NELSON MANDELA UNIVERSITY

INTEGRATION OF CLINICAL LEGAL EDUCATION WITH PROCEDURAL LAW MODULES

By

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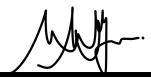
DECLARATION:

In accordance with Rule G5.11.4, I hereby declare that the above-mentioned treatise/ dissertation/ thesis is my own work and that it has not previously been submitted for assessment to another University or for another qualification.

SIGNATURE: 

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SUMMARY

This research evaluates the role that Clinical Legal Education (CLE) can and should play in the teaching and learning of procedural law modules, *ie* Civil Procedure, Criminal Procedure and the Law of Evidence. It is argued that the doctrine of transformative constitutionalism provides a sound theoretical basis for the integration of CLE in the teaching and learning of procedural law modules in that there is a constitutional imperative on law schools to train law graduates, who are ready for entry into legal practice, as far as adequate theoretical knowledge and practical skills are concerned. This research provides an indication of how the integration of CLE with procedural law modules can improve the appreciation of the values of the Constitution of the Republic of South Africa 108 of 1996 by law graduates. Graduates will learn the importance of advancing social and procedural justice when rendering legal services to members of the public. Furthermore, graduates will be equipped with valuable graduate attributes required for legal practice. The conclusion of this research is that an integrated teaching and learning methodology, in relation to procedural law modules, will result in producing better law graduates for legal practice. The result of this will be that future legal practitioners, who can serve the public in a professional, ethical and accountable manner as envisaged by the Legal Practice Act 28 of 2014, immediately after graduating from law schools, will be produced.

ACKNOWLEDGEMENTS AND DEDICATION

This research becomes a reality with the kind support of and assistance by many people. I would like to extend my heartfelt gratitude to each and every one of them.

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LIST OF ABBREVIATIONS

ACLEC	Advisory Committee on Legal Education and Conduct
AI	Artificial Intelligence
B. IURIS	*Baccalaureus Iuris*
B. PROC	*Baccalaureus Procurationis*
CCFO	Critical cross field outcome
CDH	Cliffe Dekker Hofmeyr
CHE	Council for Higher Education
CJ	Chief Justice
CLE	Clinical Legal Education
HAG	Human Settlements Action Group
HESA	Higher Education South Africa
J	Justice
LLB	*Baccalaureus Legum*
LPA	Legal Practice Act
NMU	Nelson Mandela University
NQF	National Qualification Framework
POPCRU	Police and Prisons Civil Rights Union
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SAQA	South African Qualifications Authority
SASSETA	Safety and Security Sector Education and Training Authority
SAULCA	South African University Law Clinics Association
SER	Self-evaluation report
UWC	University of the Western Cape
WITS	University of the Witwatersrand

KEYWORDS

Artificial Intelligence
Candidate legal practitioners
Case dialogue teaching methodology
Civil Procedure
Clinical Legal Education
Constitution
Constructivism
Constructive alignment
Criminal Procedure
Evidence
Experiential learning
Fourth Industrial Revolution
Graduates
Graduate attributes
Law clinics
Law of Evidence
Law schools
Legal interpretation
Legal practice
Legal Practice Act
Legal practitioners
Legal profession
LLB degree
Practical experience
Pro bono
Procedural law modules
Skills
Social and human elements
Socratic teaching methodology
Students

Teaching and learning

Teaching methodologies

Transformative constitutionalism

Transformative legal education

GLOSSARY

"Integration" refers to a combination of items, *eg* the integration of CLE with procedural law modules. This denotes an active combination of the CLE teaching and learning methodology and the conventional teaching and learning methodologies by way of which procedural law modules are taught, including both theoretical and practical training. It therefore denotes a coming together of items or elements. The terms "blending" and "incorporation" can also be used in this regard.

"Law school" refers to the specific department in a university where students can study law. The term "law faculty" can also be used in this regard.

"Law teacher" refers to a staff member of a university law school who is teaching the law to law students. The meaning can be widened in order to include other persons who are also imparting knowledge of the law to law students. The terms "law lecturer" or "course presenter" can also be used in this regard.

"Module" refers to a course presented at university level. The term "course" can also be used in this regard.

CONFIRMATION RELATING TO ELECTRONIC SOURCES

At time of submission of this research, all internet links and electronic sources had been fully active.

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“The clinical teacher can…attempt to alter the perspectives of the educational system.” – David R Barnhizer

CHAPTER 1

INTRODUCTION – PROBLEM STATEMENT, RESEARCH QUESTION, THEORETICAL BASIS AND CHAPTER OVERVIEW

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1 1 BACKGROUND AND PROBLEM STATEMENT – THE NEED FOR AN INTEGRATED APPROACH

This research focuses on the integration or blending of Clinical Legal Education (hereafter referred to as "CLE") with the conventional teaching methodologies currently employed for teaching procedural law modules, *ie* Civil Procedure, Criminal Procedure and the Law of Evidence. The concept of "integration" refers to the action of combining two or more things in an effective manner.[1] This means that the integration of CLE with procedural law modules must have a desired effect. This requires some explanation before exploring the problem statement in this research. It must be kept in mind that the law should be viewed from a holistic perspective and not merely piecemeal. This perception becomes important in legal practice when assisting members of the public in solving their legal problems: their cases must be viewed from a holistic perspective and this perspective, as will be advocated for in this research, must also include social and human circumstances.[2] It is submitted that a holistic perspective should also be applied when teaching law. Students should not be taught to view different areas and aspects of the law in compartments or "silos", but rather to view the law as a holistic structure.[3] This becomes important when dealing with rather practical modules like the procedural law modules. Although a firm theoretical knowledge is always necessary, the practical nature of procedural law

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1 Cambridge Dictionary "Integration" (2021) INTEGRATION | meaning in the Cambridge English Dictionary (accessed 2021-05-05).

2 See 3 4 5 in this regard.

3 See Bowman and Brodoff "Cracking student silos: linking legal writing and clinical learning through transference" 2019 25 *Clinical Law Review* 269 271 in this regard. Also see 4 7 1 as far as compartmentalization of the law and capstone opportunities are concerned. There must be opportunities in the curriculum where students can draw the various areas of the law together in order to become familiar with how the law functions as a holistic structure.

modules should not be left out of consideration in designing a curriculum and syllabus. Broussard and Gross opine that students must be able to see the contextual connection between substantive law and the practice of law.[4] Singh states that it is of the utmost importance that lawyers are produced who possess a social vision, especially in a developing country.[5] Changes in society, as well as modernisation, requires improvements in legal education, as well as expansion of the scope of legal education.[6] This means that legal education should not only be limited to a study of theory and legislation, but also a study of various legal procedures.[7] Legal education must have breadth.[8] It would therefore be beneficial to integrate or combine the procedural law modules with a teaching methodology that can not only provide a firm theoretical foundation to students, but also serve to instill practical skills as far as legal procedure and analysis of evicence are concerned. It will be argued that CLE is such a teaching methodology. It incorportates both theoretical and practical methods of imparting knowledge and skills on students.[9] Such integration may pave the way for a clinical law programme and procedural law modules to be merged in due course, resulting in total integration of these much related modules.

The aforementioned integration can also be explained in more theoretical and foundational manner. An integrated approach to teaching and learning will give rise to more active learning by law students. Experience is a firm foundation of learning, but it does not automatically lead to learning.[10] Theory plays an important role in learning and must therefore be integrated with experience in order to achieve learning.[11] Active learning will therefore include instructional activities that students are tasked with to do, but also that they must, after completing such tasks, reflect on

4 Broussard and Gross "Integrating legal research skills into commercial law" in Friedland and Hess (eds) *Teaching the law school curriculum* (2016) 362.

5 Singh "Importance of legal education" (18 March 2020) Importance Of Legal Education – IPEM (ipemgzb.ac.in) (accessed 2021-05-05).

6 *Ibid*.

7 *Ibid*.

8 *Ibid*.

9 See Chapter 4 for a discussion about CLE.

10 Wrenn and Wrenn "Enhancing learning by integrating theory and practice" 2009 21(2) *International Journal of Teaching and Learning in Higher Education* 258 259.

11 *Ibid*.

what they have done and evaluate their efforts.[12] From this, it can be inferred that active learning has the following characteristics:[13]

(a) students do not only listen, but are also performing tasks, including reading, writing, discussing and observing. It is submitting that something more than mere observing is also required in this instance, *ie*, actual performance of tasks that are being observed;
(b) there is a decrease of transmitting information to students with a concommitent increase in the process of developing student skills;
(c) students are involved in higher order thinking, *ie*, analysis, synthesis and evaluation; and
(d) students are required to explore their attitudes and values.

These characteristics enable students to clarify, question, consolidate and acquire new knowledge.[14] Students should participate in the learning process, which may promote their interest in the particular subject.[15] Active learning therefore differs from other methods of learning in that students do not merely sit and listen to information being transmitted to them.[16] It has been argued – and will be argued in this research – that experience cannot be dispensed with as far as learning is concerned.[17] Teachers of professional degree curricula are constantly looking for ways in which to make a solid theoretical foundation clear to students with the goal in mind of moving them (the students) to achieve excellence in practice.[18] It is argued – and supported in this research – that this can only be achieved by both classroom and practical learning experiences.[19]

12 *Ibid*.
13 *Ibid*.
14 *Ibid*.
15 *Ibid*.
16 Wrenn *et al* 2009 *International Journal of Teaching and Learning in Higher Education* 260.
17 *Ibid*.
18 Wrenn *et al* 2009 *International Journal of Teaching and Learning in Higher Education* 263.
19 *Ibid*.

With this mind, Iya convincingly states that integration, in the context of CLE, refers to the act of combining all different aspects of teaching and learning into one desired goal.[20] In this research, it will be made clear that there are various teaching methods that form part of the global methodology of CLE, including classroom and lecture sessions, tutorials and practical sessions. It will furthermore be argued that all of these teaching methods are important and have a place in employing CLE in the teaching and learning of procedural law modules.

The discussion thus far can be summarised as follows in context of this research: an integrated teaching and learning approach, as far as CLE and procedural law modules are concerned, should involve more than just the mere transmission of theory of procedural law and the principles of evidence to students. It should go further and involve students practising such theory in order to achieve the desired effect or goal of excellence in legal practice.

In light of the abovementioned, as well as in context of the topic of this research, the question can now be asked whether there is a need for this integration. Law graduates need to improve. Legal practice requires this. These two statements had been uttered countless times before by various stakeholders in legal practice.[21] In this regard, the judiciary, members from legal practice and even some law teachers have complained that law students, after graduation, lack the necessary practical knowledge, skill and

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20 Iya "Diversity in provision of clinical legal education (CLE): a strength or weakness in an integrated programme of curriculum development?" 2008 (Special issue) *Journal for Juridical Science* 34 37.

21 In this regard, see Vukowich "Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" 1971 23 *Case Western Reserve Law Review* 140 140; Redding "The counterintuitive costs and benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 55; Holmquist "Challenging Carnegie" 2012 61(3) *Journal of Legal Education* 353 353, as well as Du Plessis "Designing an appropriate and assessable curriculum for clinical legal education" 2016 *De Jure* 1 1; Greenbaum "Re-visioning legal education in South Africa: harmonizing the aspirations of transformative constitutionalism with the challenges of our educational legacy" (undated) http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Greenbaum.pdf (accessed 2019-05-28) 10; Biggs and Hurter "Rethinking Legal Skills education in an LLB curriculum" 2014 39(1) *Journal for Juridical Science* 1 2, 3; and Engler "The MacCrate Report turns 10: assessing its impact and identifying gaps we should seek to narrow" 2001 8 *Clinical Law Review* 109 115. This is not only a concern as far as the legal profession is concerned, but also in other fields and professions – see Griesel and Parker "Graduate attributes: a baseline study on South African graduates from the perspective of employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 in this regard.

ingenuity required of a practising attorney.[22] Keeping in mind that law graduates follow various career paths, it is not clear to which extent the LLB degree prepares them for these careers.[23] Many legal practitioners are of the opinion that law graduates, who, after graduating from university, join law firms for a period of articles of clerkship, lack the essential practical and theoretical knowledge necessary to make a good start in practice.[24] It appears that the market would prefer to receive ready-made legal practitioners immediately after graduating from university.[25] In 2011, the New York Times published an article about how unequipped many new legal practitioners appear to be.[26] Graduates also appear to display low levels of literacy, research and numeracy skills.[27] The legal education system, at university level, is apparently to

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22 Vukowich 1971 *Case Western Reserve Law Review* 140; Snyman-Van Deventer and Swanepoel "The need for a legal-writing course in the South African LLB curriculum" 2012 33(1) *Obiter* 121 121; Manyathi "South African LLB degree under investigation" 2010 (April) *De Rebus* 8 8; Chamorro-Premuzic and Frankiewicz "Does higher education still prepare people for jobs?" (7 January 2019, revised 14 January 2019) https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs (accessed 2020-02-13); SASSETA Research Department "SASSETA Research Report: assessment of learning conditions of candidate attorneys during a transformation attempt" (March 2019) https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf (accessed 2020-01-14) 30-31. Sasseta specifically commented on the "very sloppy" work and initiative of some candidate attorneys. In this regard, it must be kept in mind that most candidate attorneys just came from university law school training and therefore, this may reflect on the training received while at university.

23 Manyathi 2010 *De Rebus* 8.

24 Dednam "Knowledge, skills and values: balancing legal education at a transforming law faculty in South Africa" 2012 26(5) *South African Journal of Higher Education* 926 929; Gravett "Pericles should learn to fix a leaky pipe – why trial advocacy should become part of the LLB Curriculum (Part 2) 2018 (21) *Potchefstroom Electronic Law Journal* 1 2, 26; Chaskalson, "Responsibility for practical legal training" 1985 (March) *De Rebus* 116 116; Vukowich 1971 *Case Western Reserve Law Review* 140; Swanepoel, Karels and Bezuidenhout "Integrating theory and practice in the LLB curriculum: some reflections" 2008 (Special Issue) *Journal for Juridical Science* 99 100. These stakeholders also include magistrates and judges, advocates at the bar, as well as legal educators. Also see Kruse "Legal Education and Professional Skills: Myths and misconceptions about theory and practice" 2013 45 *McGeorge Law Review* 7 8 and Boshoff "Professional legal education in Australia – Emphasis on interests rather than rights" 1997 (January) *De Rebus* 27 27 in this regard, as well as Modiri "The crises in legal education" 46(3) 2014 *Acta Academica* 1 2, where the perspective of the stakeholders of the 2013 LLB Summit is indicated.

25 Dednam 2012 *South African Journal of Higher Education* 926; Bowman *et al* 2019 *Clinical Law Review* 272.

26 Stetz "Best schools for practical training" (undated) https://bluetoad.com/publication/?i=482098&article_id=3038646&view=articleBrowser&ver=html5#{%22issue_id%22:482098,%22view%22:%22articleBrowser%22,%22article_id%22:%223038646%22} (accessed 2019-06-24).

27 Biggs *et al* 2014 *Journal for Juridical Science* 1; Campbell "The role of law faculties and law academics: academic education or qualification for practice?" 2014 1 *Stellenbosch Law Review* 15 17.

blame for this.[28] It is argued that universities have the responsibility to develop these lacking skills in the students admitted for tertiary studies.[29] Because the legal profession has such a major stake in legal education, it depends on the system to provide it with skilled practitioners who have the required knowledge.[30] Governments in many countries have taken measures to facilitate articulation between higher education and the workplace.[31] Both government and the workplace are exerting pressure on higher education in order to produce graduates who possess the capabilities, attributes and dispositions to perform work in a successful manner.[32] The reason for this pressure is that those capabilities, attributes and dispositions appear to be out of sync with the needs and expectations of employers.[33] Teaching and learning experiences must therefore develop and adapt accordingly in order to meet the demands of employers and the profession.[34] Campbell poses an interesting question in this regard, which will be afforded significant attention during the course of this research, namely

> "Should the university law school train lawyers for practice or pursue a broader, academic legal education?"[35]

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28 Vukowich 1971 *Case Western Reserve Law Review* 140. According to Reed, complaints about the lack of practical knowledge, skill and ingenuity of law graduates started when legal education had primarily been taken over from law offices by universities. Also see Holmquist *Journal of Legal Education* 353 and Schultz "Teaching 'Lawyering' to First-Year Law students: An experiment in constructing legal competence" 1996 52(5) *Washington and Lee Law Review* 1643 1644 in this regard.

29 Snyman-Van Deventer and Van Niekerk "The University of the Free State Faculty of Law Write/Site intervention – supporting broader access with the skills for success" 2018 43(1) *Journal for Juridical Science* 39 42; Akojee and Nkhomo "Access and quality in South African higher education: the twin challenges of transformation" 2007 21(3) South African Journal for Higher Education 385 396.

30 Smith *The legal education – Legal Practice relationship: a critical evaluation* (Masters thesis, Sheffield Hallam University) January 2015 15.

31 Griesel and Parker "Graduate attributes: a baseline study on South African graduates from the perspective of employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 1. Also see 5 3 in this regard.

32 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1.

33 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1; 5 3 6 1. Also see Broussard *et al* in Friedland et al (eds) *Teaching the law school curriculum* 362 in this regard.

34 Smith *The legal education* 18.

35 Campbell 2014 *Stellenbosch Law Review* 15.

According to Chief Justice Mogoeng Mogoeng, there is another contributing factor: the transition from basic education to higher education.[36] The school system is failing and cannot equip student with the skills, concepts and schemas to deal with all the demands of tertiary education.[37] Universities are therefore facing the reality of admitting students who are products of an inadequate school system.[38] This is why universities bear the responsibility to adapt institutional measures in order to prepare such students for the "rigors of higher education", because the students are underprepared for them due to "no fault of their own."[39] The Council for Higher Education Task Team[40] however argued that this under preparedness is limited in value.[41] The reason for this argument is that during the 1970s in South Africa, there had already been concerns about the transition of candidates from secondary education to higher education, which happened when university intakes had been small, confined to certain races, as well as to a large extent homogeneous and advantaged.[42] Whatever the case may be, it is common cause that there is a significant gap between the education provided in schools and at universities, respectively, as far as modern day South Africa is concerned.[43]

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36 Die Vryburger "Law degree graduates can not write, read, do sums or reason" (30 March 2018) https://southafricatoday.net/south-africa-news/law-degree-graduates-can-not-write-read-do-sums-or-reason/?fbclid=IwAR0qO_cyU-ElaPRXqenoL6Q9-0My3HNOMBV-yG696ELFxEdLgoOt-lotMTc (accessed 2019-01-07); Biggs *et al* 2014 *Journal for Juridical Science* 2; Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 39; Campbell 2014 *Stellenbosch Law Review* 31. The shortcomings in the national schooling system contributes to the unpreparedness of graduates for practice.

37 Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 42; Swanepoel *et al* 2008 *Journal for Juridical Science* 100; Dednam 2012 *South African Journal of Higher Education* 934; McQuoid-Mason "The four-year LLB programme and the expectations of law students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: some preliminary results from a survey" 2006 27(1) *Obiter* 166 167; Zitske "Stop the illusory nonsense! Teaching transformative delict" 2014 46(3) *Acta Academica* 52 53-54.

38 Dednam 2012 *South African Journal of Higher Education* 934. Also see Quinot and Greenbaum "The contours of a pedagogy of law in South Africa" 2015 1 *Stellenbosch Law Review* 29 33 in this regard.

39 Akojee *et al* 2007 South African Journal for Higher Education 396.

40 See Council on Higher Education "A proposal for undergraduate curriculum reform in South Africa: the case for a flexible curriculum structure" 2013 Discussion document 8. The task team had been created in order to investigate curriculum reform in South Africa. The transition of South Africa to a new political dispensation in 1994 is a central motivator in this regard.

41 Quinot *et al* 2015 *Stellenbosch Law Review* 33.

42 *Ibid.*

43 *Ibid.*

The Chief Executive Officer of the Law Society of South Africa, as it then was,[44] has indicated that, in most cases, students lack the required literacy and/or numeracy skills in order to complete the undergraduate LLB degree in just four years.[45] The following response, made to a survey on the LLB curriculum as commissioned by the Council on Higher Education, illustrates the problem:[46]

> "Generally, students are underprepared for studies in law. They are thrown in at the deep end with little…or no knowledge…of the use of the most important tool of the trade in law – proficiency in reading, writing and, to a lesser extent, speaking English. Moreover, the lack of skill in reading and writing results in an inability to put across legal arguments in a coherent and logical fashion.
> Students struggle with reading and writing, formulating coherent arguments, and absorbing…the quantity of work that is expected of them at a tertiary level. This is not something that can be taught as part of the LLB. There simply is not enough time. Students should already be equipped with…these skills when they reach university, but they are not."

Many practitioners are of the opinion that law schools at universities should prepare students better for legal practice in that students are not experienced in routine tasks, such as drafting wills, administration of deceased estates and court procedures.[47] These practitioners assist to train graduates for practice when employing them at their law firms; however, this is something that may frustrate clients, especially taking into account the enormity of current legal fees.[48] Clients want to experience professional legal services. They have a right thereto, as legal practitioners are "…gatekeepers to and guardians of the law…" and therefore exert an influence over access to justice and the quality of legal representation.[49] In this regard, already a decade ago, the

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44 The Law Society of South Africa now carries the title of The Legal Practice Council.

45 Du Plessis 2016 *De Jure* 1; Greenbaum http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Greenbaum.pdf 10; Biggs *et al* 2014 *Journal for Juridical Science* 1; Snyman-Van Deventer *et al* 2018 43(1) *Journal for Juridical Science* 41; Van der Merwe "Profession can make important contribution to investigation into effectiveness of LLBs" 2010 (April) *De Rebus* 4 4.

46 Domanski "Ulrich Huber's programme for legal education – what lessons for today?" 2011 17(2) *Fundamina* 46 46.

47 Vukowich 1971 *Case Western Reserve Law Review* 140. Also see Gravett 2017 *Potchefstroom Electronic Law Journal* 1 and Beaton "When will legal education catch the wave?" (2 October 2018) https://www.collaw.edu.au/news/2018/10/02/when-will-legal-education-catch-the-wave in this regard.

48 Stetz https://bluetoad.com/publication/?i=482098&article_id=3038646&view=articleBrowser&ver=html5#{%22issue_id%22:482098,%22view%22:%22articleBrowser%22,%22article_id%22:%223038646%22}.

49 Nicholson "Education, education, education: legal, moral and clinical" 2008 42(2) *Law Teacher* 145 145.

former co-chairpersons of the Law Society of South Africa held discussions with government and law deans with regards to the declining quality of law graduates who enter the legal profession.[50] The rationale behind these concerns was that the legal profession owes professional and efficient legal advice and service to members of the public, something that can only be delivered by adequately trained and well equipped legal practitioners.[51]

Students themselves, as well as young lawyers, are to some extent in agreement with the point of view that universities should provide better preparation to them for the purpose of entering legal practice.[52] A student survey, the results of which were published in 2006, indicated, *inter alia*, the following:

(a) that Civil Procedure, Criminal Procedure and the Law of Evidence are in the top ten most important courses;[53]
(b) that trial advocacy, research, problem solving, legal writing, handling ethical issues, litigation skills, consultation and counselling skills are the most important legal skills to be taught. In this regard, students indicated that the acquisition of these skills, at university level, is more of a "wish list" than what is actually taught;[54] and
(c) that respect for ethical rules, respect for other people, as well as honesty and integrity are the most important values that should be acquired from law school.[55]

The abovementioned modules, skills and values are all of practical nature; hence, it is clear that many students believe that they should, as far as the practical application of the law, be better prepared for legal practice upon their exit from university.[56] This is the problem statement around which all arguments in this research will be structured.

