address second critical question

How does the undergraduate law curriculum at one specific South African university prepare its graduates to practice as competent legal professionals in South African society?

I will introduce myself, establish my interest and insider position and discuss the research topic, explaining the purpose of my study and confirming the ethical issues of confidentiality and anonymity.

[....., who was a candidate attorney and completed his/her articles of clerkship in your firm, graduated with this degree and is now a practicing attorney. I am focusing my study on law graduates from this particular university.]

1. Tell me about your views on how this four year LLB curriculum prepares graduates for professional practice?
2. What differences, if any, do you notice among graduates from different universities? *Are graduates from one or other university better prepared for professional practice?*
3. What is your opinion of the overall competency of candidate attorneys who have graduated from UKZN?
4. What is your view of UKZN graduates' sensitivity to diversity in the professional world? *Explain, if necessary: how graduate operates in a multicultural environment, in a social/ professional context.*

5. What is your opinion of .the professional legal skills that UKZN graduates have learnt during their university degree?
6. What are your feelings about the ethical values that UKZN graduates appear to have learnt during their LLB?
7. Could you describe what you think are the most important things that should be included in undergraduate law degree, to prepare graduates for the attorney's profession?

Thank you for your time and participation.

Appendix 9: Ethical Clearance



RESEARCH OFFICE (GOVAN MBEKI CENTRE)
WESTVILLE CAMPUS
TELEPHONE NO.: 031 – 2603587
EMAIL : ximbap@ukzn.ac.za

04 APRIL 2008

PROF. LA GREENBAUM (731730984)
EDUCATION STUDIES

Dear Prof. Greenbaum

ETHICAL CLEARANCE APPROVAL NUMBER: HSS/0063/08D

I wish to confirm that ethical clearance has been approved for the following project:

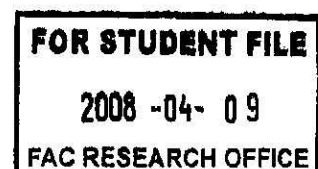
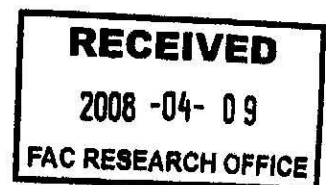
"The undergraduate Law Curriculum: Fitness for purpose?"

PLEASE NOTE: Research data should be securely stored in the school/department for a period of 5 years

Yours faithfully

MS. PHUMELELE XIMBA

cc. Supervisor (Prof. R Sookrajh)
cc. Mr. D Buchler (Faculty Research Office)



Appendix 10: Task Group Proposals on Legal Education

Proposals by the Task Group on Legal Education for Restructuring Legal Education in South Africa, based on agreement reached at a meeting of Deans of Faculties of Law, held at the request of the Minister of Justice in November 1995

Background

The restructuring of the system of legal education in South Africa has been the subject of much discussion amongst members of the legal profession for some years: the issue has of course been of particular interest to academic lawyers, and has been discussed regularly at the conferences of the Society of University Teachers of Law. However, the Minister of Justice, Mr Dullah Omar, has now indicated the urgency of reconsidering legal training, and it has been discussed at length at two conferences convened by the Minister, and at a follow-up meeting of all the Deans of the country's law faculties. At the second Law Forum, held in April 1995, there was a considerable degree of consensus among academics, members of the profession and the Department of Justice, among others, that there should be only one qualification for all branches of the legal profession, and that practical training for admission to the attorney's profession and to the Bar should be reconsidered, and possibly made a part of university training. There was a strong view that the minimum length of the academic degree should be four years, but there was no general consensus in this regard. There was also a general view that the 'ladder system' previously mooted should not be pursued further, but again, there was no general consensus on this.

At the Deans' meeting held in Bloemfontein in November 1995 (at which the Association of Law Societies, the General Council of the Bar, the Department of Justice, and Justice Training were represented) there was a greater degree of consensus and it was agreed that:

* There should be only one legal qualification for entry to any of the branches of the legal profession and that there would be only one qualifying degree for the

profession. This would obviate the clearly-perceived distinction between 'inferior' and 'superior' lawyers, and would generally improve the standard of legal professionals, including magistrates and prosecutors: that adjudicators should have lesser qualifications than legal practitioners appearing before them has always been anomalous.

- * The degree constituting the qualification should be called a Bachelor of Laws (LLB);

- * The minimum period of study at university should be four years; whether it should be possible for some law faculties to offer the degree over a longer period remained undetermined;

- * There should, however, be flexibility such that universities would be free to offer undergraduate Arts and Commerce degrees with Law majors which would lead to a shorter LLB;

- * Subject to further investigation, the LLB should be an undergraduate degree;

- * There should be various modes of entry to the legal profession, including the traditional servicing of articles of clerkship, practical training at one of the practical training schools, training in accredited university law clinics, training in public defenders' offices and pupillage coupled with some other form of training. Chief amongst the advantages of this aspect of the proposal is that the difficulties of obtaining articles, and thus entry to the profession, would be reduced; moreover, where training takes place in a law clinic or legal defender's office, in the process of being trained, students and their supervisors would be rendering an invaluable service to those people who could not otherwise afford legal services.

