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SKILLS DEVELOPMENT FOR COMPETENT PRACTICE OF LAW

**AN ANALYSIS OF THE SKILLS DEVELOPMENT PROGRAMMES FOR LAWYERS IN
THE BOLESWA COUNTRIES OF SOUTHERN AFRICA**

by

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DEDICATED

**TO MY WIFE AND CHILDREN
AND TO THE LATE FELIX K ONAMA, MY EDUCATOR**

TABLE OF LEGISLATIONS

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3. The Black Administration Act No. 38 of 1927 of South Africa.
4. The Black Succession Act No. 18 of 1864 of South Africa.
5. Constitution of Swaziland, 1968.
6. Court of Appeal Proclamation of 1954 of Swaziland.
7. Criminal Procedure and Evidence Act No. 67 of 1938 of Swaziland.
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14. Legal Practitioners Proclamation No. 95 of 1955 of Swaziland.
15. Legal Practitioners Act No. 15 of 1964 of Swaziland.
16. Legal Practitioners Act No. 1 of 1974 of Botswana.
17. Legal Practitioners Act No. 11 of 1983 of Lesotho.
18. Legal Practitioners (Amendment) Act No. 13 of 1988 of Swaziland.
19. National University of Lesotho Act No. 13 of 1975.
20. Magistrate's Courts Act No. 66 of 1938 of Swaziland.
21. Marriage Act No. 47 of 1964 of Swaziland.
22. Proclamation of 1889 by Queen Regent of Swaziland.
23. Proclamation No. 12 of 1973 Kings Order-in-Council, Swaziland.
24. Proclamation No. 23 of 1973 Kings Order-in-Council, Swaziland.
25. Proclamation on the Establishment of the Parliament of Swaziland 1978.
26. Swazi Courts Act No. 80 of 1950.
27. Swaziland Administration Proclamation No. 4 of 1902.
28. United Nations Charter of 1948.

29. United Nations Declaration on Development Objectives for the 1990s, May 1990.
30. United Nations Declaration on Human Rights of 1948.
31. United Nations Declaration on International Economic Co-operation, May 1990.
32. United Nations Declaration on the Rights to Development, December 1986.
33. University of Botswana Act, 1982.
34. University of Namibia Act, 1992.
35. University of Swaziland Act No. 2 of 1983.

TABLE OF CASES

1. Baruti v Mdziniso 1972 (Unreported).
2. Dladla v Dlamini SLR 1977 - 80 p. 15.
3. Dudu Dorothy Dlamini v The Master of the High Court and Another 1989 (Unreported).
4. Edward v The Administrator of Natal 1990 (3) SA p. 581.
5. Ex parte Ginindza SLR 1979 0 81 p. 361.
6. Khoza v Malambe and Another SLR 1970 - 76 p. 215.
7. The King v John Madeleke Criminal case No. 89 of 1990 (Unpublished).

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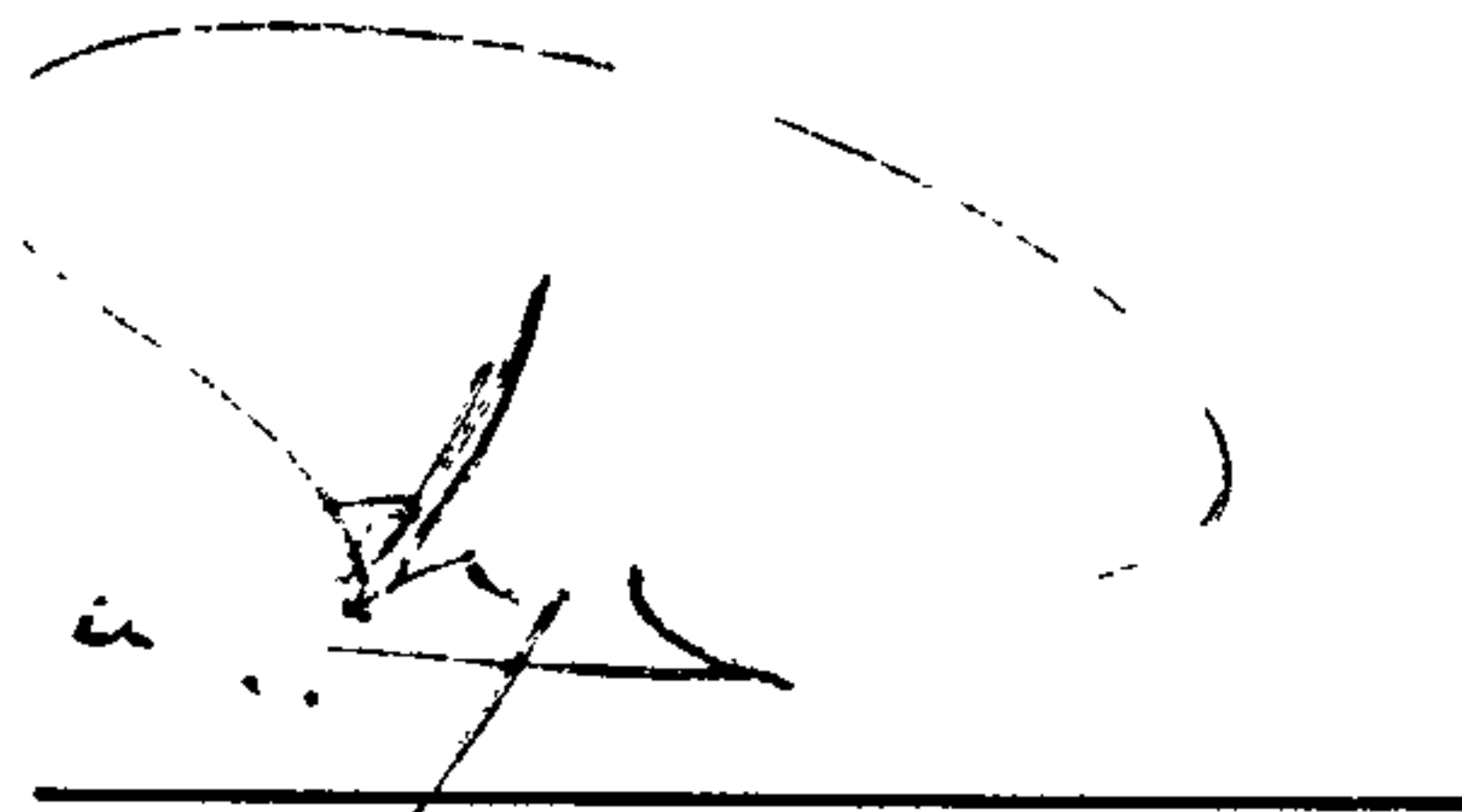
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DECLARATION

I, the undersigned, **PHILIP FRANCIS IYA**, hereby declare that the work contained in this Thesis is my own original work and where other sources have been consulted, the same have been duly acknowledged.

It is being submitted for the degree of Doctor of Philosophy (Ph.D.) at the University of Warwick in Coventry, England. It has not been submitted before for any degree or examination in any other University.



A handwritten signature in black ink, appearing to read 'Philip Francis Iya', is written over a solid horizontal line. The signature is somewhat stylized and cursive.

SIGNATURE

31 DECEMBER 1996

DATE

SUMMARY

The central thesis around which several arguments develop and revolve in this work is that time has come for members of the legal profession in Botswana, Lesotho and Swaziland - countries with shared historical, cultural, legal and socio-economic values - to join other forces in assessing both their structures and functions with a view to readjusting them to suit the new demands of society, namely that even under those new conditions, legal services must not only be available but must be competently delivered to the public. To be responsive to the needs of society, lawyers must be trained in such a way that they are able to appreciate the importance of social goals and contribute to the full satisfaction of those goals with competence and efficiency.

In advancing the above thesis three methods are employed. Firstly, is to establish the present and future needs of the society and how these needs can be met in terms of the necessary requirements of law, lawyers and the entire legal process to satisfy those needs. Secondly, to establish the extent to which those needs have and are being met and to explain the reasons for the limitation in their success. Thirdly, to advance the theory that legal education has a task in transforming society by equipping students with highly developed skills needed to bring about people-centred development.

The object of the thesis is, therefore, to develop and explore through empirical research new avenues of development-oriented legal education by analysing the sources and magnitude of the problem of legal education; by examining the social context in which law, lawyers and the entire legal process operate; by exploring all factors, legal and non-legal, which limit law, lawyers and legal institutions, including legal education in their role to meet the needs of society and by developing a skills-oriented legal education which would produce lawyers much needed for development within the context of Botswana, Lesotho and Swaziland.

To that end the work is divided into ten chapters discussing, amongst others, the objectives and methodology employed in the research; the concept of development and the limitations of lawyers in that development process as evidenced by the socio-political economy of the BOLESWA countries; the legal needs and the utilisation of lawyers to meet those needs in Swaziland; and the extent to which the past and present law programmes adequately prepare lawyers to satisfy social needs. It ends by providing a few suggestions. However, central to the entire discussion is the development of a fresh model in legal education that emphasises skills development as the most appropriate for development-oriented lawyers needed today in the BOLESWA countries. In one's research in legal education, one is struck by lack of sufficient work in this area. Yet legal education is at a crossroad of its development in the BOLESWA countries where crisis of law and development occupy central themes in scholarly debates currently taking place. If significant changes are to be effected, the arguments on skills development presented in this thesis remain critically important for future debates, policy formation and implementation on the subject in the BOLESWA countries and Southern Africa generally.

KEY TO ABBREVIATIONS

ABBREVIATIONS	TERM IN FULL
ALJ	: Australian Law Journal
ALI - ABA	: American Law Institute - American Bar Association
B.A.	: Bachelor of Arts
B.A. (Adm)	: Bachelor of Arts (Administration)
B.Comm.	: Bachelor of Commerce
BLS	: Botswana, Lesotho and Swaziland
BLSZ	: Botswana, Lesotho, Swaziland and Zimbabwe
"C" (grade)	: Credit as a grade
CLEP	: Clinical Legal Education Programme
CLEPR	: Council on Legal Education for Professional Responsibility
Co	: Company
DEMS	: Division of Extra Mural Studies
DC	: District of Columbia (Washington)
DPP	: Director(ate) of Public Prosecutions
DR.	: Doctor
ED	: Education
EDC	: Emlatine Development Centre
EDN	: Edition
E.G.	: For Example
ET. AL.	: And Others
FB/88	: Faculty Board (Minute No. 88)
FLAS	: Family Life Association of Swaziland
FPC	: First Parliamentary Council
GCE	: General Certificate of Education
GDP	: Gross Domestic Product
GNP	: Gross National Product

H.E.	:	His Excellency
IDA	:	International Development Association
IBID.	:	In the same book, passage
I.E.	:	That is
INFO	:	Information
JAL	:	Journal of African Law
JALT	:	Journal of the Association of Law Teachers
JLE	:	Journal of Legal Education
JPLE	:	Journal of Professional Legal Education
LL.B.	:	Bachelor of Laws
LL.M.	:	Master of Laws
LSC	:	Legal Skills Course
LQR	:	Law Quarterly Review
LTD	:	Limited
M.L.R.	:	Modern Law Review
M.O.E.	:	Ministry of Education
M.O.L.P.S.	:	Ministry of Labour and Public Service
N.C.C.	:	National Curriculum Centre
N.G.O.	:	Non-Governmental Organisation
N.I.D.C.S.	:	National Industrial Development Corporation of Swaziland
NITA	:	National Institute of Trial Advocacy
NO.	:	Number
NUL	:	National University of Lesotho
N.Y.	:	New York
"O" (Level)	:	Ordinary Level
OAU	:	Organisation of African Unity
OP. CIT.	:	In the work cited
OPEC	:	Organisation of Petroleum Exporting Countries
P.	:	Page
PARA	:	Paragraph
PARAS	:	Paragraphs

PH.D.	:	Doctor of Philosophy
PLC	:	Practical Legal Course
PLT	:	Practical Legal Training
PP	:	Pages
PTA	:	Preferential Trade Area
R (3Rs)	:	Arithmetic, Reading and Writing
REF	:	Reference
SADC	:	Southern African Development Community
SADCC	:	Southern African Development Co-ordination Conference
SALJ	:	South African Law Journal
SCOT	:	Swaziland College of Technology
SEDCO	:	Small Enterprises Development Company
SIMPA	:	Swaziland Institute of Management and Public Administration
SLR	:	Swaziland Law Report
SSRU	:	Social Science Research Unit
STRU	:	Science and Technology Research Unit
UB	:	University of Botswana
UBBS	:	University of Bechuanaland, Basutoland and Swaziland
UBLS	:	University of Botswana, Lesotho and Swaziland
U.ILL.L.J.	:	University of Illinois Law Journal
U.K.	:	United Kingdom
U.N.	:	United Nations
UNAM	:	University of Namibia
UNESCO	:	United Nations Economic and Social Council
UNISA	:	University of South Africa
UNO	:	United Nations Organisation
UPE	:	Universal Primary Education
U.S.	:	United States
U.S.A.	:	Unites States of America
VOCTIM	:	Vocational and Commercial Training Institute of Matsapa
VOL.	:	Volume

CHAPTER 1

INTRODUCTION

In Africa, the decolonisation process which swept the continent in the 1960s, ushered in with it a new awareness and rethinking about the role of the legal profession and development in the newly independent states. It became necessary to review not only the role of lawyers, but also legal institutions and legal education which, like other handouts by the colonial rulers, had to be placed in proper perspective by the emerging indigenous governments. The relevance of these institutions to development was being questioned against the background of new expectations that required them to play a more development oriented role.

The concern for the legal profession generally and legal education in particular was not only about what role they should play in the newly independent states, but how they should play that role. Eminent scholars of that period like Professors Paul JCN and Twining WT on the one hand¹ and Gower LCB, Johnstone Q and Stevens RB on the other,² all stressed the need for law-trained persons not only to be informed and knowledgeable about a wide range of things necessary for the development process, but to have the appropriate skills to perform their demanding jobs with ability in the interest of development. Implicit in their concern was the issue of legal education for development of the emerging African States.

While the negative aspects of colonialism have sufficiently received the attention of many writers, any one interested in the study of the role of law/lawyers in development in Africa would try to get to grips with what legal education could do to make lawyers more relevant to development. But why such a concern? Could it be in terms of the numbers or categories of lawyers then produced who lacked the required wide range of knowledge and skills necessary to meet the needs of development? Could it be that the legal education system was producing lawyers who were deficient in

¹ Their Report is entitled: "Legal Education and Training at UBLS" (1971) National University of Lesotho.

² "The Report of a Committee Appointed to Study and Make Recommendations Concerning Legal Education in Uganda", Sessional Paper No. 3 of 1969 Government Printers, Entebbe, (Uganda) 1969.

some particular lawyering skills? Could it be that the then system of legal education provided only for "the academic" education of lawyers and ignored "the practical" aspects of their training?

These, and many other questions relating to legal education in particular and the legal profession in general, have for many years become topical issues and have aroused heated debates not only in Africa, but also in other developing and developed countries.

1.A PROBLEMS WITH LEGAL EDUCATION: A MOTIVATION FOR RESEARCH

Legal education for Botswana, Lesotho and Swaziland (BOLESWA countries) began in 1964 at Roma in Lesotho when the Department of Law was established in the then University of Basutoland, Bechuanaland and Swaziland (UBBS).³ In the course of the same year, the Colonial Ministry of Overseas Development, in consultation with the Resident Commissioner, invited Professor Gower LCB to offer advice to the Basutoland Government and to UBBS on the organisation of legal training and the needs of the legal profession in the face of the current constitutional developments. It was the recommendations in his Report which laid the basis for the present system of legal education in the three jurisdictions of Botswana, Lesotho and Swaziland. Among these recommendations which were eventually to be implemented, the most relevant for the purpose of this discussion is the "Pre-admission Course" which formed part of the Curriculum for the five year LL.B. programme. According to the Report:

"Those (lawyers) intended for administrative posts in government might need no more training and rest content with LL.B. Those who intend to practice would, however, be required to take a further course of essentially practical training for a further term. This training would be in subjects such as Conveyancing, and Legal Drafting, Lawyer's Accounts, Professional Ethics, Advocacy, Office Management and local Statute Law. So far as possible, training would be by practical exercises - doing

³ After the independence of each of the three countries and with the subsequent change of their names, UBBS came to be called the University of Botswana, Lesotho and Swaziland (UBLS).

rather than being told. Visits would be paid to the courts and to lawyers' offices".⁴

The significance of this statement has to be considered against the background of the objectives of legal education which were being designed to suit the circumstances of the period of development in the BOLESWA countries, namely: training for private practice. It recognised the problem of the lack of practical training in the system of legal education for those proceeding to private practice.

The process of developing the kind of legal education to suit the developmental circumstances of the period took another sharp turn in 1971. During that year another report of great relevance was issued by two distinguished legal educators, Professors Paul JCN, then Dean of Rutgers Law School in the United States and Twining WL, then of Queen's University, Belfast, in Northern Ireland. They had also been requested by the Inter-University Council of UBLS to advise on the future of legal studies in the University and they produced their Report on Legal Education and Training of UBLS in August 1971. Among its recommendations, the report emphasised the need for training middle and high level manpower for the public and private sector to take over from the foreigners who, up to the time of independence, had staffed all the important positions in government and in the private sectors. It was argued that developing countries could not afford the traditional system of legal education which aimed at training only for private practice and that, therefore, it was necessary to give broad training to enable such lawyers to be used in a wide variety of critical developmental spheres like local government, tax administration, business organisations and other fields of general administration. It is against this important background that the 1971 Report must be viewed, namely that there were hardly any lawyers with sufficiently broad training and skills to be used in the critically wide developmental spheres. From the point of view of our study, the Report identifies another problem very peculiar to the then system of legal education, namely the narrow scope of legal education aimed at only producing lawyers for private practice (litigation).

⁴ Gower LCB, Report on "Legal Training in the High Commission Territories" (1964) National University of Lesotho. See para (c) p. 17.

It should also be noted that the two professors were very critical of other aspects of the existing system of education and training of lawyers, e.g. they identified issues of relevance and localisation. Besides, although the system then designed was meant to achieve a broad-based approach to legal education in line with the wide range of tasks which lawyers in the three countries were meant to perform, the curricula as shown in ANNEXURE I had the opposite effect. They were totally irrelevant to the local needs as they were, in terms of content, based on and were being taught against English and Roman-Dutch principles.

What is also evident from the curricula in ANNEXURE I is a lack of practical training courses, leaving one with no other conclusion but that the law programmes were highly academic in approach. Regrettably this and other negative implications of the above curricula characterised legal education in the region to the present day.

It is against the above system of educating and training that there arose a cloud of criticisms from several quarters, thus giving a base to the on-going debates on the preparation of lawyers for legal service in the BOLESWA countries. Basic questions that have consequently surfaced and now need to be seriously addressed include the following: What are the present and future needs of society for lawyers?, i.e. what are the legal needs of society? How do lawyers satisfy those needs in terms of the services, whether in the public or private sector, that they render? What knowledge and skills, both intellectual and practical, should a law-trained person have upon entry into the profession? To what extent are the current programmes of education and training a constraint to the acquisition of the required knowledge, skills and attitude necessary for legal service? What are the appropriate programmes that will most likely achieve those results and relate legal education to development?

In an endeavour to answer some of these questions, legal educators in the faculties/departments of law of the universities in the BOLESWA countries have recently embarked on different strategies with motivations for change. Clinical programmes have been considered; their mission being to furnish law-trained persons with the knowledge of practice and skills they will need for immediate and effective participation in the work of a legal office. Indeed, as already acknowledged:

"The basic aim of the practical training is to overcome the inadequacy of articles training by providing training in the essential skills and major areas of practice so as to ensure that a person entering the legal profession can function at a standard of competency which can reasonably be expected of a first-year practitioner".⁵

Research was another dimension of the strategies considered. The University of Botswana set the example by conducting some research which resulted in the introduction of a new law curriculum in 1986. Soon thereafter, similar restructuring curriculum programmes were also suggested in the universities of Lesotho⁶ and Swaziland though nothing serious has so far been achieved in the case of the latter two universities.⁷

Given the above criticisms and the challenge for more research in legal education for sustainable development in the BOLESWA countries, we accordingly wish to join the concerns about legal education and add our contribution to the debate on the emerging issues.

1.B. A PERSONAL RESEARCH CONTRIBUTION

The starting point for any research in legal education is to realise the important role which has been assigned to empirical research in education and curriculum development at any level, whether it be in school environment or in undergraduate or postgraduate education. Unfortunately, in the sphere of skills development for lawyers the need for appropriate research has remained largely unrecognised in many respects. One writer, acknowledging this fact for many jurisdictions the world over, has lamented the situation in the following words:

"What is involved in teaching, learning and assessing individual professional skills is under-theorised and under-researched The result is that almost everyone involved in general debates about the

⁵ Langley F, "Preparing for the Practice of Law: Postgraduate Pre-admission in Australia" (1985) Journal of Professional Legal Education Vol. 3 No. 2 p. 82.

⁶ The Report entitled: "Restructuring B.A. (Law) and LL.B. Programmes" is dated December 1988 and available in the Dean's office, National University of Lesotho (NUL).

⁷ The Report entitled: "The Proposed Restructured Programme of the Department of Law" dated March 1991 and is available with the Head, Department of Law, University of Swaziland

professional competency and professional training in the United States, the United Kingdom and the Commonwealth do not really know what they are talking about, because there is almost no systematic and developed body of knowledge on the subject, despite some individual studies".⁸

Similar views were also held when it was observed that the legal practice courses have had to rely on impressionistic ideas, rather than systematically acquired information on the nature and requirements of practice.⁹ In 1987 Gold Neil, also deplored the reluctance on the part of legal educators and lawyers to support research into the effectiveness and efficiency of legal education and training programmes.¹⁰

"This over-reliance upon intuition or common-sense can readily lead to wastefulness in terms of time, energy and money. We need more than the instincts of the few acknowledged experts ... it is to research, properly designed and conducted that we should be looking to provide the springboard to carry the practice courses forward. To date its neglect has hampered the advancement much beyond the elementary designs of the embryonic years".¹¹

We not only agree with these strongly worded concerns but assert that they are more true in the BOLESWA countries, than elsewhere. We therefore cannot allow such a challenge to research on legal education in the region to pass unnoticed and would wish to provide an answer. However, while acknowledging this lack of research in the BOLESWA countries, reference should be made to the scanty literature one finds on legal education in the region generally. A comprehensive list of such works duly reviewed is appended and marked ANNEXURE II. What has emerged from our review of the literature is that none of the authors mentioned addresses the important issues we have raised, i.e. issues of legal needs of the society; whether legal services satisfactorily meet those needs; what constraints, if any, legal education and training

⁸ Twining WL, "Legal Skills and Legal Education" in: The Law Teacher - Journal of the Association of Law Teachers Vol. 22 No. 1 of 1988 p. 4.

⁹ Stewart Russell, as quoted by Nelson JW, in his article, "Defining the Role of Research in Developing Legal Practice Course Curricula (1988) Journal of Professional Legal Education Vol. 6 No. 1 p. 48.

¹⁰ Gold N, "Taking Skills Seriously: A Research Prospectus" (1987) Journal of Professional Legal Education Vol. 5 No. 1 p. 65.

¹¹ Nelson JW, Op. Cit. p. 48.

have on the competent and effective way of meeting those needs, and the relationship of legal education with development in terms of legal needs. The two studies of Professor Gower in 1964 and of Professors Paul and Twining in 1971 are different in focus: they were aimed at recommending the kind of legal education directed towards producing manpower with broad knowledge to play major roles in the new civil service of the emerging independent states. In any case, so much has changed since those Reports were compiled that to rely on their findings to guide legal education and training for contemporary and future needs of society in the BOLESWA countries would be an unforgivable mistake.

In our view, and as explained in paragraph 1A above, a prima facie case exists establishing that there are and have been shortcomings in the legal education programmes for training lawyers for practice in the BOLESWA countries: they lack emphasis on skills development; they are private practice (litigation) oriented; they are colonial in structures and objectives; their broad-based curriculum had no in-depth into law in context approach; and their design was not based on appropriate research. The need for a proper choice of direction cannot therefore be over-emphasised. For that reason, it has become urgently necessary to undertake a study into the effectiveness and efficiency of legal education and training programmes in the BOLESWA countries and it is that research, properly designed and conducted, to which we would like to direct all our attention since it can provide most, if not all, the necessary answers to the emanating problems of legal education and training for competent and efficient practice of the profession.

1.C. SPECIFIC OBJECTIVES OF THE STUDY

In view of the above, therefore, the aims of this study are as follows:

1.C.1 To place legal education and training within the main stream of the debate on contributions of law, lawyers and the legal process to development and human rights issues.

1.C.2 To develop a framework for analysing the source and magnitude of the problems of legal education in a developing society.

1.C.3 To review documents which analyse the developments in legal education and skills programmes and identify the shortcomings in the system in the BOLESWA countries.

1.C.4 To explore the case for skills development programmes as a response and measure for competent practice of law in the BOLESWA countries using systematically acquired information, i.e. empirical research, on the nature and requirements of practice and in particular, to establish:

- (a) the present and future needs of the society for lawyers;
- (b) how those needs are being met by the output of lawyers, whether in the public, private and semi-private sectors of the society;
- (c) the kinds of skills that are appropriate to be imparted to the aspiring legal practitioners for their competent and efficient functions in society;
- (d) the extent to which current law curricula meet the skills development goals for legal education;
- (e) the most appropriate programmes for and organisation of the legal education system into which the practical training component could be incorporated for directing that training towards competent and efficient practice of law.

1.C.5 To draw up alternative suggestions for the consideration and implementation of the policy makers.

1.C.6 To provide a comprehensive document from which discussions can emerge and take place within the specialised area of practical training for lawyers in the region; and

1.C.7 To contribute generally to the ongoing debate on legal education and training in the BOLESWA countries specifically and in the Southern Africa, indeed the entire Africa, in general.

1.D. RESEARCH METHODOLOGY

1. D.1 Major Stages of the Research

Due to the fact that the investigation had to be carried out in the three BOLESWA countries, and considering the logistical and financial problems already at hand, the research could only be conducted in phases. The first was devoted to a general literature review. Whereas there is plenty of literature on skills development for

lawyers generally that one finds in Britain, United States of America, Canada, Australia, New Zealand, East and West Africa where the system of skills development for lawyers is well established, the scarcity of relevant information in Southern Africa necessitated the consultation of different sources from several libraries to identify the issues and to distinguish concepts relating to education and training of lawyers. A proper framework for analysing those concepts and issues could only be achieved through that kind of survey. The libraries consulted included those of the Universities of London (particularly at the Institute of Advanced Legal Studies) of Warwick, Witwatersrand, Botswana, Lesotho, Swaziland and Zimbabwe.

Phase two was devoted to fieldwork consisting of the collection and analysis of data and specific information. A survey was accordingly conducted through a set of questionnaires supplemented by interviews with randomly selected target groups and individuals. The methodology employed was determined to satisfy the research objectives set down in paragraph 1.C. above. The profile of the target group for the survey is set out in greater detail in paragraph 1. D. 2. below. It should, however, be noted at the outset that because Swaziland is to us broadly representative of all the three BOLESWA countries in terms of their historical socio-political, economic and legal system similarities, (the details of which are discussed in paragraph 3A of Chapter 3), the major aspects of the research were therefore undertaken in Swaziland. The general conclusions and recommendations are also based on the findings resulting from the empirical survey in that country.

Phase three relates to the reporting on our findings, analysis and conclusions drawn from the data collected from the survey in Swaziland. It is in this phase that we discuss the issues raised by the responses to the questions in the questionnaire and during interviews. A copy each of the questionnaire is attached to the thesis as ANNEXURES VIII and X. Chapters 6, 7 and 8 in particular provide those details of our findings. Supporting documents as Tables and Annexures are provided.

The final phase was directed towards summarising our conclusions and providing some suggestions for improving the system of legal education and training in the BOLESWA countries so as to achieve the desired objective i.e. sustainable development. Chapter 10 provides those details.

1. D. 2. Profile of Research Target Group

The method of sampling the target group for the research was geared towards ensuring that those selected could effectively assist in establishing facts fundamentally relevant to the core of the objectives of the research as set out in paragraph 1. C. 4. above. For that purpose, consideration was given to a wide spectrum of the society, reflective of the general views held in Swaziland which geographically is divided into four regions as follows:

1. the Hhohho Region with headquarters in Mbabane, the Capital City;
2. the Manzini Region with headquarters in Manzini, the Commercial City;
3. the Sisweleni Region with headquarters in Nhlangano; and
4. the Lubombo Region with headquarters in Siteki.

In each region the participating individuals were randomly selected from amongst those people who are generally involved in the administration of the law. This was to ensure that the sample contained those persons who employ a certain amount of legal skills in the performance of their duties since the main objective of the research centred on skills development for competent practice of law. The individuals who fall within this group are collectively referred to as those involved in the 'practice of law' - a term given a wide definition in this thesis/research to include that occupation which consists predominantly in the provision of legal services, including legal advice and representation, whether for fees or salary and whether to private individual clients, to corporations or governments.¹² In this group fall the following category of practitioners of law:

- a) Public sector lawyers: those in government ministries (especially the Ministry of Justice); in the judiciary; parastatal organisations; the universities; and public-interest related work like the legal aid services in Swaziland.
- b) Private sector lawyers: advocates and attorneys (some of whom have also qualified as notaries public and conveyancers).

The breakdown of those who were personally interviewed is as follows:

¹² In adopting this approach we have been persuaded by the arguments of Professor Kaburise JBK as expressed in his article, "The Unrecognised Uses of Legal Education in Papua New Guinea" in: The Commonwealth Legal Education Association Newsletter (1978) No. 49/50 Annexure III p. 9.

-	Attorney General and his Deputy	2
-	Judge (Mbabane)	1
-	Magistrates (Mbabane, Manzini, and Siteki)	3
-	Crown Counsels (Mbabane)	8
-	Crown Prosecutors (Manzini 3, Siteki 1, Nhlangano 1)	5
-	Attorneys (Nhlangano 2, Manzini 8, Mbabane 6)	16
-	Law lecturers (Manzini)	<u>3</u>
		<u>38</u>

In each case the interview was aimed at establishing:

- a) what worked they performed;
- b) what skills they utilised in their work;
- c) how effectively they and their employers considered how they performed that work, and if not, why not;
- d) the extent to which they perceived the role of the university in preparing them for their jobs;
- e) the extent to which they acquired the relevant skills for their day-to-day performance of their duties;
- f) how much of these skills, if any, they would require for more competent and effective performance of their duties;
- g) what further training, if any, they would require for more competent and effective performance of their duties;
- h) how they would contribute to solving of development problems of Society.

Another category of the random sampling was selected among those with legal qualifications as a result of formal training in law from recognised legal institutions and who work in law-related jobs. The term "Law trained persons" is used in this research, to refer to this category of individuals and it consists of LL.B. graduates; B.A. (Law)

graduates; and para-professionals (also known as para-legals). The choice of this category was not only to ensure the obtaining of information regarding legal skills referred to above, but also to establish the educational background, professional qualifications, development of professional skills during formal training and application of skills acquired in the institutions of their formal legal education. The questionnaires in Annexures VIII and X were prepared to meet the requirements of this category of individuals in obtaining the required information. The breakdown of those who responded to the questions raised in the questionnaires were as follows:

- LL.B. graduates in the Ministry of Justice (Mbabane)	12
- LL.B. graduates in the Judiciary (Mbabane 2, Manzini 2)	4
- B.A. (Law) graduates (prosecutors) (Manzini 3, Nhlanguano 2)	5
- Law Students (from different parts of the country but resident in Manzini)	18
- Attorneys (Mbabane 4, Manzini 5, Nhlanguano 1)	10
- Legal officers (in companies Mbabane 1, Manzini 3)	4
- Articled clerks (Mbabane 3, Manzini 5)	8
- Law clerks (Manzini 2, Siteki 3)	<u>5</u>
TOTAL	66

This group of law-trained persons together with the earlier group of law practitioners received high profile consideration throughout the survey because most of them willingly accepted either to be interviewed or to respond to questions in the questionnaires. Their attitude was in great contrast to commissioners and presidents of native courts who showed unwillingness to participate in the information giving process. It would have been ideal to collect data from them also because, even though they received no formal legal education of the type given to "law-trained persons" explained above, they in fact render legal services in law-related jobs. To that extent, their information would otherwise have been found valuable. All the same, their role is discussed in subsequent chapters.

The last category of our target group consisted of samples from the consumers of law and legal services - the ordinary (non lawyer) citizens. Crucial to the research was the information received from such persons as it was considered necessary to get the

information that would represent the general views of the ordinary consumers of legal services, the end-product for which legal education and training prepares the practitioners of the law. A breakdown of those interviewed is as follows:

- District Administrators (Manzini and Siteki)	2
- Secretaries (Mbabane 4, Manzini 8)	12
- Bankers (Manzini and Mbabane)	5
- Others selected randomly	<u>6</u>
Total	25

The total number of all respondents was 129

1.D.3. The Success of the Survey in Achieving its Objectives

In designing the procedure to follow in this survey, we were guided by the experience of experts in such a field, including one author whose writing was found valuable.¹³ An example of a proposed stage by stage approach to a similar survey is illustrated in the chart appended to this thesis as ANNEXURE III. What also assisted in ensuring a successful survey was the use of a self-completing questionnaire in which respondents were requested to response to various open-ended questions. More than 200 copies of the questionnaire were circulated to the above mentioned categories of persons throughout Swaziland. They were meant to reflect responses from the broad range of all types of persons defined in our research as target groups for purposes of achieving the objectives of the research. To our great disappointment only 66 were received. This necessitated the administration of oral interviews to which many more of the target groups were willing to participate. A total of 63 interviewees provided answers to some of the oral questions put to them arising out of issues determined on the basis of the questions set out in the questionnaires as in ANNEXURES VIII and X.

The Analysis of the responses received together with other details of data collected are discussed in the subsequent chapters, especially Chapters 6, 7 and 8. What is essential to note, in so far as the degree of success of the research is concerned, is first of all the fact that although the general response to the survey was

¹³ For example, Cohen L & Manion L, (1985) Research Methods in Education (2nd ed), London: Croom Helm; also Nelson JW, Op. Cit.

remarkably disappointing, that failure comes as no surprise in view of the belief that the Swazis are generally disinclined to complete survey forms and responding to questions during interviews of this nature.¹⁴ The limited responses received indicates some measure of success. But more importantly, the survey was a success in that it contributed substantially to the analysis and conclusions which form the basis of this thesis. It is equally important to note another important feature of the survey which contributed to its success in achieving the objectives of the research, namely the random samples of the target group reflect the general representative character of the respondents in Swaziland. Evidence of this can be illustrated as follows:

1. Distribution of those who responded by questionnaire

a)	Hhohho region	22
b)	Manzini Region	38
c)	Shiselweni Region	3
d)	Lubombo Region	<u>3</u>
	Total	66

2. Distribution of those who responded by interviews

a)	Hhohho Region	18
b)	Manzini Region	14
c)	Shiselweni Region	4
d)	Lubombo Region	<u>2</u>
	Total	38

3. General distribution of respondents

a)	Hhohho Region	44
b)	Manzini Region	66
c)	Shiselweni Region	8
d)	Lubombo Region	<u>11</u>
	Total	129

¹⁴ The Research Assistant, Magugula Zonke W, LL.B. II student, must be accorded a lot of appreciation for his patience in pursuing some of the questionnaire papers. Without his consistency and determination, probably only half of what was collected would have been returned for analysis.

Given the fact that Mbabane in the Hhohho region is the capital city and Manzini in the Manzini Region is the commercial city of Swaziland, we were satisfied with the large number of respondents coming from these regions as inevitably the greater number of those law-trained persons dealing with the administration of justice are located in these centres. What we found relevant to the success of the survey was also the fact that we were provided with the necessary data and information from all the regions and thus were able to support the assertions that we make in the analysis of skills development programmes reflective of issues applicable to Swaziland and to the BOLESWA countries of Southern Africa as evidenced by our discussions in the subsequent chapters.

We would also like to acknowledge the assistance of the research and findings of Dr Baloro John of the Law Department and a joint research by the Law Department under the able leadership of the then Head of Department, Professor Wanda BP. The department's report is contained in the list of the literature review appearing in ANNEXURE II. See also questionnaire in ANNEXURE VIII.

1.E. IMPORTANT TERMS USED

When discussing the category of respondents who constituted the target group of our research, terms like "law-trained persons" and "practice of law" were duly defined for the purpose of the research. To ensure that the reader is clearly informed, at this early stage of our study, of the meaning we attached to these and other important words and terms constantly applied, it was considered necessary to identify those other words or terms and give our definitional approach to and position on them. It is crucial that this is done because of the various complexities generally associated with the definitions and interpretations of these words.

We start by noting that closely associated with the definition of "practice of law" and "law-trained persons" - terms to which our perception has been already given, is another term "legal profession" which also is referred to frequently in this study. We would like to approach this term from a broad perspective by attaching to it a meaning encompassing all legally trained persons involved in the occupation of the practice of law as defined above. It consists of judges and magistrates, traditionally referred to as

"the Bench"; lawyers in practice, namely the "Bar" made up of barristers/advocates and the "Side Bar" consisting of solicitors/attorneys; law teachers in universities and other institutions; legal officers in companies and corporations and public legal officers employed by governments in its various ministries and related organisations. In that respect all of them are legal professionals as broadly conceived although they may not be members of the "Bar" and "Side Bar" by occupation at a particular point in time.¹⁵

In attaching a broad view to the term "legal profession" the discussion will take note of the narrow concept implied in the various legislations of the BOLESWA countries providing for "legal practitioners". For example in Swaziland the Legal Practitioners Act, as amended, defines "legal practitioner" as "any person duly admitted to practice as an advocate, attorney, notary or conveyancer in terms of this Act".¹⁶ In effect only advocates and attorneys constitute legal practitioners, as one must first be an attorney before becoming a notary or conveyancer.¹⁷ There is no legal provision defining the legal profession. However, as earlier stated, for purposes of this study a broad approach to the concept of "legal practitioners" and "legal profession" is preferred and will in fact be adopted throughout the research.

The status of a sub-professional group of persons whose occupation involves some form of legal jobs has also been recognised. Over the years it became evident that the access needs and the difficulties which poorer and non law-trained people experienced in dealing with legal services was reflected in the growth of endogenous sub-professional groups often referred to as "bush-lawyers", "scribes", "pleaders" and other kinds of self-made "fixers" and intermediaries between members of the legal profession and the disadvantaged groups.¹⁸ Initially those belonging to this group were "self-made" without any form of legal training or qualification. However, as their services

¹⁵ For additional reading on the legal profession read: (a) Rwelamira MRK, "The Tanzania Legal Profession" in: Lawyers in the Third World: Comparative and Development Perspectives (1981) Scandinavian Institute of African Studies Uppsala p. 204; (b) Dias CJ and Paul JCN, "Lawyers, Legal Professions Modernisation and Development in: Lawyers in The Third World Ibid. p. 11; (c) Perdomo RP, "Jurists in Venezuelan History" in: Lawyers in the Third World Ibid p. 76.

¹⁶ Section 1 of Legal Practitioners Act No. 15 of 1964 as amended by Act No. 13 of 1988. This section compares well with similar provisions in Lesotho's Legal Practitioners Act No. 11 of 1983 and Botswana's Legal Practitioners Act No. 1 of 1974.

¹⁷ Read sections 22 - 23 of Swaziland's Legal Practitioners Act, 1964 as amended by Act No. 13 of 1988.

¹⁸ Dias CJ and Paul JCN, "Lawyers, Legal Professions Modernisation and Development" Op. Cit. p. 17.

became more and more appreciated, many were recruited and trained as "para-legals" or "para-professionals" and were assigned definite legal roles.¹⁹ But one has to note that in our study we have distinguished this group not only from the professionals but also from commissioners and presidents of native courts who, though rendering legal services in law related jobs, have received no formal legal education of the type under our study.

Another important term is "legal education".²⁰ For purposes of this study we would like to adopt a separatist analysis of the term so as to get its clear understanding.²¹ The "legal" aspect of the term concerns those factors of education which relate to the law itself and to the legal profession as a specific discipline, whereas "education" relates to the learning aspect and processes. In this connection learning can be divided into three distinct elements:

1. learning, an aspect of pursuit of knowledge as a thing good in itself, or a pursuit as part of the good life;
2. learning, a formalised process of acquiring knowledge of material with chiefly instrumental value; and
3. practical learning, involving the acquisition of skills in the application in which learning is literally by practice.

All the above components characterising legal education are referred to in this study.

According to our analysis, therefore, in any modern society, the education of lawyers encompassing the above variables precedes the actual joining of the profession although it (i.e. the education) may continue thereafter. That explains why there is

¹⁹ For example the Legal Resources Foundation in Harare, Zimbabwe, has a pilot scheme which consists of selecting persons from both government and non-governmental agencies and training them to perform specific legal duties like assimilating and disseminating legal information to the rest of the community. Details of this scheme can be found in the Report of the Director published in the July - October 1990 issue of the Commonwealth Legal Education Association Newsletter pp. 23 - 5.

²⁰ There are many writers who have given different definitions of this term; read, for example, the one given by Ojwang JB and Saltev DR, in their article "Legal Education in Kenya" (1989) Journal of African Law Vol. 23 No. 1 p. 58. Read also The Gower Report (1969) on Legal Education in Uganda Op. Cit. p. 24 para 4. These and many other definitions reflect points of view on which there are as many shades as there are authors on the subject.

²¹ In pursuing this line of thinking, we agree with the arguments of Maher G, "Legal Education: 2001 and Beyond" in: Legal Education: 2000 (1985) Brookfield, USA pp. 287 - 295.

consensus of opinion that the universities do, and should, play if not the prominent part, then some part in the "education" of those who wish to join the practice of law where the profession too has a role to play in that education as it relates to the law and the legal profession. Our analysis discusses the extent of the role that each body (the university or profession) plays in this "legal education".

In addition, the word "skills" as used in the study forms a crucial aspect of the analysis. Whereas much has been said and written about its nature and importance, there are hardly any satisfactory definitions. Even where such definitions have been attempted, the tendency is to give the main characteristics of skills rather than state precisely what skills are. For those readers interested in identifying some of the legal skills, the following may be noted: (proper analysis can be found in Chapter 8)

1. communication skills;
2. interviewing and fact-gathering skills;
3. counselling or advising skills;
4. fact analysis skills;
5. legal research skills;
6. negotiation skills;
7. drafting skills;
8. office management skills;
9. trial advocacy skills;
10. mediation and other dispute resolution skills.

In the present study, however, we have adopted an approach which focuses on the main characteristics of skills development programmes and these are.²²

- (a) the emphasis on "learning how" to do something rather than "learning about" it;
- (b) the ability of students to individually perform certain operations to definite expected standard;

²² For detailed discussion on definitional issues on skills read: Twining WL, "Legal Skills and Legal Education" in: The Law Teacher - A Journal of the Association of Law Teachers Vol. 22 No. 1 of 1988 p. 4; Mackie K, "Lawyers' Skills: Educational Skills" in: Learning Lawyers' Skills (1989) Butterworths (England) p. 9; and Transit G, "Teaching Interviewing and Negotiating: The Impossible Dream" in: The Journal of Professional Legal Education (1983) Vol. 1 No. 1 pp. 59 - 71.

(c) the learning process to be built up gradually rather than being reflexive or instructive.

Educational programmes for lawyers with these characteristics are, in this study, given such terminologies like: "clinical legal education", "practical training courses", "courses in trial practice/advocacy", "simulated exercises" (to mention but a few) and they all deal in one way or another with imparting practical professional/legal skills.

Finally, the term "competent practice of law" also features prominently in our study. Our concept of "practice of law" has already been identified but the concept of "competence" in that practice is equally important as illustrated by this statement:

"[W]hen a citizen is faced with the need for a lawyer he wants, and is entitled to the best informed counsel he can obtain. Changing times produce changes in our law and legal procedures. The natural complexities of law require continuing intensive study by a lawyer if he has to render his clients a maximum of efficient service. And in so doing, he maintains the high standards of the legal profession; and he also increases respect and confidence by the general public".²³

In our view, and for purposes of the subsequent discussion, this statement contributes three important elements to the concept of "lawyering competence", namely: (1) the justification for such competence, i.e. the demands of professional service expected by a client, arising out of his/her legal needs; (2) the methods of attaining competence, i.e. intensive study and acquisition of practical skills by the lawyer; and (3) the result of competent and efficient service, i.e. maintenance of high standards of the legal profession and the achievement of an increased respect and confidence for the individual lawyer by the general public. The controversial aspects of the concept of competence will be discussed. But as far as competence for legal practice is concerned, our approach has been to recognise certain minimum standards of practice by lawyers which connote a broad client-oriented statement of competence - the notion that a lawyer should possess at least the minimal knowledge, skill and experience to be

²³ Peden J, "Professional Legal Education and Skills Training for Australian Lawyers" (1972) 46 A.L.J. 157.

responsive professionally, prepare for and undertake the representation of the client. To that end, we endorse the view that:

"Legal competence is measured by the extent to which an attorney (1) is specifically knowledgeable about the fields of law in which he or she practices, (2) performs the techniques of such practice with skill, (3) manages such practice efficiently, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the clients' attention, (5) properly prepares and carries through the matter undertaken, and (6) is intellectually, emotionally and physically capable. Legal incompetence is measured by the extent to which an attorney fails to attain these qualities."²⁴

²⁴ The Interim Report of the Task Force on Professional Competence by the American Law Institute - The American Bar Association Committee on Continuing Professional Education (1981). For a modern debate on the issue read the Report of a Conference on Lawyers and Lawyering held July 1993 in Windermere, England.

CHAPTER 2

IN PURSUIT OF DEVELOPMENT - WHAT IS THE ROLE OF LAW AND LAWYERS?

Scholars interested in the study of the legal profession in development in Africa and other developing countries have approached the subject from different perspectives. There are those who have analysed the role of the profession insofar as it relates to the legal system and development.²⁵ Others have concerned themselves with comparative study of different models and characteristics of professions generally, including the legal profession in development,²⁶ others dealt with the way in which laws and legal institutions were used by dominant groups to legitimise economic relations and the allocation of resources in third world countries;²⁷ while others considered the legal profession as an agent of social change;²⁸ and yet others were more concerned with the legal education aspect of the profession²⁹ - to mention just a few. What appears to be a common denominator in all these contributions is the general concern of the scholars of the legal profession to associate the profession with development.

It has already been established (in the previous Chapter) that in the BOLESWA countries of Southern Africa, there is currently an on-going debate on the contribution of legal education to and the role of lawyers in development. To that end, several important questions were raised which have prompted a research through empirical data for new alternative concepts and approaches to supply the

²⁵ For a list of those scholars including Geraghty T, (1968), Lowenstein S, (1970), Ross SD, (1973) and others, read Dias CJ and Paul JNC, "Lawyers, legal professions, modernisation and development" published in Lawyers in the Third World: Comparative and Developmental Perspective, 1981 Scandinavian Institute of African Studies, Uppsala p. 11.

²⁶ Read, for example, Lowenstein S, Lawyers' Legal Education and Development: An Examination of the Process of Reform in Chile (1970). (Cited by Dias CJ and Paul JCN) Op. Cit.

²⁷ Often referred to as "the role of law and legal institutions in the political economy of a country" - read Ghai YP and McAuslan JPWB, Public Law and Political Change in Kenya, Nairobi (1970) and Ghai YP, Law and Political Economy of Public Enterprise: African Perspectives New York International Legal Centre (1977).

²⁸ Find details discussed in Newsletter No. 15 published by International Legal Centre, New York (1974).

²⁹ Refer to the Report of A Committee on Legal Education in the Developing countries published in Legal Education in a Changing World Sweden (1975).

urgently needed answers. However, it is our submission that no such meaningful search can be embarked on without a clear understanding of the role of law and lawyers in development. This discussion, therefore, serves as a basis for appreciating the past and the present position on the matter in developing countries generally, and in Africa in particular upon which the future may be solidly built. For that purpose, it focuses on the following issues:

1. Putting Development and Human Rights issues high on the Agenda.
2. Scope and relevance to Africa.
3. The emerging process of the struggle for development in Africa.
4. Law/lawyers for development.
5. New dimensions and a personal agenda for research on development in the BOLESWA countries.

In pursuing this and subsequent discussions, we aim specifically at providing the kind of evidence that will go towards addressing the basic questions earlier posed for our research and we plan to achieve this by exploring the exact role of law and lawyers and explaining their importance and limitations to development. Legal education and skills development will form the case study as it is one critical area where skills development for lawyers was clearly and strongly recommended for meeting the social needs for rapid development.³⁰

2.A. PUTTING DEVELOPMENT AND HUMAN RIGHTS ISSUES HIGH ON THE AGENDA

In the 1980s while analysing issues of development in the Third World, the general concern for development was expressed in the following words:

"Today, in one way or another, many who are concerned with development are concerned with social gaps. New questions are pressed: development for whose benefit? of what? How - by what means? There is growing interest in new alternative concepts and approaches to supply answers (like) 'people-centred' development; distribution of land, goods, services, work and wages to enable

³⁰ See Report by Paul JCN and Twining WL, Legal Education and Training Op. cit. p. 23 para 10.1.

satisfaction of 'basic human needs' of everyone; 'self-reliant participation' in new, more indigenous structures which allocate these resources."³¹

Whereas the Third World countries were, in the 1980s, characterised by the above social gaps which needed to be addressed, it would be erroneous to assume that that was their concern alone. Development as a national goal was certainly not a new issue to scholars and statesmen nor was the concern for the role of law and lawyers in that process. The participation of all disciplines in the analysis of the emerging issues on the topic is an indication of the importance of that concern. In the context of the debate on those issues in Africa, of which Botswana, Lesotho and Swaziland (the BOLESWA countries) are a part, the question of development took a particularly fascinating direction at the time when the decolonisation process was being effectively implemented especially during the 1960s, a period which has earned itself a memorable term, the "First Development Decade".³²

An important feature of this decade was the focusing of all attention to and directing research for the purpose of assisting the emerging new independent states to achieve the goal of rapid development. The diversity and intensity of the debate that followed is what fascinates most modern writers on development and the debate has continued to be interestingly relevant in many dimensions. In the 1960s, the issues became so attractive as to draw inter-disciplinary researchers from both the then so-called developing and developed countries. They even drew funders, like the Ford Foundation, the International Legal Centre and other Agencies who strongly supported and financially sponsored research efforts on development. The major issues upon which the analysis centred then included the inter-relationship between law and economic structures; the importance of rapid social, economic and political change and their impact on development generally; the impact of the legal system on the development of the new independent states; the identification of the needs for substantive and institutional reforms and the appraisal of the effort to use

³¹ Dias CJ and Paul JCN, *Op. cit.* p.12.

³² Dias CJ, et al, Lawyers in the Third World: Comparative and Developmental Perspectives (1981), read especially the Preface to the Book *Op. Cit.*

law and other socio-economic instruments to bring about important developmental changes for individuals within these new emerging independent African states.³³

For scholars of the 1960s it had become obvious that the colonial structures, including the legal system, which the African states had inherited at independence, were no more than elements of political superfracture of government characterised by a rule through socially distant and non-participatory institutional and legal processes. One example which accurately illustrates this point was the manner in which trade union movements were handled in Africa.³⁴ Before 1939 trade unions of African employees existed only in a handful of countries and there were hardly any national trade union centres. Most of the few unions which existed were unions either of Europeans or Asian workers. The reasons for this state of affairs were not far to seek: the British colonialists, in conformity with the home policy, were not particularly keen on integrating the Africans into their legal, administrative and social structures. The colonial authorities and the white settlers looked at every attempt by Africans to organise in trade unions with suspicion and did whatever they could to discourage it.

Even in the 1930s when Lord Passfield, then Britain's Secretary of State for the Colonies, addressed his famous circular letter to colonial governments urging them to take the necessary steps to enact a law authorising the organisation of trade unions, that circular was not necessarily inspired by a desire to improve the lot of colonial African workers. Rather, it was necessitated by an anxiety that the bitter conflicts which had occurred in the West Indies during the 1920s, when workers took the law into their own hands in revolt against the denial of trade unions, should not spread. Thousands of pounds worth of damage and loss of property resulted. All the same, the colonial administrators and the white settlers set about sabotaging the directives.³⁵ This divisionist attitude was being perpetuated by the British Colonial administrators who used the legal system to advance the policy of Divide et impera ("Divide and rule") as illustrated by the labour legislation and those

³³ See the Report of the Research Advisory Committee on Law and Development in their book entitled: Law and Development Research (1973) International Legal Centre, New York p. 13.

³⁴ Read Wogu Anaraba's "Introduction" in; The Trade Union Movement in Africa (1979) C Hurst & Company, London, especially pp. 1 - 5.

³⁵ Wogu Anaraba Ibid p. 2.

legislation setting into operation the court systems in the different colonial jurisdictions.³⁶

Unlike the British colonialists, the French pursued the policy of assimilation which gave the Africans in their colonies a lever over their counterparts. Moreover, Africans were directly represented in the French Parliament, thus providing a useful opportunity to press the claims for improved social life for the Africans. For example, in the 1950s when the Lamine-Gueye Law which permitted indigenous Africans in Morocco, Senegal and other French colonies to organise themselves in trade unions, the Deputies and the African Trade Unions worked in close co-operation for the implementation of that law.³⁷ This does not mean all was well in the French colonies. Issues of development and human rights hardly formed part of the agenda of colonialists during the process of handing over power to the new African states.

It is against such a background that the new emerging independent African states of the 1960s started to conceive their role within the broad developmental and human right perspectives without demonstrating serious commitment to them. Questions were being asked as to whether it was desirable for these new states to maintain the status quo or to look for alternatives. Inevitably, the demand rose and grew stronger for the re-examination and re-structuring of then existing institutions and processes, so as to meet the new challenges of nationhood of which the cry for "rapid development" ranked top on the list. But this cry was never interpreted in terms of human rights aspirations. Rather, scholars only analysed issues of development as new challenges of nationhood to the countries then being handed instruments of independence.³⁸ The debate on law and legal institutions began to be clearly identified as important instruments of development and were supported by arguments based on the premises that law and lawyers were crucial to development and that it was the role of law and lawyers to ensure not only the observance of the rule of law but also the promotion of rapid development. Arising from the above

³⁶ Read for example the Swazi Courts Act No. 80 of 1950 which established a separate court for Africans and their customary law.

³⁷ Wogu A, *Op Cit* pp. 2 - 3.

³⁸ Kalula E, "Legal Education Training and Research in Southern Africa: New Items for Agenda" (1989) Unpublished Conference Paper pp. 1 - 2.

arguments, we would like to challenge those views and state our position at this early stage; and it is this:

1. that law and lawyers in many jurisdictions in Africa have been subjected to so much external forces and pressures of different nature, source and magnitude as to render them virtually ineffective as "instruments of development"³⁹ contrary to scholars who still adhere to that concept;⁴⁰
2. that right from the time of colonisation, the role of law and lawyers to development has been minimal, to say the least, because the metropolitan power introduced a legal system that was, and may still generally be, foreign to the majority of the members of African societies whose "development" is characterised by ignorance, poverty, disease, severe drought, famine, civil wars, debt crisis and economic stagnation - thus the very existence of law and lawyers make little sense to and impact on the victims of these catastrophes;⁴¹
3. that to the masses in Africa, law and legal institutions are not seen as providing any immediate solutions to the pressing needs of development and their voices of criticism against law and lawyers are widespread and almost unanimous - thus, for example, they regard these institutions as "too expensive" and the lawyers, who provide services geared towards solving these problems, are "untrustworthy (in fact liars), unethical and uncaring";⁴²
4. that legal institutions and processes, including the legal profession and system of legal education lay more emphasis on their colonial origin whose

³⁹ For similar arguments read: Dias CJ and Paul JCN, "Lawyers, Legal Professions, Modernisation and Development" in: Dias CJ et al, Lawyers in the Third World: Comparative and Developmental Perspectives Op. Cit. p.15.

⁴⁰ Scholars who have advanced and analysed these issues include: (a) Gower LCB, in his two important Reports on Legal Education and Training in Africa (1962) and in the High Commission Territories of Bechuanaland, Basutholand and Swaziland (1964); (b) Allot AN, "Legal Development and Economic Development" in: Anderson JND (ed), Changing Law in Developing Countries (1963) George Allen & Unwin Ltd., London; and (c) more recently, Adelman S and Paliwala A., "Law and Development in Crisis" in Law and Crisis in the Third World (1993) Hans Zell Publishers especially Chapter 1.

⁴¹ For the plight of African states, read "Africa in a Mess" in: The Times of Swaziland of Wednesday, 6 May 1992 where the problems plaguing Africa were dismally enumerated.

⁴² Read Parie AJ, "Objectives in Legal Education: The Case of Systematic Instructional Design" in: The Commonwealth Legal Education Association Newsletter No. 53/54 of April-July 1988 ANNEXURE III p. 2. In analysing the objectives of legal education the author first questions the relevance of lawyers and legal institutions which are often negatively perceived.

characteristics they share⁴³ to the extent that they serve more as obstacles than instruments of development;⁴⁴

5. that, therefore, the combination of historical factors, coupled with continuing cultural and the socio-legal conflicts within the general political economy have rendered the concept of the role of law and lawyers as instruments of development more fictional than realistic unless the contrary can be proved;
6. yet, sustainable development, defined as development that meets the needs and aspirations of the present without compromising the ability of future generations to meet their own needs,⁴⁵ is an emerging legal concept having enormous impact on almost all areas of the law, including planning, competition, commercial insurance, tax, administrative, labour, criminal, constitutional and human rights law - all of which are areas which cannot escape the all pervasive influence of the concern of law and lawyers in development;⁴⁶
7. democracy and human rights issues have further added new dimensions particularly from 1989 when fresh winds of change started blowing across the continent of Africa bearing the ideals of democracy: political pluralism, free market economies, freedom of expression and dissent.⁴⁷ The extent of this dimension is evident in South Africa where personal freedoms and protection of fundamental human rights rank very high among the expectations of the society as illustrated by the provision of those rights in the Constitution.⁴⁸ The attainment of the new democratic order in South Africa has set into motion a process of social and economic transformation spearheaded by the Reconstruction and Development Programme (RDP) from which the masses

⁴³ Dias CJ and Paul JCN, Op. Cit. p. 16.

⁴⁴ Ibid.

⁴⁵ For this definition read "Training Lawyers for Sustainable Development" in: IDLI Bulletin No. 17 of June 1994 p. 4.

⁴⁶ Ibid.

⁴⁷ For details read: The Times of Swaziland, 11 July 1991 p. 16 and New Africa Magazine, July 1991 p. 8.

⁴⁸ Refer also to Justice Moloto J, "Access to Justice - The Challenge of a New South Africa" 1993 African Law Review Vol. 4 No. 2/3 p. 46 where he argues amongst other issues, that there is need to fight the physical disadvantages of apartheid such as illiteracy, ignorance, poverty, disease and to introduce massive programmes of formal and informal education to de-brainwash the various population groups.

are meant to derive maximum social benefits directed towards their democratic and human rights. In that context, it is expected that a transformation of the legal system and the judiciary, the legal profession and the whole system of justice have to form part of the process. They need to adopt a reflective picture of the new values of a democratic non-sexist society just as much as they have to become non-racial and representative so as to conform and improve their human rights standards and norms in accordance with international provisions in the UN Conventions and Resolutions.⁴⁹ As far as law and legal institutions are concerned, the expectation is that they too have to direct their orientation and become more responsive to the new aspirations of the emerging democracy.

In view of the above assertions and in conformity with our earlier proposition about law/lawyers and development, our research in the BOLESWA countries will provide the necessary evidence to prove a case for sustainable development by exploring the role of law and lawyers and explaining their importance and limitations to that development, including human rights concerns therein. An analysis of the African context of these issues of development could assist the reader to appreciate the magnitude of their implications to the BOLEWSA countries.

2.B. SCOPE AND RELEVANCE TO AFRICA

There are many conflicting views about what development is supposed to depict and what its outcomes are. The term "development" has thus acquired different usages in books, journals, newspapers and the electronic media as to confuse rather than enlighten the readers as well as the listeners. Scholars have taken controversial positions of what the term implies and have used all kinds of theories to justify their positions. A Marxist's explanation, for example, differs from a Capitalist's viewpoint, as both employ contrasting ideology to influence and explain

⁴⁹ For example Resolution 48/121 on the World Conference on Human Rights where the General Assembly endorsed the Vienna Declaration and Programme of Action and called upon all states to take further action with a view to full realisation of the Conference. Refer also to the Universal Declaration of Human Rights of 1948 and the African Charter of Human and People's Rights of 1981 whose main objectives have been directed towards those noble principles.

their perspectives. Economists, politicians, social scientists all utilise different factors to explain their definition of development.

Instead of agreeing or disagreeing with one or the other of the many controversial definitions, the present discussion proposes to take a second look at the term so that the theoretical concepts implicit in its current use might be brought under scrutiny and necessary adjustments made in the interpretation of the term. For that reason, a few of the definitions will be identified with a view to examining the theoretical concepts implicit in the use of the term and a personal understanding and interpretation will be given, taking into account new perspectives in Africa which should be reflected in the use of the term.⁵⁰

The United Nations first decade for development (1960-1970) defined development using economic indices, e.g. per capita income/gross national product (GNP). Countries that had a gross national product of say 1 000 US dollars or less were considered "less developed". Consequently and taking that to be the critical variable for analysis Europe, North America and some Asian countries were considered "developed" while most African countries (excluding the Republic of South Africa, Libya and OPEC countries), Latin America, West Indies and some Asian countries were considered "less developed" or "developing".

Economic theorists view development from the point of view of economic growth, i.e. from a traditionally stagnant society to a mass consumption society reflective of the developed world. To them less developed countries are those with very low incomes and, as a result, lacking substantial savings and investment to prepare the conditions for the take-off stage. Therefore, less developed countries need an infusion of capital to raise the level of national income high enough to ensure high levels of savings and investments.⁵¹

⁵⁰ This approach was also used by such writers like Zwinoira RT, in a Paper entitled "Historical Roots of Development" presented to a Conference on Modern African Development" held in Sweden in April 1978. The Paper (unpublished) can be found at UNISWA Social Science Research Unit (SSRU).

⁵¹ Refer to the discussion of such economists like Higgins B, Economic Development Problems, Principles and Policies Norton & Co., New York 1968; and Seer D, "The Meaning of Development" in: International Development Review Vol. XI No. 4, 1969. For a more recent discussion see Adelman S and Paliwala A, Op. Cit. pp. 7-10.

To social scientists development refers to the process of moving towards higher levels of social welfare. This process, they argue, has four major components: employment, levels of living, income distribution and self-esteem. These components are mutually self-reinforcing in the sense that a positive change in one of them (other things being equal) will normally have a positive impact on the other three. Thus a country which is classified as less developed (or under-developed or developing) in the modern world is typically characterised by low levels of the four components and if such a country is to move onto higher levels of social welfare, then she must experience an increase in those components of development.⁵²

Viewed differently, Professor Seidman RB, defines development from legal perspectives. Development (or modernisation) requires, according to him, a legal order adapted to solving the difficulties of poverty and oppression; that requires a theory of knowledge, providing an agenda of steps to take in order to decide what is a good (wise, useful) rule. Such rules must be based upon knowledge of the "limits of law".⁵³

It is clear from the above discussions that whether using economic, social or legal indicators, these perspectives by themselves are not good enough. Development should be viewed as an integral, value loaded, cultural process encompassing the national environment, social relations, education, production, consumption and well-being. It should be measured in terms of persons' satisfaction, aspirations and physical needs and it should be considered as the activities of a community or society, causing something to unfold gradually; expanding something by a process of natural growth; inducing differentiation or evolution by successive changes for the good of that society.

From our point of view, therefore, at the minimum, any development strategy must seek to attain or satisfy basic human needs. Development efforts must create a safety net for all the people, especially the less privileged. Such an approach is

⁵² This point was also argued by Professor Matsebula MS, in: "Development Goals in Swaziland: Strategies, Achievements and Policy Implications" in the Proceedings of the National Workshop on Population and Development in Swaziland (Okore Edn) 1992, pp 86-105.

⁵³ Seidman RB in: The State, Law and Development (1979) Croom Helm p. 49.

suitable for developing societies because their survival and prosperity is never assured due to influences outside their territories resulting, amongst others, from interdependence of the world community. For these reasons, we perceive development as the creation of a society in which certain conditions of living such as security, sufficiency, satisfaction and stimulus prevail.⁵⁴ Development should also be concerned with justice, equality, democracy and respect for human dignity. It should give the people the ability to question things and develop the sense of awareness confidence and eagerness to be critical⁵⁵. In brief, development should equal enhancement or attainment of basic human needs rather than the measurement of the notion of national wealth. It has to thrive in the culture of human rights.

Relating the type of development defined above with education, of which legal education forms a part, we would like to emphasise that the greatest resources that any country has are its people.⁵⁶ The development of this important resource has been justified on the grounds that any meaningful societal development can only occur when people have the essential knowledge, skills and attitudes that support development.⁵⁷ Educational institutions are therefore vital in this process as they are expected to inculcate appropriate knowledge, skills as well as attitudes which recipients use to further development objectives. Education is thus a critical factor in human resources development if allowed to perform that role.⁵⁸ Therefore, broad socio-political, legal and economic influences together with education constitute the new challenges that confront society in order to attain the expected development. The form they take varies from country to country. -For example in the Third World it may take the form of absolute poverty in terms of human needs for food, habitat, health care and educational growth.⁵⁹ In other countries the challenge

⁵⁴ Curle A, Educational Problem of Developing Societies (1975) Praeger Publishers, New York p. 118.

⁵⁵ See also Adelman S and Paliwala A , Op. Cit. pp. 16-17.

⁵⁶ For details of similar arguments read Kiggundu MN, Managing Organisations in Developing Countries (1989) West Hartford Kumarian Press p. 145.

⁵⁷ Gule JM, "Human Resources and Development in Swaziland" A Paper published in The Proceedings on the National Workshop on Population and Development Mbabane p. 108.

⁵⁸ Ibid.

⁵⁹ Paul JCN and Dias CJ, "Introduction: Underlying Concerns and the Field to be Examined": A Paper presented at a symposium on "Law in Alternative Strategies of Rural Sdevelopment"

may be ecological and environmental,⁶⁰ political or discrimination based on grounds of race, sex, religion, etc.⁶¹ The problem may occur as legal, social, political and economic gaps between "haves" and "have nots" resulting from state powers, over production and distribution of goods and services.⁶² These issues of development have, therefore, to be examined from a broad perspective, taking into account and examining critically sociological, legal, political and economic broad-base situations for interpreting the concept of development.⁶³ This is the approach we have adopted and would like to pursue in the course of our discussion.

2.C. STRUGGLE FOR SUSTAINABLE DEVELOPMENT - AFRICAN PERSPECTIVES

Any study on development must first investigate its historical roots in any given society before meaningful development plans can be drawn up. The way of life of any given society is a reflection of hundreds of years of interaction and struggle between members of that society and their physical environment.⁶⁴ The environment tends to impose constraints on what individuals and communities can do, thus creating a desire for improvement. The plans and strategies devised to achieve such improvements differ from society to society depending on the nature of the constraints, the cultural behaviours and the means available to overcome those environmental constraints. In this sense, development has to be associated with

published in: Third World Legal Studies (1982) International World Legal Studies Association p. iii.

⁶⁰ As argued by Paul JCN, in his Paper "Law and Development into the 1990s: The Need to Impose Accountability Through International Law" presented to the Cumberland Lodge Conference held from May 30 - June 1, 1990.

⁶¹ As the case is in South Africa and other countries.

⁶² Paul JCN and Dias CJ, Op. Cit. p. iii.

⁶³ For a critical analysis of broad perspective of development read:

(a) Seidman RB, The State, Law and Development (1979) Croom Helm, London. See especially p. 16.

(b) Ghai Yash (ed), Law in the Political Economy of Public Enterprise: African Perspectives (1977) Scandinavian Institute of African Studies, Uppsala and International Legal Centre, New York. Read especially the "Introduction" to the book.

(c) Ghai Yash, "Law Development and African Scholarship" (1987) The Modern Law Review Vol. 50 No. 6.

(d) Dias CJ, et. al, Lawyers in the Third World: Comparative and Developmental Perspectives (1981) Op. Cit. Read especially the "Preface" to the book.

⁶⁴ Zwinoira RT, "Historical Roots of Development" Op. Cit. pp. 2 - 3.

promoting the growth of a community or society.⁶⁵ This form of approach to societal problems must have existed in African communities from time immemorial.