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50 Manyathi 2010 *De Rebus* 8.

51 Manyathi 2010 *De Rebus* 8; Smith January 2015 15; see Chapter 5.

52 Gravett 2018 *Potchefstroom Electronic Law Journal* 2.

53 McQuoid-Mason 2006 *Obiter* 170.

54 *Ibid.*

55 McQuoid-Mason 2006 *Obiter* 171.

56 In this regard, see Adewumi and Bamgbose "Attitude of students to Clinical Legal Education: A case study of Faculty of Law, University of Ibadan" 2016 3(1) *Asian Journal of Legal Education* 106 112.

According to Quinot and Greenbaum, an integrated approach to teaching law in South Africa is required.[57] It is therefore more preferable that law should be taught in a holistic way, rather than piecemeal by way of distinct branches, fields and skills.[58] Such an approach acknowledges the fact that the law is a complex discipline.[59] It also acknowledges that teaching the law can be equally complex.[60] Supplementary to this, what is suggested in this research is a more practical approach to education. Practical work refers to tasks in which students observe and/or manipulate real objects or materials; alternatively, they observe a teacher demonstrating various tasks.[61] In this way, they acquire practical skills. Such an approach will provide motivation to students and stimulate their interest and enjoyment of the specific work, enhance their learning of scientific knowledge, provide insight into scientific method and develop expertise in using the same, as well as develop scientific attitudes,[62] *eg* open mindedness and objectivity.[63] It is submitted that law schools should provide them with a proper foundation of legal knowledge and skills in that they should be better prepared for legal practice upon their exit from university. Such a foundation will support their training for practice by their supervising principals. It will also teach them the essential skills to be able to apply the law to solve various legal problems.

The mentioned call for better knowledge and skills training is not a new one. By 1997, an agreement had been reached by law deans that the LLB degree should be transformed into a four year undergraduate qualification.[64] The deans further agreed that the new LLB degree should recognise the following:[65]

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57 Quinot *et al* 2015 *Stellenbosch Law Review* 38.

58 Quinot *et al* 2015 *Stellenbosch Law Review* 38 In this regard, see 4 7 1 with regards to capstone learning opportunities.

59 Quinot *et al* 2015 1 *Stellenbosch Law Review* 38.

60 *Ibid.*

61 Nanny "Practical teaching experience 'best way to learn'" (27 October 2016) http://www.sun.ac.za/english/Lists/news/DispForm.aspx?ID=4429 (accessed 2019-05-14).

62 Scientific knowledge becomes important especially with regards to the Law of Evidence and the rationale behind many processes of analysing and interpreting evidence. See 2 4 6.

63 *Ibid.*

64 McQuoid-Mason 2006 *Obiter* 166. The agreement reached was however not a unanimous one.

65 McQuoid-Mason 2006 *Obiter* 166.

(a) that South African law exists in and also applies to a pluralistic society;
(b) that students should acquire skills, relevant to the practice of law, during their years of academic studies in law school; and
(c) that law schools should strive towards inculcating ethical values into students.

As far as skills are concerned, the deans agreed that the LLB degree should include the following:[66]

(a) analytical skills that will enable students to understand the relationship between the law and society;
(b) language skills, which includes skills relating to indigenous languages;
(c) communication and writing skills;
(d) skills relating to legal ethics;
(e) sensitivity towards race and gender;
(f) practice management skills;
(g) accounting skills;
(h) trial advocacy skills; and
(i) computer skills.

These agreements are paramount in the context of this research, as it will be indicated that students need to be educated to recognise social and human aspects relevant to the practice of law, as well as how to practice law in an ethical and professional manner by employing the aforementioned skills. It is however questionable as to whether or not students are receiving adequate training in these aspects. It will be indicated that training in effective communication and writing does not frequently take place in order for students to continuously practice such important skills.[67] Some other skills training may – and does indeed – take place, but also not on a continuous basis in order to be firmly entrenched in the effective education of the students. What is commendable, is that the deans have also suggested that law schools should encourage practical

66 McQuoid-Mason 2006 *Obiter* 167.
67 See 3 4 4.

sessions for students at university law clinics and participation in Street Law programmes – activities that will surely facilitate the practical training of students.[68]

Most graduates have a firm understanding of substantive legal principles, applicable to various legal disciplines, but lack the necessary practical skills to practically apply such knowledge.[69] This lack of problem solving skills has been acknowledged by a variety of stakeholders[70] and bears the risk of prejudice to clients in legal practice.[71] Students are thus not prepared for legal practice when they exit universities after the completion of their studies.[72] It would be a major shortcoming in the LLB curriculum if no provision is made for adequate exposure to practical legal experience to students during their time spent at university.[73] Warren Burger CJ correctly remarked, in this regard, that the "…shortcomings of today's law graduate lies not in a decent knowledge of the law, but that he has little, if any, training in dealing with facts or people – the stuff of which cases are really made."[74] The public demands legal practitioners who are skilled in solving legal problems and, if universities are not training students as such, they are neglecting their duties.[75] Skills training, as well as those presenting such training, therefore deserve attention and recognition by law schools. According to Geraghty[76]

> "…academia was critical of this rush to relevance, although it could not deny that students and the legal profession would benefit from curricula which improved lawyer skills. The debate between legal academia and those who advocated skills training

68 McQuoid-Mason 2006 *Obiter* 167.

69 Vukowich 1971 *Case Western Reserve Law Review* 141; Holmquist 2012 *Journal of Legal Education* 360.

70 Domanski 2011 *Fundamina* 46; McQuoid-Mason "Can't get no satisfaction: the law and its customers: are universities and law schools producing lawyers qualified to satisfy the needs of the public?" 2003 28(2) *Journal for Juridical Science* 199 200.

71 Domanski 2011 *Fundamina* 47.

72 Hansjee and Kader *The Survivor's Guide for Candidate Attorneys* (2013) 1; Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the profession of law: Summary* (2007) 8.

73 Holness "Improving access to justice through compulsory student work at university law clinics" 2013 (16) 4 *Potchefstroom Electronic Law Journal* 328 333.

74 Kruse 2013 *McGeorge Law Review* 16. Also see Sullivan *et al Educating Lawyers* 6 in this regard, where it is stated that this omission is one of the major limitations of legal education as we currently know it.

75 McQuoid-Mason 2003 *Journal for Juridical Science* 200.

76 Geraghty "Teaching trial advocacy in the 90s and beyond" 2012 (66) *Notre Dame Law Review* 687 693.

> focused on when and where such training should take place, who should be responsible for it, and what the status of the skills teachers should be within law school faculties. Law schools resisted giving 'skills training' curricula and its teachers status equal to 'traditional' curricula and faculty."

However, the point of view of academia sometimes supports that of practitioners and students, as mentioned above.[77] In this regard, the LLB Summit is of significance. The Summit was held by the South African Law Deans Association, the Legal and Education Development branch of the (then) Law Society of South Africa and the General Council of the Bar on 29 May 2013.[78] The purpose of the Summit was to focus on problems surrounding the LLB curriculum, quality assurance, new models for legal education and community service.[79] At the Summit, it was made clear that law schools should assume responsibility for the calibre of future professionals whom they produce.[80] The Carnegie Foundation for the Advancement of Teaching views the role of the law school as follows:[81]

> "Law school provides the single experience that virtually all legal professionals share. It is the place and time where expert knowledge and judgment are communicated from advanced practitioner to beginner. It is where the profession puts its defining values and exemplars on display, and future practitioners can begin both to assume and critically examine their future identities."

The question can now be asked: do law schools fulfil this role? It is submitted that the role is fulfilled in part only. The reasons for this submission will be made clear in this research.[82] It is further submitted that the synchronisation of the interests of law educators with the needs of legal practitioners, and also with that of the public, is a challenge.[83] Civil professionalism, or the legal profession's pledge to serve the public,

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77 See Vukowich 1971 *Case Western Reserve Law Review* 140 in this regard, where it is stated that educators themselves are criticising the lack of practical knowledge and skills of law graduates. Also see Snyman-Van Deventer *et al* 2012 *Obiter* 123 in this regard.

78 Whittle "Legal Education in a crisis? Law Deans and legal profession to discuss refinement of LLB-degree" (undated) https://www.lssa.org.za/upload/documents/LLB%20SUMMIT%20PRESS%20RELEASE.pdf (accessed 2019-11-08).

79 *Ibid.*

80 Dicker "The 2013 LLB Summit" (August 2013) http://www.sabar.co.za/law-journals/2013/august/2013-august-vol026-no2-pp15-20.pdf (accessed 2018-06-14)15.

81 Sullivan *et al Educating Lawyers* 3.

82 Also see Chapter 6 in this regard.

83 Sullivan *et al Educating Lawyers* 4.

must be kept in mind when educating future lawyers.[84] The expectations of the students should also be kept in mind in this regard. There are more and diverse career opportunities at the disposal of students today than there were a few years ago.[85] This means that law teachers, from various fields of specialisation, would be required to present practical programmes and courses to law students.[86] Law teachers should thus ensure that law students are adequately prepared for their future career in legal practice, their duty to the legal profession as well as to equip them with the necessary flexibility to adapt to changes brought about by the unknown changes of the future.[87] One example of such a change is the current rise of Artificial Intelligence (hereafter referred to as "AI"). In this regard, there are expert systems and software that have been developed in order to assist attorneys and officers of the court in the execution of their professional duties, including drafting, legal research and even sentencing.[88] As the Fourth Industrial Revolution is currently underway, it is to be expected that the role of AI, as far as legal practice is concerned, will grow considerably. Another example is the Africanisation – or South Africanisation – of the law of procedure and evidence. In this regard, the incorporation of a concept like *ubuntu*, in procedural law and evidence, will have a profound effect on the institutions of law and on the rules and processes by which conflicts are legally resolved.[89] In short: changes in regulation, technology and what clients want will require changes in education. In this regard, Smith states that new forms of legal business are developing, as well as new ways of how to go about executing work, with a concomitant shift of attitudes towards the same by members of the profession.[90]

It was further emphasised, at the aforementioned LLB Summit, that legal education plays a significant part in the problem that the legal profession is not fulfilling its proper

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84 *Ibid*.

85 Vukowich 1971 *Case Western Reserve Law Review* 146.

86 *Ibid.*

87 Hall and Kerrigan "Clinic and the wider law curriculum" 2011 *International Journal of Clinical Legal Education* 25 29.

88 See Baker, "2018: A legal research odyssey: Artificial Intelligence as Disruptor" 2018 110(1) *Law Library Journal* 5 13-16, as well as Hutchinson "Legal research in the Fourth Industrial Revolution" 2017 43(2) *Monash University Law Review* 567 570 in this regard. Also see 4 7 4 in this regard.

89 Mollema and Naidoo "Incorporating Africanness into the legal curricula: the case for criminal and procedural law" 2011 36(1) *Journal for Juridical Science* 49 49. Also see 3 4 5 in this regard.

90 Smith *The legal education* 27.

role in society.[91] The main duty of universities is to provide students with the essential, substantive theoretical knowledge that they will need when entering practice.[92] However, skills practice, ethical social values of professional responsibility and the importance of practical training at law clinics were also stressed.[93] It can therefore be implied that, should these values and skills not be dealt with at university level, practice is responsible for providing students with the totality of their practical and skills training.[94] Schultz states that

> "…I no longer believe that law school training is simply another kind of graduate school study. It now seems to me that as teachers our primary mission should be to turn out beginning practitioners, and today that means blending doctrine with experience, even if that experience is sometimes only make-believe."[95]

The notion of an approach in which theory and experience are blended was also discussed fairly recently at a conference hosted by the Law Society of South Africa, in collaboration with Monash South Africa, on 1 and 2 March 2018 in Johannesburg.[96] In this regard, it was pointed out that the role of academic institutions should be to produce graduates with the necessary base level skills, or graduates who possess the core competencies that are required within the legal profession, namely the following:[97]

(i) critical thinking and analysis;
(ii) drafting and writing; and
(iii) sound business sense.

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91 Whitear-Nel and Freedman "A historical review of the development of the post-apartheid South African LLB degree – with particular reference to legal ethics" 2015 21(2) *Fundamina* 234 237.

92 See Vukowich 1971 *Case Western Reserve Law Review* 143 in this regard, where it is stated that it, at university level, it is easier to teach knowledge than it is to develop skills. Also see Vukowich 1971 *Case Western Reserve Law Review* 148-149 in this regard.

93 Dicker http://www.sabar.co.za/law-journals/2013/august/2013-august-vol026-no2-pp15-20.pdf 16.

94 See Vukowich 1971 *Case Western Reserve Law Review* 148-149 in this regard.

95 Schultz 1996 *Washington and Lee Law Review* 1647. His reference to "make-believe" obviously refers to simulated practical exercises, which is in contrast to the live-client model.

96 Ramotsho "Uniformed PVT discussed at Legal Education Conference" April 2018 *De Rebus* 6 6. The theme of the conference was "From a Disjointed to an Integrated Legal Profession: The Design of the Appropriate and Relevant Practical Vocational Training for Legal Practitioners."

97 *Ibid.*

Following this discussion, the question as to how academic institutions can produce such graduates was asked.[98] The following suggestions were tabled:[99]

(i) employing university law clinics to assist;
(ii) the introduction of experiential learning to all LLB courses;
(iii) finding synergies between academic institutions and the LEAD division of the LSSA; and
(iv) to focus on section 29 of the Legal Practice Act (hereafter referred to as the "LPA"),[100] providing for community service by candidate attorneys.[101]

Professional and practical training, and most importantly, experiential learning, are prominently mentioned. It appears that, in law schools, there is a divide between doctrinal teachings and professional training.[102] The Carnegie Report has indicated that universities let students be detached theoretical observers with regards to legal issues, whereas they should be actively and practically engaged in such issues.[103] It therefore appears that universities, more specifically law schools, are accentuating the teaching of theory above practical, professional and ethical legal training, the very qualities that legal practice requires.[104] This is ironic, since the four year LLB degree recognised the need for an integrated approach to legal education in the sense that theory should not be separated from practice, unlike the traditional approach to teaching law.[105] This is also the context in which the term "integrated approach to

98 *Ibid.*

99 *Ibid.*

100 28 of 2014.

101 See 5 2 2 2 in this regard.

102 Grimes "The ACLEC Report – Meeting Legal Education Needs in the 21st Century?" (undated) http://www.austlii.edu.au/au/journals/LegEdRev/1996/12.html (accessed 2018-09-25) 2. Lord Chancellor's Advisory Committee on Legal Education and Conduct, or ACLEC, compiled a report in 1996, which, *inter alia*, identified the need for intellectual rigour, core and contextual knowledge, legal values, ethical standards, as well as analytical, conceptual and communication skills in law degree curricula. Also see Chaskalson 1985 *De Rebus* 116 in this regard. Also see Greaves "Learning leadership is in your hands: toward a scholarship of teaching in practical legal training" 2012 *Journal of the Australasian Law Teachers Association* 1 4 in this regard.

103 Morgan "The changing face of legal education: its impact on what it means to be a lawyer" 2011 *GW Law Faculty Publications & Other Works* 1 20.

104 See Gravett 2017 *Potchefstroom Electronic Law Journal* 2 in this regard.

105 McQuoid-Mason 2006 *Obiter* 167.

legal education" will be used throughout this research, unless explicitly indicated otherwise.

The rationale behind the reasoning that universities should focus on substantive theoretical knowledge,[106] is that law schools are not suited for practical training and should therefore invest all their time in theoretical training.[107] Furthermore, the lack of a physical and intellectual environment conducive to skills training, the preference of educators in favour of theory rather than practice, the rapid growth of substantive law with a consequent sacrifice of time required for practical work, as well as financial implications connected to practical programmes, are also obstacles in the way of the creation of more practical academic programmes at law schools.[108] If this approach is however accepted, there is a sharp contradiction between what practice requires and what universities offer.[109] As far as law schools are concerned, it would be desirable to find a way in which to rectify this situation, as there are convincing reasons as to why the teaching by universities and the requirements of practice must be complementary to each other. Consider the following:

- students undergo education both at university level as well as in practice.[110] Therefore, these two avenues should be harmonised and complementary to each other so as to ensure cohesive and substantial education and training to students and eventual professional legal practitioners. Such collaboration between abilities and experience is very important in preparing students for legal practice, especially in diverse settings.[111] In this research, the involvement of private legal practitioners in the practical legal training of law students will be discussed;[112] and

106 See Boshoff 1997 *De Rebus* 27 in this regard.

107 Vukowich 1971 *Case Western Reserve Law Review* 148.

108 Vukowich 1971 *Case Western Reserve Law Review* 151.

109 See Vukowich 1971 *Case Western Reserve Law Review* 148 in this regard.

110 The current regime provides for the four year LLB degree, completed at university level, followed by practical training at either as an attorney, advocate or state prosecutor. After completion of this practical training, more promotional options become available, which options are beyond the scope of this research.

111 Lopez "Leading change in legal education – educating lawyers and best practices: good news for diversity" 2008 (31) *Seattle University Law Review* 775 778.

112 See 4 7 2 1.

- law schools and legal practitioners need to function in harmony, as collaboration is frequently required. Practitioners often act as guest law teachers[113] and/or donors[114] for law school events, whilst the law schools will provide good advertisement for such firms at university and law school related events. Again, cohesion is required as far as education is concerned; otherwise, it may result in a scenario where, during lectures and presentations, practitioners use practical and technical terms that go beyond the level of comprehension of the students.[115]

The first report of the Advisory Committee on Legal Education and Conduct (hereafter referred to as the "ACLEC"), compiled in the United Kingdom in 1996, states in this regard that "[t]he rigid demarcation between the 'academic' and 'vocational' stages needs to disappear; what is required is a new partnership between the universities and the professional bodies at all stages of legal education and training."[116] During such education and training, skills training will be paramount. ACLEC managed to bring academics and legal practitioners together.[117] The meaning of "skill" should be investigated in order to ensure that law teachers, clinicians and other trainers approach such education and training with the correct goals in mind. A skill can be defined as "[e]xpertness, practiced ability, facility in an action or in doing or to do something."[118] It therefore denotes action, practice and competence.[119] In order to learn skills, students will have to do certain things on a repetitive basis until a certain level of objective competence has been achieved.[120] A skill should have the following attributes:[121]

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113 See Vukowich 1971 *Case Western Reserve Law Review* 151 in this regard.

114 These donations can vary from financial contributions to the faculty and the provision of financial scholarship to academically deserving and/or less privileged students to the offering of mentorship services to students during vacation work programmes and student enrichment programmes.

115 See 4 7 2 6 in this regard.

116 ACLEC's First Report on Legal Education and Training, April 1996, par 2.2; Hall *et al* 2011 *International Journal of Clinical Legal Education* 26.

117 Smith *The legal education* 65.

118 Wade "Legal skills training: some thoughts on terminology and ongoing challenges" 1994 5(2) *Legal Education Review* 173 173.

119 *Ibid.*

120 *Ibid.*

121 Wade 1994 *Legal Education Review* 173-174.

- it must be goal directed, *ie* it must be directed towards a particular result;
- it must be learnt, *ie* gradually being built up by way of practice rather than acquired in a reflexive or instinctive manner;
- it usually involves certain micro-skills, *ie* a particular skill consists of various elements. An example in this regard is the skill of listening, which includes showing attention and interest non-verbally, providing acknowledgments, restating certain statements that have been uttered by the speaker, showing feelings in order to demonstrate empathy with what the speaker said; and
- when the skill has been accomplished, a shift to intuitive levels of response for the micro-skill's elements takes place. With regards to the listening skill example: when this skill has been mastered, the listener will automatically incorporate all the mentioned elements in his or her action without concentrating or focusing on it. The separate elements therefore become mechanical or artificial.

Clinicians and law teachers must use these attributes as a benchmark when presenting skills training. O'Regan J emphasised the importance of skills training when stating that the provision of competent legal education to students is the primary responsibility of law schools.[122] According to her, skills, and not content, form the foundation of a competent legal practitioner.[123] Skills training must therefore be a core component of legal education and not merely something that is presented as a by-product of legal education.[124] Swanepoel, Karels and Bezuidenhout also investigated this issue and stated that there should not be a choice between content or skills, but the development of ways of how to integrate the two concepts.[125] They further state that the way in which law students are prepared for entry into the legal profession should be regularly reviewed.[126] According to Boshoff, skills based training is paramount.[127] He states that, during practical training, candidates should be taught

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122 Du Plessis "Access to justice outside the conventional mould: creating a model for alternative clinical legal training" 2007 32(1) *Journal for Juridical Science* 44 47.

123 *Ibid.*

124 *Ibid.*

125 Swanepoel, Karels and Bezuidenhout "Integrating theory and practice in the LLB curriculum: some reflections" 2008 (Special Issue) *Journal for Juridical Science* 99 100.

126 *Ibid.*

127 Boshoff "Professional legal education in Australia – Emphasis on interests rather than rights" 1997 (January) *De Rebus* 27 27.

the skills inclusive of drafting, research, advocacy and interviewing.[128] He is of the opinion that this would lead to a far more competent legal practitioner on a long term level than a candidate who is taught how to run and manage the daily affairs in a legal practitioner's office.[129] Boshoff's argument must be understood in context of this research. While it is important for students to know how a practitioner runs and manages a law office, this is something that practice can – and ought to – teach graduates. However, when it comes to the skills necessary to perform the legal functions in that office, *ie* to consult with clients, draft letters and other legal documents, analyse clients' cases, perform research in connection with finding solutions for such cases, as well as to eventually advocate the cases in a court of law, graduates should possess such skills.

The pressing needs of the economy in South Africa have given rise to a skills revolution. This notion had been explained as follows by former Deputy President Mlambo-Ngcuka:[130]

> "The phenomenon of unemployed graduates, who are without abilities to self-employ and self-determine, after spending three to four years of post secondary education is an indication to all of us of the challenge in our education at a tertiary level…the curriculum developers are not paying enough attention to issues of relevance and ensuring that we all pay attention to the skills and competencies learners require when they come out of higher education…we need a skills revolution in the curriculum of tertiary education."

However, Griesel and Parker state that a degree of realism needs to be sustained from both higher education and the employer with regards to the extent to which higher education can bridge the gap between higher education and entry into the workplace.[131] It is submitted that the learned authors are correct in this regard. It is not the aim of this research to suggest that higher education – more specifically law schools – should teach students everything that they need to know for success in the workplace as from their first day at the office. It is however submitted that law schools

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128 *Ibid.*

129 *Ibid.*

130 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 2; see 5 3 6 1.

131 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1. Also see 5 3 6 1 in this regard.

can equip students with adequate professional and practical skills that will allow them to perform basic tasks when entering legal practice, more specifically tasks with regards to civil proceedings, criminal proceedings and the interpretation of evidence. More clinical law modules are required in this regard.[132] In the context of this research, this must also be interpreted to mean that certain law modules, more specifically Civil Procedure, Criminal Procedure and the Law of Evidence, should be presented in the same mould as clinical law modules.