The Deans appointed a task group to investigate a number of issues and to report, provisionally, to a plenary session of the Society of University Teachers of Law at their conference at the University of the Western Cape in January 1996. The members of the Task Group appointed at the Bloemfontein meeting were:

Mr Emil Boshoff (ALS)

Professor J Burchell (Natal, Pietermaritzburg)

Professor Carole Lewis (Wits)

Professor C van Loggerenberg (UPE0)

Professor B Majola (University of the North)

Advocate I Moosa (Fort Hare)

Professor P Smit (UWC)

The Task Group reported to a plenary session of the Society of University Teachers of Law (SUTL) at its conference in January, and at the General Meeting of the Society it was agreed that the Task Group continue with its investigations and report back to a meeting of Deans of all South African Faculties of Law as soon as possible. Mr Jeremy Gauntlett SC, representing the General Council of the Bar, agreed at the conference also to become a member of the Task Group. It was also agreed that UNISA have representation on the Task Group, and the Vice-Dean of the Faculty of Law, Professor Rita Mare, has become a member of the Group.

These are the draft proposals that emanate from the Task Group:

1. ACADEMIC CURRICULUM FOR THE LLB

1.1. The length of the degree and maintaining or promoting excellence in legal education

The LLB should extend over a minimum period of four years, subject to 1.2 and 1.3 below.

There is a grave concern that the LLB degree, reduced from a minimum of five years (including the period of the undergraduate arts or other degree) to four, will inevitably lose its quality, and that it might become, in effect, nothing more than a B Proc degree. This is a possibility that we must guard against. The fundamental premiss from which we work is that the degree will be a very intensive and demanding one. It is envisaged also that because of new approaches to teaching law, with emphasis on skills-training, improvement in communication-skills, and inter-active learning, the LLB should indeed become a better degree than it has been formerly.

In determining what constitutes a legal degree of high calibre, we must have regard to the objects of legal education – to what law faculties should aim to achieve. The aims of legal education have been articulated particularly well recently in the First Report on Legal Education and Training by the Lord

Chancellor's Advisory Committee on Legal Education and Conduct in England, published on 24 April 1996 ('the English Report on Legal Education, 12996').

Building on the Ormrod Report on Legal Education (1971), and on research done subsequently, the English Report on Legal Education, 1996 suggests the following as being a general statement of what legal education should try to achieve (at 24):

- * 'Intellectual integrity and independence of mind. This requires a high degree of self-motivation, an ability to think critically for oneself beyond conventional attitudes and understanding and to undertake self-directed learning; to be "reflective", in the sense of being self-aware and self-critical; to be committed to truthfulness, to be open to other viewpoints, to be able to formulate and evaluate alternative possibilities, and to give comprehensible reasons for what one is doing or saying. These abilities and other transferable intellectual skills are usually developed by degree-level education;
- * Core knowledge. This means a proper knowledge of the general principles, nature and development of law and of the analytical and conceptual skills required by lawyers. These abilities are normally developed through a degree in law or the equivalent;
- * Contextual knowledge. This involved an appreciation of the law's social, economic, political, philosophical, moral and cultural contexts. This appreciation may be acquired in part by the study of legal subjects in a law degree in their relevant contexts, or by taking a non-law or mixed degree which provides these perspectives;
- * Legal values. This means a commitment to the rule of law, to justice, fairness and high ethical standards, to acquiring and improving professional skills, to representing clients without fear or favour, to

promoting equality of opportunity, and to ensuring that adequate legal services are provided to those who cannot afford to pay for them. These values are acquired not only throughout the legal education process but also over time through socialisation within the legal professions;

- * Professional skills. This means learning to act like a lawyer, and involves a combination of knowing how to conduct oneself in various practice settings, and also carrying out those forms of practice. These skills are normally acquired through vocational courses and in-service training.’

We attach as annexures B and C draft four-year plans from the Universities of Natal (Durban) and Wits which indicate the intensity of study that must be a prerequisite for allowing a reduction in the period for study. These are, of course, only examples of possible curricula, but they do indicate how much teaching and studying would be required if an appropriate standard of education is to be pursued. It should be noted also that in both curricula proposed there is a considerable reduction in the number of courses in the humanities required of a student, which, at least to some extent, allows for the same kind of education in law courses that is offered on the current five-year curricula.

1.2 Flexibility

In the interest of flexibility, and faculty autonomy, we consider that faculties should be able to offer not only the four-year LLB, but also a shorter LLB to those students who have an undergraduate degree, including one that has law courses in it, such that the period of the degree could be reduced from three years to two, as is presently the case. However, no faculty should be compelled to offer all three of the routes proposed, namely:

- * The four-year undergraduate LLB
- * The three-year LLB preceded by an undergraduate degree
- * A two-year LLB, where the graduate has sufficient exemptions from his or her law courses in the undergraduate degree to reduce the period of the LLB to two years.