However, to scholars concerned with the analysis of development in the context of African societies, the earliest use of the term as understood today surfaced after World War II and particularly in the 1960s.⁶⁶ This was the time when a new branch of economics came more and more to the fore, known as "development economics" characterised not so much by utilising purely economic indicators to analyse concepts of development but by utilising social and cultural indicators in the approach to the analysis of development. The most important aspect of this new branch of economics was its attraction to not only economists, but other analysts who started to identify the various components of the concept of development in terms of its socio-economic and cultural base. Most of these analysts were North American and Western Europe technical scholars and institutions who applied many of the new variables of the concept of development to different societies.

For example, in the context of African states, the strategy for the "First UN Development Decade" which, as earlier observed ran from 1961 - 1970, applied the concept of development in terms of per capita income/gross national product (GNP). The argument was that an increase in GNP would automatically result in an increase in individual living standards.⁶⁷ The usage of the emanating terminology to describe African states confirmed their "underdevelopment" as opposed to the "overdevelopment" of North America and Europe - a connotation of great concern to the then newly independent African states. However, it soon became obvious that the above theory was not absolutely sufficient in determining the concept of development because even if the GNP was an indicator to improvement in physical living standards, the same improvement did not necessarily guarantee a greater

⁶⁵ Ibid.

⁶⁶ For details of historical developments, read: Karel de Very Mestdagh, "The Right to Development: From Evolving Principal to 'Legal' Right: In Search of its Substance" 28 Netherlands International Law Review (1981) pp. 30 - 53. See also his Discussion Paper which preceded the publication of the Article.

⁶⁷ Read UN Document No. A/RES/1710 (XVI).

appreciation of the non-material facets of human development.⁶⁸ Nevertheless African countries were, during the 1960s, being judged using the yardstick of that theory. Modernisation theories grew around the same concept that development meant a predominantly endogenous and independent process viewed exclusively in economic terms which demanded political, legal and cultural change involving the abandonment of tradition in order to achieve economic growth. For that reason law and politics, far from being understood as contradictory sites of struggle, were viewed as instruments to resolve developmental problems.⁶⁹

In view of the defect realised early during the "First Development Decade", there was a change in the component of the variables in determining development, and the "Strategy for Second UN Development Decade" took a holistic approach as evidenced by the statement: "the ultimate objective of development must be to bring about sustained improvement in the well-being of the individual and bestow benefits for all".⁷⁰ Apart from being holistic, this theory also accepted the notion of "an ongoing process" as an important component of development. ... Applying this notion to African states of the decade, i.e. the 1970s, analysts introduced a new terminology for describing African states, shifting it from "underdeveloped" to "developing" states, thus attributing to development a continuing process of social growth characteristic of all societies in Africa and the Third World.

From then on, not only did the terminology of "developing" countries, (as the African and the rest of the Third World came to be referred to) find favour with most analysts of development, but even this specific variable became of universal application in all disciplines of study. Development was seen in terms of an ongoing process with a time as well as a spiral dimension added to it. Human growth in its totality became the main concern of analysts of development in Africa from the 1980s onwards.

In the forefront of this type of analysis were economists whose writings focused on applied economics to development, and aroused the interest of

⁶⁸ Karel de Very Mestdagh, "The Right to Development:: From Evolving Principle to 'Legal' Rights: In Search of its Substance" Op. Cit. p.30.

⁶⁹ Adelman S and Paliwala A, "Law and Development in Crisis Op. Cit. pp. 4 - 5.

⁷⁰ UN Document No. A/RES/2626 para 7.

governments, particularly in the developing African countries. Their efforts were soon coupled with those of political and other social scientists, including lawyers, all of whom directed their analysis towards such issues as "the social base" of economic development. The end result of these studies culminated into some form of general agreement to the effect that development should not be regarded as an end in itself. It is a means of achieving progress in the widest sense of the word and as far as the Third World is concerned, the point was emphatically made in the following words:⁷¹

"With particular reference to the development problems of the Third World this broad concept of progress is used to mean not only improving the macro-economic position of developing countries - through a strong trading position or a larger GNP, for example - but, first and foremost, improving the material and non-material living standards of individuals."⁷²

The crucial point at the height of this general agreement is another consensus which has grown in the international community concerning the definition of development and its implication for the most elementary human rights. This culminated in the adoption of the Declaration on the Right to Development by the General Assembly on 4 December 1986, and today there is a Commission on Human Rights to study measures necessary to promote the right to development for citizens of all nations the world over.

Important to our study are the relevant provisions of the Declaration which state:⁷³

1. The right to development is an alienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully utilised.

⁷¹ Karel de Very Mestdagh, Op. Cit. see especially p. 146 of his Preparatory Paper.

⁷² See also UN Document No. A/RES/2542 (XX) entitled Declaration on Social Progress and Development in which the same principles were recognised.

⁷³ Read Articles 1 - 3 of the Declaration.

2. The human person is the central subject of development and should be active participant and beneficiary of the right to develop.
3. States have the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development.

With particular reference to African states, not only have the African governments participated and assented to principles embodied in the UN Charter and the international texts on human rights in Covenants, Declarations and Recommendations, thus paying allegiance to the existence of the right to development in International Law generally, they have also signed, ratified or acceded to the African Charter on Human and Peoples' Rights adopted at the Nairobi Summit in 1981. The Charter finally came into force on 21 October 1986, having been ratified by an absolute majority of states⁷⁴. In Article 22 it is provided that all peoples of Africa shall have the right to their economic, social and cultural development with due regard to their freedom and identity, and in the equal enjoyment of the common heritage of mankind. The Article also charges all African states with the duty, individually or collectively, to ensure the exercise of the right to development.

Emerging from the above discussion are the following important points as far as the application perspectives of the concept of development relate to African states. In the first place the discussion illustrates the recent history of the analysis by scholars of applied economics joined by political, social and cultural analysts, all of whom have been concerned with development as a sustainable national goal, a pursuit by the peoples of the world. Secondly, it traces the application of the concept of development as a process of social, economic and political change and relates that change to development in the Third World countries, including those in Africa. Thirdly, it examines the input of all the analysts until the consensus that in determining development for African states the ultimate objective must be nothing else but sustained improvement in the well-being of the individual as a whole. This

⁷⁴ Read the "Introduction" to the Human Rights Document entitled: "The African Charter on Human and Peoples' Rights" published by the United Nations, New York, 1990.

means that for African states, development must encompass a broad-base approach to the process of improving the social, economic and political (both material and non-material) living standards of the individual. Fourthly, it points out that today the concern for development is considered by the international community as a fundamental human right as evidenced by the adoption of the Declaration on the Right to Development in 1986 and by the adoption of the African Charter, both of which came into force in 1986.

In the final analysis the discussion recognises the fact that today, the international community in general and the African states in particular, not only have a legal duty in terms of the above Declaration and Charter (not to mention respective Municipal laws) to refrain from opposing and impeding the exercise of the right to development, but also are under a positive obligation to help in securing its realisation by promoting its exercise. The point is best emphasised in the following words:

"We can find preferences based on a need expressed or implicit throughout the entire range of international decision-making pertaining to development. What is striking about this conception is not so much its espousal by the large majority of poor and handicapped countries but the fact that it has been accepted - by and large - by the more affluent countries to whom the demands are addressed. The evidence of this can be found not only in the international resolution with which the rich countries have concurred but also, and more convincingly, in the series of actions by them to grant assistance and preferences to those in the less-developed world".⁷⁵

However, relating the above concerns to the most current issues of development and making projections for the future, one must recognise that whatever one's views about development, today as in the past, the people of Africa are still struggling to secure more "development" in terms of "modernisation" and

⁷⁵ Schachter O, "The Evolving International Law of Development" (1976) Columbia Journal International Law pp. 9 - 10.

socio-economic and political growth. Organisations ranging from inter-governmental and governmental, international development institutions, like the World Bank family, bilateral IDAs and all sorts of specialised organs of development projects, are engaged in various activities directed towards affecting the basic interests of the members of African societies, some positively and others negatively.⁷⁶ However, the infliction of harm in the name of "development" became a matter of growing concern during the decade of the 80s. The experiences of severe hardships on the poor as the result of conditions imposed by adjustment loans was one major area of concern. There was also growing concern about the harm to people and ecologies caused by development projects. A voluminous literature depicts these harms. For example, reports have shown how other kinds of "development" projects have ignored the often changing role of women in agricultural production or marketing, and the changing needs of rural women who become heads of households as their husbands migrate to urban areas seeking wage employment. Less dramatic, but no less important, is an extensive literature dealing with the continuing failure of many rural development projects to "reach" and benefit the rural poor.⁷⁷

For development lawyers of tomorrow, the 1990s and beyond provide an opportunity to review all the efforts of the past to implement developmental projects with a view to exploring better strategies to press the efforts of the past. The suggestion of putting all these efforts under the rule of law which respects people constitutes a major part of what role law should play in the development projects of the future. In the context of Africa, the past decades witnessed how the international system has been used both by IDAs and the UN community to articulate norms governing "sustained development" goals and activities. Examples include: the 1976 World Employment Conference; the 1979 and 1989 World Congresses on Agrarian Reform and Rural Development; the 1986 Declaration on the Human Right to Development and the 1986 African Charter on Human Rights (i.e. when it came into effect); the May 1990 UN Declaration on Development Objectives for the 1990s (the Declaration on International Economic Co-operation).⁷⁸

⁷⁶ Paul JCN, "Law and Development into 1990s: The Need to Impose Accountability" Op. Cit. p. 2.

⁷⁷ Ibid p. 3.

⁷⁸ Ibid pp. 13 - 14.

Not only have these instruments inspired greater understanding of the humanitarian objectives of development but they have entrenched these objectives as an ongoing process within the framework of legal rights and obligation. The role assigned to law, lawyers and the entire legal process in this process remain the basic issue for discussion in the next section.

2.D. LAW/LAWYERS AND DEVELOPMENT

The basic hypothesis remains that whereas law in the Western capitalist states may be said to make realistic attempts at appearing to represent and be directed towards wider social and community needs, this is a much more difficult argument to pursue in the African states and more so in the BOLESWA countries because of their peculiar socio-political economy. The resulting set of problems for law, lawyers and the legal process in these jurisdictions are closely associated with the relationship of law with development. Trubek and Galanter argue persuasively that to understand the crisis in law and development, we must examine significant changes in ideas about the role of law in the Western society, the relationship between those societies especially in the United States and the Third World and the relationship between scholarship and related action programmes.⁷⁹ What is important is not the list of the scholars who participated in this analysis as the list may even be limitless, but what they stood for and argued in their numerous critical articles and books. We shall, for developing our own framework, examine their contribution to the debate on law and development in three parts before we draw our own conclusions in so far as legal education and development are concerned.

2.D.1 Arguments for the Specific Approaches to Law/Lawyers and Development

2.D.1(a) The Instrumentalist Approach

The Instrumentalist Approach which is based on the premises that law, lawyers and the entire legal process were important to development in that they

⁷⁹ Trubek DM and Galanter M, "Scholars in Self-Estrangement:: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) Wisconsin Law Review Vol. 1062 No. 4 p. 1063.

played a fundamental role not only in the establishment of the rule of law but also in the use of law to bring about social change. This role was in 1963 emphasised thus:

"The contemporary lawyer in the developing nations must become an active and responsive participant in development plans. An ever increasing part of the work of the lawyer is neither litigation nor the resolution of disputes. It lies in the scope and formulation of policies, in the exercise of legal powers constructively establishing or altering the relations between private legal parties inter se, between public authorities and private parties, between governments and foreign investors and the like. In all these questions the lawyer must play an important, often a decisive, part".⁸⁰

A good analysis of this concept can be found in the "Liberal Legalism" theory according to which law and development studies consist of two basic elements: a general model of the relationship between law and society and a specific explanation of the relationship between legal systems and "development" - all of which can be explained by stating first that society is made of individuals, intermediate groups in which individuals voluntarily organise themselves, with state being the locus of supra-individual control of society. Whereas the state action involves the coercion of individuals, it formulates rules for mutual self-governance. Thus neither the state nor the intermediary groups consisting of individuals are ends in themselves, but are instruments by which individuals pursue their own interests and affairs, and since individuals consent to the state, including its coercive features, the state control furthers individual welfare.

Secondly, the state exercises its control over the individual through law which consists of a body of rules that are addressed universally to all individuals similarly situated. Thirdly, these rules are alleged to be consciously designed to achieve social purposes or effectuate basic social principles. These purposes are

⁸⁰ Friedman W, "The Role of Law and the Functions of the Lawyer in the Developing Countries" 17 Vanderbilt Law and Development (1963) p. 181. Also cited by Dias CJ and Paul JCN, *Op. Cit.* p. 15. Read also Harison J and Brembeck S, Education and Development of Nations (1966) Holt, Rinehart and Winston, New York p. 120.

those of the society as a whole and not of limited groups within it. The rules are made through a pluralist process which enables all individuals to secure rules favourable to them, while at the same time insuring that rules respect the vital interest of all others. The prime actors in this pluralistic rule-making process are intermediate groups which aggregate individual interests.⁸¹

The above analysis of the relationship between law and society on the one side and between legal systems and development on the other not only gave rise to the instrumentalist concept of the role of law and legal processes, but it also opened the doors to different interpretations of that role. There are those who have argued that it was only through the creation of legal professions that replication of the paradigms of legal development were made possible, namely: the degree to which modernisation of law could bring other benefits depended on the character of the legal profession⁸². This argument sold very well to African scholars and statesmen of the 1960s who emphasised the importance of the role of lawyers and of legal education as crucial instruments of development. Even very recently, society in Southern Africa was reminded that law must reflect needs, aspirations and values of the society in which it operates.

"These elements of the role of law make certain demands on lawyers, notably, that they should see to it that laws are constantly subjected to review and change so as to meet current needs and opinion. In addition, those intending to become lawyers must receive wide and intensive education which combines tuition in pure law courses with interdisciplinary subjects".⁸³

Like this Minister of Justice of Namibia, Dr Tjiriange EN, there are many statesmen, lawyers and scholars who still hold strongly to the concept of the importance of the role of law and lawyers to development along the arguments given above.

⁸¹ Ibid.

⁸² Dias CJ and Paul JCN, "Lawyers, Legal Professions and Development" Op. Cit. pp. 14 - 15.

⁸³ Tjiriange EN, The Minister of Justice of Namibia in his Opening Address to the Workshop on "The Namibia Faculty of Law: Legal Education to Serve the Needs of Society" held from 29-30 October 1992 in Windhoek (A Paper not yet published).

Another interpretation of the instrumentalist concept is the argument that law is a crucial weapon in the hands of governments to translate policy into action. It is an instrument of control; it defines, creates, enforces and co-ordinates individual relationship into obligations to the community. In this respect not only do lawyers participate in drafting these laws but also in interpreting them. There is also the interpretation which emphasises the role of law as an instrument of building and maintaining democracy generally. This calls for the promotion and protection of human rights and freedoms and the maintenance of the Rule of Law. The fulfilment of this role means that law should act as a limitation on arbitrary and capricious use of power. It should also promote human rights and fundamental freedoms generally. This specific role of law also makes demands on lawyers to ensure the promotion and respect for democracy, human rights and the Rule of Law in all its various forms.⁸⁴ The thrust of this argument is that lawyers as necessary instruments of development must be encouraged to fulfil their important role.

2.D.1(b) The "Broad Social Indicators" Approach

Just as the arguments advanced to support the instrumentalist concept of law and development were gaining momentum and popularity amongst many lawyers, statesmen and scholars in Africa especially during the 1960s and early 1970s, there was also emerging a group of scholars who have continuously raised arguments to reject the instrumentalist theory as a "conservative and black letter approach", only suitable for maintaining Western values and concepts of law and development. In criticising that approach, it was argued that the concept of development underlying the instrumentalist approach was based on premises drawn from European or North American experiences about developmental objectives directed towards "modernisation", "development", "economic growth", "integration", "effective development administration"⁸⁵ and other such notions. We have noted the dissatisfaction with this approach which was clearly highlighted by Professor Ghai

⁸⁴ Friedman W, "The Role of Law and the Functions of the Lawyer in the Developing Countries" Op. Cit. p. 181.

⁸⁵ Dias CJ, et al, Lawyers in the Third World: Comparative and Developmental Perspectives Op. Cit.

Yash when comparing the approach of the contribution to law and development of the University of Lagos evidenced by their book "Law and Development" and of the University of Dar-es-Salaam evidenced by their book "The Limits of Legal Radicalism".⁸⁶

"Both seek to explore the relevance of law to the problems of social change - how law fits into African conditions. ... The contributors to the Dar-es-Salaam volume explore these links through autobiographical accounts of their teaching and research experiences at Dar-es-Salaam, and through an examination of social theories relating to law. The focus of the Lagos volume is on the substance and doctrine of the law, and the links to society are established not through a systematic exploration of social theory (or empirical research) but through general notions and prejudices common to lawyers. The Lagos volume assumes that law can be used as an effective instrument to shape and develop society, while the Dar-es-Salaam essays regard that relationship as problematic. The Lagos volume accepts the Western ideology of the goodness of law; most Dar-es-Salaam writers start from critical perspectives on the role of law, and see it as emanation of oppressive structures of the state"⁸⁷.

In our view the above statement is important in two respects, amongst others: first is the point that in the analysis of law and development and in whatever relationship law may be seen, the approach "requires that one transcends doctrinal or textual analysis and researches for the inter-action of law with society". This is what we agree with and have termed it the "broad range social indicators" approach, otherwise also referred to as "the sociological and political economy" approach by Professor Ghai Yash.⁸⁸ Secondly, in pursuing the "broad range" approach, one should be aware and explore the limits of the law in its established role to society. As argued by Professor Ghai, and again we fully agree with him, it is possible that

⁸⁶ For details read Ghai Y: "Law, Development and African Scholarship" in (1987) The Modern Law Review 50. Read especially pp 750 - 51.

⁸⁷ Ibid p. 750.

⁸⁸ Ibid.

the emanating oppressive structures of the state may subject law to non-developmental purposes thus limiting its role in contributing to the expected social change. This not only remains our contention also, but we shall proceed further to show its application in the BOLESWA countries.

The argument concerning the concept of development to encompass the process of improving the whole well-being of all individuals in the society was quickly captured by legal scholars. Leading in that kind of analysis are scholars like Seidman RB, Friedman W, Ghai Yash, Luckham R and Paliwala Abdul, to mention but a few. They argue that the critical issues for law and development should centre on the social context, and the approach for any analysis on those issues should be "people-centred" designed to address basic human needs.⁸⁹ The international aspect of this approach, as already been discussed, culminated in the adoption of the Declaration on the Right to Development.

2.D.1(c) The "Limitations" Approach

The "limitations" approach raises arguments which focuses on the limits of law, lawyers and the legal process in their role to promote the "people-centred" development. According to this argument, the promotion of, respect for and enjoyment of certain human rights cannot, and should not, justify the denial of other human rights and fundamental freedoms through legal means. One example where the denial or limitation of the legal process has been identified is in the area of legal services. The character of the legal profession in African countries has been viewed more as a product of external social forces rather than dynamics developed within an autonomous legal system.

⁸⁹ For additional arguments on such an approach read:

- (a) Luckham R (ed), Law and Social Enquiry: Case Studies of Research (1981) Scandinavian Institute of African Studies Uppsala; International Centre for Law in Development, New York, USA
- (b) Lynch Dennis O, "Legal Roles in Colombia" (1981) Uppsala p. 124.
- (c) Ghai Yash, "Law in the Political Economy of Public Enterprise" (1977) Uppsala p. 351.
- (d) McAuslan JPWB and Kanyeihamba GW, Urban Legal Problems in Eastern Africa (1978) Uppsala p. 298.
- (e) Adelman S and Paliwala A, "Law and Development in Crisis" Op. Cit. Chapter 1.

"Professions were alleged to be part of an official superstructure which sanctioned distributive injustice, social stratification, class interests and 'peripheralisation' of impoverished people".⁹⁰

As a result of this superstructure of the legal profession "social gaps" were created characterised by the absence, or inadequacy of legal services provided to society by members of the legal profession. The crucial point here is that whereas the legal profession may be said to be making considerable contribution towards the demystification of the legal process, its impact is limited by the character that it has received from the colonial legacy, i.e. its being part of an official superstructure of that oppressive system enshrined in its legal norms.

Therefore, in the African context, law has little, if any, intrinsic value of its own; irrespective of whether its content is denial of human rights on the one hand, or embracing all the human rights on the other. It has remained a mechanism utilised by the power block in society for its own needs, including suppression rather than developmental needs of society. Detention laws and other dictatorial laws are as examples of such mechanisms.⁹¹

Judges and magistrates, too, do play important societal roles, but many times their role is criticised and resisted because the state quite often places a heavy weight on the judiciary denying it the opportunity of playing a neutral, impartial and non-political role.

The above instances, and many more, go to support our contention that the importance of law, lawyers and the legal process should not be over-emphasised. The relations between governments, the colonial legacy, traditional sectors of the economy, cultural values and many other factors have combined to significantly and often negatively affect the operation of law and its institutions and process, thus limiting their role to an insignificant instrument of development mere existence in the books.

⁹⁰ Argued by Robin Luckham, "The Ghana Legal Profession: The Natural History of a Research Project" published in Luckham (Ed) Law and Social Enquiry: Case Studies of Research Op. Cit. Arguments approved by Dias CJ and Paul JCN, Op. Cit. pp. 20 - 1.

⁹¹ For details read Davies DM, "Legality and Struggle: Towards a Non-Instrumentalist View of Law" in Law and Justice in South Africa (1988) Centre for Intergroup Studies, Institute for Public Interest Law and Research, Johannesburg pp. 103 - 115.

2.D.2 The Emerging Dilemma

It has been argued in the preceding paragraphs that the needs of African countries, like their counterparts in the Third World, have raised serious challenges to development and human rights issues. It has also been argued that these challenges in so far as they relate to the role of law/lawyers have met with minimal results illustrating and supporting our view that the instrumentalist theory of law has not so far succeeded. Societies in developing countries have regrettably perceived and often experienced law and lawyers as regressive and as weapons of oppression by the state.

The above arguments, however, raise a paradoxical question in so far as our study is concerned, namely: given that law has failed to assert itself as an important factor in satisfying social needs of developing countries, how then will equipping lawyers with more skills contribute effectively to development? This dilemma of contradictory views adds a new dimension to our study in which the paradoxical issue needs to be addressed.

There is already new scholarship with growing literature on the whole issue of "liberal law and development theory and its relevance to the lives of people in the developing world".⁹² The challenges of a vitality of alternative law and development are being variously addressed by researchers against the background of the socio-political and economic factors (derived essentially from colonialism) which have combined to limit the role of law in development.

"Much of this new scholarship points to the need to reconsider the nature and role of state and law. The development state can no longer be taken for granted, nor is there any faith in law as its modernising instrument. Yet there is also a realisation that law is implicated in social relations - it may not be the key to development, but it cannot be ignored either".⁹³

⁹² The contribution of various contemporary writers on the issue can be found in "African Discourse" Series 4 (1993) Law and Crisis in the Third World Op. Cit. see especially Chapter 1.

⁹³ Ibid p. 23.

The role of lawyers and their education needs to be examined in the context of the failure of law in development as stated above. Regrettably available literature in the BOLESWA countries do not analyse their impact upon broader socio-economic and political relations. It is our contention that while an analysis of the role of law/lawyers is important, it is even more important to explore the specific way in which lawyers are involved in the development process through a search for the impact of legal education generally and skills development in particular in that process.

Therefore, although the relationship between law/lawyers in development and the pursuit for better equipment in lawyering skills may appear paradoxical and problematic, the approach here is that our contribution to skills development will lead to a better understanding of the complex issue of the relationship between law/lawyers (and their education) and development. The stated dilemma is, therefore, not incompatible with analysing and recommending alternative constructive relationship between lawyers' education and the needs of development. It is such argument that leaves us room for an agenda for research into skills development programmes in Africa generally and in the BOLESWA countries in particular.

2.E. NEW DIMENSIONS AND A PERSONAL AGENDA FOR RESEARCH ON DEVELOPMENT

Central in the debate on development has been the relationship between law/lawyers and development and the thrust of the arguments so far has been that law and its institutions have a role in solving developmental problems. The initial presumption was one of the instrumentalist view of law. With time, however, such an approach was found inadequate as an important technique for shaping society. Consequently, there grew a recurrent concern whose theme was that law and legal institutions, including lawyers and the legal processes, have to be studied within the social context. The present study not only accepts the arguments in support of the broad social approach in analysing developmental issues, but attempts to extend the analysis a little further. It argues for that type of analysis which emphasises the

limitations placed on law and legal institutions resulting in their being ineffective in the development process. Law, for example, may be part of the superstructure enforced by State organs to oppress and frustrate developmental efforts. We would like to question whether law and lawyers are either necessary or equipped with sufficient techniques to foster or protect the social goals of development and if they are not, what factors render them ineffective? It has become obvious to us that the different approaches we have discussed have failed to address such issues satisfactorily. The result is to us an incomplete analysis and understanding of the relationship between law, lawyers and the legal process with development particularly in the context of BOLESWA countries.

In view of this apparent gap we have been persuaded to make a contribution to the above relationship within the context of legal education and training, important aspects of the legal process. The aim of the contribution, therefore, is to undertake research concerned with the relationship of legal education and development with a view to establishing how social needs can be achieved through a better system of legal education and training in the BOLESWA countries of Southern Africa. The "First Development Decade" witnessed governments of the newly independent states and scholars agreeing on and aligning legal education with development. To achieve this, commissions were appointed to study ways in which legal education and the general practice of law could be best adopted for social development. But all that was done against the assumption that law and legal institutions were instruments of national development. Thus their law schools, as earlier argued, had to devise programmes which were geared towards national development as understood against the then existing values and approaches of development. Failure to break away from Western values and legal structures continued to provide evidence in support of law as if it was an effective weapon of development.

We have already rejected the perceived instrumentalist view of law and the legal process. Our concern remains; how legal education and training like law, can be designed to address the basic social needs? What are the limitations and what alternatives can be introduced to eradicate and/or minimise the barriers and enhance the chances of legal education serving the fundamental human needs of

the society? To answer these and other related questions, we have set ourselves an agenda whose objective is to research and analyse the following issues:

1. The socio-political economy of the BOLESWA countries.
2. The development of legal education in the BOLESWA countries.
3. Case study of Swaziland:
 - (a) legal needs in Swaziland;
 - (b) lawyer provision and utilisation in Swaziland;
4. Education and accreditation of lawyers: meeting the needs.
5. A critique of the methods and functions of legal education for social development - the case for skills development.

In view of the importance of each of these issues in elaborating our basic theme and concerns, specific discussion will appear in separate chapters within the overall thesis, focusing finally on Skills Development for Competent Practice of Law in the BOLESWA countries of Southern Africa as our main alternative to searching for solutions to the problems of development.

CHAPTER 3

THE SOCIO-POLITICAL ECONOMY OF THE BOLESWA COUNTRIES

In the previous chapter, the instrumentalist view of law and lawyers which conceives of law as the fundamental tool for the development process was questioned and found insufficient in analysing current development issues. An approach beyond that view was preferred, namely: the approach by which the analysis of the problems of development should focus on the social context of law designed to address basic human needs. What follows is an examination in the context of the BOLESWA countries seeking to explain those principles and to illustrate the application of those approaches with a view to reinforcing the argument that social structures and the existing allocation of economic wealth and political power coupled with historical and cultural factors play significant roles in development.

3.A. WHY THE BOLESWA COUNTRIES?

The choice of the BOLESWA countries as the focus of our study stems from a series of common denominators which permeate the socio-political economies and legal fabric of these nations. Aspects of such shared factors include:

1. a heritage of the colonial rule with a legal system built upon the Roman-Dutch Common Law, a system that ignored traditional values/law;
2. a structure of the legal profession based upon the western norms and ethos of the profession;
3. an economic structure characterised by a majority of poor people living in the rural areas;
4. a goal for development;
5. a political system struggling to find its footing in the uncertain path of constitutionalism and basic human rights culture; and
6. a desire to make law/lawyers and the legal process more meaningful to development.

The hypothesis one derives from the above common characteristics is that by focusing on these shared goals, policies, experiences, problems and solutions, one may be able to draw some beneficial lessons, a fact recognised by the political leaders like the Vice-President of Botswana, who, while addressing state guests from Swaziland, observed that Botswana shares a common history, culture and socio-political values with Swaziland. He further noted that the political and socio-economic values between the two states have even brought them together under the banners of South Africa Development Co-ordination Conference (SADCC), the Preferential Trade Area (PTA), the Non-Aligned Movement, the Organisation of African Unity (OAU), the Commonwealth and the United Nations Organisation (UNO).⁹⁴ Echoing similar sentiments for the relationship between Swaziland and Lesotho, the then King of Lesotho, King Moshoeshoe III, not only noted that the two states "shared similar institutions" (of the Monarchical system), but that it was his desire that the two countries would adopt a common approach to problems.⁹⁵

The point is even taken further when one considers that the common problems referred to above offer challenges of development which cannot be met if the approach is so narrowly based as to encompass the problems of one state only without considering what takes place elsewhere. In this respect, collaboration in the region, and indeed in the whole of Africa, is absolutely vital. Therefore, as much information as possible is needed on the possible options that can be adopted to further analyse and improve both the efficiency and relevancy of the education system to the socio-economic needs of the people.⁹⁶ With some development taking place in the region of Southern Africa, there is urgent need for research on education of a trans-national nature, if not for sharing information, then at least for comparison with a view to furthering human equality, human dignity and human development in the sub-region of Africa (the BOLESWA countries) and beyond. The relevance of this argument to the present discussion needs no further emphasis as they adequately serve to advance our arguments that the BOLESWA countries of Southern Africa have so much in common as to make them analytically important representatives on issues relating to

⁹⁴ The Times of Swaziland of Thursday July 16, 1992 p. 3.

⁹⁵ The Times of Swaziland of Wednesday, November 1, 1989 p.5.

⁹⁶ The Prime Minister of Swaziland in The Swazi Observer of July 30, 1991.

development. Their history of colonialism, neo-colonialism, imperialism and the struggle against national state and economic power to attain better living standards will be discussed for purposes of better understanding the socio-political economy, an environment within which law/lawyers in these countries have operated en route to development. The important aspects for our analysis will include:

- a. the colonial and neo-colonial legacies;
- b. the current socio-political economy;
- c. managing the struggle for development; and
- d. impact on (legal) education.

The concern for law and the education and training of lawyers for competent practice should be viewed as important, but equally so are the factors that influence their success or failure in achieving the objectives of development. For that reason the present discussion is directed towards identifying and analysing those factors with a view to assessing their impact on legal education generally and acquisition of legal skills in particular within the broader context of development.

3.B THE COLONIAL AND NEO-COLONIAL LEGACIES

3.B.1 The Socio-Legal Structures⁹⁷

The earlier reference to the common heritage the three countries share is clearly illustrated by the legal system which they received from their colonial rulers, first the Boers from South Africa and later the British. This system now consists of what is generally referred to as the Roman-Dutch Common Law as opposed to the "English Common Law" (because of its English origin) which is applied in most parts of the Commonwealth.

Prior to the introduction of the Roman-Dutch system of law, the African nations knew only one form of law which consisted of their social traditions of long standing and which were handed down from former generations. Despite the fact that they were unwritten, they were recognised and had similarities of general application, thus

⁹⁷ For details read Khumalo JAM, The Civil Practice of all Courts for Blacks in Southern Africa (1984) Juta & Co., Cape Town at Chapter 1; Sanders AJM, "Legal Dualism in Lesotho, Botswana and Swaziland, a General Survey" in: Lesotho Law Journal (1985) Vol. 1 p. 47; Crawford JR, "The Legal History and Nature of the Judicial System of Botswana, Lesotho and Swaziland" (1968) 86 South African Law Journal p. 476.

succeeding to maintain social harmony in the community. The chiefs, or kings (where applicable), exercised legislative, judicial and executive powers without being tyrants as they drew advice and assistance from counsellors, heroes and elders in the community.⁹⁸

The position, however, began to change with the arrival of the Dutch in the mid-17th century (around the year 1652). They established a trading post at the Cape of Good Hope peninsula and started the introduction of parts of the Roman-Dutch law system from their home country. This type of law was essentially different from the then existing traditional laws (and even different from the English Common Law) in that it comprised an amalgamation of Roman Law and the customs and practices of the Province of Holland in the Netherlands before the introduction of the Napoleonic Code in the Netherlands and other European countries such as Germany, Italy and Belgium. It has, as its sources, legislation, collections of decisions, and legal opinions of 18th century Dutch jurists like Grotius, Voet, Van der Keesel, Van der Linden and others.

With the beginning of the 19th century when the British took over the territories then occupied by the Dutch (subsequently renamed the High Commission Territories) began the history of the administration of the law in Southern Africa. The first significant landmark in this history was the establishment of the Cape Colony because in the legal history of this Colony (later the Cape Province) is found the sequence of events and legislation leading up to the system of administration that became uniformly applicable throughout the Republic of South Africa and beyond.

The point to note is that before the acquisition of other colonies (the Colony of Transkei, the Transvaal, and the Natal) there was only one system of law governing the persons living within the territorial boundaries of the Colony, namely, the Roman-Dutch law, modified by legislation and this system was referred to as the law of the Colony. All subjects of the Government of the Colony were subject to the law of the Colony; customary law, as such received no recognition and therefore civil suits between Blacks domiciled within the proclaimed borders of the Colony were dealt with according to the law of the Colony - as if the parties were Europeans. In fact, the courts of the Colony which knew and recognised only the law of the Colony, could not, in the absence of

⁹⁸ Kuper and Kuper (Edn.) African Law Adoption and Development (1963), London.

express legislative authority, apply any other system of law. Subsequently, legislative authority found expression in such statutes as the Black Succession Act, No. 18 of 1964. The Transvaal's Law 4 of 1885, the Black Administration Act No. 38 of 1927 and many others whose aim was to extend the Western system of law to the various parts of the Colony. Of greater significance to this study is the situation whereby notwithstanding the fact that the black population in the colonies were, at this point in time, meant to fall within colonial legal jurisdiction, the majority of them, especially those living in communities known as locations, continued to act and live in accordance with their traditional laws and customs.

In the course of the 19th century when these Europeans, especially the Boers, started to move inland in search of fertile lands, they conquered most of Southern Africa and imposed their above system of law which has become the fundamental and general "law of the land". In the BOLESWA countries, this imposition (otherwise also referred to by other writers as "reception") was effected by the introduction of the prevailing law in the Cape to Lesotho, and in Transvaal to Botswana and Swaziland. Local legislations were subsequently enacted to legalise the imposition. The result of this reception was to buttress a divided society. Customary law applied to Africans who lived and worked almost entirely in the subsistence sector of the economy. It was appropriate for that sector, since it responded to the needs of rural societies dominated by low technologies. The received law mainly applied to Europeans, and it provided the appropriate legal framework for developing export-oriented modern extractive industries and plantation farming for purchasing African-grown export crops and for selling imported manufactured goods. The Criminal Law supposedly provided the overall framework for law and order, while a variety of legal compulsions, direct and indirect, drove Africans into European employment.⁹⁹

"Plainly the importation of English law on Africa did not create Africa in England's image. In every way colonial Africa exhibited a special sort of dualism. Impoverished black workers in an export enclave produced raw materials for metropolitan markets".¹⁰⁰

⁹⁹ Seidman RB, Op. Cit. pp. 29 - 30.
¹⁰⁰ Ibid. p. 30.

Thus the received law never seriously touched the lives of the majority of the African societies, and its ideologies, assumptions and rationalisations had little relevance to and impact on them. It remained the law of the rich and powerful. Similarly, in so far as the legal profession and legal education are concerned, writers are generally agreed that the colonial masters had a deep-seated fear of lawyers. Various reasons have been advanced for this state of affairs. For example, it has been observed by Professor Ghai Yash that during this era nationalist movements in India and elsewhere had been led by lawyers. The effect on the British was that they systematically discouraged the training of indigenous lawyers for fear of experiencing a similar challenge from them. Besides, on the basis of the same fear, the British bureaucrats never wanted the interference of lawyers in their administration and, therefore, not only did they (the British) exclude them, but frustrated their further education.¹⁰¹ The inevitable result was that when institutions of higher education came to be established in Africa after the Second World War, law was conspicuously absent from the subjects offered at these institutions.

The primary method of entry into the legal profession was through qualifications in England as solicitors and barristers, but the colonial authorities refused to provide scholarships for the study of law. The few who managed to go to Britain for some training in law were those from rich families. But even then, while in Britain, these indigenous Africans only qualified from the Inns of Court, studying courses irrelevant to African issues. It is within this type of setting that most newly independent African states found themselves, and so it is not surprising that perhaps until recently most African legal systems, the legal profession and legal education laid more emphasis on their colonial origins and made colonial jurisprudence their ultimate authority even in cases where the aspirations of the majority of the people dictated otherwise. The question was how to get away from such a legacy.

Southern African states had a slightly peculiar position in view of their proximity to South Africa which, as earlier stated, was not considered a developing country. The BOLESWA countries had no choice but "to survive uneasily under the shadow of a

¹⁰¹ Ghai Yash, "Law, Development and Scholarship" in: The Modern Law Review (1987) Vol. 10 No. 6 p. 751.

mighty giant".¹⁰² The impact of this proximity was felt when the Boers in South Africa, while in search for farmlands and mines, literally "colonised" these countries until they (the BOLESWA countries) sought British protection from successive waves of Boer encroachment on their territory. Their subsequently becoming British Protectorates (British colony in the case of Lesotho) did not, however, result in their rejection of the Roman-Dutch common law. To that extent the legacy of the South African colonisers has survived to this day in the form of Roman-Dutch common law and, as we shall discuss, in the form of their legal education system.

3.B.2 The Socio-Economic Base

The socio-economic structures created during the colonial era were no less problematic. They required most new African states to devise systematic strategies for implementing new programmes for the social and economic up-lifting of the African societies. Those structures were characterised by a clearly divided society: the impoverished black workers living in the rural areas and the expatriates (with a few Africans) managing both the private and public sectors and living luxuriously in the urban centres. Colonialism even destroyed the traditional economies by the introduction of a cash economy. As argued by Seidman RB, the multiple dependencies marked the colonial economy.¹⁰³ For example, the rural area came to depend on the export sector; the economy surpluses from African production enterprise and the sale of imported goods instead of being vested in Africa, were shipped overseas to enrich investors in their home countries. The banks which managed the economy invested their funds in England or France and land-use patterns matched with the dual economy, i.e. most Africans lived in the countryside, but even then where the white settlers also occupied the countryside, they were sharply separated physically from the blacks. In the urban areas the colonial masters enforced even sharper divisions between whites and blacks, e.g. every city had its exclusively white residential areas which were out of bounds to Africans; clubs, schools and social organisations were segregated; and "Whites and blacks rubbed elbows in productive enterprises, and as a master and

¹⁰² Kumar U, "Legal Scholarship in Lesotho", Op. Cit. p. 70.

¹⁰³ Seidman RB, Op. Cit. pp. 30 - 31.

servant in homes and clubs, but lived a world apart".¹⁰⁴ Thus socially and economically the split between blacks and whites could not have been more complete.

To crown it all, the government of these two communities also differed. The colonial administration governed the export enclaves directly, but nominally left blacks in the rural areas to their traditional institutions. The principle of "indirect rule" was applied whereby the colonial masters only had indirect control over black affairs, leaving the traditional authority to continue to rule as before except for general maintenance of law and order and collection of taxes which were the rights of the colonial administration.

It is against this background that one has to understand the predicaments of the post-colonial African governments which took over the reins of power with full accountability to the governed. The major problem, however, was that while the new governments inherited the colonial structures, they had to quickly devise strategies to satisfy those to whom they had promised a complete change. To the African people, there was high expectation that independence would be a vehicle through which their suffering would be alleviated and these expectations had to be met. Thus emotional slogans like "nation building", "economic development", "eradication of ignorance, poverty and disease" characterised the manifestos of newly independent governments. Equally, law was viewed as a central instrument in implementing those attractive slogans which eventually found themselves entrenched in the early National Development Plans of most post-colonial government. Lawyers too were, therefore, viewed as active and responsible participants in the development plans. The concerns over the role of law, the legal profession and legal education during the colonial era were reflective of these attitudes and they continued to be guiding policies for the introduction of some form of a new legal order through enactment of new legislation and establishing legal institutions and structures in the subsequent years, but based on the received Western norms.

3.B.3 The Neo-Colonial Attitudes and Strategies

The attainment of independence by most African countries was a culmination and successful crowning of centuries of old anti-colonial struggles by the African

¹⁰⁴ Ibid.

peoples and the recognition of their rights to self-determination. However, despite this political victory the socio-economic and legal order that were imposed on most of the African countries remained in place. The point was emphasised thus: Many aspects of African society continued to resemble the colonial situation. A small handful lived very well in the urban centres, mainly employed in senior government posts or by firms that still dominated the economy. The majority of the population still lived in poverty in the countryside. Some governments notably increased social services ... but the basic structures of the colonial situation remained: society and economy bifurcated between export enclave and immiserated hinterland, subject to the vagaries of world markets and the interests of multi-national corporations.¹⁰⁵

It is not surprising, therefore, that the post-colonial African states found themselves trapped with these authoritarian structures in the image of the West and these foreign institutions posed all possible problems for the development of these countries.¹⁰⁶ However, the new political orders introduced by the waves of independence, professing as they did, accountability and development processes, were meant to meet the new challenges of nationhood. The underlying assumption of the new political leaders was that law and lawyers were important to development. Statesmen and scholars alike were agreed on the importance of the lawyers' roles not only in the establishment of 'The Rule of Law', but also in the use of law as an instrument of development.¹⁰⁷ Attitudes and strategies started to shift towards concerns over basic human needs. Thus, even in the sphere of law, legal profession and legal education concerns become increasingly centred on how social gaps could be filled by expanding the base of the legal process.¹⁰⁸

Lawyers may have been seen as a nuisance during colonialism but were regarded as important intermediaries after independence; they were regarded as custodians of the rule of law and other civilised values. When institutions of legal

¹⁰⁵ Seidman RB, Op. Cit. pp. 37 - 38.

¹⁰⁶ Similar arguments have recently been advanced by Skweyiya Z, in a Paper on: "The Practical Orientation of Legal Education During Transition to Democracy: The Case of Namibia", presented to the Workshop in Windhoek, pp. 1 - 3.

¹⁰⁷ Dias CJ, et al, Lawyers in the Third World: Comparative and Developmental Perspectives Op. Cit. p. 5. Read also Friedman W, "The Role of Law and the Function of Lawyers in Developing Countries" 17 Vanderbilt Law and Development (1963) p. 181.

¹⁰⁸ Paul JCN, "Law and Development into the 1990s: The Need to Impose Accountability Through International Law" (1990) Unpublished Conference Paper pp. 16-21.

education came to be established, the dominant view of the role of the lawyer held by those advising on the matter was that of social engineering rather than technician which implied a broader rather than a professional oriented approach to legal education, an emphasis on legal policies rather than doctrines. The task of nation building and economic development that seemed attendant on independence were seen as a challenge to lawyers to create new institutions, fashion an integrated legal system, establish schemes of rural credit, service foreign investment, manage diplomacy, etc. The arrival of legal education at the end of colonialism meant that other models than the English were able to influence its assumptions and forms.¹⁰⁹

But, as we are yet to discover in this study, these apparently positive attitudes and strategies were more aspirational than real as their implementation depended on key socio-political economy on the ground.

3.C THE CURRENT SOCIO-POLITICAL ECONOMY

3.C.1 Physical Geography

The BOLESWA countries consist of two kingdoms, namely of Lesotho and Swaziland and one republic, that of Botswana. The Kingdom of Swaziland, one of the landlocked countries of Africa, is located in the south-eastern part of Africa. Bound to the north, south, west and south-east by the Republic of South Africa, and to the east by the Republic of Mozambique, Swaziland spreads within an area of 17,364 square kilometres. The country is endowed with beautiful scenery and a pleasant climate, contributing to the theory that Swaziland is the "Switzerland of Africa". The size, beautiful scenery and pleasant climate of the Kingdom of Swaziland contrast sharply with the geographical features of the other BOLESWA countries, Botswana and the Kingdom of Lesotho. Botswana, also a landlocked country like Lesotho and Swaziland, is located in the heart of the sub-continent of Southern Africa and is bordered in the west and north by Namibia, Zimbabwe to the north-east and the Republic of South Africa to the south and south-east.¹¹⁰ As for Lesotho, it is enclosed on all sides by the Republic of South Africa. In terms of size, Lesotho is bigger than Swaziland while

¹⁰⁹ Ghai YP, "Law, Development and African Scholarship" Op. Cit. pp. 573-4.

¹¹⁰ Hutchison M, "Botswana - Physical and Social Geography" in: Africa South of the Sahara 1991, 20th Edition, England, Europe Publications Ltd. p. 268.

Botswana is the biggest of the three. Lesotho covers 30 335 square kilometres while Botswana occupies 582 000 square kilometres. The two countries extend over part of the South African plateau with Lesotho situated at the highest part of the Drakensberg escarpment on the eastern rim of the plateau and Botswana lies on the downwarped Kalahari Basin of the same plateau.

As regards the physical features of the two, unlike Swaziland, Lesotho is very mountainous with elevations sometimes more than 3 350 metres above sea level, especially along the eastern border. Botswana, on the other hand, has an average altitude of 900 metres above sea level and has a gentle undulating group of hills to flat surfaces, making surface drainage almost impossible. The Kalahari Desert, which dominates the greater part of the country, is responsible for low annual rainfall resulting in a shortage of water. The limitations imposed by the rainfall make much of the country more suitable for rearing livestock, especially cattle.

3.C.2 Population

The population studies in each of the BOLESWA countries have revealed important issues which are relevant to this study. For example, in Swaziland the first people to form the nation were known as the Ngami people who entered Swaziland from Maputoland under the chieftainship of Dlamini I around the year 1600. They migrated up the banks of Ponnola River and settled in the hills of Swaziland where they found fertile alluvial soil, hills free of tsetse flies, lowlands teeming with game. Dlamini I, of the Dlamini Royal Family, and his Swazi people flourished in the eastern parts of the kingdom and his successors gradually absorbed the neighbouring tribes, transforming the chieftainship into a monarchy and turning the conquered lands into a strong nation with extraordinary ethnic and cultural homogeneity. The tribes eventually became known as "Swazis" or "the people of Mswati" named after King Mswati I - thus the rise of a culturally strong society.

The census in 1986 put the country's population at 700 000, but at the given rate of 3,2%, based on the 1976 - 1986 census results, it is expected that the population will reach 1 000 000 by the end of the century. The current birth rate of 3,2% is considered to be one of the highest in the world.

Rapid population growth is not peculiar to Swaziland alone. The August 1981 census places the Botswana population at 941 207, while in 1971 it was at 547 094. By mid-1988 it was estimated to have been at 1 211 816.¹¹¹ This is composed of eight Botswana tribes, of which seven and most of the Europeans and Asians are concentrated in the eastern part of the country. In Lesotho, the population in 1989 was 1 700 000 most of whom are Basotho, including some Europeans and Asians of whom 95% reside in the rural areas.¹¹²

One common characteristic relating to population in the BOLESWA countries is the migration of the people to seek paid employment in South Africa. In Lesotho, it was estimated in 1987 that about 45% of the adult male labour force were employed in South Africa, mainly in the mines; in Botswana, a substantial number, currently estimated at 50 000, in mining; and in Swaziland the position is not any different. However, the important point to note about this brief population analysis is that although the economies of the three countries depend heavily on the remitted earnings of the migrant labourers, and although their absence helps to ease pressure on the resources, nevertheless the result of the rapid population growth, (and especially as a large proportion of the said population is less than 15 years of age) has grave social, economic, and political implications for these countries especially in terms of retarded economic growth, unemployment and insufficient systems for rendering critical services like health, education, etc.

3.C.3 The Political Economy

Each of the BOLESWA countries achieved independence at different times from the then colonial master, Britain. For Lesotho it was in April of 1964; Botswana's was in September of 1966 and Swaziland's in September 1968. Both Botswana and Swaziland had been protectorates, Britain having proclaimed the then Bechuanaland Protectorate in 1885 and Swaziland in 1902. Basutholand had been a British colony since 1884. All three formed constituent parts of high commissioned territories administered by the High Commissioner resident in Cape Town until the period of their respective declaration of

¹¹¹ Hutchison M, "Botswana: Physical and Social Geography" Op. Cit. p. 268.
¹¹² Ibid p. 595.

independence. Both before and after independence the political economy of each country has undergone important landmarks, providing an interesting and relevant comparative analysis.

As for Swaziland, at the time of independence, there was already established a monarchical system with King Sobhusa II who ruled till 1982 when he died. The current monarchy, King Mswati III was crowned in April 1986 in succession to his father, King Sobhusa II. In 1973 the independence constitution establishing the western style of government was abrogated by the King as being unsuitable for the culture and traditions of Swaziland. The King's Proclamation of that year gave absolute control of state affairs to the King, who exercised it through a Prime Minister and a cabinet of ministers, all of whom were directly responsible to the King.¹¹³

In 1978, a parliament comprising a Lower House of Assembly and an Upper Section, known as the Senate, was established.¹¹⁴ The membership of this Parliament was elected through the traditional system of voting referred to as "Tinkhundla" and from 1978 to date, this style of government continues to address the problems and developments of the kingdom with His Majesty continuing to enjoy sole residual executive and legislative powers in the form of decrees, royal orders and commands while an independent judiciary continues to dispense justice in the courts of law.¹¹⁵ However, in 1993 Parliament passed legislation abolishing the "Tinkhundla" system and introduced for the first time a system of direct election but with no political parties allowed to participate in it. The irony was that people who had been influenced and pressurised by the opposition groups did not take advantage of the new system. They rather demanded the restoration of full democracy, including participation through multi-party politics which was, and still is, not permitted under the effective Proclamation of 1973.

¹¹³ See Proclamation by His Majesty King Sobhusa II, dated 12 April 1973, Vol. 2 of the statutes of Swaziland, 1976.

¹¹⁴ Refer to The Establishment of the Parliament of Swaziland, 1978; Kings Order-in-Council No. 23 of 1973 in Vol. 2 of the Statutes of Swaziland, 1976.

¹¹⁵ Details discussing this system can be found in an unpublished Paper entitled "The Legal Profession in Swaziland" by Dr Baloro John, University of Swaziland, 1989. It should be noted that the stable monarchical system of government has all along been supported by a strong economy which too had its span of development.

Initially, the economic activity in the country was very much limited to agriculture. It was only after the Second World War that a big economic boom took place. The post 1945 era saw the mushrooming of agro-industries like forestry, sugar and mining becoming the most important areas of economic activities during the early days of Swaziland's industrialisation. Today, the principal commodities of economic importance include such agricultural items as sugar, maize, cotton, citrus fruits, pineapples, vegetables and rice of which sugar, cotton, citrus fruits and pulp are exported. The mineral exports include asbestos (mined at Bulembu), coal (mined at Mpaka and Lobuka), anthracite (mined at Mhlume) and there are current efforts of exploration and exploitation of gold in Piggs Peak in the northern part of the country. To many economists Swaziland's extremely open economy has led to an export-oriented growth resulting in unevenness of development and disturbing trends towards monoculture; and that her economic decline also owes much to the pattern of capital penetration and accumulation with the country's location, ensuring a continuing and deepening dependence on South Africa.¹¹⁶

The situation in Lesotho is slightly different in that this small landlocked country was once described economically as one of the world's least developed countries. At the time Basutholand was declared a British colony in 1884, the Boers had already settled on most of the fertile areas of the country, and after assumption of responsibility by the British, prohibition was placed on the acquisition of land in Basutholand by the whites and this has continued to the present.¹¹⁷ Today Lesotho enjoys relative peace after the restoration of political activities under a constitutional Monarchy introduced in 1994. Her resources have been listed as "people, water and scenery". Of the economically active population, about one-quarter are employed as migrant workers in South Africa, reflecting a continuing lack of opportunities in the domestic formal sector, despite government efforts to develop manufacturing and services, and severe pressure on agricultural land which continues to support more than 80% of the resident labour force. As for agriculture, although only about 10% of the total land area is suitable for arable cultivation, it is both the primary occupation for the majority of the Basotho (81%

¹¹⁶ For details read Matsebula MS, "Development Goals in Swaziland: Strategies, Achievements and Policy Implications" (1992) Conference paper.

¹¹⁷ The Establishment of Parliament Act of 1993.

of the labour force in 1988) and the single largest contributor to GDP. Livestock and milk production are being promoted.

In 1988, according to the estimates of the World Bank, Lesotho's gross national product (GNP) was US \$690 million which is equivalent to \$410 per head. During the period 1980-1988, it was estimated that the GNP increased, in real terms, at an average annual rate of 1,9% although GNP per capita declined by 0,7% per year. Currently the government is implementing a programme of food security based on the development of small scale irrigated agricultural schemes and the general improvement of rural water supplies.

Botswana, on the other hand, enjoys a better economic standing than her two partner states of the BOLESWA countries, although at independence in 1966 she, like Lesotho and Swaziland, was among the 20 poorest countries in the world with minimal infrastructural development and predominantly subsistence economy. However, by the early 1980s Botswana's economic performance was exceeding that of all other non-petroleum producing countries in Africa. Real GNP rose by an annual average of over 11% in the previous 23 years to 1989/90, when GDP per head reached an estimated 4 500 Pula compared with 689 Pula in 1977/78 financial year.¹¹⁸ This exceptional record was partly due to the rapid expansion of the beef industry; but the predominant cause was the discovery and development of valuable mineral resources, especially diamonds. Apart from transforming Botswana's export base, the development of the mineral sector has also helped to stimulate and finance the development of the infrastructure, the manufacturing sector and the social services.¹¹⁹ Equally important to its economic development are its democracy entrenched firmly in her independence Constitution and political stability.

The poor physical geography of Botswana consisting largely of the desert or semi-desert parts and a small stretch of savannah area with highly erratic rainfall and relatively poor soil, has made the country more suited for grazing than arable production. As a result of this, agriculture remains dominated by the livestock sector generally and the cattle industry in particular, which today contributes over 80% of

¹¹⁸ For details read "Botswana's Economy" by Brown R, in Africa South of the Sahara 1991 Op. Cit. p. 272.

¹¹⁹ Ibid.

agricultural GDP. It is, however, in the government's plan to encourage the development of the manufacturing and tourism sectors in order to stimulate future economic growth.

3.D MANAGING THE STRUGGLE FOR DEVELOPMENT

The complexities of development as outlined in the above analysis of the socio-political economy of the BOLESWA countries necessitate identification of specific aspects against which to measure the degree of development. In the first place history bears witness to the fact that the BOLESWA countries experienced the administration of both the Dutch (Boers) and especially the English, whose mission of evangelisation and bringing enlightenment to the dark continent resulted in total denial of African values. The coming of independence led to a crisis as most citizens saw this as a vehicle through which their plight would be alleviated. On the contrary, in the process of handing over power, the colonialists succeeded in perpetuating and entrenching their western culture, thus creating more problems for the emerging states. The social conflicts characterised by such dualism like the "haves" and "have nots"; the governed and governors; the modernists and traditionalists - all of which continued to pose serious challenges of development. Whether present governments in these countries have satisfactorily answered these challenges remains doubtful, considering the current social demands of the majority of citizens, especially those in the rural areas whose basic needs have to be addressed.

Politically, each of the BOLESWA countries emerged at independence with western style parliamentary systems of governance but soon had to take different political paths: Botswana remaining consistently a multi-party state, while Swaziland and Lesotho continue to toe the lines of monarchical systems. The struggle between traditional forces and the modern western values has characterised the political and constitutional developments especially in the latter two countries to the present day, thus presenting serious challenges to democracy, constitutionalism and basic human rights.

Economically, while the colonial administration in the BOLESWA countries maintained a divided society in the form of a rural set-up usually stricken by and

overridden with poverty and the rich urban areas usually out of bounds to Africans, the legacy that followed even after independence continued to entrench such a split. While the resources in each of the countries differed the dependency on South Africa for economic support cannot be avoided mainly because of the geographical location (all of them being landlocked) and more so as a result of a rather unproductive physical features. These factors impact on the economy as evidenced by problems of unemployment, poverty, extensive traditional subsistence sectors, lack of housing and other essentials of life.

Not only do the above socio-political and economic factors pose serious challenges to development, they also influence and to a large extent limit the operation of law. For example the system of law under colonialism was not that of equality and freedom, but of discrimination, coercion and repression. Most citizens had very little understanding of the law, its concepts and procedures which in any case related uncomfortably with their customs and ways. To make it worse, during independence, the colonialists also succeeded in perpetuating their western-style constitutions, bureaucracies, legal systems and ideologies. They passed on structures that soon placed law in problematic situations as witnessed in Swaziland where the independence constitution had to be abolished by the same Monarchy provided for in that constitution.

The coming of independence further led to a crisis of expectation as most of the citizens who saw independence as a means for change soon met with frustration. Neither the law nor state power were any longer perceived as facilitators of development and what made it even more disappointing was the lack of interest and machinery to decolonise the law so as to render it more development oriented.

3.E IMPACT ON (LEGAL) EDUCATION

Much as the governments of the newly independent states of Africa were committed to maximising indigenous human resources and ensuring an adequate supply of suitably qualified personnel for development through their manpower development policies including university education, young people coming out of the education system continued to encounter difficulty in finding jobs. The explanation given in the 1991/92-1993/94 Swaziland Development Plan is that this was partly due to

the structural constraints facing the economy and the effects of the world-wide recession which contributed to a slackening of economic development and a stagnation in income generating activities and job creation in the modern sector.¹²⁰ The problem is much greater than is reflected in the economic explanation. The system of education was a major contributor to the difficulty of the youth getting employment. It did not afford the majority of school leavers, including university graduates, the opportunity to acquire the relevant skills demanded by the labour market. As government and the private sector continued since independence to expand in numbers and sophistication, the shortage of personnel with the required skills continued to be identified as a critical constraint to sustainable development. It thus became obvious that the educational curricula at the various levels of the system were inadequate in catering for the economic and manpower needs of society.¹²¹

In some sectors the shortages reached such alarming proportions as to necessitate recruitment of personnel overseas. The appointment of expatriate judges and magistrates in Swaziland is a case in point. But this was a more problematic and costly method of curing the symptoms of the disease instead of eradicating the root cause. In our view the real concern is the fact that at present the BOLESWA countries lack the mechanism or machinery to ensure continuous links between the education system and the employment market, so that the information on the demand for manpower and opportunities for employment are fed back into the education system. The education of lawyers forms part of this broader problem. Any constraints placed on educational systems also bear serious repercussion on the contribution of lawyers and considering the motivations discussed above the conclusion one draws is that the role of law/lawyers including their institutions and system of education in the BOLESWA countries has remained problematic, given the interface between the socio-political and economic forces within the process of progressive and sustainable development.

¹²⁰ The Development Plan 1991/92-1993/94 of Swaziland. Read especially paragraph 5.4 on Education and Training.

¹²¹ Ibid.

CHAPTER 4

LAW PROGRAMMES OF UNIVERSITIES IN THE BOLESWA COUNTRIES

In the previous chapter the role of law, lawyers and legal education was examined and discussed within the general context of the socio-political economy of the BOLESWA countries. The emerging specific problems relating to social structures with their general impact on legal processes and legal education in promoting the development needs of the society were raised. The next discussion aims at analysing and establishing those factors that have directly influenced legal education in development.

4.A THE BASIS FOR ANALYSIS

The literature on legal education, discussing its different aspects in the BOLESWA countries, has continued to grow, though in a limited scope, as evidenced by our literature review.¹²² What is really lacking, as earlier observed, is a serious concern for and a concerted effort in analysing issues of skills development for lawyers, an approach which requires investigating the legal needs of society and how, by acquiring the appropriate skills, lawyers can efficiently and competently meet those needs within the general goals of social development.¹²³

While acknowledging conflicting viewpoints in the debate on legal education in the sub-region of Southern Africa, and addressing himself specifically on the issue of legal needs, Professor Gold N argued that there are areas of common ground over which it is easy to agree. He outlined the following as those areas, namely:¹²⁴

1. that as society develops, there will always be need for more lawyers because of their important role in society;

¹²² See the Literature Review appended as ANNEXURE II.

¹²³ Refer to our research objectives in Chapter 1.

¹²⁴ Gold N, "Pursuing Excellence in Law: Comments on Professional Legal Education and Training in Zimbabwe" (1986) University of Zimbabwe Faculty of Law (Unpublished) p. 1.

2. that those educated and trained in law must be able and competent to serve in a range of capacities as necessitated by the development needs;
3. that whatever the range of the service, the members of the legal profession must be adequately trained to serve the society's interests - thus the need for those lawyers to be highly equipped for that service;
4. that those competent practitioners are needed sooner than later because of the current pace of development currently taking place - hence the importance of the length of study and the funds to support that study; and
5. that the development of an improved system of legal education and training for meeting the present and future needs of society depend upon the goodwill and co-operation of all segments of the legal profession, the government and the society at large.

Where the above arguments fall short, thus making it difficult to agree totally with Gold N, is his view about the importance of the role of lawyers which appear "instrumentalist" in approach. Such a statement that "there will always be a need for lawyers" is questionable on the grounds of performance of their role in society who often perceive of lawyers as a group of uncaring liars whose main interest is to dispossess their clients of as much money as possible. There are those who consider lawyers as conservative employees of those hungry for property and power in society, thus rendering them insignificant to development. The unpopular image of lawyers is one area we would wish to establish in the BOLESWA countries before we can fully agree with the Professor. Armed with that kind of reservation and caution, we would agree with the professor only insofar as members of the legal profession have a role in social change depending on the aspirations of and the socio-political economy operating within the society. We also agree that to serve those social interests competently, lawyers must be adequately trained, thus the need for their being equipped with appropriate skills for that service. What is at issue for the BOLESWA countries is, however, whether the system of legal education and training exists to provide the required knowledge, skills and attitudes to meet the present and future needs of society. To analyse this issue and establish limitations, if any, it is important to first examine and

explain the development of law programmes in these countries. In achieving that objective, the discussion will focus on four main areas:

- (a) Joint-venture pursuits under a Common University Programme.
- (b) Separate national developments and the emergence of a model for the region.
- (c) Failure to meet development needs: Issues of general concern.

4.B. THE GENESIS TO THE LAW PROGRAMMES

4.B.1 Pius XII University College¹²⁵

In 1945 the Roman Catholic Hierarchy in Southern Africa founded a University College (given the name of Pius XII University College) at Roma in the then British colony of Basutoland. The initial aim of establishing this college was to provide higher education opportunities for the black population of the region. While it relied for its administration on the Order of the Oblates of Mary Immaculate (a religious body), it was affiliated to the University of South Africa (UNISA) for academic accreditation. The significance of the foundation of the College became even more appreciated in 1952 when the then South African Government placed a serious restriction upon University entry of foreign black students. In 1964, a time when the administration of the College was experiencing acute financial problems, the three High Commission Territories of Basutoland, Bechuanaland and Swaziland took over the College from the Order of Oblates of Mary Immaculate and reconstituted it as the University of Basutoland, Bechuanaland and Swaziland (UBBS). Representatives of the governments of the three Territories were accordingly appointed as members of the Governing Council of the College and as members of Senate. It was these organs of the University that established the first law programmes for the three countries.¹²⁶ The first basis for the establishment was to encourage localisation since the policy of the colonial government

¹²⁵ For details read: "Historical Notes" in the 1988/89 Calendar of the National University of Lesotho. Read also: Magagula CM, The Multi-National University in African: An Analysis of the Development and Demise of the University of Botswana, Lesotho and Swaziland, 1978 Ph.D. Thesis UNISWA Library.

¹²⁶ For the establishment of the Department of Law read: Kumar U, "Legal Scholarship in Lesotho" in Legal Scholarship in Africa (1988) Guadagni M, (Ed).

up until then was to permit limited legal education and training for blacks to be pursued overseas, especially in Britain¹²⁷.

The second was Professor Gower's Report, which was submitted on 9 December 1964, which examined several important areas and recommended three levels of legal education at UBBS:¹²⁸ the sub-degree programme leading to the award of Certificate or Diploma in Law; the law programme leading to the award of the Bachelor of Laws (LL.B.); and the para-professional training programme. In addition to the recommendation on the levels of legal education, the Professor also examined and recommended on (a) the organisation of the legal profession, taking into account its present position then, problems and future directions; (b) the number of lawyers required, how and where to train them; (c) the course content and qualification of lawyers; (d) legal training below degree level; and (e) miscellaneous matters like staffing, library, the legal system, etc.¹²⁹ The significance of Gower's report does not remain at the level of a foundation for legal education in the BOLESWA countries, but rises to the level of recommendations quite unique in Southern Africa at that point in time because of the focus on legal education for developing countries.

4.B.2 Introduction of Law Programmes

4.B.2(a) The Certificate / Diploma Programme

In 1968 the Law Department started to run a two-year correspondence course leading to the award of a Certificate in Law. In starting this programme, the Department was reacting to the needs of the society for personnel with such qualifications. Previously only a few of such people were being trained by the University of South Africa through correspondence courses and those who qualified were being awarded Diplomas in Law.

The certificate programme was intended to meet the needs of persons who acquire some knowledge of basic legal principles but did not seek to qualify as legal practitioners. It was specifically organised for part-time students who wished to study by

¹²⁷ See Ghai Y, "Law Development and African Scholarship" in: 50 Modern Law Review Op. Cit. pp. 751 - 2.

¹²⁸ Refer to the Report for details.

¹²⁹ Gower LCB, Legal Training in the High Commission Territories dated 9 December 1964 Op. Cit.

correspondence and the minimum entrance qualification was Junior Leaving Certificate or its equivalent.¹³⁰ This arrangement has to be understood against the background of Professor Gower's recommendation of introducing the Programme as part of the general scheme to restructure and adapt university legal education to suit the needs of the wider community and the ever changing times and it was based on the prevailing notion, at this point in time, that law and legal institutions ought to be conceived as tools for almost every aspect of national development. Interest in the programme was expressed both formally and informally by state institutions like the judiciary and other aspects of the public service. The programme stressed the kinds of contribution which a vigorous legal institution of the day could make to development as it focused on the importance of law training for para-professionals and middle-level public servants. Above all it underlined the fact that broadly trained law manpower could be used in a wide variety of crucial development spheres.

In view of the above nature of the groups and their needs while performing specific duties in society and taking into account lack of staff and other resources, the university designed a programme which provided for a core of subjects like Elements of Roman-Dutch law, Criminal Law and Constitutional Law in the first year; and Evidence, Procedure, Mercantile Law and Customary Law in the second year.

Another important aspect of this training programme was that the certificates awarded were recognised for incremental advance in the civil service for example, in Swaziland and as suitable qualifications for local government officials in Botswana. The graduates also exercised judicial functions. According to the available records, enrolment for the programme for 1968-1971 were 12, 24 and 24 respectively.¹³¹ In 1975, however, the break-up of UBLS also witnessed the demise of the programme, at least in as far as Swaziland and Lesotho were concerned. Botswana re-introduced the programme in 1987.

¹³⁰ The Paul/Twining Report. Op. Cit. p. 25.

¹³¹ Ibid.

4.B.2(b) The Law Degree Programme

One of Professor Gower's strongest recommendations related to how and where lawyers were to be trained. In view of the impact of his arguments on the establishment of the first law programme in the BOLESWA countries, we shall first identify them since they justify the establishment of the system to promote the legal needs at that time.

Professor Gower's arguments were basically the following:

- (i) that within a predictable future, each of the BOLESWA countries would not be able to support more than ten legal practitioners in full-time private practice because most of the legal work consisted of litigation (civil and criminal) and this was not likely to change until there was industrial and commercial development;¹³²
- (ii) that even in government, about an equal number would be required, though there would be a growing number of administrative posts in the public service for which legal training would be the ideal qualification; and
- (iii) that, therefore, neither all of the BOLESWA countries nor each one of them would in the near future need lawyers in sufficient quantity to make a full scheme of local training an economic proportion.

In essence Professor Gower preferred the training of a small group of lawyers because of the limited demand for lawyers in the BOLESWA countries at that time. Notwithstanding this argument, he still admitted that more indigenous lawyers would soon be needed and many more were likely to be needed urgently after independence. He was against the sending of UBBS students to English or other non-Roman-Dutch law universities for legal training. He thought the legal training in those universities would have no direct relevance to conditions prevailing in their countries. The University of Edinburgh, Scotland, was eventually chosen.