1 2 RESEARCH QUESTION, THEORETICAL BASIS AND LITERATURE REVIEW

1 2 1 RESEARCH QUESTION

It is trite knowledge that, in practice, the application of all legal principles is accomplished by way of specific legal procedures. The research question is therefore the following: how can law schools most effectively use procedural law modules to enhance the competence of graduates entering legal practice? To facilitate a discussion of the research question, it is useful to break it up into shorter questions, each of which will provide more insight into the relevance and importance of the main question. These shorter questions are the following:

(a) does legal practice require a change in the manner in which law students are currently trained?
(b) how do universities currently train law students as far as procedural law modules are concerned?
(c) why should university training be more practical in nature as far as procedural law modules are concerned?
(d) what teaching methodology should be employed, as far as procedural law modules are concerned, in order for universities to produce more competent graduates for legal practice?

[132] Smith *The legal education* 19.

(e) is there a qualifications framework and/or any relevant legislation that has an impact on the argument that law graduates should be more competent for entry into legal practice?
(f) what role does transformative constitutionalism play in context of the main research question?

These questions, culminating in the main research question, will be answered by way of a discussion in this section and following subsections of this chapter. More elaborate discussions, answering these questions, will be conducted throughout this research.

It has already been pointed out that various stakeholders in legal practice require that the calibre of law graduate, who enters legal practice, must improve.[133] Erasmus states that a "…practical mechanism that may have the effect of improving the competency and calibre of…legal representatives…would be to put proper mechanisms in place to ensure quality legal representation."[134] Although he primarily refers to defence attorneys and state prosecutors, it is submitted that the statement is equally applicable to legal practitioners who specialise in civil litigation as well. Erasmus furthermore does not state which mechanisms should be employed; therefore, it is submitted that legal education at tertiary level is a good place to start. In this regard, law schools primarily employ the Socratic and case dialogue teaching methodologies during all years of academic study.[135] These methodologies mainly entail students attending lectures while undergoing learning in a passive manner. In this research, it will be argued that, although these methodologies do hold value as far as acquiring knowledge is concerned, something additional is required in order to prepare students for practice. In this regard, Huber[136] stated that students, by merely listening to law teachers in a classroom setting, are not at all sufficiently provided with

133 See 1 1.

134 Erasmus "Ensuring a fair trial: striking the balance between judicial passivism and judicial intervention" 2015(3) *Stellenbosch Law Review* 662 674.

135 See 3 3 in this regard.

136 See Van der Bergh "Book reviews: *De ratione juris docendi & discendi diatribe per modum dialogi*, by Ulrich Huber" 2011 128(2) *South African Law Journal* 381 382. Ulrich Huber is described as an outstanding Roman-Dutch jurist and an exceptionally good law teacher.

a ready and sound knowledge of the law.[137] He suggests that students should get practice in disputing, which should permeate through and continue for the duration of the students' academic training.[138] This will prepare the students' minds, modes of expression and equip them with an appropriate manner of speaking for public speaking, which is important in the case of litigation.[139] These aspects are central to the successful discharge of duties by jurists.[140]

Although Huber focused on rhetoric and public speaking in this regard, which is also a pivotal skill that law students should develop, it is true that students will not be able to "discharge their duty successfully" as legal practitioners on behalf of clients if they do not practice their knowledge in any way. Knowledge of substantive legal principles is important, but it is submitted that it is more important to know how to go about enforcing such legal principles in order to reach a specific outcome desired by a client. Legal procedure now becomes important and students cannot become familiar with procedure and the intricacies thereof if they do not practice it at university level. This pertains specifically to the procedural law modules. The Preamble of the LPA provides that the legal profession must be accountable to the public. It is submitted that this will be achieved with greater success should legal education be adapted in order to instill principles and skills in law students that will shape them into professional legal practitioners. Law schools must therefore also focus on the future of law students after graduation when considering appropriate teaching methodologies with regards to these modules in particular. In this context, Parmanand believes that law schools should become more proactive.[141] Law schools should demand that all students, from their first academic year, become involved with clinical legal training, working in the offices of attorneys and/or advocates, or performing clerking duties for judges.[142] As an alternative Parmanand suggests that law schools could implement the whole pupillage curriculum as a final year course, which should be set as a prerequisite for

137 Domanski 2011 *Fundamina* 52.

138 *Ibid.*

139 *Ibid.*

140 *Ibid.*

141 Parmanand "Raising the bar: a note on pupilage and access to the profession" 2003 2 *Stellenbosch Law Review* 199 202.

142 *Ibid.*

the law degree.[143] It is submitted that the learned author is correct in stating that law schools should be more proactive. Whether it will be logistically possible for a university law clinic to also train additional students, apart from the students enrolled for the clinical course, is a more difficult question. Also, it is not certain as to whether members of the legal profession will have the infrastructure and/or time to host students for the purpose of shadowing or legal training at their respective offices or venues. Whatever the case may be, it is submitted that, while involved in clinical work, even first year students will be able to learn about procedure and how to enforce the law. The only problem is that they will not know what the specific legal principles are that must be enforced, as they have not studied the theory yet. University law clinics generally present a module on clinical law, mostly during the final academic year, in terms of which students perform practical work at the law clinic, either in a live client setting, or as part of simulations.[144] Although this module is an important one as far as legal practice is concerned, two problems are apparent. Firstly, the module is not compulsory at all universities, which means that not all students will be exposed to legal practice before graduation. Secondly, the module is only for one year, and even less than a year, keeping in mind the start and end times of official university academic programmes, student recesses and public holidays. It would therefore be desirable if the students' exposure to legal practice could be prolonged or enhanced by integrating legal practice with their conventional academic curriculum.

Based on the aforementioned, it is submitted that the main research question must be answered in the affirmative. However, the discussion relating to the importance and relevance of the main research question, as well as to the subordinate questions, do not end here. The following subsections are equally important in providing substantial information and arguments in that regard.

143 *Ibid.*

144 See Chapter 4 in this regard.

1 2 2 THEORETICAL BASIS FOR THE RESEARCH QUESTION

Every research study should be based on a sound theoretical basis. The theoretical cornerstone of this research will be the concept of transformative constitutionalism. Broadly speaking, it will be argued that transformative constitutionalism, in this context, will impact on the content of and methodologies by which procedural law modules should be presented to law students. This argument will be fully supported by reasons as to make it clear.

Transformative constitutionalism denotes a change, brought about in a structured manner, to better things by way of adherence to a constitutional system of government.[145] In the South African context, transformative constitutionalism is a process – it is thus not an event that has taken place and therefore been completed.[146] It is a transformative process in itself.[147] This is significant, especially considering South Africa's former apartheid regime. During the apartheid regime, the law was based on a culture of authority and coercion.[148] The apartheid regime was founded upon parliamentary sovereignty.[149] Therefore, what Parliament stated was law, without the need for any justification.[150] However, with the advent of the constitutional dispensation, a major change occurred: a move away from the culture of authority and coercion towards a culture of justification.[151] This means that, contrary to the apartheid regime where actions did not have to be justified, all actions are now expected to be justified by the government.[152] To illustrate the importance of such justification for the purpose of this research, it is necessary to briefly discuss the impact that

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145 Mbenenge "Transformative Constitutionalism: a judicial perspective from the Eastern Cape" 2018 32(1) *Speculum Juris* 1 2.

146 Mbenenge 2018 *Speculum Juris* 2; Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 354.

147 *Ibid.*

148 Mureinik "A bridge to where? Introducing the Interim Bill of Rights" 1994 (10) *South African Journal on Human Rights* 31 32.

149 Mureinik1994 *South African Journal on Human Rights* 32.

150 *Ibid.*

151 Mureinik1994 *South African Journal on Human Rights* 32; Langa 2006 *Stellenbosch Law Review* 353; Klare "Legal culture and transformative constitutionalism" 2017 14(1) *South African Journal on Human Rights* 146 147.

152 Mureinik1994 *South African Journal on Human Rights* 32.

transformative constitutionalism should have on the law, as well as how it should be instilled in law students as far as the procedural law modules are concerned. It had been stated that the South African civil law tradition had conceptual clarity.[153] From this, general legal principles could be deduced – principles which would apply to specific scenarios.[154] This would apparently be different from the casuistic English common law.[155] However, the difference was not apparent. Instead, a manner of formalised legal reasoning was developed, rendering the flexibility, adaptability and fairness of the civil law system obsolete.[156] A formal manner of reasoning, or a conservative approach, is confined to a purely textual interpretation of a particular legal text.[157] The effect of this was that substantive legal reasoning, as the basic underlying corrective measure to ensure that formalised rule and concepts fulfilled their original purpose, had not been applied at all.[158] A substantive manner of reasoning invokes a contextual and purposive interpretation of a particular text, taking into account, *inter alia*, the background of a specific scenario.[159] The advent of the Constitution however brought change. The Constitution is a protective measure to ensure that substantive legal reasoning is taken into account when all legal principles are considered.[160] The following principles are important in this regard:

(a) section 8(3)(a) of the Bill of Rights provides that, when applying a provision of the Bill to a natural or juristic person, the court must apply or, where necessary, develop, the common law in order to give effect to a right in the Bill.[161] Such development must take place to the extent that legislation does not give effect to such right;[162]

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153 Froneman "Legal reasoning and legal culture: our 'vision of law'" 2005 16 *Stellenbosch Law Review* 3 17.

154 *Ibid.*

155 *Ibid.*

156 *Ibid*.

157 Froneman 2005 *Stellenbosch Law Review* 6.

158 Froneman 2005 *Stellenbosch Law Review* 17.

159 Froneman 2005 *Stellenbosch Law Review* 6.

160 Froneman 2005 *Stellenbosch Law Review* 17.

161 The Bill of Rights can be found in Chapter 2 of the Constitution of the Republic of South Africa 108 of 1996. Also see Froneman 2005 *Stellenbosch Law Review* 17 and *Du Plessis and Others v De Klerk and Another* 1996 3 SA (CC) par 60.

162 S 8(3)(a).

(b) section 39(1)(a) of the Bill of Rights provides that, when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;[163]

(c) section 39(2) of the Bill of Rights provides that, when any legislation is interpreted, or when the common law or customary is developed, a court must promote the spirit, purport and objects of the Bill of Rights; and[164]

(d) section 173 of the Constitution provides that the Constitutional Court, Supreme Court of Appeal and the High Court have the inherent competence to protect and regulate their own processes, as well as to develop the common law with due regard to the interests of justice.[165]

It therefore appears that the Constitution does not afford the courts any other choice than to apply substantive reasoning.[166] A formalised system of law would not regard such an approach as proper law.[167] This clearly shows the impact that transformative constitutionalism has – or should have – on the legal system in South Africa, including both substantive law and adjectival or procedural law. It will consequently be argued that the traditional teaching and learning methodologies, as far as procedural law modules are concerned, should be subjected to change based on the same reasoning: substantive, instead of conservative. In this regard, the background of education in South Africa,[168] the notion of development of people as appearing in the Constitution,[169] as well as the spirit of the LPA,[170] will be important factors to motivate such change. Moreover, law teachers will have to take into account that millennial students are in need of extensive justification for whatever tasks they are required to perform or complete.[171] The rationale behind each strategy and task therefore

163 Also see Froneman 2005 *Stellenbosch Law Review* 17.

164 *Ibid.*

165 *Ibid.*

166 Also see Froneman 2005 *Stellenbosch Law Review* 17, as well as Le Roux "The aesthetic turn in the post-apartheid constitutional rights discourse" 2006 1 *Tydskrif vir die Suid-Afrikaanse Reg* 101 112.

167 *Ibid*.

168 See 2 3.

169 See 2 1, 2 2 1 and 2 4 2.

170 See Chapter 5.

171 See 4 7 4 1 and 4 7 4 2 in this regard.

becomes important.[172] Also, centennial students have been born amidst technology and prefer the use of technology in teaching and learning experiences.[173] Law teachers can therefore no longer ignore changes to the teaching and learning environment, as such changes will contribute towards the development of the student, as well as to the development of society as a whole.

With regards to the content that the teaching and learning of procedural law modules must contain, it is essential that aspects of transformative constitutionalism should be included. The following statement from Froneman J indicates the reason for this submission:[174]

> "How can one… [pretend] not to…have views on how democracy and law works in a society, or that these views can be kept wholly separate from one's view of the law? The traditional South African lawyer who claims to do only 'law' and not 'politics', and who relies only on formal legal reasoning as his stock-in-trade, is in trouble here. No amount of formal legal reasoning is going to save the day for him."

By "stock-in-trade", the Honourable Judge refers to a resistance against any changes to the common law, statutory law or customary law as it currently stands.[175] This would be indicative of a neglect of the underlying values of the Bill of Rights and the need to provide justification for any changes to the law that become necessary.[176] Such a neglect will further be indicative of support for the pre-1994 *status quo* as far as legal reasoning is concerned, which had largely been based on authoritarianism, without the need for any substantive reasoning in order to justify any legal decisions or acts.[177] This approach is not appropriate, because it rejects the notion of transformation of society, whereas the Constitution endorses transformation as a central element.[178] Although this is trite law, support for the pre-1994 dispensation is still a remnant in the South African legal culture.[179]

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172 *Ibid.*
173 See 4 7 4 1 and 4 7 4 2 in this regard.
174 Froneman 2005 *Stellenbosch Law Review* 15.
175 *Ibid.*
176 *Ibid.*
177 *Ibid.*
178 *Ibid.*
179 *Ibid.*

Froneman states that the study and practice of law is a practical discipline that is aimed at arriving at a solution for practical issues.[180] There is no time to postpone conclusions in this regard.[181] When practising law, decisions are made by a process that involves the following elements:[182]

(a) an analytical element, *ie* the use of language to systemise and make sense of the various areas of legal disciplines;
(b) an empirical element, *ie* what is happening in practice, how the law is being applied and what is happening in the courts; and
(c) a normative element, *ie* the justification for a particular principle that is being applied.

These elements are applicable to legal education in general, including the teaching and learning of the procedural law modules. The "stock-in-trade" culture, as indicated by Froneman, is therefore also applicable to teaching and learning. In this research, the meaning of teaching and learning will be confined to the procedural law modules. Law teachers must question the direction in which the teaching and learning of these modules is heading.[183] Transformative constitutionalism plays a pivotal role in this exercise in that a critical pedagogy is required, *ie* a methodology where students can be taught to look at the law, as it currently is, and critically evaluate the *status quo* in light of the values of the Constitution.[184] In this regard, Zitske states that, because the Constitution is the supreme law of South Africa and therefore applies to all law, as well as because it promotes transformative constitutionalism, there is a constitutional duty on all law teachers to conduct teaching and learning in a transformative manner.[185]

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180 *Ibid.*

181 *Ibid.*

182 Froneman 2005 *Stellenbosch Law Review* 15-16.

183 Zitske 2014 *Acta Academica* 54.

184 See Zitske 2014 *Acta Academica* 55 in this regard. This approach is an answer to the Critical Legal Studies theory. See Legal Information Institute "Critical Legal Theory" (undated) https://www.law.cornell.edu/wex/critical_legal_theory (accessed 2020-03-29) with regards to Critical Legal Studies (hereafter referred to as "CLS"). In short, this theory promotes the point of view that the law is intertwined with social issues. CLS theorists believe that the law supports the interests of those who created the law. They state that law is in favour of the historically privileged members of society, but is a disadvantage to the underprivileged members.

185 Zitske 2014 *Acta Academica* 55.

This argument is fully supported in this research and forms the basis of the plea for change as far as the teaching and learning of procedural law modules is concerned. In line with the constitutional spirit of justification, law teachers of procedural law modules need to justify the teaching and learning of these modules in the same manner as power is exercised by the three tiers of government, *ie* the legislature, the executive and the judiciary.[186] This involves introspection with regards to what is taught, how it is taught, as well as providing justification to students as to why such study content is being taught.[187]

1 2 3 THE CONSTITUTIONAL IMPORTANCE OF AN INTEGRATED APPROACH TO THE TEACHING AND LEARNING OF PROCEDURAL LAW MODULES

In light of the theoretical basis, as explained, it goes without saying that students will need to be knowledgeable and skilled in legal procedure and the principles of evidence in order to promote the spirit and purport of the Constitution and the LPA in legal practice. As stated by Froneman,[188] the study and practice of law is a practical discipline. It will consequently be argued in this research that, by presenting the procedural law modules by way of CLE, the students will experience a much more practical approach to these subjects, as it should be. Legal procedure does not appear in theoretical form in legal practice, but in practical form; therefore, by subjecting students to only or mainly lecture based presentations in this regard, law schools are not doing justice in preparing students for legal practice. It will also be argued that CLE is an appropriate methodology, as it combines the teaching of theory with practice, in order to train students for legal practice. It does not mean that law schools must choose between theory and practice, as both are important and complement each other.[189] It simply means that the one must not exist without the other. As far as procedural law modules are concerned, students should not merely study abstract doctrinal principles, which may be confusing and difficult to understand, but practice

186 *Ibid.*

187 *Ibid.*

188 See 1 2 2.

189 Parmanand 2003 *Stellenbosch Law Review* 202.

such principles by engaging in examples or other scenarios, *eg* mock trials, moot courts or work at a university law clinic. Apart from this, CLE can also:[190]

- expose students to the chaos and complexities of real life;
- teach students to handle emotional stress and tension that is associated with professional life;
- uplifts students' experience of quality standards of legal practice;
- teach students what it is to be people orientated;
- make the machinery of justice function better by way of the presence of students as prospective legal practitioners; and
- expose students to the demands of justice on its operational level, as well as how it may affect them as professionals in relation to their clients as individuals. It must be kept in mind that the law does not exist in abstract, but is a relationship with individuals and society.[191]

Training of this nature resembles the heuristic[192] training approach followed by the medical, teaching, pharmacy and psychology professions.[193] It can also be described as a work integrated learning approach.[194] It is yet to be implemented in the legal profession,[195] and greatly anticipated, as the mere teaching of the law to students does not assist them to become legal practitioners.[196] Students need to develop their lawyering skills by actually participating in practical tasks. Students also need to realise that, in exercising the mentioned lawyering skills, there is a human being on the receiving end of such skills. It will therefore also be argued that human interaction

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190 Parmanand 2003 *Stellenbosch Law Review* 203.

191 Bon "Examining the crossroads of law, ethics, and education leadership" 2012 22 *Journal of School Leadership* 285 293.

192 Vocabulary.com "Heuristic" (undated) https://www.vocabulary.com/dictionary/heuristic (accessed 2019-10-14). The meaning of "heuristic" is derived from the Greek word that means "to discover." It describes a rule or method that comes from experience. Such experience assists a person in thinking things through, including by way of the process of elimination or trial and error. Students therefore learn to look at a problem from many angles instead of approaching it directly.

193 Parmanand 2003 *Stellenbosch Law Review* 202.

194 Evans, Cody, Copeland, Giddings, Joy, Noone and Rice *Australian Clinical Legal Education: designing and operating a best practice clinical program in an Australian Law School* (2017) Australian National University Press 25.

195 *Ibid.*

196 Parmanand 2003 *Stellenbosch Law Review* 202.

and reaction should never be omitted from the training of students towards entry into the legal profession. If they are omitted, it cannot be said that students are trained to approach legal issues against the backdrop of the values enshrined in the Constitution.[197] In this regard, the Preamble of the LPA specifically provides that the legal profession must ensure that the values, underpinning the Constitution, are embraced and that the rule of law is upheld. As stated above, CLE can expose students extensively to human interaction and enhance their practical education in the context of real life issues in society.[198]

Cappelletti convincingly states that legal education should not follow a traditional, easy and abstract approach.[199] As motivation for this, he states that the law is a tool for the pursuance of social policies and therefore, the role of a legal practitioner includes a responsibility towards such social policies.[200] Therefore, the law must be seen and taught as an instrument for ordering and changing society.[201] In this regard, Cappelletti states that professional ethics and clinical education must be included in the law curriculum and also that the connection between clinical education, legal aid and other public legal services needs to be emphasised.[202] The reason for this emphasis is because the law does not only consist of norms and doctrines, but also of processes, stakeholders and institutions which create and operate the legal system.[203] For this reason, legal education needs to focus on such processes, stakeholders and institutions in order to evaluate their actions in light of values like freedom and equality.[204] Cappelletti's argument further strengthens the importance of human elements in the legal system and that the law should be used as an instrument to improve their lives, wherever possible. The learned author further states that law

197 See Chapter 2 for a detailed discussion in this regard.

198 See 3 4 5 for a discussion about the importance of including social and human elements in the training of law students as far as procedural law modules are concerned.

199 Cappelletti "The future of legal education: a comparative perspective" 1992 (8) *South African Journal on Human Rights* 1 11.

200 *Ibid.*

201 *Ibid.*

202 *Ibid.*

203 *Ibid.*

204 *Ibid.*

clinics and CLE are important in this regard.[205] He calls upon all law schools to sponsor a system in terms of which final year law students are encourage to work at law clinics in return for academic credit.[206] Although this system is currently in place in many law clinics, CLE is not compulsory at all law schools. It will be argued in this research that CLE should become compulsory at all law schools in order to ensure exposure to legal practice for all law students.[207] This will also have an impact on how students experience the practical application of the procedural law modules in a practical environment, as well as how they perceive procedural justice in lieu of the values enshrined in the Constitution.

It is however not only Cappelletti who calls for a new approach to the teaching and learning of the law. It is submitted that a novel approach to teaching law, more specifically the procedural law modules in the context of this research, can be inferred from the National Qualifications Framework (hereafter referred to as the "NQF"). The LLB degree is currently registered at NQF level 8.[208] The South African Qualifications Authority (hereafter referred to as the "SAQA") exit level outcomes for the LLB degree are as follows:[209]

(a) the learner will have acquired a coherent understanding of, as well as the ability to critically analyse fundamental legal and related concepts, principles, theories and their relationship to values;
(b) the learner will have acquired an understanding and application of the relevant methods, techniques and strategies involved in legal research and problem solving in both theoretical and practical contexts;
(c) the learner is able to collect, organise, analyse and critically evaluate information and evidence from a legal perspective;

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205 Cappelletti 1992 *South African Journal on Human Rights* 12.

206 *Ibid.*

207 See 4 7 6.

208 Whitear-Nel *et al* 2015 *Fundamina* 244.

209 South African Qualifications Authority "Registered Qualification: Bachelor of Laws" (undated) http://regqs.saqa.org.za/viewQualification.php?id=22993 (accessed 2019-10-29). Also see Swanepoel *et al* 2008 *Journal for Juridical Science* 101 and McQuoid-Mason 2006 *Obiter* 167-168 in this regard.

(d) the learner will have acquired the ability to communicate effectively in a legal environment by means of written persuasive methods and sustained discourse;
(e) the learner can solve complex and diverse legal problems in creative, critical, ethical and innovative ways;
(f) the learner is able to work effectively with colleagues and other role players in the legal process as a team or group and contribute significantly to the output presented by such a group;
(g) the learner will, where practicably possible, have acquired computer literacy to effectively communicate, retrieve and process relevant data in a legal environment;
(h) the learner is able to manage and organise professional activities in the legal field in a responsible and effective manner;
(i) the learner has sufficient skills and knowledge to participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law; and
(j) the learner has acquired legal skills and knowledge in order to solve problems responsibly and creatively in a given legal and social context.