The point about university autonomy, entailing faculty autonomy, is made strongly in the English Report on Legal Education, 1996. There it is stated (at 58) :

‘A pervasive theme of this Report is that the quality of legal education would be improved by giving higher education institutions greater freedom to determine the content and arrangement of courses. Many of our recommendations are predicated on this assertion of autonomy..... This freedom is also essential if law schools are to be at the frontier of knowledge, encouraging experimentation and so producing better practice. Universities need to be encouraged to find new or better ways of providing legal education, and this requires a greater degree of institutional autonomy. Institutions must be free to experiment.’

The arguments on autonomy are particularly important in so far as the content of the curriculum is concerned and so will be dealt with more fully below.

1.3 Disadvantaged, or academically weaker, students

Faculties may consider it necessary to include a foundation year in the degree/s to assist students who come from historically disadvantaged educational backgrounds. This additional year of study (which is becoming increasingly common in undergraduate degrees at the historically open universities) should not be regarded as increasing the number of years for the degree: it should be a bridging year, leading to the LLB. Alternatively, faculties should be encouraged to insist on an extended curriculum (over five or six years, as the case may be) for disadvantaged students. As indicated under 1.1 above, a four-year curriculum will require of a student intense study and a maturity that not every school-leaver possesses: it is thus important that faculties make it possible for a weaker student to spend a longer period studying.

1.4 Content of the curriculum and core courses

The recommendation of the Task Group is that each Faculty be free to determine its own curriculum, including the courses which are taught and the stage in the curriculum at which they are taught. Thus there should be no prescribed core courses. However, the Task Group has identified a number of core courses which it considers should be taught in the LLB in all Faculties, and the list of such courses is

attached as Annexure A. It is emphasised that the list is offered for the purpose of making recommendations only. We do not consider that Faculties should be bound to offer all these courses in the future, and we think it wrong in principle to impinge on the academic freedom of university faculties to determine their own curricula. In the history of South African legal education, only three courses have ever been prescribed for the LLB graduate for admission to the profession – Afrikaans, English and Latin. And for the B Proc, where the Board for the Recognition of Law prescribed core courses, the content of these courses differed markedly from faculty to faculty. It is important to be aware of the danger of prescribing courses which are then offered in name only. We consider that it is preferable to leave it to faculties, which have to compete with one another, and which have to maintain the confidence of the profession, to determine the content of their own LLB curricula.

In this regard we refer to the English Report on Legal Education, 1996, which argues very strongly in favour of absolute law school autonomy in the determination of law curricula. The argument is founded in part on the notion that any law degree should be focussed on the aims of legal education (cited under 1.1 above), and that the ways of achieving those aims must be left to individual institutions.

The Report, expecting that ‘any satisfactory law degree will contain sufficient knowledge of the main areas of substantive law to enable professional skills trainers to teach skills in the context of the students’ existing knowledge of substantive law’ (at 57) recommends that:

‘[L]aw schools should be left to decide for themselves, in the light of their own objectives, which areas of law will be studied in depth, which only in outline, which (if any) shall be compulsory, and which optional, provided that the broad aims of the undergraduate law degree are satisfied’ (at 64).

We strongly endorse this recommendation.

It should be noted also that the American Bar Association (ABA) which determines whether a law school’s degrees will be recognised, does not prescribe any course for the law degree, other than one in Ethics.

However, one of the recommendations in the discussion document issued by the National Commission on Higher Education in April 1996 is that there should be mobility between tertiary institutions. Thus, while not wishing to detract from the principle of autonomy in any way, we recommend that in constructing their curricula, faculties bear in mind the need of students to move between institutions, and to carry credits with them.

1.5 Legal skills-training in the LLB

For the same reasons as those outlined in 1.4, we consider it undesirable to dictate whether practical skills should be taught in the legal academic curriculum. Many faculties will consider it appropriate to incorporate some element of practical training in academic courses, others may wish to have specific skills courses, or process courses. Some might consider a mixture appropriate. Annexures B and C, the draft four-year plans from the Universities of Natal (Durban) and Wits, attached hereto, indicate different approaches to teaching courses and practical skills, but both incorporate these. As noted in 1.1 above, the Task Group considers it very important that certain skills – language, writing, communication, and computer-aided research skills, for example – be taught in the academic curriculum.

1.6 Non-law courses

The incorporation of non-law courses is another matter which the Task Group considers should be left to the decisions of different faculties. In the Wits draft (annexure C) a major in a non-law subject is required. In the Natal draft (annexure B) it is possible to do a non-law course at second-year level as one of the elective courses for the degree, but not to major in such a course. Certain faculties might wish to determine the non-law courses which may be done by students: others will want to leave the choice to the students. Some might wish to place particular emphasis on languages or on the social sciences. Again, this should be a matter of faculty discretion, but we recommend that some such courses be part of the four-year LLB, so that law graduates do have some understanding of the social, political and economic context within which they work.

1.7 Completion of the degree

The degree should be conferred as soon as all academic requirements have been fulfilled. This would normally be at the end of the fourth year of study. Those students who wish to proceed to the fifth year of practical training would obviously then obtain some other qualification at the end of that period. Others would be free to move off in to other fields.