In view of the above considerations, University of Basutoland Bechuanaland and Swaziland designed a law programme that was meant to promote the needs of the BOLESWA countries for that period. The programme of legal education during 1964

¹³² He even gave the example that Conveyancing which forms the bread and butter work of attorneys in most other countries was negligible in the BOLESWA countries because of the system of land tenure that did not allow for alienation of land.

and 1975, at the University of Botswana, Lesotho and Swaziland consisted of a five year study divided into three parts, namely, part one consisted of two years of study at Roma, part two consisted of a further two year period of study at the University of Edinburgh by special arrangement with the Faculty of Law of the University, and part three consisted of one final year at Roma. The details of the curriculum recommended by Gower LCB, and thereafter applied, is reproduced in ANNEXURE I. For the purposes of this study what is important to note is the "Pre-Admission Course" which was the fifth year of the training at Roma. The basis for the curriculum of this aspect of the training was the recommendation of practical training within the LL.B.. programme, a vision that had not even been conceived in the legal education systems of many jurisdictions including universities in England. Other comparable aspects of the recommendation as contrasted with a later Report are reflected in ANNEXURE IV.¹³³

Already at this stage of the development of legal education in the three countries, a clear distinction was being made between academic and practical training as evidenced by the curriculum. This distinction arose because by combining resources for law training and development administration and maximising their use through multi-disciplinary programmes, the university was able to provide more broadly trained lawyers and law-trained development administrators who were thus better equipped to respond to a variety of important manpower needs. Questions of manpower requirements for the private sector and for the public sector therefore contributed towards obtaining a law degree for purposes of qualification for admission to practice and for purposes of obtaining administrative jobs in government. As observed by Gower LCB, above, for the former no more training of practical nature was required (their education remained academic). While for the latter, further courses of essentially practical training for a further term was necessary (giving their legal education the practical aspect).

¹³³ The significance of this ANNEXURE is its illustration of the advanced vision of scholars like Professors Gower LCB, Twining WL and Paul JCN for a suitable law programme for lawyers in developing countries. Subsequent educators failed to follow their footsteps as subsequently discussed.

4.B.2(c) Legal Education for Non-Lawyers at the Undergraduate Level

On the recommendations of the Gower Report, legal instructions to non-lawyers at degree level were offered to B.A. (Admin) and B.A. (Econ.) students. The courses offered were:

- (i) The Law of Contract and Sales.
- (ii) Administrative and Constitutional Law.
- (iii) Company and Partnership Law.
- (iv) Industrial Relations Law.

The main thrust of the entire system of legal education was the training of lawyers who were expected to serve the emerging states and replace the expatriates of the colonial period. The basis remained the Gower Report of 1964.

4.B.3 JOINT-VENTURE PURSUITS UNDER A COMMON UNIVERSITY PROGRAMME

In the meantime, in 1964 Basutoland became independent, followed almost soon after by the independence of Bechuanaland in 1966. The result was a change in the university name to the University of Botswana, Lesotho and Swaziland, reflecting the new names acquired by the two independent states. Swaziland never changed her name even after receiving the Instruments of Independence in September 1968.

The pursuit of legal education and training masterminded by Professor Gower LCB was not affected by the political developments of the early 1960s. The new University of Botswana, Lesotho and Swaziland (UBLS) continued to implement the law programmes which provided the academic, professional/vocational and the practical training stages, thus laying the foundation of the system of legal education which prepared law-trained persons for rendering legal services to the citizens of the three partner states as they struggled with the problems of new nationhood. As already discussed, it was "academic" because those graduates who intended joining the administrative posts in government did not require further training in practical courses. It was "practical" because the graduates who aspired to join the private sector as private practitioners were required to take practical training courses like Conveyancing, Legal Drafting, etc., during a separate given term over and above their "academic" education.

It was also "professional/vocational" because the nature of the education related to law as a profession or a vocation to which a law graduate had to be admitted after the fulfilment of the professional requirements which extended beyond graduation, i.e. further training as a pupil to become an advocate or articled clerk to become an attorney. As to whether this system of education really and sufficiently prepare law-trained persons for competent practice of law is a question we have answered in the negative, mainly because the system lacked adequate skills development programmes. The point, however, remains that it laid the foundation (underlining for emphasis) of the system of legal education which is the subject matter of this study.

It should also be noted that the three levels of legal education and training were introduced with the aim of satisfying the manpower requirements for the period immediately following the attainment of independence namely: academic stage (at Roma and Edinburgh), practical stage (at Roma), and articles (in Swaziland). They were tailored to suit the developmental needs of the society at the material time; they were designed on the premises that the lawyer had to be much more than just a competent legal technician. He/she had to be more; for, with the coming of independence, the manifold problems that beset development countries required lawyers to play a wider and more vital role in these developments since upon them was expected to fall a major share of the work of putting into practice the principles and ideas of their colleagues in the fields of politics, economics and science and ensuring that the resulting and system worked fairly and efficiently. Legal education then had to take into account these aspirations.

However, early in 1971, Professors Paul JCN then of Rutgers Law School and Twining WL, then of the Faculty of Law at Queen's University, Belfast, were invited and requested to prepare a report on the future of legal education at UBLS. The need to appoint these professors arose as a result of several previous review commissions that the University deemed necessary to establish in its struggle for the right to development along with the wishes of the newly independent state. To appreciate the relevance of the appointment of these two professors, therefore, it is important to make a brief reference to a few of those review commissions, noting especially their terms of reference and their recommendations.

In 1966, a review commission on higher education chaired by Sir Roger Stevens, Vice-Chancellor of the University of Leeds, submitted a report, normally referred to as The Stevens Report, on the academic and development needs of UBBS. The importance of the Commission lay in its role in reviewing the then existing system of Higher Education with the aim of introducing changes that would make the university more responsive to its constituencies. "By reviewing individual faculties and schools in terms of existing facilities, curriculum, capital costs, and enrolment, the Commission submitted specific recommendations that would increase the effectiveness of the university".¹³⁴

The specific investigation in the field of law was undertaken in 1971 as evidenced by The Report on Legal Education and Training at UBLS submitted by Professors Paul JCN and Twining WL. They took serious exceptions to the then existing programme and argued that when a regular intake of 15-20 students per year was assured, but not before then, a full local law degree programme had to be introduced at the university. They therefore recommended:¹³⁵

- (i) that the Edinburgh link should be phased out;
- (ii) that for the intake of 1972 (and, if applicable thereafter), the period spent in Edinburgh should be reduced to one year so as to reduce the pressure on Edinburgh as number of UBLS students increased; and
- (iii) that as from 1972 selection of students for the LL.B. should take place at the end of one academic year at UBLS, i.e. that the four year LL.B. should be preceded by one year of general education after matriculation at "O" level.

This explains how the five year LL.B. programme was eventually to be designed, with the aim of strengthening the programme proposed by Professor Gower.

The report also criticised the then existing programme for providing an inadequate grounding in procedural subjects and making too little provision to develop the basic practical skills of the practitioner. It emphasised the following point:

"In the absence of other provisions for formal practical training, UBLS is expected to undertake that task, and much of the dissatisfaction with the

¹³⁴ See Magagula CM, The Multi-National University in Africa: An Analysis of the Development and Demise of the University of Botswana, Lesotho and Swaziland (1987) Ph. Thesis p. 67.

¹³⁵ At p. 7 of their Report.

present LL.B. seems to be due to the inadequacy of the present Part III. We recommend that immediate steps be taken as a matter of urgency either to extend Part III by at least three months, or to organise a pre-admission course along the lines suggested by Professor Gower."¹³⁶ (underlining for emphasis).

Not only was the Report important in signalling the beginning of the severance of the Edinburgh link, but it also emphasised the need for practical training. As for the link, the severance was effected in 1982 when the University of Botswana and Swaziland (UBS) broke up, but as we shall discuss later, the recommendation emphasising practical training was, however, never taken seriously. For other aspects of the Report as compared with an earlier Gower Report, see ANNEXURE IV.

4.C. SEPARATE NATIONAL DEVELOPMENTS: THE EMERGENCE OF A NEW MODEL OF LEGAL EDUCATION IN THE REGION

The joint venture developments in legal education provided by the University of Botswana, Lesotho and Swaziland were characterised by recommendations of legal experts and efforts on the part of the university authorities to implement those suggestions. The fundamental aim of this period was to see African universities devising law programmes which had to be far different from their Western counterparts whose law schools tended to provide legal education and training more oriented towards private practice than development conscious. However, before any meaningful implementational strategies could be realised, the intensity of other developmental issues in the three BOLESWA countries led to the break-up of the University with the Government of Lesotho establishing a separate University, the National University of Lesotho by Act No. 13 of 1975 leaving the two remaining constituent parts to reconstitute themselves into the University of Botswana and Swaziland with colleges in the two respective countries. In 1982 this latter university also disintegrated, giving each country her own national independent university.

¹³⁶ At pp. 37 - 8 of the Report.

The discussion that follows analyses the developments in legal education in each of the BOLESWA countries, focusing particularly on the emergence of the new model introduced in 1985 by the University of Botswana.

4.C.1 At the National University of Lesotho (NUL)

The present National University of Lesotho, a proud heir of Pius XII University College, UBBS and UBLS, took over all the programmes, not to mention other assets and liabilities of its predecessor, UBLS. Among the items inherited was the Department of Law which, until then, had been under the Faculty of Economic and Social Studies.

The first task of the National University was to continue with the programmes already in existence at the time of its creation and to review and implement new programmes recommended by commissions appointed by UBLS. Law programmes based on the Paul/Twining Report of 1971 fell amongst those whose implementation had to continue. Beginning 1974/75 academic year, the Law Department was offering LL.B. courses along the structure recommended by the Paul/Twining Report; namely Part One, consisting of two years, taken at Roma; Part Two (also consisting of two years) taken at Edinburgh by those who qualified for admission to the Faculty of Law at Edinburgh; and Part Three consisting of one year, taken again at Roma at the end of which the successful students were awarded the LL.B..

However, with the creation of the new University, some important characteristics soon developed. First of all, the increasing student intake and the limited financial resources to support it, especially for education in Edinburgh, resulted in restricting the number of students (not more than 10) to continue studying Part Two of the LL.B. programme at Edinburgh. There were also those students who did not meet the requirements for admission to study in Edinburgh. What followed was that all those who completed Part One but could not, for the reasons stated above, proceed to Edinburgh to pursue Part Two were permitted to pursue a B.A. with a law major. Accordingly, as argued by Kumar U, this arrangement later matured into a B.A. (Law) programme.¹³⁷

¹³⁷ Kumar U, "Legal Scholarship in Lesotho" in Guadagni (Ed), Op. Cit. p. 28 (read his footnote No. 29). Read also the Paul/Twining Report of 1971 p. 17 where the same arguments had already been made.

Secondly, the logistical problems of sending students to Edinburgh, including the financial implications referred to above, were already beginning to be felt by the new University. Indeed, as far back as 1971, the Paul/Twining Report anticipated these problems and a strong case made for establishing a full local LL.B. programme.¹³⁸ It, therefore, came as no surprise when the new University terminated the Edinburgh link in the training of lawyers up to 1975/76 academic year after which legal education and training, resulting in the award of LL.B., were fully catered for locally at Roma.

Thirdly, with the localisation of the LL.B. programme, a review of the existing structure for the LL.B. was undertaken with the result that the B.A. (Law) programme became a prominent feature in the training of lawyers in Lesotho. Also Part Three of the old programme which consisted of one year shared between academic (one term) and practical training (the second term) was increased to two years so that, according to the revised structure, admission to two year LL.B. programme became open essentially to holders of at least a Second Class Division B.A. (Law) or an equivalent degree. Non-law graduates with at least a Second Class Second Division were admissible to a three year LL.B. course.¹³⁹

Fourthly, the university adopted the "unit system" of teaching law courses. According to this system, the various courses offered for the LL.B. were designated one-semester or two-semester courses, depending on the content of each course. A unit, as already noted, is defined as one contact hour per student per week per semester. This system introduced the organisation of the academic year into two semesters generally without specifying the unit which determined the type and length of time for specific courses.

Fifthly, the study of law continued to be offered under the Law Department within the Faculty of Economic and Social Studies until 1981, when the Faculty of Law was established contrary to the earlier suggestion that law should first combine with Administration to constitute the Faculty of Law and Administration. Although no explanation can be found for the change in plans, it would be correct to assume that the long years of service (since 1964) and the increasing number of students justified the

¹³⁸ At page 17 of their Report.

¹³⁹ Kumar U, i.e. Op. Cit. p. 84 (footnote No. 39).

maturity to a fully-fledged Faculty by itself. This maturity was even to grow further by increasing the number of Departments from one to three, i.e. from August 1988 steps were taken, to establish the Departments of Private Law, Public Law and Procedural and Adjectival Law - a position which maintains to the present day.¹⁴⁰

There were other developments in the Faculty,¹⁴¹ but the most important aspects of these for the purposes of the present study, is in the area of practical training for the students in the Faculty. For example, reference has already been made to the original Part Three whose year was increased from one to two. The obvious question one must pose at this stage is, what has the curriculum offered by way of practical training during the two years? Briefly, the present curriculum content is as follows:

In the first year of the LL.B. programme seven compulsory courses were offered, mainly Taxation, Succession and Administration of Estates, Jurisprudence, Mercantile Law II, Conveyancing and Notarial Practice, Criminology and Bookkeeping and Accounts for Legal Practitioners. The rest of the list in ANNEXURE V is optional. The second year of the LL.B. offers six compulsory courses; besides, students are also required to write a dissertation of about 15 000 words on a topic chosen in consultation with their supervisors.

Considering the course content outlined above, one has no alternative but to agree with Professor Kumar who has argued that one of the major shortcomings of the programme for training lawyers in Lesotho is the lack of practical law training in the curricula. Although moot courts are now offered, there is no legal clinic in the programmes. This is in spite of the fact that LL.B. graduates are admitted into practice as advocates at the end of their course. While this is generally acceptable as a valid

¹⁴⁰ In the context of legal education for development the issue of creation of law faculties with various departments has not been clearly motivated. More so were those of law schools and even law departments created within faculties of Social Sciences. To us the degree of autonomy seems to have been the driving force from law departments to law faculties and in some cases to law schools.

¹⁴¹ For details of other developments read:

- (a) Kumar U, Op. Cit. especially pp. 81 - 86.
- (b) A Report entitled: "Restructuring B.A. (Law) and LL.B.. Programmes" dated December 27, 1988 and presented by Professor Kumar U, to the Board of the Faculty of Law (NUL) meeting held on February 3, 1989. This Report given as Paper Ref. No. FB40/88 is unpublished.
- (c) Kalula E, "Legal Education Training and Research in Southern Africa: New Items for the Agenda" Op. Cit. especially pp. 4 - 5.

criticism of the programmes, it is notable that the legal profession itself has so far made no contribution to the professional training of the students either during their studies or later.¹⁴² Unfortunately, some academics argue that no system of legal training can prepare competent lawyers. Important professional skills are learnt 'on the job' and are acquired with experience.¹⁴³ They further argue that the task of the Faculty is not only to train lawyers for private practice, but also to prepare them to perform a variety of development roles. In that respect the traditional courtroom skills of the advocate and office skills of the solicitor are not identical to those needed by the public service when drafting of regulations, negotiations and representations in various contexts is more important than drafting, pleading or conveyancing. As Kumar U has again pointed out, lecturers would rather be seen as social engineers rather than technicians.¹⁴⁴ With these types of arguments lingering in the minds of academics at NUL, it may take a long time before the programmes for practical training and the Law Practice Institute strongly recommended by the Gower Report, and more so by the Paul/Twining Report, are fully implemented at NUL.

Another critical aspect of the development in training in skills relates to apprenticeship or skills development prior to enrolment. In Lesotho this aspect of "training on the job" is provided for by the Legal Practitioners Act No. 11 of 1983. Under this Act, a legal practitioner is "a person admitted to practice as an advocate, attorney, notary public or conveyancer".¹⁴⁵ A distinction exists between advocates and attorneys even in the manner each one of them is admitted.¹⁴⁶ According to the Act, those who hold LL.B. qualifications from Universities outside Lesotho and wish to be admitted to practice as advocates must pass a practical examination set by the Law Society or the Chief Justice of the High Court of Lesotho. But the holders of LL.B. qualifications from NUL are admitted as advocates without having to pass any practical examination. The assumption was that the legal education at NUL caters both for academic and practical aspects of legal training, a fallacy to which reference has already been made.

As regards attorneys, a person can be admitted and enrolled as an attorney if:

¹⁴² Kumar U, Op. Cit. p. 95.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Section 2 of the Legal Practitioners Act, 1983.

¹⁴⁶ For details read section 6 of the Act.

- (i) he is a solicitor admitted to practice in other countries and has passed the required practical examinations;¹⁴⁷ or
- (ii) he is an attorney in South Africa, Namibia or Zimbabwe and has passed the required practical examination; or
- (iii) he has been admitted as an advocate in Lesotho and has passed the required practical examinations; or
- (iv) he has served the required period of articles of clerkship¹⁴⁸ and passed the required examinations.¹⁴⁹

Articles of clerkship are served under a practising attorney and those following this route need not hold an LL.B. There is hardly anyone who has become an attorney in Lesotho through clerkship. For all practical purposes, the LL.B. degree of the University is increasingly the only route to being enrolled as an advocate or an attorney.¹⁵⁰

It is evident from the above system of admission of advocates and attorneys to practice law in Lesotho that the failure on the part of the University to provide practical training is bound to have adverse effects on those who seek admission, especially as advocates to practice law. The provision for procedural law and adjectival law courses, though handled by part-time attorneys and by relatively junior members of academic staff, cannot fill the wide gap created by failure to provide practical training.

While still on the evolution of skills development programmes in Lesotho, the available literature has fallen short of any discussion on continuing legal education as an integral part of skills development for lawyers. This is a system which involves post-admission skills development programmes. The lack of any recommendation on the matter by both the Gower Report of 1964 and the Paul/Twining Report of 1971 cannot in any way undermine the importance of this system of legal education, except that though the system is most promising in developed countries, it remains an untested field of skills development programme for lawyers in Lesotho.

¹⁴⁷ They are set by the Law Society.

¹⁴⁸ The period is two years for those holding a B.A. (Law) degree from NUL, three years for holders of LL.B. from NUL and five years for all holders of other degrees.

¹⁴⁹ See section 8 of the Act.

¹⁵⁰ Read Kumar U, *Op. Cit.* pp. 90 - 91. He gives the number of attorneys who were admitted as such in Lesotho by 1984 well over 5 000 although many of them, like advocates, practice in South Africa.

4.C.2 AT THE UNIVERSITY OF BOTSWANA (UB): TOWARDS A MODEL OF LEGAL EDUCATION IN THE REGION

4.C.2(a) Introduction to the LL.B. Programme

1975 is an important milestone in the emergence and evolution of legal education in Botswana as it marked the end of Botswana's association with the University of Botswana, Lesotho and Swaziland. As already stated, with the creation of the National University of Lesotho in that year, legal education in Botswana had to sign a new lease of life under the roof of the new University of Botswana and Swaziland (UBS) which emerged in 1976¹⁵¹ with its headquarters in Swaziland. A new department was accordingly created at the Kwaluseni Campus of UBS to cater for the legal education interests of the two partner states. The striking feature of their system of legal education in the new department of law included the transplant of the recommendations of the Paul/Twining Report which were implemented with some minor modifications, effective from 1975/76 Academic year. Some of the lecturers of the Law Department at UBLS moved over to Kwaluseni to ensure full implementation of the Roma patterns of legal education and training.

From the point of view of practical training at UBS, the main characteristics of this period may be divided into two:¹⁵²

- (i) The Procedural/Adjectival Aspects: these deal with those laws which regulate the procedures by which offenders, for example, are brought to be punished. The courses involved with this type of practical training are the Laws of Evidence, Criminal and Civil procedure and Administration of Estates. Whereas Evidence, Criminal and Civil Procedures are "taught" in the fourth year of the B.A. (Law), Administration of Estates is a course for the second year of the LL.B.
- (ii) The Skills Development Aspects: the aim of the courses under this aspect of the training is to create the necessary forum to acquire and develop certain skills through a number of transactions. For example, moot court trials, like mock trial

¹⁵¹ Kakuli GM, "Experimentation in Clinical Legal Education in Botswana" in Commonwealth Legal Education Association Newsletter Op. Cit. pp. 1 - 3 where he briefly discusses the establishment and growth of Law Department programmes in Botswana.

¹⁵² For some discussion on these aspects of skills development read Iya PF, "Developing a Practical Training Programme in a University Law Curriculum: Some Reflections on a Suitable Programme for the University of Swaziland", Lesotho Law Journal, Vol. 6 No. 2 of 1990 pp. 109 - 125 p. 117.

practice course, are intended to develop the skills of dispute resolution, while conveyancing and notarial practice course developed drafting courses. The course in Legal Research is meant to develop the scholarly skills. In the context of the Law Department of UBS all these courses were offered in the second year of the LL.B. except for moot court trials which, though not provided for in the curriculum, was a "compulsory" course for students in the fourth year of the B.A. (Law) of UBS. The successful students, who were awarded the LL.B. of UBS, could proceed to be enrolled as advocates or attorneys in accordance with provisions of the law regulating the practice of law in their respective countries. The comments on continuing legal education as an aspect of skills development programme in Lesotho were applicable to the system of legal education offered by UBS.

4.C.2(b) Why a Model in the Region?

To refer to the legal education programmes of the University of Botswana as "the new model case" is to echo the statement of the Law Faculty Sub-Committee of the Office of the Vice-Chancellor of the University of Namibia. The Sub-Committee had been set in December 1991 to, amongst other functions, evaluate the necessary steps to implement the proposed structure of the Faculty of Law and to develop the required law curricula. During its deliberation the considered view of the Committee was that the case of Botswana, in terms of the legal education of her university, was to become the role model upon which to establish the law curricula for the proposed Faculty of Law of the new University of Namibia. The following reasons were advanced to justify the relevance of the experience of Botswana to legal education in Namibia:¹⁵³

- (a) the dependence of the legal systems on the legal system of South Africa;
- (b) the constitutional necessity of justifying the inherited legal system from unconstitutional and antiquated provisions;
- (c) the necessity to enhance a legal culture as part of the process of building a democratic nation;

¹⁵³

For details read "The Report of the Law Faculty Sub-Committee of the office of the Vice-Chancellor of the University of Namibia" dated Windhoek, October 26, 1992 pp. 40 - 51.

- (d) the necessity of reviewing the inherited Roman-Dutch Common Law in terms of its appropriateness in regard to the needs of the country; and
- (e) the necessity to create training conditions for lawyers which enable them to meet the requirements from all sides of the society.

On the basis of the above facts, the justification for adopting the Botswana programme as a model case by Namibia can equally be applied to the sister BOLESWA countries as same facts also relate to Lesotho and Swaziland. What is more, all three universities had a common genesis of legal education and, therefore, any novel departure, as is the case with the introduction of a Clinical Legal Education Programme by Botswana, should conveniently serve as a model upon which to build their own programmes. Accordingly, the Botswana model of Clinical Legal Education is here being discussed not only because it is a departure from the traditional system of legal education in the BOLESWA countries, but because it can be looked upon as a guiding star to lead the rest of the jurisdictions in the region (excluding South Africa) - at least for a start.

The arguments favouring Botswana's Clinical Legal Education Programme as a new guiding star for the BOLESWA countries has to be considered against the background of the fact that since the recommendations of Professor Gower and more particularly of Professors Paul JCN and Twining WL stressing the need for skills development for competent practice of law, thereby contributing effectively to development processes, past law programmes gave little attention to or emphasis on the acquisition of practical skills by students. The law programme at the University of Botswana focusing on imparting practical skills to students in order to better prepare them for their career in law practice, therefore, serves as an eye-opener to those law schools/departments which lack such a programme. This is what has made it not only a "model" but a "new" approach to legal education and training for development. Aspects of the new model are accordingly discussed in the subsequent paragraphs.

4.C.2(c) Specific Features of the New LL.B. Programme

The University of Botswana was formally inaugurated in October 1982, having previously been a constituent College of the University of Botswana, Lesotho and

Swaziland (UBLS 1964-75) and of the University of Botswana and Swaziland (UBS 1975-82). Legal education at the Gaborone Campus started a year before that inauguration, that was in 1980 when the Government of Swaziland decided to terminate the study of law at the University of Edinburgh and fully localised legal education at the Kwaluseni Campus. The result was that the government of Botswana in return withdrew the Tswana law students from Kwaluseni and set up a Department of Law in Gaborone in 1981 to provide legal education leading to the award of the degree of Bachelor of Laws (LL.B.). As expected, the new Department of Law at Gaborone inherited the law programmes of its counterpart in Manzini except for the link with the University of Edinburgh which could not be severed without making the necessary alternative arrangements. The process of full localisation even in Botswana was finally achieved in 1985 when two important decisions were taken:

- (a) to terminate the Edinburgh link; and
- (b) to design a new programme of legal education and training to reflect the needs and aspirations of the society in Botswana.

With the establishment of the new department, it became obvious that the initial reasons for the establishment of the link with the University of Edinburgh were the justifications of the past with no relevance to the new system of Botswana legal education under changed conditions of 1985.¹⁵⁴ It was also argued that with the growth of the Department of Law and the increase of law students over the years, it became economically burdensome to continue the link.¹⁵⁵ The need for designing a new programme of legal education and training for Botswana was, therefore, inevitable.

The first step taken to design the new LL.B. programme related to its structure which was a direct result of the phasing out process. At the beginning of the 1986/87 academic year, instead of the second year law students proceeding to Edinburgh to start their third year, they remained at the Law Department in Gaborone to pursue a

¹⁵⁴ These justifications, as stated in the Department of Law Handbook 1987/88, included the lack of sufficient numbers of students to justify a fully fledged local LL.B. programme; the superiority of such managements over other alternatives, such as sending students abroad for the whole of their legal training or to study for the English Bar; and the closer affinity of the Scottish legal system to the Roman-Dutch Common Law system as compared to the English Common Law jurisdictions. For additional information on the same, read also The Gower Report of 1964 and the Paul/Twining Report of 1971.

¹⁵⁵ Kakuli GM, Op. Cit. p. 1.

locally based third year of a new five year law programme. The last group of the University of Botswana student to study in Edinburgh returned in July 1987 and the new LL.B. programme was finally localised during 1988/89 academic year. Currently, therefore, the Law Department of UB runs a five year straight LL.B. as opposed to Swaziland's current B.A. (Law) and LL.B. degree programmes.

There followed steps to address the problems of the content of the curricula in the new LL.B. structure. The fundamental consideration in this exercise outlining the problems of the old curricula was explained in the following words:

"In designing the new programme, the Department of Law was conscious of the fact that lawyers' competence in most, if not all, areas of law practice demands a wide range of fundamental skills. The Department, therefore, departed from the traditional approach which unnecessarily separated academic and professional education and introduced a clinical legal education built in the LL.B. programmes."¹⁵⁶

The point to note seriously is that this new model of legal education which abolished the B.A. (Law) and LL.B. programmes of UBLS and UBL, and which reduced the number of years required for pursuing an LL.B. degree from six to five incorporated, within the academic system, the training in practical or vocational skills. To create the appropriate environment for the acquisition of the necessary practical or vocational skills, the Department designed a special programme, the details of which have been given by the Head of Department of Law as follows:¹⁵⁷

4.C.2(d) Characteristics of the Skills Development Programmes

(i) Emphasis of Practical Elements of a Course

In teaching any course lecturers are required to delineate the practical elements of the course. For example, they are expected to show the students how pleadings pertaining to certain causes of action may be drafted.

¹⁵⁶ Ibid p. 3.

¹⁵⁷ From the remarks of Professor Nsereko DDN, Head of the Law Department, during a meeting of the Faculty of Law Sub-Committee of the University of Namibia held on October 5, 1992.

(ii) **Practical Courses**

Procedural and other practical courses are taught at various levels of the LL.B. programme. These courses include: Criminal Procedure, Civil Procedure and Practice, Evidence, Legal Ethics, Accounting for Lawyers, Conveyancing and Notarial Practice, Law of Business Associations.

(iii) **The Clinical Legal Education Programme (CLEP)¹⁵⁸**

CLEP is the major vehicle that the Department employs to impart lawyering and professional skills. It has four components:

(a) **Moot Court and Mock Trials**

Each student is required to participate in a minimum number of moot court and mock trial sessions each semester. The moot court introduces students to appellate advocacy while the mock trials introduce them to trial techniques in both civil and criminal proceedings. The sessions are usually presided over by lecturers and by experienced practitioners and magistrates.

(b) **Legal Aid Clinic**

Each student is required to attend at the legal aid clinic 2 to 3 hours every week. The clinic enables students to experience real client-lawyer situations. Under the supervision of a member of staff, the students interview clients, give the advice on their rights and obligations and draft letters of demand as well as all the requisite pleadings, affidavits and notices. Students also attend pre-trial conferences and participate in the negotiations on behalf of "their clients". The students actually manage cases, short of going to court. The legal aid clinic is analogous to a teaching hospital at a medical school.

(c) **Clinical Seminars**

At these seminars, skills that the students need for effective participation in the moot court and mock trial sessions, as well as in the legal clinic, are taught. They include such skills as interviewing, negotiating, case management, trial tactics, and court etiquette. They also include office

¹⁵⁸

Ibid.

management and the handling of cases in specialised areas, such as divorce and motor vehicle insurance claims. Simulations as well as videos shown are used as instructional tools.

(d) Internship

During their long vacations, students are placed as interns in various legal establishments, including private law firms, High Court, Magistrate Courts, financial and insurance institutions, and police stations. They perform legal duties assigned to them by their supervisors at the places of internship. At the end of the internship, they write a comprehensive report on their experience. The internship helps them observe the law in action and to learn by doing - thus supplementing their legal aid clinic experience.

It was also argued that the above programme would assist the students to develop the following "Lawyer skills".¹⁵⁹

1. analysis of legal problems;
2. performance of legal research;
3. the collection and sorting of facts;
4. effective writing and drafting (both in general and in a variety of specialised lawyers applications such as pleading, opinion letters, memoranda, contracts, wills or legislation);
5. effective oral communication in a variety of settings;
6. performance of important lawyer tasks calling on both communication and impersonal skills, e.g. interviewing, counselling and negotiation; and
7. organisation and management of legal work.

Currently, therefore, the above range of fundamental skills are being developed within the Department's component of practical training. As to the stage within the curricula at which these skills are imparted, reference can be made to the general Curricula, a copy of which is herewith attached and marked ANNEXURE VI. More important, however, is the question whether this new programme is effective in

¹⁵⁹ See The Report on Clinical Legal Education prepared by Barr Alan R, a consultant appointed to set up the programme. This Report followed intensive work (for about six weeks) of observation, research and consultation with every aspect of the members of the legal profession in Botswana.

addressing the common needs of lawyers in addressing the problems of development. Our assessment is given in paragraph 4.D.3. below.

4.C.3 AT THE UNIVERSITY OF SWAZILAND (UNISWA)

Like the two universities of the Partner States, the origin and developments that led to the establishments of the University of Swaziland are quite similar. To that extent the period 1964-1982 are covered in the discussion of the two Universities above. The formal birth of a national university was effected by Parliament in 1983 when the University of Swaziland Act No. 2 of 1983 was enacted, giving it wide powers under section 5 of the Act. What concerns us most amongst these powers, is the provision of facilities to acquire legal knowledge, practical skills and necessary attitudes for competent practice of law. We still hold the view that those educated and trained in law must be able and competent to serve in a range of capacities as necessitated by the developmental needs of society. For that reason we would like to establish the case of legal education and training in Swaziland at a later stage of this discussion.

4.D. FAILURE TO MEET DEVELOPMENT NEEDS - AN OVERVIEW

We have already set out in Chapter 2 general developmental needs to include economic development, national integration, political stability, good governance, constitutionalism, promotion and maintenance of democracy and rule of law, and the preservation of human rights and values. We further argued that any development strategy should seek to attain and satisfy the fundamental human needs and values based on the above principles of justice, equality, democracy and respect for human dignity.

In our view legal education and training programmes should play a more significant role in fashioning law as a progressive weapon for development. This in turn means that by law playing that role it should transform the way lawyers and other law-trained persons function in Society. Legal education should ensure that those trained in the law acquire enhanced capacities to stimulate awareness of law in its economic and social context and to provide effective and efficient legal service in both the public and private sector. It has also been our contention that for legal education and training to be

more relevant to development, greater attention should be given to skills development programmes as such courses do enhance the capacity for provision of effective and efficient legal service which in turn puts the law-trained person in a better position to meet the urgent developmental needs of the societies in the BOLESWA countries. Such programmes should emphasise skills for practice in the various sectors of the communities.

However, given our analysis of the developments in legal education and training in the BOLESWA countries as discussed in this chapter and strengthened by personal research with experiences (1988-1993) as lectured at UNISWA, we believe legal education failed to contribute effectively to development for the following reasons:

- (a) The legal institutions and system of legal education of the post-independence era were created or continued to be in the image of the West, applying legal systems and Western ideologies of law that were imposed upon them at independence. In the case of Botswana and Swaziland, for instance, the “Edinburgh Link” remained in place until the late 1980s. Even when the Paul/Twining Report of 1971 recommended localisation of both institutions and programmes of legal education and training, Law degree curricula remained basically the same.
- (b) The LL.B. curricula in all the three Universities of the sister BOLESWA states continue to emphasise the requirements of the private practitioner i.e. the lawyer’s role as advocate/attorney, the litigator. Until recently (1987 in Botswana and 1990 in Swaziland when curricula were seriously reviewed) the applicable curricula were based on those recommendations of the Gower Report in 1964 and especially of the Paul/Twining Report of 1971, which are not outdated.
- (c) There was a broad-based curriculum with non-law contents but no clear direction of integrating knowledge with practice e.g. no provision for student to prepare for the complex corporate and taxation arrangements in the economy.
- (d) No training to encourage students to appreciate law in social context so as to play bigger roles in development. Emphasis was on “black-letter” learning.
- (e) No emphases on research and postgraduate studies directed towards law and development issues.

- (f) Limited library resources with no texts to integrate law within the political economy of the BOLESWA countries.
- (g) The current LL.B. programmes (except in the University of Botswana) give far too little attention to or emphasis on the acquisition of practical skills by students. Given the express intention to make legal education more relevant to development by equipping lawyers with copractical skills to make them more competent, such absence or little attention to skills development courses deprive legal education from the role it is expected to play in development.
- (h) The failure at the Universities of Lesotho and Swaziland to provide sub-degree programmes in law was evidence of failure to recognise the problems of access to law by the majority of citizens. The training of para-legals (a programme provided only at the University of Botswana) would greatly assist in filling in the gaps left in areas not served by members of the legal profession.
- (i) Recent efforts, like the introduction of more comprehensive skills development programmes by the University of Botswana in 1987, have, in our opinion, not gone far enough in the placing legal education into the mainstream of those factors contributing effectively to development. For example when we visited the University of Botswana in September 1992 and observed the implementation of the clinical programmes of the Law Department, it became clear to us that efforts were directed to clinical service at the cost of core skills-based training courses. The clinic emphasised legal assistance with no development content. In our view, therefore, though it may be too early to give a proper assessment of the "Model" programme in Botswana, there is already some evidence of its shortcoming in adequately preparing the lawyers of the future to effectively meet the challenges the new demands of development in the special socio-economic settings of Botswana.

CHAPTER 5

CRITIQUE OF METHODS AND FUNCTIONS OF LEGAL EDUCATION: THE ROLE OF SKILLS

This chapter endeavours to analyse more critically the dimension of the problems of legal education focusing on:

1. The basic concerns.
2. Is history the root cause?
3. A search for the status and role of skills development programmes in legal education.
4. Clinical Programmes and Development.
5. The Need for Empirical Research.

5.A. THE BASIC CONCERNS ABOUT LEGAL EDUCATION

In the context of developing nations characterised by ignorance, poverty, disease, severe drought, famine, war, debt crisis and economic stagnation,¹⁶⁰ the very existence of the law, lawyers and legal education make little sense since these institutions are not seen as providing immediate solutions to those pressing problems of development. To the masses the voices of criticisms and discontent are “widespread”, a “swelling chorus” and “never as unanimous as they are today”. They regard these institutions as “too expensive”. The lawyers who are to provide the most needed services are described as “untrustworthy” (liars), unethical and uncaring.¹⁶¹ In some quarters it is even argued that after all there are just too many lawyers for the society that rather needs more doctors, economists, agriculturalists and engineers.¹⁶²

¹⁶⁰ See “Africa in a Mess” in: The Times of Swaziland of Wednesday May 6, 1992 where the problems plaguing Africa were dismally enumerated.

¹⁶¹ Pirie AJ, “Objectives in Legal Education: The Case for Systematic Instructional Design” in: The Commonwealth Legal Education Association Newsletter No. 53/54 of April-July 1988.

¹⁶² These types of misconceived attitudes and perceptions against lawyers, and by extension against those who teach lawyers, can have damaging effects on the provision of legal education as confirmed by Derek CB, in: “A Flawed System of Law Practice and Training” 33 Journal of Legal Education (1983) p. 596.

Whereas the legal profession in many jurisdictions has had difficulty generating a silencing response to its critics, legal education has, to a certain extent, been luckier in that dynamic reforms have constantly been injected into the system by such learned authors, scholars and professionals like Redlick, Reed, Frank, Cohen, Carrington, Ormrod, Gower, Crampton, White, Twining, Gold, Goldrin and many others.¹⁶³ All the same for developing countries, especially those in Africa, some basic questions still remain unanswered concerning the entire system of legal education. Almost every stage of legal education is attacked by raising issues which have direct links with development. A summary of those issues may be outlined as follows:¹⁶⁴

At the level of "Entry to Legal Studies" should law be studied straight from (high) school or should it be studied after a pre-law degree? What should be the qualifications required for entry to legal studies? Should there be standardised tests like the American "Law School Admission Tests"? What, therefore, should be the admission criteria and procedures? What financial sources should be available to those wishing to study law? Should there be a policy on distribution of law students as to race, age, sex, religion, colour or class? What should be the number, if at all necessary, of students admitted and should such number take into account the needs of the legal profession, the financial costs involved and the opportunities available for such studies to find jobs on successful completion of their studies?

As to the "Law Degree", should it be a Bachelor of Arts with a Law Content, i.e. the B.A. (Law) Degree; a straight Bachelor of Law (LL.B.) Degree or a Jurist (J.D.) Degree - and why? Connected to these issues are those focusing on the period of years to be spent on the study of law. Should, for example, the study of law be on a part-time, or full time basis, and if so, for how long? Should all courses be compulsory or optional - or even both and why? Should the course content be geared toward those areas considered important in legal practice, or liberal education and what should be left as the guiding objective of the study of law?

¹⁶³ For details of their respective contributions, read Pirie AJ, Op. Cit. p.2.

¹⁶⁴ Read the Report of the Conference on "Legal Education: 2000" held at the University of Glasgow in 1985 pp. 2 - 8 of the Proceedings.

Then there is the problematic issue of "Entry to the Legal Profession". Should there be specific professional examinations for entry to the profession or should there be an exemption from them? If they are necessary, how does one prepare for them and where? What should be the role of the University in the preparation of students for practice? What share of that preparation should be left to the profession through the articulated clerks or apprenticeship programmes - or should this specialised type of professional programme be totally handed over to post-graduate legal institutions which are independent of universities? What is the qualification to be awarded after such a training - another post-graduate degree? - or should a post-graduate diploma, or even no certificate, characterise that type of qualification?

The issue of "post-qualification Training Requirements and Opportunities" has added yet new dimensions to the many other issues raised herein above. Should, for example, continuing legal education for legal practitioners, judges, magistrates and others involved in "the practice of law" be compulsory or not? And who is to take charge of such training? Has the stage of national development reached a level where the need for specialisation in the practice of law becomes an issue? If so, who should be responsible for that type of specialised training, how and for how long should that type of training be effected?

5.B. IS HISTORY THE ROOT CAUSE?

One point of clarification that could be of great assistance in understanding the magnitude of the problem is to examine the debate on the objectives of legal education from historical perspectives, for, as stated by Honourable Sir Roger Ormrod, that no one was ever going to understand the problems of legal education without looking at its historical development and establishing what the profession actually did.¹⁶⁵ As for the history of legal education, one has to look at the history of the Universities in England to see what they have been at for a long time. Medicine

¹⁶⁵ Refer to his address on 17 April 1971 at the Annual Conference of the Association of Law Teachers on: "The Reform of Legal Education" in: The Teaching of Law Op. Cit. p. 5.

and law were two of the ancient faculties of all the old universities. The Inns of Court served the interests of civil lawyers, e.g. the ecclesiastical lawyers.

The four faculties at Oxford were law, medicine, theology and philosophy.¹⁶⁶ The Universities existed, among other things, to train lawyers and to train doctors, and they did so from the middle ages. But somewhere in the 19th century, this concept changed and the idea developed that anything smacking of vocational training was anathema. It was not what universities were there for. From then on, all preparation for practice "was done among the doers" - the practising lawyers, and according to the select committee of the House of Commons Report on legal education in 1846, by this time there was no method of qualifying as a Barrister or Solicitor (practitioners of law), except to read in somebody's chambers and pass the examination set by the Bar or the Law Society. This period of practical training was referred to as Apprenticeship characterised by a system of pupillage for those preparing to become barristers and a system of articles for those preparing to become solicitors.

In the context of the objectives of legal education, this period (1825-1914) was analysed as "formative period of contemporary legal education" which saw the development, and in some respects, the entrenchment, of professional and legal education and law degrees.¹⁶⁷ During this period there were no traditions of teaching English law in the universities. It was clear that even when law degrees were offered from 1828 at the University College, London, there were few undergraduates. Although sources were established more widely in the "civic" universities from the 1870's it was clear that many universities had few law students even though this was a time when both the legal profession and the universities were thriving.

However, changes were later introduced to ensure that the turmoil which characterised legal education during the early years of the 20th century was

¹⁶⁶ Ibid. p.12.

¹⁶⁷ Leighton P and Sheinman B, "Central Questions in Legal Education" in Teaching of Law Op. Cit. p.3. Read also Baker JH, "Current Legal Problems" (1977) Journal of Association of Law Teachers p. 1; Manchester AH, Modern Legal History (1980) Chapter 2 and Jeriks E, "English Legal History" (1935) 1 Law Quarterly Review p. 162.

eradicated.¹⁶⁸ Most significant among the changes in England was the expansion of higher education following the recommendations of a committee on higher education.¹⁶⁹ Also important was the merger in 1962 of the Law Society's School of Law with its principal competitor, Gibson & Weldon, which formed the College of Law (a body now governed by Royal Charter) and the authorisation of seven provincial colleges to offer teaching for the Society's examinations.¹⁷⁰

The lesson to be derived from this aspect of the historical development of legal education is that during this "formative period" when interaction between the universities and the profession was vital for the production of cohesion and logic in legal education, the former were unable to establish sufficient identity or authority to challenge the dominance of the latter. The aims of legal education were confused to the extent that "it was never very clear to potential students what extra insights or skills they would gain by studying for a law degree. This confusion was, however, relative as the aims of legal education differed from one jurisdiction/society to another. The period also helped in the introduction of the division between academic and professional education.

The American legal history is equally relevant in attempting to understand the aims of legal education. The early stages of American legal education was similar to the English, i.e. he was trained through an apprenticeship.¹⁷¹ Education in a law school became an alternative about a hundred years ago, and the virtually exclusive entrance into the profession only a few decades ago.¹⁷²

The major change occurred with the adoption in 1870 of the case method of instruction by the Harvard Law School under Dean Langdell. The case method, a dynamic rather than a static approach to law, provided a purely intellectual educational process which enabled the full-time, scholarly law teacher to become virtually "the exclusive purveyor of legal education". The specific advantages of this

¹⁶⁸ For details of those changes read Saunders N, "From Cramming to Skills - The Development of Solicitors' Education and Training Since Ormrod" (1996), The International Journal of Legal Education Vol. 30 No. 2, p. 168.

¹⁶⁹ Report of the Committee on Higher Education, Chairman Lord Robbins, Cmnd 2154, 1963.

¹⁷⁰ Saunders N, Op. Cit. p. 169.

¹⁷¹ Dutile FN, "The Problems of Teaching Lawyer Competence" in Dutile FN, (Ed) Op. Cit.

¹⁷² For details, read Grassman S, "Clinical Legal Education: History and Diagnosis" in: 25 Journal of Legal Education (1974) p. 162.

method over the traditional university teaching of substantive law were: (a) the built-in participation of the student since the Socratic method of teaching is virtually a component of the case method; (b) the skills development element with actual practical experimentation through student participation; (c) cases being chosen on the basis of their dramatic interest; (d) provision of exposure to the customs of an area, of an era or of an industry as stated in the case; (e) in contrast with a narrative statement of the law, the case method affords a better assessment of policy; (f) provides the actual legal reasoning behind the emerging principles; (g) provides the student with original rather than secondary sources; to mention a few of the strengths of this new system of legal education.¹⁷³

The significant contribution of this period of American legal education was, in addition to the new method of teaching, the transfer to the classroom from the practitioners chambers of training for practice. Of course before that it was never contemplated that all of the training of neophyte lawyers happen in one place, for example, the classroom. It was never contemplated that the rest of the profession would wash its hands off the training of neophyte lawyers.¹⁷⁴

Another development which followed was the introduction of sociological jurisprudence into the teaching of law. As earlier observed, this functional study of law in terms of its purpose or ends in society, started by Jhering's theory of harmonising individual and social interests, was elaborated further by Pound R. This functional approach in studying law is relevant to the development of legal education because it encouraged law to be studied and taught as a social phenomenon in the social context. These views were strengthened by such scholars as Llewellyn K and Hoebel E, who argued that law should be looked at as a tool for getting jobs done in a particular culture.¹⁷⁵ For Llewellyn K, lawyers had to be trained not only in the interpretation of legal rules but also in other skills relevant

¹⁷³ Dutile FN, Op. Cit. pp. 1-2.

¹⁷⁴ Penegar K, et al, "Getting There from Here: Priorities, Remedies and Resources" in: Dutile FN, (Edn) Op. Cit. pp. 143-144.

¹⁷⁵ Llewellyn K and Hoebel E, The Chevenne Way: Conflict and Case Law in Primitive Jurisprudence (1941).

to a vision of law as an activity, a set of crafts rather than rules.¹⁷⁶ In this respect, both Llewellyn K and Kahn-Freund O, share similar viewpoints.¹⁷⁷

The next approach to the study of law in America was introduced by Lasswell and McDougal, who argued that law must be studied as a Social Science, a point we have already made reference to. This approach, and those of other scholars, were important milestones on the developmental road of legal education in America, especially by integrating non-case law materials into the legal curricula.¹⁷⁸ For our purpose, i.e. of identifying the objectives of legal education, it suffices to agree with Professor Twining WL who traced all these developments in terms of what was intended to be a Periclean model through that of the Plumbing craftsman to one which is basically assimilated Pericles with the Plumber.¹⁷⁹ The result of all this process was a considerable movement towards clinical legal education in American Law Schools which paved the way for skills development programmes upon which different jurisdictions in Europe, Canada, Australia and those in the developing Third World countries built their specific programmes.

5.C. A SEARCH FOR THE STATUS AND ROLE OF SKILLS DEVELOPMENT IN LEGAL EDUCATION

5.C.1 Apprenticeship - The Traditional Skills Development Programme

In view of the above analysis legal education, whether centred at the university as illustrated by American experience or at the professional institutions like in England, exhibited a high degree of dissatisfaction in terms of making appropriate preparation for the practice of law, an objective which is a core to the education of lawyers (as we strongly contend). This apart, the very ideal system of preparation for law practice, i.e. the apprenticeship system, was itself a subject of severe criticism.

¹⁷⁶ Read Llewellyn K, "The Study of Law as a Liberal Art" (1960) reprinted in Jurisprudence: Realism in Theory and Practice (1962).

¹⁷⁷ For details of Kahn-Freund's arguments, read: "Reflections on Legal Education" Op. Cit.

¹⁷⁸ Read Trubek DM and Galauter M, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) WISCONSIN LAW REVIEW p. 1062.

¹⁷⁹ Twining WL, "Pericles and the Plumber" (1967) Law Quarterly Review vol. 83 p. 398.

The objective of the system of apprenticeship is to provide the trainee (a pupil in the case of training for the Bar and an articled clerk training to be a solicitor) with practical training and experience on the job in preparation for becoming a competent member of the profession. However, over the years the inadequacy of the system as the best method for training for the practice of law was recognised throughout the world, not least by the English Law Society and Bar Council who were formerly the most fervent advocates of the system.

For example, it became obvious that the trainees were not receiving sufficient training and supervision. Some of the barristers or solicitors to whom the trainees were attached often did not regard themselves as teachers. They regarded themselves as delivering services while the trainees were there just to help - thus operating without the expected educational objectives of the system. In addition, it was also discovered that the said barrister/solicitor insisted on one primary professional objective, i.e. to serve his client; he thus had little time to do more. These and related problems of the system were emphatically summarised as follows:

“In the Commonwealth tradition (the American system of university legal education had long shed the system) of apprenticeship, it is increasingly recognised that articled clerks work most unevenly. If the principal has (i) a good varied practice, and (ii) the time and ability to instruct his articled clerks, it may be an unrivalled method of learning the practical ‘know-how’ of the profession. If both these conditions are not fulfilled (and they rarely are), it may be a complete waste of the articled clerk’s time and even a method of obtaining skilled assistance on the cheap”.¹⁸⁰

Apprenticeship, the traditional form of training in professional skills has thus proved disadvantageous in that it is haphazard. Its value is dependent upon the qualities of the Master/Principal as instructor and the breadth of the practice in which the instructor is engaged. The question that then came to light was: what alternative method could one turn to? Much as the need for training in practical

¹⁸⁰ See the 1964 Gower Report. Op. Cit. pp. 21-22.

skills, i.e. learning by doing under the supervision and instruction was felt, how could that be best implemented to ensure that the “end product” is sufficiently prepared to start the practice of law? Apart from the difficulties of developing a new technique of instruction, the introduction of such courses raises a number of inter-related problems, e.g. who should be responsible for such training? Why, when and how?

5.C.2 Towards New Skills Development Programmes

The pioneer move in the right direction (for our purposes) was taken in America by the introduction of clinical legal education programmes whose purpose is to give sufficient practical information and training to enable the law graduate to cope both competently and confidently with matters likely to arise in the first years after admission to the profession. Historically, the concept and genesis of clinical legal education was formulated in response to the perennial criticisms, namely that institution of legal education provided theoretical classroom education and, therefore, provided inadequate preparation for the practice of the profession.

Associated with the clinical legal education programmes at the formative stage was the legal aid movement which became prominent at the same time. “Legal aid” is a phrase which, in legal circles, refers to “giving persons of limited means gratis or for nominal fees, legal advice or legal assistance in court in civil and criminal matters”.¹⁸¹ Its primary object is to make it impossible for any person to be denied equal protection of the law simply because he or she is poor. It is a cardinal obligation of the legal profession in any part of the world to establish and maintain legal aid schemes as it is an essential part of the administration of justice.¹⁸²

For the purpose of our argument the most significant development in the legal aid movement in the United States of America was that aspect of the service which was operated by the Law School “clinics” or directly affiliated with the Law Schools which provided direct services to clients as part of the students’ training programme. This arose initially because in a fast growing community like the United States, it

¹⁸¹ Wikamanayake EB and Ramanathan, “Concept of Legal Aid”, a Paper submitted to the first Conference of LAWALISA published in Legal Aid (1968).

¹⁸² *Ibid.* p.1.

became necessary to extent and strengthen the legal aid services. In the process of extending and strengthening the movement, legal educators then recognised their educational values and regarded it as a crucial step towards reforming the educational system since this new system sought to broaden legal education beyond its academic component found in the books, libraries and lecture rooms. Clinical work in the Law School required the student to assume responsibilities for clients, courts, other lawyers and to others involved in the administration of justice. It was realised that by exposing more of himself/herself in this process that was done in the classroom, the law student engages his/her development as a human being, and in the process, the lawyer-to-be further accelerates his/her mastery of the lawyering skills. He/she begins a professional development in an educational environment where more adequate attention may also be devoted to public responsibilities.

Thus in the United States legal aid clinics were first introduced as a measure to cater for the expanding needs of legal aid. But as the years passed by, they were used to advance the objectives of clinical legal education, i.e. "to equip the lawyer-to-be to function as a lawyer as well as to think like one ... (and) to help the lawyer-to-be with his emotional development so that he might cope more adequately with the persons and institutions of the outside world".¹⁸³ Law Schools, e.g. at Yale and Harvard started legal aid programmes with that objective. This indeed was a significant change responsive to the criticisms.¹⁸⁴

It has also recently been noted that summertime legal employment for law students including term-time employment has burgeoned everywhere in the United States. This type of employment has been viewed as a new apprenticeship system developing in America to yet answer the cry against theoretical classroom preparation for law practice.¹⁸⁵ Professor Reisman W of Yale Law School is one of the designers of this programme.

¹⁸³ Pincus W, "Clinical Legal Education in the United States 1968-1975" (1975) 49 A.J.L. p. 420.

¹⁸⁴ For details of the operation of the programme read Barnhizev D, "The Clinical Method of Legal Instruction: Its Theory and Implementation" (1979) 30 J.P.L.E.

¹⁸⁵ The ABA Task Force. Op. Cit.

While the above processes were taking place in the United States, within the Commonwealth, where the system of pupillage and articles of the English model were extensively employed together with all its deficiencies, efforts were being directed towards finding remedial solutions to these deficiencies. Ideas began to focus on skills training for the profession as these were insufficiently provided for by both the apprenticeship system and the undergraduate legal education system. It was clear that the young lawyers had not grasped sufficient skills in legal practice as well as professional experience to equip them with basic tools of legal practice so that they could contribute adequately to the cause of justice and the establishment and maintenance of a strong and respectable legal profession. The available systems could hardly produce lawyers with varied practical skills and broad-mindedness that the modern world required.

Accordingly, several countries within the Commonwealth started devising ways of improving the quality of professional training for lawyers. The last 30 or so years have witnessed the setting up, largely under the influence of Professor Gower LCB, of a network of professional law schools to supplement the basic legal qualification obtained from a university. One of the first and famous programmes in institutional training in skills was established in Toronto, Canada, where a postgraduate pre-admission course was started as Osgoode Hall Law School. A similar system was established by Professor Gower LCB at the Nigeria Law School in Lagos in 1961 and subsequently in Kampala, Uganda; Lusaka in Zambia; Nairobi in Kenya, as well as in Australia, New Zealand, Hong Kong, Ghana, etc.

The wind of change was also felt in the United States, where already the efforts of the Council on Legal Education for Professional Responsibility (CLEPR) were directed towards the study, development, sponsorship and support of programmes of clinical legal education in American law schools. More importantly, the responsibility of the law schools for providing "practical training in lawyering skills" was the subject of a special American Bar Association scrutiny, most notably by the report of the legal education section (Crampton Report). There was also the

work of the Special Committee for a study of Legal Education (FOULIS Report).¹⁸⁶ The work of these special committees for study of Legal Education was distinctive for its sponsorship and review of an extensive programme of empirical research in American Legal Education conducted by the American Bar Foundation.¹⁸⁷

The need for greater emphasis on skills development has been properly articulated by Professor Crampton R, Chairman of the ABA Task Force on Lawyer Competency and by many researchers on the objectives of legal education in the United States¹⁸⁸ all of whom argue that a greater emphasis on skills outside the learning of straight rules would be greatly appreciated. They discovered that some of these skills were of exclusively practical nature, such as counselling and interviewing, negotiating and arbitration and proficiency advocacy; others, such as legal research, were not. Indeed, for the United States what liberated their law schools from the worst aspect of the tyranny of coverage was the move away from “black letter” study of law to studying how to handle legal issues, problems, concepts and principles in relation to a largely fictitious entity.

This American experience is similar to the Commonwealth experience where, as earlier observed, experimentation on more emphasis on skills development took the form of establishing professional law schools to remedy the deficiencies in respect of skills training. This was recognised as an equally important component of the objectives of legal education.

The above arguments and experimentation in the United States and in some Commonwealth States go to illustrate the recognition of “knowledge of the substantive law” and the inclusion of “thinking and behavioural skills” as all important objectives of legal education, except that there were indications and clear recognition that a greater emphasis on skills outside the learning of straight rules, would radically improve the quality of law graduates, make law schools more interesting.¹⁸⁹

¹⁸⁶ Law Schools and Professional Education: 1980 Report and Recommendation of the Special Committee for a Study of Legal Education.

¹⁸⁷ The American Bar Foundation Research Programme was conducted 1974-1980.

¹⁸⁸ For example, the work of Pipkin RM, “Legal Education: The Consumer’s Perspectives: (1976) American Bar Foundation Research Journal p. 1161.

¹⁸⁹ Crampton T, Op. Cit. p.16.

“[T]he time is ripe for academic lawyers to take the lead in making direct learning of ‘skills’ a central component of every stage of legal education and training. Such a change will involve not only shifts of emphasis in curriculum but more importantly, change in attitudes and competencies of law teachers as well as new institutional and collective arrangements”.¹⁹⁰

In line with the above arguments many law schools and law teachers in Southern Africa have developed keen interest in skills development oriented programmes. The Law Society in South Africa has established a number of postgraduate practical training schools as independent institutions with the aim, among others, of integrating various skills and developing basis skills for practice.¹⁹¹ Integrated skills development courses within the LL.B. programme can also be found in many universities including that of Botswana, details of which (programme) have already been discussed.

5.C.3 CRITIQUE OF CLINICAL PROGRAMMES

Our investigation during a visit to the Legal Aid Clinic in Gaborone and talking with staff of the clinic revealed a few shortcomings with the clinical programme. For example the Lecturer in charge complained about lack of full co-operation from the practitioners of the profession who are required to provide the “practical touch” to skills training. It is one thing to simulate different legal transactions in the lecture room but it is another to draw up particulars of claim, where and how to issue summons, and how to perform certain duties which are performed by the profession. The argument is that those with the day-to-day experience of the dynamics of practice should be the ones to guide students on those “practical” issues. Unfortunately that aspect of the acquisition of skills from experienced practitioners is lacking and a recommendation to supplement the programme with articles was made to fill in the gap.

¹⁹⁰ Twining WL, Op. Cit. p.4.

¹⁹¹ Schools for Legal Practice: Policy Document 1995 Publication of the Association of Law Societies of the Republic of South Africa.

Another criticism that we found out through questions to staff during the visit relates to whether the clinical programmes of the university provided the required skills for those intending to take up careers as magistrates, prosecutors, judges or politicians. There was a divided reaction to this problem: there were those who agree that the training does not provide for specialisation and efforts should be made to include programmes geared towards training for such specialised aspects of the profession, taking into account certain material differences in their attitude and approach of practice. There were others who argued that it was absolutely impossible to teach everything required for practice during the clinical programmes. What is important is to focus on the basic skills which a person desirous of joining the profession requires. One can thereafter always build upon this foundation through continuing legal education programmes organised by the profession.

Another remark received concerns Botswana's integrated programme in which both the academic and practical teaching form part of the LL.B. degree curriculum. The question is why the practical training should not follow the academic stage as is the case in most Commonwealth countries. The arguments against the postgraduate practical courses (normally followed by the award of a certificate or diploma) are that they lead to serious divisions among law schools, practitioners and the providers of postgraduate practical course. Each blames the other for the knowledge, skills and attitude inadequacies. Those in academic often sneer at their colleagues in practice, holding them to be unprincipled, uncaring and anti-intellectual. Practitioners in their turn claim their academic counterparts to be unrealistic, impractical and theoretical.¹⁹²

In our view the philosophy of the integrated system where both theory and practice are pursued at the same time and in one institution, as is the case at the University of Botswana, needs to be supported. It should be recognised that such division within the legal profession into stages or compartments is arbitrary, unnecessary, expensive and confusing. The dichotomy of academic and practical

¹⁹² Gold N, "Themes, Trends and Prospects in Professional Legal Education - A Global View" (1985) Journal of Professional Legal Education Vol. 3 No. 2 p. 171. For further criticisms read Twining WL, "Legal Skills and Legal Education" (1988) in The Law Teacher Op. Cit. pp. 8-11.

training merely drives further a wedge between scholars and practitioners and confuses the objectives of legal education. In the eyes of those of us who see legal education as a "continuum" such divisions are more destructive than constructive.¹⁹³

Lawyers in the United States, for example, find no need for a system of postgraduate practical training. Rather, they feed in their law courses and into particular aspects of their law courses a practical component - hence developing the concept of complete integration through a system of clinical legal education programmes. This is very much like the medical profession where medical students who are in the closing years of their courses attend to patients. They (the students), in the course of their training, are forced to be party to decision-making and the exercise of judgement in relation to practical matters most of which have no high theory behind them, but most of which require action - and appropriate action - if the patient is not to suffer a range of penalties including mere discomfort and subsequent death.¹⁹⁴

The above arguments go to explain why we have not only supported the integrated skills development programmes of the University of Botswana but have recommended it as a model, the morning star, to guide all those sailing in the troubled seas of experimentation of different systems of practical training courses. It is not being suggested, of course, that we agree with every aspect of that programme. Therefore, the critical issue which we consider as a new challenge is one of directing clinical programmes more towards development and human rights issues as discussed below.

5.D. CLINICAL PROGRAMMES AND DEVELOPMENT

In the United States legal aid clinics were introduced first as a measure to cater for the expanding needs for access to justice especially to those incapable of paying for such services due to poverty. But more importantly, as the years passed

¹⁹³ Iya PF, "Integrating Skills and Academic Study: An Overview Analysis of Diverse Institutional Strategies and Practices within Southern African Jurisdiction" 1966 (unpublished) read at the Association of Law Teachers Conference in London.

¹⁹⁴ Nash G: "Should Law Schools Produce Lawyers?" (1991) Journal of Professional Legal Education Vol. 9 No. 2, p. 32.

by, and the demands for legal services continued to expand, legal clinics started to mushroom and to play different educational and social roles. Indeed as early as the 1960s, it was realised the concept of clinical education had to expand far beyond the legal aid clinics at law school campuses for legal education purposes. It had to encompass programmes of empowering the poor through knowledge of the law. Thus clinical programmes came to focus on social development issues through provision of legal services and dissemination of legal information contributing therefore to the appreciation of social justice, democratic and human rights values.¹⁹⁵

What we have established during our visit to Botswana revealed that their clinical programmes have no clear direction towards the kind of empowerment of the poor as discussed above. While the programme provides limited (because of above criticisms) access to law and serves the skills development needs of students, it does not encourage the target groups especially the students and the clients to understand the existing rights under the law and to devise their own strategies (empowerment) to bring about improvement in their lives (social development). This, as we have argued, constitutes a new challenge for the clinicians. Other ways of providing more meaningful improvement to legal education for development is to identify the present and future needs of society through empirical research.¹⁹⁶

5.E THE NEED FOR EMPIRICAL RESEARCH - SWAZILAND AS A CASE STUDY

The critical analysis of the system of legal education in the BOLESWA countries, including Botswana's model of clinical programmes coupled with the critique of legal education generally, has established in our view one clear fact, namely: legal education has not progressed far enough in solving the complex problems of development especially in the BOLESWA countries. Making any further

¹⁹⁵ For detailed discussion read Iya PF, "Legal Education for Democracy and Human Rights in the New South Africa with Lessons from the American Legal Aid Movement: (1994) Journal of Professional Legal Education Vol. 12 No. 2, p. 211.

¹⁹⁶ A general conceptual framework for such research can be found in Iya PF, "Addressing the Challenges of Research into Clinical Legal Education within the Context of the New South Africa" (1995) The South African Law Journal vol. 112 p. 265.

comments and recommendations is only possible when one is equipped with empirical data. For that reason, and as already explained at the beginning of this thesis, we designed a research project which was duly and specifically executed in Swaziland. The subsequent chapters, therefore, will discuss the results of this research and our comprehensive recommendations will appear at the end of the thesis.

CHAPTER 6

MONITORING LEGAL NEEDS IN SWAZILAND

In ascertaining the legal needs (both present and future) of the society in Swaziland and analysing the extent of the contribution of law and lawyers to the process of meeting those needs in the context of sustainable national development, the following issues will be addressed in this chapter:

1. Mechanism for establishing legal needs.
2. Social transformation with implications on legal needs - Theoretical Framework and Trends.
3. Monitoring and Establishing the emerging legal needs through empirical research:
 - (a) key findings;
 - (b) research methodology;
 - (c) profile of informants.
4. Main findings: analysis and conclusions.

By discussing the above issues not only the theoretical aspects of legal needs in Swaziland are established, but their practical applications are explored through our empirical research, the results of which are also discussed.

6.A THE MECHANISM FOR DETERMINING LEGAL NEEDS

Considering the popular image of lawyers in society generally, one often wonders whether society really needs lawyers. They, for example, have been described as having interests which are in constant conflict with the interests of the community.¹⁹⁷

As reflected in Charles Dickens' classic novel Bleak House, lawyers are portrayed as virtual vampires bleeding society's innocence dry and driving them to poverty. They are perceived as men and women who have complicated all the social relations with their legal jargon which turns simple everyday problems into endless protracted legal battles

¹⁹⁷ Read The Satirist Jonathan Swift's "Voyage to the Country of Honyhnms" in The Works of Jeremy Bentham, (Bowring Ed), Russell and Russell, New York.

that benefit nobody other than the lawyers themselves.¹⁹⁸ They are seen as causing more problems in society so as to generate work for themselves.

The Swazi society is not without its bias against lawyers. Students have confirmed that most lay-Swazis look upon lawyers as a group of legalised cheats whose "blood-sucking" profession is unnecessary especially because of the problems they create for society.¹⁹⁹ At the University of Swaziland where student unrest manifests itself in perennial strikes leading to closure of the campuses to students, law students are often blamed for those disturbances. One often hears in the corridors sentiments of strong distrust for "these so-called lawyers" who know no more than to cause problems.

These and other forms of abuse of lawyers may be blamed on popular ignorance about the role of lawyers, but deep down, they unearth the paradigm of law as a weapon of suffering. Law under the colonial regime was, as already observed, not that of equality among and freedom for citizens, but of discrimination, coercion and repression.

The Swazis, like many of their brothers and sisters elsewhere in Africa, had very little understanding of this law of which they regarded themselves as merely victims. The colonial legal concepts and procedures slept uncomfortably with their customs and ways, thus undermining not only the role of law, but even of lawyers, making them unacceptable and indeed unnecessary. Therefore, to prove that lawyers are not totally insignificant to processes of social advancement, one must establish those areas where society actually needs legal services. To be able to do that the following issues have first to be addressed:

- (a) What are the problems of society that need legal solutions?
- (b) What type of lawyers are required to solve these problems, i.e. meet the needs of society?
- (c) How can lawyers best be moulded for their tasks of solving social problems?

¹⁹⁸ Ncube W, "Legal Education and Access to the Legal Profession in Zimbabwe: Past, Present and Future" (1989) Unpublished Paper presented at the Inaugural Meeting of Law Teachers Under the Botswana, Lesotho, Swaziland and Zimbabwe (BLSZ) Roman-Dutch Common Law Project held from 16-20, 1989 at the University of Swaziland. (Paper available with Head of Law Department in Swaziland).

¹⁹⁹ During the five years in Swaziland, the writer taught a course in Legal Ethics which involved discussing several issues related to professional conduct. It is at this lecture and from written assignments by students that information about the attitude of the majority members of the society is received. One such information is contained in Research Papers on "The Nature and History of the Legal Profession in Swaziland" submitted for marking in 1991 by Masuku T, and Nkambule KP, where these comments can be found.

A debate has arisen around the problem of ascertaining and assessing the legal needs of society. In contrast to the general view held among Africans, globally it has been recognised that there has been a phenomenal growth of lawyers since World War II and this has been accompanied by an unprecedented increase in demand for legal work both from business clients and on behalf of previously unrepresented individuals. In the United States, for example, by 1990 the profession had become a \$91 billion a year service industry employing more than 940 000 people with the result that there was one lawyer for every 320 persons and with the added result that not only the manner in which law was practiced but even how law firms were structured and organised in their work were also affected.²⁰⁰

To assess this growth and demand for legal work, it was argued there that law schools played a significant role in that first of all they attracted, then enrolled and taught record number of students. The necessary consequence of which was the establishment of numerous law schools to accommodate the increase.²⁰¹ It is here that one notes the role of law schools in the growth of lawyers.