These outcomes imply something more than mere legal education in the traditional sense, as students will not acquire skills and knowledge from merely studying theory from textbooks and other relevant study material. Students must therefore be afforded the opportunity to practice effectively what they have studied in order to acquire such skills. Also, because the LLB qualification is listed as generic, *ie* that all LLB degrees from various universities are not required to be identical, innovation in curricular design can be facilitated.[210] Law schools can therefore devise new ways in which to teach law. Taking into consideration the abovementioned SAQA outcomes, it is essential that law schools consider more practical ways to better prepare students for legal practice. Furthermore, the mentioned outcomes show a similarity to the outcomes of CLE.[211] As the law of procedure and evidence is the spool around which the functioning of the law is running, it is submitted that it should be taught by way of CLE

[210] Whitear-Nel *et al* 2015 *Fundamina* 244.
[211] Swanepoel *et al* 2008 *Journal for Juridical Science* 101.

in order to ensure that graduates are competent in putting substantive law in motion when confronted with legal problems in practice. This will also ensure that the SAQA outcomes have been complied with as far as the procedural law modules – and CLE – are concerned. In the United States of America, the MacCrate Task Force made specific recommendations with the view to improve legal education and professional development of students.[212] The MacCrate Task Force Report was the result of an event in 1989, when the Section of Legal Education and Admissions to the Bar of the American Bar Association established the Task Force on Law Schools and the Profession Narrowing the Gap in order to examine the extent to which law schools were really preparing law students for entry into the profession.[213] The report was published in 1992.[214] The official title of the report was *Legal Education and Professional Development – An Educational Continuum*, but it has also been referred to as *The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*.[215] The latter title states the problem: there is an existing gap between what is taught at law schools and what is actually experienced in legal practice. Within the confines of "professional development" in the said report, the following aspects are of special significance to ensure that the teaching of lawyering skills and professional values is effective:[216]

(a) the development of concepts and theories underlying skills and values being taught;
(b) the opportunity for students to perform lawyering duties, followed by feedback and self-evaluation; and
(c) reflective evaluation of the performance of the students by a qualified assessor.

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212 Chavkin "Experience is the only teacher: meeting the challenge of the Carnegie Foundation report" (2007) http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html (accessed 2019-06-20); Morgan 2011 *GW Law Faculty Publications & Other Works* 19.

213 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

214 Engler 2001 *Clinical Law Review* 110, 113.

215 Engler 2001 *Clinical Law Review* 113.

216 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

The MacCrate Task Force identified the mentioned lawyering skills and professional values that every lawyer should possess[217] and, in doing so, it sought to put in motion a discussion in all sectors of the legal profession relating to the nature of skills and values that are central to the role and functioning of legal practitioners in practice.[218] The skills are the following:[219]

(a) problem solving;
(b) legal analysis and reasoning;
(c) legal research;
(d) fact investigation;
(e) communication;
(f) negotiation;
(g) counselling;
(h) litigation;
(i) alternative dispute resolution;
(j) organisation and management of legal work; and
(k) recognising and resolving ethical issues.

The values are the following:[220]

(a) the provision of competent legal representation;
(b) striving to promote justice, fairness and morality;
(c) striving to improve the legal profession; and
(d) professional self-development.

Firstly, the mentioned aspects, lawyering skills and professional values are all part of CLE training.[221] Secondly, it shows that outside of South Africa, there are also efforts being made to increase the practical skills training of law students by way of

217 Morgan 2011 *GW Law Faculty Publications & Other Works* 19; Engler 2001 *Clinical Law Review* 113.
218 Engler 2001 *Clinical Law Review* 113.
219 *Ibid.*
220 *Ibid.*
221 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

experience. The MacCrate Task Force in fact stated that the said skills and values can be best enhanced by way of a student's active involvement in the clinical programme of a university.[222] It stated the following:[223]

> "Clinics have made, and continue to make, a valuable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession. Their role in the curricular mix of courses is vital."

This further substantiates the argument in this research that CLE is the appropriate methodology by which practical modules like the procedural law modules, in which a lot of these skills and values find application, can and should be taught.

After the publication of the MacCrate Report, the Clinical Legal Education Association, better known as CLEA, appointed a joint task team of clinicians with regards to the implementation of the recommendations in the report.[224] This task team identified the following implementation goals:[225]

(a) law schools should provide all students with appropriate instructions relating to the mentioned skills and values by way of a combination of live client representation, simulations and classroom components;
(b) in order for such skills and values to be taught by way of live client representation, law schools will provide students with faculty supervision;
(c) in order for such skills and values to be taught by way of live client representation, law schools will provide students with a faculty supervised live client clinical programme;
(d) law schools should provide all students with a list of the mentioned skills and values and also inform them about the availability of clinical and other programmes by way of which skills and values can be developed;

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222 Morgan 2011 *GW Law Faculty Publications & Other Works* 20; Engler 2001 *Clinical Law Review* 114.
223 Engler 2001 *Clinical Law Review* 114.
224 Engler 2001 *Clinical Law Review* 121.
225 Engler 2001 *Clinical Law Review* 121-122.

(e) law schools must provide for adequate resources in order to ensure that students fulfil their obligation towards enhancing the capacity of law and legal institutions to do justice; and

(f) law schools should provide students with the necessary instructions relating to the mentioned skills and values in order to enable them to fulfil their obligations to provide legal services to people who cannot afford them.

These implementation goals will resonate throughout this research in the context of integrating CLE with the teaching and learning of procedural law modules. All the CLE teaching methods, mentioned by CLEA, should play a clear and distinct role in this regard, *ie*, classroom sessions, the live-client method and simulated activities. The relevance and importance of each of these teaching methods, in context of this research, should be briefly evaluated at this stage.[226] Classroom sessions, or lectures, are relevant for conducting information sessions with students and explaining the theory of law to them.[227] It is a common teaching method implemented by universities all over the world[228] and is effective in addressing large numbers of students. Classroom sessions are important for imparting foundational theoretical knowledge onto students, which they can use as basis and background for other more practical tasks and activities that they will be required to do.[229] The importance of classroom sessions lies in the argument that theory and practice should not be separated when using CLE as teaching methodology.[230] However, classroom sessions are deemed to be one of the most ineffective teaching methods at the availability of law teachers[231] and, for that reason, it is submitted that it should not be used on its own.[232] For such classroom sessions to be effective, and keeping in mind the practical focus of CLE, lectures must be presented in such a manner so as to meet the educational objectives of CLE.[233] One of these ojectives is an awareness of professional ethics, social

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226 See 4 3 for a more detailed discussion of the various teaching methods as far as CLE is concerned.

227 See 4 3 3.

228 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* (2018) 220.

229 See 4 3 3.

230 *Ibid*.

231 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 220.

232 See 3 3 with regards to the Socratic and case dialogue teaching methodologies, the most common teaching methodologies that are being used for lectures.

233 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 221.

responsibility and the values underpinning the legal profession.[234] Another objective is the presentation of substantive law.[235] This may provide students with valuable and useful knowledge in order to address legal issues that they may encounter in legal practice.[236] It will work especially well in specialised units that law clinics may host.[237] A third goal is that information relating to important practical skills can be imparted on students, *eg*, consultation skills, negotiation, trial advocacy, drafting, research, as well as file and office management.[238] Nevertheless, lectures give rise to passive learning, insufficient engagement between teacher and student and lack of feedback from teacher to student, to mention but a few disadvantages.[239] Lectures should however not be disregarded, but something additional is required by way of which the information, transmitted during classroom sessions, can be augmented and concretised. This is where experiential learning becomes important.

Experiential learning entails the integration of theory and practice by combining the foundational knowledge of students, acquired during classroom sessions, with actual experience that they may acquire during live-client sessions at law clinics, at law firms or during simulated activities.[240] Students can gain experience by assuming the role of legal practitioners or observing how legal practitioners practice law.[241] In doing so, students are active in contributing to their own education, which is fully underscored by the philosophy of constructivism. The philosophy of constructivism and the relevance thereof for this research is discussed elsewhere.[242] Contrary to the classroom component, student learning, as part of experiential learning, is active and students and law teachers engage on a regular level.[243] It is submitted that this is the best method for teaching in a CLE course, as well as for teaching and learning of

234 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 223; 4 3 3.

235 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 223.

236 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 223; 4 3 3.

237 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 223. See 4 7 2 1 with regards to specialised units in some university law clinics.

238 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 223; 4 3 3.

239 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 224-225.

240 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 229. See 4 3 4 with regards to the practical component of CLE.

241 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 229.

242 See 2 3.

243 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 230.

procedural law modules. The majority of clinicians are in agreement that the most important objectives of CLE are to teach lawyering skills and social justice to students.[244] The integration of the context of legal theory and lawyering skills into legal education can play an important role in motivating students to developing a passionate attitude towards other people, towards the craft of practising law and seeking justice.[245] This passion and commitment is of crucial value as far as the role of transformative constitutionalism in legal education and legal practice is concerned.[246] It may also move students to be amenable to render *pro bono* legal services for people who are not able to afford legal representation, but who are in definite need of legal assistance, especially where their fundamental rights are affected. In order to maintain the students' passion, the practise of law and the social good,[247] opportunities, as part of legal education, need to be created where students can interact with people.[248] The most plausible way in which this can be achieved, is by way of the live-client method.[249] Experiential learning of this nature will make students more familiar with people and their circumstances, social institutions, the tasks that legal practitioners perform, legal doctrines behind the performance of such tasks,[250] as well as legal procedure.[251] Students will be able to assume responsibility for their actions in representing members of the public,[252] which responsibility plays a significant role in the creation of accountable legal practitioners, as envisaged by the LPA.[253] Students receive feedback from their supervisors and also have the opportunity to perform self-reflection as far as their efforts are concerned.[254]

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244 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 230. Also see 4 3 4 in this regard, as well as Stuckey *et al Best practices for legal education* 84.

245 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 230; Stuckey, Barry, Dinerstein, Dubin, Engler, Elson, Hammer, Hertz, Joy, Kaas, Merton, Munro, Ogilvy, Scarnecchia and Schwartz *Best practices for legal education: a vision and a road map* (2007) 84.

246 See 4 3 4 in this regard.

247 Stuckey *et al Best practices for legal education* 84.

248 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 230.

249 *Ibid*.

250 The doctrines of legal professionalism and ethical behaviour of legal practitioners are important in this regard.

251 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 231.

252 See Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 235 and Stuckey *et al Best practices for legal education* 195 in this regard.

253 See the Preamble of the LPA in this regard.

254 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 236.

Self-reflection further emphasis self-directed learning, underpinned by the philosophy of constructivism.[255] Reflection plays a key role in lifelong learning.[256] The law school experience should assist students to develop expertise in reflecting on what they have learned.[257] This will contribute towards students identifiying the causes of both their successes and failures and use such knowledge to plan any future efforts to learn so as to continuously improve.[258] It is submitted that this may advance transformative constitutionalism. Having received the appropriate foundational background during classroom sessions, students should reflect on their practical performance and continuously ask themselves whether, what they are doing, is advancing social justice and improving the lives of their clients. In repeating this exercise of reflection, students will get into the habit of doing so during and after every practical activity, with the result that reflection will move with them past law school and into legal practice. In this way, students carry an awareness of the impact of transformative constitutionalism with them into legal practice. It is further submitted that they, as legal practitioners, can use such an awareness to improve the legal system and influence other pracitioners to also develop the same awareness.

Although the live-client method is recommended, it will not always be possible to employ such a methodology. For this reason, it will be shown that simulations may also be beneficial in teaching skills and values. The use of simulations proves that teachers are increasingly making use of more active learning experiences.[259] Simulations are excellent exercises where the live-client model is not available, but where teachers nevertheless are looking for opportunities to introduce active learning in modules.[260] Simulations can be used as teaching tools for almost any activity that legal practitioners may be involved in[261] and may include mock trials, moots, client consultations, negotiation, mediation, alternative dispute resolution, as well as drafting

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255 See 2 3 for a discussion on the philosophy of constructivism, as well as 3 4 9 5 with regards to the importance of self-assessment in light of constructivism.

256 Stuckey *et al Best practices for legal education* 66.

257 *Ibid*.

258 *Ibid*.

259 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 217.

260 *Ibid*.

261 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 218.

exercises based on real or simulated case scenarios.[262] The more authentic simulations are being presented, the more purposeful and effective it can be as far as teaching and learning is concerned.[263] In this regard, it is submitted that students could be requested to draft pleadings, based on existing case scenarios at the university law clinic, that will actually be used in court, whereas the actual pleadings will be drafted by clinicians. The students should however be made to believe that their drafted products will be used in court. This should move the students to assume more responsibility when drafting such pleadings. Simulations should include topics from a variety of areas of the law, including the law of property, law of succession, law of contract, law of delict, criminal law and law of persons and marriage, to name but a few examples. Some of these areas should even be combined in order to illustrate the complex nature of the law and that student learning of the law should not be confined to compartments and silos.[264] It is submitted that the more authentic the simulation is, the more of a foundation it will be towards producing graduates who will possess an awareness of professional responsibility towards their work, as well as act as accountable legal practitioners in legal practice. This will promote social justice.

Simulations can indeed be used to emphasise aspects of social justice, professional responsibility and legal ethics by making use of appropriate case scenarios.[265] When conducted in group format, it will enable students to learn to cooperate with one another and to share ideas about how to achieve social justice.[266] It is submitted that this may be extremely useful where students in a particular group are from different social and cultural backgrounds. In this way, students can learn from one another and develop respect for diversity and people of different backgrounds, races and cultures, re-inforcing the importance of promoting social justice for all people. As such, students further develop an appreciation for transformative constitutionalism and the impact that it can have on the lives of people and the efficacy of the law and legal procedure to bring about change wherever and whenever required. Simulations will therefore be

262 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 217.

263 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 217. Also see Stuckey *et al Best practices for legal education* 186 in this regard.

264 See 1 1 and 4 7 1 in this regard.

265 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 218.

266 *Ibid*.

relevant and another valuable component of CLE in teaching and learning of procedural law modules, especially where the presentation of procedural law modules takes place in an academic year preceding the year in which clinical law is presented as a module on its own. As such, students will be provided with a good foundation on which the clinical law programme can build, thus continuing their awareness of social justice, procedural justice and transformative constitutionalism. It furthermore emphasises continuous and lifelong learning.[267] However, to adequately conduct simulated exercises, the law school should have an adequate number of teachers who can facilitate and supervise such exercises.[268]

Tutorial sessions are also part of the CLE teaching methodology that helps to place the knowledge gathered during classroom sessions, as well as the experience gained during practical sessions, in context and to clarify any questions that the students may have in that regard.[269] A tutorial session as another opportunity to lecture students in the same way that classroom sessions are being conducted. It should be used as an interactive manner to engage with students and to further develop their knowledge and skills. It is submitted that, during tutorial sessions, theory and practical experiences can be analysed and important lessons from them should be highlighted. A tutorial session presents the appropriate opportuntity to discuss practical case scenarios and the personal circumstances of clients in order to ascertain whether or not the law adequately provides solutions to whatever issues the client may be experiencing. This may contribute to the students' awareness of transformative constitutionalism and how important it is for them to pay close attention to a client's factual scenario and personal circumstances in order to determine what the appropriate substantive and procedural solution should be. Tutorial sessions should therefore form part of the CLE methodology in the teaching and learning of procedural law modules.

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267 See 4 2, 4 7 1, 5 2 2 1 and 5 3 6 2 with regards to lifelong learning and the importance thereof.

268 See Stuckey *et al Best practices for legal education* 188 in this regard.

269 See 4 3 4 for a more detailed discussion on tutorial sessions.

As far as practical and tutorial sessions are concerned, appropriate supervision by clinicians and law teachers will be a requirement. It does however not mean that the teacher should intervene frequently in order to guide and correct the student. If this happens, or even if the teacher intervenes too soon, the student will not adequately learn from a practical experience.[270] The student may also lose confidence as far as consultation skills are concerned, which loss of confidence may have an impact upon the student's ability to develop into a competent legal practitioner.[271] Instead, the teacher must fulfil the role of an active observer in allowing the student to perform particular activities without any intervention.[272] The teacher should take careful note of all forms of communication by the student, both verbal and non-verbal for discussion with the student during a feedback session.[273] The teacher must determine whether the substance of relevant issues had been addressed and what skills had been utilised by the student in order to address such issues.[274] Particular attention must be paid to whether or not the student adhered to a planned way of conducting a practical exercise, as well as to the student's reaction to any unplanned occurrences.[275] It is submitted that supervision will be helpful in the case of consultations between students and clients. Consultations do not always go according to plan and the student will, at some points during the consultation, rely on guidance by the teacher. This does not mean that the teacher should sit in the consultation room with the student and client for the entire time. The teacher can enter the room at regular intervals in order to observe the progress of the consultation. The teacher should however be available at all times during the consultation should the student require urgent guidance, especially in cases of unplanned occurrences, *eg,* an irate client, potential conflicts of interests, ethical issues or where urgent legal relief is sought, negating a drawn out period of time within which the student must first do research and thereafter revert to the client. This availability of the teacher will ensure that no harm befalls the client.[276] The

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270 Stuckey *et al Best practices for legal education* 195.

271 *Ibid*.

272 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 232; Stuckey *et al Best practices for legal education* 195.

273 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 232.

274 *Ibid*.

275 *Ibid*.

276 Stuckey *et al Best practices for legal education* 195.

teacher should however refrain from shaping the student's experiences in a certain way, because the student should develop a reflective and critical approach as far as practical experiences are concerned.[277] This reflective approach enables the student to consider, i*nter alia*, whether or not sufficient attention had been paid to the existence of anything in the client's case that should involve transformative constitutionalism to play a role. If the teacher will unduly intervene in this process, the student will not be able to learn how or when to recognise such factual scenarios. On the other hand, too little intervention or no intervention at all may potentially cause harm to the client[278] and may contribute to the student not becoming aware of situations requiring the involvement of transformative constitutionalism. The teacher must therefore be able to strike a balance between intervening and not intervenening in the activities of a student.[279]

In reaching an appropriate balance, the teacher should keep in mind respect for the student and CLE providing opportunities for the student to experience professional responsibility in relation to real-life legal issues on the one hand, and the possibility of a client being furnished with incompetent legal representation on the other hand.[280] Also, the characteristics and needs of individual students should be aspects that the teacher should take into account in deciding whether or not to intervene in student activities.[281] In this regard, the teacher should consider the following:[282]

(a) the student's knowledge and reflective learning ability;
(b) situations that may potentially create difficulties for the student;
(c) the influence of characteristics like gender and race on the student's experience; and
(d) the relationship between the student and the client.

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277 *Ibid*.
278 Stuckey *et al Best practices for legal education* 195.
279 *Ibid*.
280 *Ibid*.
281 *Ibid*.
282 Stuckey *et al Best practices for legal education* 196.

The aforementioned items require some discussion. If the teacher is aware that the student has insufficient knowledge about the field of law that the student activity is concerning, the teacher should provide some intervention in order to ensure that the student interprets the law correctly so as not to pose any harm to the client. Similarly, if the teacher knows that, because of the student's insufficient knowledge, the client's scenario may create difficulties for the student in recognising applicable and appropriate legal remedies that may be helpful in achieving social justice for the client and consequently improving the client's life, the teacher should intervene. Furthermore, because of the gender and race of the student, the student might not be inclined to recognise certain traits or characteristics in the client's case that may necessitate urgent legal assistance so as to improve the life of the client. By intervening in the student activity, the teacher can provide guidance to the student as to why the client, being of a different gender or race, requires legal assistance in a particular instance and how such legal assistance promotes transformative constitutionalism. The student's relationship with the client is an interesting aspect. If the teacher, being a clinician or attorney, is present at all times during a student activity like a consultation with a client, the possibility exists that the client may look to the teacher at all times for the required legal advice and assistance, thus completely ignoring the student.[283] This will deprive the student from experiencing a true attorney-client relationship[284] and thus developing into a legal practitioner that will learn enough from such an experience so as to detect a situation that requires the involvement of transformative constitutionalism.

The aforementioned discussion provides and indication that adequate supervision is important, but that it should not deprive the students of developing self-learning and self-reflection.[285] Nevertheless, supervision should always be available, as situations will arise where intervention by the teacher will be necessary.[286] Adequale supervision however takes time and effort, especially where large student numbers are at stake. For such supervision to be properly exercised, it is desirable for more than one

283 *Ibid*.
284 *Ibid*.
285 *Ibid*.
286 *Ibid*.

supervisor to be available at a given time, especially where more than one student group is consulting with clients. This will confine one supervisor to a particular student group, enabling the supervisor to keep proper record of that particular group's activities and progress. The supervisor should not be moving to a different group during the currency of a consultation, as that may interfere with the supervisor's concentration and thoughts. In the process, the supervisor might miss one or more things that the students did or did not do which might influence the consultation or other activities to a significant extent.

Mention will also be made of two relatively new voluntary projects at the Nelson Mandela University (hereafter referred to as "NMU") Faculty of Law that do provide for the exposure of law students, of all academic years, to live client environments.[287] Such projects do have the potential to develop skills and values and be complementary to existing clinical programmes and simulated exercises.

In conclusion, the SAQA exit level outcomes should be viewed in light of the rationale behind such outcomes. This rationale is the following:[288]

> "There is a crucial need in South Africa for capacity building in the sub-field of justice in society to promote the principles contained in the Bill of Rights in the Constitution with a view to addressing past and current injustices and to ensure the sustained development of a just and democratic society based on the rule of law. The generation of a generic LLB qualification will provide an opportunity to promote the establishment of curricula with an innovative approach to legal education in order to achieve the aims of not only inculcating knowledge in a learner, but also imparting skill and values essential for lawyers living in a democratic society."

Therefore, more practical training of students in procedural law and the principles of evidence will be meaningless without integrating constitutional values and the importance thereof to bring change in a democratic society. This change can have the effect of improving the quality of life of all South African citizens and freeing the potential of each person, as stipulated in the Preamble of the Constitution. In this regard and in light of this research, the self-development of law students, as future

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287 See 4 7 2 3 and 4 7 2 4, relating to Nelson Mandela University Faculty of Law's Mobile Law Clinic and Legal Integration Project.

288 South African Qualifications Authority http://regqs.saqa.org.za/viewQualification.php?id=22993.

legal practitioners, as well as the welfare of members of the public, as clients of such future legal practitioners, should be implied.[289]

Although the concept of transformative constitutionalism denotes a substantial reconsideration and change to the way(s) in which things are done, it does not mean that there should be a total disregard for and non-application of existing rules, especially where such rules are clear and not against the spirit and purport of the Constitution.[290] This could result in creation of law instead of interpreting the law, which is definitely not in the vision of the Constitution.[291] The Constitution itself provides that any law or conduct, that is not consistent with it, will be invalid, and that the obligations, imposed by it, must be fulfilled.[292] Therefore, students must be taught that a strict adherence to legal rules, that may result in injustice to a client and/or such a client's case, should be reconsidered in light of the spirit and purport of the Constitution in order to bring about justice. For this reason, mention of certain rules and legal procedures, as well as adherence thereto, will be made in this research. However, where changes are required, such changes will be clearly indicated. The same approach should apply to teaching methodologies as far as procedural law modules are concerned: it furthermore means that not all conventional teaching methodologies should be summarily discarded and substituted with new ones. Where it is found that a teaching methodology does not advance the preparation of a law student for entry into the profession after graduation, the efficacy of the methodology should be revisited, adapted or changed. Where changes are not possible, the entire teaching methodology should be substituted with another methodology.

1 2 4 LITERATURE REVIEW

In conducting this research, it was discovered that many sources do indeed call for the more practical training of law students, as well as integrating practical training and a firm constitutional foundation with conventional law modules. In this regard, the

289 See 2 1, 2 2 1, 2 2 2, 2 4 2 and 5 2 2 1 in this regard.
290 See 2 2 3 and 3 4 5 in this regard.
291 Langa 2006 *Stellenbosch Law Review* 357.
292 S 2.