1.8 Introduction of new LLB and phasing-out of other legal degrees

It is self-evident that universities which currently offer the B Juris and the B Proc degrees will have to phase these out. Similarly, the LLB as presently structured will need to be phased out. We recommend that universities make provision for the completion of the degree for which any student is enrolled, so that no individual is adversely affected by the introduction of the new system. It should be left to each university to determine how best to phase out the degrees which they offer now, and how to introduce the new structures. We recommend, however, that the new LLB should be offered for the first time in 1998, and would encourage all universities to take steps to introduce the changes by the start of the academic year in 1998, or as soon as possible thereafter.

2 PRACTICAL TRAINING

We recommend that there should be one year of practical training, which can take place in several different environments, and which will qualify a student for entry to the attorneys profession, to the Bar, to the Public Service or to become a magistrate. We recommend that a number of routes to a professional qualification be created. Note that there is room for variation, and for a mixture of forms of training. All forms would precede professional examinations, administered by the professions as at present.

It is recommended also that skills training and formal teaching in certain aspects of professional practice be compulsory for all candidate practitioners. Again, these should be organised and administered by professional bodies, and it is recommended that these bodies play an active role in teaching and in determining the course content of the practical training.

The following are the recommended forms of practical legal training:

2.1 Community service

A year's service in the following places (plus the professional training referred to above) would satisfy the requirement of practical training:

Accredited university law clinics

Accredited community law centres

Public Defenders' office

2.2 Practical Legal schools

There are already a number of these schools established, which offer courses over a six-month period, and also for part-time students. Since much expertise has gone into designing curricula and methods of teaching, and since the candidate attorneys who have attended these schools have, in general, fared well in the professional examinations, these should continue to operate. However, the candidate practitioner who chooses to go to one of the Practical Legal Schools would have to serve an additional six months in a community law centre, or doing pupillage, or articles of clerkship.

2.3 Conventional articles of clerkship

We recommend that the present system be continued, so that those graduates who can find 'articles' and those attorneys who wish to employ candidate attorneys, be able to do so. However, the period of training would be reduced to one year. Candidate practitioners following this route would, however, be required to attend the formal practical training courses referred to above.

2.4 Pupillage with a member of the Bar

Again, we recommend that where this is possible, the system of pupillage be continued. Since it is only of six months' duration at present, we consider that the candidate advocate should be required, for example, to attend a practical school for the balance of the year, or to render service in a community law centre (including a university law clinic) for six months. And of course, the candidate advocate should be able to complete a year of practical training in any one of the other recognised training centres and do pupillage thereafter.

It is the strong wish of the General Council of the Bar that pupillage should be preceded by the other form of training undertaken by the aspirant advocate, so that s/he can proceed directly from pupillage to the Bar.

2.5 Justice Training College

Where a graduate wishes to follow a career as a prosecutor or magistrate, training should be offered, as at present, by the Department of Justice. Again, this should be done over a period of a year.

The professional examinations should follow the practical training, and as indicated above, should be administered by the professions. Thus, for example, the organised attorneys profession would determine the formal requirements for admission as an attorney, and the General Council of the Bar would set and administer its own entry examinations. The professions would thus continue to be the gatekeepers/licensors of admission to their respective professions.

In addition, where the practical training is given in a university law clinic, the candidate practitioner should be registered for a **Higher Diploma in Legal Practice** and the university would determine the assessment of the candidate's performance, and confer the Diploma. See the model proposed by the University of Natal (Durban) attached as annexure B. That model also sets out a curriculum for the year of practical training. It should be noted here that in the English Report on Legal Education, 1996 a strong theme is the importance of a partnership between the professions and the law schools – between the academic educators and the vocational trainers. The point is made thus (as 23) :

'Partnership between universities and professional bodies. The freedom of universities to decide what, whom and how they teach, has to be reconciled with the duty of the professional bodies to maintain and improve the educational standards and qualifications of entrants and practitioners; if greater flexibility, variety, diversity and intellectual rigour are to be achieved, as well as a liberalisation of the law degree, universities will need greater freedom of manoeuvre and institutional autonomy; at the same time the rigid demarcation between the "academic" and "vocational" stages needs to disappear; what is required is a new partnership

between the universities and the professional bodies at all stages of legal education and training.’

Thus it is recommended that the professions play an important role in assisting in the training of candidate practitioners in community law centres, and university law clinics in particular.

3 HIGHER DEGREES

The Task Group sees no difficulty in permitting a student who has completed the LLB to proceed straight to a masters degree by coursework. The fourth year of study would be equivalent to an honours degree. We anticipate that masters degrees which enable specialisation in different fields will become increasingly popular, and regarded as important further qualifications by the professions. Where these are offered on a part-time basis they will fulfil a further need in society, creating the opportunity for lawyers to specialise while still practising. This should not preclude faculties from offering an honours degree (LLB Honours) as well, comprising elective courses from the LLB which the student has not yet done, plus a research report.