In the case of the BOLESWA countries an experimental method was used by Professors Paul JCN and Twining WL. They attempted to make projections of needs for law-trained persons from estimates in the Development Plans of the three countries.²⁰² Naturally they ran into serious problems because those estimates and projections failed in many respects to explain the paradox of insufficiency and yet growth of lawyers. For example, they failed to explain how in each of the BOLESWA countries experiencing an increasing number of lawyers being trained, there was also an increasing number of ordinary citizens who were unable to obtain effective and affordable representation for their personal legal problems.

The approach we have adopted in this study is to obtain information based on our conduct of empirical research through which we were able to monitor and establish the emerging social problems and legal needs of society in Swaziland. The focal point of our monitoring process explored the following:

²⁰⁰ MacCreate R, (ed), Legal Education and Professional Development - An Educational Continuum (1995) West Publishing pp. 5-6.

²⁰¹ Ibid p.5.

²⁰² Paul JCN and Twining WL, Report on Legal Education and Training Op. Cit. p.6.

- (a) The nature of the social problems requiring the production and utilisation of law-trained persons to assist in solving them.
- (b) The number of lawyers needed to solve social problems.
- (c) The scope of lawyer utilisation.
- (d) The quality of lawyers: to be ascertained through their education, experience, degree of professionalisation/specialisation and the degree of their usability in many different capacities, depending on the quality of their education.

The remaining part of this chapter will address the issues of demand for legal services arising out of social changes and related problems. Both the theoretical and empirical information monitored through our research are also analysed in the subsequent paragraphs.

6.B SOCIAL TRANSFORMATION WITH IMPLICATIONS ON LEGAL NEEDS - THEORETICAL FRAMEWORK AND TRENDS

6.B.1 Socio-political transformation

The last decade has witnessed strong winds of change blowing over Africa, sweeping away one-party authoritarian governments and restoring multi-party politics. The slow but steady movement away from dictatorial rulers to democratic governance should augur well for a new political dispensation as illustrated by trends in Malawi, Zambia, Namibia, Mozambique and now South Africa. Even the economic reform programmes which swept across the continent under the watchful eyes of the World Bank and the International Monetary Fund (IMF) have also created a climate which impacts positively towards social advancement. But, the realisation is setting in among leaders and those they lead that finding the politically desired system is by no means a guarantee of peace, stability and development in their fragile nation-states. Human rights, gender, environment, housing, children and land rights are just a few of the plethora of issues that have been banded together in order to keep African governments accountable.²⁰³

²⁰³ For similar arguments read Paul JCN, "Law and Development into the 1990s..." Op. Cit. pp. 15-21.

There is increasing awareness among people of attempts by governments to violate their constitutional rights. People's power and confidence to change their own situations is evident in many ways. Some, like the workers, go on strike and take their employers to court; others look to constitutional remedies; and others turn to available legal provisions for solutions. It is in the context of these trends that we need to examine the extent of the socio-political, legal and economic changes and how they relate to demands for legal services in Swaziland. A few factors on the country to guide our discussion can be found in ANNEXURE VII.

The historical developments as discussed earlier have created fundamental socio-political structures from which one can easily understand the present and future problems of the country. Prominent among the socio-political problems brought about by the changes is the current dichotomy between what is considered modern or westernised standards of behaviour and the traditional forms or standards which permeate the entire Swazi society. A good example of this is the socio-political paradigm whose changes have created serious constitutional problems for the country requiring constitutional measures. A few of those problems can be highlighted to illustrate the point.

When the Kingdom attained independence in 1968, a monarchical arrangement was established incorporating both the Westminster-type and the traditional systems as entrenched in a constitution of 1968.²⁰⁴ However, in 1973 King Sobhuza II suspended the constitution, regarding it as unsuitable to Swazi way of life.²⁰⁵ This decision of the King did not resolve the complexity of the relationship between the modern and traditional system of societal governance. The position still maintains. The King has the key function in the political life of the nation, as well as in the social, military, religious and legal spheres. Indeed, the centralised political authority is vested in the King and his mother, the Indlovukazi, both of whom perform the highest legislative, executive and judicial roles.²⁰⁶

²⁰⁴ Read especially Chapters IV and VII of that constitution.

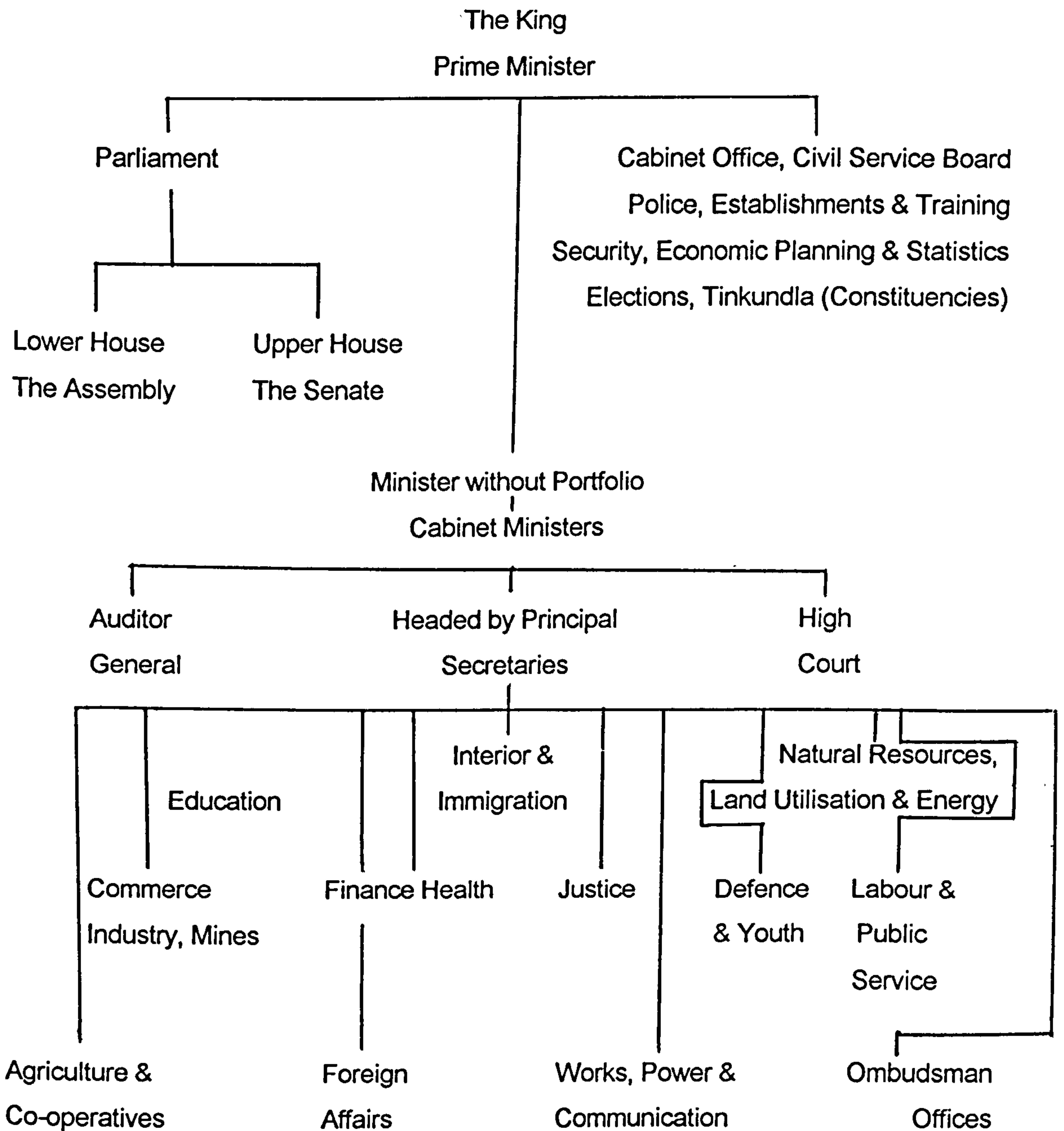
²⁰⁵ Refer to Proclamation No. 12 of 1973.

²⁰⁶ For further details read Malan JS, Swazi Culture 1985 Johannesburg: African Institute of South Africa.

On the one hand the King rules the society through various traditional institutions which buttress the Swazi culture. In this aspect of his function, he is advised by the Swazi National Council which is composed of all chiefs in the land and selected other individuals. Thus the King has exclusive control over all traditional law and practice, including land and mineral royalties. The day-to-day affairs concerning all these issues are managed by an inner advisory council, the liqogo. But on the other hand the King is also the head of a modern western-style government and he legislates on the advice of his Ministers, whom he appoints. The Council of Ministers is presided over by the Prime Minister who reports to an elected parliament consisting of the House of Assembly (Lower House) and the Senate (Upper House). The sketches outlining the structure of both types of government are given below: the Western-style Structure in Table I and the Traditional Structures in Table II.

TABLE I

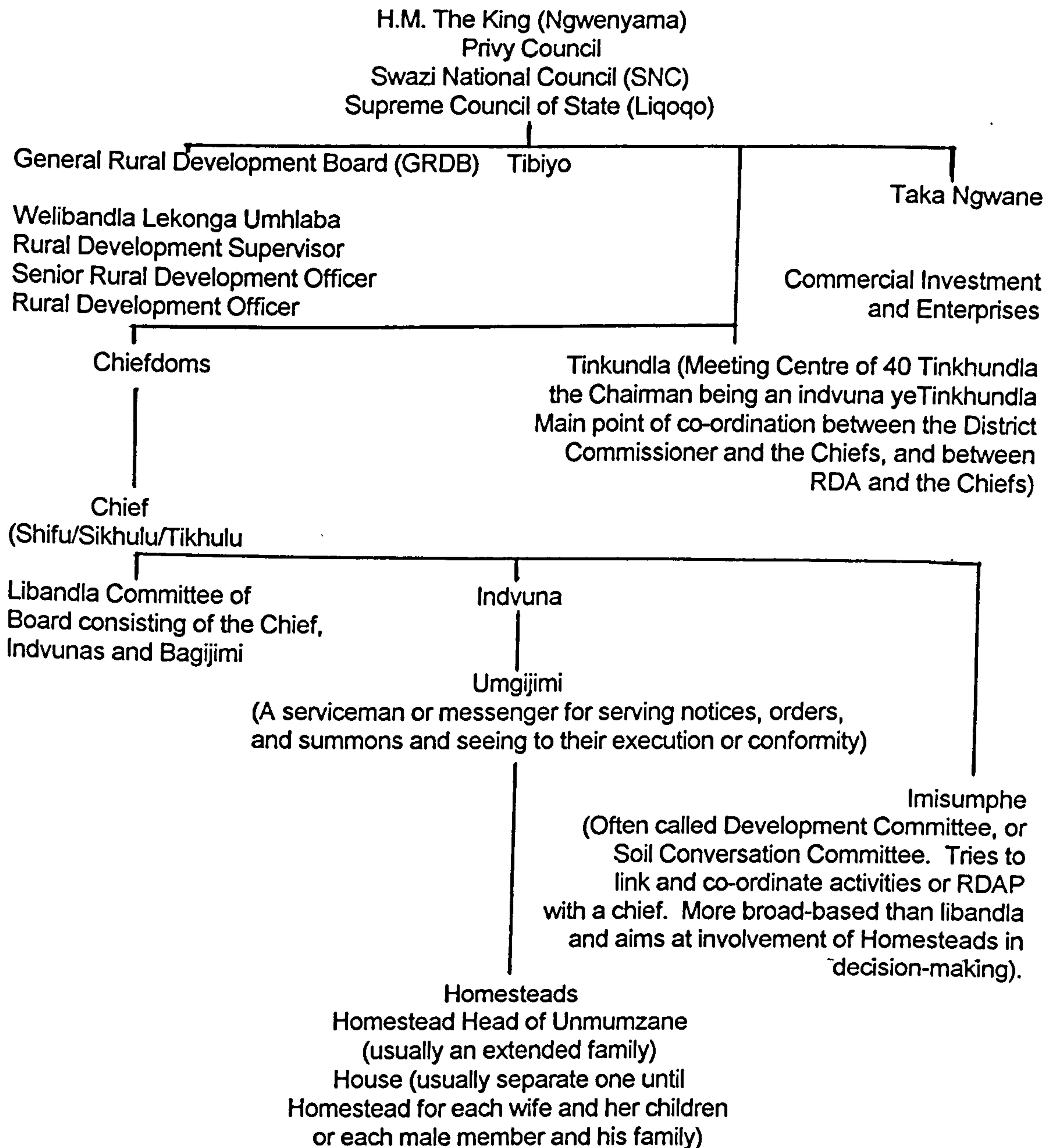
KINGDOM OF SWAZILAND: GOVERNMENT & POLITICAL STRUCTURE



Source: Adepouju A (Ed): Swaziland: Population Economy and Society (1991) p.15.

TABLE II

LINE OF AUTHORITY UNDER THE TRADITIONAL ADMINISTRATION



Source: Adepoju, A (Ed) Swaziland: Population, Economy and Society (1991) p.16.

The local administration reflects even more the complexity being emphasised.

The chiefs act as agents of both the traditional and modern authorities. For example, under the Criminal Procedure and Evidence Act, the chiefs have power of arrest without a warrant.²⁰⁷ But at the same time they also head the lowest units of traditional organisation, composed of all male adults in the chiefdom, which fulfils, at the lowest local level, the role of the Swazi National Council.

The impact of the sharp division in the society is evident in terms of the traditionalists versus the modernists between whom a deep gap has already developed.²⁰⁸ The modernists have already gone a long way in their preparation for change. The manner in which the Tinkhundla system of election to Parliament is questioned has been, for example, cited as one of the reasons for not wishing to run the country under the old system any longer. But on the other hand, the traditionalists are holding tight to their beliefs that Swazi people cannot and should not be run according to foreign principles and ideologies: that it is unknown in the lines and rule of the people to be told how to manage national affairs by their sons and daughters, and that urban western style of life and the educational system were destroying Swazi culture roots in young people.²⁰⁹

Currently Swaziland is experiencing the pain of transition to a modern democracy. In July 1996 King Mswati announced moves towards democratic reform. He not only appointed a new Prime Minister to drive the process but also re-established the Swazi National Council and set up a Constitutional Review Commission which includes members of the banned opposition leaders (only appointed in their capacity as ordinary citizens and not as representatives of organised political interests). Labour mass action which had paralysed the country the previous year as well as pressure from the country's South African neighbours were key factors in precipitating this process.

What all the above discussion means for the present and future needs for legal services are further explained from the results of our monitoring research, details of which will be discussed after the analysis of the socio-economic and legal changes. It is

²⁰⁷ Section 22 of the Criminal Procedure and Evidence Act No. 67 of 1938.

²⁰⁸ For details of these arguments read Magongo SS, "Swazi Panorama" in the Swazi Observer of January 31, 1992 p. 4.

²⁰⁹ In the Swazi Observer of September 25, 1989 p. 6.

evident at this point that there is a demand for constitutional review based on principles of democracy and human rights which need to be entrenched in that Constitution.

6.B.2 Socio-Economic Changes

Historically, Swazi men were responsible for clearing the fields and women for cultivating. Women contributed the bulk of the labour in planting, weeding, harvesting and storage, in addition to performing the routine domestic chores, while the men hunted, looked after the cattle, built houses and contributed labour to national and local chiefs as members of regiments.²¹⁰ Under Swazi culture "Women's lives - what clothes they wear, the kinds of friends they make, where they work and the places they go to are subject to constant and close scrutiny by their husbands, and both their own and their husbands' relatives. Thus in effect, a woman is regarded as a ward under guardianship."²¹¹

The above situation concerning traditional roles impact heavily on the current economy. In ANNEXURE VII, paragraph C attempts to portray some indication of the economic growth. The figures show a growth rate of 4.7% per annum in the GNP per capita between the years 1986-89 and 1.5% per annum in the GDP per capita for the same period. The volume of export contributed to by 70% of agricultural and mineral exports (see ANNEXURE VII) has also continued to grow. Generally, therefore, Swaziland has been associated with an open market conducive to export-oriented growth resulting in some degree of economic progress as shown by available indicators.

Unfortunately, this has not translated into sustainable economic growth, poverty alleviation, employment and so on, because both social and economic infrastructures are in a very parlous state. Prospects for accelerated growth for sustainable development remain uncertain on account of several factors. From an employment point of view, for example, while women represent 30% of the labour force, their participation is incapacitated by a high degree of discrimination entrenched in the law. Under the Employment Act, female employees, irrespective of marital status, who have been in

²¹⁰ Armstrong AK and Russell M, in A Situation Analysis of Women in Swaziland 1985 United National Children Fund, UNICEF/UNISWA Social Science Research Unit Project.

²¹¹ Armstrong AK and Nhlapo RT, in Law and the Other Sex: The Legal Position of Women in Swaziland 1985 University of Swaziland.

continuous employment for one year or more are entitled to maternity leave of not less than 12 weeks, but even then employers are not obliged to pay for such leave period.²¹² This has profound effects on women's health since they are obliged to return to work soon after confinement to ensure continuity of income.

The position appears to have slightly changed, for in recent years women have increasingly participated in wage employment. It is estimated that about 30% of wage labourers in Swaziland are women, mainly in unskilled and clerical jobs. The current statistics show that of the 220 286 women in the working age-group, only 55 164 are regarded as working, constituting an activity ratio of 25%. In the private sectors, females on the average earn less than males at all levels of skills, the average female wage being about 65% of the male²¹³. This position, though in itself not satisfactory, has been made possible by many programmes for women including those related to their education. The available figures show that 63% of women are literate or have some rudimentary education. They do tend, however, to be less in institutions of higher learning. The reason given being that many girls drop out of school due to pregnancy and that parents are more likely to withdraw the female child from school, should there be a financial crisis in the family. Therefore, it is not surprising to find few women in the legal profession as we shall soon discover.

The second important economic factor has been the movement of labour between urban and rural areas. Writers have argued over the advantages and disadvantages of the rural-urban migration.²¹⁴ The case of Swaziland is better appreciated when examined across the four regions.²¹⁵ For instance, Hhohho and Manzini regions attracted more people compared to Lubombo and Shiselweni. Table III explains the fact that the majority of migrants came to urban centres for work while a large portion also came as dependants accompanying husband, wife or parents. Other reasons for migrating to town include schooling, and for social and economic services as clearly illustrated in the Table.

²¹² Section 107 of the Employment Act No. 5 of 1980.

²¹³ Armstrong AK and Nhlapo RT, Op. Cit.

²¹⁴ Read for example the writings of Vanderpost C, "Report on a Survey of Migration, Employment and Housing in Swaziland" 1982 University of Swaziland and Subair SK, "Steaming Rural-Urban Migration in Swaziland", Proceedings of the National Workshop on Population and Development Focus in Swaziland, Op. Cit. pp. 18 - 190.

²¹⁵ Details can be found in the Paper by Subair SK, Ibid p. 184.

TABLE III
MIGRANTS ACCORDING TO MAJOR MOTIVE OF MIGRATION
FROM RURAL TO URBAN CENTRES

	MAJOR MOTIVE	% OF MIGRANTS
1.	to get work	35,8
2.	other reasons connected with work (to be near work)	4,2
3.	for schooling	7,9
4.	for marriage/to live with husband or wife in town	19,7
5.	to live with parents	12,8
6.	other family reasons	7,7
7.	attracted to Manzini for housing or general living	3,4
8.	wanted to leave home (including political refugees)	1,4
9.	others	3,4
10.	unknown	3,7
	TOTAL	100%

Source: Subair, SK in "Steaming Rural-Urban Migration in Swaziland".

Related to the issue of labour mobility is the migration of Swazis to South Africa. According to the available figures in 1986, 18 138 Swazis were recruited to work in the South African mines. The figure was 20 462 in 1976, but it dropped sharply (maybe as a result of the 1976 Soweto uprising and its aftermath) to 10 598 in 1980. Then it rose again between 1980 and 1986 probably as a result of the recession in Swaziland. Since then, because of the decline in gold prices, recruitment for mine work in South Africa has been declining. In 1990 only 16 800 Swazis were working in the mines.²¹⁶ The

²¹⁶ Read Mensah SNA, "Population Growth Employment Generation in Swaziland. A case for Promotion of Small-Scale Enterprises" Op. Cit. 127.

result has been growing unemployment in Swaziland.

Culturally too, the impact of the labour is quite visible. The Swazis are polygamous in their marriages and they attach great value to children to the extent that marriage is not fully contracted unless it has been blessed with a child. It is a child that integrates the wife into her husband's family, kinship and clan. The more children a person has the better, because they have increased the numbers and hence the strength of the family and the whole lineage. This is what has led to the existence of large families among the Swazis. The desire for large families coupled with declining mortality rates and high fertility have been used to explain the rapid growth in population in Swaziland, as indeed elsewhere in Africa.²¹⁷ The resulting fact that the rate of population growth which remained at the high level of 3.4% per annum between 1966 and 1976 and did not change in the 1976 to 1986 period has created certain constraints to the socio-economic survival of the country.²¹⁸ This was recognised by government as evidenced by the following statement in the development plan 1991/92- 1993/94.

"Given the small area of the country, the limited natural resources and the requirement of an increasing population in terms of social services (health, education, law enforcement, administrative and other services) and infrastructure (housing, water supply, waste disposal, roads, telephones etc) projections call for increased efforts by all concerned to reduce population growth".

Another factor influencing the economy is the existence of the traditional subsistence sector which occupies a fairly large portion of the country. The land which is the main source of production unfortunately does not belong to (not-owned by) individual native Swazis. Three-quarters of the land is "Swazi National Land" held in trust by the King and administered by the chiefs while the remaining one-third is freehold

²¹⁷ For details read Gule G, "Population Dynamics of Swaziland" A Report of the Seminar on Population and National Development, organised by the Parliamentary Committee on Population and Development and FLAS was held from 15-16 August 1990 at Nhlanguano Sun Hotel, Swaziland; Okore AO, "Population Education: Traditional and Modern Perspectives with Particular Reference to Marriage and Reproduction" in Proceedings No. 3, Annual Conference of the Population Association of Nigeria, 1985; United Nations Report on International Conference on Population, 1984, Mexico City, 6-13 August 1984 - Publication No. E/CONF. 76/19; and World Bank "Sub-Sahara Africa - From Crisis to Sustainable Growth: A Long-term Perspective Study", Washington D.C., 1989.

²¹⁸ Gule G, "Population Dynamics of Swaziland" Ibid p. 15.

land owned by individuals, mainly foreign white farmers and commercial companies. This situation has left the majority of the citizens within the traditional subsistence bracket with all its characteristics of abject poverty. (See ANNEXURE VII).

The problem of poverty is aggravated by the problems of unemployment. For example estimated total paid employment fluctuated from year to year during 1980 - 1984. This is illustrated by the table below.

TABLE IV
THE TOTAL EMPLOYMENT FIGURE (1980 - 1984)

Sector	1980	1981	1982	1983	1984
Formal private sector	55,077	57,243	54,775	54,327	50,581
Public sector	20,047	22,496	22,582	22,246	24,552
Total formal sector	75,124	79,739	77,357	78,573	75,133
Informal sector	10,145	10,452	10,873	10,873	12,200
Total	85,269	90,191	88,230	90,092	87,333
Growth rate	0,033	0,058	- 0,022	0,021	- 0,031

Source: Okore A (Ed), Proceedings of the National Workshop on Population and Development Focus on Swaziland (1992).

The total employment figure in 1986 was 116 400 and the corresponding figure for 1989 was 126 161. This implies an annual rate of growth of 2.5%. But from the most recent Development Plan, 1991/92-1993/94, the growth rate of employment has dropped below the 1986-89 average, i.e. between 1989 and 1990 it was less than 1%, thus supporting our assertions on relative poverty based on unemployment in the country.

In conclusion one may project Swaziland as a country with ideal economic indicators for growth. Most places had not been unionised, and where unions existed,

they were weak because unions were branded “un-Swazi”. This led to an extremely open economy with some evidence of a headway made for growth. However, considering other socio-economic aspects, e.g. the dichotomy of the modern capital economy with intensive techniques of producing export crops as operated by the foreign whites and the subsistence farming by the majority of citizens on the Swazi National Land, the tendency is to believe that the apparent positive economic indicators have not been translated into tangible sustainable growth for the majority of the Swazis.²¹⁹ In our monitoring exercise, we shall attempt to establish legal needs in the economic and industrial sectors within the context of the socio-economic infrastructure. But the available trends so far point to some form of regulatory measures to drive the economic process on the road to social advancement.

6.B.3 Changes In The Socio-Legal Order

The search by the Swazis for accelerated transition to a modern democracy has not only been limited to socio-political and economic sectors of the community. It engulfs socio-legal aspirations. The changes in the economic and political scenario during the past decade or so have opened up more space for people’s questioning of the legal order inherited from the colonial era. The emerging problematic legal system can be assessed when placed within its historical perspective.

The colonisation of Swaziland necessitated the creation of a legal order of a dual nature consisting of Swazi law and custom on the one hand and the Western/European style of law (Roman-Dutch common law) on the other.²²⁰ In 1889 by Proclamation of Queen Regent (after the death of King Mbandzeni), legal history was made by her setting up a provincial government committee. This took over the functions of a white committee responsible for both civil and criminal jurisdiction in respect of matters in which white persons were and might have been involved and such other matters determined in accordance with the Roman-Dutch law of South Africa. It was the first

²¹⁹ Magagula ZW, “Legal Education and Practice in Swaziland: From Competence to Excellence” (1993) Dissertation, UNISWA, pp.18 - 19.

²²⁰ For details read the following articles appearing in the local papers:

- (a) “What is dual legal system” by Observer Correspondent in The Observer of January 10, 1992 p.9.
- (b) “Problems of dual law system” by Gumede N, in The Sunday Times of Swaziland of March 22, 1992 p.14.

formal acknowledgement by the Swazi authorities of the existence of the two legal systems in Swaziland. The process of formal acceptance was completed by the General Law and Administration Proclamation No. 4 of 1907 which provides, inter alia, that "the Roman-Dutch law, save in so far as the same has been heretofore or may from time to time hereinafter be modified by statute, shall (underlining for emphasis) be the law in Swaziland". This statute remains the landmark in the history of Swazi culture represented and regulated by Swazi law and custom. Its effect was to formally introduce duality to the legal system of Swaziland where dualism denotes the co-existence of the received law and the Swazi law and custom. It did not abolish the indigenous structures, it merely relegated them in conformity with the British colonial strategy of oppression of the people through their own institution. Indeed Article II(3) of the convention of 1884²²¹ provided that "the management of internal affairs of the natives shall be in accordance with their native law and custom". These sentiments subsequently found expression in many pieces of legislation, which from the colonial period to the present day form the backbone of a strong dual legal system in Swaziland.²²²

The impact on the present society of the dual legal system discussed above can be assessed from different perspectives. In general terms, the most significant offshoot of the situation is that there is one general received law for the whole population in Swaziland and another law, customary law, for another section of the society. The Swazi is subject to two legal systems (received and customary), while his non-Swazi counterpart is subject to one (received law). This not only leads to double standards but also to uncertainty, discrimination, inaccessibility and all sorts of legal evils of such a structure as to question the very process of positive transformation to a democratic society governed by principles of the rule of law and culture of human rights. A typical example of the failure to advance towards those goals relates to the issue of

²²¹ One of the Conventions between the English and the Boers which finally brought Swaziland under English rule.

²²² Amongst the most important of such colonial legislation are the following:

- (a) Administration of Estates Act No. 28 of 1902 (especially section 68 thereof).
- (b) The Magistrates Court Act No. 66 of 1938 (especially section 16 thereof).
- (c) The Swazi Courts Act No. 8 of 1950 (especially sections 3, 8 and 13 thereof).
- (d) The Interstate Succession Act No. 3 of 1953 (as amended in 1954 - especially section 4 thereof).
- (e) The Marriage Act No. 47 of 1964 (especially section 7 thereof).

discrimination against women on the basis of sex and gender. In discussing this matter it has been argued that Common Law and uncodified Customary Law derived from Swazi traditions relegate the status of women to that of minors.²²³ They are completely controlled by the male head of the family.

This customary law, which still overrides the common law based on the Roman-Dutch legal system when it comes to marital power held by men over women, makes it extremely difficult for women's struggle for equal rights. All sorts of laws keep women under male control. For instance, women cannot be chiefs in Swaziland, and the immigration office requires a married woman to have her husband's or guardian's permission to obtain a passport. Women married in community of property do not enjoy equality. Men, always regarded as the head of the family, are free to take unilateral decisions regarding family property like cattle, land, estates and movables.

According to Magwaza Maureen, local programme officer of Women in Law and Development in Africa (WILDAF), with whom we had discussions on the issue, the biggest handicap of customary law is its constraints on women, especially married women. Under customary law or Western-style marriage in community of property, married women may not own property. The Deed Registration Act prohibits married women from registering property in their own names. Married women can only sue or be sued with their husbands' involvement. Men can transfer or sell family property without the consent or knowledge of their wives.

Recently Attorney-General Zwane Sipho transferred his family estate without the knowledge of his wife. She has had to take legal action against him to get her share. Swazi Nation land is controlled by the chiefs and held in the national trust by the monarchy. The chiefs do not entertain requests for land from married women. In the case of single women, they can access land through their male relatives. Title deed land is urban land controlled by the city council. Those married in community of property cannot register title deed land in their own names - it must be registered in their husband's name. This is spelt out in the Land Act No 37 of 1968.

Inheritance laws are very hard on widows. According to Swazi law and custom, a widow cannot inherit her deceased husband's property in her own right, but through

²²³ Hlatshwayo V, "Swazi Women Still Lack Status" Sowetan of Monday, 21 October 1996 p.16.

their *inkhosana*, the son chosen by the family council. The *inkhosana* inherits the estate and livestock. This custom excludes women from being heirs because they will probably leave the family when they re-marry. The widow is left powerless as her in-laws grab the property she shared with her husband. A widow must observe one month of confinement, but a widower does not. Her movements and public conduct are restricted. Widows working in public places must cover their mourning weeds because members of the royal family might see them. Policewomen and nurses are not allowed to wear mourning clothes. These mourning rituals place working women at a disadvantage in terms of productivity and eligibility for promotion.

Several organisations are working to improve women's rights. The questions which we need to pose here are: to what extent and degree? How is law part of the process for improving women's rights?

6.C MONITORING AND ESTABLISHING THE EMERGING LEGAL NEEDS

Having set out in detail the problems of the Swazis in the context of their socio-political economy, the next issue to establish is whether these problems are of a legal nature requiring legal solutions. Only then can we be in a position to answer the questions: what types of lawyers are needed to solve those problems? What is it they lack in meeting those needs? How can legal education be so designed as to equip the lawyers and make them more capable to meet the identified legal needs of the society? This part of the discussion focuses on answering the question whether Swaziland's problem require legal solutions.

6.C.1 Key Findings

- (a) The present system of governance and political transformation requires principles of constitutionalism and democratic governance.
- (b) Current inequalities in the socio-legal and economic structures impact heavily on fundamental human rights and the role of law in promoting and protecting them.
- (c) Social justice and due process of law raise serious legal issues involving not only equality before the law but accessibility to legal services for every citizen without discrimination. Public interest law is equally called for.

- (d) Gender issues especially in the area of discrimination against women present the need for not only constitutional but other legal guarantees for the protection against discrimination.
- (e) Awareness on environmental issues have direct bearing on land as an important resource not only under customary law but under current land law reforms.
- (f) Industrial and commercial transactions require regulation both nationally and internationally to ensure a sustained social development.
- (g) Cultural values which control the general lifestyle of the Swazis require a review to establish the customary law involved and how that can be harmonised with the received or western law.

6.C.2 Research Methodology

The methodology used for this aspect of the enquiry was designed to satisfy the research objective of establishing the legal needs, both present and future, of the Swazi society. Three stages were followed when collecting the information, namely: (i) the questionnaire method which required the informer to answer specific questions contained in the questionnaire; (ii) the interview method involving oral discourse (question and answer) between the interviewer and interviewee; and (iii) library/telephone surveys.

The relevant questionnaires are appended as ANNEXURES VIII and X. Refer particularly to questions 1-7 of ANNEXURE VIII, the answers to which are discussed subsequently. Due to the problems of administering the above questionnaire as earlier discussed in Chapter 1, oral interviews (the second stage) not only became necessary but constituted the greater part of the information-gathering process. The questions and objectives for the interviews are the same as set out in Chapter 1. The third stage consisted of library research and telephonic survey, both of which supplemented and in some cases confirmed the information collected through the two stages mentioned above.

6.C.3 Brief Profile of Informers

The principle of random sampling discussed in Chapter 1 provided the basis for the choice of informants. However, to achieve the objective of this aspect of the research two categories of participants were utilised: employers (particularly from the financial institutions) and members of the legal profession.

The financial institutions which responded to the request for interviews come from the two main commercial centres of Swaziland: Mbabane and Manzini. The members of the legal profession especially the Magistrates interviewed came from the four regions. The principle of regional representation, therefore, guided the process of information-gathering.

6.D MAIN FINDINGS

6.D.1 Questionnaire Results

The sample of employers interviewed were:²²⁴

- Barclays Bank Head Office (Mbabane)
- Standard Chartered Bank (Mbabane)
- Swazi Bank (Mbabane)
- Union Bank (Manzini)
- Bank of Credit and Commerce International (Manzini)

The specific questions on legal needs to which they responded were of three types as found in questions 5-7 of ANNEXURE VIII. Their response is summarised under the following themes:

- | | | |
|-----|-------------------------|--------------------|
| (a) | Present Law Programmes: | Scope and content |
| (b) | Present Law Programmes: | Relevance |
| (c) | Law Programmes: | Avenues for reform |

6.D.1.(a) Present Law Programmes: Scope and Content

It was a prevalent opinion among the institutions that law training is essentially a specialised if not an esoteric discipline. In that sense they found it difficult to comment adequately on the content and scope of the law programmes. A majority felt that their

²²⁴ This aspect of the research was administered by the Law Department in 1989.

operations were predominantly financial and fairly routine thus involving minimum legal problems which would require distinct or specialised legal departments within their establishments. It was stated that whenever their operations required legal input, their needs were adequately catered for by various practitioners whom they had retained for that purpose. Given such an operational context, it was difficult to draw broad generalisation on content and scope of law programmes. No doubt this is a minority view but could well serve as a pointer or a guide to future reform initiatives concerning employment of lawyers in financial institutions.

6.D.1.(b) Law Programmes: Relevance

The responses to this general theme were varied and fairly unstructured. Most of the respondents thought law had very little everyday relevance to their work. A more informed view, however, was that at the moment the operations of many of the financial institutions were fairly small in size and relatively unsophisticated. This, however, was more of a reflection of the performance of the economy than anything else. It was their considered opinion that as the economy expanded and became more diversified (particularly in view of the PTA and SADDC initiatives), financial institutions would have to contend with corresponding diversified transactions for which legal expertise would be a necessity. The expansion in international trade and transnational bodies in the subregion would certainly put pressure on law programmes to meet that challenge. As regards the relevance of the current programmes to current financial needs, most of the respondents felt the programme was adequately relevant. However, a view was expressed that for a career in the financial world, a familiarity with basic commercial subjects was almost indispensable. In practical terms, it was felt that law students should be exposed to other relevant disciplines such as Economics, Commerce, Accounting, Banking (as opposed to Law of Banking), Mathematics and International Trade. Not only would these augment the relevance of our programmes to the prevailing needs of financial/employer institutions, but would also open up new opportunities for law graduates in areas which have hitherto been considered to be the exclusive domains of students of social sciences, commerce and accounting.

6.D.1.(c) Law Programmes: Avenues for Reform

From the interviews it was apparent that the law programmes, though not in dire need of immediate overhaul, required a careful and intelligent review, if for nothing else, at least to come to terms with market needs. It was felt that such an exercise was timely and urgent particularly in view of the rapidly changing economic complexion of the subregion as well as the possible future diversity of transactions that may be ushered in by the pace of political reform in neighbouring South Africa.

In terms of immediate needs the view was expressed that law programmes need to be given more depth and variety. While the former seeks to put greater emphasis on content, the latter points to the need for flexibility as well as the desire to cater for individual students' career dispositions or preferences. In this regard, consideration needs to be given to introducing in the fourth or fifth years more elective courses to facilitate specialisation and provide appropriate career blends. Courses like economics, international trade, commerce, management, will have to find a place in law programmes. Similarly, the programmes need to be restructured in terms of content to provide the necessary mix to facilitate employment versatility without, of course, compromising the content of the legal components of the programme or even creating "jacks of all trade".

As to the response from those involved in the administration of Justice, 9 persons were provided with copies of Questionnaire (ANNEXURE VII).²²⁵ They included two Judges (Hannah CJ and Rodney J); the then Honourable Minister of Justice (Mr Dladla); Magistrates (Messrs Mabuza, Strauss, Magagula, Maphalala and van Loggerenberg); the Master of the High Court (Mr Dlamini S.C.) and the Commissioner of Police. A summary of their response to the relevant questions is given below:

Question 5: Is there any need in the country for the introduction by the Department of postgraduate studies in law at Masters or Doctorate level? What need would such a programme fulfil?

²²⁵ Same source as indicated in Footnote 215 above.

Answers:	(a) Need for postgraduate studies (Masters)	Yes	3
		No	5
		Neutral	1
	(b) Need for postgraduate studies (Ph.D. & J.S.D.)	Yes	2
		No	5
		Neutral	3
(c) Needs fulfilment: Those who answered "yes" commented: "Anticipated benefits", "benefit of specialisation".			

Question 6: Do you feel that the Department is producing too many or too few lawyers for the demands of the country or should the present numbers of 15 graduates with LL.B. and 35 graduates with the B.A. (Law) be maintained? Please give reasons.

Answers:	(a) Whether current output adequate:	
	(i) Too many LL.Bs. -	6 out of 9
	Too few LL.Bs. -	1 out of 9
	Adequate -	2 out of 9
	(ii) Too many B.A. (Law) -	6 out of 9
	Too few B.A.(Law) -	0 out of 9
	Adequate -	3 out of 9
	(b) Reasons given:	
	(i) Too many LL.Bs. because they fail to get articles -	2 out of 9
	(ii) Too many B.A. (Law) because they are not easily employed -	5 out of 9
	(iii) Too few B.A. (Law) or LL.B. - no answer or reasons given	

Question 7: Is there any need for sub-degree programme in Law? If so, which categories of employees should it cater for?

Answer:	(a)	Whether needed	Yes	9 out of 9
			No	0 out of 9
(b)	Categories of employees	Interpreters	3 out of 9	
		Court clerks	2 out of 9	
		Police	6 out of 9	
		Prisons	5 out of 9	
		Others	2 out of 9	
(c)	Reasons given: "will be very useful to ... officials who are responsible for conducting departmental enquiries" and "for administering justice in their respective departments" (given by 3 magistrates)			

Question 8: Any other comments?

Answers: Most informants limited their comments to the introduction of additional courses which are needed for current practice. The courses listed were: tax law; labour law and industrial relations; ethics; conveyancing; international trade law; criminology; law of economic organisations; arbitration and alternative dispute resolution mechanisms; military law and intellectual property law.²²⁶

Analysis: In terms of legal needs, there appears to be a trend not so much towards increasing the number of lawyers but rather towards equipping them with more courses (knowledge) and skills for emerging problems and legal issues e.g. conveyancing, taxation, commerce, industry, etc.- There is also some information suggesting the need for paralegal training for certain government officers (police, prisons, clerks, interpreters, etc) whose day-to-day duties require some knowledge of the law. The need for these categories of people appears to be greater than that for graduates with B.A. (Law) degrees who are indeed struggling to get employment.

²²⁶ Evidence of a written response to questionnaire in ANNEXURE IX can be found in ANNEXURE XI.

6.D.2 Interview Results

Finally, with reference to responses from other sources (including library/telephone surveys), reliance focused more on oral interviews than on the use of questionnaires. The informants selected randomly included the two Regional Administrators of Manzini and Lubombo, law students originating from the different areas of the country, legal practitioners and a few ordinary citizens introduced for the interview by the Regional Administrators. The questions asked in the interviews were aimed at establishing the present and future needs for lawyers; how those needs were being met and what specific recommendations were necessary to satisfy the identified legal needs.

The main findings set out and discussed in the subsequent paragraphs reflect an overview summary of the responses received together with our analysis and conclusions.

6.E ANALYSIS AND CONCLUSIONS FROM EMPIRICAL RESEARCH

6.E.1 Areas of Legal Need

It is clear from our research that there is sufficient evidence to show specific areas of concern that require legal solutions. Important aspects of these are set out below.

6.E.1.(a) The Legal System

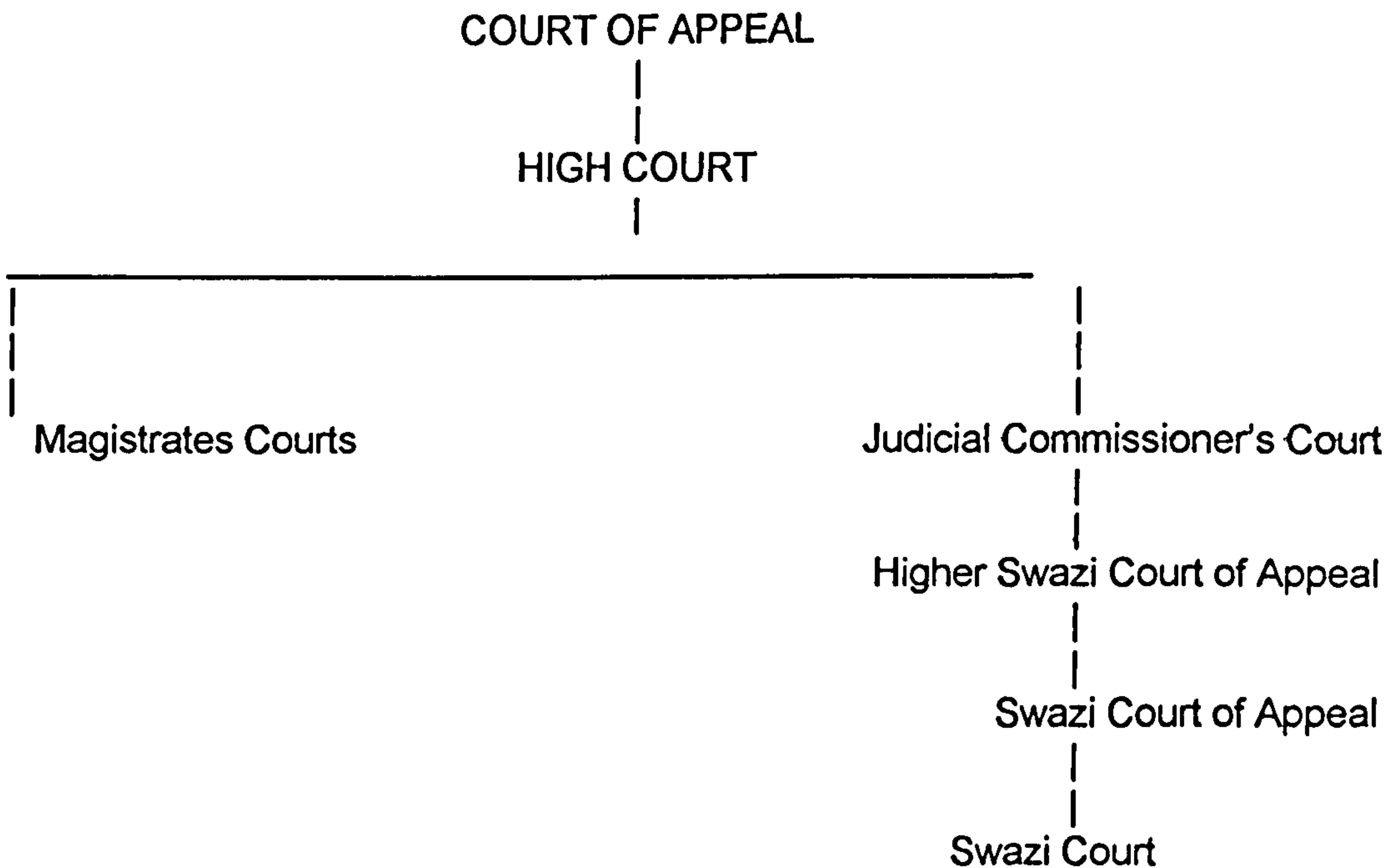
As earlier argued, the greatest concern for the Swazi society is the dual nature of its legal system which need harmonisation. It may be pointed out that the groups of people to whom the different systems were to apply during the colonial period are not today as distinct as they were during that era. Economic, social, political and administrative necessities have closed the racial and cultural gap and produced what may be termed "modern Swazis". Some of them have lived in the towns for generations now, such that it would be very difficult for them to trace any connection with the rural areas, or if any connections exists, they are very weak. These categories of Swazis have been used to the western style of life in towns that Swazi law and custom means

no more to them than it does to a white person. Nevertheless, some old statutes especially the Administration of Estates Act (section 68) still subject them to customary laws whose principles are either unknown to them or have outlived their value. Those statutes need a review.

Furthermore, legal dualism has also created an internal conflict in that there are two systems of courts applying two different legal cultures but meant to serve the same society. There are the common law courts which apply the Roman-Dutch common law and there are the Swazi Courts established by the Swazi Courts Act No. 80 of 1950 which apply Swazi law and customs. The creation of this dual court structure means that before anyone commences action, they must first choose between the two competing systems illustrated by Table V.

TABLE V

THE COURT SYSTEM OF SWAZILAND



A good example of the problem created by uncertainty of choice especially at the level of the subordinate courts is the case of Baruti v Mdziniso (unreported) where the Appellant was a Mutswana lady and the respondent was a Swazi man. The Appellant had sued the Respondent in the Magistrates Court claiming damages for breach of promise to marry. The clerk in the Magistrates Court transferred the matter to a Swazi Court as per Section 16 of the Magistrates Court Act No. 66 of 1936. The Appellant then appealed to the High Court against the order of the subordinate court. The High Court dismissed the appeal so the Appellant further appealed to the Court of Appeal which upheld the appeal. The matter was, therefore, submitted back to the Magistrates Court for proper trial. The challenge of harmonisation is, therefore, an urgent necessity.

6.E.1.(b) The System of Governance and Political Development.

The exercise of governmental authority is to a large extent determined by the nature of its structures. This implies important principles of constitutionalism. In the case of Swaziland it has been established that the King has the key function in the political life of the Nation. In 1973 when King Sobhuza suspended the Constitution declaring it as unsuitable to Swazi way of life, he vested centralised political authority in the Monarchy. However, recent political developments have resulted in a limited system of parliamentary system with two house of elected parliamentarians. There are also moves towards multi-party democracy although that is being strongly resisted by the traditionalists and Conservative elements (the Royalty) in society. These developments are important in drawing the line not only between the various structures of government but also between the rights of the individuals to ensure that government structures, including the Monarchy are no longer seen as instruments of division, oppression and corruption but rather as means of enabling the Swazis to live in peace and improve the standards of their lives. The drawing of these lines require fundamental principles of constitutional and administrative law which in turn require competent and well trained lawyers in those fields.

6.E.1.(c) Development in Human Rights Issues

Related to the constitutional developments raised above are human rights issues which are regularly discussed in Swaziland especially when issues of elections are brought forward. The Tinkhundla system of election to Parliament is being criticised by democratic forces as a denial of fundamental human rights. The acute inequalities established by the Monarchical system all add to serious concerns about fundamental human rights in Swaziland. Therefore a pattern of legal machinery needs to be provided by which fundamental rights are treated as crucial legal and constitutional norms of governmental whereby legal and human rights relationships are not only established but protected. In this respect, therefore, the problems of Swaziland relating to human rights issues are legal problems needing human rights lawyers with sufficient expertise to deal with these issues.

6.1.E.(d) Social Justice and Due Process of Law

Related to issues of fundamental human rights and freedom are issues of social justice and due process of law the characteristics of which are that:²²⁷

- (i) no person should be subject to legal penalty save for a breach of some specific and duly promulgated law;
- (ii) there should be adequate safeguards regarding the detention and fair trial of accused persons;
- (iii) the legal system should be based on a policy of providing a fair and efficient means of dispute resolution; upholding the rule of law in a manner consistent with individual justice in the protection of society; and providing a forum for the appropriate punishment of those who commit offences;
- (iv) the legal system should also be accessible and affordable; protect the rights of minorities and disadvantages groups; have mechanisms for enforcement of

²²⁷ For details read "Educating Lawyers for the 21st Century" by Richardson, the Rt. Hon. Sir Ivor, 1988 Journal of Professional Legal Education Vol. 6 No. 2 pp 111-113. Read also Kawana A, "The Spirit Behind Legal Education in Namibia, Constitutionalism, Affirmative, Action and Development" (1992) Unpublished Paper presented to the Workshop at the University of Namibia held from 29-30 October 1992 in Windhoek.

decisions; be independent of direction, political control etc; and provide punishment which is human, consistent and proportional to the offence.

These principles encompass a wide range of legal needs for any society. In the case of Swaziland, what emerged from our discussion on the socio-political economy are clear indicators of problems some of which have sources in the colonial oppressive structures characterised by ultimate authority with laws which were not only foreign but discriminatory and most times contrary to the aspirations of the Swazis. That is why such laws were regarded by most African countries as repressive, alien and instruments of colonial rule which spilt over to post-colonial structures, attitudes and processes. The post independence legal system in Swaziland (like in other sister states) was particularly characterised by duality, complexity and detachment from the majority of the citizens as to make it ineffective to adequately redress the numerous social evils referred to above. The extent to which this inadequacy affects the provision of legal services needs to be explored further by the analysis of the legal profession and legal roles in Swaziland - a discussion which follows in the subsequent chapter.

What has to be made absolutely clear at this point of the discussion is that because of the extent to which society is subjected to the above-mentioned social problems, the majority of the Swazis will for quite some time in the future continue to be disadvantaged socially, economically and even politically. More importantly, justice will also continue to remain distant and inadequate especially in the rural areas because the population in these areas have inherited a notion that the legal profession must, of necessity, be in the exclusive hands of highly skilled and long-trained professionals who have effectively assimilated the Western norms and structures of adjudication. The legal system will continue to be inaccessible to most people because:

- (a) they are poor and cannot afford to pay lawyers;
- (b) they live far away from legal services and have very limited legal resources and facilities in their communities;
- (c) they cannot read or write;
- (d) they do not know about the law, human rights; and
- (e) many lawyers will not, or cannot, take on cases affecting poor people.

Certainly where law continues to be so complex and its practice is largely confined to a small class in the elite social bracket, injustice due to inequality of means and resources will continue to exist. That, to us, is where the focus of the legal needs clearly presents itself. A system of justice which fails to protect the weak members of society as against the rich, privileged and the powerful can hardly bear any claim to justice. Such a system can only be an instrument to be used for the exploitation of the weak by the strong, in this case the Monarchy.

The above legal problems are but some of the many aspects of the legal needs calling upon lawyers in Swaziland to perform tasks not customarily associated with lawyers in England and other Common law countries, and we shall assume (until our discussion in the next chapter) that such problems will necessitate change in the role of law, lawyers and legal education as similar problems will continue in Swaziland. What this means is that lawyers will be needed to represent people in judicial and related proceedings, giving legal advice and preparing legal documents and instruments in non-contentious matters, presiding over and participating in tribunals of legal and quasi-legal nature. Para-legals, commissioners and presidents of native courts, legal aid practitioners etc. may all be required to meet the various legal problems relating to the administration of the law. Locally based legal resources centres, street law advisors, family and labour mediators, the office of an ombudsman are all essential to the system. Because of the scope of such potential demands, care should therefore be taken to avoid the mistake previously made (as we have pointed out in the Chapter 4 above) of over-emphasising the requirements of the private practitioner in designing legal education. The work of the lawyers in providing legal services to meet the above legal needs will involve far more public lawyers than has been traditional in legal education in Swaziland specifically and in the BOLESWA countries in general.

6.E.1.(e) Commercial Transactions

The economic development in Swaziland as outlined above have identified serious problems of unemployment, poverty, traditional subsistence sectors, lack of housing and other essentials of life. There is, therefore, need to focus on the expansion of the economy, striving for self-reliance, raising the degree of social justice and

maintaining social and economic stability. All these require facilitators of economic development of an integrated, efficient and internationally competitive national economy. In this respect Swaziland needs yet another category of legal practitioners who will be employed as legal advisors to private and parastatal organisations. They will be expected to negotiate and draft contracts, review projects and resolve local and international commercial disputes ranging from tax and customs issues to industrial relations matters. Lawyers with appropriate skills to perform those demanding jobs with ability are required as the wheels of economic development continue to role in Swaziland.

6.1.E.(f) Development of Cultural Values

It has already been argued that in Swaziland the traditionalists hold very closely to their indigenous values and beliefs to the extent that according to them the Swazi nation should not be run according to foreign principles and ideologies. There is a strong belief currently entertained by many that the general life style and education introduced by the Western cultures are destroying the very roots of Swazi culture. The protection of indigenous values and respect for culture, language and beliefs is a problem requiring customary law experts who need research skills, and legal drafting skills to ensure that the customary laws enable people to take pride in their culture, language and beliefs without infringing on principles of democracy and fundamental human rights and freedom.

6.E.1.(g) Gender Issues²²⁸

The problem relating to the status and role of women in Swaziland was also raised in the analysis of the socio-political economy of the country. In this area lawyers are required through appropriate instruments to:

- (i) guarantee equal rights for women and men in all spheres of public and private life;

²²⁸ Read Sekweyiya Z, "The Practical Orientation of Legal Education During Transition to Democracy: The Case of Namibia and South Africa" (1992). Unpublished Paper presented at the Windhoek Workshop.

- (ii) create mechanisms whereby the discrimination, disabilities and disadvantages to which women have been subjected are rapidly removed;
- (iii) give appropriate recognition to reproductive and birth rights;
- (iv) guarantee constitutional protection against sexual violence, abuse, harassment or defamation; and
- (v) ensure that women are heard in all issues and participate actively in all levels of society.

The demands on lawyers not to ignore gender issues have a strong case in Swaziland where cultural values on the status and role of women in society are often found to be in sharp conflict with the requirements of the principles of democracy and human rights and freedoms. Constitutional and specific legal issues on the equality of women in society deserve expertise to solve that important social problem.

6.E.2 Towards Meeting Swaziland's Legal Needs: The Role Of Legal Education

Writing on the legal profession in Tanzania and Kenya, Rwelanira MRK and Ojwang JB, argued that the colonial policy laid specific emphasis on English law and on the creation of an English type legal system, with the requirement of these in terms of training and professionalism, but gave scant attention to the need for legal training for Africa.²²⁹ Our general discussion on legal education and training in the BOLESWA countries (Chapter 4) points out this to be the position also in these countries.

There was an undue over-emphasis on the lawyer's role as an advocate and litigator to the extent that the requirements of his/her education and training were geared towards those functions. What our above analysis of the new role of lawyers to solve contemporary and future development problems go to show is that in addition to the traditional legal functions of judge and private practitioner, lawyers and all law-trained persons must be prepared through their system of education to take up new roles in politics, in general administrative positions, in commerce, labour, tax, customary law,

²²⁹ Rwelanira MRK, "The Tanzania Legal Profession" in Dias CJ, *et al*, Lawyers in the Third World: Comparative and Developmental Perspectives 1981 Op. Cit. pp. 204-223 and Ojwang JB, "The Legal Profession in Kenya" (1990) *Journal of African Law* Vol. 34 No. 1 pp. 9-26.

human rights, gender law etc. The motivation to fully and effectively participate in meeting legal needs should drive them into those new roles.

The questions that remain to be answered are: How can legal education prepare individuals for such tasks? What are the “development law” skills with which these law-trained persons need to be equipped so as to have the capacity to effectively and competently contribute in meeting the stated needs of development? Given our hypothesis that there is need to make legal education in the BOLESWA countries more relevant to development, what design of legal education programme would be appropriate to these new post-colonial development lawyers?

In Chapter 1 a list of skills generally applied by lawyers was given (paragraph 1.E). We now need to address the issue whether the skills already identified are the same skills needed by development lawyers in Swaziland and, if so, how they can be imparted to law-trained persons; or whether development lawyers need different (or certain core) skills and if so what are those different skills. Before making our recommendations on these issues, we shall first analyse the results of our findings on the current role of lawyers as discussed in the next chapter and their education (Chapter 8) in Swaziland with a view to establishing the present contribution of law-trained persons and legal education to the development needs of the Swazis. After that analysis we would then be in a position to establish what skills are lacking and recommend solutions.

CHAPTER 7

LAWYER PROVISION AND UTILISATION: TRENDS AND FUTURE PERSPECTIVES

Having established that in Swaziland there are social problems which require legal solutions, what is left is to explore the extent to which the structures and functions of the members of the legal profession, albeit of all those law-trained persons, address those same legal needs. The present chapter focuses on past trends and future perspectives. To achieve and give it a broader discussion, the analysis will be divided into two main parts namely: structural and functional perspectives.

In the case of the former, the focus will be the structure in terms of: (a) the production and growth in the number of lawyers; (b) their distribution according to employment categorisation; and (c) their distribution according to their location. In the case of the latter, the focus will centre on functions in terms of legal roles in rendering services directed towards meeting the legal needs of the people of Swaziland. To appreciate all these issues, however, one has to understand the historical factors which have shaped the present structures and functions of the legal profession in Swaziland. A discussion on the history of the legal profession is, therefore, a suitable starting point in analysing issues of current structures and roles of the profession, including all law-trained persons in Swaziland.

7.A THE LEGAL PROFESSION: HISTORICAL FACTORS AND IMPACT

In the discussion on terms commonly used in our entire study as found in Chapter 1, reference was made to terms like "legal profession", "legal practitioner", "law-trained persons", "lawyers" and others. Without getting bogged down with problems of definitions which are treated more exhaustively by other writers,²³⁰ we shall continue, for purposes of the present discussion and in the context of Swaziland, to apply the broad definition of the term "legal profession", aspects of which have already been dealt

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For details of those discussions read:

- (a) Rwelamira MRK, "The Tanzania Legal profession" in Lawyers in the Third World: Comparative and Development Perspectives Op. Cit. p. 205.
- (b) Perdomo RP, "Jurists in Venezuelan History" in Lawyers in the Third World, Op. Cit. p. 76

with in Chapter 1. Since the history of legal education and training in the BOLESWA countries has revealed three levels of legal education for the practice of law, namely: (i) for those leading to the award of B.A. (Law) and LL.B. degrees; (ii) for those sub-law degree programmes leading to the award of Certificates/Diplomas in law; and (iii) for those undergraduate programmes to non-lawyers leading to the award of general B.A. degrees or B.Comm degrees, we shall, for purposes of this discussion, take into account all those persons equipped with legal knowledge and skills acquired through the three identified levels of legal training. It is the historical development of the structures and functions of these persons that this particular discussion is concerned with.

7.A.1 Dispensing Justice During Pre-Colonial Era

The type of law that applied during that period was the Swazi Law and Custom some characteristics of which have already been discussed. What is important to note here is the philosophy of justice which maintained then, namely, the participation of the community in dispensing justice. Their system of justice was a simple one: court hearings took place under a tree and the chief or headman presided, often assisted by his counsellors. These courts were courts of first instance and from them there was hardly any avenue of appeal, except the rare cases when appeals lay to the King. In most cases, the remedy was compensation in a material form. But over and above that, it was the inherent social duty of the courts to reconcile the parties. Unity in the community was a vital element in the reasoning of the presiding officer as he endeavoured to reach a just decision in the resolution of disputes among the members of the community.²³¹

One important point to note is that the system of dispensing justice at this time recognised and provided for certain personnel whose duty it was to administer justice. The difference, however, was that since the system of the law differed from the one "received" or "imposed" by the subsequent colonial rulers, the nature of the personnel, their qualifications (mostly age and social status), and their functions were also

²³¹ For details of the concept of justice read: Khumalo JAM Op. Cit. at Chapter 1. Read also Kuper H, An African Aristocracy: Rank Among the Swazis (1947) Oxford University Press, London.

characteristically different. Even from the point of procedure, the litigants who lacked trained counsel's skills, argued their cases in informal styles and procedures. The accused, for example, was allowed to speak "to his heart's content and satisfaction" about many things, some irrelevant, and could not be expected to speak with the logic and coherence of skilled lawyers. The crucial point, therefore, remains that in the pre-colonial times, and indeed in the present-day customary set up, the office of the "legal practitioners" is non-existent. Presumably litigants appeared in person. This point has been emphasised by a writer in the following words:

"In trials of this nature there is no sworn testimony and cross-examination is relied upon to sift truth from lies. There are no rules of evidence and hearsay, and irrelevant evidence may be tendered without objection being taken. The extra time involved is of no concern. There are no advocates, each party relying upon his own wits and those of his witnesses. If anything, members of the 'libandla' (counsellors) are "advocates" because in their cross-examination they may adopt an extremely partisan attitude."²³²

7.A.2 The Colonial Period

In terms of legal structures and administration of justice by the colonisers, the first white settler in Swaziland associated with the administration of the received law as its forerunner was Shepstone T Jr, who had been appointed by the British to administer the affairs of the whites in Swaziland. He was assisted by a committee of management. However, much as the Swazi authorities had initially consented to the work of the committee, it soon became difficult to have co-operation as the white community refused to be brought under the King's jurisdiction. The result was a breakdown of the administration of justice carried out by the committee which was accordingly dissolved by Shepstone in October 1889.

The alternative organ of administration for the whites was subsequently set up by Britain jointly with the South African Government later during 1889 and, with the

²³² Marwick B, Abantu Bakwangwane: An Ethnological Account of the Natives of the Swazi Protectorate M.A. Thesis submitted to the University of Cape Town in 1934.

approval of the then Queen Regent Tibati, a Provincial Government Committee was established by a Proclamation on 18th December of that same year. The Proclamation charged the committee with the duty, among others, of appointing judicial officers for the government of the white population in Swaziland.²³³ The committee was also to apply the Roman-Dutch Law of South Africa to determine civil and criminal matters in which white persons or their property were involved. This committee could also delegate its jurisdiction to subordinate judicial officers. What was beginning to emerge at this point in time was a group of officers who were being charged with both administrative and judicial functions, and until the introduction of a legal profession proper, they were performing some of those functions of the profession (though without being trained for it), i.e. resolving disputes among the white population.

Another important point in the development was the beginning of a court structure upon which the common law courts were to be founded. This embryonic structure grew into a full system starting from 1894 when Swaziland became a British Protectorate. In 1898, an important Protocol was signed which enhanced the judicial powers of the members of the Provincial Committee and established courts with exclusive jurisdiction over serious crimes, including murder. The Protocol also provided for the jurisdiction of the King, then referred to as "The Paramount Chief". This move was to be followed by another significant step, namely the transfer, for administrative purposes, of Swaziland from the government of the Transvaal to the High Commissioner for Southern Africa with a resident commissioner in Swaziland.

In 1902 an important Proclamation was enacted, the Swaziland Administration Proclamation, which created two superior courts, namely, the Court of the Resident Commissioner and the Special Court of Swaziland. The former, which had full jurisdiction over criminal and civil matters was presided over by the Resident Commissioner and two assistant commissioners, while the latter was presided over by an advocate of the Supreme Court of Transvaal as president and two assistant commissioners with jurisdiction limited to civil matters in which either party was a European. The qualification of the president of the second Court, the advocate, is quite significant in introducing the element of qualification to the post. It is not clear why this

²³³ For details read the entire Proclamation of 1889.

developed, but one may rightly associate it with the level of the court and the nature of the cases before it. In fact the cases before this court could be of the value of up to and equivalent of US\$1000.

The next significant development took place in 1938 when several important Proclamations were enacted, notably: Proclamation No. 66 which created a hierarchy of magistrates categorised as magistrates courts of the first, second and third class presided over by a District Officer or a District Commissioner, appointed by the Minister of Justice from legally qualified persons.²³⁴ But of more significance were Proclamation No. 20 creating a High Court for Swaziland and Proclamation No. 67 introducing the new Criminal Procedure and Evidence laws.²³⁵ Of the three, the one most relevant to our study is the High Court Proclamation which has at least four important consequences. In the first place, under section 2, the court was vested with the same jurisdiction as the Supreme Court of South Africa. This made it possible for South African lawyers to appear before it, thus opening the way for advocates and attorneys from there to come and practice in Swaziland.

Secondly, under section 3 of the Proclamation, the qualification for the post of high court judge was clearly spelt out; the person had to be a barrister (or advocate) admitted to the Bar in one of Her Majesty's dominions and must have practiced as such for a period of at least five years prior to the appointment. The need for proper legal qualifications for certain jobs was now becoming more necessary than ever before. Thirdly, it was also the practice that in addition to his judicial functions, the judge was also the legal advisor to the High Commissioner on matters arising from the jurisdiction. The legal staff to advise government in terms of appointment to the Ministry of Justice was developed with this kind of need in mind. Fourthly, it soon became necessary to establish a judiciary headed by one High Court Judge. In Swaziland this took place in 1955 when the first resident Chief Justice was appointed.

The 1950s also witnessed yet other crucial landmarks in the developments towards the creation of a legal profession in Swaziland. With the introduction of the High Court, legal practitioners from South Africa began to surface in Swaziland.

²³⁴ See section 3 of the Proclamation.

²³⁵ Similar enactments were concurrently taking place in Botswana and Lesotho.

According to the interview held with Bertram G, in 1991, one of the oldest practicing attorneys in the country, who for a long time was also the chairman of the Law Society of Swaziland, the first attorneys from South Africa and from Britain to enrol and open law firms in the capital city, Mbabane, came to Swaziland in the 1940s.²³⁶ These legal practitioners originated from the Transvaal Province and they came to Swaziland on the strength of the laws we have already discussed and also because of the establishment of the High Court where they could take their cases. In Transvaal, the Association of Advocates was known to have been established during the 1880s and the Law Society in the early 1890s. One is, therefore, to conclude that these practitioners must have been admitted and enrolled under the laws then in force in the Transvaal before coming to practice in Swaziland. In any case, as we shall discuss later, they also were admitted and enrolled as attorneys with the Registrar of the High Court.

The impact of the development of the court system on the legal profession was completed by the creation of the Court of Appeal for the BOLESWA countries in 1954, for it pushed the colonial government to make special provisions in Swaziland for the regulation of legal practitioners. This was effected by the Legal Practitioners Proclamation No. 95 of 1955 whose main objective was to consolidate and amend the law relating to the admission and enrolment of legal practitioners in the territory and matters ancillary thereto. The admission and enrolment referred to in the Proclamation were related to those in South Africa especially as provided for in the laws of the Transvaal Province. According to section 3, any fit and proper person who possessed the qualifications prescribed, could apply to the High Court, upon written petition, to be admitted and enrolled as an advocate, attorney, notary public or conveyancer, as the case may be. Thus, the Proclamation introduced in Swaziland the category of legal practitioners whose practice needed to be regulated especially in terms of qualification and the nature of the practice intended together with the procedure to follow before one was permitted to practice the profession. These are all set out in sections 7 and 8 of the Proclamation.

Of great value to our study are the wordings of the two sections. Under section 7, persons qualified to be admitted as advocates if they were British subjects

²³⁶ See subsequent discussion on the production and growth of the legal profession in paragraph 7B.

admitted as barristers in England, Northern Ireland or as advocates in the court of sessions in Scotland, and who, at the date of the petition, were still entitled to practice in the countries mentioned above. The section also provided that any British subject qualified if admitted to practice as an advocate in any division of the South African Supreme court or the High Court of Southern Rhodesia and remained enrolled in the countries mentioned above. Similarly, issues of training, qualification for practice, procedures for enrolment and functions of the members of the profession have also been provided for according to the English division of the legal profession.²³⁷ These in general terms include the provision that:

"... solicitors may enter into partnership; barristers may not. Solicitors, since they stand in a contractual relationship to their clients, may sue for their fees; barristers, whose fees are honorary rather than contractual payments, may not. For the same reasons, solicitors may be liable to their clients for professional negligence, barristers are historically immune from such liability. Barristers appear in court in wig and gown; solicitors appear in a gown in certain courts, notably the county court, but are never bewigged. Solicitors are instructed by their clients directly; barristers may be instructed only by a solicitor and not by a lay client direct."²³⁸

Along the same route, advocates and attorneys in the BOLESWA countries follow with the performance of their day-to-day duties to society. The important point remains that these developments set the arena upon which contemporary structures and functions of the legal profession interplay, the details of which will form a separate discussion in terms of current legal tasks.