MacCrate Report, *inter alia*, states that some law schools have started to develop new models and approaches in order to integrate the clinical methodology throughout the curriculum.[293] Some sources also specifically mention that a module like Civil Procedure should be presented in a more practical manner in order to remove the somewhat abstract nature of the theory thereof. However, no source has been encountered in which the CLE methodology is suggested specifically for all the procedural law modules with the aim of producing a better graduate for legal practice. The same goes for any source that has used transformative constitutionalism, in a South African context, as a theoretical basis specifically for this purpose. Also, no source was found where CLE and a constitutional foundation are both incorporated in the teaching and learning of procedural law modules. The only author encountered, who has written on the presentation of civil procedure by way of CLE, is Elizabeth Schneider.[294] Furthermore, in light of the advent of the LPA, it is worthwhile to investigate whether or not legislation requires, either explicitly or by necessary implication, legal services of the highest quality to be delivered to the public. It will be argued that the LPA does indeed require the same and that such quality control already starts with the training of law students at university level. No sources were encountered in which this aspect is discussed with specific reference to procedural law modules taught by way of CLE, especially in light of the new political dispensation in South Africa.

1 3 RESEARCH METHODOLOGY

This research will involve different research methodologies. Each of these methodologies will be briefly explained.

An analytical study will be conducted with regards to the current attitude of legal practitioners, specifically attorneys and advocates, towards the quality of recent law graduates. The data, to be analysed, will be obtained by way of information already

293 Engler 2001 *Clinical Law Review* 148.

294 See Schneider "Rethinking the teaching of Civil Procedure" 1987 37(1) *Journal of Legal Education* 41 41. Also see 6 2 1 for a discussion of Schneider's rationale for employing CLE in order to teach civil procedure.

available in a variety of sources.[295] From this analysis, it will be determined whether or not attorneys and advocates are satisfied with the quality of current recent law graduates.

An investigative study will be conducted into the current teaching methodologies relating to the procedural law modules already mentioned, namely Civil Procedure, Criminal Procedure and the Law of Evidence. In this section, the investigation will concern the type of teaching methodology and what it involves, the benefits and disadvantages of a particular methodology and the reason(s) why such a methodology – and not an alternative methodology – is utilised. An investigative study will also be conducted into the LPA in order to determine whether or not it presupposes certain imperatives as far as the professional training of law students is concerned.

The final methodology will be constructive, in the sense that it will entail a proposed new teaching methodology for South African law schools as far as procedural law modules is concerned. This teaching model will focus on the integration of CLE with the procedural law modules, consolidated by a strong constitutional foundation. The viability of such a teaching model will be evaluated by identifying the benefits and disadvantages that it could hold as far as student education and value to legal practice are concerned.

The curricula relating to Civil Procedure, Criminal Procedure, Law of Evidence and CLE, followed by the Nelson Mandela University Faculty of Law will serve as the basis and sounding board throughout this research. In certain instances, references to other universities will be made and specifically indicated. No empirical research has been done as far as this research is concerned.

[295] See 1 1 in this regard.

1 4 CHAPTER OUTLINE

1 4 1 Chapter 1

This chapter provides a general introduction to this research. The problem statement, research question and theoretical basis for this study, literature review, as well as the research methodology to be used in this study, will be clearly identified. It will be made clear that various stakeholders in the legal profession are not satisfied with the current level of legal education that law students are receiving for the specific reason that it does not prepare them for entry into legal practice. It will be proposed in this chapter that CLE can bring about better preparation of students for legal practice. It will further be proposed that the training of students must incorporate respect for the values enshrined in the Constitution, in order for students to appreciate the importance of procedural justice in a democratic society based on equality and freedom.

1 4 2 Chapter 2

This chapter outlines the theoretical basis, *ie* transformative constitutionalism, of this research. The concept of transformative constitutionalism is analysed in order to determine to which extent it has, or should have, an impact on the teaching and learning of law students. It will be argued that transformative constitutionalism is not only important as far as the development of the law is concerned, but also as far as the law students, as future legal practitioners, as well as their clients, as member of the public, are concerned. As the re-accreditation of law schools in South Africa has recently taken place, the self-evaluation report in this regard, as drafted by NMU, will be analysed in order to determine to what extent transformative constitutionalism is already embedded in the law curriculum, as well as where improvement is required as far as the procedural law modules and CLE are concerned.

1 4 3 Chapter 3

This chapter will provide a general overview of the procedural law modules, namely Civil Procedure, Criminal Procedure and the Law of Evidence. Specific mention will be made of the current course syllabi of each module at NMU. The current, most common ways of teaching these modules, namely the Socratic and case dialogue methods, will also be discussed. Shortcomings in the current syllabi, as far as the teaching of these modules is concerned, will be addressed and recommendations for improvement will be made. Advantages and disadvantages of the Socratic and case dialogue methodologies will also be analysed and it will be argued that these methodologies are not, on their own, suitable for teaching the procedural law modules. A discussion will also be conducted about legal interpretation and the role it plays in the context of the procedural law modules. In this regard, the importance of legal interpretation in the everyday life of a legal practitioner will be shown, especially as far as the values of the Constitution are concerned. A proposal will be made to incorporate legal interpretation, in a practical and constitutional sense, in the teaching of the procedural law modules. Such an incorporation will facilitate the interpretation of contracts, wills, affidavits and other documents, as well as the proper drafting of such documents in a clear and unambiguous manner.

1 4 4 Chapter 4

This chapter will provide a discussion regarding CLE and the teaching methodologies associated with it. CLE does not exclude the teaching of theory, but combines theory and practical training in order to provide a balanced and real life training experience to students with the aim of preparing them for legal practice. In this regard, CLE combines classroom teaching, practical sessions either by way of live client experiences or simulations, as well as tutorial sessions, in order to achieve its goal. It will furthermore be shown that an integrated teaching methodology, in that the procedural law modules are taught by way of CLE, will be advantageous towards the practical and theoretical skills training of students. The latter part of the chapter will consist of discussions pertaining to the extension of CLE beyond the conventional

ambit of university training in order to provide for better practical training. In this regard, the involvement of private legal practitioners, as well as other stakeholders in the legal profession, will be examined. Two relatively new projects at NMU, *ie* the Mobile Law Clinic and the Legal Integration Project, will also be discussed in so far as they can facilitate CLE and more practical training with regards to the procedural law modules. Another important aspect of this chapter will be the impact of the Fourth Industrial Revolution on the legal profession. It will be argued that students must be exposed to the possibilities of this impact as part of the CLE training, and in particular the implications, as part of transformative legal education,[296] that it holds for the procedural law modules.

1 4 5 Chapter 5

This chapter will evaluate the LPA and whether or not support for an integrated teaching methodology can be inferred from the provisions thereof. It will be argued that the spirit and purport of the LPA, read together with the Constitution, places a constitutional imperative on law schools to ensure that law students are adequately trained in procedural law and the principles of evidence for entry into legal practice. In order to support this argument, it will furthermore be argued that law graduates need to be in possession of certain graduate attributes for legal practice in order to play a meaningful role in rendering professional and accountable legal services to the members of society. Graduate attributes will be discussed in context of the South African Qualifications Authority Qualification Standard for the LLB degree, as well as a baseline study that investigated the alignment between the quality of graduate that higher education delivers and the quality of graduate that prospective employers expect to receive from higher education.

1 4 6 Chapter 6

This chapter will provide a conclusion to this research. The conclusion will be that CLE should be integrated with the teaching and learning of procedural law modules in

[296] See 2 1 in this regard.

order to ensure that graduates are in possession of theoretical knowledge as well as practical skills when entering legal practice. This knowledge and skills should be taught in the context of the values enshrined in the Constitution so as to foster an appreciation for human and social elements associated with every case in legal practice. A summary will be provided as to the suggested format of a restructured curriculum for the procedural law modules taught by way of CLE.

1 5 CONNECTING THE THEORETICAL BASIS, DIFFERENT CHAPTERS AND VARIOUS ISSUES IN THIS RESEARCH

From the aforementioned sections in this chapter, it is clear that various issues are discussed in this research, which issues are all intended to address the research question and the relevance thereof.[297] It may therefore be prudent to summarise the main issues by indicating how they will interact with one another in order to bring about a definitive conclusion as far as the research question is concerned. This summary will also make it clear as to how the theoretical basis of transformative constitutionalism[298] underpins the argument that universities should produce more competent graduates for legal practice, focusing specifically on the integration of CLE in the teaching and learning of procedural law modules.

The argument will be made that transformative constitutionalism can lead to improved and quality legal education. There are a few reasons for this. In terms of the Constitution, the rights of people should be protected and enforced, wherever necessary and applicable.[299] The Bill of Rights includes fundamental rights that are designed to improve the lives of people, to provide equal education, as well as access to justice to people should they be in need of legal problems that can be resolved by the involvement of the courts. The Constitution also seeks to advance the dignity and equality of people. Transformative constitutionalism seeks to improve the lives of people. In a South African context, this means that a person's past and circumstances need to be taken into account in order to determine in which ways improvement(s) can be brought about. Therefore, constitutional values need to be actively and clearly incorporated into the teaching and learning of procedural law modules[300] so that students can learn how to apply the law in order to advance people's rights. This may also provide an indication to students as to in what instances the law should be

297 See 1 2 as far as the research question is concerned.

298 See 1 3 as far as the theoretical basis of transformative constitutionalism is concerned.

299 The importance of the Constitution is discussed in detail in Chapter 2.

300 The procedural law modules are discussed in Chapter 3.

challenged should it be discovered that procedural law and evidence do not bring about procedural justice.[301]

If legal education has been adapted in accordance with the spirit and purport of the Constitution, it will lead to more competent graduates for entry into legal practice. The reason for this is that the Constitution should be regarded as the starting point for practising law in South Africa. This will ensure that procedural justice is achieved in that all law, procedure and evidence is measured against the values of the Constitution. This will provide motivation for the interpretation and application of the law not to follow a conservative and formalistic approach that is still found in abundance in legal practice, despite the existence of the constitutional dispensation for almost 30 years now.[302] It will be submitted that this is what the LPA, by implication, requires.[303] The reason for this submission is that the Constitution is explicitly recognised in the LPA as the measure that must underpin the legal profession. There should be no doubt as to this aspect, as the Constitution is the supreme law in South Africa. Therefore, the conduct of legal practitioners will only be in accordance with the LPA if it is simulteanously in accordance with the values of the Constitution. Anything falling short of the values of the Constitution may potentially impact on a person's right of access to justice, which will not advance transformative constitutionalism in any way.

Improved and quality legal education will produce better and more competent graduates for entry into legal practice. These practice entrants will be able to advance their clients' rights and act as professional and accountable legal practitioners.[304] If graduates have been trained in this manner, they may become more employable and attractive to law firms.[305] Graduates will also be trained in ways that can advance the

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301 See Chapter 3, more specifically3 4 5, with regards to procedural justice.

302 See 3 5 with regards to a discussion on legal interpretation as far as legal procedure and evidence are concerned.

303 See Chapter 5 with regards to a discussion about the LPA and its relevance as far as this research is concerned.

304 See 5 2 2 1 with regards to the accountability of legal practitioners in light of the LPA.

305 See 5 2 2 3 with regards to the employability of law graduates and the impact thereof on entry into the legal profession.

law and the rights of their clients in line with the times that they live in, *eg*, making use of technological advances underscored by the Fourth Industrial Revolution.[306] If students are trained to use technology that can be used to advance their client's cases and consequently their rights, students have acquired graduate attributes that can greatly enhance access to justice. New practice entrants can employ such skills in law firms that have been slow in adapting such technological advances. In this way, both access to justice and the spirit of the Constitution is advanced significantly.

In order to achieve the abovementioned graduate attributes,[307] students need to undergo legal education that will enable them to start advancing procedural justice as soon as possible after they enter legal practice. Such education should already start (as soon as possible) at university level. Legal education should not only be theoretical, but also practical, thus enabling students to sufficiently practice their theoretical skills and knowledge before graduation. As CLE is a teaching methodology that has developed so as to provide both theoretical and practical training to law students, either by way of simulated activities or the live-client model, it stands out as the ideal and preferred teaching methodology by way of which procedural law modules should be presented to law students.[308] The most plausible way, in which this can be achieved, is to integrate the CLE methodology with the teaching and learning of procedural law modules. Before integration can take place, it is important to investigate and evaluate the conventional manner in which procedural law modules are currently presented at university level,[309] as well as how CLE can address any shortcomings in the teaching and learning of procedural law modules. It is furthermore also important to investigate and evaluate the current application of CLE in clinical law programmes so as to become familiar with this teaching methodology and the benefits that it holds for the teaching and learning of procedural law modules.[310] The

306 See 4 7 4 with regards to the impact of the Fourth Industrial Revolution on the legal profession and the influence that it can have on legal education.

307 See 5 3 for a detailed discussion on graduate attributes and the importance thereof for entry into legal practice.

308 See Chapter 4 with regards to CLE and the importance thereof as a teaching methodology for the teaching and learning of procedural law modules.

309 See Chapter 3, more specifically 3 3, with regards to the Socratic and case dialogue teaching methodologies.

310 See Chapter 4 in this regard.

integration of the CLE methodology in teaching procedural law modules will entail a paradigm shift from the conventional manner of teaching these modules. However, this integration will result in students who are skilled in legal procedure, including a firm theoretecial foundation thereof. Students will also be skilled in practical aspects of legal procedure, including drafting, verbal communication and consulting. This methodology will further ensure that students have acquired skills in procedural justice, *ie*, to realise that legal procedure should be used to advance the interests of clients. In this regard, students should be trained in becoming aware of and taking into account the applicable social and human elements that may be relevant to their clients and present in their clients' cases.[311] These aspects may provide indications to students, as new practice entrants, where the law appears to be prejudicial, and therefore potentially unconstitutional, as far as their clients' cases are concerned. This may move these lawyers to argue for changes in the legal system in order to improve the lives of their clients. In this way, transformative constitutionalism takes place in that interpretation and application of the law crosses a bridge from an undesirable situation towards an improved situation. Such improvement is fully underpinned by the Constitution.[312]

All of the above will significantly enhance the ambit and quality of legal education that is prescribed by the Qualification Standard for the LLB degree.[313] This will bestow better graduate attributes upon graduates required for entry into legal practice. Graduate attributes are important in contemporary times, as employers have indicated that there is a discrepancy between what they expect when appointing graduates, and who they actually employ.[314] Also, when graduates possess better graduate attributes, they become equal as far as training is concerned and experience an escalation in their dignity, because their employability is now enhanced to a significant

311 See 3 4 5 with regards to the importance of including an awareness of social and human elements in the teaching and learning of procedural law modules.

312 See Chapter 2 in this regard.

313 See 5 3 3 and 5 3 4 for a discussion the relevance of the Qualification Standard for the LLB degree for this research.

314 See 5 3 6 with regards to a South African baseline study into graduate attritutes from the perspective of employers.

extent.[315] In this way, it will be easier for them to exercise their constitutional right to employment, as they can acquire their occupation or vocation, being legal professionals, with a greater amount of confidence.[316] In this way, transformative constitutionalism takes place in that the life of the student and, eventually, newly admitted attorney in legal practice, is transformed into a legal practitioner who is trained to further the spirit and purport of the Constitution, protect and advance the rights of clients, execute legal procedure with confidence and with an awareness of procedural justice. Such execution of professional duties will lead to legal procedure and evidence applied in a manner that is professional and in line with the Constitution. This will bring about legal practitioners who are accountable to their clients, as envisaged by the LPA.[317]

315 See Chapter 5, more specifically 5 2 3 3, in this regard.
316 See Chapter 5, more specifically 5 2 2 1, in this regard.
317 See Chapter 5 in this regard.

CHAPTER 2

THE IMPACT OF TRANSFORMATIVE CONSTITUTIONALISM ON LEGAL EDUCATION

2 1 INTRODUCTION

On 10 December 1996, the late president, Nelson Mandela, signed the Constitution of the Republic of South Africa[1] into law.[2] It took effect on 4 February 1997.[3] The Constitution is the supreme law in South Africa.[4] Any law that is inconsistent therewith will be invalid.[5] "Any law" denotes both substantive and procedural law.[6] The Constitution is progressive and transformative in nature,[7] with the purpose to regulate public power, as well as to provide an objective and normative value system.[8] It is the political and legal foundation for democratic transformation in South Africa.[9] The Preamble of the Constitution states that the aims of the Constitution are the following:[10]

1 108 of 1996.

2 Constitutionnet "Constitutional history of South Africa" (undated) http://constitutionnet.org/country/south-africa (accessed 2020-03-16).

3 *Ibid.*

4 Preamble, as well as s 2; Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 9; Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative adjudication" 2002 18 *South African Journal on Human Rights* 309 314.

5 S 2; Currie *et al The Bill of Rights Handbook* 9.

6 Currie *et al The Bill of Rights Handbook* 9.

7 Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 351; Moseneke 2002 *South African Journal on Human Rights* 314; Liebenberg "Needs, rights and transformation: adjudicating social rights" 2006 1 *Stellenbosch Law Review* 5 6.

8 Rosa "Transformative constitutionalism in a democratic developmental state" 2011 3 *Stellenbosch Law Review* 542 543.

9 Albertyn and Goldblatt "Facing the challenge of transformation: difficulties in the development of an indigenous jurisprudence of equity" 1998 14 *South African Journal on Human Rights* 248 248.

10 Also see Moseneke 2002 18 *South African Journal on Human Rights* 313, Liebenberg 2006 *Stellenbosch Law Review* 6 and Albertyn *et al* 1998 *South African Journal on Human Rights* 248 in this regard.

(a) to heal the division of the past[11] and establish a society based on democratic values, social justice and fundamental human rights;
(b) to lay the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
(c) to improve the quality of life of all citizens and free the potential of each person; and
(d) to build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

The Constitution therefore envisages a new society and invites everyone to engage actively in this endeavour by following the values and rights enshrined in the Bill of Rights.[12] In this regard, it is also relevant to mention the postscript of the Interim Constitution of the Republic of South Africa.[13] It, *inter alia*, states that the Constitution provides a historic bridge between the past and the present of South Africa.[14] The past had been deeply divided by strife, conflict, untold suffering and injustice, whereas the future is founded upon the recognition of human rights, democracy and peaceful co-existence.[15] In this regard, development opportunities for all South Africans are of the utmost importance, irrespective of their colour, race, class, belief or sex.[16] In pursuing national unity, reconciliation between the South African people and the reconstruction of society should be achieved.[17] The postscript further states that the Constitution provides a secure foundation for the people of South Africa to overcome

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11 Also see Thebe "Legal Practice Act and human rights at the core of issues discussed at LSSA AGM" (2015) http://www.saflii.org/za/journals/DEREBUS/2015/89.pdf (accessed 2020-07-24) with regards to the importance of the developmental character of the Constitution in addressing the imbalances of the past.

12 Albertyn *et al* 1998 *South African Journal on Human Rights* 248.

13 200 of 1993.

14 Also see Pieterse "What do we mean when we talk about transformative constitutionalism?" 2005 20 *South African Public Law* 158, as well as *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 par 263; Du Plessis "Theoretical (dis)position and strategic leitmotivs in constitutional interpretation in South Africa" 2015 18(5) *Potchefstroom Electronic Law Journal* 1332 1345; Langa 2006 *Stellenbosch Law Review* 352 in this regard.

15 *Ibid.*

16 *Ibid.*

17 Also see Pieterse "What do we mean when we talk about transformative constitutionalism?" 2005 20 *South African Public Law* 156 158, as well as *S v Makwanyane and Another* par 263 in this regard.

the divisions and strife of the past and start a new chapter in the history of the country.[18] In the same spirit, Mahomed J stated the following in *S v Makwanyane and Another*[19] that the Constitution, referring to the Interim Constitution, is different in that it retains from the past only that which is defensible. It however moves away from everything in the past that is racist, authoritarian, insular and repressive.[20] It strives towards a democratic, universalistic, caring and egalitarian ethos as clearly articulated in its provisions.[21] The Constitution therefore aspires towards a transition from the mentioned unacceptable practices to a future founded upon the recognition of human rights, democracy and peaceful co-existence and development opportunities, irrespective of the colour, race, class, belief or sex of a person.[22]

The mentioned system of objective and normative values aims to remedy South Africa's past and to transform society into one characterised by dignity, equality and freedom.[23] This is evident from the Preamble. In this regard, section 7(1) of the Constitution also provides that the Bill of Rights is "…a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom." Mureinik states the following, as far as the Interim Constitution is concerned, which equally applies in the context of the current Constitution:

> "What is the point of our Bill of Rights? The Bill is Chapter of the interim Constitution, which declares itself to be aspiring to be 'a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'. If this bridge is successfully to span the open sewer of violent and contentious transition, those who are entrusted with its upkeep will need to understand very clearly what it is a bridge from, and what a bridge to."[24]

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18 *Ibid.*

19 Par 262.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 Rosa 2011 *Stellenbosch Law Review* 543.

24 Mureinik "A bridge to where? Introducing the Interim Bill of Rights" 1994 (10) *South African Journal on Human Rights* 31 31.

The theoretical basis in this research, for changes in teaching methodologies relating to procedural law modules, will be transformative constitutionalism.[25] The argument will be that there is a constitutional imperative on universities, more specifically law schools, to train students more adequately so that better graduates may be produced for entry into legal practice. It is also on the premise of transformative constitutionalism that Quinot and Greenbaum believe that legal education as a whole will be impacted.[26] They term this approach "transformative legal education."[27] Transformative legal education is firstly based on transformative constitutionalism as a guiding theory and overarching discipline.[28] Secondly, it relies on constructivism as an underlying teaching philosophy.[29] Thirdly, it focuses on the impact of the digital revolution on the acceptance of knowledge and teaching and learning.[30] The significance of these premises, on which transformative legal education is based, will become clear through this chapter as well as this research as a whole. Transformative constitutionalism is discussed in this chapter, as well as elsewhere in this research. The philosophy of constructivism entails that students learn by way of new experiences, adding to their existing framework of knowledge.[31] CLE,[32] and especially the application thereof in procedural law modules, is a new experience to all students and therefore resorts aptly in this category. CLE furthermore matches another important characteristic of constructivism, *ie* the point of view that knowledge cannot be constructed in an a-contextual manner.[33] This means that skills and concepts cannot be separated from each other and taught in isolation.[34] It must therefore be taught collectively and in

25 See Chapter 1 in this regard.

26 Quinot and Greenbaum "The contours of a pedagogy of law in South Africa" 2015 1 *Stellenbosch Law Review* 29 34.

27 Quinot *et al* 2015 *Stellenbosch Law Review* 35. Also see Bauling "Towards a sound pedagogy in law: a constitutionally informed dissertation as capstone course in the LLB degree programme" 2017 (20) *Potchefstroom Electronic Law Journal* 1 11-12 in this regard.

28 *Ibid.*

29 Quinot *et al* 2015 *Stellenbosch Law Review* 11-12. See 2 3 for a discussion on the philosophy of constructivism, as well as 3 4 9 relating to the impact of constructivism and constructive alignment on assessment methods as far as the procedural law modules are concerned.