Whether an LLB graduate should be able to proceed to a masters degree by dissertation (that is, by research only) should be left to the decision of each faculty. We see no need for any change in the present system of admitting candidates to doctoral degrees. Admission criteria vary from university to university, and we do not see it as part of our mandate to consider any changes in this regard.

4 CHANGES TO LEGISLATION

Clearly the statutes regulating admission as an attorney and as an advocate will have to be changed in order to alter the requirements for the LLB degree that qualifies one for admission to the profession; to recognise the Higher Diploma in Legal Practice; and to provide for the different modes of practical legal training. The admission statutes should be mended to provide for these matters, as should all legislation pertaining to the training and qualifications of magistrates.

5. FINANCIAL IMPLICATIONS FOR UNIVERSITIES

A concern expressed by universities about offering the LLB as an undergraduate degree is that this will affect adversely the subsidy granted by the state for students since postgraduate students are in general funded at a higher level than undergraduates. However, at present, only one of the three years of the LLB is funded at Honours level : the other two (or, in many cases, one, year) are funded at undergraduate level since the degree is considered to be an undergraduate (bachelor's) degree. Moreover, a fourth year in a professional undergraduate degree is also funded at Honour's level, so there would appear to be no change in the amount of subsidy that would be earned per student on the proposed new system.

Those universities who are able to offer a Higher Diploma in Legal Practice would of course also earn subsidy for this purpose, though whether it would be at postgraduate level is not clear. The Department of Education assesses the Diploma before deciding whether it is indeed postgraduate in nature.

It is important to bear in mind that the Discussion Document of the National Commission on Higher Education issued in April 1996 proposes entirely new funding mechanisms for universities. It is not possible at this stage to determine what difference, if any, the new funding mechanisms would make to the subsidies for either the present 'postgraduate' LLB or the proposed undergraduate degree.

6 THE NATIONAL COMMISSION ON HIGHER EDUCATION

One of the recommendations in the discussion document issued by the NCHE in April 1996 (Proposal 14) is to the effect that as part of a 'National Qualifications Framework' there should be intermediate 'exit qualifications within multiple-year qualifications and [which] should consist of a ladder set of qualifications from higher education certificates and diplomas, through bachelors degrees and advanced diplomas, to masters and doctoral degrees'. There is nothing in this report which is inconsistent with this proposal. It might be argued that since there is no exit point before the end of the LLB, the proposals contained in this report do not conform with this recommendation. However, there is no suggestion in the NCHE's document that a bachelor's degree should be obtainable in a period less than four

years – particularly in a professional discipline – and, indeed, this report does suggest a ‘ladder’ in the sense that the LLB can, and in general will be followed by a Higher Diploma in Legal Practice and by masters degrees allowing for specialisation.

In pursuance of the general recommendations of the NCHE, faculties may well wish to issue certificates to students who do not complete the degree, certifying what they have done. This is intended to have the effect of making people who do not qualify more ‘marketable’, and to improve their chances of getting jobs in the public service or elsewhere. It might also enhance mobility between universities. Where appropriate, the certificate might enable the person certificated to work as a ‘paralegal’, though it should not permit him/her to appear in court (other than, possibly, to apply for bail or a postponement of a matter).

7 PARALEGALS

A discussion of the role, function and training of paralegals was beyond the purview of the Task Group. It was recognised, however, that there is a clear need for paralegals in South Africa, and that attention ought to be paid to their training and certification. And, as indicated above, certification by universities of courses completed by persons wishing to work as paralegals is possible under the proposed structure.

8 COMMITTEE ON LEGAL EDUCATION

The final recommendation made by the Task Group is that a Committee on Legal Education be established on a permanent basis in order to monitor developments in this field and to report from time to time to the universities, and to the Ministers of Justice and Education.

Appendix 11: SALDA Response to professions documents 19/10/2005

SOUTH AFRICAN LAW DEANS ASSOCIATION (SALDA)

**REVIEW OF THE LLB DEGREE: SALDA'S RESPONSE TO DOCUMENTS TABLED BY THE
PROFESSIONS' REVIEW PANEL**

Profile of a Legal Practitioner

- 1 SALDA accepts the document in its entirety.

Learning assumed to be in place for an LLB graduate when he or she commences his/her training for admission as an advocate or attorney

- 2 The document is substantially the same as the SAQA exit level outcomes for the LLB.
- 3 Item 11 referring to employment opportunities was not included in the SAQA outcomes and SALDA believes that this item should be excluded from the list.
- 4 SALDA agrees with the inclusion of an outcome regarding the processing of numerical data.
- 5 SALDA believes that item 8 needs to be revisited. While responsible and effective management and organisational skills fall within the ambit of a university education, their linking to professional activities in the legal field falls outside such scope.
- 6 In all, the document serves as a useful starting point, but requires further interrogation to ensure that the items are compatible with a formative education in law.

Minimum requirements of LSSA and GCB with regard to learning fields and generic skills

- 7 The document bears a striking similarity to the learning fields for the Practical Legal Training Course for attorneys and the requirements for the attorneys' admission examination.
- 8 The document does not distinguish between the two essential aspects of a legal practitioner's education and training – the academic component followed by

professional training. A substantial number of the suggested learning fields is more suited to the latter component, not the former.