Another landmark in the development appeared around the advent of independence with the introduction of yet another new legislation to regulate the legal profession. This was The Legal Practitioners Act No. 15 of 1964 which only came into force in January 1966 (just about two years before independence). The philosophy behind this enactment was said to be the policy of the colonial rulers to localise the

²³⁷ For details, read Walker JR, The English Legal System (1976) Butterworths, London (4th Ed).
²³⁸ Ibid, p. 211.

profession in the wake of the constitutional changes then taking place. For the purposes of this discussion, the point to note are the provisions of section 5 which for the first time puts as a requirement for qualification that the applicant for enrolment, whether an attorney or an advocate, must be "ordinarily a resident in Swaziland". Equally novel was the provision in the same section for the passing of an examination in Roman-Dutch Law and Swaziland statutes prescribed by the Chief Justice in accordance with section 33. At this point, not only was the aspect of localisation of the legal profession catching the eyes of the policy makers, but even their education which had to be tested before a person could join the profession and practice as such. We need to come back to this crucial issue of the relationship between legal practice and legal education in a subsequent chapter.

Finally, it is important also to make reference to another angle of the legal system which is of paramount significance to the structure and functioning of the legal profession in Swaziland, i.e. the relevance of the enactment of the Swazi Courts Proclamation No. 80 of 1950. Its significance lies not so much in enhancing the structure, nor expanding the functions of the legal profession. On the contrary, it was meant to limit those aspects of the profession. Whereas the main objective of the statute was to grant powers to the traditional courts to exercise jurisdiction over members of the Swazi nation and to apply Swazi Law and Custom so far as it is not repugnant to natural justice or morality or inconsistent with the provisions of any law in force in Swaziland, it also provided that the practices and procedures of these courts are to be regulated in accordance with Swazi Law and Custom.²³⁹

The aspect of the limitation relates to the provision that no trained-attorney has the right of appearance in these courts since it would be "un-Swazi" to have rules of procedure of more formal nature. Also the right to legal representation is restricted by the provision which states that "notwithstanding anything contained in any other law, no advocates or legal practitioner may appear to act for any party before a Swazi court".²⁴⁰ The absence of any provision stipulating the qualification of the persons who preside over those courts is equally significant because when it comes to considering the

²³⁹ See sections 3 and 11 respectively.

²⁴⁰ Ibid.

relationship between legal education in preparation for legal practice one begins to wonder whether persons who preside over these courts also need training for better performance of their legal task, and, if they do, what kind of training - formal law education or informal education as provided under Swazi Law and Custom?

In contrast, legal practitioners appear before all the common law courts namely, the Magistrates Courts, the High Court and the Court of Appeal. Matters of qualification of all legal practitioners in these courts are also specifically provided for by the relevant statutes and as we shall soon discuss, these qualifications have a bearing on legal education and competence in the practice of the law.

7.A.3 Post-Independence Character of the Profession

The post-independence statute which governs the qualification, structure and functions of the members of the legal profession in Swaziland remains the Legal Practitioners Act of 1964 as amended by subsequent statutes, the most recent and most important being the Legal Practitioners (Amendment) Act No. 13 of 1988.

As regards qualification, the provision of sections 7 and 8, earlier described, was not changed by the 1988 Act. A new provision was introduced by Section 5 of the 1988 Act which amended Section 6 of the 1964 Act. According to this amendment, a prospective attorney is required to serve a period of articles in the law firm of a practicing attorney. In the case of a person who is the holder of an LL.B. degree, the period of articles of clerkship is one year and in the case of a person who holds any other degree such as the B.A. (Law) degree, the period of articles of clerkship is three years. After serving the required articles of clerkship, the candidate must also pass an examination prescribed by the Chief Justice before being admitted and enrolled as an attorney of the High Court of Swaziland. Candidates wishing to be admitted and enrolled as advocates are not required to serve any period of articles of clerkship.

The structure for the practice of law as laid down in the 1964 Act and categorised into the two branches of advocates and attorneys along the English lines of barristers and solicitors was not changed by the 1988 amendment. Apart from the provision regulating the service as articulated clerks, the statutes are silent on the structural characteristics of the two branches of attorneys and advocates. However, the practice

derived from the Roman-Dutch common law and from the English legal profession has established the following characteristics for attorneys, and advocates: attorneys are entitled to rights of audience before all magistrates and other subordinate courts and the High Court of Swaziland. They cannot appear in the Court of Appeal which is the highest court in the Kingdom. In common with advocates, they cannot appear before the Swazi National Courts which have been established in accordance with the Swazi Courts Act of 1950 where, as earlier indicated, legal practitioners are not allowed to practice. Besides, attorneys who after passing prescribed examinations, qualify for admission as notaries public and conveyancers. However, advocates have a monopoly over the rights of audience in the Court of Appeal but share rights of audience with attorneys in the High Court and the Magistrates Courts.

Part IX of the Legal Practitioners Act as amended in 1988 formally established the Law Society of Swaziland. All legal practitioners provided under the Act namely advocates, attorneys, notaries public and conveyancers are members of the Society. The Law Society's objects and functions are set out in Section 36 of the Act. Thirteen such objects and functions are laid down the general trend of which include the following: to oversee the practice of law by its members in order to ensure the proper administration of justice; to monitor and enhance the prestige, status and dignity of the legal profession; to uphold the integrity of legal practitioners; to uphold and improve the standards of professional conduct and qualifications of legal practitioners; to promote uniform practice and discipline among practitioners; and to provide for the effective control of the professional conduct of practitioners. Part X of the Act provides for the establishment of Law Society Fidelity Fund which is intended to meet the "loss sustained by any person in consequence of an act of dishonesty by legal practitioners".

Another novel introduction which has a direct bearing on the functions of legal practitioners is the discipline of legal practitioners under the 1964 Act as amended by Sections 14, 15 and 16 of the Legal Practitioners (Amendment) Act of 1988. Briefly, these provisions not only establish the expected code of conduct but specify the organs which are vested with the powers of disciplining those legal practitioners who commit acts of misconduct. The procedure followed and the punishments issued against the erring practitioners are also provided for in the Act.

7.A.4 The Impact of the Historical Factors

The above historical review of the legal profession in Swaziland is a clear demonstration of the development of the profession in a culturally distinct society within a unique historical context. Several conclusive lessons are extractable from these developments. One fact which emerges is that the introduction of the Roman-Dutch Common Law and the British Common Law were instrumental in importing into the BOLESWA countries the kind of legal profession that is now available and constitutes the concern of the present study. This view is strengthened by the string of colonial statutes that have gradually come to shape and regulate legal practice in the three countries.²⁴¹

Another point is that the state has had a vital role to play in regulating legal practice. The statutory enactments referred to above are good examples of that role, coupled with the exercise of the power of appointing judges vested in the Head of State. Initially the colonial rulers limited the practice of law to judicial officers. Then followed the admission of British subjects who had qualified as barristers or solicitors in Europe or as advocates and attorneys in South Africa, thus introducing the English legal system's dichotomy of the profession into barrister/advocate and solicitor/advocate - a divided profession which contrasts sharply with a fused profession. There was no mention of the educational qualifications for these practitioners because it was taken for granted that the European-type of legal system needed personnel trained in Europe to administer it. The support for this view is the "scant attention to the need for legal training for Africans" that was given by the colonial rulers in the BOLESWA countries.²⁴²

On the other hand, the same colonial rulers through their policy of indirect rule emphasised the dual legal system with its parallel system of courts by establishing what in Swaziland was referred to as "The Swazi Courts" to exercise jurisdiction over members of the Swazi nation within such limits as may be defined by the King.²⁴³ In these courts, the practice and procedure are regulated in accordance with Swazi law

²⁴¹ Amongst the most important statutes are the Swaziland's Legal Practitioners Proclamation of 1955; the Legal Practitioners Act of 1964 as amended by the 1988 Act; Botswana's Legal Practitioners Act No. 34 of 1967; No. 10 of 1969; No. 44 of 1970 and No. 17 of 1972; and Lesotho's Legal Practitioners Act of 1967 and of 1983 respectively.

²⁴² Ghai YP and McAuslan JPW, Public Law and Political Change in Kenya 1970 Oxford Press pp. 359 - 366.

²⁴³ Section 3 of the Swazi Courts Act No. 80 of 1950.

and custom and no advocate or legal practitioner is allowed to appear or act for any party.²⁴⁴ The effect of this position was to create a cadre of "judicial" personnel who could not be considered as members of the legal profession, though they were involved in some form of "legal practice".

Even where there was a semblance of a legal profession in terms of availability of legally-trained persons who combined their knowledge with a legal occupation, the profession did not conform with the normal characteristics of a legal profession as it lacked autonomy; it did not have its own controlling basis of professional ethics and etiquette; it was a disintegrated profession consisting of "practitioners" of differing orientations, character and vocational commitment; and it was a sheer pragmatic device of a legal system, with its principal regulatory machinery resting with the colonial bureaucracy.²⁴⁵ This was the position until some change was brought about by the legal practice statutes introduced by the post-independence governments of the three BOLESWA countries.

In terms of the legal services that were being rendered by the type of profession analysed above, the position has satisfactorily been described in the following words:

"Such a profession, in its form then, was not truly a social device for the resolution of the broader society's legal conflicts; rather it appeared as a skewed edifice whose character was dictated by the social and political apprehensions of the colonial authorities, the demands of the fledgling commercial economy, and the sectional and personal interests of those who had formal training in or knowledge of the procedures of the law of the dominant courts."²⁴⁶

Notwithstanding the shortcomings of the legal system as analysed above and the legal profession that characterised its administration during the colonial period, the post-independent governments did not achieve much progress apart from introducing new legislations which remained more on paper than in action. The point was made by one

²⁴⁴ Sections 21 and 22 of the Act. Compare these provisions with those of Botswana's Customary Law (Application and Ascertainment) Act Cap 14:03 where similar provisions are made.

²⁴⁵ These arguments advanced by Ojwang JB and Salter DR, in their article on "The Legal Profession in Kenya" 1988 Journal of African Law p. 11 are quite relevant and applicable to the situation in the BOLESWA countries during the colonial era.

²⁴⁶ Ibid.

prominent lawyer in Swaziland who complained that a law had established the Law Society of Swaziland but that law was never made operational.²⁴⁷

The final point to note on the issue is the fact that the historical forces just discussed have not only shaped the traditional structures and functions, but have influenced the environment for and the trends in the socio-political economy within which the profession has since developed. Much as one expected to see remarkable change in the structures and functioning of the members of the profession at, and immediately after independence (9 September 1968), that never came. They basically remained in the same image and form as those characterising the profession of the colonial era.

7.B TRENDS IN THE STRUCTURES OF THE PROFESSION

The three specific aspects of the structure of the legal profession earlier identified will now be discussed, starting with the production, growth and distribution of the members of the profession. The aim is to establish whether these aspects of the structure facilitated the working environment for adequately meeting the legal needs of the Swazis.

7.B.1 Trends In Production and Growth

7.B.1(a) The 1960s and the 1970s

Although there are no definitive statements on the number of lawyers during the colonial era in terms of how many advocates, attorneys or judges were then available, their appearance in the legal arena in Swaziland dates back to the enactment of the Legal Practitioners Proclamation of 1955. The result was that attorneys and solicitors from South Africa were enrolled either as attorneys or advocates in Swaziland. In the case of these South African lawyers, we have established from the Registrar of the High Court that most of them were simply enrolled, and only from time to time did they

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In an article entitled "Law Society - What's the Hitch" in the Times of Swaziland of 2 March 1992 at p. 10 Bertram G, Chairman of Swaziland's Law Society, is reported to have complained that one of the curious aspects of the law is the apparent sluggishness with which the law establishing it is being handled. "First, it took more than 18 years to establish it (the Law Society) and recognised it as a statutory body. And now it has been more than two years since the law establishing it as a statutory body was introduced by Dladla, Senator . And still the technical amendments, which would make it fully operational, have not yet been tabled in Parliament" - he charged.

actually practice in Swaziland. Many others enrolled in the High Court register, after South Africa left the Commonwealth on 31 May 1962 in the belief that under the reciprocal arrangements with the English Bar, this would assist them if they wanted to leave South Africa for the United Kingdom.²⁴⁸ Thus the number of South Africans enrolled elsewhere as advocates or attorneys, but without offices in Swaziland could have exceeded 500, but many of these never in fact practiced in Swaziland. (See Table VI below, which not only gives the total number but gives a progressive increase between 1915-1973). The drop in number after independence is quite remarkable. One explanation given is the suspicion and uncertainty of the socio-economic environment under the black nationalist government. This forced the South Africans to remain at home.

TABLE VI
ENROLMENT OF SOUTH AFRICAN-BASED
LEGAL PRACTITIONERS FROM 1915 - 1974

YEAR	ADVOCATES	ATTORNEYS	NOTARIES	CONVEYANCERS	TOTAL
1915 - 1950	16	16	9	-	41
1951 - 1960	26	60	25	-	111
1961 - 1968	59	182	43	-	284
1969 - 1973	17	70	13	-	100

Sources: Records in the High Court Registry, 1992.

According to Bertram G, the then Chairman of the Law Society in Swaziland, the first law firm in Swaziland was established by Millen A, in Mbabane in the 1940s and by the time of independence in 1968, there were not more than ten locally based advocates and attorneys including Millen A, Bertram G, who enrolled in 1956; Friedland in 1965; Robinson in 1952; Van Heerden in 1960; Lukhele D in 1957; Carlston EM in 1964 (all

²⁴⁸ For details read Gower LCB, Legal Training in the High Commission Territories Op.Cit. pp. 23-26.

attorneys) and Advocate Dlamini S who enrolled in 1951.²⁴⁹ Table VII below illustrates the slow growth of locally-based lawyers in private practice especially as from the year of independence, 1968. There was a remarkable change since the 1980s as will be subsequently be discussed.

TABLE VII

YEARLY ENROLMENT OF SWAZILAND-BASED LEGAL PRACTITIONERS

YEAR	ADVOCATES	ATTORNEYS	NOTARIES	CONVEY-ANCERS	TOTAL
1952	-	1	1	-	2
1956	-	1	1	1	3
1957	-	1	-	-	1
1959	-	-	1	-	1
1961	-	1	-	-	1
1963	1	-	-	-	1
1964	5	-	1	1	7
1965	-	1	-	1	2
1966	-	2	2	-	4
1967	-	1	1	-	2
1968	1	1	-	-	2
1970	-	2	-	-	2
1972	-	3	-	1	4
1973	-	1	-	1	2
1975	1	1	-	-	2
1976	-	4	-	-	4
1977	1	2	-	-	3
1978	-	2	1	-	3
1979	-	4	-	-	4
1980	-	2	-	-	2
TOTA	9	30	8	5	52

Source: The Roll in the Office of the Registrar of the High Court of Swaziland.

²⁴⁹ Bertram G, made these statements during a lecture on "The Growth of the Legal Profession in Swaziland" which he delivered as a guest speaker to the LL.B. II students of Legal Ethics in April 1991.

TABLE VIII

TRENDS IN THE PUBLIC SECTOR BETWEEN 1967 - 1970

A.	IN THE MINISTRY	By 1967	By 1970	
1	Attorney-General	1	1	
2	Legal Draftsman	1	1	(Expatriate)
3	Senior Crown Counsel	1	1	(Expatriate)
4	Crown Counsel	2	3	(First local appointed)
5	Pupil Crown Counsel	-	1	(A local)
6	Crown Prosecutor	-	(3)	(Vacant posts created in 1970)
7	Law clerks	-	7	(Locals)
8	Other clerical officers	2	2	
B.	IN THE JUDICIARY			
9	Chief Justice	1	1	(Expatriate)
10	Other judges	(2)	(2)	(Part-time judges from South Africa)
11	Registrar of the High Court	1	1	(Expatriate)
12	Deputy Registrar	1	1	
13	Magistrates	4	5	(Expatriate)
14	Law Clerks	-	4	(Locals)
15	Other clerical officers	2	2	(Locals)

- Sources:
- (1) Directory of the Office of Her Majesty's Commissioner, October 1967 pp. 20 - 21.
 - (2) The Swaziland Government Establishment Register, 1970.

The purpose of Table VIII is to give the reader an idea of what growth was also taking place in the public sector around the same time.

The conclusions one can draw from the above analysis on the production and growth in the membership of law-trained persons during the period preceding and immediately following independence are the following: Over 95% of all law-trained persons who qualified and were admitted to practice law during the colonial period originated mostly from South Africa though the law which permitted them to practice in Swaziland was the Legal Practitioners Proclamation of 1955 which provided for the admission of British subjects (including British protected persons) as advocates and attorneys if they were either barristers or solicitors, in England, Scotland, Northern Ireland, the Republic of South Africa or Rhodesia. The majority of these were advocates and attorneys as illustrated in Tables VI and VII. The small percentage of the balance who came from England were mostly employed in the Ministry of Justice and a few in the judiciary. There were very few locals employed as illustrated in Table VIII. This state of affairs has to be explained against the background of the colonial policy on legal education which, as already discussed in Chapter 3, discouraged the locals from studying law.

Besides, apart from the foreign element which boosted the production of lawyers, the period preceding independence witnessed a relatively slow growth in number as again illustrated in Table VI. The period 1960-1968 is particularly remarkable, but as explained above, the number sharply dropped immediately after independence because of the suspicion and uncertainty connected with the emerging new Nationalist government. However, by the 1970s and certainly in the 1980s some significant increase occurred characterised by legal practitioners who started to establish their offices in Swaziland instead of being based in South Africa. This period (the 1970s), therefore, remains important for the foundation of locally based legal practitioners, especially attorneys. Also significant during the late 1960s and the early 1970s is the emergence of local personnel in the lower cadre of legal officers in the Ministry of Justice and in the judiciary (see Table VIII). This again has to be explained against the background of localisation in legal education when the training of lawyers was established at Roma in 1964 as discussed in Chapter 4. The impact of this localisation process is also visible in the growth of locally-based legal practitioners.

7.B.1(b) Trends in the 1980s and the 1990s

According to a survey carried out in 1989, there was, at that time, 68 locally-based attorneys of whom 37 were engaged in private law practice while 31 were employed as attorneys with the Government mainly as Crown Counsels and prosecutors.²⁵⁰ The same source revealed that there were only 10 women attorneys in the country, two of whom were engaged in private law practice, while the remaining 8 were employed as Government lawyers.

In addition to the general growth, a few significant legal manpower features of the period are also worth noting. Firstly, there was only one advocate resident in Swaziland and for the reason that the High Court and the Court of Appeal for Swaziland are seated in Mbabane, his offices were and still are suitably located in Mbabane. The majority of advocates who worked in Swaziland resided in South Africa. Secondly, it is also worth noting that, as in most African countries, the legal profession was male-dominated. Thirdly, the legal profession at this period showed a fairly high degree of localisation. Out of 37 lawyers in private practice, only 15 were Europeans of South African origin. Fourthly, as has already been pointed out, the names of lawyers of South African origin and resident in South Africa appear on the Roll in large numbers despite their inactivity in Swaziland. They only came to Swaziland to take up special cases as specialisation was not a feature of the profession at the period under review. Finally, apart from the non-resident South African legal practitioners who practice in the country, there are no foreign law firms represented in the country. Likewise, there were no locally enrolled lawyers practicing outside the country.²⁵¹ These features of the number, size and location are significant when we come to consider the nature of the legal services rendered.

As for the progressive growth, Table IX shows that the number of locally based lawyers kept steadily rising from 96 in 1980, to 125 in 1989 and to 157 in 1992.

²⁵⁰ Survey by Baloro Dr J, who reported his findings in: "The Legal Profession in Swaziland" (1989) a Paper unpublished but available in the SWAZIANA Section of the Library, University of Swaziland. Read especially pp. 10 - 14 of the Paper.

²⁵¹ Ibid p. 12.

TABLE IX
DISTRIBUTION OF QUALIFIED LEGAL PRACTITIONERS IN
SWAZILAND BY 1992

	Ministry of Justice		Judi- ciary	Other Mini- stries	Para- statal	Local Advoc- ates	Local Attor- neys	Univer- sity Lec- turers	Total
	Posts	Filled							
1980	38	28	18	0	6	11	28	5	96
1989	38	18	18	2	8	21	29	16	112
1992	49	21	21	3	13	22	40	13	133

- Sources:
1. Government Establishment Register.
 2. Personal Interviews.
 3. Records in the Ministries, Judiciary (High Court Registrar's Roll) and Parastatal Agencies.

Table IX also gives a broad picture of a relative horizontal growth in the numbers of legal practitioners most of whom have been locally trained. Table X below, on the graduation of law students, generally of Swazi origin, reflects the steady increase in the number of those entitled after graduation for admission to practice law by reason of their qualification, thus illustrating how the Law Department was also contributing to the steady increase of law-trained persons entering the legal profession.

TABLE X

GRADUATION OF LAW STUDENTS 1978 - 1992

Year	B.A. (Law) Programme	LL.B. Programme	Total	Sex		Total
				Male	Female	
1978	1	4	5	5	0	5
1979	0	4	4	2	2	4
1980	0	7	7	4	3	7
1981	1	8	9	3	6	9
1982	2	6	8	5	3	8
1983	4	15	19	14	5	19
1984	16	11	27	18	9	27
1985	19	3	22	14	8	22
1986	27	4	31	18	13	31
1987	26	9	35	22	13	35
1988	26	18	44	31	13	44
1989	25	9	34	18	16	34
1990	29	15	44	28	16	44
1991	28	13	41	28	13	41
1992	43	6	49	32	17	49

Source: Students Records in the Dean of Students Office, University of Swaziland, 1993.

Apart from underscoring the success of the policy of localisation of legal education, a policy strictly adhered to by the governments of the three sister states of Botswana, Lesotho and Swaziland, the apparent steady increase of those entitled after graduation to practice law also encouraged and promoted the organisation and work tasks of the legal practitioners. As the work of practitioners increases in volume and becomes better organised around specific needs, so the orientation of better location of law offices, the kinds of skills, the tasks and the volume of clients engaged, all shape up to reflect the growth of legal services to meet the legal needs of society. The increase in the production of locally trained lawyers by the National University therefore boosted the growth of both the number of legal practitioners and the services they were able to render. However, whether the apparent growth in production of law-trained persons

resulted in rendering better and more effective/competent legal services to promote development remains the question to be addressed next.

7.B.2 Trends in Scope of Employment

The question whether most Swazis who are law-trained get absorbed in public service and in private practice has been a concern that necessitated a survey carried out in 1992 and early 1993.²⁵² A perception has developed which associates the production of law-trained persons with the traditional role of lawyers in western industrialised societies, namely: to become counsel to government ministries (particularly the Ministry of Justice); judges and magistrates; and to engage in private practice. This, unfortunately, was the scope of employment categorisation or distribution which characterised the legal profession before and after independence. The colonial legacy emphasised private practice as the major and the most important aspects for and of legal practice. The capitalist economy which is the root of this narrow-scope lawyer-employment distribution remains the backbone of the hard-to-uproot colonial hangover not only in Swaziland but in most parts of Africa. Our interview with the Attorney-General in 1992 revealed that in 1980 no law-trained persons were employed in government ministries other than the Ministry of Justice, but in 1989 two lawyers were employed in the Ministry of Foreign Affairs; that before 1980 there were no lawyers employed in companies and semi-public corporations, but that in 1992 six lawyers were being employed in such companies as SEDCO, Tibiyo, and a few others. Law teaching also began to attract more lawyers, especially of Swazi origin.

The question whether this apparent expansion of the scope of employment categorisation for law-trained persons can cope with the legal needs of society has to be examined against another background, ie. the growing number of non-lawyers who are involved in law-related jobs. For example, we have found during our interview with articled clerks in 1992 that holders of B.A. (Law) degrees are finding it extremely difficult to get employment as the majority of practicing attorneys interviewed prefer hiring the LL.B. holder who has had a wider exposure to law courses, and yet the Ministry of

²⁵² For example a survey undertaken by Magagula ZW, for a Dissertation submitted in May 1993 in partial fulfilment of the requirement for the LL.B. Degree of the University of Swaziland, addressed this issue.

Justice has continued to employ them as prosecutors. At the time of writing, each district magisterial area has two or more prosecutors holding B.A. (Law) degrees and complaints received during our interview with the Siteki Regional Administrator in 1991 of delays in prosecution of cases goes to show the demand for lawyers in that category of employment.

Despite the above trends, Swaziland has to face the challenge that sufficient numbers of law-trained persons especially graduates should be produced in order to meet the national needs for legal service. In this regard it is important not to confine legal practice to the traditional fields of the bar, the side bar or the Department of Justice. The role of paralegals is a challenge that also needs to be addressed in the context of greater need for law-trained persons to provide legal services.

7.B.3 The Geographical Distribution

The scope of legal practice in Swaziland has a narrow base not only in terms of the number and scope of those practicing law, but also in terms of their geographical distribution in the various sectors of the practice. The point is illustrated by Table XI below. This figure does not show the number of Magistrates who are distributed as follows: Manzini 4, Hhohho 6, Shiselweni 2 and Lubombo 2. One is, however, left to wonder whether the Regional population compared with the number of lawyers in the region as per Table XI show a clear case of insufficiency of lawyers in some parts of the country. We hope to throw some light on this issue when we analyse our research findings discussed in the subsequent paragraphs of this chapter.

TABLE XI

CURRENT GEOGRAPHICAL DISTRIBUTION OF QUALIFIED LEGAL PRACTITIONERS BY TOWNS AND REGIONS AS BY 1992

TOWNS	REGIONS	ATTORNEYS		ADVO-CATES	PARA-STATAL	LECTU-RERS	TOTAL
		GOVT.	PRIVATE				
Manzini	Manzini	0	16	0			35
Matsapa				0			
Uniswa				4	1	13	
Bunya					1		
Mbabane	Hhohho	69	23	18	9	0	123
Ezulwini			1		1	0	
Sandla			2			0	
Nhlan-gano	Shiselweni	0	3	0		0	3
Siteki	Lubombo	0	0	0	1	0	1
TOTAL		69	45	22	13	13	162

Source: Survey in Swaziland, 1993.

The apparent shortage of lawyers in the country is being alleviated by the supply of South African attorneys and advocates some of whom have been admitted and enrolled in practice in Swaziland, but are non-resident as they reside in South Africa. These are, according to the report given to us by the High Court Registrar, occasionally called upon to come and take on special cases. There are other South African practitioners who are not on the roll in Swaziland, but are still called upon to also take up cases as being part of a special assignment.²⁵³ The point being emphasised is that the trends in Swaziland illustrate a vastly changing profession not only in its

²⁵³ See, for example, the case of The King v Prince Mfanastri I Criminal case no. 118 of 1989 in which both the State and the Prince had to import Counsel from South Africa on the basis that there were no local attorneys and advocates with special knowledge in political issues.

demography, but also in its geographical distribution though insufficiency of legal services still haunts the society as illustrated by the importation of lawyers from South Africa. One has to go further and examine changes in how lawyers practice, the variety of services they provide, the multiplicity of areas of law, the differentiation of practice settings and the different methods of delivering legal services to establish further the insufficiency of legal services in the country.

7.C TRENDS IN LEGAL ROLES

In the subsequent paragraphs we shall analyse the theoretical framework on the functions of law-trained persons with a view to establishing whether in the process of performing their roles they have in fact adequately met the legal needs of the people of Swaziland. The analysis will be discussed within the context of the profession's four main working environments:

- (1) The public sector - The Ministry of Justice and other Ministries.
- (2) The public sector - The Judiciary.
- (3) The public sector - Public Corporations and semi-public bodies.
- (4) The private sector - Advocates and Attorneys.

7.C.1 Legal Roles In The Public Sector - The Ministry of Justice and Other Ministries

Legal practice in the public sector consists broadly in rendering legal service by law-trained persons, employed by government as attorneys, advocates and law clerks in Government Ministries; as judges, magistrates, registrars, masters and law clerks in the Judiciary, including those in the Industrial Court; and as legal advisors in parastatal organisations/corporations. We shall also include here the services of Legal Aid Officers under the auspices of the Council of Swaziland Churches, a non-governmental organisation in Swaziland. A peculiar type of legal service by law lecturers in the University of Swaziland will also be discussed.

It has not been possible during our survey to obtain minute details of the nature and scope of the practice as there was little co-operation in responding to our questionnaires. However, we were, through limited oral interviews, able to identify the

most significant aspects of the practice sufficiently to assist our conclusions in as far as the impact of the practice on the legal needs of the public sector is concerned. In the Ministry of Justice, as to the scope in terms of the size of the manpower there is concerned, Table XII below not only illustrates the current size of the legal personnel in the Ministry, it also shows its growth over the periods since independence in 1968. One significant point to note in this Table is the perennial number of vacancies. This is indicative of the fact that despite the apparent annual growth in the size of legal personnel being employed, there has always been need for more law-trained persons in public service. The natural conclusion that one draws from this is that the Ministry does not have enough legal personnel to render the necessary legal services required by the public as explained by the recurrent establishment of posts, some of which have regularly remained vacant or only temporarily filled by expatriates (see Table VIII *supra* and Table XII below).

TABLE XII
DISTRIBUTION OF QUALIFIED LEGAL PRACTITIONERS IN THE
PUBLIC SECTOR BY 1992

YEAR	MIN. OF JUSTICE		JUDI- CIARY	OTHER MINIS- TRIES	PARA- STATALS	UNISWA LECTURERS	TOTAL
	POSTS	FILLED					
1967	8	5	7	0	0	-	12
1970	17	12	8	0	0	-	20
1980	38	28	18	0	6	5	57
1989	38	31	18	2	8	16	75
1992	49	45	21	3	13	13	95

- Sources:
1. Government Establishment Register.
 2. Records in Ministries, Parastatal Agencies, UNISWA.
 3. Personal Interviews.

Another relevant feature of legal practice in the Ministry as reported to us by the Attorney-General is the apparent domination of foreigners especially in some departments, notably those of the Directorate of Public Prosecutions (DPP) and the First Parliamentary Counsel (FPC). Currently the two departments are headed by expatriates and out of 10 Crown Counsels in the department, six are non-locals and plans are underway to recruit more from Kenya and Ghana. In the FPC department, which is very thin on the ground with only two lawyers, the most senior member is also an expatriate. This state of affairs has far-reaching implications, some of which have historical roots. As expected, prior to independence and immediately thereafter, all legal personnel in the Ministry were Europeans. Our earlier discussion of this period in the present chapter bears witness to this fact. What is of even more concern is that at the time of independence, only a few locals joined the Ministry. In 1970 the number of Swazis stood at four. Our recent investigations now show that amongst the initial group of three law graduate Swazis to join the Ministry, only one, the current Attorney-General, is still employed in the Ministry. The rest left for private practice as soon as they felt ready and confident for "private business".

The case study in the judiciary in this respect also shows interesting peculiar features. In the first place, in the judiciary, law-trained persons provide only limited legal service to the common law courts. The Swazi Courts Act of 1950 excludes legal representation by attorneys and advocates and so far no legally qualified person has been appointed as Judicial Commissioner or Judge President of any of these courts. From the report of the Registrar of the High Court their chances of appointment to those offices appear very remote, at least not in the near future. That apart, even in the common law courts, records of the Registrar show that the Court of Appeal judges are only appointed on a part-time basis and they, being three in number, sit only twice a year; that the High Court has only two full-time judges, the Chief Justice and one other judge who is so far the only Swazi to be in that high position; that there is a vacancy for a judge, but it has been difficult to fill it because of the poor salary attached to the post, i.e. the salary equivalent to that of an under-secretary in the Ministry; that there are posts for nine magistrates, but so far only seven of those posts have been filled; and

that of these seven, three, who are the most senior, are expatriates of South African origin.

7.C.2 Legal Roles in the Public Sector - Corporate Bodies

Legal practice in the public sector also includes the provision of legal services by law-trained persons employed by corporate bodies. In Swaziland, when we visited companies in Mbabane and Manzini, we found such persons in the following parastatal bodies:

Swaziland Posts and Telecommunications - 1 as legal officer.

Tibiyo - 1 as legal secretary.

SEDCO - 1 as company secretary.

Posts and Telecommunication - 1 as legal secretary.

The Sun International Group of Companies - 1 as industrial relations officer.

When interviewed, legal officers in these companies confirmed that they serve a wide range of roles, including giving legal advice, participating in negotiations, drafting contracts and other legal documents and in the case of SEDCO, representing the company before the ordinary courts, including the Industrial Court. The point of contention concerning employment of legally-trained persons in corporate organisations is why there are so few of them when these organisations offer very attractive salaries and fringe benefits? Could it be the attitude of the law graduates who prefer private legal practice to employment with such organisations? Could it be the attitude of the employers who resent lawyers in their organisations? Could it be the system of legal education which offers no specific training for legal practice in those organisations? Or could it be the economic forces which pull all practitioners towards private legal practice? We interviewed attorneys in Manzini and they revealed that all these considerations exert some influence, but the dominant factor remains lack of interest so that given a choice, a legal job in a corporate organisation would come second to one in private practice.

Another category of legal practice in the public sector involves the academics employed by the University of Swaziland. In view of the fact that the University is incorporated by an Act of Parliament, any reference to legal practice at the University

needs to be discussed together with those in the corporate organisations. However, because of the peculiar nature of the legal service rendered by those (lecturers) appointed by the University, it has been found necessary to discuss their case separately. Part of the reason for this special treatment is the allegation that law lecturers, despite their high legal qualifications, have very little to offer by way of legal service for development. In fact, some interviewees among the attorneys relegate the status of law lecturers to failures in the practice of law as the explanation for their becoming academics.²⁵⁴

The main area of legal service by the law teacher, therefore, can be found in teaching, research and legal publications. As employees of the University in Swaziland, we would like to observe that currently there are serious problems influencing rendering of service by law lecturers. The university policy explicitly demands from each lecturer a teaching load of not less than 12 hours a week, leaving the lecturer with hardly any time to devote to proper research and publications. Besides, the demands exerted by moot court trials, marking of scripts of large classes (of about 40 students in each of the years 1 to 4), and insistent undertaking of numerous administrative responsibilities in the department, faculty and the university, render the lecturer into a jack of all trades, but master of none. Requests for the increase of the establishment has fallen onto the deaf ears of the administrators and if anything was done in that regard, it was to reduce the present establishment from 9 to 7. The fundamental point to note is that the present demands on the lecturers are such that they cannot be expected to meet the requirements of research and publications due to other pressing problems created in the work environment.

Also within the public sector there are persons who are not graduates in law, i.e. neither hold the B.A. (Law) nor the LL.B. but practice law by virtue of their being holders of the Certificate/Diploma in Law from the then Universities of Botswana, Lesotho and Swaziland or from the University of South Africa. The High Court Registrar's record revealed that there are three such persons employed as legal clerks or training officers in the Ministry of Justice, including the Judiciary. He confirmed that their number has

²⁵⁴ For aspects of the role of the law teacher read: Dlamini DRM, "The Law Teacher, the Law Student and Legal Education" (1992) South African Law Journal p. 595.

remained low because of the suspensions of the sub-degree training programmes in law by the University of Swaziland. At the time of writing, efforts were underway to re-introduce the sub-degree programmes to cater specifically for Police Officers as a way of legal manpower to meet the needs of the society.

The discussion on legal practice in the public sector would remain incomplete without making a reference to the obligation on the part of private legal practitioners to provide Pro Bono or Pro Deo or any other form of legal service to members of the public who, for reasons of poverty, are not able to pay for the required legal service. The legal officers at the Legal Aid Office reported to us that until early 1993, when the Law Society of Swaziland showed some special interest in legal aid, those functions were being performed by law-trained persons employed by the Council of Swaziland Churches. In 1993 there were two such persons, one with an LL.B. degree and the other with a B.A. (Law) degree. The Legal Aid Programme which appears to suffer acutely from financial problems attempts to provide legal services of a peculiar nature namely, dissemination of legal information to special interest groups, including students in high schools, youth groups and women's organisations. A limited amount of legal advice is occasionally provided to clients, mostly women, referred by the Family Life Association of Swaziland (FLAS), a non-governmental organisation (NGO) dealing with family planning. There were only four cases when the programme was called upon to handle a real case involving court proceedings on behalf of a client. For such rare cases, an arrangement exists whereby the legal aid officers, who are not qualified attorneys, refer to a list of three attorneys who take up the matter free of charge.²⁵⁵

Two other aspects of the provision of legal aid in Swaziland need to be mentioned. Firstly, the members of the Law Society have continued to perform their duties relating to Pro Bono legal services as illustrated in the recent case of The King v John Madeleke Criminal Case No. 89 of 1990 in which a Tanzanian psychiatrist was convicted of the murder of his wife, although her body was never found. On appeal, his attorney, who had defended him in the High Court trial, refused to continue the defence

²⁵⁵ The writer was personally involved in the programme from its beginning and was the co-ordinator on behalf of the Law Department. For his writing on Legal Aid, discussing different aspects and student participation, read Iya PF, "Developing a Practical Training Programme in a University Law Curriculum: Some Reflections on a suitable Programme for the University of Swaziland" 1990 Lesotho Law Journal Op. Cit. p.109.

because of fees still due and owing to him. The court accordingly appointed another attorney to defend the accused in the Court of Appeal on Pro Bono basis. The limitation of payment of fees forms an important aspect of law and poverty in Swaziland, a point that deserves noting.

7.C.3 Legal Roles in the Private Sector

As in the public sector, the present structure, functioning and scope of legal practice in the private sector in Swaziland has been influenced by several factors, some of which are political, while others are economic or social. A brief historical account may help to put a few of these factors in their proper perspectives.

From 1955, when His Excellency the High Commissioner to Swaziland, promulgated the Legal Practitioners Proclamation on the 25th of November, until 1988 when the last Legal Practitioners (Amendment) Act No. 13 was passed, legal practice in Swaziland was subjected to a series of legislations bringing into focus developments of particular interest to scholars of the legal profession in Swaziland. Prior to 1955, the reception of the Roman-Dutch law into the country by the General Law and Administration Proclamation of 1907 imported into Swaziland a number of South African statutes, including those from the Transvaal Province, establishing the legal practitioners in that province. According to some writers, an association of advocates was created in the province as far back as the 1880s, and the Law Society there was established in 1892.²⁵⁶ These advocates and attorneys in that province infiltrated into Swaziland, particularly after the British conquered the Boers in 1898. Because of this influx, the then colonial government found it necessary to promulgate a local legislation "to consolidate and amend the law relating to the admission and enrolment of legal practitioners in the territory."²⁵⁷

The provisions of the 1955 statute were distinctly based on and influenced by the legal system and practice in England, of course taking into account the Roman-Dutch system imported from South Africa. Consequently, the dichotomy of the English legal practice into barristers and solicitors were clearly referred to in the 1955 Act except that

²⁵⁶ Pound et al, Our Legal Heritage (1982) Butterworths, South Africa.
²⁵⁷ The Title to Proclamation No. 95 of 1955.

for Swaziland the dichotomy introduced was between advocates and attorneys, reflecting the South African System.²⁵⁸ By the 1955 Proclamation, therefore, legal practitioners in Swaziland were of two types: advocates and attorneys along the lines of barristers and solicitors.²⁵⁹ Thus was introduced in Swaziland a divided profession, unlike in many parts of Africa where the legal profession is fused, i.e. with no distinction in nature, function or structure amongst the members of the type characterised by a divided profession.

The concept of a divided profession is based on and works upon a number of British conventions and practices which automatically had to apply to Swaziland. The first of the conventions was that the lay client has direct access to the solicitor (attorney) only. Secondly, the barrister (advocate) cannot accept instructions directly from a client. Thirdly, barristers (advocates) only were entitled to have audience in the superior courts, and fourthly, barristers (advocates) only had the right to wear wigs. It, however, turned out that some of these conventions did not apply to legal practitioners in Swaziland, presumably because of the Roman-Dutch influence. For example, in Swaziland both advocates and attorneys have audience in the High Court and advocates do not wear wigs. Nevertheless, we see here established in Swaziland a system of legal practice by persons defined in the 1955 Proclamation which (the system) was South African by terminology, but essentially English in nature.²⁶⁰

Another important historical factor which subsequently influenced legal practice in Swaziland in terms of the pattern of distribution of legal service was the location of legal firms by the first Europeans who started legal practice in the country. The position in most African countries on the matter was distinctly illustrated in Tanganyika as described clearly in the following words:

"The predominance of Europeans and Asians in the commercial and plantation sectors set a pattern for the distribution of legal service. Lawyers during the colonial time set up their chambers near the

²⁵⁸ Read sections 8 - 10 of the 1955 Proclamation.

²⁵⁹ For details of comparison read Gower LCB, Independent Africa: A Challenge of the Legal Profession (1967) Harvard University Press, Cambridge p. 104.

²⁶⁰ The Proclamation defines Legal Practitioners as "any person entitled or admitted to practice as an advocate, attorney, notary public or conveyancer in terms of this Proclamation". This definition remains true, even today.

concentration of commercial activities in towns or adjacent to the large expatriate plantations. More than half of these law offices were concentrated in the territory's capital, Dar es Salaam, which was also the main centre of commercial activity."²⁶¹

This attitude of the colonial legal practitioners which swept across African countries colonised by the British did not leave out Swaziland. Its influence on current legal practice is an important aspect we shall turn to later.

Of equal importance was the policy of state control over legal practice as illustrated by stern and detailed provisions regulating the practice of law since 1955. The courts too were used and particularly involved in this exercise, for upon them have been vested the supervisory roll of legal practice irrespective of whether the particular practitioner was an advocate or an attorney. This aspect of control is again an important factor, because, whether in terms of qualification, functions, behaviour or organisation, there is always some specific statutory provision and the courts have always been made to stand around the corner with their big stick to strike off the roll or otherwise punish those practitioners who did not comply with those provisions. It is, therefore, against this kind of background that we would like to start the discussion on the current legal practice in the private sector in Swaziland. This is not to admit that there are no other important factors to consider. There are many that have direct relevance and need to be pointed out. In fact, we did precisely that in the previous chapter. The factors referred to immediately above are considered quite crucial for the subsequent discussions on legal roles.

In Swaziland legal practice in the private sector is, by law, the monopoly of advocates, attorneys, notaries public and conveyancers in accordance with the definition provided in the Legal Practitioners Act of 1966 as amended in 1988. Under Section 16 of this same Act, it is an offence for an unauthorised and unqualified person to engage in private practice, although to date nobody has been prosecuted in spite of the existence of some "bogus lawyers" occasionally alleged to be "practicing" law. Therefore, private legal practice is for advocates and attorneys, because, under the Act,

²⁶¹ Rwelamira MRK, "The Tanzania Legal Profession" in Dias JR, Luckham, Lynch DD and Paul JCN (ed). Op. Cit. p. 210.

the qualification for admission and enrolment to practice as a conveyancer or notary public requires one to have been enrolled as an attorney.²⁶² For that reason this discussion will mostly emphasise those aspects of the practice that involve advocates and attorneys.

Upon enrolment, the two, i.e. the advocate and the attorney, have some separate and distinct roles to play in the practice of law. In the first place, advocates are not allowed to practice in partnership, while attorneys are. Secondly, an advocate cannot appear in court without the instructions of an attorney; this is not the case with attorneys. Thirdly, advocates are normally organised in Bar Associations (as is the case in South Africa and in England for barristers), while attorneys organise themselves in law societies. In Swaziland, however, the law allows advocates to become members of the Law Society. This could probably be the influence of the fused profession in some countries around Swaziland or it could be the small and negligible number of advocates whose formation of a Bar Association would indeed be meaningless.²⁶³ Fourthly, the right of audience in the superior courts is normally the preserve of advocates while attorneys are entitled to appear in the lower (magisterial) courts, but again, in Swaziland, for probably the same reason as stated above, the right of audience in both the High Court and in the Court of Appeal is enjoyed by advocates and attorneys alike. There is, nevertheless, one fundamental common characteristic which needs to be mentioned here, namely, under section 23 of the Swazi Courts Act of 1950 both groups of legal practitioners are excluded from appearing before the Swazi courts.

As regards the day-to-day work task of legal practitioners in the provision of legal services in the private sector, our joint research with the Law Department between 1990-92 shows a lot of interesting features, the highlights of which include the following: Organisationally, we have established through our interviews with attorneys in Mbabane and Manzini that the majority of practitioners prefer what is commonly known as "solo practice" as opposed to joining into partnerships.²⁶⁴ The reasons given to us for such

²⁶² Sections 23 and 24 of the Legal Practitioners Act 1964 as amended by Act 13 of 1988. Read especially sections 10 and 11 of the amending Act.

²⁶³ Section 35 provides that every person admitted and enrolled as a legal practitioner shall be a member of the Law Society. Legal practitioner, for this purpose, includes an advocate.

²⁶⁴ For details of our findings on the organisational structure of the profession in Swaziland see ANNEXURE XII.

preferences were basically that it offers the best atmosphere for the much needed lawyer independence where the practitioner enjoys complete independence in decision making, financial control, office management, workload determination, time management and working relationship with the client, to mention but a few of those advantages. A practitioner in this situation employs one or two legal assistants who are usually fresh graduates recently enrolled or preparing to be enrolled as attorneys. In addition, the practitioner has a support lay-staff consisting of a legal secretary, a process server, office clerks in charge of finance and other administrative matters, and a cleaner. To start a solo practice is a decision not easily taken. An attorney, once admitted and enrolled, would prefer to remain with his/her former principal and be employed as a legal assistant in that firm. Because of the large sum of money required, it usually takes a few years before the new attorney opens his/her own firm. From our research, only five of those attorneys ventured to start solo practices immediately after their enrolment and the reasons given for their "rush" were partly self-confidence derived from good experience during the period of articles or some strong financial support from relatives.

We have also established through interviewing the attorneys that most of the attorneys, whether in solo or in partnership, are involved in litigation, the majority of which are criminal cases. Other types of cases are comparatively rare. For instance, it is difficult to have very many divorce cases because most Swazis are married according to Swazi law and custom which strictly speaking, does not allow for divorce. Cases in conveyancing, too, are limited because, as earlier pointed out, the greater part of land in Swaziland falls under Swazi National Land, which is held in trust by the King, who, through the chiefs, can only allocate it for use and not for possession. However, the freehold land mostly owned by foreigners and commercial companies, offers some amount of work for conveyancers. Legal practices connected with commercial or industrial activities are also limited and relative to the development currently taking place in the economic sector. The point remains that an attorney would normally take any case that comes before him. It would be true to say he/she is "a jack of all trades and a master of none". The circumstances of the practice and the prevailing economy dictate likewise for most attorneys who have to survive the competition of the limited

area of operation in legal practice. For a general view of the trend of cases handled by private practitioners, study Tables XIII, XIV and XV.

TABLE XIII

TYPES OF CASES HANDLED BY A PROMINENT FIRM IN MANZINI FOR A PERIOD OF THREE YEARS

TYPE	1990	1991	1992
1. Criminal	89	97	130
2. General Litigation	111	125	109
3. Divorce	20	12	12
4. Maintenance	19	8	21
5. Contracts and Sales	37	33	20

Source: Attorney's Firm Register 1993

The above table assists in the monitoring of legal practice in Swaziland by establishing that:

- (a) Criminal law practice remains by far the most important practice for lawyers as evidenced by comparing the number of criminal cases vis-à-vis other aspects of general litigation. The rising number of cases between 1990-1992 is equally significant and confirms the above assertion.
- (b) The small number of divorce proceedings handled by the Manzini attorney may confirm our earlier assertion that most cases relating to marriage and divorce are handled extra-judicially according to Swazi law and custom, leaving the common-law courts with few cases to handle.
- (c) The impact of the small and slowly-growing economy is evidenced by the few commercial and industrial cases reaching the attorneys.

TABLE XIV

**TYPES OF CASES HANDLED BY A PROMINENT FIRM IN MBABANE
FOR A PERIOD OF THREE YEARS**

TYPE	1990	1991	1992
1. Criminal	185	203	237
2. General Litigation	83	98	147
3. Divorce	17	12	15
4. Maintenance	32	35	41
5. Contracts and Sales	48	53	70

Source: Attorney's Firm Register 1993

1. The above table confirms most of the facts established concerning the legal practitioner with an office in Manzini.
2. Evidence of greater number of civil cases is explainable on the basis of the fact that Mbabane as the Capital City where the High Court is located attracts more people with civil problems for lawyers to handle.

TABLE XV**TYPES OF CASES HANDLED BY THE HIGH COURT FOR THE PERIOD OF THREE YEARS**

TYPE	1990	1991	1992
1. Criminal	188	182	265
2. General Litigation	1188	1329	1651
3. Divorce	29	28	36
4. Maintenance	12	10	25
5. Contracts and Sales	1171	1093	1436
6. Miscellaneous*	117	198	154

* Miscellaneous consists of motor vehicles, cattle disputes, appeals, etc.

Source: High Court Registry 1993

The above figures are consistent with the findings of cases handled by attorneys in Manzini or Mbabane and merely serve to confirm them.

In conclusion, the diversity in practice settings and differentiation in the lawyers work as discussed above also raise issues of lawyering tasks in terms of their day-to-day provision of legal services. In this regard the Swazi lawyer, like his/her counterpart elsewhere, engages in a number of tasks in the fulfilment of the demands of the clients. Generally these tasks have been identified by most writers on the topic to consist of the following activity areas:

1. Advising clients.
2. Negotiating agreements.
3. Drafting agreements and other legal documents.
4. Planning and designing legal transactions.
5. Reviewing documents.
6. Collecting debts.

7. Participating in court proceedings (litigation).
8. Settling problems out of court.
9. Monitoring performance of legal obligations.
10. Administration of Personnel management.

Notwithstanding the above activities in practice by "general practitioners", our research has also revealed some aspects of specialisation. We have found that there are some attorneys in Swaziland today who, by constant practice in a particular branch of the law, have managed to achieve what has been termed "an informal status of specialisation". We take a specialist to be a person who has acquired more than average or ordinary knowledge and skill in a particular branch of the law in which he/she claims specialisation, and this acquisition is either by experience or training, or both. In the case of legal practice in Swaziland, attorneys with this type of specialisation, are few and are again limited in scope. There are however two law firms where individuals have specialised in conveyancing and notarial practice. In one of the firms there is one specialist while in the other there are two. It has also been found that there is one law firm comprising two attorneys who have specialised in corporate practice, and there is one law firm which has specialised in family law.²⁶⁵

7.D THE PARADOX OF GROWTH IN THE LEGAL PROFESSION AND INSUFFICIENCY OF LEGAL SERVICES - AFFIRMATION BY EMPIRICAL EVIDENCE

7.D.1 Key Findings

1. We have gathered information on lawyers in the different practice settings of the public and private sectors, giving the profession an overview picture of some growth both in the structure and functioning of law-trained persons in Swaziland.
2. Legal services today are more diverse and more organised indicating a greatly changed profession not only in terms of its demography but in the variety of services provided and the different methods employed in the delivery of those services.

²⁶⁵ The position established by Baloro Dr J, in 1989 did not change when we carried out investigations in 1993. For his findings, read Baloro "The Legal Profession in Swaziland" Op.Cit. pp. 10-14.

3. The growth in the profession is also reflected in the record of number of students who enrol and graduate annually from the Law Department of the University of Swaziland, indicating a relation between those who teach law and those who provide legal services in the different sectors of the society.
4. Evidence goes further to show that for the public sector:
 - (i) Crown Counsels of various cadres, qualifications and experiences in the Attorney-General's office provide legal advice, represent government in all civil matters and also negotiate and prepare documents on behalf of government.
 - (ii) Crown Counsels, Crown Prosecutors, Public Prosecutors in the Directory of Public Prosecutors perform all functions relating to criminal matters in the country on behalf of the King.
 - (iii) The Registrar of Deeds keeps records and registers deeds, leases, etc.; the Registrar of Companies keeps records and registers companies; the Registrar of Deaths, Births and Marriages performs those duties; and training officers and law clerks are fully made use of.
 - (iv) Legal Advisors are providing legal services in Ministries such as Foreign Affairs and of the Interior and in a few parastatal organisations.
 - (v) Lecturers in the university teach law, research and publish articles analysing and reforming the law.
 - (vi) In the Judiciary, judges and magistrates interpret the laws and resolve disputes within their scope of jurisdiction; the Registrar and the Master of the High Court together with their deputies, are responsible for the keeping of records and administering specific aspects of justice in their respectful areas; and the Sheriff executes the decisions of the courts.
 - (vii) Paralegals have since colonial period continued to occupy important positions especially in the judiciary in providing legal services as clerks and court interpreters.
5. For the private sector:
 - (a) the number of practitioners and the scope of their practice in geographical terms has been increasing since independence;

- (b) legal practitioners have been involved in litigation of both criminal and civil matters and some limited specialisation exists in such matters such as criminal law, notarial practice, conveyancing, and family law, though at a slow pace;
 - (c) legal practice has been concentrated in the major commercial cities of Manzini and Mbabane (also the capital) leaving the rest of the country with limited access, if any, to legal services.
6. The job market for legal practitioners has some openings as evidenced by vacancies for lawyers in the Ministry of Justice and by absence of attorneys in most parts of the country.
 7. The demands for all kinds of legal services, particularly from the commercial and industrial sectors and in the context of the socio-economic political changes, have created a set of new fields for legal services for which the present lawyers are insufficiently equipped, e.g. in the technological development and use of computers.
 8. Competence to provide the required legal services for the newly created set of complex transactions present problems directly related to the nature and quality of legal education provided to the lawyers.

7.D.2 Research Methodology

Firstly, the methodology used for this aspect of the enquiry was designed to establish the fact that there exists in Swaziland a paradox between the apparent growth in the structures and roles of the legal profession on the one hand and the insufficiency in the provision of legal services on the other. Three important stages were followed in the collection of data most relevant to the issues. In the first place the review of documents containing important records formed a very substantial part of the research. The aim was to establish from these records the different practice settings within the public and private sector; growth in both the structure and roles in the profession; and the general pattern of change in the demography and variety and methods of services provided in the delivery of legal services in Swaziland.

Secondly, aspects of the set of questionnaire administered provided some insights into the information about the profession that was being evaluated. For example question 6 of ANNEXURE VIII and Parts III and VI of ANNEXURE X raise issues pertinent to the aspects of the profession that were under investigation. Though the information obtained from these sections of the questionnaire was limited in terms of the limited number of responses, it nevertheless assisted in affirming the items that were being established.

Thirdly, oral interviews and telephone enquiries and discussions formed a substantial part of the investigation. The aim was to fill in the gaps not duly established through the other two stages of the research.

7.D.3 Main Findings

7.D.3(a) From Review of Documents

One significant evidence of change has been the growth in the number of students choosing law as a career vocation. This is vividly illustrated by Table X, the source for which is the records in the Dean of Students' office as established in 1993. Equally evident has been the growth in terms of number of lawyers practicing in Swaziland. The documents in the High Court Registry and in the Ministry of Justice have assisted us in establishing this fact and the trends of the degree of growth are illustrated by Tables VI and VII an analysis of which has been provided in the preceding paragraphs.

Available records also assisted us in establishing the different practice settings in both the public and private sectors of the Swazi society. The Government Establishment Registers of the various years, the Directory of the Office of Her Majesty's Commissioner and the records in the Ministry of Justice, in the Judiciary and in the High Court Register are contributed effectively in our data affirming the trends in the growth and distribution of lawyer population by generic divisions of practice settings. Table IX sets out to illustrate our findings on the issue.

In addition, the available records go further to provide information not only on the practice settings but also on what practitioners normally do. It is one thing to accept the fact that practice settings take many forms: public as opposed to private practice;

small-firm as opposed to large-firm practice; general as opposed to specialist practice; new as opposed to veteran practitioners, to mention but a few. It is another to establish effectiveness in the practice. However, our review of documents reveals a set of characteristics which are attributable to and cut across different practice settings. A list of these tasks was provided in the earlier part of this discussion. What is more is that the examination of records in specific law firms in Manzini and Mbabane also illustrate a model of a typical practitioner who handles individual clients' disputes. Tables XIII and XIV set out those tasks.

7.D.3(b) From Responses to Questionnaire

Question 6 of ANNEXURE VIII required respondents to answer whether the Department of Law of the University of Swaziland was producing too many or too few lawyers. Our finding, as earlier discussed, is that the majority of the respondents (6 out of 9) think that too many lawyers were being produced because many of the law graduates with LL.B. and B.A.(Law) qualifications cannot easily join the profession. What has to be emphasised here is the point that what emerges from the survey in terms of legal needs is the trend not so much towards increasing the number of lawyers but rather towards equipping them with greater knowledge and skills to make them more relevant to the job market, and thus to the needs of society.

Part III of our questionnaire, a copy of which appears as ANNEXURE X, was intended to solicit information on the occupation and professional experience of respondents. It was hoped that with such information one would be able to assess the structure and roles of respondents. In Chapter 1 paragraph 1.D.2 of this thesis is given the list of respondents according to their occupation in the profession. In terms of the present discussion what is significant about all the available lists is its affirmation of the different practice settings for the respondents, i.e. there are lawyers in the public sector (as Crown Counsels in the Ministry of Justice as judges and magistrates in the judiciary and as prosecutors) and in the private sector (as attorneys). There are also legal officers in companies as well as clerks, whether articled or simply law clerks in firms of private practitioners.

Another aspect of the questionnaire required each respondent to outline the duties he/she performs in the respective occupations identified. Our findings are set out according to the particular sector (public or private) to which each respondent belonged, the details of which are in the “Key Findings” outlined in paragraph 7.D.1 above.

Part IV of the same questionnaire in ANNEXURE X was intended to solicit responses relating generally to the changing aspects of the profession. Many respondents avoided answering the various questions set out under this part. The few who responded gave information similar to one respondent whose answers to the questions are recorded verbatim in the following words:

Question 1:

In your opinion is the enrolment of law students in your University increasing or decreasing and why?

Answer:

Increasing because more students, especially girls, are interested in studying law, although some join not by choice but because they could not obtain any other course to pursue at the university.

Question 2:

Will this trend continue and why?

Answer:

Yes, it will continue not only because a lot more students are passing from High Schools and applying for tertiary education but also because legal services are now in greater demand than before.

Question 3:

What are the authorities doing about this trend?

Answer:

Trying to cope up by increasing student intake to university education especially in the law department.

Question 4:

What is the effect on the profession?

Answer:

Expansion.

Question 5:

What do you suggest should be done?

Answer:

- (a) Encourage more locals to join all sectors of the profession so as to replace expatriates.
- (b) Expansion of legal services to all corners of the country.
- (c) Specialisation to meet new complex legal demands of a modern society, including specialists in customary law which affects the lives of the majority of the Swazis.
- (d) Improve quality of legal education.

Question 6:

Is the legal profession changing, if so in what way?

Answer:

Yes. Changing in that there is:

- (a) Increase in numbers.
- (b) Increase in the variety of use of legal services, e.g. by companies.
- (c) Change in gender make-up as more women are becoming lawyers.
- (d) Professionalisation through the Law Society whose activities are being intensified.
- (e) Localisation.
- (f) Introduction of technology, e.g. computers.

Question 7:

Is there greater demand for legal services? If so, why?

Answer:

Yes because of new demands on development, i.e. increasing and complex changes in the socio-legal, political and economic activities.

Question 8:

What role does legal education play in satisfying the increasing demand?

Answer:

Training more competent lawyers to cope with increasing complex demands especially in terms of skills and values for competent and responsible lawyers forming part of curriculum for quality legal education.

Question 9:

What role does skills-development play in this process?

Answer:

Prepare the lawyer for more effective and efficient practice of law.

Question 10:

What does the future look like for the profession and why?

Answer:

Future looks problematic because of insufficient preparation of law students on the part of the University for practice and total lack of continuing legal education programmes for those in practice.

Question 11:

Give suggestions on how lawyers can educationally be better equipped to satisfy the increasing demands on their services.

Answer:

Improve on acquisition of legal knowledge, skills and professional values. Emphasis on skills.

7.D.3(c) From Oral Interviews/Telephonic Discussions

As previously stated, these interviews were intended to fill in gaps not covered by information obtained through the other two forms of data collection. Throughout the discussions in this chapter references are continuously made to the results of the responses received, the details of which need no further repetition.

7.D.4 Analysis and Conclusions: The Question of Incapacity to meet Legal Needs

7.D.4(a) Structural Defects

Whereas the trends in the production of law-trained persons show a remarkable growth as illustrated by Tables VI-IX, one structural concern of the role of lawyers relates to their location and distribution. We have established through the survey (see Table XI) that most law-trained persons provide legal services in the two centres of the country (Mbabane and Manzini) where they are concentrated. The majority of the population who live in rural and other urban areas are largely left without the assistance of lawyers. Legal needs in such areas are either unmet or are resolved through traditional dispute resolution mechanisms with limited jurisdiction because of the provisions of the Swazi Courts Act of 1950 referred to above. Extra-judicial systems are also often utilised. There is, therefore, a need to improve legal services in the local/rural areas through introduction of paralegals, village attorneys or local legal resource centres where citizens in those areas can turn to for the resolution of their legal problems. As an alternative, consideration should also be given to expanding the role of the Swazi courts in view of the strong adherence of the Swazis to traditional values.

Another structural defect in the provision of legal services relates to the very limited number of law-trained women. It was established, when discussing the socio-political economy of Swaziland (Chapter 5), that lawyers' provision of services must guarantee equal rights for women and men, create mechanisms whereby the discrimination, disabilities and disadvantages to which women have been subjected are eradicated, and must guarantee constitutional protection against sexual harassment and violence against women. In our view, therefore, greater numbers of women lawyers are

required if such guarantees are to be pursued more vigorously in the interest of women than has been in the past.

Equally important in the structural evaluation is the characteristic of the profession based on the English legal system's dichotomy of barristers and solicitors (i.e. in Swaziland advocates and attorneys). The significance of this distinction is its costly reflection on the future role of the profession, thus the necessary steps need to be taken to improve structures and functions with a view to enhancing relevance to and greater involvement in the process of development. The result of the distinction is the perpetuation of perceptions associated with the traditional role of lawyers which emphasised private practice as the major and most important aspect of legal practice. The future needs of Swaziland requires more public-interest lawyers to provide services in the various government department, corporations, legal aid centres etc. A fused profession would, therefore, be more suitable in the developmental needs of the country.

7.D.4(b) Shortcoming in the Legal Roles

In our discussion on legal roles in government ministries, the issue of expertise and employment of expatriate lawyers was raised. There are many dimensions to this: they include employment of expatriate judges and magistrates on the one hand and the importation of South African lawyers to prosecute and defend political cases as happened in the case of The King v. Prince Mfanasibili referred to in our previous discussion, on the other. Currently the High Court has two Judges of whom only one is a Swazi and all Judges of the Court of Appeal are foreigners. It is clear from these facts that Swaziland lacks certain local personnel with sufficient expertise to satisfy the legal needs of society.

In Tables XIII, XIV and XV it was established that the general case load of lawyers in Swaziland is criminal in nature. It was explained that there are several reasons for this state of affairs. For example it was difficult to have many divorce or family-related cases handled by practitioners because most Swazis married under custom and would rather seek traditional methods of dispute resolution - in fact Swazi Law and Custom does not even allow for divorces. Attention was drawn to the

increasing social activities in the area of constitutionalism, commercial and industrial participation, human rights concerns, women's issues etc. It is in these areas that we found through our interviews especially in Manzini, the commercial city of Swaziland, a real dearth of lawyers who are competent to represent national and international commercial and industrial interests. Public corporations including multi-national corporations are on the increase, taking on complex taxation and finance matters. In our view, under these changed and changing circumstances, competent lawyers properly trained in international concession agreements and good legal draftsmen would better advance the cause of development than the narrow and ill-equipped lawyer who would, in any case, be a hindrance to such a cause.

There is also a great need for courageous and imaginative lawyers to help design political institutions to help in the preservation of the rule of law by seeking all means to minimise the curtailment of individual freedoms which are being threatened by the increasing governmental intervention in every sphere of activity. The absolute monarchy is a case in point. Besides, international and comparative lawyers are needed to enable the country to move towards more active participation in regional co-operation. The reliance on foreign experts to handle these new aspects of development can be disastrous particularly in terms of the costs to tax payers. Crown Counsels interviewed on the issue of foreign experts complained that not only do these foreigners siphon money out of the country but most of them are even unfamiliar with the practical day-to-day requirements of the ordinary Swazis.

Equally relevant to our study was the report received particularly from the attorneys in Manzini concerning specialisation. According to them most attorneys prefer solo general practice because they want to be "jacks of all trades for the sake of the money. In Swaziland, there are two firms where individuals have "specialised" in conveyancing and notarial practice. However, considering a specialist to be a person who has acquired more than average or ordinary knowledge and skill in a particular branch of law, in the case of Swaziland, such specialists can hardly be found in the area of legal practice. Neither do the legal education programmes at the University provide the facilities for specialisation e.g. there are no Masters Degrees or Postgraduate

Diploma programmes nor does the profession provide continuing legal education programmes for that purpose. This, to us, is a serious pitfall.

7.D.4(c) Other pitfalls in the Legal Education System

Given the above shortcomings in the structures and functions of law-trained persons generally, and their role in providing legal service in particular, it is our contention that lack of capacity and competence to deal with the political, constitutional, administrative, commercial, industrial and other legal issues affecting society contribute substantially to these shortcomings. We further contend that those trained to render such legal services should not only be legally knowledgeable about these issues but should have the appropriate skills to perform the new demands of development with competence and effectiveness. However, the greatest difficulty we have is how to evaluate legal competence and effectiveness. What are their component elements? What processes are involved in acquiring them? Who should be responsible for ensuring their acquisition?

7.E IS COMPETENCE A CRITICAL FACTOR?

7.E.1 Competence as a Factor in Provision of Legal Services

This part of the discussion is intended to address the question of competence as one of the important factors influencing or limiting the provision of legal services to meet legal needs in Swaziland. The issue of competence in the practice of law is as old as the profession itself. Methods and processes among lawyers of striving to become more competent in the performance of legal services dates back to the early days of the profession. However, modern study on professional competence started in the 1970s in the United States when the American Bar Association established its first Task Force on Professional Competence against the background of public and professional demands for increased accountability of lawyers.²⁶⁶

Although according to Brink , the then President of the Association, incompetent performance in an individual case or consultation can occur, amongst other reasons,

²⁶⁶ Interim Report of the "Task Force on Professional Competence" 1972 American Bar Association publication p.1.

because a usually competent lawyer is diverted by other work, is neglectful of calendar and systems of practice, is practicing in a field in which the lawyer is not experienced or is inhibited by factors such as alcohol or drug abuse or personal problems. To many the concept of competence or what amounts to incompetence is far from clear. What is generally acknowledged is the fact that the means of obtaining greater professional competence is critically important, whatever profession one is dealing with.

In Canada, as in the United States, there appears a general consensus that legal competence “the capacity to perform certain tasks adequately or to a specific standard” comprises the possession of:²⁶⁷

- legal knowledge in the relevant areas;
- practical skills in the relevant areas;
- administrative skills in practice management;
- motivation to perform the tasks in a disciplined and diligent manner;
- proficiency to plan and prepare in advance of performing the tasks;
- mental and physical faculties to complete the task.

To other writers legal competence has to do with setting standards for members of the profession based on performance.²⁶⁸ Thus competence is perceived as describing a set of behaviour patterns that are involved in the performance of an occupational role or which a person brings to that role. Therefore a statement of competence will be accompanied by a set of performance criteria or behavioural indicators which provide the criteria against which a “performance” is judge and, for that purpose, performance should reflect or result in an “outcome” rather than an “input”.

Obviously different view points exist on the concept of competence as applied to different behaviour patterns. We have already associated ourselves with the general concept which emphasises the six key variables stated above.²⁶⁹ But a better approach to competence which has direct relevance to the analysis of the legal profession in

²⁶⁷ For details read Stebbings AM *et al*, “Implementing a Competency System in the Professions: From Theory to Practice”. Unpublished Paper presented to the Third International Conference on “Lawyers and Lawyering” held from 8-11 July 1993 at Windermere in England.

²⁶⁸ E.g. Neild S, “Some Lessons from Hong Kong on Assessment and Competence” and de Groot J, “Evaluating Lawyer Competence: An Approach to a First Stage in the Process” 1993 Windermere Conference. *Ibid*.

²⁶⁹ See our definition in para 1E of Chapter 1.

Swaziland would be to view it from two important perspectives, namely: (i) competence which involves setting standards to be achieved during training in preparation for competent professional practice; and (ii) competence in terms of management standards to be applied by those involved in the performance of an occupational role.