30 Quinot *et al* 2015 *Stellenbosch Law Review* 11-12.

31 Quinot *et al* 2015 *Stellenbosch Law Review* 35.

32 See Chapter 4 for a detailed discussion of CLE.

33 Quinot *et al* 2015 *Stellenbosch Law Review* 36.

34 *Ibid.*

context.[35] This is in line with the concept of integration that has been mentioned elsewhere.[36] The CLE approach is also insistent that doctrine and practical aspects should not be divorced from one another, but that they should be taught as one concept in the context within which it applies.[37] The digital revolution, or impact of the so called Fourth Industrial Revolution, is also discussed in detail elsewhere.[38] In this regard it will be indicated that, apart from the advantages that a digital approach to teaching and learning can have on the mindset of the millennial and centennial student, it is necessary to prepare law graduates for approaching changes in the legal professional world brought about by the Fourth Industrial Revolution, especially as far as legal procedure and evidence is concerned.[39]

Legal education is currently in a state of introspection and re-imagination.[40] The Constitution does not only require a radical re-evaluation of all legal rules, but also for different legal methodologies to be implemented, changes which will support distinct political, policy or social agendas.[41] In order to identify and evaluate these changes, it is necessary to investigate the expression "transformative constitutionalism", as it will be pervasively used throughout this research. A contextual meaning thereof is therefore essential to this research. It will be argued that transformative constitutionalism should be incorporated into legal education as far as both substantive law and adjectival law, relating to procedural law modules, is concerned. However, this in itself is not enough to bring about change in legal education and ensure better graduates for legal practice. Students must develop an appreciation of the impact that transformative constitutionalism can have on the public and the credibility of the legal profession. It will also be argued that, if students are made aware of the effect that a transformative approach to law might have on their cases and, consequently, the lives of members of the public, they (the students) will emerge

35 *Ibid.*

36 See 1 1.

37 See 4 1.

38 See 4 7 4.

39 *Ibid.*

40 Gravett "Of 'deconstruction' and 'destruction' – why critical legal theory cannot be the cornerstone of the LLB curriculum" 2018 135(2) *South African Law Journal* 285 285.

41 Quinot *et al* 2015 *Stellenbosch Law Review* 34.

as better and more adequate, ethical and professional legal practitioners in legal practice. In this regard, a transformative approach to law will be the justification of legal decisions, instead of blindly following a conservative approach as was done during the pre-1994 political dispensation.[42] This conservative approach is discussed elsewhere,[43] but in short, it denotes an approach in terms of which formal directives were blindly followed without paying any attention to political and contextual meanings of the law and legislation. This includes directives from Parliament, technical interpretation of statutes and self-revealing nature of legal texts. Students should be made aware that justification does not consist of a mere statement substantiating a particular legal decision without considering the effects that such a statement may have on a particular situation.[44] The reason for this is that there may be opposing points of view or critique against such a statement.[45] Rather, students must be encouraged to embark on an imaginative approach in their endeavours, *ie* engage with any conservative or positivist assumptions of what the law is and, thereafter, unmask such conservative assumptions in order to see what the law can be and, probably, should be.[46] This approach will further be a conceptualisation of the proverbial bridge between the pre-1994 dispensation and the future of the law and its application, as appearing in the postscript of the Interim Constitution, the Preamble of the Constitution and as is advocated by Mureinik.[47] This re-imaginative approach to the law will place legal practitioners in a position to be creative in constructing legal arguments and will be an important factor in establishing harmony between the conservative legal culture that is largely still in existence, and the transformative values of the Constitution.[48] As was already stated, legal procedure forms part and parcel of the body of law and therefore, this approach is equally applicable to the teaching and learning of the procedural law modules. Due to the legal profession still being in a transitional phase, current law graduates will move into a working environment where

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42 Zitske "Stop the illusory nonsense! Teaching transformative delict" 2014 46(3) *Acta Academica* 52 61, 66.

43 See 2 2 3.

44 *Ibid.*

45 *Ibid.*

46 *Ibid.*

47 Mureinik 1994 *South African Journal on Human Rights* 31.

48 Zitske 2014 *Acta Academica* 61; Klare "Legal culture and transformative constitutionalism" 2017 14(1) *South African Journal on Human Rights* 146 170.

both the conservative and constitutional approaches exist.[49] Students should therefore be taught about the importance of transformative constitutionalism as far as the profession is concerned.[50] This will enable them to make value laden decisions wherever a change is necessary to bring about the goals of the Constitution in legal practice.[51] Examples in this regard are discussed elsewhere in this research.[52]

It will further be argued that CLE is the appropriate teaching methodology to achieve these outcomes.[53] In this regard, it should be remembered that this research is only concerned with the teaching and learning of procedural law modules, *ie* Civil Procedure, Criminal Procedure and the Law of Evidence, as well as the interpretation thereof. This should not be interpreted to mean that CLE cannot be employed as a teaching methodology for other law modules as well. It does however mean that CLE, as an appropriate and effective teaching methodology for other law modules, falls outside the scope of this research.

2 2 DEFINITION AND CONTEXTUAL MEANING OF TRANSFORMATIVE CONSTITUTIONALISM

2 2 1 TRANSFORMATION

The term "transformation" denotes change. This change further denotes a social and economic revolution.[54] It can be profound and radical changes that can steer

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49 Klopper "Exposing the true argument, a student's response to Dr Willem Gravett: 'Pericles should learn to fix a leaky pipe'" 2018 12 *Pretoria Student Law Review* 40 54-55.

50 *Ibid.*

51 See Fourie "Constitutional values, therapeutic jurisprudence and legal education in South Africa: Shaping our legal order" 2016 19 *Potchefstroom Electronic Law Journal* 1 2, 3 in this regard.

52 See 6 1.

53 CLE is mainly discussed in Chapter 4, but references as to its benefits for teaching and learning of procedural law modules will be made in all chapters of this research.

54 Langa 2006 *Stellenbosch Law Review* 352. Also see Chapter 5, and more specifically 5 3 6 1 and 5 3 6 4 with regards to the notion of a "skills revolution", as proposed by Higher Education South Africa and the South African Qualifications Authority.

organisations[55] in new directions.[56] This may result in new levels of effectiveness being reached, for example an open, bias free and non-hierarchical legal profession, not hindered by aspects like race and gender.[57] Transformation can be used to describe a wide variety of processes or programmes, from affirmative action and black economic empowerment to a complete restructuring of the legal culture in South Africa.[58] It is an infinite process of redefinition and rethinking with no certainty as to how the final product might look or what it might entail.[59] Yet, it should not be so vague as to preclude any deliberate and meaningful participation in the process of redefining and restructuring by applicable stakeholders.[60] There is a strong notion of change evident in the Preamble and, as such, in the Constitution.[61] This notion seeks to improve the lives of all South African people in order to reflect the values enshrined in the Constitution.[62] Songca agrees and states that transformation is an:

> "…individual, collective, cultural & institutional change, aimed at high performance, effectiveness and excellence. It entails improvement and continuous renewal guided by a sense of justice and ethical action, based on community engagement and achievement of a state that is demonstrably owned and controlled by the people."[63]

Albertyn and Goldblatt state that transformation requires a complete restructuring of the state and society, including redistribution of power and resources on an egalitarian basis.[64] It involves the eradication of systematic forms of domination and material

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55 As will be evident from this research, not only organisations will be affected by transformation, but also individuals.

56 SASSETA Research Department "SASSETA Research Report: assessment of learning conditions of candidate attorneys during a transformation attempt" (March 2019) https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf (accessed 2020-01-14) 1 11.

57 *Ibid.*

58 Pieterse 2005 *South African Public Law* 159.

59 Pieterse 2005 *South African Public Law* 159.

60 *Ibid.*

61 South African Government "Transformation of the legal profession" (undated) https://www.gov.za/documents/transformation-legal-profession-discussion-paper (accessed 2020-01-21). This culture of change is also evident from the postscript to the Interim Constitution 200 of 1993, as mentioned. See 2 1 again in this regard.

62 *Ibid.*

63 Songca "Decolonisation: meaning and impact for the profession" (undated) https://www.lssa.org.za/upload/Decolonisation%20LSSA%20Prof%20R%20Songca.pdf (accessed 2019-11-22).

64 Albertyn *et al* 1998 *South African Journal on Human Rights* 249; Pieterse 2005 *South African Public Law* 159; Moseneke 2002 *South African Journal on Human Rights* 315.

disadvantages on account of race, gender, class and other relevant grounds that may bring about inequality.[65] Furthermore, it entails the development of opportunities that allow people to come to realise their full human potential in the context of social relationships.[66] As good as this may all sound, transformation also creates tension between much required political change and the uncertainty of the future.[67] A plausible response to this tension would be to accommodate change, but at the same time retaining as much stability as possible.[68] The response appears to be simple, *ie* to conduct transformation in a constitutional democracy based on equality, human dignity and freedom.[69] The significance of this response, in the context of this research, will become clear in this chapter, as well as elsewhere in this research.[70]

The legal profession is no exception to the changes that will and must take place. Transformation has already played – and will continue to play – an important role in interpreting the Constitution in order to bring about change.[71] Transformation of the profession will enable it to better respond to the needs of the South African people.[72] The main challenges are the need to make the legal profession representative of the diversity of the South African society, as well as to make the profession more accessible to the public.[73] As will be discussed elsewhere, the LPA[74] aims to bring about these changes.[75]

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65 Albertyn *et al* 1998 *South African Journal on Human Rights* 249; Pieterse 2005 *South African Public Law* 159.

66 *Ibid.*

67 Van der Walt "Legal history, legal culture and transformation in a constitutional democracy" 2006 12(1) *Fundamina* 1 3.

68 Van der Walt 2006 *Fundamina* 4.

69 *Ibid.*

70 In Chapter 5, the freedom to choose an occupation, profession and trade, as entrenched in s 25 of the Constitution, is discussed in more detail in context of this research. It is submitted that this constitutional right should have a profound impact on how universities should view the teaching and learning of law students as far as procedural law modules are concerned.

71 Langa 2006 *Stellenbosch Law Review* 351.

72 South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper.

73 *Ibid.*

74 28 of 2014.

75 See 5 2.

Langa states that transformation also involves the provision of, *inter alia*, greater access to education.[76] As will be argued in this research, the specific content of such education, complemented by a more integrated teaching methodology with regards to legal procedure, can bring about an improved graduate for legal practice. This graduate, when entering practice, will be in a better position to help to address the aforementioned challenges of the past, as set out in the Preamble of the Constitution. It is submitted that such improved education is necessary for the "…achievement of a state that is demonstrably owned and controlled by the people…", as stated by Songca.[77] Moreover, improved education will bring about more and better developmental opportunities for the people, as proposed by Albertyn and Goldblatt. Justice and ethical action therefore cannot reach their full effect if the people, controlling the legal profession, have not been educated properly in order to guide justice, professionalism and ethics. Equality is very important as far as transformation is concerned.[78] In this way, all prospective legal practitioners must have the same opportunities and legal education that will enable them to play a meaningful and progressive role on their quest to guide justice, professionalism and ethics. In this way, human development is taken to maximum levels and material imbalances are addressed.[79] Kriegler J confirms the importance of equality in *President of the Republic of South Africa and Another v Hugo*.[80] He stated that the Constitution is egalitarian in nature.[81] For this reason, the supreme laws may underscore other principles and rights, which must be done in light of history and the vision for the future.[82] This is significant in the context of social justice, which is discussed elsewhere.[83] Pieterse states that transformation includes:

> "…the dismantling of…the explicit targeting and ultimate eradication of the…social structures that cause and reinforce inequality, the redistribution of social capital along egalitarian lines, an explicit engagement with social vulnerability in all legislative, executive and judicial action and the empowerment of poor and

76 Langa 2006 *Stellenbosch Law Review* 352.

77 See fn 63 above.

78 Moseneke 2002 *South African Journal on Human Rights* 316.

79 Moseneke 2002 *South African Journal on Human Rights* 316; Pieterse 2005 *South African Public Law* 160.

80 1997 4 SA 1 (CC).

81 Par 74; Moseneke 2002 *South African Journal on Human Rights* 316.

82 *Ibid.*

83 See 2 2 3.

> otherwise historically marginalised sectors of society through pro-active and context-sensitive measures that affirm human dignity."[84]

Therefore, equality fully underscores social justice and consequently everyone is entitled to it. Social justice can be defined as the just and fair access to and equitable distribution of opportunities, resources, privileges and burdens in a group or between groups.[85] Social justice therefore concerns the equal enjoyment of all rights and freedoms by everyone, irrespective of human diversity and historical injustices.[86] It is forthwith submitted that, if there are reasons, of whatever nature, as to why social justice is not available to everyone, such reasons should be addressed on an immediate basis. Consequently, an egalitarian mode of legal reasoning should be instilled in law students.[87]

2 2 2 CONSTITUTIONALISM

"Constitutionalism" refers to the notion that government should obtain its powers from a written constitution and, as such, its powers will be limited to what is being provided for in such written document.[88] The Constitution is however not only applicable to government.[89] Section 8(2) of the Bill of Rights in the Constitution provides that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.[90] In this regard, it is argued that a university, as a juristic person and an institution of tertiary education,[91] will be subject to the rights of law students to be trained adequately for entry into legal practice. This requires some explanation. A range of socio-economic rights, as justiciable rights, have been

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84 Pieterse 2005 *South African Public Law* 159.

85 Madonsela "Social justice: what are we doing wrong?" (2018) https://www.sun.ac.za/si/en-za/Documents/Events/Symposium%202018/1%20Madonsela%20-%20Social%20Justice.pdf (accessed 2020-07-14).

86 *Ibid.*

87 Bauling 2017 *Potchefstroom Electronic Law Journal* 10.

88 Currie *et al The Bill of Rights Handbook* 8; Liebenberg 2006 *Stellenbosch Law Review* 6.

89 That the Constitution also binds the state, can be seen in Moseneke 2002 *South African Journal on Human Rights* 314. All organs of state are subject to the Constitution.

90 Also see Rosa 2011 *Stellenbosch Law Review* 543 in this regard.

91 See Universities South Africa (undated) https://www.usaf.ac.za/public-universities-in-south-africa/ (accessed 2020-07-13).

included in the Constitution.[92] This inclusion stems from a successful struggle by various political personae and civil society organisations in order to bring about the convergence of these rights, being needs, as objects of state responsibility.[93] It has been argued that the justiciable rights theory can help to "…overcome some of the obstacles to the effective exercise of existing rights."[94] The mentioned state responsibility is thus mandated by the Constitution.[95] The result is that the state now has a constitutional obligation to ensure that everyone has access to an array of socio-economic rights, as the needs of members of the public are recognised as public matter.[96] Based on the aforementioned, an analogy can now be drawn between this responsibility of the state and that of university law schools to provide more adequate legal education to law graduates as far as procedural law modules are concerned. This analogy will be discussed and emphasised throughout this research. In short, it entails that the said constitutional imperative functions as a public need. This means that universities, as juristic entities, are bound by the Bill of Rights. The argument is that members of the public are entitled to quality services by legal professionals who should be accountable for what they do and how they perform.[97] Therefore, universities have a constitutional duty to produce law graduates who can assist the public by way of quality legal services. Although such an imperative can also be "…relegated to the 'private' domestic or market sphere…",[98] in that it can also benefit individuals in developing their potential,[99] this should not be the only consideration at the expense of the public need. The argument and analogy can thus be summarised as follows: both these needs, public and individual, are transformed into entitlements.[100]

Having stated that the powers of government are limited to what is provided for in the Constitution, this should not be interpreted to mean that constitutional interpretation

92 Liebenberg 2006 *Stellenbosch Law Review* 16.
93 *Ibid.*
94 Liebenberg 2006 *Stellenbosch Law Review* 20.
95 Liebenberg 2006 *Stellenbosch Law Review* 16.
96 *Ibid.*
97 See 5 2 2 1 in this regard.
98 Liebenberg 2006 *Stellenbosch Law Review* 16.
99 See 5 2 2 1 in this regard.
100 Liebenberg 2006 *Stellenbosch Law Review* 17.

should be limited to what is stated in the text. In this regard, Moseneke states that judicial interpretation, in terms of the Constitution, has placed different imperatives on the adjudicator.[101] Conventional legalism, normally applicable to the interpretation of statutes, is not conducive towards constitutional interpretation.[102] The intention of the legislator bears little significance when conducting constitutional interpretation.[103] What is important, is an interpretative approach in which the values of the Constitution are being promoted.[104] In doing so, courts should be searching for substantive justice, which should be inferred from the foundational values of the Constitution.[105] In this way, a constitutional imperative is being addressed, namely transformation.[106] This clearly shows how transformation and constitutionalism are interlinked.

2 2 3 TRANSFORMATIVE CONSTITUTIONALISM

When transformation and constitutionalism are brought together, the result is "transformative constitutionalism." The late Langa CJ stated that there is no single accepted definition of this concept.[107] Former Chief Justice Moseneke further stated that the meaning of transformative constitutionalism, in juridical terms, is highly contested as it is difficult to formulate.[108] Keeping in mind that transformation denotes change, Langa states that it is in line with the spirit of the Constitution that there is no single and stable understanding of what transformative constitution entails.[109] Klare however defines transformative constitutionalism as follows:[110]

> "By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement, committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes

101 Moseneke 2002 *South African Journal on Human Rights* 316.

102 *Ibid.*

103 *Ibid.*

104 *Ibid.*

105 *Ibid.*

106 *Ibid.*

107 Langa 2006 *Stellenbosch Law Review* 351.

108 Moseneke 2002 *South African Journal on Human Rights* 315; Langa 2006 *Stellenbosch Law Review* 351.

109 Langa 2006 *Stellenbosch Law Review* 351.

110 Klare 2017 *South African Journal on Human Rights* 150.

> an enterprise of inducing large-scale social change through nonviolent political processes grounded in law. I have in mind a transformation vast enough to be inadequately captured by the phrase 'reform', but something short of or different from 'revolution' in any traditional sense of the word."

It is clear that Klare calls for a change in legal culture in South Africa.[111] In this regard the learned author states that both the legal culture and legal education in South Africa need to undergo transformation in order to become more harmonious with the values of the Constitution.[112] To bring about change is said to be a "magnificent goal" for the Constitution.[113] The wounds of the past are healed and South Africa is guided in the direction of a better future.[114] According to Langa, these aspects are the central ideas of transformative constitutionalism.[115] Transformative constitutionalism provides historical justification for transformation while simultaneously being representative of the Constitution, the primary source by which transformation is set to take place.[116] As stated earlier,[117] the powers of government will be limited to what is actually stated in the written words of the Constitution. However, it will become clear that such written words require interpretation in a specific way, and that is to further the spirit and purport of the Constitution, contrary to a rigid following of the literal meaning thereof. This basically means that some legal work has to be undertaken if the Constitution is to achieve its purpose of transformation.[118]

This brings about at least two questions, namely how South Africa must change, as well as how society, on the other side of change, must differ from where it finds itself at a particular stage in time.[119] In order to bring about change, the mentioned legal

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111 Klare 2017 *South African Journal on Human Rights* 151; Quinot *et al* 2015 *Stellenbosch Law Review* 34. Klare indicates that "legal culture" refers to professional sensibilities, habits of mind, as well as intellectual reflexes – see Klare 2017 *South African Journal on Human Rights* 166.

112 Klare 2017 *South African Journal on Human Rights* 151.

113 Langa 2006 *Stellenbosch Law Review* 352.

114 Langa 2006 *Stellenbosch Law Review* 352; Shai "The right to development, transformative constitutionalism and radical transformation in South Africa: post-colonial and de-colonial reflections" 2019 19 *African Human Rights Law Journal* 494 502.

115 *Ibid.*

116 Pieterse 2005 *South African Public Law* 158.

117 See 2 2 2.

118 Claassens and Budlender "Transformative constitutionalism and customary law" 2016 *Constitutional Court Review* 75 75.

119 Langa 2006 *Stellenbosch Law Review* 352.

work has to commence with questioning the origins, underlying premises and purposes of the law as it stands at a particular moment in time.[120] In this regard, the following was stated by the already mentioned late Langa CJ in *Investigating Directorate Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; in re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*:[121]

> "The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognize the context in which we find ourselves, and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. The spirit of transition and transformation characterizes the constitutional enterprise as a whole."[122]

It therefore seems that South African constitutionalism attempts to bring about the transformation of a society, deeply divided by way of racism and an unequal past, into a society that is based on democracy, social justice, equality, dignity and freedom.[123] Although social justice is not mentioned in the founding provisions of the Bill of Rights, it can be argued that a creative jurisprudence of the right to equality, together with a substantive interpretation of the content of socio-economic rights, should restore social justice as a primary foundational value along with human dignity, equality, freedom, accountability, responsiveness and oneness.[124] It must be kept in mind that, although the apartheid regime has ended, there are still remnants thereof that need to be addressed.[125]

Legal decisions now have to be justified.[126] This is in sharp contrast with the system of parliamentary sovereignty of the pre-1994 dispensation, in terms of which a culture

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120 Claassens *et al* 2016 *Constitutional Court Review* 75.

121 2000 ZACC 12, 2001 1 SA 545 (CC), 2000 10 BCLR 1079 (CC).

122 Par 21; Claassens *et al* 2016 *Constitutional Court Review* 75.

123 Pieterse 2005 *South African Public Law* 158; Rosa 2011 *Stellenbosch Law Review* 545.

124 Moseneke 2002 *South African Journal on Human Rights* 314; Liebenberg 2006 *Stellenbosch Law Review* 6.

125 Rosa 2011 *Stellenbosch Law Review* 545.

126 Quinot and Greenbaum "The contours of a pedagogy of law in South Africa" 2015 1 *Stellenbosch Law Review* 29 34; Mureinik1994 *South African Journal on Human Rights* 32.

of authoritarianism was the order to the day.[127] In terms of this particular regime, what parliament stated was the law,[128] without the need to offer any justification to the courts.[129] The result of this was to effectively bring about obedience.[130] Transformative constitutionalism therefore constructs a proverbial bridge between the cultures of authoritarianism and justification.[131] Compliance with human rights is essential when considering transformation and the justification thereof.[132] This transformation will require a shift in professional sensibilities and what people are thinking, intellectual reflexes, how lawyers argue, as well as what can be described as a persuasive legal argument.[133] This becomes significant when keeping in mind that the prevailing legal culture in a particular system can either constrain or facilitate the role of the law in such a system.[134] This includes the ability of the law to facilitate transformation.[135] The system in South Africa is a good example thereof. It is made up of a rather conservative legal culture that relies heavily on formal authority, *eg* what Parliament has directed, technical ways of reading legislation, the precision, determinacy and self-revealing nature of the text and the ways of interpretation inherent in the common law tradition that sometimes ignores contextual and political meanings.[136] The South African legal fraternity mostly takes recourse to this system in a subconscious way, because it is the basic part in approaching a legal problem.[137] This approach prevents inquiry into the true motivation for certain decisions and presents the law as being neutral and objective.[138] New perspectives, alternative views and different thinking paradigms can be easily excluded, resulting in the loss of creative, alternative and unconventional solutions to legal problems.[139] Instead, the

127 Mureinik1994 *South African Journal on Human Rights* 32; Moseneke 2002 *South African Journal on Human Rights* 316.

128 Moseneke 2002 *South African Journal on Human Rights* 316.

129 Mureinik1994 *South African Journal on Human Rights* 32.

130 *Ibid.*

131 *Ibid.*

132 Rosa 2011 *Stellenbosch Law Review* 545.

133 Quinot *et al* 2015 *Stellenbosch Law Review* 34-35.

134 Quinot *et al* 2015 *Stellenbosch Law Review* 35; Davis and Klare "Transformative constitutionalism and the common and customary law" 2010 26 *South African Journal on Human Rights* 403 406.