- 9 A clear understanding needs to be achieved regarding the respective roles of the universities and the professions regarding the education and training of legal practitioners. While a symbiotic relationship must exist, each sector should take full responsibility for its role in achieving a satisfactory end result.
- 10 At present universities are caught in the middle. They are expected to provide a quality education in circumstances where entrants into the LLB curriculum lack the basic entry level requirements; but, at the same time pressure is placed upon them to provide more vocation-orientated training in the curriculum. Formative and/or remedial work and vocational training require time – a luxury that is not available in the current degree structure. While some blurring or overlap of functions is both necessary and inevitable, SALDA believes that a binary divide between education and professional training should be maintained. Such an approach is educationally sound and best suited to achieving quality practitioners, for in each instance specialists are responsible for their fields of expertise.
- 11 The suggested learning fields serve too narrow a purpose in focusing on vocational training needs and they do not take into account that the LLB degree serves to provide a general formative education and an entry to other fields within and outside the practice of law. For example, the document makes no mention of Jurisprudence as a learning field – nor of Public International Law, despite a constitutional imperative that International Law be considered when interpreting the Bill of Rights. SALDA believes that the learning fields should relate to the core function of the LLB, and not to the outcomes of a practical legal training programme.

13 October 2005

Appendix 12: SALDA LLB Review doc 19 October 2005

SOUTH AFRICAN LAW DEANS ASSOCIATION (SALDA)

REVIEW OF THE LLB DEGREE

Introduction

For a number of years prior to 1998, three degrees provided the basic academic requirements for entry into legal practice – the postgraduate LLB degree (a five-year qualification route) for advocates; either the postgraduate LLB or the B Proc degree (a four-year undergraduate qualification) for attorneys; and any of the LLB, B Proc or B Iuris degrees (the latter, a three-year undergraduate qualification) for civil servants.

In 1998, after extensive consultation between universities, government and the professions, a new uniform basic qualification for entry into all forms of legal practice was agreed upon – a four-year undergraduate LLB qualification. At some universities this reduction in time necessitated a limitation on disciplinary diversity and intellectual depth in the curriculum. Universities were still free to offer degrees such as the B Iuris (most universities decided not to offer this degree, but some still do), or to offer a five-year programme (eg B Com LLB, BA LLB etc), similar to the old postgraduate LLB qualification, which most universities do. However, all the universities offer the new four-year LLB degree and by far the majority of current entrants into the profession have the new qualification. At some universities this reduction in time necessitated a limitation on disciplinary diversity and intellectual depth in the curriculum.

Responses to the new degree have been mixed and in recent years criticism has increased. The criticism itself has not been uniform, the principal (but not exclusive) concerns being, for some, that the curriculum is not sufficiently academic and a return to the former postgraduate route is advocated; for others, that the curriculum does not address the needs of the professions since many graduates lack specific general skills that the professions

value; and for yet another group, that the curriculum is not the problem, but the time frame in which the skills are to be obtained is too condensed – the curriculum should be offered over five years.

SALDA welcomes the opportunity to reflect on the implementation of the new LLB curriculum and to engage with interested parties so as to find optimal ways of educating students in the discipline of law and of preparing some of them for legal practice. Law Deans have consulted their staff and each other in an attempt to find a common approach to the issue, but, while some common trends can be discerned, the group is simply too diverse to present a single SALDA view. Each university has its own history, strategic mission and niche, and although the LLB degree is common, the curriculum is not uniform – each university has its own curriculum, tailored according to its niche. Allowance must be made for the differing views that result.

Basic paradigm for legal education

The role of a university faculty of law, even in a post-modern society, is to provide students with opportunities to acquaint themselves with the discipline of law. Law is one of the oldest university disciplines and from time immemorial the primary focus has been to educate students in the discipline of law so as to place them in a position, upon graduation, to make use of their legal education in whichever way they see fit. A university degree primarily serves to equip graduates with a particular disciplinary lens through which they can approach opportunities, issues and problems that they may confront in their lives. The more varied the disciplinary background of an individual, the greater the variety of approaches open to him or her.

A university that fails to provide basic education for its students, fails in its core societal function. However, a modern-day university cannot maintain an ivory tower approach to education and must tailor its core function in such a way that the education is relevant to current societal needs as well.

A significant number of university law graduates practise law in one way or another – as attorneys, advocates or as participants in the criminal justice system. But these are not the only avenues open to such graduates and a substantial number enter the commercial world

or the general civil service, either direct from university or a few years after qualifying as legal practitioners.

Universities must therefore be cognizant of the needs of the professions, but not exclusively so – their prime loyalty should be to the discipline of law, and to equip students with universal skills; and not to any time-specific needs of a particular profession. At the same time, however, universities cannot ignore these needs entirely. To do so, would create a situation in which their educational offerings become irrelevant. Not only could this lead to an extreme situation in which alternative entry levels into the professions are contemplated; or to an undesirable situation that they become subject to outside control and accreditation in order to become more relevant; but it would also ignore the secondary aspect of universities' core function – to provide relevant education.