In the case of the former, (also referred to as “performance based training”) the main features focus on skills acquired at two different levels: (1) Skills involved in “learning to think like a lawyer” acquired usually during the academic phase of the training for the profession; and (2) Skills involved in “learning to act like a lawyer” acquired usually either concurrently with the academic phase (as is the case in the United States) or at some other stage prior to admission to the profession (as in the case in the United Kingdom and in the British Commonwealth). The emphasis here is placed on the form of performance setting which define the lawyering skills and professional values with which every lawyer should be familiar prior to assuming the full responsibilities of a member of the legal profession.²⁷⁰ Legal education in many jurisdictions is designed in such a way as to ensure a Legal Practice Course, which shifts from knowledge-based courses to skills and practice-based courses with the aim of providing a more effective bridge from theory to practice. Such education is designed to train the student to become reflective practitioners with a lawyering identity developed during university education that incorporates within its curriculum high standards of competence, ethics and social responsibility.²⁷¹

In the latter case, the concern is about setting management standards for those engaged in the actual practice of the profession. This is also known as functional competence, characterised by a set of given tasks for lawyers within which are integrated a statement of the required skills. The Law Society of England and Wales has, for example, come up with a list of skills within the problem-solving and decision-making processes most relevant to the management of practice.²⁷² Communication skills, client relationship skills, internal office practice skills, personal work management

²⁷⁰ American Bar Association Task Force on “Statement of Fundamental Lawyering Skills and Professional Values” publish in 1991 and analysed by Laser GS, “Educating for Professional Competence in the Twenty First Century: Educational Reform at Chicago-Kent College of Law” 1993 Chicago-Kent Law Review, Chicago, USA, p. 250.

²⁷¹ Ibid. p.254.

²⁷² Stebbings AM et al, “Implementing a Competency System in the Profession: From Theory to Practice” Op. Cit.

skills and others form part of the list of those skills. The American Bar Association, on the other hand, identifies the following ten fundamental skills compiled from the views of practicing lawyers, judges, traditional and clinical law professors:²⁷³

1. **Problem Solving:** The term 'problem' include(s) the entire range of situations in which a lawyer's assistance is sought... This skill encompasses identifying and diagnosing a problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan and keeping the planning process upon to new information and ideas.
2. **Legal Analysis and Reasoning:** This skill encompasses identifying legal issues, formulating legal theories, elaborating and enhancing the theories, and evaluating and criticising the theories.
3. **Legal Research:** This skill encompasses a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design.
4. **Factual Investigation:** This skill encompasses determining whether factual investigation is needed, planning an investigation, implementing an investigative strategy, organising information in an accessible form, deciding whether to conclude the investigation, and evaluating the information that has been gathered.
5. **Communication:** This skill encompasses both written and oral forms of communication - in a wide variety of ways and in a wide range of contexts.
6. **Counselling:** This skill encompasses establishing a proper counselling relationship with a client, gathering information relevant to the decision to be made by the client, analysing the decision to be made by the client, counselling the client about the decision, and implementing the client's decision.
7. **Negotiation:** This skill encompasses preparing for a negotiation, conducting a negotiation, counselling a client about the terms obtained from the other side in a negotiation, and implementing the client's decision.
8. **Litigation and Alternative Dispute-Resolution Procedures:** This skill encompasses a working knowledge of the fundamentals of trial-court litigation,

appellate litigation, advocacy in administrative and executive forums, and alternative dispute resolution.

9. **Organisation and Management of Legal Work:** This skill encompasses efficient management, including appropriate allocation of time, effort and resources; timely performance and completion of work; co-operation among co-workers; and orderly administration of the office.
10. **Recognising and Resolving Ethical Dilemmas.**

In the context of our discussion which focuses on the issue of competence - whether a critical factor in rendering professional service - our contention is that both aspects of competence as discussed above are not only important but are indeed very critical especially to lawyers in developing countries. We are strengthened in this view by scholars who have argued that for lawyers who are going to do legal work in the public or private sector, an essential part of their training involves the development of practical skills necessary to do their work. For the wide range of tasks which lawyers in developing countries like Botswana, Lesotho and Swaziland will be called upon to perform, will require a corresponding wide range of skills.²⁷⁴ The question, however, is: to what extent is competence a critical factor to the legal profession in its endeavour to provide legal services aimed at meeting legal needs of countries in development? A related question is: what then are those core skills, if any, which are needed by lawyers for development?

7.E.2 Addressing the Challenge of Competence

Despite the different approaches to the concept and content of legal competence for professional service, lawyers in the developing countries will have to face singly and collectively the following challenges: Firstly, the demands and new complexities of development have put on all law-trained persons, an increasing pressure on competence assurance processes not only during preparation for practice but also in the management of the entire legal practice so that the identified needs of society, i.e. the clients of the present and future, are met. The paradox of growth in numbers and

²⁷⁴ Professors Paul JCN and Twining WL, "Legal Education and Training at UBLS" 1971 p. 23 available with the National University of Lesotho.

functions of the legal profession and the insufficiency for legal services in Swaziland call for a serious examination of competency issues as a critical factor in solving the problem of failure to meet the needs of society.

Secondly, in addition to legal knowledge lawyers need knowledge of all the fundamental skills and values that competent, ethical and socially responsible practitioners use in the practice of law. An educational system which ensures acquisition of those aspects of competence needs to be in place to ensure a competence-driven curriculum provides the type of lawyers needed by a society in transition like Swaziland.

Thirdly, there is a need to identify and define core competence not only at the level of performance-based training, i.e. at the level of legal education but also at the level of functional management of professional practice. This, as earlier observed, is a critical factor especially for lawyers in development.

Fourthly, the issue of legal competence deserves greater analysis than has hitherto been addressed. Given the shortcomings in the delivery of legal services that was discussed above and taking into account the requirement to meet the legal needs of a changing society as is the case in Swaziland, it becomes a necessity to engage in serious research in legal competence. The challenge for such research is further necessitated by the public and professional demands for increased accountability of lawyers.

Since our basic concerns relate to issues of competence in terms of skills-development in legal education, we shall attempt to identify and define the issues in that regard in the next chapter. The focus will be to establish and analyse the core skills in a performance-driven system of legal education in the context of the system of legal education in Swaziland.

CHAPTER 8

IS THERE A COMPETENCE (SKILLS)-DRIVEN SYSTEM OF LEGAL EDUCATION IN SWAZILAND?

Before one can establish whether or not legal education in Swaziland is competence/performance(skills)-driven as defined in the previous chapter, it is first of all necessary to understand the system that was and is still maintaining in the country. Thereafter, one would then be in a position to assess it and measure exactly in what respects it has failed, if at all. To achieve that objective, the discussion in this chapter will focus on:

1. The past experiences.
2. Current procedures.
3. Available empirical evidence.
4. Overview analysis with a search for a holistic competence/skills-driven system of legal education for Development Lawyers.

8.A PAST EXPERIENCES IN SWAZILAND

8.A.1 General Trends in the 1970s And 1980s

Immediately after independence, i.e. from the late 1960s until the early 1970s, an attempt was made to evaluate the legal needs of society in terms of assessing the manpower requirements of lawyers to meet those needs. Notwithstanding the difficulty of such an exercise, it was established that the legal needs of society would be met by producing law-trained persons of three different categories, i.e. at degree level; degree level for non-lawyers; and at sub-degree levels. The argument then was that legal education and the general practice of law were to be directed and adapted for social development during the "development decade". Not only commissions were appointed to design legal education to suit those objectives but even legal education programmes were structured to produce the "development lawyer" for the period. The works of Professors Gower LCB, Paul JCN and Twining WL in that regard have already been referred to especially in Chapter 4 of this thesis.

Despite all these efforts, the period following independence witnessed a rather slow growth of local law graduates. As already observed, senior offices in the Ministry of Justice, and the judiciary, and most of those in private practice were occupied by expatriates with qualifications and practice unsuitable for local environment.²⁷⁵ The Swaziland Post Independence Development Plan which emphasised the need for land reforms, irrigation, increased agricultural productivity, development of credit and marketing institutions and other aspects of social development called for increased manpower requirements at all levels. There was a shortage of man-power, especially of local nature, suitable for solving local problems. The field of law was no exception, but it did not occupy any high position on the agenda for post independence development strategies.

Due to the shortage of lawyers to meet social needs, non-lawyers were, therefore, called upon to provide the much needed legal services especially at the grassroots. The need for this calibre of law-trained persons, coupled with the need to provide a law content in the B.A. (Admin), B. Comm and greater reliance on traditional systems of legal services, strengthens our view that the legal needs of society were not being met by the lawyers of the post-independent Swaziland.

8.A.2 Implications of Unmet Needs of the Past

In the 1980s, most independent African countries after 15 to 20 years of experience, began to witness a new wave of change in development strategies. The fact that the change was getting even greater was re-affirmed by President Kaunda, as he then was, who described the period in relation to the role of law and lawyers to development in the following words:

"We live in a changing world and one in which the pace of change is becoming even greater. Neither the character nor the need for any given society can remain static, and if the law is to fulfil its proper function, it must keep pace with the changes. This is not to say the law must be a straw in the wind; if it is to be an effective instrument of social order, it must be a stabilising influence, but it must be flexible

²⁷⁵ The Paul/Twining Report in Appendix B, p. 45.

and it must be progressive, else it will hinder society in its progress and development."²⁷⁶

The importance of this statement is not limited to recognising the pace of change in society but in realising the role that lawyers must play: ensure stability, justice and order, and at the same time to be flexible and progressive, thus keeping pace with the changes in society.

In the context of meeting the legal needs of society involved in that process of change, the lawyers in Swaziland were not quite successful during the period following independence as just discussed. One area where that success was found lacking may be attributed to legal education which was intended to prepare and facilitate the role of the lawyers so as to keep pace with the changes in society. It did not.

Governments set numerical manpower targets which had to serve as indicators for the requisite manpower to be trained by the year 1980.

The relevant statistics are as follows:²⁷⁷

1. Each country had, by 1980, had to have 1 000 students in higher education institutions per 100 000 inhabitants.
2. Each country, by 1980, had to have 1 000-2 000 scientists and engineers per 1 million inhabitants, 10% of whom should be engaged in research and development.

However, according to the UNESCO figures, very few African countries (in fact only Egypt) had achieved these targets in 1987 although steady progress had been made elsewhere since. In the case of Swaziland, in 1983 there were 287 students in higher education institutions per 100 000 inhabitants and it was nowhere near the targets with respect to engineers, scientists and other professionals. The point to note is the failure on the part of newly independent African states to meet the production of the required manpower necessary for the challenges of development following the achievement of their well-earned independence. As we have seen, Swaziland was no exception. This

²⁷⁶ Ojwang JB and Salter DR, in: "Legal Education in Kenya" (1989) 22 Journal of African Law p.78.
²⁷⁷ For details read the Welcome Address by Makhubu Professor LP, the Vice-Chancellor of the University of Swaziland in the Proceedings of the National Seminar on Tertiary Education in Swaziland February 1990, University of Swaziland.

failure to produce sufficient manpower was indeed one of the main weaknesses of the general system of education, including legal education of the period.

Our contention remains that an important aspect of the weakness to the system of legal education then lay in its failure to provide relevant legal knowledge and develop the appropriate skills in all those preparing to provide legal services. We note the point that no system of training can be expected to produce a fully fledged competent lawyer and that the problem of developing profession skills is complex because of the variety of roles the "development lawyer" had to play.²⁷⁸ There was, nevertheless, no justification during the 1960s and 1970s for failing to conform with the recommendation of the Gower Report which clearly emphasised not only the importance of such training but even detailed the nature and method of imparting such skills.²⁷⁹

8.B CURRENT PROCEDURES OF EDUCATION AND ACCREDITATION

After "The Edinburgh Link" was severed as discussed in Chapter 4, and when the bilateral arrangement establishing the University of Botswana and Swaziland as two constituent colleges also broke up in 1982, the Department of Law of the new University of Swaziland continued administering both the B.A. (Law) and the LL.B. programmes. The B.A. (Law) degree is awarded upon successful completion of four years of study of Law with subsequent two years of study which qualifies a successful candidate for the award of LL.B. degree. Initially the intake for all programmes was small but the number of law graduates continued to increase year after year as illustrated by Table X.

During 1992/93 there were 41 students pursuing the LL.B. programme and 164 in the B.A. (Law) programme, giving a total of 205 students. The breakdown per year including the current position is given in the Table below. The figures were obtained from registration of students in the Department of Law.

²⁷⁸ Arguments pursued in the Paul/Twining Report of 1971 Op. Cit. at p.23.
²⁷⁹ Ibid. See p.17.

TABLE XVI**CURRENT ENROLMENT OF STUDENTS IN THE LAW PROGRAMME**

1992/93 Academic Year	Year 1 BA (Law)	Year 2 BA (Law)	Year 3 BA (Law)	Year 4 BA (Law)	Year 5 LL.B.I	Year 6 LL.B.II	Total
No. of Students	41	45	41	37	29	12	205
1996/97	90	50	55	40	17	20	272

Total No. of BA (Law) Students: 399

Total No. of LL.B Students: 78

8.B.1 Qualifications for and Enrolment to Study Law

Unlike many countries where governments strictly control and dictate the enrolment of students for University education in accordance with manpower development projection, the investigation on Swaziland shows that at UNISWA it is the university's capacity which determines the enrolment. The average intake per year is approximately 40 for the first year of the B.A. (Law) programme and 15 for the first year of the LL.B programme. The University of Swaziland General Regulations prescribe minimum requirements for entry into the University for any course, and in addition, further requirements are imposed for professional courses, depending on their unique technical aspects.²⁸⁰

For purposes of enrolment at the University, the minimum admission requirements are six passes in the G.C.E. "O" Level obtained in not more than two sittings. These must include passes at "C" grade, or better, in English language and five other relevant subjects. Unlike the science-based courses for which credit in mathematics is a pre-requisite, admission to the law programme does not require any

²⁸⁰ See the Dissertation of Magagula ZW, on Legal Education and Practice in Swaziland Op. Cit. p.26.

particular subjects to have been studied at high school level. What, in practice, has ensured high standards for entrants into the law course has been the requirements for exceptionally high grades that an applicant must obtain especially in English Language.

Although the present system of pre-university education has operated as a workable criterion for admission, its rationality as to perfection is questionable. Given the wide range of approved subjects at high school level, it is possible to have a number of law students who, in their high school stage, take an odd combination of subjects, including Mathematics. This apparently provides limited assistance to a budding lawyer especially in the development of lawyering skills. One could, for instance, take English Language, Physical Science, Geography, Human and Social Biology, Siswati and Agriculture and still be admitted to study law. The subjects do not in any way assist the lawyer-to-be in developing his lawyering skills as they may appear to have no direct relevance to the study of law.²⁸¹

Our research from the records in the office of the Assistant Registrar (Academic) has also revealed that every year over 300 applications are received for consideration by the Admissions Committee chaired by the Vice-Chancellor. Applications from foreign students, too, feature prominently, and they add to the stiff competition for the limited number. This, to us, reflects the fact that the study of law, and perhaps the desire to join the legal profession, is a popular ambition, considering the relatively small population of Swaziland.

8.B.2 The Law Programme

An in-depth discussion on the origin of the law programmes in the BOLESWA countries appears in Chapter 4 of this thesis. The studies in each partner-state show that except for Botswana, there has been little change from the programmes introduced during the 1970s. In the case of Swaziland, and as shown in ANNEXURE 1 the programme which has remained the same is made up of law courses and a number of ancillary courses in English, Politics, Public Administration and Sociology. The inclusion of non-law courses was a reflection of the policy then sweeping across Africa

²⁸¹ Ibid.

that broadly trained lawyers could be used in a variety of crucial developmental sectors of society because in newly independent African countries lawyers had to perform tasks that were not commonly associated with the traditional roles of lawyers in Western industrialised societies.²⁸² The success in that regard has remained questionable.

Admission qualification for the LL.B. programme is dependent on a student's performance in the B.A. programme. Students who pass the B.A. programme with a second class, lower division, or higher (average mark of 60% and above) are entitled to proceed right away to the LL. B. programme. Students who obtain a pass in the B.A. (Law) degree are admitted into the LL.B. programme after working for a minimum of two years in a law-related field. The LL.B. programme itself comprises of the following law courses: Year 1 - Public International Law, Company Law and Partnerships, Conflicts of Laws, Jurisprudence and Accounting for Lawyers: Year 2 Legal Ethics, Trial Practice, Conveyancing and notarial practice, Administration of Estates, Legal Research, a Dissertation and one course chosen from the following: Human Rights, Criminology, Insurance, and Labour Law. Practical training courses are offered only for the LL.B.II students. Efforts to introduce a new five-year LL.B. which emphasises practical training have so far failed mainly due to lack of competent and sufficient staff.

8.B.3 Staffing

The department enjoyed a rather satisfactory staffing in 1989 but since then there has been a decline in positions as illustrated by Table XVII below:

²⁸² The Paul/Twining Report of 1971 Op. Cit. pp. 6 - 8.

TABLE XVII
DEVELOPMENTS IN THE STAFFING POSITION SINCE 1989

	1989	1992	1996
Professors	1 - (expatriate)*	0	2 (expatriates)
Associate Professors	3 - (expatriates)	1 - (expatriate)	0
Senior Lecturer	1 - (expatriate)	2 - (expatriates)	1 (expatriate)
Lecturers	4	6	4
Teaching Assistants	5	1 (Study Leave)	0
Part-time Lecturers	2	3	3
Total	16	13	10

* Visiting Fullbright Professor from a Law School in the USA.

Source: Personal Research in the Department of Law.

This staff is drawn from different nationalities, although currently only 4 (full-time) out of 10 are non-citizens and of the total of 10, only one holds a Ph.D. degree. The rest have Master of Laws degrees. There exists a staff development programme for training locals to take over from the expatriates. The current number of local staff, though small, is evidence of the success of that programme. In terms of practical training, the current full-time staff lack the necessary experience as none were involved in active practice. The majority are even very young in the profession.

8.B.4 Aspects of Competence/Skills-Based Legal Education

While considering the type of law programme that would be suitable for the UBLS, the Gower 1964 Report paid great attention to the provision of practical training for lawyers pursuing the LL.B. degree of that University. In the Report, reference was made to the fact that holding the University's LL.B. did not in itself qualify one for admission to practice; that those intended for administrative posts in government might need no more training and rest content with the LL.B; but that those intending to

practice should be required to take a further course of essentially practical training for a further term.

"This training would be in subjects such as conveyancing and legal drafting, lawyers' accounts, professional ethics, advocacy, office management, and local statute law. So far as possible training would be by practical exercises - doing rather than being told. Visits would be paid to the courts and to lawyers' office".²⁸³

The above recommendation for practical training was implemented as fully reflected in the 5th year (or LL.B.I) of the Law curriculum of the then University, (UBBS). The later report of Paul and Twining, in 1971, did not make any substantial recommendation for change, so that the law curriculum of UBLIS also largely reflected similar programmes for practical training. The same pattern remains unchanged in the present UNISWA law curriculum, the practical training aspect of which can be broadly divided into the following:

8.B.4 (a) Procedural/Adjectival Aspect

The programmes under this aspect consist of those courses which provide for the application of substantive law. They deal with those laws which regulate the procedure by which, for example, offenders are brought to punishment. The courses involved with this type of practical training are the Law of Evidence, Criminal and Civil Procedure, and Administration of Estates. Whereas Evidence and Criminal Procedures are taught in the fourth year of the B.A. (Law) course, Administration of Estates is a course for the second year of the LL.B. course.

8.B.4 (b) Specific Skills Development Aspects

The aim of the course under this aspect of the training is to create the necessary forum to acquire and develop certain skills, by providing a number of practical situations. For example, moot courts and trial practice courses are intended to develop the skills of dispute resolution, while conveyancing and notarial practice courses develop drafting skills. The course in Legal Research is meant to develop scholarly

²⁸³ The Gower report of 1964 p. 17.

skills. In the UNISWA curriculum all these courses are taken in the second year of the LL.B., except for Moot Courts which does not appear among the list of courses, although participation is compulsory and marks obtained count for examination of students in the fourth year of the B.A. (Law).

8.B.4 (c) Professional Responsibility Aspects

The course which involves this aspect is meant to instil in and impart to the students the ethics of the profession. The course under which this training falls is known as Legal Ethics and is offered to the second year LL.B. students.

8.C BRIDGING THE ACADEMIC/PRACTICE DIVIDE

One question which has taken the minds of many legal educators has always been: should legal education remain essentially "academic" and therefore largely theoretical or should its thrust be toward preparing the student for his day-to-day professional life?²⁸⁴ A number of side issues have emerged from this same question. From the professional point of view, the question posed with all seriousness is: what formal training should be provided to assist young lawyers to cross the gap between classroom academic instruction and the actual practice of law? Should there be a mandatory period of apprenticeship between graduation from the University and admission to the Bar? If so where, when and for how long? If not so, what other type of alternative training should be provided? What should be the content of such training and who should provide it and where?

In the United States of America these questions were, some half a century ago, answered by introducing what became known as Clinical Legal Education: the need for which was said to have been "a pressing one for American legal education."²⁸⁵ Soon, this "pressing problem" became the concern of legal educators not only in the United

²⁸⁴ For details read, amongst others, Dustile FFN, who discusses these same issues in the "Introduction" to the book he edited entitled: Legal Education and Lawyer Competency - Curriculum for Change (1981) University of Notre Dame Press.

²⁸⁵ Kitch Professor EW, in: Clinical Education and Law School of the Future Conference Series No. 20 of 1969 published by University of Chicago (1969).

States of America but it spread to Canada, Australia and new Zealand.²⁸⁶ In third-world countries, too, the questions soon became topical issues. Countries like Ghana, Uganda, Nigeria, Zambia, (to mention just a few) are cases in point where concern was expressed in a variety of ways. In Uganda, for example, in 1968 a committee was appointed to study and make recommendations concerning legal education. That committee is commonly referred to as "The Gower Committee" and its report, "The Gower Report" because of Professor Gower who was its Chairman.²⁸⁷ The Committee addressed itself squarely to the question of clinical education which they described as "one obviously needed in Uganda because of the complaint that institutions of legal education offered education that was theoretical, academic and far from being practical for the purpose of legal practice in Uganda".²⁸⁸

In the case of Southern Africa, different views and practices have emerged which have made a discussion on the subject a topical one too. Of particular interest has been the debate concerning the apprenticeship system which in Swaziland is referred to as "serving articles of clerkship". The essence of this type of training is that during the period of the apprenticeship the clerk, who is articulated to the attorney, is expected to receive practical training and experience on the job in preparation for becoming a competent member of the legal profession.

Under Section 5 of the Legal Practitioner (Amendment) Act of 1988,--it is provided inter alia that a lawyer wishing to practice law in Swaziland "shall be admitted and enrolled if he holds a Bachelor of Laws degree and has served a period of articles and after such service passes examination prescribed under this Act".²⁸⁹ What this means is that after the attainment of the law degree the aspiring lawyer must serve a period of apprenticeship with a practicing attorney of at least three years standing on his own and as a partner in a firm of attorneys. The minimum period of articles differ

²⁸⁶ These countries are specifically singled out because they administer one of the oldest and most developed systems of clinical education so far.

²⁸⁷ Details about the Committee and its Report can be found in Sessional Paper No. 3 of 1969 entitled: Government Memorandum on the Report of a Committee Appointed to Study and Make Recommendations concerning Legal Education. Op. Cit.

²⁸⁸ Ibid at paragraphs 64 - 66 of the Report.

²⁸⁹ See Section 5(a) and (c) of Act No. 13 of 1988. The Law Degree referred to in the Act must be awarded by the former University of Botswana, Lesotho and Swaziland; or the former University of Botswana and Swaziland; or any University in Botswana, Lesotho, Swaziland, Zimbabwe, South Africa and Namibia - all these are Universities in the Roman-Dutch Law jurisdiction.

according to whether he has the Bachelor of Laws (LL.B.) or the B.A. (Law). If he is a holder of the LL.B., the maximum period of clerkship is one year and if he is a holder of the B.A. (Law) the minimum period is three years. The period of clerkship is essentially a continuation of legal education, at least that seems to be the case in Swaziland. The apprentice is, for the first time, exposed to the practical aspects of what he has hitherto only had in theory. In a way this period of apprenticeship serves to remedy the lack of practical skills-training at the law school. With the present structure of legal education, the clerk, for the first time, gets the opportunity to interview a client, prepare documents to be used in a real court situation and appear before a magistrate to represent a client in minor cases, e.g. bail applications.

Too often the period of clerkship is seen more as a continuation of legal education than an introduction to legal practice, though during this time the articled clerk has the right of audience in the Magistrates Court and may appear before any Board and Tribunal. The practice with most legal firms in Swaziland is that clerks only represent clients in minor cases such as bail applications, minor traffic offences and in the drafting of legal documents which, however, have to be approved by the principal first. This, according to a leading lawyer in Mbabane whose practice is probably the oldest in the country, is to give the young attorney-to-be a feel of private practice in cases where the consequences of error will not result in serious prejudice to the client. As the clerk's self-confidence grows, he is then allowed to handle real cases. When the clerk has completed his mandatory period of clerkship, he is then free to sit the bar examination prepared by the Council of Law Society in accordance with the Act. If he is successful then he may petition the High Court to be admitted and enrolled to practice law as an attorney in Swaziland. The Court seldom refuses this petition and the name of the petitioner is included in the role of attorneys who may appear before the High Court and Court of Appeal.²⁹⁰ The critical issue concerning the service of articles after the LL.B. or B.A. (Law) courses is the argument that it is the vehicle through which the acquisition of the needed professional skills can be achieved. However, during our interviews with the present articled clerks it was reported to us that in some chambers it is possible to acquire practical skills. In others it may not be so

²⁹⁰ For details read the Dissertation by Magagula ZW Op. Cit. especially pp. 42 - 43.

depending, as seen above, on the size of the firm and the nature of work and supervision received.

In a search for a system of legal education that would provide competence-based education for lawyers in Swaziland we have gathered available information in the different practice settings from which to draw conclusions for future action. The subsequent paragraphs set out not only our methods of collecting that information, but our analysis and proposals for improvement in terms of introducing a system of education used both to judge performance on a skills based legal practice course and to design a curriculum to achieve it.

8.D AVAILABLE EMPIRICAL EVIDENCE

The concern for quality education for lawyers in Swaziland generated some debate about the development of a new programme as reflected in the proposal for restructuring and strengthening introduced early in the 1990s by the Law Department of the University, reference to which was made in Chapter 1 of this thesis.²⁹¹ Our research and that sponsored by the Department may reveal different perspectives but the key findings reflect some agreement on the need for a system of legal education that is expected to provide graduates with the knowledge, skills and professional values required to enable them to serve the society with competence (as already defined). Aspects of the key findings are set out below.²⁹²

8.D.1 Monitoring by Research - Key Findings

(a) There is ambiguity in the relationship between the B.A.(Law) and the LL.B. degrees in so far as the job market is concerned. By restructuring the LL.B. degree programme and abolishing the B.A.(Law) degree the University would produce graduates with enhanced knowledge and with much better chance of access to the legal practice. (Regrettably the proposed restructuring has never been implemented).

²⁹¹ See paragraph 1A.

²⁹² For the views of the Law Department regarding its key findings, read: "Proposed Restructured Programmes in Law" Op. Cit. pp. 5-6.

- (b) To make legal education more relevant to development, more attention should be given to sharpening lawyering skills. However, there is general uncertainty as to what constitutes “development lawyer skills”.
- (c) The present law degree curriculum contains a large component of compulsory non-legal and even legal courses which are of very marginal relevance to a graduate who ends up in practice within a fast changing society with diverse legal needs.
- (d) The current legal education and training gives too little attention or emphasis on the acquisition of practical skills, thereby putting to question the competence of the graduates in the performance of their occupational role. Again restructuring of courses has failed.
- (e) Although debates in contemporary legal education offer little by way of assistance to skills-based training in the context of Swaziland, an inevitable challenge exists to define the levels of performance and to produce a set of skills “guides” to be included in the law curriculum.
- (f) Facilities for specialisation are lacking since higher degree courses at Masters and Doctoral levels and continuing legal education programmes are not provided for in the country.
- (g) Disjunctive nature of law studies on the one hand and their insufficient provision of practice-oriented skills-development programmes on the other, put the preparation for the practice of law to serious question.
- (h) The policy on entry to study law, in terms of the nature and content of the qualification required for entry to legal studies, needs reviewing to ensure quality students join the Department of Law.

8.D.2 Research Methodology

In paragraph 1.D.2 of Chapter 1 to this thesis, an elaborate analysis of the profile of the respondents to our questionnaire was discussed. However, for purposes of the present discussion we shall limit our source of information to the responses received in the Questionnaire, a copy of which is available as ANNEXURE X. This is because the oral interviews conducted provided equally uncoordinated and unclear

answers as those found in the responses to the questionnaire, suggesting to us the limited degree of knowledge about competence in terms of performance/skills-based training. Also confirmed is the view that it is not easy to evaluate legal competence, although we have gone ahead to design questions. The answers to which were meant to assist us to make an assessment on lawyering skills which should be taken into account when designing performance/skills-based training for competent practice of law.

The relevant parts of the questionnaire in ANNEXURE X are parts IV and V dealing with “Application of Professional Skills” and “Development of Skills” respectively. We have set out herebelow the responses as received from the lawyers in the Ministry of Justice, the judiciary and in private practice, a total of 31 lawyers, all of whom appear to have different views on whatever question was asked.

8.D.3 Main Findings

Part IV of Questionnaire (Annexure XI)

Question 1: What do you understand by the term “skills”?

Answers:

- It is the ability to seek and find. Identify a problem and find a solution by use of established procedure, authoritative resources and methodical reasoning at a given time.
- It is skills and knowledge.
- Proficiency in drawing pleadings/agreements and other documents. Proficiency in presenting a case in court.
- Ability to handle a client.
- Knowledge of the profession or job substance and practical knowledge ability to identify nature of a particular problem.
- Ability to administer an office.
- Attainment of abilities and competence in technical requirements of legal profession.
- It is a manner of performing certain tasks.
- Expertise in doing a particular thing.
- Technical know-how.
- Refers to tools with which a profession must be equipped in the legal profession.

- Abilities gained by training and experience.
- Specially acquired ability to perform a particular duty whether academic or artistic.
- Ability and aptitude to do anything diligently and expertly.
- Learned ability.
- Understanding the ability and knowledge enshrined in legal personnel to able perform their day-to-day professional responsibilities to clients, fellow professionals and to the courts.
- Practical knowledge.

Question 2: What skills are required by lawyers in their day-to-day duties?

Answers:

- Sound knowledge of the basic principles of law.
- Intelligence.
- Knowledge where to find support for the principle.
- Initiative.
- Integrity.
- Diligence.
- Reliability.
- Proficiency/ability on legal issues.
- Ability to communicate/analyse and assess material and make appropriate conclusions including sound arguments, master techniques, make sound and ethical judgements.
- Accounting and research skills.
- Analytical drafting, sources of law.
- Skill of talking is very crucial.
- Communication/listening/recording and research.
- A lawyer needs to understand the function of the law and should be able to apply it.
- Ability to advise clients on the law and effects thereof (often by reference to texts or statutes).
- Ability to diarise as procedurally, time is important for the filing of papers at court.
- Trial skills.

Question 3: What skills do you apply?

Answers:

- Knowledge/common sense.
- All.
- Proficiency and ability on the legal matters/issues.

- Ability to communicate ideas and technical information, assess and develop legal skills, organise and conduct research, participate in decision making.
- Research skills/drafting.
- Analytical and clarity expression.
- Self experience.
- Interviewing, drafting presenting arguments, interpreting legislation and rules.
- Ability to reason combined with knowledge gained after carefully assessing the issue at hand.
- Reference to texts or statutes and precedents, listening to clients in consultation, understanding and identifying the problem.
- Professional legal skills.
- Understanding of the law and communication skills.
- Ability to analyse facts and determine where the truth lies.

Question 4: Describe circumstances when you apply these skills

Answers:

- Continuously.
- Daily.
- When dealing with clients/cases brought to you.
- During teaching and counselling of students; academic and administrative meetings; writing research papers; editing of scholarly work and legal consultancies.
- When drafting a charge sheet.
- In teaching.
- In lecturing research and writing.
- Day-to-day prosecution of cases.
- Where and when government has been sued we interview a person from the Ministry to be able to draft a plea or affidavit, read, analyse and determine the law and argue the matter.
- In consultation with clients settling disputes in court, drafting pleadings, conducting litigation.
- Interviewing, drafting and oral presentations.
- All cases tried and the reviewing of law reports.
- Identity problem, see if I can solve it or not, if not, consult books.
- In consulting and litigation.
- Taking of instructions, drafting of readings, preparation for trials, consultations with clients.

- When with clients and when in court and other tribunals.
- These skills apply in a court room scenario where you have a knowledge of the law and also be a good communicator in our advisory system of justice where some times you have to take the role of a mediator.
- When arriving at a decision in a court case.
- Drafting is a daily occurrence, i.e. summons, wills, affidavits, etc., research or points of law while preparing for trials.
- Negotiating settlements of cases.

Question 5: Advantages of applying these skills?

Answers:

- Clients' instructions are better performed.
- One has no choice but to apply these skills; the question of advantages and disadvantages is of no consequences.
- It is easy to apply them.
- Skills leads to efficiency, saves time, most important - if you apply your skills you are most likely to keep your clients and gain more.
- Skills merge the theory part of training and practical aspect.
- Equitable application of justice.
- Makes the difference between winning and losing cases.
- Enables practitioners to prepare sound arguments.
- Puts together documents properly - wills, trusts.
- They are essential.
- Job satisfaction.
- Ability to manoeuvre during litigation.
- Confidence when addressing the court.
- Easy to identify the real issues and possible solutions.
- Provide a speedy, efficient and satisfactory manner of handling professional work.
- Necessary for functioning as a lawyer.
- Mere knowledge is not enough in legal practice; technical skills are essential.
- Before I present case of law in court I know the verdict.
- It is easy to apply them.
- Provides guidelines, measures of certainty in application of law and knowledge thereof.

Question 6: Disadvantages?

Answers:

- None. Skills do not lead to disadvantages.
- Skills are maximised in the right kind of atmosphere in terms of student response, appropriate facilities and institutional support. These requirements are not always forthcoming in every aspect of one's work.
- They are not developed with society and they are not uniform and are applied depending on individual and his instructor.
- More by experience. Depends more on one's personality. character, discipline and desire to improve.
- Attorneys tend to become more technical than legal.
- Failure to detect flaw in method of reasoning.
- The disadvantages come when one has too much theory training with no practical legal training at varsity level.
- These are general towards common and coded law excluding customary/traditional law.
- Not all cases are the same, sometimes time is not sufficient.

Question 7: Do you have to be a lawyer to know and apply these skills?

Answers:

- Yes = 28
- No = 3

Question 8: Why?

Answers:

- Required in the practice of law.
- At times the skills are applied in technical situations.
- To acquire the basic knowledge.
- Essential in any sphere.
- The skills are general.
- Because only a trained/experienced lawyer can apply these properly and have mastery of law skills.
- Anyone with a trained mind and self-discipline can acquire and apply these.
- Only lawyers know the law.
- The skills can be acquired by anyone trained, not just lawyers.
- Because it is only lawyers who have legal training.
- These skills are learned, not inherited, thus one must be trained.

- The field of the law is a highly specialised field which takes years of hard training to acquire basic tenets of the law.
- Before the skills can be applied it first has to be ascertained what the nature of a problem is and from source/reference assistance will be provided. A lawyer will have the basic theoretical background to give proper advice.
- General, yes, but a lawyer needs them in order to be effective and efficient.

Question 9: Application of skills part of training?

Answers:

- Training to acquire skills to be applied later.
- Some/most of the training was academic.
- Not necessarily at varsity; only taught basic principles.
- Only knowledge of the law is emphasised and tested.
- Training was theory, although now practical skills are being taught.
- The application of the skills is part of any lawyer's training.
- To a limited degree, specific training was greatly lacking during my training.
- During lectures listen and note fast and relate and know where to get reference.
- Yes, as well as experience.
- Trained at varsity on the theory aspect of law.
- Not part of syllabus.
- Yes, in respect of references to texts and statutes when doing case studies. However, the application is on limited basis and not all situations are canvassed, nor can they ever be.

Question 10: Part of professional responsibility?

Answers:

- Failure or inability to apply your skills to the practice of your profession will make a very poor lawyer; we are expected to guide and advise the juniors.
- Skills should be applied to the best of one's ability and experience.
- I am not sure.
- Necessary for coping with development.
- Necessary to yield good results.
- Vague question.
- As a prosecutor should be able to match the case with the defence that may be raised.
- I have read constantly and widely in law and also do the practical aspect.

- Yes, any attorney who takes a clerk has the responsibility of providing training that will bring about skills as best as possible.
- Reference to the tests and in particular to statutes which is necessary where the rights and duties of persons are involved.

Part V of the Questionnaire (Annexure XI) on Development of Skills

Question 1: At what educational stage should the study of law begin?

Answers:

- Educational stage. (?)
- High school = 10
- Undergraduate = 12
- Post graduate = 5
- Other = 4

Question 2: What qualification should such a person possess?

Answers:

- Good grades = 4
- Reasonable academic standards = 2
- Sound knowledge of English, good knowledge = 3
- At least a bachelors degree = 8
- One year of University study and competitive entry exam into study of law = 1
- Junior certificate = 2
- None = 1
- O Level = 8
- LL.B = 2

Question 3: Broad content?

Answer:

- To impart a sound knowledge of the basic principles applicable.
- Give solid grounding in drawing pleadings.
- A working knowledge of bookkeeping, i.e. trust accounts.
- An understanding of the ethics and integrity of the profession.
- Theoretical law and practical skills.
- Exposure to selected non-legal fields also desirable.
- Should depend on field of specialisation.

- Depends on policy decisions reached between teaching institutions and legal profession on role of lawyers.
- Principles, analysis and the overall idea of a legal system.
- Both (i.e. content of instruction should be both academic and practical).
- All legal aspects without specialisation.
- Students at law school should be taught every aspect of law.
- Make special emphasis on good written and spoken English for debates, interactions with members of public should also be encouraged.
- General training in law research methods and skills.
- Both theory and practical.
- History of the common and statute law and basic principles and accounting.
- Functions of the law in society, ethics and functions of lawyers in society.
- Exposure and limited knowledge of court procedure and observed practice.
- Most of what is in the first year introduction to law.
- LL.B course should also include practical courses such as communication skills, business principles and advocacy.
- Less social sciences, although this is a necessity; not all courses, e.g. law of delict should be over a 9 month period, but possibly over an 18 month period of study due to the volume of principles to be acquainted with and complexity of the subject.
- Varsity to provide a solid academic background in practical skills can be imparted. It is the duty of the profession to ensure that practical skills to match the challenge are imparted.

Question 4: List of the law subjects studied at University

Answers:

- Commercial law. Law of contract. Law of evidence.
- Roman Dutch law. Latin. Law of persons. Law of property.
- Company Law. Delict. Procedure. Conflict of laws. Constitutional law. English. Afrikaans. German. History. Human rights. Law and development. Labour-law. Armed conflict and use of force of law. Torts. Treaties. Family law. Political science. Sociology. Conveyancing. Economics. Administration of Estates.
- Mathematics. Statistics.

Question 5: Practical courses studied?

Answers:

- Conveyancing. Contract. Criminal. Natural law. Jurisprudence. Bookkeeping and drawing. Moot courts. Administration of Estates. Trial practice. Legal counselling.

Legislative drafting. Criminal Procedure. International Law: Public/Private. Constitutional. Mercantile.

Question 6: At which University?

Answers:

- Wits.
- Unisa.
- Rhodes.
- Cambridge.
- Zambia.
- West Indies.
- Columbia.
- London/Oxford.
- Warwick.
- Scotland.
- Edinburgh.

Question 7: Different institutions to supervise academic and practical courses

Answers:

- Yes = 10
- No = 8
- Do not know = 3

Question 8: What should be nature of training in practical skills?

Answers:

- Practical exposure to training profession from office level to the court or other end.
- Training should be as much as practicable near real field situation.
- Preferable students should also be taught by legal practitioners.
- Field work, i.e. students should spend a major part of their training in attorneys' offices and experience daily workings of such offices and should attend court hearings.
- Those being trained should be involved in interviewing clients, preparing court documents and should be given audience in court on selected matters.
- A legal aid centre should be established at varsity and run by legal experts.
- Both supervised by qualified and experienced personnel.
- Drawing of documents (agreements, wills, liquidation).

- Mock trials, legal practices, visit courts.
- How to cross-examine and lead a witness.
- As practical as possible.
- Practical law skills.
- Gives reflection of real practice to students.
- Drafting exercises and oral presentations.
- Practise that theory.
- Training should be geared to equip students with skills/attending court sessions and being attached to legal firms and government.
- Orientation of practice and instruction of students on relevant courses and exchange of ideas with other countries.
- Students should be exposed to the courts as much as possible.

Question 9: Who should bear responsibility?

Answers:

- University = 4
- Legal profession = 14
- Other (which) = 3 (both)

Question 10: What method?

Answers:

- Learning on the job.
- Student should be given practical examples of legal documents, i.e. drafting legal documents.
- Simulation of actual case situations and clinical situations of actual clients.
- There should be some kind of relation between varsity and legal practitioners.
- Precedents.
- Material used in practice should be made available.
- Synthesising real life law practice.
- Drafting legal documents and presentations in court.
- Fully fledged private/public practitioners in the legal profession should provide the necessary material.
- Legal clinic should be built at varsity and supervised by an attorney to cater for those who cannot afford lawyers.
- Tutorials and seminars.
- Real court situations.

- Use of precedents, provision of problem situations over a reasonable length of time, i.e. over 2-3 year period.

Question 11: Briefly describe nature and content of materials used during practical training

Answers:

- Mock trials.
- Rewrite articles.
- Experience/learning from others, precedents.
- We were thrown in at the deep end of the sea.
- Cases and other legal materials as recommended.
- None other than ordinary court processes or similar documents filed in court, on-the-job training.
- Moot courts only.
- I was only exposed to fictitious problems and could only undertake research in case law.
- At Wits there is supervised by advocate, aided by 2 attorneys. Fifth and sixth year law students work there interviewing clients. Attorney and advocate take cases to court.
- Tutorials and seminars.
- Use of precedents. Application to problem/trial questions in civil and criminal procedure.

Question 12: What skills did you acquire?

Answers:

- Very little owing to the fact that practical training was very sporadic.
- Communication skills and an understanding of the practical side of the law.
- Overall knowledge.
- Average drafting skills and some ability to distinguish between contractual and delictual issues.
- General.
- Drawing reasonable documents.
- Ability to communicate in technical terms.
- Analyse material and make reasonable conclusions.
- Legal skills.
- The skills of a legal practitioner.
- How one should approach a criminal delictual problem.

- Drafting.
- During consultation, to ask the right/appropriate/relevant questions, draw papers for court, present legal argument.
- Few.
- Research, communication and recording.
- None.
- Interviewed clients, took statements, gave legal advice and briefed the attorney on the case to go to court.

Question 13: Were you aware and satisfied?

Answers:

- Yes = 7
- No = 12
- No answers (12)

Why yes?

- One needs exposure and time which he does not have due to the load of cases.
- Some made sense and their need apparent, others were rather far-fetched and unreal from law and action.
- In life things seemed to be a bit different from the basics we were given at University.
- After the presentation you look forward to another chance to do even better.

Why no?

- I gained no experience.
- I was not channelled to the kind of legal practice I would have like to pursue.
- Not entirely - public service has limitations. Best training can occur under a qualified senior attorney.
- It is real life things. Seemed to be a bit different from the basics we were given at University.
- Training was not practically oriented.
- No training.
- There was absolutely no exposure to an understanding of court proceedings or etiquette.
- Moot courts were held on extremely isolated occasions with very few students getting the opportunity to participate, practicals were not taken seriously.

Question 14: Should there be a stage of probationary training before articles?

Answers:

- Yes = 7
- No = 4
- Unsure/not know = 20

Why yes?

- It is desirable.
- Allows for hands on experience and reinforcement of skills.
- Students at college are not taught practice, but theory.
- It would be helpful as long as it does not interfere with the duration of the course.
- To gain experience and apply theory in practice.

Why no?

- The kind of course structure I have in mind would be unnecessary.
- Period of articles is sufficient for that purpose.
- The varsity is not the place.
- There already is such a scheme - the serving of articles and attorney's examination.
- This would make admission to practice impossible for many to achieve if this is introduced in addition to present admission procedures, but if it is a replacement, maybe yes.
- There is a probationary period for officers working under government.
- It is sufficient that law graduates undergo a period of articleship before being admitted as attorneys.
- If a rigorous practical training could be designed and the Law Society given to handle the practical courses, the need for an additional probationary training could be dispensed with.
- The service of articles is sufficient probationary training. What is needed is even after admission to practice there should be further legal education (by way of seminars or short courses and current updates on the developments of law).
- The serving of notices should be maintained. Recently qualified students should serve articles. They learn what they would not learn in a classroom situation.

Question 15: Should there be continuous legal education for lawyers?

Answers:

- Yes = 9
- No = 3

- Not sure = 9

Why yes?

- This will ensure a better practice of the law and will also be of benefit to practitioners who have specialised in certain fields of the law.
- Not necessarily further education, but refresher courses or workshops to update these officers with current laws.
- They do not prepare for matters except the High Court, mainly on appeal cases. Thus magistrates rely on counsel and as such an uninformed counsel leads to injustice.
- We all have more to learn.
- To keep up with the changes in the law.
- The need is obvious; there are many new developments.
- The varsity cannot best impart relevant skills. There is need for a training institution.
- There are developments in the legal system and changes in other spheres of life. Lawyers and judges etc. must be systematically trained to adjust.
- After leaving school people tend to relax and rely on skills acquired at school. This results in complacency.
- To update new developments in law. It is not enough to expect lawyers to read on their own. Material for studying is not available.
- To keep up to date on legal developments, skills and technical and case law.
- Lawyers in whatever field should be able to upgrade their knowledge since law is not static. Constant reading and training is essential.
- Will ensure training at same level and standards to all trainees.

Why no?

- Experience at work is the best tool.
- Unnecessary.
- Nobody to give training.

Question 16: What should be the content?

Answers:

The content

- Latest developments in law theories and techniques.
- Basic introductory programme would enable field specialisation.
- Lectures on various topics which affect legal system.
- New developments in the legal world.
- There should be a limited extent of specialisation rather than generality.

- Changes in law, new legislation and case law changing the existing law and how these should be applied.
- Continued legal information or education.
- More practical work, drafting of pleadings and documents.
- Theoretical training.
- Case law, current amendments to statutes and current publications.
- Rules of court and their application, art of pleading, training, documents in general, negotiating legal arguments.

Method

- Practical training.
- Regular seminars - 3 months where papers are presented.
- Practical exercises intended to sharpen the skills and generate confidence in the lawyers/magistrates.
- Seminars, lectures and conferences, videos, hands-on computer training, group discussions. These could be organised by the varsity, Law Society and even the judiciary.
- The approach has to be as practical as possible, using factual situations, drawing actual documents, attendances to court.

Question 17: What should be the nature of a continuing relationship between University and the profession?

Answers:

- Varsity to consult with legal profession about courses being taught at varsity. This should be on a regular basis.
- Talks by professionals to students from time to time.
- Practitioners should be involved in teaching students.
- There should be a mutual relationship. Students should be given an opportunity to test their achievements in practice by joining legal firms.
- Minimum contact at the level of whether courses taught are broadly relevant to the legal profession.
- Varsity should organisation at a much higher level, to have professionals such as notaries, conveyancers, and advocates give open lectures.
- Both should take cognisance of the fact that the one cannot do without the other.
- Should be complementary and supportive of each other.
- There should be a constant exchange of information between the two.

- Law Society should involve itself more in training students (law) than it does at present.
- The two should develop together; one must anticipate the needs of the other without necessarily taking its place.

8.E OVERVIEW ANALYSIS - THE SEARCH FOR HOLISTIC COMPETENCE/ SKILLS-DRIVEN LEGAL EDUCATION FOR DEVELOPMENT

8.E.1 Analysis and Conclusions

The preceding paragraphs contain some valuable general information gathered from lawyers on legal education and training in Swaziland. The aim of the enquiry was to get responses to certain questions with a view to compiling a list of challenges and suggestions particularly in the area of competence/skills-based training for purposes of establishing the content of the skills and the methods of developing them in student performances so as to achieve the required competence.

At the level of entry to study law the responses received suggest no general consensus as to the basic qualification required for entry to study law. “Good grades”, “reasonable academic standards”, “sound knowledge of English” have been stated by respondents.²⁹³ In terms of skills and capacity to perform, the basic performance qualification required, though not stated by respondents, should be the ability to listen, observe, write and communicate effectively so as to participate in the law programmes at all levels of intellectual activities. The question is whether pupils with “O”-level qualifications are fully equipped with these skills has generated some concerns in the light of the fact that in other jurisdictions “A”-levels or even higher qualifications are required before entry to study law. In this respect a re-examination of entry qualifications to the University, and to the law programmes in particular, deserves immediate attention to ensure that those selected to study law are equipped with the essential initial skills, e.g. to speak effectively, organise information, respond in acceptable grammar and language. Lack of such skills would require their introduction in the curriculum for the first year of study.

²⁹³ See responses to question 1 of Part V in ANNEXURE X.

At the level of law degree programmes, Part V of the questionnaire poses several questions aimed at soliciting views on whether the law curriculum should be geared towards skills-based or general academic and liberal education, and if skills-based, the nature and content of such skills.²⁹⁴ In this respect the variety of the universities attended by the respondents is significant and, to a large extent, explains the variety of views expressed on virtually all issues related to the guiding objectives of the study of law.

In terms of which institution should be charged with the responsibility for training in skills, the majority view (12 out of 19) state that such a responsibility should vest with the profession rather than the University. The debate about this role is an on-going one. The trend in other jurisdictions, especially in Canada, Australia and other Commonwealth countries is the recognition of the fact that the task of educating students to assume the full responsibilities of a lawyer is a continuing process that neither begins nor ends with the years of law school study. It involves legal educators from both the academic and practicing members of the profession and the goal is to provide a basis for the prospective professional to make informed choices as he or she moves along the continuum of legal education and professional development.²⁹⁵ What this means for Swaziland is that there must be a shift away from describing, as the evidence appears to show, legal education “academic” (for universities) and “practical” (for practitioners).

Once it is accepted that universities have an equally important role in competence/skills-driven legal education, the question then is: what is the nature and content of the skills to be imparted? Reference has already been made to the problems of identifying and defining core competences in legal education.²⁹⁶ Clearly the responses available in Part V of the Questionnaire support the problematic nature of this issue as one gets no consensus of opinions.²⁹⁷ If anything, the information gathered goes further to suggest that not only did many respondents not know what skills they acquired during their university training, but even the few who knew were

²⁹⁴ See particularly questions 4-13 of Part V.

²⁹⁵ MacCreate R, “Legal Education and Professional Development - An Educational Continuum” Op. Cit. pp. v-vi.

²⁹⁶ See our discussion in paragraph 7.E.1 of Chapter 5.

²⁹⁷ Read particularly answers to questions 11-13 of Part V.

dissatisfied with the way skills-development courses were handled. One respondent states, for example, that "Some (skills) made sense and their need apparent, others were rather far-fetched and unreal from law and action". Another states, "After the presentation, you look forward to another chance to do even better".²⁹⁸

Exhaustive study exists on the profession from which more specific skills have been extracted for purposes of competence/skills-driven legal training. The position in the United States as discussed by MacCreate R, is one such study.²⁹⁹ Gold N, MacKie K, and Twining WL have also analysed the issue of transferable skills covering professional tasks in the United Kingdom, Canada and parts of the Commonwealth.³⁰⁰ What needs to be emphasised in the case of Swaziland is that there are core competences in the work settings across a range of professional tasks that define common skills for the profession. Not only can these skills be identified but can also be transferred through competence/skills-based (practical training) courses. We have already noted that the current law programme in Swaziland pays little attention to or emphasis on acquisition of practical skills by students with the result that the graduates leave the university having hardly acquired the necessary skills for competent practice of law. This is a serious problem that needs to be urgently addressed.

At the point of entry to the profession, therefore, there is the expectation that graduates should have been sufficiently equipped not only with legal knowledge but also with the fundamental skills and values before assuming the full responsibilities of a member of the legal profession. In the case of Swaziland this raises the issue of the relationship between the academic and vocational stages of legal education in terms of how best to prepare for competent practice. Part IV of the Questionnaire in ANNEXURE X contains questions responses to which were intended to solicit views on the skills that can be defined from the range of tasks and transactions in which members of the legal profession in Swaziland are engaged. The answers to questions 3 and 4 of Part IV raise the following tasks and transactions, namely: legal analysis, legal research, interviewing, counselling, communicating, writing and drafting, negotiating, advocacy. It is not surprising that these have been identified because they

²⁹⁸ In answers to question 13 of Part V.

²⁹⁹ MacCreate R, Op. Cit.

³⁰⁰ Their book is entitled: Learning Lawyering Skills 1989 Butterworths.

relate to the range of tasks and transactions that lawyers generally would perform in their day-to-day duties. What did not emerge clearly from the responses is what skills, in the circumstances of Swaziland, would be required to perform the above tasks and transactions competently.

Questions 1 and 2 of Part IV of the Questionnaire were intended to establish the respondents' views on what he/she understood by the term "skills" and what skills are required by lawyers in their day-to-day tasks and transactions in Swaziland. Again not only is there evidence of uncertainty of what amounts to "lawyering skills" but even the list of identifiable skills identified by some respondents were indeed limited.³⁰¹ In fact they represent a few of the skills employed generally by lawyers.

A serious concern that has, therefore, remained unestablished is the sort of skills that form the core (also referred to as "master") skills required for development-oriented lawyers. Our contention is that there are those core/master "development lawyer skills" which should be emphasised in a competence/skills-driven legal education for not only lawyers in Swaziland but elsewhere in the BOLESWA countries.

8.E.2 The Search for Holistic Competence/Skills-Driven Legal Education for Development Lawyers

Studies in competence/skills-based practical training for lawyers have produced a list of generic lawyer skills for inclusion in the curriculum especially of clinical programmes. Different approaches have emphasised different levels of competences and skills; for example, some studies have focused on consideration of the particular skills involved in more common lawyering functions, while others have focused on more sophisticated inter-personal competences within a particular problem and client-based activities. In our view "development lawyering skills" should take into account both those skills involved in more common lawyering functions and also pay particular attention to skills needed for problems and client-based activities peculiar to development needs.

As to the former, i.e. skills involved in common lawyering functions, the ten fundamental skills identified by the American Bar Association provide the core skills

³⁰¹ Read particularly responses to question 2 of Part IV.

which need to be emphasised for all lawyers in developing countries. The details of those skills have already been discussed.³⁰² As to the latter i.e. “sophisticated” skills peculiar to development needs, we would wish to associate ourselves with those studies that emphasise problem solving competency which sets out problem solving techniques or skills. The reason for accepting this as a suitable approach is based on the peculiar socio-political and economic problems that lawyers in developing countries are called upon to solve during their practice. A renowned writer in this area, Nathanson S, of the University of Hong Kong, has argued that this model is important because it serves as a unifying theme, enabling course designers to produce a curriculum which covers a diversity of tasks, transactions, legal skills and knowledge, yet which still remains an integrated whole.³⁰³ This means that the approach is advantageous to the development processes not only in terms of its contribution to providing problem-solving skills but also because it provides the easy means for legal educators to design competence/skills-based courses for students in developing countries.

Another advantage of the approach is its setting out the stages of the skills that a problem-solver has to pass through, namely:

- (a) problem and goal identification;
- (b) fact-finding investigation;
- (c) legal issues identification and assessment;
- (d) option-identification and decision-making;
- (e) planning and implementation.

Finally the model also provides the “master” skills of effective problem-solving techniques which are:

- (i) perceptive ability i.e. the ability to recognise what is problematic and what is not;
- (ii) analytical ability;
- (iii) creativity;
- (iv) logical thinking;
- (v) flexibility;

³⁰² Read paragraph 7.E.1 of Chapter 7 of this thesis.

³⁰³ His works are cited in a series of Unpublished papers - CASEL Briefing Papers 1 & 2 available with Burrige R, of the School of Law, University of Warwick.

(vi) ability to transfer problem-solving skills between a range of new tasks.

In our view a development lawyer equipped with the above skills should be able to perform the complex demanding tasks of development with competence. Legal education which aims at developing persons of this kind would go a long way in providing lawyers most suited for meeting the needs of society in development. To date Swaziland has failed to provide this type of legal education.

The training methodology for the above education takes into account many factors.³⁰⁴ Essentially the methodology emphasises "learning by doing: which involves active participation in class discussion, relevant case studies, role-play as those in the in-house clinics and simulations. The kind of holistic competence/skills-driven system of legal education takes all the above factors into account. This is what we consider suitable in the development circumstances of Swaziland. Other important and related factors are discussed in the next chapter.

³⁰⁴ For details read MacKie K, "Lawyers' Skills - Educational Skills" in: Learning Lawyers' Skills Op. Cit. pp. 8-23.

CHAPTER 9

FACTORS TO CONSIDER IN THE MANAGEMENT OF SKILLS DEVELOPMENT PROGRAMMES: WHICH DIRECTION FOR THE BOLESWA COUNTRIES?

It has been observed in the previous discussions that jurisdictions with varying developmental objectives, when faced with increasing criticisms of inadequate preparation of lawyers for practice, react differently to those criticisms. Some of them have stuck to the traditional intellectual university education of lawyers, arguing that those who wish to practice law could proceed to pursue the apprenticeship programme before admission into the profession. According to them, a distinction must be made between academic and professional training of lawyers. This approach to legal education is in sharp contrast with another reaction based on the argument that the dichotomy between the "academic" and the "professional" elements of legal education is artificial because the lawyers' skills in the "professional" training are themselves part of the "academic" education which must be studied together in any system of legal education designed to provide a competent legal practitioner of any standing and scope. Such group of jurisdictions advocate the development of professional skills within the law programme, and emphasise the aspect of professionalism in an undergraduate programme, leaving the responsibility of professional legal education in the LL.B. curriculum of the university.³⁰⁵

These types of arguments on the objectives of legal education, explain why there are many jurisdictions supporting and implementing each one of the above approaches to legal education. Various alternative institutions have emerged claiming responsibility, superiority and suitability for education and training of those preparing for legal practice, leaving society to wonder about and even challenge such systems.

Some of the contradictions illustrated above are currently being addressed in the BOLESWA countries because of the differing institutional approaches to legal education in the region. For example, in justifying the seat for the current skills-development

³⁰⁵ See for example the Botswana University or the Newcastle University (Australia) Models of legal education.

programmes in the Department of Law of the University of Botswana, the Head of the Department recently observed that unlike countries such as Zambia, Nigeria, Kenya and England, Botswana does not have a post LL.B. institution for training practitioners. "Such an institution was deemed too costly. So, it is the responsibility of the Department to prepare graduates for practice. For this reason, its programme has been designed in such a way as to integrate theory with professional training. This in part explains why the LL.B. course takes five years."³⁰⁶ Of the same view was a lecturer in the Department who also argued that in designing the new programme of the Department, legal educators were conscious of the fact that lawyers' competence in most, if not all, areas of law practice demand a wide range of fundamental skills. "The Department, therefore, departed from the traditional approach which unnecessarily separated academic and professional education and introduced a clinical legal education built in the LL.B programme."³⁰⁷

But in Swaziland, as in Lesotho, the approach is to separate academic from professional training along the arguments of Professor Gower. He had argued that the obtaining of the LL.B would not in itself qualify for admission to practice; that those lawyers intended for administrative posts in government did not need any more training and could rest contented with the LL.B, but those who intended to practice needed to take a further course of essentially practical training in subjects such as Conveyancing, Legal Drafting, Lawyers' Accounting, Professional Ethics and Advocacy; and that, as far as possible, training would be by practical exercises."³⁰⁸ These arguments were subsequently implemented through the establishment of the two-tier system of legal education which categorised academic and practical training along the three stages recommended by the Ormrod Report in England. Currently all the "practical" course recommended by Professor Gower and approved by the Paul/Twining Report are offered only to the postgraduate LL.B. degree students.

³⁰⁶ Nsereko DDN, Remarks at the Meeting of the Faculty of Law Sub-committee of the University of Law of Namibia held at the University on 5th October, 1992 (Paper unpublished).

³⁰⁷ Kakuli GM, "Experimentation in Clinical Legal Education in Botswana" in: The Commonwealth Legal Education Association Newsletter of October 1989 at ANNEXURE IV.

³⁰⁸ Read the 1964 Gower Report p. 17. In fact, the 1971 Paul/Twining Report endorses those arguments which led to the establishment of the two-tier system of legal education still being followed at the University of Lesotho and Swaziland.

The above contradictions and disparities in the institutional approach to the training of lawyers raise a number of fundamental questions for any scholar of legal education in the BOLESWA countries. For example, can we say that the Botswana approach is better than the Swaziland approach? Why? Especially when these countries have so much in common? Considering the practices in other jurisdictions, what do we conceive of the institution most suitable to bear the responsibilities of preparing lawyers for competent legal practice in developing economies, and why? What method should such an institution employ, and why? In summary, therefore, the concern really is whether the institution that assumes responsibility for legal education in any of the BOLESWA countries should be essentially academic without being practice-oriented, as is argued for Swaziland and Lesotho, or vice versa, or both. Once a choice has been made, the issue concerning the appropriate methodology has also to be addressed. To us, therefore, in raising these concerns, our interest is to establish an appropriate institutional base upon which suitable skills-development programmes can firmly entrench its roots within the context of the developmental objectives of these countries.

The importance of our concern arises not only because of the current differing institutional approaches, but mainly because of the new demands on legal education to equip the intending legal practitioners with better knowledge, skills and attitudes to meet the new challenges of development. This is when it becomes absolutely necessary to re-examine our institutional base for the development of skills with the hope of providing better institutions and their management of future skills-development programmes.

To assist us in reaching our conclusions on these matters, we need to focus our discussion on the following issues:

1. The basis for the struggle for responsibility and control over legal education: Universities versus Professional Institutions.
2. Suitable institutional character and roles for managing skills-development programmes.
3. Model programmes and methodology approaches.
4. Towards a new direction for the BOLESWA countries.

In addition, it has to be borne in mind that the subsequent discussions on the above issues must be understood against our general hypothesis namely, that professional skills, whether for professional or academic practice of the law are important aspects of the lawyer's education. To ignore them means we are only educating part of the aspiring lawyer³⁰⁹. We share this view with another writer who, also referring to those skills, states that to "ignore them is to provide a distorted picture of the law. Conversely, to include them in an 'academic' law programme is certainly not to run an academic course into a 'trade school' or 'plumbing course': rather, it is to ensure that the subject matter of the academic law programme is not artificially abstract and thus distorted."³¹⁰

If, therefore, skills-development is so important not to be ignored in legal education, it is equally important to be clear as to who has to bear the responsibility for imparting it, and how they should be imparted, to ensure adequate and proper preparation for practice. In the BOLESWA countries where issues of skills-development have recently attracted so much attention and debate, any analysis and contribution to the debate on the above issues would enhance positive steps to be taken towards improving the system of legal education in the region.

9.A THE BASIS FOR THE CONTROL OVER LEGAL EDUCATION³¹¹: UNIVERSITIES VERSUS PROFESSIONAL INSTITUTIONS

As adequately observed by Neil Gold Professor N, when academics meet their practitioner friends, they invariably face criticisms about their work and in particular about the educational enterprise of which they are a part. In their turn, practitioners are variously criticised by academics for their lack of intellectualism, pragmatism and demands for economic orientation. Thus the debate, according to him, between academics and practitioners resemble a kind of "turf warfare", each side stubbornly protecting a position.³¹²

³⁰⁹ Refer to our earlier arguments on the same in Chapter 5.

³¹⁰ Goldring J, "Academic and Practical Legal Education: What Next?" in: Journal of Professional Legal Education (1987) Vol. 5 No. 2 p. 106.

³¹¹ For detailed discussion on the genesis and development of legal education, read Chapter 5, especially paragraph 5.B.

³¹² Gold N, "The Role of University Law Schools in Professional Formation in Law" in J.P.L.E. (1986) Vol. No. 2 p. 15.

This tension which, as we shall discover, has been formalised in the struggle for responsibility and control over legal education, has been influenced by the notion of the dichotomy of "academic" and "practical" application of the law during its teaching and practice. There are those lawyers who apply their talents to protect the rights of their clients, irrespective of whether those clients are from the public or private sector. There are others who use their talents solely for the purpose of scholarship and teaching. The latter have, for centuries now, been referred to as the "academic" lawyers, while they in turn refer to the former as "practitioners".

Much as the above division may have existed in the practice of the law, it has greatly influenced the general direction of legal education along those two demarcations, thus swaying the objectives of legal education between those two poles. However, this polarisation soon came under severe attack resulting in major reforms, the impact of which influenced developments in the institutional base and management of legal training in the Commonwealth.

Important among such reforms was the recommendation by the Law Society in 1969 that the apprenticeship system be abolished. But of more relevance to our study was the 1971 Report of the Ormrod Committee on Legal Education, which recommended that the basic qualification for the English Bar should be a degree in law followed by a year's vocational training in skills. The result of the recommendation of the Ormrod Committee is what became popularly known as the three stages of legal education which in substance established the following³¹³: the first steps of legal education, i.e. the academic training which emphasises theory and develops in the student the academic and intellectual skills required in the practice of law; the second stage, i.e. the practical training which consists of courses from which clients are noticeably absent; and the third stage, i.e. continuing legal education whose aim is not only to ensure the growth of the young practitioner into a fully mature lawyer, but to assist all practitioners to keep abreast with the current theoretical and practical skills to meet the new demands of the practice.

³¹³ For details read: Nash G, "Should Law Schools Produce Lawyers?" in J.P.L.E. (1991) Vol. 5 No. 9 pp. 27 - 35, especially p. 30.

The above division into the three stages of legal education is significant, not only for entrenching the dichotomy of "academic" and "practical" aspects of legal education, but in allocating responsibilities to the concerned institutions. To all intents and purposes, stage one is generally the responsibility of the universities, whilst stages two and three are the responsibilities of professional institutions. Much as these divisions may have disappeared in UK and USA they still exist in Africa e.g. in East Africa. The point to note, however, is that from the 1970s, practical training courses were established on an institutional basis (as opposed to training in law offices) either to supplement or to replace apprenticeship training.³¹⁴ But yet the control of these institutions have generally been in the hands of the professionals.

As the reforms were gradually being implemented, other scholars of legal education in the Commonwealth had come up with new ideas for improving legal education and training for more competent practice. Leading the group of such scholars was Gower Professor LCB who, together with the others, questioned all the existing systems of preparing lawyers for the practice of law. In their view, the available systems could hardly produce lawyers with varied practical skills and broad-mindedness that the modern world required. There was need to establish new institutions to supplement the basic legal qualifications obtained from a university. This resulted in their designing new programmes of legal education with more emphasis on skills-development, and more importantly, it resulted in the establishment of specific institutions with skills-development as their sole objectives. The mushrooming of these institutions starting from the 1960s in Canada, Australia, Africa and other parts of the Commonwealth is evidence of their beneficial contribution to the preparation of lawyers for legal practice. The important point, for the purposes of this discussion, is the development of yet a new category of legal institution with different characteristics from the traditional ones, but also claiming responsibility and control for the preparation of lawyers for legal practice.

In the context of the BOLESWA countries, what the above brief analysis has introduced is a new scenario of legal institutions which in one way or another, partly and wholly, have assumed responsibility for the education and training of lawyers for legal

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Ibid.

practice.³¹⁵ It is against the background of this new scenario that we are compelled to question the type of institutions that have been chosen for these developing countries and the methods employed in these institutions.

9.B SUITABLE INSTITUTIONAL CHARACTER AND ROLE FOR MANAGING SKILLS DEVELOPMENT PROGRAMMES

There is a view held that the struggle for the control over legal education is now over, because attitudes have since changed as a result of the recognition that legal education must be divided into stages: the academic for the universities and the professional/vocational, together with post-admission stages for the professional institutions. Obviously these were views that were expressed in the 1970s and are now being contradicted by contemporary policies, attitudes and practices, which go to show that the struggle is far from over. It is now a fact that universities like those in the USA, Canada, England, including the University of Botswana as discussed above are involved in the professional training of legal practitioners. On the contrary, the Inns of Court School of Law in England and Wales have, to a large extent, retained the full responsibility and control over the training of barristers at the second and third stages of legal education, while their counterparts, the solicitors are slowly giving away some of their control over training of intending solicitors to the universities and other institutions. What then is, or should be, the role of universities generally, and law schools/faculties and departments of law in particular in professional training? Should the law become an exclusively graduate profession? If so, what should be the distribution of educational control between the universities and the profession? Should institutions other than universities and professional bodies take over responsibility of legal education? If so, to what degree? Should there be a new organ with special training programmes to suit the special needs of lawyers in development?