135 Quinot *et al* 2015 *Stellenbosch Law Review* 35.

136 Quinot *et al* 2015 *Stellenbosch Law Review* 35; Langa 2006 *Stellenbosch Law Review* 356.

137 Langa 2006 *Stellenbosch Law Review* 356.

138 Langa 2006 *Stellenbosch Law Review* 357.

139 Van der Walt 2006 12 *Fundamina* 18.

law should be expressive of particular politics and enforcing a singular conception of society.[140] It is particularly a system of this conservative and formalistic nature that must make way for a legal culture that distinctly embraces transformation in terms of the Constitution.[141] Having mentioned Mureinik's proverbial bridge, it is worthy to note that Le Roux states that the function of transformative constitutionalism is to keep the law in a state of suspension so as to ensure that the legal order can continuously be contested.[142] This state of suspension releases an energy that has the effect of stimulating imaginative jurisprudential responses to the question of where the law should be heading from the place that it had been in prior to the enactment of the Constitution.[143] The result is an anti-foundational and imaginative openness.[144]

However, the conservative and formal system of law in South Africa has not yet disappeared, although the Constitution has now been in force for almost three decades.[145] This "delusional danger", as this formal approach is termed by Froneman,[146] will allow the Constitution to merely be interpreted formally, without engaging with substance and the search for justice.[147] It should however be noted that not all South African legal practitioners are guilty of this conservative and formalistic approach.[148] There should be nothing wrong with sticking to existing legal rules when they are clear and good.[149] However, adherence to the words should not be taken too far so that the upholding of a law obscures or ignores justice.[150] If this happens, it can be said that formalism truly becomes dangerous, as stated by Froneman.[151] On the other hand, a complete disregard of the legal text could result in

140 Langa 2006 *Stellenbosch Law Review* 357.

141 Quinot *et al* 2015 *Stellenbosch Law Review* 35; Langa 2006 *Stellenbosch Law Review* 357.

142 Le Roux "Bridges, clearings and labyrinths: the architectural framing of post-apartheid constitutionalism" 2004 19 *South African Public Law* 629 641.

143 *Ibid.*

144 *Ibid.*

145 Froneman "Legal reasoning and legal culture: our 'vision of law'" 2005 16 *Stellenbosch Law Review* 3 9; Langa 2006 *Stellenbosch Law Review* 357.

146 Froneman 2005 *Stellenbosch Law Review* 9.

147 Langa 2006 *Stellenbosch Law Review* 357.

148 *Ibid.*

149 *Ibid.*

150 *Ibid.*

151 *Ibid.*

the creation of law instead of interpreting the law, which is definitely not in the vision of the Constitution.[152] Critical awareness must therefore be cultivated in favour of the resistance of legal tradition that has a restrictive effect on development.[153] Such an approach is inconsistent with transformative constitutionalism in that substantive reasoning and the examining of underlying principles of certain laws are not taken into account.[154] This reasoning and examining are inherent responsibilities of transformative constitutionalism.[155] Therefore, in the words of Langa:[156]

> "…[u]pholding the transformative ideal of the Constitution requires judges to change the law to bring it in line with the rights and values for which the Constitution stands. The problem lies in finding the fine line between transformation and legislation."

Former Chief Justice Moseneke states that, as far as the Constitution is concerned, there is a specified set of values that provides information as to what is permissible in an open and democratic society, based on freedom and equality.[157] Therefore, whenever the Constitution is interpreted, it should be done in a holistic way and in light of these values.[158]

The move away from authoritarianism to justification is also significant in another respect, the significance of which is discussed elsewhere.[159] In this regard, it will be shown that the conventional teaching methodologies for teaching procedural law modules, *ie* the Socratic and case dialogue methods, can have a psychologically destructive effect on law students, because they happen to feel inferior when just sitting during lectures listening to information being fed to them by someone more learned than them.[160] It will be argued that the millennial and centennial student is

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152 Langa 2006 *Stellenbosch Law Review* 357. This should however not be interpreted to mean that the courts have no law making responsibility. A discussion of such responsibility falls outside the scope of this research.

153 Van der Walt 2006 *Fundamina* 31.

154 Langa 2006 *Stellenbosch Law Review* 357.

155 *Ibid.*

156 *Ibid.*

157 Moseneke 2002 *South African Journal on Human Rights* 315.

158 *Ibid.*

159 See Chapter 3.

160 See 3 3 1; McQuoid-Mason "Methods of teaching Civil Procedure" 1982 *Journal for Juridical Science* 160 164.

much more receptive to an interactive teaching methodology, *eg* CLE, because such a methodology will justify the kinaesthetic needs of the student, including moving, speaking, observing, listening and using technology.[161] Millennial students, more often than not, are seeking justification for tasks that they need to complete, and it will be shown that CLE is able to provide such justification when employing this methodology to teach procedural law modules.[162] Centennial students are passionate about using technology and dialogue as far as teaching and learning is concerned.[163] It will be shown that CLE can provide access to such components and thus stimulate the needs of these students.[164]

Focusing on the transformation of legal education, Gravett argues that all law teachers are incumbent with the constitutional duty to teach law modules in a transformative manner.[165] This will involve, *inter alia*, a re-imagination of existing and traditional educational practices in an attempt to produce graduates who will become "…proficient citizens willing to take up the moral and ethical responsibility to develop the society they will serve…"[166] This is a convincing argument, because extraordinary knowledge and competence levels are expected of modern day graduates, especially because of all the quality resources available.[167] This means that law teachers can no longer pretend that the current teaching and learning methodologies are suitable and sufficient for the purpose that they should fulfil, *ie* teaching and learning in light of the values of the Constitution. Law teachers must therefore approach teaching and learning with an anti-foundational and open and imaginative attitude, which is in line with transformative constitutionalism, as explained earlier. To resist such a change may cause higher education to move out of synchronisation with the needs of legal practice and, ultimately, the spirit and purport of the Constitution. Van der Walt

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161 See 4 7 4 1; Roel "The kinesthetic learning style: traits and study strategies" (11 September 2018) https://www.thoughtco.com/the-kinesthetic-learning-style-3212046 (accessed 2019-09-18).

162 See 4 7 4 1; Laskaris "How to engage millennials: 5 important moves" (2016) https://www.efrontlearning.com/blog/2016/03/5-strategies-to-engage-the-millennials.html (accessed 2019-09-18).

163 See 4 7 4 1.

164 See 4 7 4 2.

165 Gravett 2018 *South African Law Journal* 300.

166 Bauling 2017 *Potchefstroom Electronic Law Journal* 2.

167 *Ibid.*

emphasises the importance of a transformative manner of teaching and learning as follows:[168]

> "In the postrealist world we live in, we can no longer pretend that legal certainty in the sense of true and certain knowledge is attainable by deductive reasoning from axiomatic principles. What used to be regarded as axiomatic principles are often questioned and contested on historical, cultural, economic or political grounds or have been loosened from their moorings in civil-law certainty by new constitutional principles."

It is submitted that law graduates need to possess an appreciation of the aforementioned democracy, social justice, equality, dignity and freedom. Law teachers are therefore tasked with the construction of learning environments that will enable students to engage in ways that bring about the development of embedded subject knowledge, problem identification, solving capabilities and lifelong learning skills.[169]

When attempting to transform legal education, it is however not possible, nor desirable, to develop a single teaching methodology for the teaching and learning of all law modules.[170] Subject matter, and how it is organised within a module, should not be completely separated from a particular methodology; therefore, what the students learn, as well as how the students learn, should be aligned.[171] In the context of this research, there is a strong agreement with this point of view. This research does not imply that no teaching methodology other than CLE can be followed to teach procedural law modules in order bring about better graduates for legal practice. It will however be concluded that CLE is the preferred teaching methodology because of its obvious practical connection and, therefore, concomitant advantages for the procedural law modules.[172] Procedural law modules involve, *inter alia*, legal procedure. Legal procedure involves practical aspects. CLE is known for making use of actual experience of the legal process as the core of education.[173]

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168 Van der Walt 2006 *Fundamina* 26.

169 *Ibid.*

170 Quinot *et al* 2015 *Stellenbosch Law Review* 30.

171 *Ibid.*

172 See Chapter 4 in this regard.

173 De Klerk "University law clinics in South Africa" 2005 122(4) *South African Law Journal* 929 929; Quinot *et al* 2015 *Stellenbosch Law Review* 49.

In *Mahapa v Minister of Higher Education and Another*,[174] Mabesele J stated the following:

> "Education is an instrument for development. It is as important as the air that one breathes. It is a vehicle for the promotion of self-dependence and self-worth. It liberates the mind from self-oppression and promotes positive thinking. Important, it protects one's dignity."[175]

This *dictum* complements the aims of the Constitution as set out in the Preamble. The goal of development, in context of the aims as set out in the Preamble, is significant in light of the fact that South African history is infamous as a result of colonialism and apartheid, causing an unjust situation for many people.[176] Education was no exception. In order to demonstrate clearly why transformative constitutionalism is important for the purposes of quality education, a brief historical overview of this unjust situation, brought about by apartheid, will be done.

The aforementioned discussion clearly indicates that the transformative nature of the Constitution and the impact thereof on the teaching and learning of legal education, more specifically the procedural law modules, constitutes the main theory underscoring this research. It must also be investigated whether or not transformative constitutionalism, decolonisation and Africanisation in procedural law modules are sufficiently emphasised. As part of this investigation, the submissions of NMU to the Council on Higher Education (hereafter referred to as the "CHE") in 2016, relating to the re-accreditation of its LLB degree, will be evaluated. The conclusion will be reached that, although the Constitution is mentioned in all modules and significant influence and changes, brought about by the Constitution, are highlighted, these aspects are not sufficient to qualify as transformative constitutionalism. Students need to be taught how to approach constitutional values and when to use them in order to lobby for changes in the existing law. This, together with the implied imperatives in

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174 (2017/01217) [2017] ZAGPJHC 9; [2017] All SA 254 (GJ).

175 Par 15.

176 Police and Prisons Civil Rights Union "POPCRU's submission to the Commission of Inquiry into Higher Education and Training" (March 2017) https://www.justice.gov.za/commissions/FeesHET/hearings/set8/set8-d2-Andrews-Submission.pdf 1 1 (accessed 2020-03-02).

the LPA to prepare law students to be legal practitioners of the highest quality, will strengthen the argument that a more practical and constitutional approach to teaching procedural law modules is required. It will further strengthen the argument that CLE is the appropriate methodology to teach such modules.

2 3 A CONSTITUTIONALLY BASED ARGUMENT IN FAVOUR OF A CHANGE IN TEACHING METHODOLOGIES RELATING TO PROCEDURAL LAW MODULES

Nelson Mandela stated the following:[177]

> "Education is the great engine of personal development. It is through education that the daughter of a peasant can become a doctor, that a son of a mine worker can become the head of the mine, that a child of the farm worker can become the president of the country."

As far as tertiary education is concerned, section 29(1)(b) of the Bill of Rights provides that everyone has the right to further education that must be made progressively available and accessible by the state by way of reasonable measures.[178] In the *Mahapa* case, Mabesele J states that this section and subsection is intended to enhance a person's knowledge and to equip a person with necessary skill in order to become self-dependant and, as such, to contribute in a meaningful way toward the socio-economic development of South Africa.[179] This point of view will be emphasised extensively throughout this research in constructing an argument for change to the current teaching and learning methodologies as far as procedural law modules are concerned. It will be argued that such development will not only be for the benefit of the general public, but also for the individual graduates as future professionals.

As is evident from the Preamble of the Constitution, as well as the postscript of the Interim Constitution, as mentioned earlier,[180] South Africa has gone through several

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177 Police and Prisons Civil Rights Union https://www.justice.gov.za/commissions/FeesHET/hearings/set8/set8-d2-Andrews-Submission.pdf 9.

178 This refers to tertiary education. S 29(1)(a) provides that everyone has the right to basic education, which also includes adult basic education.

179 Par 31.

180 See 2 1.

decades of racial segregation, with the result that the violation of fundamental rights took place. Education, which is a fundamental right in the Bill of Rights,[181] was merely one of the rights seriously affected by the apartheid regime, having a profound effect on the lives of people in South Africa. The *Mahapa* case provides a concise, but structured background with regards to the effect that apartheid has had on education in South Africa. During the apartheid regime, educational policies were carefully and deliberately formulated on the basis of discrimination.[182] The aim of this discrimination was to prevent an African child from thinking independently, debating issues in constructive ways, as well as to become self-determined.[183] In order to achieve this, schools had deliberately not been built in most rural areas and farms where African families resided.[184] These families could stay on such farms, provided that family heads and older children performed cheap labour for the farm owners, while the younger children looked after cattle.[185] As industries and other institutions of development came about in the cities, many of these families moved there to look for better employment, better education for their children and a better overall life.[186] Schools were consequently built in the cities for the children; however, these schools were unable to accommodate all the children.[187] Moreover, education in these schools was neither free nor compulsory, resulting in many children not completing their school careers.[188] This was caused either by non-payment of school fees or because parents could not afford to buy school uniforms for their children.[189] This is not surprising, as parents were categorised as unskilled workers.[190] Furthermore, certain types of employment was reserved for particular racial groups, thus excluding others.[191]

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181 S 29. This right, in context of this research, will be discussed in more detail in Chapter 5. However, subsection (1) provides as follows: "Everybody has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible."

182 Par 19.

183 *Ibid.*

184 Par 20.

185 *Ibid.*

186 Par 21.

187 *Ibid.*

188 Par 22.

189 *Ibid.*

190 *Ibid.*

191 *Ibid.*

Domestic poverty, malnutrition and inadequate teaching conditions therefore culminated in the exact results that the apartheid authorities had envisaged.[192]

Historical misfortunes of racial discrimination and oppression therefore contributed to inequality of people on, *inter alia*, economic, social, political and other levels.[193] Education forms part hereof.[194] As already stated, although the apartheid regime does not exist any longer, deep social disparities and the consequent social inequity still exist.[195] Democracy and freedom can be used in order to improve social justice and, consequently, better and fairer politics.[196] In order to achieve this improved state of events, engagement from two sides is required, namely by those affected by injustice, poverty and marginalisation, as well as those who intellectually contribute to transforming societies, including the legal profession and academics.[197] These aspects will be addressed in this research, but it is necessary to provide a brief explanation thereof in the context of this research at this stage. An improved education can lead to an improved law graduate. Whether the particular education is an improvement over what it was in the past, will depend on whether or not it fulfils its true purpose. In this research, it will be argued that there is a constitutional imperative on law schools to produce graduates who are adequately prepared for legal practice. Therefore, if a graduate exits law school with an improper understanding of what legal practice, and more specifically, legal procedure, entails, the education, and most probably the teaching and learning methodologies used, did not fulfil their purpose. For all practical purposes, it will mean that an educational goal in terms of the Constitution has not been reached. Moreover, graduates must have an appreciation for social and procedural justice in that they should be trained to closely listen to what their clients need in the context of their social settings. This will ensure that justice

192 *Ibid.*

193 Police and Prisons Civil Rights Union https://www.justice.gov.za/commissions/FeesHET/hearings/set8/set8-d2-Andrews-Submission.pdf 1.

194 Police and Prisons Civil Rights Union https://www.justice.gov.za/commissions/FeesHET/hearings/set8/set8-d2-Andrews-Submission.pdf 2; *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 2 SA 415 (CC) par 45.

195 *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* par 45; Rosa 2011 *Stellenbosch Law Review* 545; See 2 2.

196 Rosa 2011 *Stellenbosch Law Review* 549.

197 *Ibid.*

prevails in particular circumstances. It will however require the public to voice their problems to their legal representatives[198] and be open to suggestions and legal advice that is aimed at improving their social circumstances. In this way, human dignity and freedom are greatly enhanced.[199] As stated by Liebenberg:[200]

> "Participation in public and private processes of decision-making is not only an affirmation of individual dignity and freedom, but gives substance to a participatory and deliberative concept of democracy. This is the best reading of the value of accountable, responsive and open democracy in the Constitution."

This theory of participation is known as participatory parity.[201] It is a theory of social justice[202] based on the principle that everyone has the right to participate and interact with one another as peers in social life.[203] Formal notions of equality are not as such sufficient.[204] Instead, the theory focuses on the substantive requirements that ensure that everyone has access to the institutional prerequisites of participatory parity.[205] These prerequisites specifically refer to the economic resources and social standing that people will need in order to participate on an equal level with others.[206] It significantly reinforces human autonomy.[207]

Education and dedicated teaching methodologies play important roles in this instance. The applicable teaching methodology must have the effect of producing a graduate who can appreciate social justice and is skilled in legal procedure so as to know how to bring about social justice. For this reason, it will be argued that CLE is the preferred teaching methodology. In this regard, CLE can be seen as part of a constructive

198 Rosa 2011 *Stellenbosch Law Review* 552. This is a wider approach to the *audi alteram partem* rule, which is discussed in 3 4 5.

199 Liebenberg *Socio-economic rights: adjudication under a transformative constitution* (2010) 167-168; Rosa 2011 *Stellenbosch Law Review* 552.

200 Liebenberg *Socio-economic rights*167-168.

201 Liebenberg 2006 *Stellenbosch Law Review* 7. "Participatory parity" is a theory that has been developed by Nancy Fraser.

202 Armstrong and Thompson "Parity of participation and the politics of status" 2007 *European Journal of Political Theory* 1 1.

203 Liebenberg 2006 *Stellenbosch Law Review* 7; Armstrong *et al* 2007 *European Journal of Political Theory* 1.

204 Liebenberg 2006 *Stellenbosch Law Review* 7.

205 *Ibid.*

206 *Ibid.*

207 Armstrong *et al* 2007 *European Journal of Political Theory* 1.

teaching and learning philosophy, which is included in the transformative legal education theory proposed by Quinot and Greenbaum.[208] The philosophy of constructivism entails that persons learn by integrating new experiences into their existing knowledge framework.[209] Constructivism is connected to educational psychology, but also appears to be part of the general trend in the humanities and social sciences, aimed towards, *inter alia*, a sociocultural approach to knowledge and society.[210] An underlying principle of this philosophy is that knowledge is not found, but that it is made.[211] What is referred to here, is self-discovered, self-appropriated learning[212] and, thus, that knowledge is generated from individual understanding.[213] A big motivator behind this philosophy is the view that market pathology should at all times be considered and that transactional defects are pervasive, especially in complex societies.[214] In this context, it is submitted that South Africa consists of a complex society and that new situations and issues can easily arise. In light of this, the philosophy of constructivism implies that a law teacher cannot simply convey information to a student and call it "learning" due to the fact that the student is in the position to take in such information.[215] Students must personally experience situations to effectively learni from it. Rogers believes that anything, that can be taught to another person, will have very little or no influence over such a person's behaviour, because it is relatively inconsequential.[216] New legal practitioners would not be fully prepared to assume the responsibilities of practising law if they have received all

208 Quinot *et al* 2015 *Stellenbosch Law Review* 35. See 2 1.

209 Quinot *et al* 2015 *Stellenbosch Law Review* 35.

210 Maharg "Rogers, constructivism and jurisprudence: educational critique and the legal curriculum" 2008 *International Journal of the Legal Profession* 1 6. A sociocultural approach refers to a common method to explain what defines people as individuals. This approach places emphasis on the influence of the society, in which people are living, on their learning process – see Psychologist World "Sociocultural approach" (undated) Sociocultural Approach - Psychologist World (accessed 2021-04-24) in this regard.

211 Quinot *et al* 2015 *Stellenbosch Law Review* 35.

212 Maharg 2008 *International Journal of the Legal Profession* 3.

213 Maharg 2008 *International Journal of the Legal Profession* 6; Wrenn and Wrenn "Enhancing learning by integrating theory and practice" 2009 21(2) *International Journal of Teaching and Learning in Higher Education* 258 260.

214 Alexander "Interpreting legal constructivism" 1985 71(1) *Cornell Law Review* 249 254.

215 Quinot *et al* 2015 *Stellenbosch Law Review* 35.

216 Maharg 2008 *International Journal of the Legal Profession* 2. Reference is made to Carl Rogers, his educational literature and its relevance as far as contemporary legal education is concerned.

instructions merely by way of lecturing.[217] For this reason, Rogers believes that the only behaviour-influencing education is self-discovered and self-appropriated learning.[218] Learning is seen as an active process and learners are constantly in the process of constructing thought which emanates from their own experience and structures of thought.[219] Bigss refers to such a system of learning as constructive alignment.[220] The "constructive" aspect in the term refers to the notion that students construct meaning by way of relevant learning activities.[221] This re-iterates what was stated earlier, *ie*, the meaning of something is not transmitted or imparted to someone, but constructed by students themselves.[222] The effect of this approach is that teaching merely becomes a catalyst of the learning experience.[223] Students must therefore be active and participatory in the learning experience.[224] In this regard, legal ethics and professionalism immediately stand out, as it is submitted that the best way to learn ethics and professionalism is by experiencing it in practice.[225] The same goes for client behaviour and emotions that are often experienced in legal practice in almost all civil and criminal legal matters. It is furthermore submitted that students can be informed about how some clients react or may react in certain instances as a response to legal advice being offered to them, but that students will understand such reactions so much better, and will learn how to respond to such reactions, if they personally experience it in legal practice. In this regard, Du Plessis states that, in a clinical law programme, students should receive substantial instruction relating to, *inter alia*, substantive law relevant to effective and responsible participation in the legal

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217 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* (2016) 56.

218 Maharg 2008 *International Journal of the Legal Profession* 3.

219 Maharg 2008 *International Journal of the Legal Profession* 5.

220 Biggs "Aligning teaching for constructing learning" (undated) Microsoft Word – Biggs.doc (heacademy.ac.uk) (accessed 2021-04-02).

221 Biggs Microsoft Word – Biggs.doc (heacademy.ac.uk); Biggs 2014 *HERDSA Review of Higher Education* 9.

222 Biggs Microsoft Word – Biggs.doc (heacademy.ac.uk)

223 *Ibid*.

224 See 4 2 in this regard. Also see Biggs 2014 *HERDSA Review of Higher Education* 6. The focus should be on what the student does that causes the student to learn, not on what the teacher does.

225 See Sheppard "Ethics can't be taught, but they can be modeled" (24 August 2018) Ethics Can't Be Taught, But They Can Be Modeled (trainingmag.com) (accessed 2021-04-26) in this regard. This aspect has been well researched by psychologists and scholars. It had been agreed that ethics can indeed be taught, although it will be a complicated process to determine how exactly it should be taught. Ethics constitutes an extension of a person's conscience and moral behaviour and is therefore better learned by way of personal experiences and influences.

profession, legal analysis and legal reasoning, research, problem solving, verbal communication, legal drafting, professional responsibility, social responsibility, consultation skills, ethics and trial advocacy.[226] It is however submitted that the true learning experience will be achieved when students actively participate in these activities.[227]

Constructivists view this activism, or legal intervention, to be an inescapable aspect of life.[228] A student's knowledge stems from connecting a new experience to existing knowledge derived from past learning and/or life experiences.[229] With this in mind, according to Ackerman, lawyers should be

> "…confident in [their] power to discover the norms that ought to govern [them] through an abstract philosophical reflection untainted by experience or historical fact, and equally confident in [their] ability to implement whatever norms [they] choose through the systematic and self-conscious reconstruction of existing institutions from the bottom up."[230]

In saying this, Ackerman is attempting to move the legal profession to relinquish its old and traditional ways[231] and be more active in analysing facts and finding solutions.[232] Ackerman's argument is significant and convincing in a South African legal context, keeping in mind that it has already been indicated that the law has developed to be rather formalistic and sometimes inflexible, even in the constitutional era.[233] A constructivist approach will result in new knowledge being added to the existing knowledge framework, while at the same time restructuring the existing framework in the context of the new knowledge.[234] A continuous construction of knowledge takes place in this way, which does not only contribute to the restructuring

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226 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 39-40.