Universities are not training institutions, despite the recent collapsing of the binary divide between former universities and former technikons. The responsibility for training legal practitioners lies with the professions. The requirements for each branch of legal practice, whether public or private, are different; and while there is some overlap in activity, professions generally acknowledge that training for one profession is not sufficient for practise in another.

Any attempt to situate practical training as a core activity of a university faculty of law should be resisted. In addition to the aspects mentioned above, practical training is best left to practitioners who are at the coal-face and whose skills are honed on a daily basis. No matter how experienced he or she might be, once one takes a practitioner out of daily practice the practical skill fades and the training becomes more academic. Furthermore, which profession are universities to serve when they offer practical training? Attorneys, advocates, or civil service practitioners? And should they ignore the other students who have no interest in the practice of law, but nonetheless wish to make use of legal knowledge and skill in entirely separate fields?

SALDA believes that universities should remain true to their core function, which is to provide relevant legal education to students who can then use such an education in a variety of ways, the practice of law being a significant but not exclusive field of activity.

The current four-year undergraduate LLB

Introductory remarks

Despite some teething problems, the current LLB curriculum has generally been implemented successfully at all campuses. Some caution should be shown when evaluating the dissatisfaction currently expressed concerning the LLB. The situation might not be ideal at present, but before wholesale changes are effected, the exact deficiencies, if any, should be determined. Criticisms currently levelled at the degree might not be valid, or might be better placed at another door. One should therefore first determine the source of the discontent – whether it is the nature of the LLB curriculum or perhaps another source, such as inadequate preparation of students entering the LLB programmes. It may well be possible to deal with concerns by addressing issues other than the LLB curriculum.

Universities cannot merely point to inadequate preparation of students and other possible deficiencies at entry level, and wash their hands of the problems at exit level. Despite such drawbacks, faculties should produce quality graduates at the end of the day, and if the professions indicate that our graduates lack certain skills that the market place needs, then we should address those concerns.

Commendations

The current LLB curriculum is not a disaster and it serves its purpose when students are properly prepared for university. As a rule, candidates with a good school background cope with the curriculum demands.

The current curriculum is more relevant than its predecessor. While academic subjects form the core, the addition of courses that focus on practical skills has enabled students to situate their learning in legal practice. Most universities have courses to improve literacy, numeracy, computer literacy, mooted and research skills and this focus on skills has improved students' legal research, problem-solving and mooted skills. The students are not trained practitioners at the end of their degrees, but they at least have some exposure to issues that might arise in practice. The most common concern about law students and graduates relates to academic and personal maturity, and their lack of broader perspectives and exposure to knowledge outside law, not the curriculum.

The degree provides greater access into the profession. University education is expensive and the shorter degree results in a smaller financial burden. Graduates enter the labour market a year earlier than before.

The curriculum is compact and concentrates on general principles. Persons who wish to specialize can do so in their fifth year by doing an LLM degree.

Concerns

The curriculum is overburdened with too many modules and there is little scope for broader (non-legal) education and almost none for specialization. Universities are expected to equip students with the necessary knowledge and skills in four years instead of five years – as was the case previously – resulting in a 20% reduction in “education time”.

The conversion to a more compact curriculum has meant that some (more academic) subjects have had to be jettisoned and also that some subjects previously taught at a later stage in the LLB are now found earlier on in the curriculum, when the students are less-equipped to tackle complex learning tasks. Universities have experienced difficulty in structuring the LLB in terms of a rational progression from lower to higher level learning. In the past, at some universities, introductory courses were taught in the BA and BCom whereas all modules within the LLB could be set at postgraduate level. Now the curriculum needs to offer certain core modules in the first and second years. There has been fairly keen contestation over which modules should be taught at which level and concerns have been raised about the fact that certain students would be exposed to complex learning issues in courses like Family Law or Criminal Law in the first or second year without proper grounding.

The condensed curriculum also restricts attempts at integrating the curriculum – one struggles, in the short time available, to provide basic information relevant to the subject and cross references and linkages are minimal. There is no scope for reflective learning. As a result, students lose the broader picture.

Students are too young and inexperienced to cope with some of the subjects that they encounter early on in their studies. The school grounding is insufficient for coping with academic life and students are thrown into the deep end. This affects throughput rates as

well. Deans have found that the throughput rate for those following the five-year route is better.

Even in those instances where students do perform academically, the graduates do not have the same maturity after four years as those who are a year older. Differences have been discerned when comparing the performance of those who follow the five-year (BA, B Com LLB) route with those following the four-year route. There is often nothing wrong with their basic competencies; it is just that they have been unable to benefit fully from their educational exposure.

Exposure to disciplines other than law is extremely limited, often only at first year level. As a result, graduates lack the broader problem-solving background and often approach issues in a one-dimensional way. Many deans comment on the difference in academic maturity of those who are exposed to non-law courses in the BA, B Com LLB routes.