The answers to these questions require a full examination of the nature, characteristics and scope of operation of each of the institutions currently involved, directly or indirectly, in the education of legal practitioners. Such a perspective is not

³¹⁵ For details read Twining WL, *Legal Skills and Legal Education* (1988) The Law Teacher-Journal of the Association of Law Teachers Vol 22 No. 1 p 4, especially p 7.

only important for understanding the need for their responsibility over skills-development of aspiring legal practitioners, but, in the context of the BOLESWA countries, of getting a sense of new direction in the institutional base for the management of skills-development programmes most suited for development lawyers.

9.B.1 Universities

Before we can start any examination on the nature and role of the universities in legal education, we would like to sound the same warning to which the attention of scholars of legal education was timely drawn, namely, what exactly is the focus of the concern? Are we focusing on whether professional legal skills are being given their due place in university education? If so, then the problem may either be seen as one relating to the standard of professional legal skills or as involving reflections on the proper nature of university law schools or as being some combination of the two. Different assumptions about the nature of the problem will result in different conclusions about the form of the answer³¹⁶. In the final analysis the issue will be one of how to improve legal education in the university. In the alternative, is the concern the position of the law school as part of the university? In which case the issue becomes easier because whatever is done in the law schools, and that which might be done, is tested against criteria universal to university as an institution³¹⁷. In the final analysis, the broader issue is how far does a particular activity further the aims of the university? or the people? or the profession?

A university has, among so many other definitions, been defined as "an institution, the essence of whose purpose and methods is preordained by long practice, which a society can either decide it needs or does not need ... Something is a university not because of its title, but because of what it does."³¹⁸ The significance of this definition is seen first from the point of view of its associating the nature of a university with historical, sociological and legal (from decision-making approach) factors which combine to make what a particular university is. Secondly, it brings into sharp focus the

³¹⁶ Bradney AGD, "The Place of Teaching Professional Legal Skills in the UK University Law Schools" in: The Proceedings of the Workshop on Professional Legal Skills (1986) pp. 1 - 2.

³¹⁷ Ibid.

³¹⁸ Ibid. p. 3.

function approach to the establishment of the character of a particular university. Whereas there may have been some debate about the general nature of universities, the issues involved have been marginal compared to those concerning their functions. To avoid the risk of details which may land us into problem areas of contention, we shall limit the summary of these functions to the three which are generally accepted: (i) education of the whole man, professional training, and (ii) research; for the university is simultaneously a professional school, a cultural centre and a research institute. People have forced the university to choose between these three possibilities. In the idea of the university, however, these three are indissolubly united.³¹⁹ We find this statement simple and clear, yet emphatically persuasive on the issue of the functions of any university. Subject to the influences of the factors referred to above, universities the world over are founded upon these foundational functions.

For example, in the developing countries, and particularly in Africa, universities that were created after the attainment of national independence in the 1960s imported the above character of a typical university. African governments, even at that early stage, recognising the crucial role which universities had to play in the development process, invested heavily in their establishment and laid down specific mandates which were commensurate with the demands of the early post independence period. These were:

- (1) to produce middle and high-level manpower with professional skills to manage the economy and government;
- (2) to conduct research into problems of development; and
- (3) to provide a focus for national economies and cultural activities³²⁰. Therefore, for the purposes of this discussion, it must be made clear that the training of professionals is not inconsistent with the functions of universities. However, the question that has proved problematic, not only to scholars of legal education, but to all concerned with the education of professionals, particularly lawyers, is how universities should implement the training of professionals within the general

³¹⁹ Jaspers K, The Idea of a University (1960) Also cited by Bradney AGD, Ibid p. 3.

³²⁰ Professor Makhubu LP, Vice-Chancellor of the University of Swaziland in her opening speech at the National Seminar on tertiary education in Swaziland held at UNISWA from 31 January - 1 February 1990.

scope of their functions. This problem, as far as the legal profession is concerned, is being compounded by historical factors which, as already discussed, witnessed the control of professional training by professional institutions.

In view of the apparent confusion of institutional roles over professional training caused by these historical developments, the law schools established in the universities to implement the objectives of legal education found themselves in equally uncertain grounds.³²¹ The issue of the interplay and resulting struggle for control between institutions also gave law schools peculiar characteristics, depending on which forces influenced them most. Ideally, as our discussion in Chapter 8 has already shown, the education of those who wish to join the profession of law and practice it, precedes the actual joining of the profession, although the whole process is a continuum. We have also argued that the part that precedes the joining and practice of the law is generally accepted to be the responsibility of the universities.³²² The Ormrod Committee's allocation of responsibilities appears to firmly establish this, and the duties which law schools have generally received as a result of this allocation were to provide law students with: (1) a basic knowledge of the law which involves covering certain "core" subjects, and acquiring a sound grasp of legal principles and the ability to discover for himself the law on any subject; (2) an understanding of the law to the social and economic environment ... and (3) the intellectual training necessary to handle facts and apply abstract concepts to them³²³.

Of great interest to this study is the interpretation and application of these general functions by law schools in different jurisdictions, especially considering university theories and policies regulating professional training and, considering also the control by professional bodies on the same matter. The mixture that has resulted from these influences has given law schools a character so varied and contentious that a body of literature is now building up to resolve the issues of "the first stage" of legal

³²¹ For the purpose of this discussion, any reference to the law school will include faculties/departments of law, as basically all of them are structurally organs of the universities created to further and implement the objectives of the universities concerning legal education. Their differences relate only to the scope of those functions.

³²² Authors who have argued the same points include Sangenberg, "Legal Services for the Poor: The Boston University Roxbury Defender Project" (1965) U. Ill.L.J. p. 63.

³²³ The Ormrod Committee Report Op. Cit.

education. It is, however, necessary to give a few of those characteristics to illustrate the sense of direction towards "academic" training that is being provided.

As universities began to get more and more involved in the education and training of lawyers, (roughly from mid-19th century), the number of law schools and law teachers began to grow, as did the facilities to study law. What emerged was that the law schools changed from a small group of lawyer-academics assisted by a large number of practitioner-teachers to a large group of lawyer academics with a decreasing input from the practicing profession. In time, the lawyer-academics became academics who happened to be lawyers.³²⁴

Currently in many jurisdictions where law schools have been established, universities have given these schools a character even more peculiar in terms of the academic foundation and substance. Emphasising this point, one writer has recently argued that for a good reason, and to the detriment of the legal profession as a whole, the academic profession has been carved out of the body of lawyers as a separate and distinct group of people, largely having different perspectives and different values from those of the practitioner, with the result that the insight of law school and law students has reduced the nature of practice and has deprived the practitioners of the benefit of the more leisurely, more scholarly and less pragmatic analysis which could assist him in his day-to-day activities.³²⁵ He concludes this argument by summarising the effects of the growth in number of full-time academic staff on the separation of practice and theory in the following manner:

- (a) the general scholarly content of law subjects has improved;
- (b) practical insight has disappeared from most law subjects;
- (c) most teachers have postgraduate qualifications from overseas universities, Oxford, Cambridge, London, Harvard, Yale, Michigan, etc;
- (d) most law teachers have little or no experience of practice;

³²⁴ Nash G, Op. Cit.

³²⁵ Nash G, Ibid. His discussion, particularly of the situation in Australia, tends to expose the general characteristics of law schools of many jurisdictions at least during the period when universities took over some of the responsibilities in legal education.

- (e) the size of the legal academic community and the size of the staff of individual law schools is such as to provide a self-contained professional community separate and distinct from the practicing profession;
- (f) there has developed a tendency amongst university law teachers to underestimate the importance of a knowledge of what happens in practice to an understanding of the meaning and impact of case law and statute.³²⁶

It is these characteristics and attitudes which are fully endorsed as being responsible for the problems emerging from the sharp division between "academic" and "professional" training of lawyers. What is more, they are held responsible for the absence, or lack of emphasis on skills-development in law schools, which instead focus on the substantive study of the law - a series of doctrines and theories based on "core" subjects. When suggestions of practical training are put forward to such academics, they quickly react by asserting that such a programme of training is not for law schools as they are "necessarily illiberal, amoral, narrow, reactionary, anti-intellectual, impractical or unnecessary."³²⁷ The attitude of these kinds of academics spills over towards resisting the implementation of practical training in the law school; they dislike the idea of allocating additional time for such programmes when forcefully introduced; and they even resist employment of full-time lecturers for practical training programmes, and when such lecturers are hired, they keep them away from the tenure track or judge them by traditional classroom and scholarship criteria.

In the eyes of those who see legal education as a continuum with the first stage based in the law schools of universities, and considering law schools as the first trainers of those aspiring to practice law competently and efficiently, the above characteristics and attitudes leave a lot to be desired. It is for that reason that we hear loud and clear the voices of those legal educators who cry for "taking skills training seriously" or for "greater emphasis" in skills-development programmes in law schools of universities. It is conceded that many law schools today have introduced one form or another of the many programmes of practical training in their undergraduate or postgraduate degree

³²⁶

Nash G, *Ibid.*

³²⁷

Twining WL, "Legal Skills and Legal Education" in The Law Teacher - A Journal of the Association of Law Teachers (1988) Vol. 22 No. 1.

courses. The different models of these programmes from which such choices are being made will soon be discussed.

Of particular significance to law schools in America has been the development of the clinical legal education programmes or courses which, as already discussed, have gone a long way to enhance practical training at universities. Many developed countries, including Canada, Australia, South Africa, New Zealand, etc. and developing countries like Botswana whose programme we have discussed have also incorporated these programmes in their curricula. Equally important and related are comprehensively designed law degree curriculum which are being introduced as courses which form a component part of university legal education. These types of practical training courses within the law school emphasise the reconciliation of the apparently different aims of the university and the profession. The argument is that whereas the university must continue to insist on its business of liberal education, the profession ought to feel no shame in reminding the university of its obligation to provide professional training as an integral part of legal education. These courses are also different from the "practical/adjectival courses" like criminal and civil procedure, evidence, administration of estates, though all of them should form part of the comprehensive practical training course in the law school. The important aspect of this type of course within the law curriculum is to balance what would otherwise be a theoretical and too academic training of lawyers which we have always asserted to be undesirable and out-of-step with developments in modern society.

Nevertheless, most of these courses are directed at the development of "know how" rather than at reflection upon the significance of the way in which these skills are applied in the practice of law. Students, in most cases, are denied the opportunity and incentive to understand and appreciate the nature and role of professional skills in the day-to-day job tasks of lawyers. This to us is where the competency gap starts from.

It is also conceded that in considering the issue whether the development of skills is being given due weight by the law schools, the aims of the university must be taken into account. What amounts to legal education or the knowledge of law, in university terms, sets the perimeter within which law schools operate. Perhaps this is

where the discussion should focus on the areas of co-operation between universities and professional institutions, another topical issue which needs to be tackled separately.

9.B.2 Professional / Vocational Institutions

Reference was earlier made to the genesis of vocational training or training for particular trades. With advancement of technology and differentiation of professions, various types and levels of vocational training have gradually come into existence. The reflection of this development in law, as a particular trade, is quite significant. What originally started as a simple apprenticeship system for the acquisition of lawyering skills grew into complicated systems managed by different institutions which have mushroomed in different jurisdictions all over the world.

Today, vocational training in legal education is characterised by provision for the second and third stages of legal education which involves practical training to mostly postgraduate law students either immediately after graduation, but prior to the admission for practice, or after employment in legal service. During the practical training course, the graduate acquires certain "practical skills", thereby (in theory) becoming an embryo practitioner and after a period of service, emerging and developing (during the third stage) into a fully-fledged and mature legal practitioner.³²⁸ These predominantly pre-admission institutions functionally are vested with duties "to create a link between theory and practice and to give a theoretical background to professional work."³²⁹ They took on the old system of apprenticeship training and moulded it to suit modern needs.

Corresponding to the vocational institutions established in England for practitioners to meet the second and third stages of legal education, are institutions in the USA, Canada, Australia and New Zealand, which have been established to meet specialised needs of the practitioners. Such institutions have taken the role of skills-development within the context of practical training generally, including continuing legal education. One such example is the National Institute of Trial Advocacy (NITA) established to create methods and materials for training in trial advocacy at various levels, including postgraduates and law schools. Though the programme was initially

³²⁸ Nash G, Op. Cit.

³²⁹ For details read our earlier discussion on the experiences in the Commonwealth in Chapter 5 para 5.C.

aimed at improving the skills of young trial lawyers in advocacy, it now provides for the component of a typical continuing legal education programme for litigative skills throughout the United States. The Institute of Professional Legal Studies of New Zealand fits in this group.

However, as already observed, these institutions, too, had, and still have, shortcomings, the major one of which is that they are designed to produce narrow specialist practitioners and are alleged to be even more theoretical than practical in their teaching methods. Their existence was said to be a continued manifestation of the undesirable division of legal education into compartments which is regarded arbitrary, unnecessary and confusing.³³⁰

9.B.3 Hybrid Institutions

The dissatisfaction with the preparation of legal practitioners for competent practice by the law schools of the universities and by the above professional institutions led to the creation of special pre-admission postgraduate institutions whose objective was to ensure full-time vocational training, focusing entirely on skills training as the best and the most realistic and most successful approach to professional training for lawyers.³³¹ The arguments advanced for the establishment of this group of institutions are many and varied. Briefly, it is argued that the exclusive objective in training in skills at particular specialised vocational institutions must be perceived in the light of the seriousness attached to public and professional demands for increased accountability of lawyers, i.e. its aim must be to enhance the fact that any member of the public who engages the services of a lawyer receives competent professional service.³³² It is also argued that the emphasis on skills-development can only be best achieved at these institutions which, for maximum efficiency must be statutorily created. They may or may

³³⁰ For a more detailed criticism read Neil G, on the Role of University Law Schools Op. Cit.

³³¹ Gower Professor LCB, first established this type of programme at the School of Law in Nigeria in 1961 along the lines already in operation in Toronto, Canada, where a postgraduate pre-admission course was being run at Osgood Hall Law School. By 1970, similar programmes had been adopted in Ghana, Uganda, Sierra Leone, Hong Kong, etc. and with the publication of Ommrod Committee Report in 1971, the Gower/Ommrod Philosophy soon spread to Australia, New Zealand and to such other developing countries like Kenya, Zambia, etc.

³³² For details read Twining WL, Op. Cit. pp. 6 - 8. Read also Crampton R, "The Need for Greater Emphasis on Skills Development" in Legal Education and Lawyers Competency (Dutile Edn) Op. Cit. pp. 11 - 14.

not be located within the university campus and the management falls under independent organs composed of public officers, representing the interests of the state, and representatives from the academic and professional practitioners. Most postgraduate pre-admission institutions in Africa, notably the Nigeria Law School, the Law Development Centre of Uganda, and the Kenya Law School, were of this nature.

Ideal as these institutions were expected to be in delivering the correct results on skills-development, they too eventually became ridden with all sorts of problems characterised by few professional staff who get involved in the management of the institutional activities; unreasonable salaries given to these few staff, forcing them into private practice "to make ends meet"; reliance is placed on part-time, good hearted volunteers who are difficult to come by, and, when found, they become disillusioned because of "too much work and poor pay"; lack of funds for both professional and capital development, and many others to the extent that even the very concepts of these institutions are being questioned because of their failure to live up to the expectations and objectives for which they were established³³³

9.C COURSE DESIGN TEACHING METHODS AND ASSESSMENT IN SKILLS DEVELOPMENT PROGRAMMES

With the introduction of stages two and three within the process of legal education, not only have the debates on the nature and types of practical training increased, but the theoretical framework against which to base such courses and the suitable methods of teaching and assessing them have even raised more issues in the ensuing debates.³³⁴ Many learned authors have raised the relevant issues and squarely addressed them.³³⁵ Our discussion is aimed at analysing some of the important aspects of institutional management of skills-development programmes with a view to assisting

³³³ For other dimensions of these problems, read Iya PF, "How to Teach Negotiation and Negotiating Skills - An Experience at the Law Development Centre in Kampala, Uganda" (UNISWA 1990). Aspects of the Paper were published in the Commonwealth Secretariat - Legal Division Report on Continuing Legal Education (1990).

³³⁴ We have made the same arguments elsewhere. See Iya PF, "Clinical Legal Education - Its Concept and Application in Uganda With Some Comparative Overviews of its Development in Some Countries in Southern Africa" (unpublished) Paper (1990) UNISWA. p. 16.

³³⁵ Read, for example, the writings of Cruickshank DA, "The Professional Legal Training Course in British Columbia, Canada" in 1985 J.P.L.E., June p. 111 and Gold N, Mackie K, and Twining WL, in Learning Lawyers Skills (1989) Butterworths.

the BOLESWA countries in their choice over the matter. This discussion will highlight the following important points:

- (1) nature and characteristics of practical training;
- (2) course design and implementation;
- (3) teaching models; and
- (4) assessment procedures.

9.C.1 Nature and Characteristics of Skills Development Programmes

Practical training, as generally understood in legal circles, consists of courses variously referred to as Legal Practice Courses (LPC); Practical Legal Training (PLT); Legal Skills Courses (LSC); Clinical Legal Education Programmes (CLEP); and Skills Development Programmes (SDP), to mention but a few. These terms, for the purposes of this discussion, will be used interchangeably because essentially their objective is one and the same namely to provide a method of instruction to potential or actual legal practitioners in the practical skills needed in the various branches of legal practice. Most authors are agreed that the main function of practical training for lawyers is to bridge the gap between academic study and the practical application of the law and that it should be designed to help the student adapt his academic knowledge to the conditions of practice by inducing him/her to the practical skills and techniques of the law and to acquaint him/her with the knowledge in other fields which will be of particular value in practice³³⁶. This view is very persuasive in the light of our endeavour to establish the type of practical training that will enhance competence in the practice of law in the BOLESWA countries.

The rationale for practical training courses (or programmes, as often used in this discussion) need not be over-emphasised. Its historical development reveals the perennial dissatisfaction with the existing systems of legal education which were wholly inadequate as they did not prepare new members of the profession adequately to serve the public needs. New legal practitioners were being produced without the skills necessary for efficient practice. They were simply expected to pick up these skills on

³³⁶ Roper C, "The Legal Practice Course - Theoretical Framework and Modes". (1988) J.P.L.E. p. 78.

the job. When law degrees became a full-time activity, little was done to bridge the gap between academic grounding and the development of practical and professional skills, knowledge and attitudes which are the pre-requisites of competent practice. It is as a result of the changes introduced within the systems of legal education in reaction to these pitfalls that the present practical training courses have developed.

They are inextricably linked to skills training on the premise that professional skills cannot be learnt in isolation and without practice. Thus, today we find the different models of such courses, all attempting to pursue the same objective. In view of the variety of these courses, any effort to discuss content can only be limited to characteristic features as earlier outlined.³³⁷

The choice and preference of this set of content of skills usually included in practical training courses over other given lists relate to its exhaustive compartmentalisation of the "common core" skills normally used in the practice of law. For any researcher interested in application of skills to competent performance of legal services, the categorisation given in Chapter 7 conveniently facilitates the identification and utilisation of each of these skills.³³⁸ In fact they have, in addition to other attributes of competency like the environmental factors earlier discussed, assisted us greatly in reaching our conclusions over performance and competency of legal practitioners in Swaziland.

9.C.2 Course Design and Implementation

The high level scientific approach to course designing generally is outside the scope of the present discourse. For our purpose, it will suffice if the conceptual framework can be exposed and understood so that when it comes to the practical application in the context of the BOLESWA countries, we have some variable to guide the discussion.

Whereas disagreement amongst authors on models of teaching and instructional design is as wide as the list of such authors, in essence they are all seeking to establish

³³⁷ For details read Park R, "Appropriate Methods for Teaching of Legal Skills in Practical Training Courses" (1990) J.P.L.E. Vol. 8 No. 2 p. 161.

³³⁸ *Ibid.* at pp. 162-163. Read also Hogan A, "The Legal workshop in the Australian University, Canberra, A.T.C." (1983) J.P.L.E. Vol. 1 No. 1 p. 80.

the most workable model for a particular purpose.³³⁹ In the area of practical training for lawyers, courses to achieve their specific objectives may be designed along courses which are on a continuum "from teacher-centred to learner-centred instances", and this approach has attracted the interest of most designers of practical training for lawyers.³⁴⁰

According to this approach there are five models, namely:

- (1) The Expository model, which is predominantly teacher-centred and relies on the skill of the presenter in commanding respect, gaining attention and motivation. It is characterised by the teacher's "majestic" use of language and acting ability.
- (2) The Behavioural model, which breaks learning down into manageable steps and rewards the learner for mastery of each of the steps.
- (3) The Cognitive Developmental model, which takes into account the age, experience and stage of life of the learner to use reasoning in problem solving.
- (4) The Interaction model, which focuses upon interaction with other learners, as well as the external environment. It is highly learner-centred.
- (5) The Transaction model, which concentrates on self-directed learning with adults interacting with their environment in an attempt to satisfy their own needs or group needs³⁴¹.

In the practical application of these theoretical concepts some writers argue for an approach wide enough to encompass all, or most, of these models.³⁴² We, however, would like to associate ourselves with those who support the approach of the "Holy Trinity of legal skills training", which focuses on knowledge, skills and attitude as it allows for a greater degree of activity at the student-centred end, especially as most of the students participating in these training courses are adult.³⁴³ This, by implication is a support for models three, four and five above. The additional reasons for supporting these models will become clearer when it comes to the discussion of the application of these models.

³³⁹ For one type of design read, Joyce B and Weil M, Models of Teaching (1968) 3rd Edn. Prentice-Hall International New Jersey.

³⁴⁰ The author of this type of approach is Bradney L, in Models and Methods of Teaching (1985) Prentice-Hall of Australia, Melbourne.

³⁴¹ Park R, Op. Cit.

³⁴² Roper C, Op. Cit.

³⁴³ Cruickshank D, Op. Cit.

9.C.3 Models of Teaching Methods

Again because of its theoretical implications, the discussion on models of teaching practical training courses is as difficult as it is likely to turn out to be superficial. All the same, the main concern is once the specific skills have been identified, how can they be imparted to the student? How, for example, can one impart the skill of negotiation? How does one impart a skill learnt in a litigation interview to a commercial interview? It thus becomes obvious that it is not enough to design a course, which certainly is an important step, but it is equally important to ensure that the purpose of the course, which is the learning process, is achieved by the student receiving the knowledge, skill or attitude that is required.

Experts on the subject have termed this the "transfer of learning" process, and have argued that adults have many different learning styles. Therefore, the variety of teaching methods can only extend the effectiveness of the teachers, themselves as adults. For that reason it has been contended that whereas learning through "lectures, case method, group discussion belong to the pedagogical style of learning more suitable to the education of children than adults, a clinical programme (practical training) would allow our adult learners to benefit from experiential learning which is the prime "method of andragogical learning suitable for the teaching of adults".³⁴⁴

In the context of the models designed for the teaching of practical courses for lawyering competence, and considering the theories on teaching methods discussed above, the centre of the discussion has now to focus on the methods usually chosen to impart practical skills to lawyers. What method(s) should specifically be employed in teaching lawyers practical skills for competent practice of law? Faced with a similar problem, one writer observed as follows:

"Among professional legal trainers ... there is disagreement about what 'practical' means in terms of curriculum planning. Some contend instruction is practical when transaction based - the actual nuts and bolts information - others see legal training as being practical when it is skills-based. Adherents of the skills based system tend to see nuts and bolts

³⁴⁴ Tzannes M, "Research Project and Report on Educating Tomorrow's Lawyers: The Case for Clinical Legal Training and an Examination of Various Models" (1991) J.P.L.E. Vol. 9 No. 2 p. 182.

information as too job specific and transitory. Students, they say, should be taught a set of generic skills which can be applied generally to various legal problems³⁴⁵.

In our view, a good practical course should be designed to encompass the three important elements as indicated above and the skills for competent practice should be imparted through the following methods:

- (a) the skills-based training which focuses more on the skills rather than the transactions, although it is taught in the context of specific transactions. The advantage of this approach is that the skills are first identified, explained and understood, and then applied within a particular context. Once a student has mastered a set of general skills through this process, he is put in a strong position to apply the skills he has acquired vertically to various and similar legal problems or horizontally to one particular problem;
- (b) the transaction-based training is a method whereby the skills in which instruction is given are taught in the context of specific legal transactions, i.e. they are given a transactional focus. This method has an advantage in that students are trained specifically to perform the step-by-step procedure of legal practice on a particular transaction, whether it be commercial, administration of estates, or conveyancing in nature. At the end of the exercise which may be thoroughly simulated, the student acquires the knowledge of all the procedures, though with little or no insight into the specific skills being imparted. Therefore, skills training only takes place by means of role playing in which the legal procedure is simulated;
- (c) the clinic-based training has had some confusion on its status within the course design system, i.e. it is often questioned whether it exists primarily to enhance the educational experience of students or to provide for unmet legal needs within the local community. This confusion is associated with the historical development of clinic being used as educational channels, but the consensus now puts the emphasis on their educational value and we agree with that. The method of clinic-based training, therefore, is given a high position within the skills

³⁴⁵ Nathanson S, "Putting Skills and Transactions Together in Professional Legal Training" (1990) J.P.L.E. Vol. 5 No. 2 p. 187.

training courses. Its educational value rests on the premise that it brings the student and his supervisor into contact with real problems where skills are applied in the interest of the actual (not simulated) client's rights. Its added advantage lies in instilling into the student important aspects of professional ethical responsibilities;

- (d) the internship-based training, sometimes referred to in the practical training context, as "placement" is a teaching method which involves placing students in legal offices, government departments, legal divisions within private industries, and any other workplace which employs lawyers to do legal work. The purpose is to expose students to a great variety of learning encounters which usually encompass exposure to the relevant law; practice at relevant skills such as interviewing, advising, negotiating; experiencing conflicting interests between duties to the client, the court and the organisation; and, at the same time, exposing the student to professionalism. This method differs significantly from the apprenticeship system in that it emphasises the educational rather than the work, or work experience.³⁴⁶
- (e) the workshop-based training also called "the practicums" is a method (currently used in Canada) which combines an intensive course in a particular area of law followed by work experience in the same area. Its peculiar characteristic and advantage lies in the integration of practice with substantive law to better teach the principles of substantive law.³⁴⁷

9.C.4 Supervision and Assessment Methods

There could be other methods for imparting skills to aspiring legal practitioners to develop their capacity for the practice of the law. Those discussed above represent the most acceptable and generally applied methods. They make students aware that all the skills they need to acquire to act efficiently and competently cannot only be conceptualised in terms of content, mode of transfer and utility, but they can also be tested and practically applied in their day-to-day activities with clients (of a broad

³⁴⁶ Tzannes M, Op. Cit. p. 184.
³⁴⁷ Ibid.

definition) and in their professional life. However, an important element of this learning process is to test the success of the whole training programme. Two methods exist for that purpose: assessment during the training period and evaluation of performance on the job. Our immediate concern is the former.

A central issue in the assessment of students in the practical training courses relates to supervision, not merely in terms of ensuring that students arrive on time and complete assignments on time and in accordance with expected standards, but also in terms of establishing whether the teaching methods are achieving their desired objectives. Supervision in this context means that "appropriate tasks are given to the student, having regard to the level of responsibility and the stage that the student has reached. It further encompasses analysis of the tasks performed with emphasis on ways in which improvement can occur ... What is important is that there is an opportunity for de-briefing and discussion of the student's performance in the task, the ways in which the performance can be improved and what implications or lessons the student will take away from the experience."³⁴⁸

As to the assessment procedure within the practical training process, the important point to note is that it is necessary first to establish its purpose. In that regard the critical questions are: Why the assessment, for what and for whom? Writers on course assessment have answered the above questions differently,³⁴⁹ but for the purpose of the present discussion, it is recognised that course assessment serves two major learning and teaching purposes:

- (i) to provide students with information about their progress in achieving objectives set for them so that they may seek to improve their performance, or maintain it; and
- (ii) to assess the extent to which course objectives have been met by students as evidenced by their work and attitudes.

³⁴⁸ Ibid. p. 186.

³⁴⁹ For writers who have discussed issues of course assessment in practical training programmes read: Parente JJ, "How to Plan a skills Course" (1985) Journal of Professional Legal Education Vol. 3 No. 1 pages 157 - 158. Read also Armytage L, "Towards Professionalism in Continuing Legal Education - Some Questions of Policy and Practice" 1990 Journal of Professional Legal Education Vol. 8 No. 1 p. 139. Read also Nield S, "Assessment - Some Lessons from Hong Kong", a Paper submitted to the Third International Conference on Lawyers and Lawyering held from 8 - 11 July 1993 at Low Wood Conference Centre, Lake Windermere, England.

More importantly, course assessment may be considered in the wider societal context of developmental needs. For example, in the USA when the effectiveness of the entire system of clinical legal education became a heated national issue, a special committee of the Association of American Law Schools on Clinical Legal Education was established in 1986 to examine a broad range of issues related to live-client, in-house clinical education.³⁵⁰ To effectively perform their "daunting task" members divided themselves into sub-committees on:

- (a) Pedagogical justification of live-client, in-house clinics.
- (b) Data collection involving the survey of sample clinicians to determine the areas of need.
- (c) Examination of key issues of clinical education as seen through the eyes of those who teach in that setting.
- (d) Drafting a series of minimum guidelines that could be used by clinical teachers in the assessment of their clinical programmes.

The Report emphasises the need for clinical teachers to articulate clearly their programme goals and to structure the case selection, faculty/student ratio, seminar components and other programme facets so as to be consistent with those goals. Their recommendations were designed to call attention to the need for clinicians to develop structures that will enable them to keep abreast with developments that have affected and will affect clinical education. Within this wider context, therefore, and taking the example of the reaction of the American Association of Law Schools, additional lessons may be learnt from the process of course assessment in skills-development programmes.

As to the actual assessment of students, it may take the form of "continuous assessment", involving the assessment of a student in each particular aspect of the training by a supervisor who remains with the same group throughout the course. It is a protracted method of assessment as opposed to the "live performance" assessment which is implemented through many methods: it may be a vivace assessment; assessment during an interview or negotiation exercise; assessment of a written

³⁵⁰ The Report including a wide range of recommendations has been published as "Report of the Committee on the Future of the In-house Clinic" 1992 Journal of Legal Education Vol. 42 No. 4 pp. 508 - 574.

answer to a legal problem, etc. The two methods use different means to achieve the same objective.

The other point relates to the issue of procedure which normally works through assessment guides designed specifically for the skills being assessed. The grading which gives the final feedback on the performance being assessed is part of this procedure. In practical training courses Pass/Fail grading is preferred to First/Second/Third Class grading system. The importance of serious supervisor involvement in these procedures of assessment need not be over-emphasised.

9.C.5 Facilities and Equipment

Related miscellaneous issues can only be mentioned in passing without, of course, minimising their important contribution to the success of the practical training courses. Issues relating to the time-framework within which to accomplish the objectives of the courses, their financial implications, staffing, teaching materials, and many other items of logistical importance have caused endless debates.

For the purpose of this discussion, it is more realistic to consider some of these issues from the point of view of constraints rather than advantages to the whole process of practical training. Most writers are agreed that practical training courses are extremely costly, because of the restriction on the number of students that can be accommodated in the programme; recruiting staff with special attributes of practitioner/teacher qualities has not, in most cases, been easy; equipment, like teaching materials, is not easy to come by,³⁵¹ human and physical resources, too, are often not easy to mobilise - thus presenting all sorts of challenges to the noble objectives of the practical training courses.

9.D THE NEW DIRECTION FOR THE BOLESWA COUNTRIES

With the conceptual and analytical exposure of institutional management of skills-development through practical training courses now in full view, one may be left wondering where jurisdictions in the BOLESWA countries can fit or find their niches

³⁵¹ The only comprehensive teaching source book we are aware of is the book by Gold N, Mackie K, and Twining WL., Op. Cit.

within what may appear a complicated set up of skills institutional management system. As previously stated, universities in the three jurisdictions are currently strategically poised at different positions of approach, but they all share a common front, namely: the policy, supported by the university statutes establishing the universities and their respective faculties/departments, is to educate lawyers in the universities. Currently only a limited scope of practical training courses are available at these institutions.

The National University of Lesotho (NUL) and the University of Swaziland (UNISWA) provide practical training in the form of Procedural/Adjectival Courses and Moot Court Trials in the B.A. (Law) programme and courses, highly academic in approach, in Trial Practice, Conveyancing, Legal Research, and Legal Ethics in the LL.B programme. The step that the University of Botswana (UB) has taken ahead of its counterparts is to introduce a Clinical Legal Education Course consisting of clinical-based and internship/placement-based training. The narrow scope of practical training at NUL and UNISWA also apply to UB. Apprenticeship training of the nature of serving articles also applies in all three jurisdictions.

Characteristically, and more so for Lesotho and Swaziland than Botswana, there is a lot of unease about the quality of legal education in preparation for competent practice. This is inevitable, considering the above nature and scope of practical training offered. As for the future, the current thinking in Lesotho supports our contention. This was illustrated by one lecturer, then at NUL, who not only deplored the position, but went ahead to recommend that the setting-up of a well-designed legal clinic could not only enhance the teaching of practical professional skills, but, if well structured, could also serve the community in increasing access to legal services, especially the poor, and could also be used to broaden the outlook of prospective lawyers vis-a-vis social needs.³⁵² According to him, the idea of introducing a Clinical Legal Education Course would be "a new item on the agenda" for the required change. He increased the item on the agenda by his inclusion of a Regional Law Institute to provide centralised facilities for clinical legal education, specialised courses under the continuing legal education

³⁵² Kalula E, "Legal Education, Teaching and Research in Southern Africa" A Paper (unpublished) presented to the Symposium of Educational Research in Southern Africa held from 7 - 11 August 1989 in Gaborone, Botswana. p. 9.

programmes and for advanced research in Roman-Dutch Law.³⁵³ This impressive future thinking has, however, remained on paper.

A similar viewpoint lingers in the minds of many academics in Swaziland. This is evidenced by the recommendation of the Department of Law as contained in their Proposed Restructured Programme in Law where it is stated that in the absence of a formal post-university vocational training institution of practical training in skills, the Department recommends that the proposed curriculum should reflect a substantial emphasis on the vocational aspect of the degree; that the curriculum should have a built-in vocational aspect starting with the Fourth Year of law study and continued into the Fifth Year of the programme; and that the best way of implementing these proposals is to introduce clinical legal education programmes the details of which were also recommended.³⁵⁴

The above sentiments at NUL and UNISWA should be viewed as encouraging positive thinking towards new directions aimed at improving skills-development programmes at the two institutions of high learning with some clue to the introduction of another institution for vocational training programmes. As for Botswana, the status quo appears to prevail, perhaps for obvious reasons, namely that having just introduced the clinical legal education courses and because available reports speak favourably of its performance, especially the legal aid clinic, six years of operation is just too early to suggest new directions without giving the opportunity for the current programmes to take roots and bear long-term fruits. The question then is: are the clinical legal education courses now in the minds of the legal educators in Lesotho and Swaziland, and already on the ground in Botswana, the right steps in the right direction? Are clinical legal education programmes the only answer to the practical training needs of lawyers in these jurisdictions? How much do we know of the content and qualities of such programmes?

Any reaction to these questions must clearly take into account the problems associated with clinical programmes, especially in the United States, where they

³⁵³ Kalula E, *Ibid.* p. 10.

³⁵⁴ "The Proposed Restructured Programme in Law" A Paper prepared by the Department of Law of UNISWA dated March 1991. It contains recommendations for such restructuring currently under consideration by Senate.

originated and have gained remarkable ground on the fight against inadequate preparation of lawyers for practice. There is a danger in thinking that because the programme has succeeded in the law schools of the universities in the United States, it will also succeed in the BOLESWA countries. "Not all that glitters is gold" is a warning to keep in mind when importing the concept and practice of those programmes, especially when one considers that LL.B. in the States is a postgraduate education within a completely different socio-economic environment.

It goes without saying that there are problems in running clinical programmes. The critics of clinical legal education have attacked it from all angles including those which are not only political and socio-economic in nature, but are also academic and administrative, the details of which may not be in the present interest of this discussion³⁵⁵. It will suffice to note that some of the traces of those arguments are still being pursued in the BOLESWA countries to the detriment of the good intentions on clinical programmes. This statement is being made against the background of our research in the region which reveals a few of those traces.

An example of the attitude of some lawyers can be found in a recent statement which argues that "it should be emphasised that no system of legal training can prepare competent lawyers. Important professional skills are learnt 'on the job' and are acquired with experience. Moreover, the Faculty (of Law) has to prepare lawyers not only for the private practice, but also for performing a variety of developmental roles."³⁵⁶ If by 'on the job' training reference is being made to the apprenticeship system of training, then our earlier discussion of the shortcoming of the system, especially in the developing countries, is a sufficient answer. But if by that the author means from the faculty the graduate should immediately join legal practice and acquire the skills of the profession 'on the job' and through experience, then we are in total disagreement for the same reasons that we support a system of skills-development training for competent legal practice. Besides, to argue that the Faculty of Law has to prepare lawyers not only for private legal practice, but also to perform other roles as a reason for not offering

³⁵⁵ Professor Twining WL, lumps some of these objections under the heading "the luddite fallacy". See his work Op. Cit.

³⁵⁶ Professor Kuma U, Op. Cit. His same arguments are also reported in "Legal Scholarship in Lesotho" published in Legal Scholarship in Africa (1988) Marco Guadagni Edn. p. 88.

practical training in the faculty is to deny the faculty the achievement of its very objective which is to prepare students for the practice of law, regardless of where that practice takes place.

It has also been recently argued that the reason why Botswana did not consider establishing a post-LL.B institution for training legal practitioners was because "such an institution was deemed too costly."³⁵⁷ The validity of this argument may be appreciated for a small country like Botswana even in the circumstances of her economic resources, but it cannot be pursued too far in the circumstances of the aims of regional co-operation, especially the Southern Africa Development Conference (SADC) whose headquarters are ironically in Botswana. The thinking, which is supported by the writer, should rather be towards establishing the regional law practice in Lesotho.³⁵⁸

Our research has also revealed, and this is supported by our personal experience in the BOLESWA countries, that not only are the teachers with practical training qualifications and/or experience few, if any, but there is an attitude of some resistance in giving them full-time tenure or, in the alternative, they are strictly assessed for tenure by traditional classroom and scholarship criteria giving the impression that they are after all "second-class citizens."³⁵⁹

The greatest danger to accepting clinical programmes is to evaluate its success with the amount of services it provides for the indigent members of the society. This is particularly true in developing countries with poor and limited access to legal services. The programme may well serve the interests of the clients to whom all efforts are directed while losing sight of their educational value. It is yet to be established through empirical research that the favourable reports on the Botswana programme is not associated with the success to clients rather than to the educational objectives for which the programme was established.

The above and many other signs of "dragging the feet" on issues relating to skills-development for lawyering competence in the BOLESWA countries causes some concern over the delivery of legal services in these countries. It is at this point that one begins to seriously wonder what the new direction on the matter should be. Whatever

³⁵⁷ Nsereko DDN, Head of the Law Department, University of Botswana. Op. Cit.

³⁵⁸ Kalula E, Op. Cit.

³⁵⁹ A befitting term used by Datile NF, Op. Cit. pp. 4 - 5.

thoughts are on the issues, development initiatives in this area must encompass an acknowledgement of a variety of institutional structures, course models, different teaching methods and assessment procedures. But first and foremost, one has to start by resolving the institutional issues. In that respect university legal education in the BOLESWA countries has to receive the first attention. The clinical legal education programme offered by the University of Botswana, as a model to which the other universities look to as a guide, has to be revisited. There is a convergence of interest from all quarters, as evidenced by the criticisms already mentioned, in the improvement of the training of lawyers for legal practice. Time has come to see the role of the faculties/departments of law in the universities of the BOLESWA countries as fundamental restructuring of legal education to meet the wide range of professional needs and occupational opportunities. It is these institutions which can mobilise the necessary capacity, in terms of facilities, equipment, resources and personnel for proper professional preparation. However, in this preparation, not only emphasis should be placed on the intellectual skills-development - such as legal writing, problem solving, fact evaluation and legal research, which are skills closely associated with traditional classic education, but practical skills of the nature and content referred to above should also be equally and effectively emphasised. There could not be a more appropriate objective of legal education than the inclusion of these types of approach to it.

Secondly, the language and attitude which are divisive of the practitioners from the academician has to be set aside. The rigid categories of institutions of legal education characteristic of the English system of stage-by-stage education along the lines of the Ormrod recommendation should be discarded because they lead to inflexibility, lack of contact and interaction between teachers, disjunction between stages, and absence of "academic" input at the professional stage and of "professional" inputs at the academic stage.³⁶⁰

The above argument is not inconsistent with the recommendation for the establishment of a vocational training institute, preferably of a regional nature as suggested. This type of institution should, however, not take the characteristics of the

³⁶⁰ For details read Mackie K, "Professional Legal Skills: Report of a Workshop" (1987) J.P.L.E. vol. 5 No. 2 pp. 18 - 19.

professional institutions in England. Rather, they should be of the hybrid natures discussed earlier. Its sole objective, as far as practical training is concerned, would be to bridge the gap between university education and legal practice. The management of such an institution should be the responsibility of a neutral organ of the nature of a Law Council or Council of Legal Education composed of all interested groups of the legal profession including the government.

The proposed new (regional) institution would then embark upon designing a practical training course that is ideal for the purposes of legal practice in the region. Such a course could take into account the arguments we have advanced in the preceding paragraphs concerning course design, teaching methods, course assessment and other related issues. In designing that course, the emphasis must be placed on the training of legal practitioners for competent and efficient legal services of the nature also already discussed.

Practical training is the most expensive model for legal education because direct teaching and assessment of professional skills is perceived to be labour intensive, a factor which has inhibited its development.³⁶¹ There is no question that to be effective, practical training must be adequately financed. In view, however, of our earlier arguments in favour of the important role of education generally and legal education in particular in the national development of the countries in the region of Southern Africa, it is perceived that the necessary financial support should always be found.

³⁶¹

Ibid.

CHAPTER 10

CONCLUSION

10.A AN OVERVIEW

This thesis represents the result of an ongoing concern on the part of the writer for legal education and professional training which would be beneficial to the individual recipients (students of law) in particular and consumers in general (society at large). Its completion marks an important milestone on the road to a study towards making legal education a development-oriented process worth pursuing especially in Eastern and Southern Africa where the writer has witnessed not only severe criticism on the quality of legal education but the limited efforts made by governments, academicians and professionals to direct and control legal education so as to design its development to social needs.³⁶² However, these efforts appear to be making little headway. The legal system and the legal profession in these countries has been founded and still operates on structures buttressed by colonial pillars traditionally erected in response to different social demands which were "western" or "European" in nature - notably the capitalist economy emphasising private enterprise. The result has been to subject legal education, an integral part of the received legal system, to a series of legal issues and problems which haunted legal educators and scholars in Africa for the past two to three decades and, therefore, had to be met head-on by all those concerned with developing legal education to meet social needs.³⁶³

The fundamental aim of this study has been to analyse some of these issues and problems through an intensive and extensive examination of legal education and

³⁶² In the 1970s and early 1980s the writer was involved in professional practical training at the Law Development Centre in Kampala, Uganda, where as Director of the Institution, he was at the Centre not of those criticisms but also at the source of initiatives taken to improve the quality of legal education for better service to society. From 1988 to 1992 the Universities of Botswana, Lesotho and Swaziland embarked on programmes of evaluation of legal education in which the writer took keen interest, resulting in the desire to compile a report which forms the content of this thesis.

³⁶³ The Literature review annexed to Chapter 1 is a clear manifestation of the efforts towards addressing some of those issues and problems.

training within the context of national development.³⁶⁴ The BOLESWA countries were chosen for the study because of their shared historical, socio-political and economic setting and developmental values and aspirations which clearly bring to focus some of the issues and problems of development-oriented legal education currently being experienced and debated. The origin of these problems is, however, not new. Traditionally people trained in "western" law were considered central and critically instrumental in shaping society and as such their education and training occupied important status. This study traces how the changing nature of modern society and of legal roles in terms of structures and functions are reflected in and have influenced the orientation of legal education and training, legal career patterns, the work-setting of law-trained persons, their distribution and delivery of services, etc. It assesses these changing roles with a view to having them adjusted to suit the new demands of society in the BOLESWA countries of Southern Africa; and argues for the theory that to be responsive to the needs of society lawyers have to be trained in such a way that they are able to appreciate the importance of social goals and contribute to the full satisfaction of those goals. Central in all the arguments is the thesis which advocates the designing of a fresh model of legal education which emphasises skills development as the most appropriate for development-oriented lawyers needed in the BOLESWA countries of today and tomorrow.

In Chapter 1, it was pointed out that with the achievement of independence during the 1960s most African countries questioned the role of law and its instructions, including the legal profession and legal education in the context of the newly independent states. Eminent scholars who headed various government commissions called for, among many other of their recommendations, localisation of law programmes, broadening of curriculum and greater emphasis on skills, research and other strategies to bring law, lawyers and the entire legal process into the mainstream of development. In the same chapter, we gave a brief historical analysis of why it became necessary to question the role of lawyers and their education and our conclusion was that there was

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In 1988 when the writer assumed duties as Law Lecturer at the University of Swaziland the debate on legal education had already gathered great momentum. The five year law programme, which marked a fundamental departure from the traditional two tier, six year programme, introduced by the University of Botswana around this time had already set in motion serious rethinking about the law programmes in the Universities of Lesotho and Swaziland.

little literature about the way social change actually shapes legal roles, and about the capacity of legal education to influence development. Hence we expressed the need to pursue research the aim of which, amongst others, is to provide an analytic document which would contribute to the ongoing debate on legal education and training in development. The objective has been to develop arguments which would bring into sharp focus the importance and role of skills-development programmes in providing the foundation upon which legal roles can be effectively directed to meeting the needs of social change. Not only our research objectives but general methodology and detailed procedures of obtaining the desired and related information in support of our above thesis are all discussed in Chapter 1.

In the process of our research, it transpired that in shaping legal education and law for development, researchers during the colonial era and the period immediately following independence proceeded on the assumption that the law is both effective and capable of solving the problems of development. In Chapter 2 we questioned this assumption and argued that a meaningful process of examination of law and legal institutions, including lawyers and their education, must proceed from a clear appreciation of the role and place of law and its institutions within the wider social context - a context which demands an understanding of the interaction of law with political, social and economic factors and which gives a more complete perception of the social role of law. Our arguments and conclusion as reflected in Chapter 2, therefore, go to support this kind of broad approach in analysing developmental issues. We even went beyond to argue that not only must such analysis be broad enough to encompass holistic social factors, but must emphasise the limitations placed on law and legal process, thus rendering them ineffective in contributing to development.

In the context of analysing the issues of lawyers and their education, our conclusion was that in pursuing any debate on any of those issues in the BOLESWA countries, we need first to establish the relationship between legal education and development and assess how social needs can best be achieved through the system of legal education and training. We need also to ascertain the limitations, if any, to the effectiveness and success of the contribution, and, if necessary, propose alternatives that can eradicate and/or minimise the barriers, thus enhancing the chances of law,

lawyers and legal education to serve the fundamental human needs of society. Our agenda to achieve those aims through research is set out at the end of Chapter 2. The fundamental conclusion there emphasises an approach to the research on law, lawyers and legal institutions in a framework which is broader than just a legalistic enquiry. Our conviction is that our approach should greatly assist society to understand better the role of law/lawyers in the process of change and development management. Law alone cannot be the instrument of change for development. That is why the broad social approach was accepted and emphasised. The agenda outlined at the end of the chapter reflects that type of approach which we have adopted throughout this study.

Chapter 3 represents the application of the hypothesis argued in Chapter 2 to the social realities of the BOLESWA countries. The reasons for the focus for our studies on the choice of BOLESWA countries was given. It also became necessary to invoke the terminology of most writers on the issue with whose approach we would like to associate this particular study, i.e. the study of law/lawyers in the socio-political economy context of the society in the BOLESWA countries.³⁶⁵ Of particular relevance to the study is the argument that the relationship between the modern and the traditional sectors of the economy determine very significantly the role and operation of the law and its institutions.³⁶⁶ What has emerged from the discussion in Chapter 3 is that in the case of the BOLESWA countries there are several social factors like the feudal system providing a specific cultural impetus to the development of Swaziland - and to a certain extent of Lesotho; the rich economy of Botswana; the military rule which dominated the government of Lesotho in the 1980s; the population growth in the three countries; the already existing colonial structures and many other historical, cultural and political factors which have combined to determine the impact of law and lawyers on development. Our conclusion, therefore, is that one must take all these factors into account when assessing the extent to which law, lawyers and legal processes contribute to development. In our view, the relevance of these factors should be assessed for purposes of designing legal education and training which will equip development lawyers with the necessary knowledge and skills to perform their tasks, demanded by

³⁶⁵ Spearheaded by such writers as Ghai Y, Seidman R, Dias C, Paul J, to mention just a few.

³⁶⁶ Ghai Y (Ed), Law in the Political Economy of Public Enterprise (1977) Op. Cit. Read especially the "Introduction".

social needs, effectively and efficiently. We perceive of law and lawyers to be active and knowledgeable participants in the ongoing struggle to attain economic, political and constitutional development, national integration and socio-political stability. We see law and lawyers involved in the process of building the whole social fabric and holistic human values - all of which can only be possible in the social context within which they operate. But in the case of the BOLESWA countries, given the influence of the socio-economic and political forces discussed in the chapter, the role of law/lawyers to progressive and sustainable development continues to be limited and problematic.

The thesis also provides in Chapters 3 and 4 a comparative perspective to the analysis of legal issues in the BOLESWA countries. We recognise the fact that the problems of legal education with which the study is concerned are, as in other areas of development, so similar in their post-colonial societies that there are benefits to be derived from cross-border comparison of experiences. Whereas Chapter 3 analysed issues of socio-political economy nature, in Chapter 4 the aim was to analyse the status and role of legal education and training in the BOLESWA countries with a view to establishing the factors that have and are still influencing its contribution to development.

In tracing the specific features of legal education in these jurisdictions similarities in programmes were established but more importantly certain gaps resulting in specific problems were also identified. Practical training in professional skills, amongst others, was found to illustrate the widest gap between objectives of legal education as conceived and the practical experiences in providing skills-development programmes as exists on the ground. Even where an attempt was made to provide such training as in Botswana, much was still found to be lacking in what was referred to as a "model" for the region. The critical point which Chapter 4 supports and advances is that there are a variety of human skills which can be identified as those commonly used in the profession of law; that each of these skills can be taught and applied; and that there is no academic justification for their exclusion from the university curriculum or the curriculum of any other institution chosen to impart those skills. What is even more important is that they should be taught and applied in the most appropriate

(educationally functional) setting since their aims are valuable within the context of legal education and legal practice for development.

Unfortunately, when we sought guidance from past and present research on the above critical issues, we disappointedly only discovered a gap in the literature on the subject of skills-development or practical training of lawyers in the region capable of answering the above question. We thus realised with serious concern that to uncover the importance and role of skills-development, we needed to go beyond the research of the South African writers in our literature review. Chapters 6, 7 and 8, therefore, embody the results of our survey in Swaziland in an effort to contribute towards greater and deeper knowledge about the importance of skills to lawyers. The critical point about this survey remains the desire to establish the historical, cultural, political, legal and other social forces that have played a major role in limiting the influence of law, lawyers and the legal process, particularly legal education in Swaziland. The result, we have established, was the introduction of a system of legal education which could hardly meet the needs of lawyers for competent practice and this has led to severe complaints to which we made specific reference in the thesis.

Our analysis of the results of interviews also reveals that political developments in Swaziland are now such that lines between the rights of citizens to criticise their leaders, their cultural values and the offence of treason against the King need the handling of adequately trained practitioners who are competent in Constitutional and Administrative law rather looking upon South Africa to produce such practitioners for Swaziland. With the enactment of the Employment Act and the Industrial Relations Act³⁶⁷, and the resulting confusion and endless disputes in the areas of industrial relations, there are serious changes in the attitude of government, employers and employees -all of which require competent practitioners with a deep knowledge of collective bargaining and other aspects of industrial relations. Public corporations are increasingly involved in industrial and agricultural development; commercial interactions are becoming more and more complex, attracting even more international expertise, the negotiations and drafting of contractual and other transactional documents are increasing in number and complexity; international financial activities including taxation,

³⁶⁷ Act No. 4 and No. 5 of 1980 of the Laws of Swaziland.

insurance and banking are now more common than ever before - all of these and many other transactions within the scope of legal practice require not only sufficient number, but the competence about which few lawyers in Swaziland can boast.

Chapter 5 presents the heart of the thesis by arguing for the development of a fresh model of legal education that emphasises skills-development, as the most appropriate for competent legal practice. The basis for the argument is the failure over the years to provide adequately equipped development-oriented lawyers with the result that in the BOLESWA countries, as illustrated by the study in Swaziland, (Chapter 8) law-trained persons were not only making legal services unavailable to the majority of the citizens, but lacked the necessary competence to meet all the legal needs of the society.

The problem of assessing the legal needs of society was addressed and workable criteria were identified and applied in the case of Swazi society. As to competence, we discovered that, like legal needs, its assessment is problematic. But we established that it can be measured by the extent to which an attorney: (1) is specially knowledgeable about the fields of law in which he/she practices; (2) performs the techniques of such practice with skills; (3) manages such practice efficiently; (4) identifies issues beyond his/her competence relevant to the matter undertaken, bringing these to the client's attention; (5) properly prepares and carries through the matter undertaken; and (6) is intellectually, emotionally and physically capable. Can all the attorneys in the BOLESWA countries measure up to these qualities?

We also found out that when a citizen is faced with the need for an attorney, he wants and is entitled to the best informed counsel he can obtain. Changing times produce changes in the law and legal procedures such that the complexities of law require continuing intensive study by an attorney if he/she is to render to the client the maximum of efficient service. In doing so, he/she maintains the high standards of the profession; and he/she also increases respect and confidence by the general public.

In this respect we would like to observe in our conclusion that it has in fact been declared that there are no simple tests for quality of legal services.³⁶⁸

³⁶⁸ Statement by the Benson Commission found in the Royal Commission on Legal Services in England and Wales, Cmnd. 7648 HMSO 1978 para 22.3 and 4.

Not only are we agreed with these sentiments but even support the view that notwithstanding that problem, all those involved in the law make quality judgements as part of their everyday life. Clients recommend lawyers to their friends; lawyers make remarks on their successes and failures; partners promote (or fail to promote) their staff; law lecturers mark examination scripts - to mention a few of those instances where everybody involved with lawyers expresses his/her views freely about lawyers' competence or lack of it. The difficulties come in formulating and committing oneself to explicit criteria.³⁶⁹ We attempted to identify the characteristics of competence in terms of skills and performance outputs and made suggestions for core/master skills for development lawyers.

Chapter 9 focused on the new direction that we envisage the BOLESWA countries to take on the road to establishing a suitable institutional base for managing skills-development programmes. Different models of practical training courses, teaching methods, assessment procedures and other management issues were discussed with a view to suggesting what is suitable. That suggestion is detailed in paragraph 9.D. and in Chapter 10, paragraph 10.B.

One aspect of limitation in our study to note at this stage relates to the relatively small number of lawyers who showed willingness to co-operate with us during our research. Perhaps the fact that the research was being conducted by a foreigner could have played a role in the lack of interest, and other constraints such as financial resources and time factors could also have contributed to a fully satisfactory information collection process. However, the content of the nine chapters reviewed in the preceding paragraphs evidence an earnest desire to overcome all hurdles in the research.

In view of the above, our efforts cannot lay full claim to success in attaining the objectives we set ourselves at the beginning of the thesis. These, however, go to strengthen the hope that the analysis will successfully prompt further debate, further

³⁶⁹ Tamara G, "Debating the Quality of Legal Services: Differing Models of the Good Lawyer". A Paper presented to the Third International Conference on Lawyers and Lawyering held at the Low Wood Conference Centre from 8 - 11 July 1993, Lake Windermere, England. Read also:
(a) Travers M, "Measurement and Reality: Quality Assurance and the Work of a Firm of Criminal Defence Lawyers in Northern England". A Paper prepared for the same Conference; and
(b) De Groot John K, "Evaluating Lawyer Competence: An Approach to a First Stage in the Process". A Paper presented at the same Conference.

experimentation and further support from all concerned with legal education. Different jurisdictions have, over the years, reacted differently to criticisms that legal education and training lack the practical professional approach to sufficiently prepare the aspiring practitioners for the practice of law. What remains a fact is that skills-development programmes, an important approach to the practical training movement, is currently undergoing new discoveries and experimentation as our discussion has illustrated. For that reason alone (and there are many other reasons) it deserves the support, encouragement and participation of practitioners, academics and administrators within the legal world.

In the case of the BOLESWA countries, and especially of Swaziland, our study was intended to provide an information base for decision-making about the development of skills so as to make legal education and subsequently legal practice responsive to the needs of new practitioners who join the profession either in the public or private sector. We were also concerned with determining the content of the entire curriculum of the law programmes to establish whether what is available adequately reflects the domain of legal practice for which the programmes were designed to prepare its students. These, and other objectives set out in Chapter 1, have accordingly been achieved to our satisfaction. In motivation of this fact, it should particularly be noted that our objectives as set out in paragraph 1.C. of Chapter 1 have been met in the following manner:

1. In Chapter 1, by identifying the critical issues of concern in legal education as provided in Africa generally and in the BOLESWA countries, we were able to place legal education and training within the main stream of the debate on contributions of law, lawyers and the legal process. The analysis in Chapter 2 strengthens that point and the agenda provided therein established the framework for analysing the source and magnitude of the issues raised (see paragraphs 1.C.1 and 1.C.2).
2. The review of documents was achieved by our literature review as illustrated by ANNEXURES II. Besides, the wide range of documents consulted during the entire analysis as evidenced by the bibliography appended go to prove beyond doubt the achievement of our objective in paragraph 1.C.3.

3. The objectives set out in paragraph 1.C.4 are achieved through the analysis in Chapters 3-8. It is in these chapters that using systematically acquired information we were able to discuss all the issues raised in the said particular set of objectives.
4. As earlier stated, Chapter 5 represents the heart of the thesis for it is in this chapter that we have made our fundamental suggestion for a fresh model of legal education that emphasises skills-development. Equally important and related suggestions are laid down in Chapters 6-8, thereby fulfilling our objective in 1.C.5.
5. The completion of the analysis in the form of the volume that it has taken marks the contribution, we hope, of a useful document on skills-development for competent practice of law. Its availability is a contribution to the ongoing debate on legal education and training in the BOLESWA countries specifically and in Southern Africa, indeed the entire Africa, in general (see paragraphs 1.C.6 and 1.C.7).

10.B EMERGING CHALLENGES WITH RECOMMENDATIONS

10.B.1 Professional Legal Education for Development

While the focus was on skills-development, nevertheless we are convinced of the important implications of the study not only to legal practice but to specific aspects of national development. For example, from our study one can conclude that the nature of legal practice in the BOLESWA countries, as indeed is the case throughout the world, is changing greatly and these countries face rapid changes during the 1990s and beyond. Our strong suggestion is that professional legal education in these countries should, therefore, aim to produce flexible, creative adoptive problem solvers whose potential abilities as lawyers should extend far beyond their certification as having passed a set of knowledge-based examinations on legal information which will inevitably become rapidly out of date. As properly observed by Gold N, the experience of other jurisdictions with skills training for lawyers is that it produces graduates better prepared to take on practical and unpredictable exigencies of legal practice. All the overseas advisors confirm this from personal experience in their own countries. We not only agree with

them, but go further to assert that law/lawyers in development must be conceived and applied along those critically important lines.

10.B.2 Legal Practice and Development

Full-time lawyering occupation as a measure of professionalism does not offer much of a challenge to the legal profession in the BOLESWA countries. The evidence of the historical survey of the legal profession in the region (especially in Swaziland) shows that over the years the government's regulatory control by statutory enactments has eliminated possible part-time legal practitioners like the "law agents" from Scotland who could "practice law" under the Legal Practitioners Act, 1955 of Swaziland. In the BOLESWA countries law practice, whether as counsel to government ministries and agencies, judges and magistrates and private practitioners, has always been a full-time occupation.

However, one related issue to which some attention should be directed concerns unauthorised law practice which, in Swaziland, is an offence under the Legal Practitioners Act³⁷⁰. In an article entitled "Bogus lawyers raise concern" appearing in the Times of Swaziland (Friday 1 March 1991), it was reported that "Bogus lawyers operating all over the country have swindled scores of innocent people coming to them for help" and that they "pose as genuine legal practitioners, claim to be able to register companies on behalf of their clients and give all forms of legal advice". It, therefore, becomes a challenge to the legal profession to prevent unauthorised practice of law. The prohibition against the practice of law by a layman is grounded in the need of the public for additional lawyers with integrity and competence of those who undertake and profess to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of the legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

³⁷⁰ Section 26(1) and (10) of the Legal Practitioners Act No. 15 of 1964. Similar provisions exist in Lesotho (see Section 31(1) and (8) of the Legal Practitioners Act No. 11 of 1983. However, this Act goes further in Section 33 to specifically prohibit part-time practice unless with consent of First Law Officer (see also Section 28(2)(c) of Botswana's Legal Practitioner's Act Cap. 61:01).

10.B.3 Training Model for the Profession

The Legal Practitioners Acts of the BOLESWA states provide for holders of university degrees from recognised universities who have served the required period of articles as persons eligible for admission and enrolment as attorneys or advocates. This sets two models of training for the profession: (i) the academic model; and (ii) the apprenticeship model. Because of the potential demands for members of the profession, care should be taken to avoid over-emphasising the academic requirements which are associated with liberal education and the role of universities. In a properly planned legal education, not only should emphasis be laid on knowledge of substantive laws, but extensive emphasis should also be directed towards the development and sharpening of lawyering skills which they can apply intelligently and effectively in every aspect of the practice of the profession. In this respect, the first challenge to the members of the profession is to co-operate with universities in their programmes of legal education. This could take the form of advising the universities on the type of curriculum that would be suitable for legal practice, whatever form that practice takes. Lawyers could also actively take part in the practical training programmes of the respective law departments/programmes of each of the universities.

Another challenge to lawyers lies in establishing their own professional vocational institution, for the profession cannot be expected to abdicate all responsibility for legal training and admission to practitioners. Whereas it should have a limited voice in the running of legal education at the university, the profession should have a considerable measure of responsibility for the operation of a professional institution where, amongst other things, skills-development programmes could be organised not only for postgraduate pre-admission neophytes but also for practicing members.

Equally important to the issue of legal education is the challenge of continuing legal education for members of the profession. The availability of such a programme, especially at the professional vocational institute, would reflect the realisation that the need for a "knowledge base" for the profession is being taken seriously not only at the level of primary legal education in the universities or at the postgraduate pre-admission institution but also in respect of subsequent continuing legal education and specialisation for all practicing lawyers including judges and magistrates.

The climax to the challenge for lawyers in the area of legal education appears to be the establishment of a council of legal education consisting of representatives of the Ministry of Justice, the judiciary, the department/faculty of law and the Law Society. Such a body would be responsible not only for the admission and discipline of lawyers, but would also monitor legal education in each country. It would bring together and harmonise views from different interest groups and would set the minimum standards for the aspiring lawyers.³⁷¹

10.B.4 The Formation of Lawyers' Associations

This characteristic of the profession involves, on the one hand, the formal organisation of professional associations, and on the other, the establishment of the necessary networks to regulate its own affairs including the discipline of its members. One challenge which faces lawyers in the BOLESWA countries is whether to have two separate associations for advocates and attorneys respectively in line with a divided profession like in England or South Africa. This raises the question whether the BOLESWA countries need a divided or a fused profession - an issue that needs to be resolved especially as it relates to the nature of the services rendered by both aspects of the profession. We support a fused profession for the reason that it would better serve the need of development, as a divided profession is too expensive for the ordinary citizens.

Another issue of concern to lawyers is their independence to run their own affairs. Government control has often been viewed as exerting pressure to bear upon members of the profession, thus corroding its independence and autonomy. Aware of the shortfalls to the goal of achieving autonomy, members of the profession should continue to demand for that independence, as such interference from other quarters may affect their judgement and professional competence.

In running their own affairs, lawyers must accept the responsibility of implementing and enforcing the regulations imposed on the profession by the law

³⁷¹ A step towards that direction has been taken by Botswana which has established under Section 25 of the Legal Practitioners Act, 1967, a Legal Practitioners' Committee. However, the composition and functions of such a committee should be extended to include the proposals herein recommended.

establishing it. Much as the laws incorporating such associations are of recent origin, for example, in 1983 in Lesotho and 1988 in Swaziland, there is need to give effect to their provisions by organising regular meetings, electing the required committees to implement the rules made by the society and establishing the Fidelity Fund. The future must witness the members of the profession taking the activities of the Society more seriously.

10.B.5 Service to the Public

The study of the management of professions reveals that there are two possible justifications for management schemes in the professions: the internal interest of the professionals, and the external interest of the State and the consumer public.³⁷² Whereas the challenges discussed above are mostly related to the internal interest of the members of the legal profession in the BOLESWA countries, there are even greater challenges relating to the external interest, i.e. the interest to serve. This is one of the fundamental characteristics of any profession worth the name.

The concept of service to the public has two dimensions: the idea that the profession is one of the role players in social development as its services benefits the public as well as its members and the sense of calling to the field reflects the dedication of the professional to his work and his motivation by intrinsic rather than its extrinsic rewards³⁷³. The question being raised for all lawyers in the BOLESWA countries is not whether they believe in or comply with the objective of service; but rather whether they have effectively answered the challenge of service to the public. Our study has revealed that lawyers satisfy themselves by providing that service in the private sector for obvious economic benefits. This selfish reason based on wrong economic premises should not divert the lawyer's role in social development.

One area of concern is the existence of the two-structure profession vis-a-vis a fused profession which exists in most other developing countries. There are arguments for or against the establishment of either structure. However, considering such factors like most advocates are South African based, their employment is an additional expense

³⁷² A point well argued by Ojwang JB and Salter DR, Op. Cit. p. 19.

³⁷³ Odenyo AO, "Professionalism and Change - The Emergent Kenyan Lawyer" Op. Cit. pp. 197 - 198.

to the client. By training attorneys in the region who are equally competent to appear before superior courts, etc., a strong case is made for a shift to a fused profession, which, in Swaziland, appears already to exist de facto.

The geographical distribution of legal service is also an area of concern to which lawyers must address themselves. For, as long as rural areas remain unattractive in terms of business facilities, legal services will remain the monopoly of the urban areas. Is this what the profession would like to encourage? We support all efforts that attempt to decentralise legal services because the right to such service is fundamental to all individuals, irrespective of its cost.

Access to legal services is not only hindered by geographical factors. There is also the question of the size of the profession and the distribution of lawyers in the different sectors of the economy. In all the BOLESWA countries, the largest concentration of lawyers is in the private sector with the public sector absorbing only a small portion. The requirements of development demand that lawyers must perform tasks other than the traditional ones of judge and private practice.

The service to the public includes providing legal services for those indigent citizens who cannot afford to pay the fees of lawyers. In that respect, the establishment of legal aid schemes run by members of the law society should be amongst the many programmes of the profession.

Another serious challenge comes from the delays in the administration of justice. "Justice delayed is justice denied". The causes of the accumulation of arrears of cases in courts must immediately be established and all loopholes blocked, for, unless urgent reforms are introduced, the entire system of administration of justice will break down, as society will lose confidence in it. In the proposed reform, the role of magistrates and para-professionals involved in the administration should be reviewed and the cost of the legal services and for the general administration of justice should also be included in that review by the profession.

The development process in society has introduced new areas of growing demand for lawyers. Intellectual property law, tax laws, industrial relations law, are all acquiring great importance and yet there are hardly any lawyers competently equipped to render services in those areas. Related to this is the issue of new technology which

is becoming a fascinating challenge to lawyers, judges and private practitioners alike. The use of computers by lawyers in other developing countries for storage of swift and easy availability of information has started. Members of the profession in the BOLESWA countries should not be left behind.