Although no formal feedback has been collected, Deans have anecdotal evidence from members of the professions that the quality of graduates has deteriorated, especially regarding literacy and numeracy skills. Many practitioners give preference to older graduates over those following the four-year route. However, since the problems seem to apply across the board, it might not be fair to lay the blame on the chosen route and it might be more apposite to look at the nature of the curriculum itself.

Like the professions, the deans are concerned with the literacy and numeracy levels of the graduates. While some progress has been made regarding literacy, attention must be given to numeracy.

The current four-year curriculum creates the impression that students will be ready for employment within four years, but the reality is that a vast number take an additional year to complete the programme.

Way forward

SALDA does not have a unanimous view on whether the four-year or five-year route is preferable as the minimum entry level into the professions. SALDA nonetheless believes that it would be more productive to focus on improving the disciplinary diversity and academic depth of the LLB curriculum.

An important factor when considering the structure of the LLB curriculum will be its position in the Higher Education Qualification Framework. The present draft provides for four-year professional bachelor's degrees, with minimum of 480 credits (4800 notional hours) for the programme, calculated at 120 credits (1200 notional hours) per annum. While universities are free to offer programmes with a higher number of credits, the LLB structure should not fall too far outside what the HEQF considers appropriate. It does seem, however, that the current curriculum may have too many component courses, alternatively, that these would have to be taught at a superficial level if the minimum requirements are to be adhered to. Certainly, one cannot pack more courses into the four-year curriculum.

We should not become more rigid in our approach to offering programmes that provide entry into the legal professions. The flexibility that we currently have in offering either the four-year LLB or the BA and B Com LLB routes, for example, should be retained. However, a two-tier LLB programme, one undergraduate the other post-graduate, each with different curricula, should be avoided. The curriculum should be the same for all, irrespective of the route followed or the entry level into the LLB.

We should also avoid a fixed LLB curriculum to be followed by all universities. Expertise and emphasis vary, and the variety of educational backgrounds of those who enter the profession provides the necessary creative stimulus for ensuring quality practices. Deans wish to see more flexibility in the curriculum design, particularly with more opportunity in the curriculum for linking courses and modules, thus enabling students to see the broader picture.

Deans do not want to see any watering down of the academic emphasis of the curriculum. The LLB should remain a general formative degree for providing learned and rounded people who can enter the legal professions and other fields. We should resist turning universities into vocational colleges. Having said that, there is recognition that graduates that lack basic skills, like research or numeracy skills, are not properly equipped for any activity, let alone the practice of law, and that some effort needs to be made to improve such essential aspects of a basic formative education. Some thought could also be given to including basic conversational competency in an indigenous language as part of the curriculum.

Deans are convinced that the problems currently associated with the LLB curriculum do not stem from the lack of attention to skills training, but in fact to insufficient attention being given to core generic skills associated with the discipline of law for centuries – research and oral and written communication. In the current context, numeracy skills that were often taken for granted in a law graduate and technological skills that are essential for functioning in a modern society, should also be included. In their view, the current problems with the LLB might well have been the result of teachers of law having skimmed the surface and, in an effort to provide a practical-orientated curriculum in a shorter time than before to students who have insufficient academic grounding, having taken less care than they should have on providing fundamentals. While attention must be given to improving the skills levels of graduates, the solution does not lie in providing additional training, but in strengthening the curriculum's emphasis on the core discipline of law. Remedial action should focus on the causes, not the symptoms.

Attention should be given to foundational programmes or extended versions of the LLB programme, for those whose learning background requires them to receive additional support. One should note that supplemental programmes require time and that they would generally add another year to a student's educational experience. Most universities are at present considering ways of improving the entry level competencies of degree students, and this is probably best left to be resolved at institutional level. Some thought could also be given to minimum admission requirements for entry into the LLB. However, as with foundational programmes it is unlikely that this could be implemented across the board. Entry requirements are matters determined by each university, according to their vision and mission statements and access to education policies. International trends and benchmarking might be useful in determining the best course of action, provided that proper allowance is made for educational differences in respect of each society.

It is proposed that a joint SALDA/Legal Professions Task Team on Legal Education be established and that the following may be part of the Task Team's mandate:

- e) Describing desirable attributes of learned and rounded jurists that need to be inculcated in the course of the study of law. The SAQA exit level outcomes for the LLB, which are similar to the profession's review panel's "Learning assumed to be in place before a LLB graduate commences training towards admission as

advocate/attorney”, could serve as the starting point, but require further interrogation to ensure that they are compatible with a formative education in law.

- f) Investigating the academic profiles of persons embarking on a study of law and the extent to which such profiles match the learning assumed to be in place for the LLB as set out in the SAQA Qualification Standard for the LLB.
- g) If necessary, canvassing the assistance of the State (Department of Education, Department of Labour and the Department of Justice) in preparing aspiring law students to fit the entry and exit level academic profiles listed in 30.1 and 30.2 above – for example, by providing funding for foundation programmes and for admissions testing.
- h) Providing recommendations on what, if anything, needs to be done to ensure that the LLB curriculum provides a quality legal education.

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