As for Swaziland where our study was specifically focused, although it is difficult to produce future employment patterns for law graduates, we can conclude, on the basis of our investigation, that an increasing number of graduates will not enter or remain in private practice, but will find employment as legal advisors in companies, in management positions as management executives or as politicians, bureaucrats and many other top non-legal jobs. There are many who will remain in legal practice but take on specialised functions in line with the increasing technological complexities of modern development. In whatever positions lawyers will find themselves, they will become even more directly involved in shaping the nature of law and legal institutions with far-reaching consequences on all those living in the society. Inevitably they will be involved in social change and in resolving disputes between social values which require competence. The essential object of all social policy is to seek policies and structures to reflect the values and goals of the people. In this respect we share the view that :

"It (legal education) should assist in providing a framework for recognising, articulating and testing alternatives and for shaping the profession and the law to meet the aspirations and necessities of the times ... Inspired in part by their legal education lawyers can and should play pivotal roles in expanding a national vision of a free and just society. Clearly they, that is lawyers and legal educators, must help to map out the directions in which society needs to move to answer the most troubling legal and non-legal questions facing the profession and the nation."³⁷⁴

³⁷⁴ Richardson, The Right Hon. Sir Ivor, "Educating Lawyers for the 21st Century" (1988) J.P.L.E. Vol. 6 No. 2 p. 116.

10.B.6 Towards a Culture of Legal Education for Democracy and Human Rights in Development

While the various legal institutions, especially law faculties/departments of universities in the BOLESWA countries, are considering how and when to restructure their law programmes to reflect the new demands of nation building and development generally, those efforts to generate and share knowledge with others have to be directed towards establishing a culture of legal education for democracy and human rights. This briefly means the kind of legal education and training must ultimately be people-centred aimed at improving their conditions as human beings.³⁷⁵ To achieve this some writers have argued:

"Education in law which is geared to people-centred development can take place in a variety of settings: the media, the classroom, discussion groups and grassroots meetings. But if education in law is to promote the values of alternative development, it must incorporate these values into the practice of 'educating'. The process of learning and generating knowledge must enhance the capacities of the rural poor to use law in their struggles, and also to enhance their power to influence others to understand their struggles and respond to them sympathetically and supportively."³⁷⁶

We not only support such views but recommend that such values of democracy and human rights in development should be reinforced when reviewing the new roles of lawyers and the appropriate education to meet the demands of society in development.

The ideals of equitably distributed legal access are complex in nature and difficult to implement. A satisfactory system of dissemination of legal knowledge and services play a crucial role. This should explain why legal educators have to put on their agenda for discussion issues of legal education for democracy and human rights, as such discussions, based on well researched information, will clear the way for new and alternative ways of improving the conditions of society in need of sustainable

³⁷⁵ For details read our arguments in "Legal Education for Democracy and Human Rights in the New South Africa with Lessons from the American Legal Aid Movement 1993 J.P.L.E. Vol. 12 No. 2.
³⁷⁶ Dias CJ and Paul JCN, "Educating for Alternative Development:: Sharing Knowledge About Knowledge", 1985 Third World Legal Studies Scandinavian Institute of African Studies, Uppsala p. 65.

development, especially those members of the society who are disadvantaged by the system of law and the legal processes including legal services.³⁷⁷ Hopefully, issues raised in this study go a long way in generating more discussion, as was the intention.³⁷⁸

10.C FINAL REMARKS

The purpose of exposing the challenges for the 1990s and beyond is to alert all lawyers in the BOLESWA countries that perhaps the time has come to assess both its structures and functions with a view to adjusting them to suit the new demands of society which expects that even under those new situations, legal services must not only be available, but must be efficiently delivered to the public.

But, for lawyers to be responsive to the needs of the society in which they operate, they must be trained in such a way that they are able to appreciate the importance of community goals and how to satisfy them. "This means that the institutions that are set up to train lawyers must be clear as to the kind of legal education they must offer, one which must produce lawyers who are adequate for the needs of the country".³⁷⁹

It is our hope that the above aspirations which we share remain the objectives of legal education in the BOLESWA countries and although our approach to identify the nature of legal work through needs, jobs, tasks and skills analysis is new in the region, the study speaks for itself in terms of the depth and breadth of issues that are raised by our analysis of skills-development and objectives of legal education in developing societies like those in the BOLESWA countries.

Finally, we strongly believe that our study can be received and appreciated as an eye-opener on the size of the task faced by proponents of skills-development. To that extent it can form a basis for networking within and across national boundaries. For, like Gold Professor N, we have sought to add knowledge and the next generation will see further changes as we begin to understand better what lawyers do, how they do it and

³⁷⁷ See Iya PF, "Legal Education for Democracy and Human Rights in the New South Africa with Lessons from the American Legal Aid Movement" Op. Cit.

³⁷⁸ See Objectives set out in paragraph 1.E of Chapter 1.

³⁷⁹ Ndulo M, "Legal Education in Zambia: Pedagogical Issues" 1986 Lesotho Law Journal Op. Cit. pp. 77 - 78.

what distinguishes an exemplary practice from its competent journeyman counterpart. When we know more, we shall be able to develop more effective, efficient, powerful and sure instruction³⁸⁰. To us, skills-development for lawyers is the beginning of that process for meeting national goals by lawyers.

³⁸⁰ Gold N, et al, "Learning Lawyering Skills" 1989 Butterworths, London p. VI.

ANNEXURE I

LAW PROGRAMME FOR THE UBLS	LAW PROGRAMME FOR UBBS
<p align="center">YEAR ONE</p> <ol style="list-style-type: none"> 1. Introduction to Law 2. Roman Law 3. Customary Law 4. Communication Skills 5. Introduction to Politics and Administration 6. Introduction to Sociology 	<p align="center">YEAR ONE</p> <ol style="list-style-type: none"> 1. Introduction to Law 2. Customary Law 3. English I 4. Government I
<p align="center">YEAR TWO</p> <ol style="list-style-type: none"> 7. Law of Contract & Sale 8. Criminal Law 9. Constitutional Law 10. Contemporary African Politics 11. Deviance and Crime 	<p align="center">YEAR TWO</p> <ol style="list-style-type: none"> 5. Roman-Dutch Law 6. Criminal Law 7. Philosophy I 8. History of South Africa
<p align="center">YEAR THREE</p> <ol style="list-style-type: none"> 12. Administrative Law 13. Law of Persons 14. Delict 15. Succession 16. Politics of Labour in South Africa 17. Development of the African Working Class 	<p align="center">YEAR THREE</p> <ol style="list-style-type: none"> 9. Civil and Comparative Law 10. Constitutional Law 11. Scots Law I 12. Scots Law II

<p style="text-align: center;">YEAR FOUR</p> <p>18. Criminal Procedure 19. Law of Evidence 20. Law of Property 21. Mercantile Law 22. Civil Procedure 23. Industrial Relations 24. Sociology or Politics</p>	<p style="text-align: center;">YEAR FOUR</p> <p>13. Jurisprudence 14. Public International Law 15. Private International Law</p>
<p style="text-align: center;">YEAR FIVE</p> <p>25. Public International Law 26. Company Law & Partnerships 27. Conflict of Laws 28. Jurisprudence 29. Accounting for Lawyers</p>	<p style="text-align: center;">YEAR FIVE (1st Term)</p> <p>16. Constitutions 17. Evidence 18. Land Law 19. Mercantile Law</p>
<p style="text-align: center;">YEAR SIX</p> <p>30. Legal Ethics 31. Trial Practice 32. Conveyancing and Notarial Practice 33. Administration of Estates 34. Legal Research</p> <p><u>And One</u> chosen from the following: 35. Insurance Law 36. Labour Law 37. Human Rights 38. Criminology</p> <p>All courses are compulsory</p>	<p style="text-align: center;">YEAR FIVE (2nd Term) (PRE-ADMISSION COURSES)</p> <p>21. Civil and Criminal Procedure 22. Local Statute Law 23. Legal Drafting 24. Conveyancing 25. Accounts 26. Professional Ethics 27. Advocacy 28. Office Management 29. Notarial Practice</p> <p>All courses are compulsory except No. 29</p>

SOURCE: (1) The 1964 Gower Report
(2) The 1971 Paul/Twining Report

ANNEXURE II

A LITERATURE REVIEW OF MATERIALS FROM SOUTHERN AFRICA

BOTSWANA

1. A Paper (unpublished) by the Department of Law of the University of Botswana entitled, "Clinical Legal Education Programme (1986) discusses the justification for the establishment of Clinical Legal Education programme in the Department and the content of the programme.
2. The Barr Report of 1986 (Mr Alan R Barr, a consultant who came from the University of Edinburgh to set up the new clinical programme prepared this Report) describes fully the operational procedure to be followed in running the programme.
3. Kakuli GM, "Experimentation in Clinical Legal Education in Botswana" in: The Commonwealth Legal Education Association Newsletter of October 1989, ANNEXURE IV thereof discusses the current procedures being followed in the administration of the programme.
4. Nsereko DDN, "Remarks to the Faculty of Law, University of Namibia Sub-Committee on Legal Education in Botswana" (unpublished) (1992) gives a general analysis of the law programme in terms of its history, content, procedure and new directions.

LESOTHO

1. Kumar U, "Legal scholarship in Lesotho" in Legal Scholarship in Africa (1988) Marrco Guadagni (Edn) contains a comprehensive analysis of the system of legal education in Lesotho. He discusses in particular, Lesotho's legal system, legal profession, development lawyers and a few comments on practical training.

2. Kumar U, "Restructuring B.A. (Law) and LL.B. Programmes", a Paper No. FB/88 (later published in the form stated above) presented to the Faculty Board in 1988 on similar issues like his Paper in 1 above.
3. Rugege S, "Legal Training, Legal Professions and Social Welfare: Some Notes" (1988) a Paper (unpublished) presented to the 24th International Conference on Social Welfare held in West Berlin, Germany. It argued that the content of legal education and the method of imparting knowledge and skills play an important part in moulding the kind of person produced.
4. Kalula E, "Legal Education Training and Research in Southern Africa: New Items for the Agenda" (1989), a Paper presented to the Symposium of Educational Research in Southern Africa held on 7-11 August 1989 in Gaborone, Botswana. It focuses on the several alternatives that can enhance legal education and research in the Southern African context, but particularly in Lesotho. It also examines the need to include a substantial component of practical training in skills in legal education curriculum and analysis the relevance of the present B. A. (Law) and LL.B. programmes in this same context.

SWAZILAND

1. Mlangeni TN, "The Reception of the Roman-Dutch Law in Swaziland (1985), a Dissertation for the LL.M. Degree. It is important in discussing the importation of the Roman-Dutch law system in the country and the relevance to the development of the legal profession.
2. Baloro J, "The Legal Profession in Swaziland" (1988), a Paper (unpublished) which focuses mainly on the legal profession generally in terms of number, size, distribution and education of members.

3. Iya PF, "Clinical Legal Education: Its Concept and Application in Uganda with a Comparative Overview of its Development in Some Countries in Southern Africa" (1990), a Paper (unpublished) on clinical legal education generally, giving a comparative analysis of its nature, scope, development and application.
4. Iya PF, "Developing a Comprehensive Practical Training Programme in a University Law Curriculum - Some Reflections on a Suitable Programme for the University of Swaziland" (1990) 5 Lesotho Law Journal p. 113. The same article was also published in the Uniswa Research Journal (December 1991) p. 22. It gives the characteristics of practical training for lawyers and discusses how the different methods can be incorporated in the curriculum of the law programme of the University of Swaziland.
5. Iya PF, "Educating Lawyers for Competent Practice: Clinical Experience as an Integral Part of Legal Education in the BOLESWA countries of Southern Africa" (1993), a Paper (unpublished) presented to the Third International Congress on the Legal Profession and Clinical Legal Education held from 8-11 July 1993, at Low Wood Conference Centre, Lake District, England. It analyses the development and present status of clinical legal education in the three BOLESWA countries.
6. Magagula Z W, "Legal Education and Practice in Swaziland" (1993) A Dissertation for the LL.B. Degree. It discusses the system of legal education in Swaziland and how the shortcomings in the system affects the practice of law.

ZAMBIA

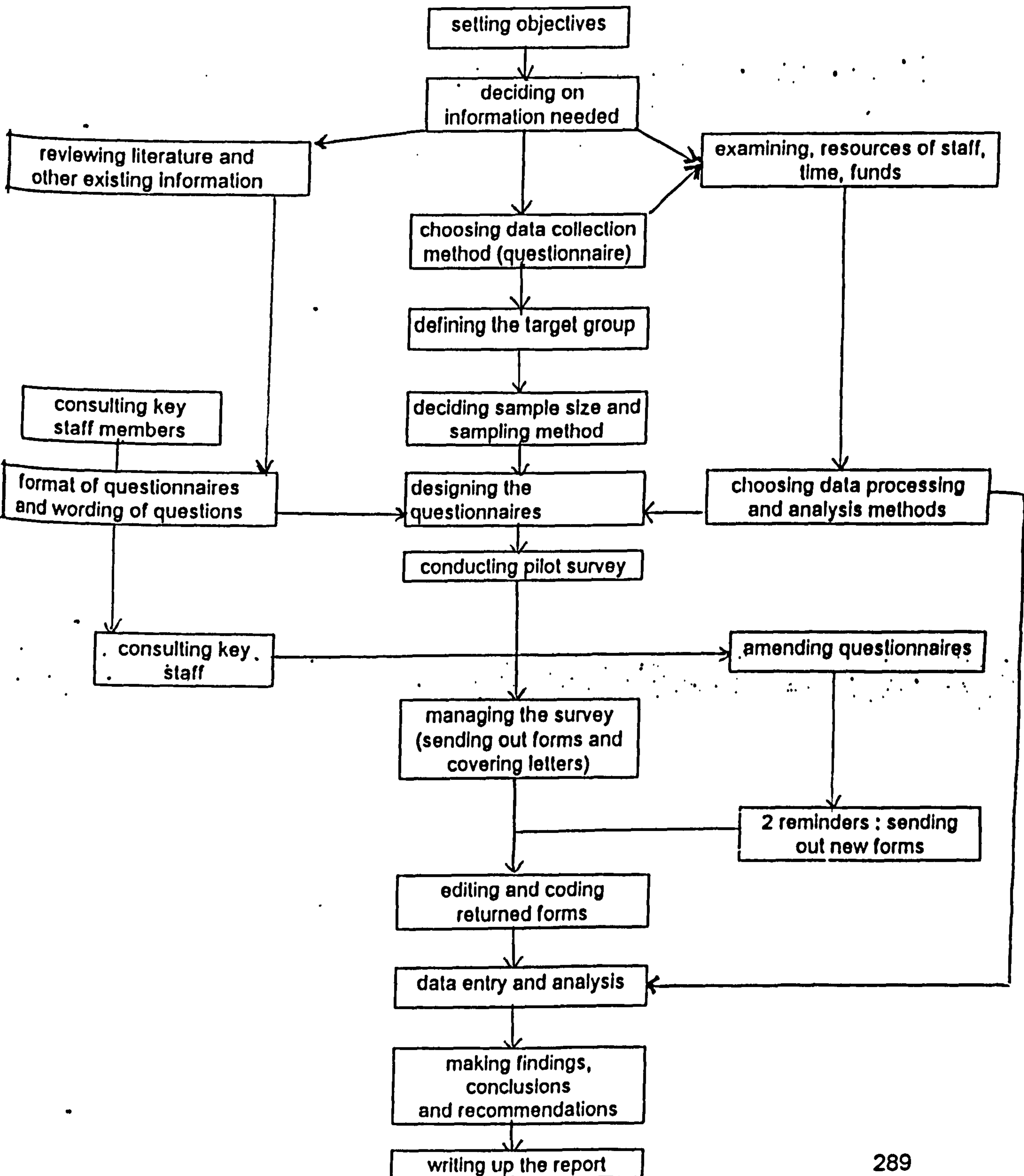
1. Ndulo M, "The Need to Restructure Legal Education" (1985) 11 Commonwealth Law Bulletin p. 513.

2. Ndulo M, "Legal Education in Zambia: Pedagogic Issues" (1986) Lesotho Law Journal Vol. 2 No. 1 p. 75. It analyses the system of legal education generally in Zambia.
3. Himonga CN and Beyani C, "Access to Legal Education and the Legal Profession in Zambia" (1990). Commonwealth Legal Education Association Newsletter. It analyses issues of access but with no reference to the training in skills for lawyers.

ZIMBABWE

1. Gold N, "Pursuing Excellence in Law: Comments on Professional Legal Education and Training in Zimbabwe" (1986), a Paper (unpublished) which presents a very exhaustive analysis of the nature and problems of skills training programmes and discusses the need and methods of conducting research on the subject.
2. Ncube W, "Legal Education and Access to the Legal Profession in Zimbabwe: Past, Present and Future" (1989), a Paper presented to the Workshop of Law Lecturers from the Universities of Botswana, Lesotho, Swaziland and Zimbabwe (the Roman-Dutch Common Law Jurisdictions) held in April 1989 at the University of Swaziland.
3. Ncube W, "The Curriculum at the University of Zimbabwe's Faculty of Law" (1989), a Paper presented at the same time as the one above.

ANNEXURE III
STAGES IN CONDUCTING THE SURVEY



ANNEXURE IV

THE TWO RECOMMENDATIONS OF PROFESSORS GOWER AND PAUL/TWINING IN COMPARATIVE TERMS

GOWER (1964)

1. The distinction between advocates and attorneys should be abolished and the legal profession fused. Those qualifying under the new proposals for legal training and all those already enrolled as attorneys should become "legal practitioners" and be entitled to perform the functions of both attorneys and advocates.
2. The separate designation of conveyancer should be abolished but that of notary public should be retained.
3. Those already enrolled as advocates should be placed on a separate part of the roll and not allowed to practise in Basutoland except on the instructions of a legal practitioner on the general part of the roll.
4. Legal practitioners should be required to take out annual practising certificates and should be removed from the roll unless they do so.
5. Subject to the above, South Africans already enrolled should be allowed to continue to practise in Basutoland notwithstanding their loss of British nationality which should no longer be a condition for enrolment.
6. Legal practitioners qualified to

PAUL/TWINING (1971)

- 1(a) Manpower projections of needs for law graduates suggest that the intake for the LL.B. can be justifiably increased to at least 15 from 1972 and should build up to 20-25, but should not in the foreseeable future exceed 30 at the most. These figures assume: (a) that the LL.B. will be a broadly conceived degree, with a substantial non-law content; and (b) that a proportion of law graduates will move into occupations not normally classified as 'legal'. (Para 3.1-3.3).
- 1(b) There is an urgent need for an increased amount of para-professional or 'sub-degree' training in law. It has not been possible for us to gauge precisely the extent and nature of the training required and how much of such training can be undertaken on a co-operative basis by the three countries. We recommend that UBLS should take the initiative in stimulating a thorough investigation of needs for para-professional training in law and law-related subjects and in the drawing up of plans for such training, especially for those phases to which UBLS can make a substantial contribution. (Para 3.3).
- 1(c) There is likely to be an increasing demand for teaching of law to

practice in the Republic (of South Africa) or any part of the Commonwealth should be entitled to appear in Basutoland courts in connection with a particular case.

7. A General Legal Council should be established to promulgate rules relating to qualifications for enrolment, professional conduct, remuneration and accounts and to exercise discipline.

8. Qualifications for enrolment should be the holding of a law degree approved by the General Legal Council followed by the satisfactory completion of a course of practical training approved by the General Council.

9. UBBS should institute a LL.B. degree, in conjunction with the University of Edinburgh and should also be responsible for the provision of post-graduate pre-admission, practical training.

10. All forms of local legal training should so far as possible be centralised at UBBS which should institute a legal course for judicial and administrative officers.

11. The law staff at UBBS should immediately be increased to three and later to four full-time lecturers plus part-time assistance from local practitioners.

12. Immediate steps should be taken to improve the law library at UBBS.

non-lawyers at degree and post-graduate level (e.g. at the proposed IPA). In the view of some it is desirable that the law content of the B.A.(Admin.) should be increased and there is a general feeling that many officials in the public service could have benefited from a more thorough grounding in law. (Para 3.3)

2(a) When a regular intake of 15-20 is assuredly, but not before, a full local LL.B. course should be introduced. (Para 5.1 and 8.11).

2(b) In our view the minimum viable unit for teaching a full LL.B. curriculum is 8-10 full-time teachers of law, assisted by occasional visitors, part-timers, volunteers, etc. Given the likely number of LL.B. students such a unit can only be justified if it also is in a position to take on a substantial amount of 'service' and para-professional teaching. This also assumes that a substantial amount of teaching for the LL.B. will be provided by teachers from other disciplines. (Para. 5.1-5.5):

3(a) The special arrangement with Edinburgh University should continue in modified form until a full local LL.B. programme can be offered. It should then be phased out, but the link with Edinburgh might fruitfully be continued to perform other functions. (Para 8.11).

3(b) For the intake of 1972 (and, if applicable, thereafter) the period spent in Edinburgh should be reduced to one year. This will, *inter alia*, reduce pressure on Edinburgh as numbers of UBLS law students increase. (Para 8.11)

Source: The 1994 Report

and Appendix C).

- 3(c) Detailed plans for the next 3-5 years of the link need to be formulated and negotiated with Edinburgh and ODA. (Para 8.6).
- 3(d) Consideration should be given to giving Edinburgh some assistance with resources in connection with the link. (Para 8.11).
- 4. We recommend that as from 1972 selection of students for the LL.B. should take place at the end of one academic year at UBLS - i.e. that the four year LL.B. should be preceded by one year of general education after matriculation at O-level. (Para 9.4-9.6). When it becomes financially possible to do so, the total length of the LL.B. course should be increased by one year. (Para 9.4-9.5).
- 5(a) The main weakness of the present UBLS LL.B. is that it provides an inadequate grounding in procedural subjects and does too little to develop the basic practical skills of the practitioner. The present Part III is too short for this purpose and its curriculum is overloaded. We note that the post-LL.B. pre-admission course proposed in the Gower Report (1964) has not materialised. In the absence of other provisions for formal practical training UBLS is expected to undertake the task and much of the dissatisfaction with the present LL.B. seems to be due to the inadequacy of the present Part III. We recommend that immediate steps be taken as a matter of urgency either to extend Part III by at least three months or to organise a pre-admission course along the lines

suggested by Professor Gower.

- 5(b) In addition, we propose that a vacation internship programme should be organised and supervised by the UBLS Law Department as part of the LL.B. programme. This should be financed from a single course in each country.

- 6(a) Legal studies should be centred on one of the three main university campuses, preferably as part of a School of Law and Administration. It is desirable that there should be a reasonably strong social science presence at the same place.

- 6(b) The planning of the future of Law Administration and the Social Sciences should be undertaken simultaneously. If the recommendation to establish a School of Law and Administration is accepted in principle, then a Professor of Law should be appointed well in advance of the establishment of the School so that he may participate fully in its detailed planning.

- 6(c) To save costs all full-time law teachers should, if possible, be in one place. This may necessitate adjustments in the B.A.(Admin.) and B.A.(Econ.) Part I curricula, if these are to be taught on all three campuses.

- 6(d) In addition to the Professor of Law, there should be at least two posts at senior lecturer/reader level.

- 6(e) Careful consideration should be given to problems of localisation of the law teaching staff.

7. Location of legal studies. In our view the paramount considerations are that law teaching should not be dispersed and that legal studies should be situated in the same place as the main centre for cognate disciplines. It is also important that law teachers and law students should play a full part in the intellectual and social life of a university community; they should therefore be situated on one of the three campuses. Proximity to courts, Ministries and commercial/-legal activities is also valuable. In this latter respect the differences between Manzini and Gaborone seem to us to be marginal. We do not make a positive recommendation on location, but our personal opinion is that Gaborone offers the most promising site for the development of the kind of institution we envisage.

8. The Library of the School of Law and Administration should be developed towards a target of 10 000-20 000 volumes within five years. Assistance from foreign donors and a system of exchanges (e.g. for Law Reports edited by the Law Department) will probably be necessary if this target is to be achieved.

Source: The 1971 Report.

ANNEXURE V

THE CURRENT CURRICULUM FOR THE B.A. (LAW) AND LL.B. AT N.U.L. (LAW COURSE ONLY)

YEAR ONE

1. L101-6: Introduction to Law

YEAR TWO

2. L201 - 8AB: Law of Contract
3. L202- 8AB: Criminal Law
4. L205 - 6AB: Constitutional Law
5. L206 - 6AB: Administrative Law

YEAR THREE

6. L301 - 8AB: Family Law
7. L302 - 8AB: Delict
8. L303 - 4: Mercantile Law
9. L304 - 8AB: Criminal Procedure (including Moot Court)

YEAR FOUR

10. L401 - 8AB: Law of Property
11. L402 - 4A: Conflicts of Laws
12. L403 - 8AB: Civil Procedure (including Moot Court)
13. L404 - 8: Evidence
14. L405 - 8AB: Law of Business Association

YEAR FIVE

15. L501 - 4B: Taxation
16. L502 - 4A: Succession and Administration of Estates
17. L503 - 8AB: Jurisprudence
18. L504 - 8AB: Mercantile Law II
19. L505 - 4A: Conveyancing and Notarial Practice
20. L506 - 4B: Criminology
21. L507 - 4B: Bookkeeping and Accounts for Legal Practitioners
22. L508 - 4B: Comparative Law
23. L509 - 4: Human Rights
24. L510 - 4: Law and Environment

YEAR SIX

25. L608 - 6AB: Labour Law
26. L602 - 4B: Public International Law
27. L603 - 4B: International Organisations
28. L604 - 4B: Sociology of Law
29. L609 - 6AB: Legal Aspects of Economic Development
30. L606 - 4: Interpretation of Statutes and Documents

Source: The University Calendar

ANNEXURE VI
THE CURRENT CURRICULUM FOR THE LL.B. AT U.B.

YEAR ONE

- L101: Introduction to Law
- L102: Contract
- L103: Law of Persons and the Family
- L104: Trial Practice

YEAR TWO

- L201: Delict
- L202: Criminal Law
- L204: Customary Law
- L205: Succession
- L206: Constitutional Law and Human Rights
- AM207: Accounting for Lawyers

YEAR THREE

- L301: Mercantile Law
- L302: Roman Law
- L303: Property
- L304: Legal Clinic

and, with the approval of the Head of Department, one of the following:

- L305: Comparative Law
- L306: Legislation
- L307: Industrial Law and Relations
- L308: Forensic Medicine

YEAR FOUR

- L401: Mercantile Law**
- L402: Jurisprudence**
- L403: Administrative Law**
- L404: Clinical Legal Education**
- L405: Public International Law**

and, with the approval of the Head of Department, one of the following:

- L406: Taxation**
- L407: Legal Aspect of International Trade and Investment**
- L408: Criminology and Penology**
- L409: Private International Law**

YEAR FIVE

- L503: Law of Business Associations**
- L504: Criminal Procedure and Evidence**
- L505: Civil Procedure and Evidence**
- L507: Legal Ethics**
- L508: Conveyancing, Notarial Practice and Drafting**
- L509: Clinical Legal Education**

Source: The Faculty Handbook

ANNEXURE VII
SWAZILAND'S BASIC DATA

A. GEOGRAPHY:

Area	17 364 km ²	
Ecological Zones	% Total	Area Average Height
Highveld	30%	1 300 m above sea level
Middleveld	25%	700 m above sea level
Lowveld	37%	200 m above sea level
Lubombo Plateau	8%	600 m above sea level

Seasons:

Spring	September- October, rainy
Summer	November - February, hot rainy
Autumn	March - April, occasional rains
Winter	May - August, cold/dry

B. DEMOGRAPHY

Total de facto population (1990)	772 500
% of total under 15 years (1986)	47%
% of total under 5 years (1986)	18%
Life expectancy at birth (1986)	53 years
Crude birth rate (1982)	50,8/1 000
Crude death rate (1982)	17/1 000
Total fertility rate (1982)	6,8 children per woman
Population growth rate (1986 census)	3,2% per year
Urban population (1986 census)	23% of total
Average population density (1986)	44 km ²

C. ECONOMIC INDICATORS:

GDP per capita (1988)	EI 765.55 or \$759
GDP growth rate (1986 - 1989)	4,7% per year
GDP per capita growth rate (1986-1989)	1,5% per year
Inflation rate (1980-1988)	14,2% per year
Net additions to the labour force (1977-1982)	5 400 per year
Job creations	2 100 per year
Employment:	
Estimated total wage employment 1987 domestic formal sector	27,3% of total labour force
Estimated employment in mines (South Africa 1986)	5% of total labour force
Homesteads with members in wage employment	82%
Currency unit	Emalangeni (singular lilangeni)
Foreign exchange rate (December 1996)	E4,5 = US \$1,00
Agricultural Indicators:	
Main products	Maize, sugar, cotton, citrus
Food self-sufficiency (1985)	85 000 tonnes maize
Produced (1990)	130 000 tonnes maize needed
Food expenditure (1985)	31 % of household income
Contribution to exports	70% of total
Land Ownership (1985):	
Swazi Nation Land	60%

Title Deed Land:

- Individual held Swazi 4,5%
- Non-Swazi 9,5 %
- Companies 20%
- Other (Government, parastatals, churches, etc) 6%

D. HEALTH INDICATORS:

Infant mortality rate 110/1000 live births
Under 5 mortality (1987) 117/1000 live births

Coverage:

Antenatal attendances 70%
Births in hospital 50%
Fully immunised before 1 year (1989) 83%
Pregnant women immunised against tetanus
(1989 estimate) TT2 64%

Access:

Within 8 km of a health facility (1984) 70%
Portable water - rural (1983) 39%
Portable water - urban (1983) 80%
Within 8 km of a health facility (1984) 70%
Portable water - rural (1983) 39%
Portable water - urban (1983) 80%
Access to piped water supply (1986) 42,5%

Provision:

Government share of modern health
facilities 50-60%
Traditional healers 40%

Rural Health Motivators (1989)	1 400
People per health facility bed - rural	1 450
People per health facility bed - urban	100
Government health expenditure	6% of GDP (1985)
	9% of Budget (1987/88)
	9,1% of Budget (1989/90)

E. EDUCATIONAL INDICATORS:

Primary school enrolment (1988) (as % of 5 - 14 year cohort in population)	76%
---	-----

Secondary school enrolment (1988) (as % of 15 - 19 year cohort in population)	47%
--	-----

Adult (15+ years) literacy rate (1986)	67%
- Male	69%
- Female	65%

Children 10 - 19 years who have never attended school 1986 census)	13%
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Source: Statistical Office in Mbabane

ANNEXURE VIII

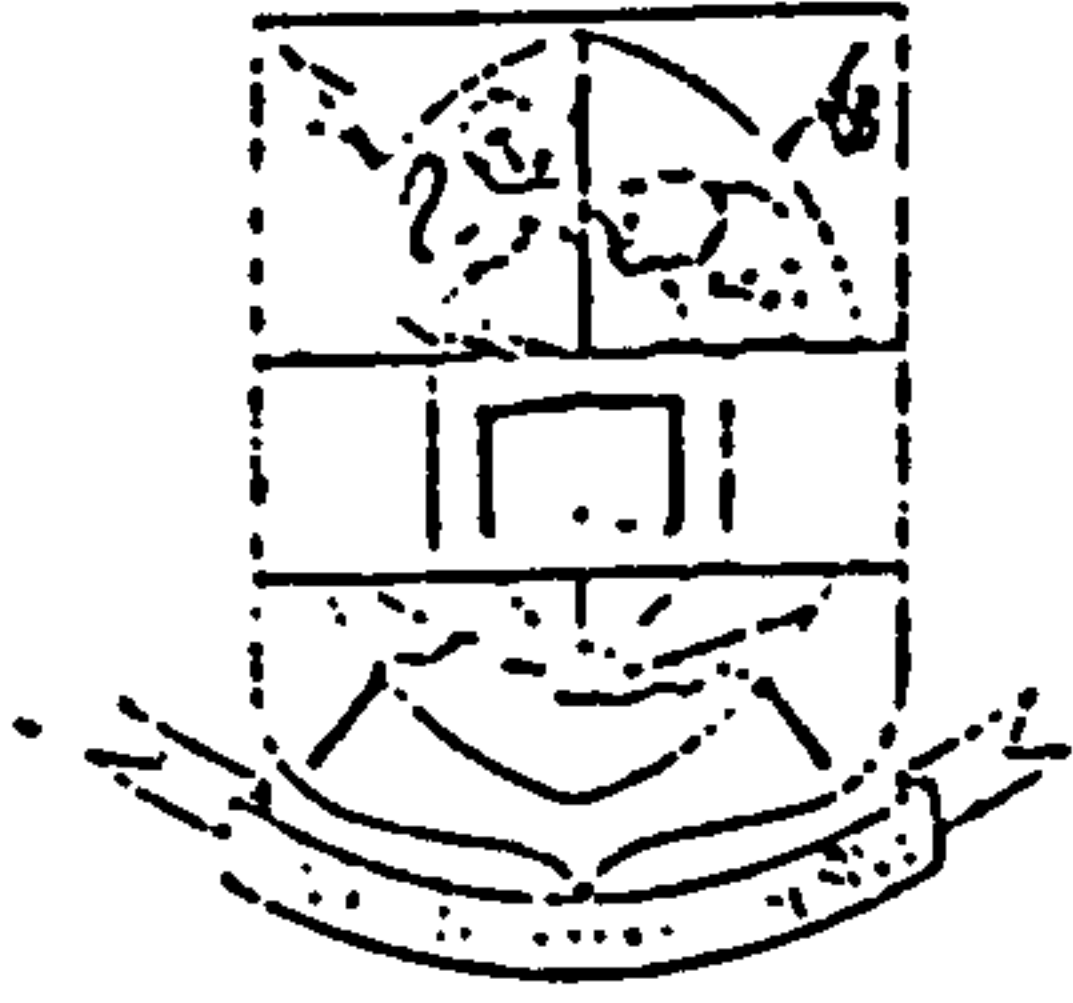
QUESTIONNAIRE PREPARED BY UNISWA LAW DEPARTMENT

1. Should the existing programme which is divided into B.A. (Law) and LL.B. be maintained or should we move towards a 5 year LL.B. degree programme? If your answer is yes or no, please give reasons.
2. Do you feel that graduates who have gone through the existing programme had sufficient knowledge of the substantive law?
3. Do employers prefer the B.A. (Law) holders or the LL.B. holders or both? What are the reasons for their preference?
4. Do you feel that the present courses offered in the Department for both the B.A. (Law) and LL.B. degrees should be retained or readjusted or whether some additional courses should be introduced, and if so, which courses would you like to see included in the curriculum and at what level?
5. Is there any need in the country for the introduction by the Department of postgraduate studies in law at Masters or doctorate level? What need would such a programme fulfill?
6. Do you feel that the Department is producing too many or too few lawyers for the demands of the country, or should the present number of 15 graduates with the LL.B and 15 graduates with the B.A. (Law) be maintained? Please give reasons for your answer.
7. Is there any need for a sub-degree programme in law? If so, which categories of employees should it cater for?
8. Any other comments you may wish to make.

University of Swaziland

Tel: Matsapa 84011/2/3
Tlx: 2087 WD
Fax: 55270
Tigrm: UNISWA

Kwaluseni Campus
P/Bag Kwaluseni
Swaziland
Southern Africa



12th August, 1991.

Dear Colleague,

RESEARCH ON THE LEGAL PROFESSION
AND LEGAL EDUCATION IN SWAZILAND

As you may already be aware, the Law Department of this University is currently involved in reviewing its degree programmes with a view to strengthening the same to suit the practice of law in the country in particular and in the region in general. This review remains incomplete without analysing the nature and needs of the profession in the practice of law. To get an in-sight of these issues it has become necessary to draw up a questionnaire which may be filled by any lawyer interested in improving the quality of legal education for better law practice.

The purpose of this letter is, therefore, to submit the said questionnaire to you with a request that you fill the same at your earliest convenience. You may not fill in your name if you do not prefer to do so. We shall come to collect the questionnaire, duly filled, after one month from the day it is delivered to you.

Your cooperation in this regard is highly appreciated.

Yours sincerely


PHILIP J. IYA
SENIOR LECTURER - IN-LAW

cc: The Dean, Faculty of Social Science.
The Head, Law Department.

ANNEXURE X

RESEARCH PROJECT ON SKILLS DEVELOPMENT IN LEGAL EDUCATION FOR LAWYERS IN THE COUNTRIES OF BOTSWANA, LESOTHO AND SWAZILAND (THE BOLESWA COUNTRIES)

QUESTIONNAIRE*

PART I: PERSONAL RECORD

1. Surname First name/s
2. Title (please tick): The Hon., Mr. Justice, Professor, Dr., Advocate, S.C., Mr, Mrs, Miss, Other.
3. Country of residence (please tick): Botswana, Lesotho, Swaziland.
4. What is your age? years.
5. Place of Birth: Country of Birth:
6. Present Address:

PART II: EDUCATIONAL BACKGROUND AND PROFESSIONAL QUALIFICATIONS

1. High school/s attended.
 2. University/ies attended.
 3. Other institution/s.
 4. Degree/s obtained and the year.
 5. Qualifications other than degrees.
 6. Special achievements.
 7. Are you an Advocate, an Attorney or law student?
 8. If Advocate, when admitted to the Bar?
- (* Additional answers would be recorded in the subsequent pages hereto attached)
9. To which Bar were you admitted?

10. If an Attorney, state year when articles commenced.
11. With whom did you serve articles?
12. The date of admission to the Side Bar.
13. Duties performed during articles.
14. Are you also a Notary? Since when?
15. Are you also a Conveyancer? Since when?
16. If student, what degree have you registered for?
17. What year of the degree programme are you attending? Year?

PART III: OCCUPATION AND PROFESSIONAL EXPERIENCE

1. (a) Name of your employer and/or university, organization etc. to which you are attached, attend or which you represent or that recruited/seconded you for employment with your present employer/firm/organization.
- (b) Address
2. If Judge/Magistrate:
 - (a) The year when appointed to the Bench.
 - (b) To which Bench were you appointed.
 - (c) Are you still a member of that Bench? Yes/No
 - (d) If not, then state the present Bench.
 - (e) Outline your duties on the Bench.
3. If Advocate:
 - (a) At which Bar do you practise now?
 - (b) Outline your duties as an Advocate.
 - (c) If applicable, the year you took silk.
4. If Academic:
 - (a) When appointed?

- (b) The institution.
- (c) The faculty The position
- (d) Your duties are?

5. If with Government (excluding Judge/Magistrate):

- (a) When appointed?
- (b) The institution.
- (c) The faculty The position
- (d) Your duties are?

6. If other:

- (a) Your position.
- (b) Duties.

7. Professional societies of which you are a member:

PART IV: APPLICATION OF PROFESSIONAL SKILLS

1. What do you understand by the term "skills"?
2. What skills are required by lawyers in their day-to-day duties?
3. What skills do you apply in the performance of your duties?
4. Briefly describe the circumstances when you apply these skills.
5. The advantages of applying these skills.
6. The disadvantages of/problems with these skills.
7. Do you have to be a lawyer to apply these skills? Yes/No
8. Why?
9. Is the application of these skills part of your training/testing during your legal education? (Explain)
10. Is it part of your professional responsibility to do so? (Explain)

PART V: DEVELOPMENT OF PROFESSIONAL SKILLS

1. At what educational stage should the study of law for would-be lawyers being? High school/Undergraduate/Postgraduate/other (which)?
2. What qualification should such a person possess?
3. What should be the broad content and extent of academic instruction for would-be lawyers?
4. Give the list of the academic subjects/courses you studied.
5. Give the list of the practical subjects/courses you studied.
6. At which university/ies did you study the above subjects/courses?
7. Should such academic and practical subjects/courses be conducted by or under the auspices of different institutions? Yes/No and why?
8. What should be the nature of training in practical profession skills?
9. Who should bear this responsibility? The university/the legal profession/other (which)?
10. What method and teaching materials should be used during practical training?
11. Briefly describe the nature (content) and methods/materials used during your practical training within your legal education.
12. What skills did you acquire?
13. Were you aware and satisfied with the skills being imparted? Yes/No and why?
14. Should there be a stage of probationary training and qualification followed by in-service practice leading to full admission to the practice of law? Yes/No and why/why not?
15. Should there be a systematic further education for practicing lawyers (including judges/magistrates)? Yes/No and why/why not?
16. What should be the content and method used for such education? (a) The content. (b) The method.
17. What should be the continuing relationship between universities and the profession/s?

PART VI: GENERAL

1. In your opinion, is the enrolment of law students in your university increasing or decreasing? Increasing/decreasing and why?
2. Will this trend continue? Yes/No/ and why/why not?
3. What are the authorities doing about this trend?
4. What is the effect on the profession?
5. What do you suggest should be done?
6. Is the legal profession changing? Yes/No (a) If yes, in what way? (b) If no, why not?
7. Is there a greater demand for legal services? Yes/No. Why?
8. What role does legal education play in satisfying the increasing demand?
9. What role does skills development play in this process?
10. What does the future look like for the profession? And why?
11. Give suggestions on how lawyers can educationally be better equipped to satisfy the increasing demands on their services.

2nd November, 1909

Professor B.P. Wanda

The Associate Professor of Law
University of Swaziland
Private Bag Kwaluseni
Swaziland.

Dear Professor,

STRENGTHENING OF THE LAW PROGRAMMES AT THE UNIVERSITY OF
SWAZILAND.

With reference to your letter of the 20th October, 1909, I wish
to comment as follows to the questionnaire :

AD QUESTION 1:

I will recommend that the existing programme be maintained.
It would appear that students find the practical courses at the end of
the present period very useful.

AD QUESTION 2:

Generally speaking, I find that graduates have
satisfactory knowledge of the substantive Law. However, one finds
that few of them are able to apply the principles in practice. The
introduction of a more practical approach in the presentation of
lectures might be of value.

AD QUESTION 3:

I am not in a position to reply to this question.

AD QUESTION 4 :

I suggest that the introduction of the following additional courses be considered:

- (a) Interpretation of Statutes
- (b) Medical Jurisprudence (basics only).

AD QUESTION 5 :

There is no need in the country at present, for the introduction of these post-graduate studies.

AD QUESTIO 6 :

I cannot reply to this question.

AD QUESTION 7 :

I am of the opinion that a sub-degree programme in law will be very useful to especially Police officers and may be, even to Prison officers or other Government officials who are responsible for conducting Departmental enquiries for instance.

AD QUESTION 8 :

I have no further comments to make.

Yours faithfully



N. J. VAN LOGGERENBERG

PRINCIPAL MAGISTRATE.

ANNEXURE XII

THE STRUCTURE OF THE LEGAL PROFESSION

A. THE HORIZONTAL STRUCTURE

1.

Public Practitioners (Government) (Corporation)	Private Practitioners Solo (Partnerships)
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2.

Private Practitioners			
Advocates	Attorneys	Notaries	Conveyancers
Bar Association	Law Society		

B. THE VERTICAL STRUCTURE

1.

In Government		
The Minister		
Head of Department	Chief Justice	Judicial Commissioner
Senior Counsel	Judges	Court President
Counsel Pupil Counsel	Magistrates/ Registrars Master	Court Clerks

2.

In Private Practice	
Senior Partners Partners	Solo Practitioners
Legal Assistants	Legal Assistants
Articled Clerks	Articled Clerks
Para-Professionals	Para-Professionals

BIBLIOGRAPHY

1. Adelman S and Paliwala A (Ed) Law and Crisis in the Third World (1993) Hans Zell Publishers.
2. Adepoju A, (Ed) Swaziland: Population Economy and Society (1991) UN Population Fund, New York.
3. Allot AN, "Legal Development and Economic Development in: Anderson JND Changing Law in Developing Countries (1963).
4. American Bar Association Committee on Professional Education, The Report by the Task Force on Professional Competence, 1981.
5. American Bar Association, The Report by the Task Force on Professional Competence, 1972.
6. American Bar Association, The Report by the Task Force on Professional Utilisation, 1972.
7. Anderson JND, (Ed) Changing Law in Developing Countries (1963) George Allen & Urwin Ltd, London.
8. Armstrong AK and Nhlapo RT Law and the Other Sex: The Legal Position of Women in Swaziland (1985) University of Swaziland Social Science Research Unit.
9. Armstrong AK and Russell M A Situation Analysis of Women in Swaziland (1985) UN Save the Children Fund, a UNICEF/SSRU Project, University of Swaziland Social Services Research Unit.
10. Armitage L, "Towards Professionalism in Continuing Legal Education: Some Questions of Policy and Practice (1990) JPLE p 139.
11. Association of Law Teachers, The Law Teacher: Journal of the Association of Law Teachers Sweet & Maxwell especially Vol. 22 No. 1 of 1988.
12. Baker JH, "Current Legal Problems" (1977) Journal of the Association of Law Teachers p. 1.
13. Baloro J, "The Legal Profession in Swaziland" (1988) Unpublished Paper, University of Swaziland Library.
14. Barnhizev D, "The Clinical Method of Instruction: Its Theory and Implementation" (1979) Journal of Legal Education Vol 30. p. 1253.
15. Barr AR, "Report on Legal Education and Training in Botswana" (1986) Unpublished document, University of Botswana Law Department.

16. Booth A, Swaziland: Tradition and Change in a Southern African Kingdom (1983) Colorado Western Press, USA.
17. Bradney AGD, "The Place of Teaching Professional Legal Skills in United Kingdom University Law Schools" in The Proceedings of the Workshop on Professional Legal Skills 1986 University of Nottingham, England.
18. Broadfoot T, "The Comparative Contribution - A Research Perspective" (1977) Comparative Education Vol 13 No. 2 p. 134.
19. Brown R, "Botswana's Economy" Africa South of the Sahara (1991) Europe Publication Ltd.
20. Cohen L and Manion L (1985) Research Methods in Education (2nd Ed) Croom Helm Publishers, London.
21. Commonwealth Legal Education Association, Newsletters especially No. 49/50 of 1987 and October 1989.
22. Crampton R, "The Need for Greater Emphasis on Skills Emphasis" in Dutilleul Ed of Legal Education and Lawyer Competence (1981).
23. Cruickshank DA. "The Professional Legal Training Course in British Columbia, Canada" (1985) Journal of Professional Legal Education p. 111.
24. Curle A, Educational Problem of Developing Societies (1975) Praeger Publishers, New York.
25. Davies DM, "Legality and Struggle: Towards a Non-Instrumentalist View of Law" in Law and Justice in South Africa (1988) Centre for Intergroup Studies, Institute for Public Interest Law and Research, Johannesburg, RSA.
26. De Groot JK, "Evaluating Lawyer Competence: An Approach to a First Stage in the Process" (1993) Unpublished Paper presented at the Windermere Conference on Lawyers and Lawyering in England.
27. Dias CJ and Paul JCN "Educating for Alternative Development: Sharing Knowledge about Law: (1985) Third World Studies, Scandinavian Institute of Studies, Uppsala.
28. Dias CJ *et al* Lawyers in the Third World: Comparative and Developmental Perspectives (1981) International Centre for Law in Development, New York, also Scandinavian Institute of Studies, Uppsala.
29. Ditchley Foundation, Training for the Law - Report of a Conference at Ditchley Park in Oxfordshire, England, July 1967.
30. Dlamini CRM, "The Law Teacher, The Law Student and Legal Education" (1992) South African Law Journal p. 109.

31. Dutile FN (Ed), Legal Education and Lawyer Competency - Curriculum for Change (1981) University of Notre Dame Press, USA.
32. Friedman W, "The Role of Law and the Functions of the Lawyers in the Developing Countries (1963) Vanderbilt Law and Development Vol. 17 p. 181.
33. Ghai Y (Ed), Law in the Political Economy of Public Enterprise: African Perspectives (1977) Scandinavian Institute of African Studies and International Legal Centre, New York.
34. Ghai Y, "Law, Development and African Scholarship" (1987) Modern Law Review p. 50.
35. Ghai YP and McAuslan JPWB, Public Law and Political Change in Kenya (1970), Oxford University Press.
36. Gold N, "Pursuing Excellence in Law: Comment on Professional Legal Education and Training in Zimbabwe" 1986 Unpublished Paper presented to the University of Zimbabwe
37. Gold N, "Taking Skills Seriously - A Research Prospectus" J.P.L.E. Vol 5 No. 2 p 65.
38. Gold N, "The Role of University Law Schools in Professional Formation in Law" (1986) Journal of Professional Legal Education Vol 2 at p.15.
39. Gold N, "Themes, Trends and Prospects if Professional Legal Education - A Global View" (1985) J.P.L.E. Vol 3 No. 2 p. 171.
40. Gold N, Mackie K and Twining WL, Learning Lawyers' Skills 1989 Butterworth, London.
41. Goldring J, "Academic and Practical Legal Education: What Next?" (1987) Journal of Professional Legal Education Vol 5 No. 2 p 106.
42. Gower LCB, Independent Africa: A Challenge of the Legal Profession (1967) Harvard Press, Cambridge, USA.
43. Gower LCB, Report on Legal Training in the High Commission Territories" presented to the Resident Commissioner and the Vice-Chancellor of the University of Botswana, Bechuanaland and Swaziland in 1964.
44. Grassman S, "Clinical Legal Education" History and Diagnosis" (1974) Journal of Legal Education Vol 26 p 162.
45. Gule G, "Population Dynamics of Swaziland" (1990) Report on Proceedings of Seminar on Population and National Development, Mbabane.

46. Gule JM, "Human Resources and Development in Swaziland" (1991) Proceedings of National Workshop on Population and Development in Swaziland Mbabane.
47. Halpern J, "Lesotho's Resent History" Africa South of Sahara (1991) Europe Publication Ltd, England. p. 96.
48. Harrison J and Brembeck S, The African Charter on Human and Peoples' Rights (1990) United Nations, New York.
49. Higgins B, Economic Development Problems: Principles and Policies (1968) Norton & Co., New York.
50. Himonga CN and Beyani C, "Access to Legal Education and the Legal Profession in Zambia" (1990) Commonwealth Legal Education Association Newsletter, Annexure 1 thereof.
51. Hogan A, "The Legal Workshop in the Australian University of Canberra, ATC" (1983) Journal of Professional Legal Education Vol 1 No. 1 at p 80.
52. Hussey H, The Swazi Jambo Tourist Guide (1989) Hussey & Co (Pty) Ltd, Swaziland.
53. Hutchison M, "Botswana - Physical and Social Geography" in: Africa South of the Sahara (1991) Europe Publication Ltd., England.
54. International Development Law Institute, The Bulletins of the Institute, especially No. 17 of June 1994.
55. International Legal Centre, Report of a Committee on Law and Development - The Future of the Law and Development Research, (1975) International Legal Centre, New York.
56. International Legal Centre, Report of a Committee on Legal Education in a Changing World, 1972 International Legal Centre, New York.
57. International Legal Centre: Law and Development Research (1973) International Legal Centre, New York p 13.
58. Iya PF, "Clinical Legal Education: Its Concept and Application in Uganda with a Comparative Overview of its Developments in Some Countries in Southern Africa" (1990) Unpublished Paper with University of Swaziland Law Department.
59. Iya PF, "Developing a Comprehensive Practical Training Programme in a University Law Curriculum - Some Reflections on a Suitable Programme for the University of Swaziland" (1990) Lesotho Law Journal Vol 5 p. 113. Also published in the (1991) UNISWA Research Journal of December 1991 p. 22.

60. Iya PF, "Educating Lawyers for Practice: Clinical Experience as an Integral Part Legal Education in the BOLESWA Countries of Southern Africa" (1994) International Journal of the Legal Profession Vol 3 No. 1 p. 315.
61. Iya PF, "Integrating Skills and Academic Study: An Overview Analysis of Diverse Institutional Strategies and Practices" (1966) Unpublished Paper read at the Conference of Association of Law Teachers in London.
62. Iya PF, "Legal Education for Democracy and Human Rights in the New South Africa" (1994) Journal of Professional Legal Education Vol 12 No 2 p. 12.
63. Iya PF, "The Proposed Programme for Service of Articles in the Campus Law Clinic: Reflections on Implementational Issues" (1993) Journal of Professional Legal Education Vol 11 No. 2 p. 231.
64. Jaspers K, The Idea of a University (1960) London.
65. Jeriks E, "English Legal History" (1935) Law Quarterly Review Vol 1 p. 162.
66. Johnstone Q and Hopson D, Lawyers and Their Work (1967) USA.
67. Joyce B and Weil M, Model of Teaching (1968) 3rd Ed.
68. Kaburise JBK, "The Unrecognised Use of Legal Education in Papua New Guinea" (1987) Commonwealth Legal Education Association Newsletter No. 49/50 Annexure III p. 9.
69. Kahn-Freund O, "Reflections on Legal Education" (1966) Modern Law Review Vol 29 at p. 127.
70. Kakuli GM; "Experimentation in Clinical Legal Education in Botswana" (1987) Commonwealth Legal Education Association Newsletter Annexure IV.
71. Kalula E, "Legal Education Training and Research in Southern Africa: New Items for the Agenda" (1989) Unpublished Paper presented to the Symposium of Educational Research in Southern Africa held from 7-11 August 1989 in Gaborone, Botswana.
72. Kiggundu MN, Managing Organisations in Developing Countries (1989) West Hartford Kumanian Press.
73. Kitch EW (Ed) Clinical Education and Law School of the Future (1969) University of Chicago.
74. Kumar U, "Legal Scholarship in Lesotho" in: Legal Scholarship in Africa (1988) Marco Guadagnui Ed., Italy.

75. Kuper H and Kuper A (Ed) African Law Adoption and Development (1963) London.
76. Kuper H, An African Aristocracy: Rank Among the Swazi (1947) Oxford University Press, London.
77. Langley F, "Preparing for the Practice of Law: Postgraduate Pre-admission in Australia" (1985) Journal of Professional Legal Education Vol. 3 No. 2 p. 82.
78. Laser GS, "Educating for Professional Competence in the Twenty-First Century: Educational Reform at Chicago-Kent College of Law" 1993 Chicago-Kent Law Review p. 250.
79. Leighton P and Sheinman B, "Central Questions in Legal Education" (1980) Journal of Association of Teachers p.3.
80. Leiko P, "The Opportunity to Differ and be Equal: An Analysis of the Interrelationships between Tenure, Academic Freedom and Teaching of Professional Responsibility in Orthodox and Clinical Legal Education" (1980) Notre Dame Lawyers Vol 5 p. 390.
81. Lesotho Government, National Development Plans, especially in the 1990's.
82. Llewellyn K, "The Study of Law as a Liberal Art" (1960) in Jurisprudence: Realism in Theory and Practice New York 1962.
83. Luckhan R (Ed), Law and Social Enquiry: Case Studies of Research (1981) Scandinavian Institute of African Studies, Uppsala; also International Centre for Law and Development, New York.
84. Lynch D, "Legal Roles in Colombia" (1975) Studies in Law and Social Change Scandinavian Institute of African Studies. Also by International Legal Centre, New York.
85. MacCreate R (Ed), Legal Education and Professional Development - An Educational Continuum (1995) West Publishing Press.
86. Mackie K, "Professional Legal Skills: Report of a Workshop" (1987) J.P.L.E. Vol. 5 No. 2 p. 18.
87. Magagula CM, The Multi-National University in Africa - An Analysis of the Development and Demise of the University of Botswana, Lesotho and Swaziland (1987) Ph.D. Thesis presented to the University of Maryland, Virginia, USA.
88. Magagula ZW, Legal Education and Practice in Swaziland (1993) LL.B. Dissertation.

89. Maher G, "Legal Education: 2001 and Beyond" Legal Education: 2000 (1985) Brookfield USA p. 287.
90. Makhuba LP. "Opening Address" in Proceedings of the National Seminar on Tertiary Education in Swaziland February 1990, University of Swaziland.
91. Malan JS, Swazi Culture (1985) African Institute of South Africa, Johannesburg.
92. Marwick B, Abantu Bakwangwane: An Ethnological Account of the Native of the Swazi Protectorate (1939) Ph.D. Thesis presented to the University of Zululand.
93. Masuku T and Nkambule N, "The Nature and History of the Legal Profession in Swaziland" (1991) Unpublished Papers presented to Department of Law, University of Swaziland.
94. Matsebula MS, "Development Goals in Swaziland: Strategies, Achievements and Policy Implications" (1992) Proceedings of the National Workshop on Population and Development in Swaziland (Okore Ed) p. 86.
95. McAuslan JPWB and Kanyehamba GW, Urban Legal Problems in Eastern Africa (1978) Uppsala.
96. McGowan C, "The University Law School and Practical Education" (1979) American Bar Association Journal, Vol. 65 p. 374.
97. McNally NJ, "Law in a Changing Society" (1998) South African Law Journal at p. 105.
98. Mensah SNA, "Population Growth Employment Generation in Swaziland - A case for Promotion of Small-scale Enterprises" in Okore (Ed) Proceedings of Workshop on Population p. 121.
99. Mlangeni TN, The Reception of the Roman-Dutch Law in Swaziland (1985) LL.M. Dissertation presented to the University of Adelaide, Australia.
100. Moloto J, "Access to Justice - The Challenge of a New South Africa" (1993) Africa Law Review Vol 4. Nos. 2/3 p. 46.
101. Nash G, "Should Law Schools Produce Lawyers?" (1991) Journal of Professional Legal Education Vol 5 No. 9 p. 27.
102. Nathanson S, "Putting Skills and Transactions Together in Professional Legal Training" (1990) Journal of Professional Legal Education Vol. 5 No. 2 p. 187.
103. National University of Lesotho, The Calendar of the University especially of 1990/91 and 1988/89.

104. National University of Lesotho, The Handbook of the Faculty of Law of the University especially of 1990/91.
105. Ncube W, "Legal Education and Access to the Legal Profession in Zimbabwe" (1989) Unpublished Paper presented to a Workshop of Law Teachers held in April in Swaziland.
106. Ncube W, "The Curriculum at the University of Zimbabwe's Faculty of Law" (1989) Unpublished Paper presented to the same Workshop of Law Teachers held in Swaziland.
107. Ndulo M, "Legal Education in Zambia: Pedagogic Issues" (1986) Lesotho Law Journal Vol 2 No. 1 p. 75.
108. Ndulo M, "The Need to Restructure Legal Education" (1985) Commonwealth Law Bulletin Vol 11 p. 513.
109. Nelson JW, "Defining the Role of Research in Developing Legal Practice Course Curricula" (1988) Journal of Professional Legal Education Vol. 6 No. 1 p. 48.
110. Nield S, "Some Lessons from Hong Kong on Assessment and Competence" 1993 Windermere Conference (Unpublished) Paper.
111. Nsereko DDN, "Remarks to the Faculty of Law of University of Namibia's Sub-committee on Legal Education in Botswana" (1992) Unpublished Paper presented to the Faculty of Law Sub-committee Meeting held on 5 October 1992, at the University of Namibia in Windhoek.
112. Odenyo AO, "Professionalism and Change - The Emerging Kenyan Lawyer" (1981) Lawyers in the Third World Uppsala, p. 177.
113. Ojwang JB and Salter DR, "Legal Education in Kenya" 22 (1989) Journal of African Law p. 78.
114. Ojwang JB, "The Legal Profession in Kenya" (1988) Journal of African Law p. 11.
115. Okore A (Ed), The Proceedings of the National Workshop on Population and Development Focus on Swaziland (1992) University of Swaziland Social Science Research Unit.
116. Omotola JA and Adeogun (ED) Law and Development 1987 cited by Ghai Y, in "Law Development and Scholarship in Africa" 1987 Modern Law Review p. 50.
117. Ormrod Committee, Report on Legal Education in England and Wales 1971.
118. Parente JJ, "How to Plan a Skills Course" (1985) JPLE p. 157.

119. Parie AJ, "Objectives in Legal Education: The Case of Systematic Instructional Design" (1988) Commonwealth Legal Education Association Newsletter No. 53/54 April-July Annexure III.
120. Park R, "Appropriate Methods of Teaching of Legal Skills in Practical Training Courses" (1990) Journal of Professional Legal Education Vol 8 No. 2 p. 161.
121. Paul JCN and Dias CJ, "Introduction: Underlying Concerns and the Field to be Examined" (1982) Third World Legal Studies International Third World Legal Studies Association Publication.
122. Paul JCN, "Law and Development into the 1990s: The Need to Impose Accountability Through International Law" (1990) Unpublished Paper presented to the Cumberland Lodge Conference held from May 30- June 1, 1990, in England.
123. Peden J, "Professional Legal Education and Skills Training for Australian Lawyers" (1972) 46 ALJ 157.
124. Penegar K, *et al*, "Getting There from Here: Priorities, Remedies and Resources" in Dutile FN (Ed) p. 143.
125. Perdomo RP, "Jurists in Venezuelan History" Lawyers in the Third World: Comparative and Development Perspectives (1981) Scandinavian Institute of African Studies, Uppsala, p. 76.
126. Pincus W, "Clinical Legal Education in the United States 1968-1975" (1975) Atlanta Law Journal Vol. 49 at p. 420.
127. Population Association of Nigeria (1985) Report of the Proceedings of the Annual Conference on Population in Nigeria.
128. Pound *et al* Our Legal Heritage (1982) Butterworths, South Africa.
129. Richardson Sir Ivor, "Educating Lawyers for the 21st Century" (1988) Journal of Professional Legal Education Vol 6 No. 2 p. 116.
130. Roper C, "The Legal Practice Course - Theoretical Framework and Mode" (1988) J.P.L.E. p. 77.
131. Rugege S, "Legal Training, Legal Profession and Social Welfare" (1988) Unpublished Paper presented to the 24th International Conference on Social Welfare held in West Berlin, Germany.
132. Rwelamira MRK, "The Tanzania Legal Profession" (1981) Lawyers in the Third World: Comparative and Development Perspectives Uppsala, p. 204.

133. Rwomire A, The Family Life Association of Swaziland - An Evaluation of Selected Programmes (1989) University of Swaziland Social Science Research Unit.
134. Sanders AJM, "Legal Dualism in Lesotho, Botswana and Swaziland: A General Survey" (1985) Lesotho Law Journal Vol. 1 No. 2, p. 47.
135. Sangenberg, "Legal Services for the Poor: The Boston University Roxbury Defender Project" (1965) University of Illinois Law Journal p. 63.
136. Schachter D, "The Evolving International Law of Development" (1976) Columbia Journal of International Law p. 9.
137. Seer D, "The Meaning of Development" (1969) International Development Review Vol. XI No. 4.
138. Seidman RB, "On Teaching Law and Development" (1986) Third World Legal Studies International Third World Legal Studies Association Publication p. 53.
139. Seidman RB, The State, Law and Development (1979) Croom Helm, London.
140. Shivji A (Ed), The Limits of Radicalism (1987) University of Dar-es-Salaam.
141. Sikweyiya Z, "The Practical Orientation of Legal Education During Transition to Democracy: The Case of Namibia" (1992) Unpublished Paper presented to the Workshop held at the University of Namibia in October 1992.
142. Stebbings Am *et al*, "Implementing a Competence System in the Professions: From Theory to Practice" An Unpublished Paper presented to the Third International Conference on "Lawyers and Lawyering" held from 8-11 July 1993 at Windermere, England.
143. Subair SK, "Stemming Rural-Urban Migration in Swaziland" in (1990) Proceedings of the National Workshop on Population and Development Focus, Mbabane.
144. Summers A, "Fuller on Legal Education" (1984) Journal of Legal Education Vol. 34 No. 1 p. 2.
145. Swazi News, Newspaper in Swaziland, especially of 9 June 1990.
146. Swazi Observer, Newspaper in Swaziland, especially of 3 July and 2 September 1991, and 10 January and 31 January 1992.
147. Swaziland Government, 1975 Report on the Survey of Manpower Resources and Requirements, Mbabane.

148. Swaziland Government, 1990 Report of the Seminar on Population and National Development, Mbabane.
149. Swaziland Government, National Development Plans, especially those of the 1970s and early 1980s, Mbabane.
150. Swift J, "Voyage to the Country of Honyhums" in: The Works of Jeremy Bentham (Bowring Ed) Russell & Russell, New York.
151. Tamara G, "Debating the Quality of Legal Services: Differing Models of the Good Lawyer" (1993) Unpublished Paper presented to the Third International Conference on Lawyers and Lawyering held from 8-11 July 1993 at the Windermere Conference, England.
152. Taverns M, "Measurement and Reality: Quality Assurance and the Work of a Firm of Criminal Defence Lawyers in Northern England" (1993) Unpublished Paper presented at the Windermere Conference, England.
153. The Sowetan Newspaper published in Johannesburg, South Africa.
154. Times (Sunday Times) of Swaziland, Newspaper of Swaziland, especially of 22 March 1992.
155. Times of Swaziland, Newspaper of Swaziland, especially of 6 May 1992.
156. Tjiriange EN, "The Namibian Faculty of Law - Legal Education to Serve the Needs of Society" (1992) Unpublished Paper presented to the Workshop held from 29-30 October 1992 at the University of Namibia, Windhoek, Namibia.
157. Transit G, "Teaching Interviewing and Negotiating: The Impossible Dream" (1983) Journal of Professional Legal Education Vol. 1 No. 1 p. 59.
158. Trubeck DM and Galanter M, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States" (1974) Wisconsin Law Review Vol. 1062 No. 4 p.1063.
159. Trubeck DM, "Towards a Social Theory of Law: An Essay on the Study of Law and Development" 82 Yale Law Journal 1, 1972.
160. Turpin CC, "Legal Education in South Africa" (1988) Acta Juridica p. 153.
161. Twining WL, "Legal Skills and Legal Education" (1988) The Law Teacher - Journal of the Association of Law teachers Vol. 22 No. 1 p. 4.
162. Twining WL, "Pericles and Plumbers" (1967) Law Quarterly Review Vol. 83 p. 398.

163. Twining WL, "Preparing Lawyers for the Twenty First Century" (1990) Unpublished Paper presented to the 9th Commonwealth Lawyers Conference in New Zealand.
164. Tzannes M, "Research Project and Report on Educating Tomorrow's Lawyers: The Case for Clinical Legal Training and Examination of Various Models" (1991) Journal of Professional Legal Education Vol. 9 No. 2 p. 182.
165. Uganda Government, Report of a Committee Appointed to Study and Make Recommendations Concerning Legal Education in Uganda (1969) Sessional Paper No. 3.
166. United Nations, 1980 Report of the Food and Agricultural Organisation on the Agricultural Sector of Swaziland and 1984 Report on Peoples' Participation in Rural Development in Swaziland.
167. United Nations, 1984 Report on the International Conference on Population (Publication No. E/CONF. 76/19).
168. United Nations, Documents Nos. A/RES/1710(xiv) and A/RES/2542(xx) on Population.
169. University of Botswana, "Clinical Legal Education Programme" (1986) Unpublished Paper of the Law Department.
170. University of Botswana, 1992 Handbook of the Law Department.
171. University of Botswana, Lesotho and Swaziland (1969) Report on the University Development (The Alexander Report).
172. University of Botswana, Lesotho and Swaziland, (1966) Report of the Review Commission on Higher Education in Botswana, Lesotho and Swaziland (Steven's Report).
173. University of Botswana, Lesotho and Swaziland, (1970) Report of the Academic Planning Mission of the University.
174. University of Botswana, The Calendar, especially of 1990/91.
175. University of Glasgow (1985) Report on the Proceedings of the Conference on Legal Education: 2000.
176. University of Namibia (1992) Report of the Faculty Sub-Committee of the office of the Vice-Chancellor of the University on Legal Education in Namibia.
177. University of Swaziland Law Dep[artment, (1991) Report on the Proposed Structured Programme in Law.
178. University of Swaziland, 1990 Report on the Proceedings of the National Conference on Tertiary Education in Swaziland.

179. University of Swaziland, The Calendar, especially for 1991/92.
180. University of Swaziland, The Handbook for the Faculty of Social Sciences and for the Law Department, especially for 1989/90.
181. Vanderpost C, "Report on a Survey on Migration, Employment and Housing in Swaziland" (1992) Unpublished Paper at University of Swaziland Library.
182. Walker JR, The English Legal System (1976) Butterworth, London.
183. Weil M and Joyce B, Models of Teaching (1968 Ed) Prentice-Hall International, New Jersey, USA.
184. Wikamauayake EB, "The Concept of Legal Aid", (1968) Report of the Proceedings of a Conference of LAWAISA Countries on Legal Aid.
185. Wogu A, "Introduction" in: The Trade Union Movement in Africa (1979) Hurst and Company, London.
186. World Bank, (1989) Report of Sub-Sahara Africa - From Crisis to Substantial Growth: A Long-term Perspective 1981 and 1989 respectively.
187. Zwelethu D, The Chief's Court in Swaziland (1991) LL.B. Dissertation presented to the Law Department of the University of Swaziland.
188. Zwinoira RT, "Historical Roots of Development" (1978) Unpublished Paper presented to the Conference on Modern African Development held in April 1978 in Sweden.