227 Also see Wrenn *et al* 2009 *International Journal of Teaching and Learning in Higher Education* 260 with regards to active participation by students. The acquisition of knowledge by the student arises by a shared process of inquiry, interpretation and creation.

228 Alexander 1985 *Cornell Law Review* 254.

229 Quinot *et al* 2015 *Stellenbosch Law Review* 35.

230 Alexander 1985 *Cornell Law Review* 250. Reference is being made to professor Bruce Ackerman and his book, "Reconstructing American Law."

231 Alexander 1985 *Cornell Law Review* 249.

232 Alexander 1985 *Cornell Law Review* 251.

233 See 1 2 2 in this regard.

234 Quinot *et al* 2015 *Stellenbosch Law Review* 35-36.

of the student's knowledge, but also of the community in which the student is utilising such knowledge.[235] This community refers to the members of the public as far as the legal profession is concerned. Therefore, both the student and the public are receiving an advantage in this way. For students, such learning experiences, by way of authentic activities, are motivational and they may find it more rewarding to learn.[236] They learn to let go of the defensiveness of expertise and attempt to understand how the other parties, being the members of the public, feel.[237] This is important as far as skills learning is concerned, with particular reference to consulting and interacting with clients.[238] As such, students explore clients' fears and anxieties[239] and, in this way, learn to take into account social and human elements as far as their clients' cases are concerned.[240] This knowledge can be said to be emergent, developmental, non-objective, contingent and socially situated,[241] which makes it suitable to the needs of an activist welfare state.[242] Advantages of this nature move constructivists like Rogers to reject explicit teaching methodologies that seek to influence behaviour, in favour of a model of facilitative communication.[243] In such a model, the teacher also becomes a learner, either individually or as part of a group.[244] In this regard, Rogers refers to Kierkegaard and the belief that teachers achieve much more when they act as facilitators and remain attentive to the learning experience, as opposed to merely teaching.[245] It is submitted that the former aspect becomes especially relevant where a law teacher, together with students, interact with members of the public and, in such

235 Quinot *et al* 2015 *Stellenbosch Law Review* 36.

236 Maharg 2008 *International Journal of the Legal Profession* 3.

237 *Ibid*.

238 Maharg 2008 *International Journal of the Legal Profession* 4.

239 *Ibid*.

240 See 3 4 5 with regards to the importance of social and human elements as far as the teaching and learning of procedural law modules are concerned.

241 Quinot *et al* 2015 *Stellenbosch Law Review* 36.

242 See Alexander 1985 *Cornell Law Review* 255 in this regard. A welfare state can be defined as a governmental concept in which the state or a network of social institutions fulfils a significant role in protecting and promoting the economic and social well-being of citizens. It is underscored by the principles of equality of opportunity, equitable distribution of wealth and public responsibility for those who are not in a position to avail themselves of the minimal provisions of a good life – see Britannica "Welfare state" (2021) Welfare state | Britannica (accessed 2021-04-21).

243 Maharg 2008 *International Journal of the Legal Profession* 3.

244 *Ibid*.

245 Maharg 2008 *International Journal of the Legal Profession* 4.

a way, the teacher also builds on his or her own knowledge, which knowledge can again be shared with the students.

This way of learning is in perfect alignment with the experiential learning style of CLE.[246] The focus falls on how, why and when the students learn and also how they experience learning.[247] Constructivism is therefore extremely learner-centred.[248] Biggs cites the example of a learner driver to illustrate this aspect: a learner driver learns by way of the act of actual driving until the outcome of the exercise, ie driving, has been achieved.[249] Rogers insists that actual experience is the highest authority and that it supersedes other persons' ideas, experiences and even his own ideas.[250] He makes it clear that experience is fallible and therefore open to correction,[251] This reverts this discussion to the clients' emotions, in which context empathy, from the side of the consultant, plays a significant role.[252] Empathy, in this context, includes communication by the consultant relating to sensing the position of the client with a fresh and fearless attitude.[253] This will put the consultant in a position to determine exactly what the client is fearful of.[254] The consultant must frequently converse with the client with regard to the accuracy of such sensings and must be guided by the responses provided by the client.[255] In this way, a confidential companionship develops between the consultant and the client.[256] Instead of an authoritative expert, the consultant acts as a companion, who keeps discussions with the client confidential.[257] In the context of constructive legal education, it is submitted that this reinforces the concept of facilitative learning and communication between the law

246 See 4 1 with regards to "experiential learning."

247 Maharg 2008 *International Journal of the Legal Profession* 4.

248 Maharg 2008 *International Journal of the Legal Profession* 5; Biggs "Constructive alignment in university teaching" 2014 1 *HERDSA Review of Higher Education* 5 6.

249 Biggs 2014 *HERDSA Review of Higher Education* 6. Also see Biggs 2014 *HERDSA Review of Higher Education* 7 in this regard.

250 Maharg 2008 *International Journal of the Legal Profession* 4.

251 *Ibid*.

252 Maharg 2008 *International Journal of the Legal Profession* 5.

253 *Ibid*.

254 *Ibid*.

255 *Ibid*.

256 *Ibid*.

257 *Ibid*.

teacher and the student. Instead of acting as an authoritative expert, the law teacher should facilitate the student's learning experience by interacting with the student during educational activities.[258] In doing this, the teacher will be exploring how the student interprets the learning experience and what improvements can be made. Teaching and learning can thus be seen as activities that complement each other: teachers cooperate with students in order to assist them in changing their understanding where required.[259] In this way, social negotiation of meaning, or collaborative construction of knowledge, takes place.[260] The importance of this, according to constructivism, is, firstly, that individuals learn and interpret things differently and that teachers should learn how to interpret such differences in learning.[261] Secondly, because of the importance of social negotiation of meaning within communities relating to the transfer of meaning, students need to be informed about the particular construction of the particular community, its attitudes, logical forms, procedures and beliefs, as well as what might constitute substantive content as far as these elements are concerned.[262] Thirdly, when learning, cooperation between people, instead of isolation, becomes important, especially as far as heuristic learning and experiences are concerned.[263] Constructivism also links the epistemological grounds of theory to heuristic learning opportunities in the classroom.[264] In this regard, it is re-iterated that there is a strong connection between constructivism and CLE, in that CLE does not exclude theory of the law from the learning process.[265] Instead, theory and practical training are regarded as integral components in the learning process.[266] It will be indicated, elsewhere in this research, that the Legal Practice module at the NMU employs, *inter alia*, classroom sessions during which students are

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258 The faciliative communication methodology stands in contrast with a conventional teaching methodology such as the Socratic teaching methodology in which the teacher is in the position of an authoritative expert. This may have a destructive psychological effect on students. See 3 3 1 in this regard.

259 Maharg 2008 *International Journal of the Legal Profession* 9.

260 Maharg 2008 *International Journal of the Legal Profession* 6.

261 *Ibid*.

262 *Ibid*.

263 *Ibid*.

264 Maharg 2008 *International Journal of the Legal Profession* 7.

265 See 4 3 3 in this regard.

266 See 1 4 4 and 4 3 3 in this regard.

being taught theory of legal practice.[267] During their practical sessions at the university law clinic, students get the opportunity to execute their knowledge of the theory by providing access to justice to the members of the community by way of legal advice and other legal assistance.[268] It is submitted that this approach by the NMU is in line with Biggs's argument that teaching and learning takes place in a whole system.[269] According to the learned author, teaching and learning should take place by integrating classroom, departmental and institutional level components.[270] In such instances, teaching and assessments are aimed at higher level learning and can it be said that constructive alignment is taking place.[271] This approach to curriculum design will optimise conditions in order to facilitate quality education and learning.[272]

Constructivism starts with what the student already knows, including the student's knowledge about the learning process.[273] The students must therefore be informed about the intended learning outcomes of a particular module at the beginning of the teaching experience.[274] Constructivism furthermore takes into account what the teacher knows of the learning process, and this includes careful curriculum planning.[275] This moves the focus to the "alignment" aspect in the term constructive alignment[276] in that the teaching and assessment processes should be aligned to the intended learning outcomes of the particular module.[277] It is stated that teachers should know more than just their subject – they need to be aware of ways in which their subjects can both be understood and misunderstood, as well as how students experience the subject.[278] What the teacher knows about the epistemological and

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267 See Chapter 4, more specifically 4 3 3.

268 See 4 3 2.

269 Biggs "Aligning teaching for constructing learning" (undated) Microsoft Word – Biggs.doc (heacademy.ac.uk) (accessed 2021-04-02).

270 *Ibid*.

271 *Ibid*.

272 *Ibid*.

273 Maharg 2008 *International Journal of the Legal Profession* 8; Wrenn *et al* 2009 *International Journal of Teaching and Learning in Higher Education* 25.

274 Biggs 2014 *HERDSA Review of Higher Education* 8.

275 Maharg 2008 *International Journal of the Legal Profession* 8.

276 See Biggs Microsoft Word – Biggs.doc (heacademy.ac.uk) in this regard.

277 Biggs 2014 *HERDSA Review of Higher Education* 9; Biggs "Constructive alignment" (undated) Constructive Alignment | John Biggs (accessed 2021-04-02).

278 Maharg 2008 *International Journal of the Legal Profession* 11.

educational theories, relating to their position as teachers, is of cardinal importance to the educational process, because this should make them aware of how they should facilitate the learning experiences of the students.[279] This preferred awareness is the reason why many educationalists have lobbied for a symbiotic relationship between theory and practice, which relationship will improve the quality of teaching and learning.[280] The teacher should construct a learning environment that will support all learning activities that are required in order for students to achieve the intended learning outcomes of a particular module.[281] Assessments should also be be indicative of how and whether students have achieved the said learning outcomes.[282] If such a teaching environment, learning activities and assessments are present in a curriculum, it can be said that constructive alignment has been achieved.

It is submitted that the way of facilitating the learning process between law teacher and law student should move students to apply the same process of facilitation to their interaction with clients when they (the students) enter legal practice. Students should realise that consulting and interacting with clients, in order to reach a solution or way forward, as far as their cases are concerned, constitute collaborative efforts between consultant and client. The client's circumstances should duly be taken into consideration in this regard, as will be discussed in more detail elsewhere in this research.[283] The client should be assisted and corrected, where necessary and applicable, as far as the client's perception of a case and the applicable law is concerned. It is submitted that this is an important way in which constructivism, as motivator for transformative legal education, can influence the development of the student for entry into legal practice. This indicates how transformative constitutionalism impacts on the teaching and learning of the student for purposes of legal practice, as transformative legal education and constructivism mark a departure from traditional and conventional teaching methodologies. The effect of this departure will be an improvement in the lives of people, being the students and members of

279 Maharg 2008 *International Journal of the Legal Profession* 9.

280 Maharg 2008 *International Journal of the Legal Profession* 9. Also see 4 1 in this regard.

281 Biggs Microsoft Word - Biggs.doc (heacademy.ac.uk) in this regard.

282 See 3 4 9 for a more elaborate discussion of the impact of constructivism and constructive alignment on assessment of modules, specifically referring to procedural law modules.

283 See 3 4 5.

society. The transformation lies in the fact that improvement of lives and circumstances is what the Constitution seeks. In the process, the law teacher also undergoes a transformation in that the teacher develops new skills and perceptions of teaching and learning in order to produce students who are better trained for entry into legal practice. The result will be a continuing improvement in the lives of people in that legal practitioners will be more client-centred, constantly looking for new ways in which to assist them in solving their legal problems. Purely formalistic approaches to solving legal problems will be abandoned in the process.

In light of the aforementioned discussion on the philosophy of constructivism and constructive alignment, it can be expected that the philosophy can and will have an impact on the particular assessment methods that are utilised in order to assess the performance of students. This aspect is discussed elsewhere in this research.[284]

As already stated, reform in higher education is taking place. The quality of teaching has become a major concern for universities.[285] Legal education is no exception to this, which is evident from the 2016 re-accreditation of university law schools in South Africa by the Council on Higher Education.[286] It speaks for itself that a novel approach to educating law students becomes extremely relevant due to several factors, including but not limited to technological changes in the world,[287] more specifically the advent of the Fourth Industrial Revolution,[288] applicable legislation aimed at restructuring the legal profession,[289] as well as higher expectations of the public as far as professional service delivery is concerned.[290] More specifically, traditional legal educational methods have been criticised as far as clinical law, skills training, legal

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284 See 3 4 9.

285 Biggs 2014 *HERDSA Review of Higher Education* 14.

286 See Macupe "Eight universities get full LLB accreditation; five more in the balance" (22 June 2018) https://mg.co.za/article/2018-06-22-00-eight-universities-get-full-llb-accreditation-five-more-in-the-balance/ (accessed 2020-03-14) with regards to more information on the Council on Higher Education's re-accreditation process and results.

287 See Chapter 4 in this regard.

288 *Ibid.*

289 See Chapter 5 in this regard. It will be argued that the LPA is pivotal as far as the preparedness of law students for legal practice is concerned.

290 See Chapters 3 and 5 in this regard.

ethics and sociolegal aspects are concerned.[291] Also, the statements by universities relating to graduate attributes, as well as their emphasis on learning outcomes, sets the stage for curriculum designs and assessment methods underscored by constructive alignment.[292]

It will be argued that the Constitution plays a prominent role in the argument that CLE is an appropriate and the preferred methodology by which the procedural law modules should be taught.[293] It will further be argued that this integrated teaching and learning approach will not only benefit the legal education of the student, but also access to justice and the quality of legal services that is being rendered to members of the public. Even before the advent of the Constitution, the South African clinical law movement bore close links with access to justice and thus aiming to protect the rights of members of the public.[294] To illustrate this point, it is both necessary and relevant to examine some of the history of law clinics and CLE in South Africa. It is submitted that this history will connect the past and present and provide more insight into why universities should revisit the manner of teaching and learning relating to procedural modules and also why CLE is the preferred teaching methodology in this regard.

During the 1970s, the state did very little to provide legal aid to disadvantaged persons.[295] Some progressive academics wanted social inequality to be addressed, as such inequality, at that specific time, had been politically motivated.[296] This function, of addressing inequality, had mostly been fulfilled by law students.[297] This led to clinical legal programmes being created at universities, starting with the University of Cape Town in 1972, followed by the University of the Witwatersrand and the University of KwaZulu-Natal (then referred to as the University of Natal) in 1973.[298]

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291 Maharg 2008 *International Journal of the Legal Profession* 11.

292 Biggs 2014 *HERDSA Review of Higher Education* 14.

293 See Chapter 4 in this regard.

294 McQuoid-Mason "Introduction to clinical law" in Mahomed (ed) *Clinical law in South Africa* (2016) 1.

295 Du Plessis "Forty-five years of clinical legal education in South Africa" 2019 25(2) *Fundamina* 12 17.

296 *Ibid*.

297 *Ibid*.

298 Du Plessis 2019 *Fundamina* 17; Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* (2018) 1.

After a conference, sponsored by the Ford Foundation in 1973, more clinical legal programmes were established, focusing on access to justice for the needy.[299] This conference can been as the catalyst for the clinical law movement in South Africa.[300] This was an important step, especially in light of the fact that there were only limited government legal aid facilities at the time.[301] As far as the conference is concerned, it was known as the Ford Foundation Clinical Conference and was held in Cape Town.[302] It was most probably the first formal clinical law conference that had been held in South Africa.[303] The conference was boycotted by both the Department of Justice, as part of the apartheid regime, as well as the Legal Aid Board, currently known as Legal Aid South Africa.[304] The following recommendations had been made at this conference:[305]

(a) that legal aid should be a compulsory or, at least, an elective module, in legal curricula;
(b) that legal aid work, performed by law students, should be worthy of academic credits;
(c) that student numbers should be limited where legal aid modules are presented as electives;
(d) that law students should be used as a way of reducing manpower shortage as far as legal aid work is concerned; and
(e) that adequately supervised legal aid clinics should be established at all universities in South Africa.

It is clear that boycotts and even the South African State of Emergency of 1985 did not hamper the development of law clinics and advancement of social justice. In 1985, on the day that the South African apartheid government declared a State of

299 Du Plessis 2019 *Fundamina* 17, 22; McQuoid-Mason in Mahomed (ed) *Clinical law in South Africa* 4.
300 McQuoid-Mason in Mahomed (ed) *Clinical law in South Africa* 4.
301 Du Plessis 2019 *Fundamina* 17.
302 Bodenstein (ed) *Law clinics and the clinical law movement in South Africa* 4.
303 *Ibid*.
304 McQuoid-Mason in Mahomed (ed) *Clinical law in South Africa* 4.
305 Bodenstein (ed) *Law clinics and the clinical law movement in South Africa* 1.

Emergency, professor David McQuoid-Mason, currently still affiliated to the University of KwaZulu-Natal, invited Ed O'Brien, the co-founder of Street Law in the United States of America, to South Africa.[306] Despite the State of Emergency underway, McQuoid-Mason and O'Brien conducted a successful workshop for a non-racial group of school teachers and learners.[307] Suggestions for a Street Law curriculum had been elicited during this workshop.[308] Funding for a Street Law project had been obtained during 1986 and was thereafter extended for a further period of six months.[309] Thereafter, it turned out that this project was so successful that it had been converted into a full time programme at the then University of Natal in Durban during 1987.[310] It was not long before similar programmes had also been employed at the University of Pretoria and University of the Witwatersrand and, while donor funding lasted, the programme reached 17 of the 21 law schools in South Africa.[311]

During the early development of law clinics in South Africa, only the live-client approach, and no simulations, had been followed.[312] In this regard, social justice education already became a distinguishing factor as far as CLE and conventional practical legal training courses and education are concerned.[313] Some of the progressive law clinics had a strong social justice focus and were called "legal aid clinics."[314] These clinics could be distinguished from more conservative law clinics that focused on legal skills of law students.[315] The more conservative law clinics were however also called "legal aid clinics."[316] The more progressive law clinics focused on the need to address the deprivations caused by the apartheid regime, which sentiment

306 McQuoid-Mason in Mahomed (ed) *Clinical law in South Africa* 5.

307 *Ibid*.

308 *Ibid*.

309 *Ibid*.

310 *Ibid*.

311 *Ibid*.

312 McQuoid-Mason "Legal aid services and human rights in South Africa" (undated) SouthAfrica-McQuoid-Mason-PILI.pdf (clarkcunningham.org) (accessed 2021-04-06).

313 *Ibid*.

314 *Ibid*.

315 McQuoid-Mason SouthAfrica-McQuoid-Mason-PILI.pdf (clarkcunningham.org). Also see Du Plessis 2019 *Fundamina* 17 in this regard.

316 McQuoid-Mason SouthAfrica-McQuoid-Mason-PILI.pdf (clarkcunningham.org).

superseded the educational focus of law students.[317] A big motivator behind this sentiment was the fact that the government-funded legal aid system did not go to great extents to provide assistance to apartheid victims.[318] Whatever the case may be, the apartheid government did recognise the need for legal aid in civil matters and established the Legal Aid Board for that purpose in 1969.[319] The Legal Aid Board commenced operation in 1971 and initially used its budget for civil cases like divorce and personal injury matters.[320] This situation however changed later on in that the budget had been spent mostly on criminal legal matters.[321] Even in the democratic era, the majority of the government-funded budget to Legal Aid South Africa is allocated towards criminal legal matters due to the demands of the Constitution.[322] University law clinics therefore became one of the considerations in order to assist members of the public as far as civil legal matters are concerned.[323]

Law clinics at first mainly handled labour matters, consumer issues, housing, customary law matters, women's matters, criminal matters, as well as succession-related matters.[324] However, apartheid victims also required assistance as far as police brutality, pass law issues, forced removals from land, detention without trial, as well as other breaches of fundamental rights, are concerned.[325] With this in mind, it is submitted that the legal practitioners, manning the more progressive law clinics, realised that they were well placed to make an important contribution towards the preservation and strengthening of the rule of law in the same way that the Constitution provides today, *ie*, that everyone has the right to access the courts in order to have disputes adjudicated.[326] Such legal practitioners might have viewed this as a sacred

317 *Ibid*.

318 *Ibid*.

319 McQuoid-Mason "The delivery of civil legal aid services in South Africa" 2000 24(6) 111 114.

320 *Ibid*.

321 *Ibid*.

322 McQuoid-Mason 2000 112.

323 McQuoid-Mason 2000 115.

324 McQuoid-Mason SouthAfrica-McQuoid-Mason-PILI.pdf (clarkcunningham.org) .

325 *Ibid*.

326 See Navsa "Introduction" in De Klerk (ed) *Clinical Law in South Africa* (2006) 3. S 34 of the Constitution provides that everyone has the right to have any dispute, that can be resolved by the application of law, decided in a fair public hearing before, *inter alia*, a court.

duty towards the public,[327] which view continued into the democratic era of South Africa in that some law clinics began to focus on human rights issues due to poverty still being a pressing issue for many people.[328] Some clinics also included practical legal service at the clinic as part of existing law modules right from the start, *eg* the practical legal training course at the University of the Witwatersrand, as well as the professional training course at the University of KwaZulu-Natal.[329] During the 1990s, an increase of legal aid programmes became evident.[330] Motivating factors behind this included an increase in the development of state legal aid systems, accreditation of university law clinics in 1993 by the South African Law Society, funding provided by the Attorneys Fidelity Fund (hereafter referred to as the "AFF"),[331] as well as the establishment of the Association of South African Legal Aid Institutions, or AULAI, now known as the South African University Law Clinics Association, or SAULCA.[332] The AFF funding commenced on 1 January 1988 and had as its purpose the employment of a full-time coordinator, more specifically an attorney, who could manage the law clinic's activities.[333] The coordinator's duties furthermore included supervision of law students when rendering free legal services to members of the public.[334] AULAI had to, *inter alia*, inform law schools about the importance of CLE and that CLE programmes should become more formalised.[335] Another event, that highlighted the importance of CLE, was the South African-US Public Interest Law Symposium, held at Stony Point, United States of America, during November 1992, just before the advent of South Africa's democratic regime.[336] At this symposium, CLE had been

327 Navsa in De Klerk (ed) *Clinical Law in South Africa* 3.

328 McQuoid-Mason SouthAfrica-McQuoid-Mason-PILI.pdf (clarkcunningham.org); McQuoid-Mason 2000 130, 131.

329 McQuoid-Mason in Mahomed (ed) *Clinical Law in South Africa* 1-2.

330 Du Plessis 2019 *Fundamina* 18.

331 The Attorneys Fidelity Fund funding had specifically been providing for the educational development of clinical law programmes – see Du Plessis 2019 *Fundamina* 18.

332 Du Plessis 2019 *Fundamina* 18.

333 McQuoid-Mason "The organization, administration and funding of legal aid clinics in South Africa" 1986 1(2) *Natal University Law and Society Review* 189 197; Bodenstein (ed) *Law clinics and the clinical law movement in South Africa* 2. As far as the current state of the funding is concerned, see Chapter 4 fn 548. The Attorneys Fidelity Fund is currently known as the Legal Practitioners Fidelity Fund.

334 Bodenstein (ed) *Law clinics and the clinical law movement in South Africa* 2.

335 *Ibid*.

336 *Ibid*.

identified as a means to address the inequalities brought about by legal education during the apartheid era.[337]

An important consideration that can be inferred from the development of law clinics and legal aid in South Africa is that the need for social justice, equality and access to justice has become even more important during the democratic era. The state's inability, to provide for social and economic rights in terms of the Constitution, is a large contributor in this regard.[338] Furthermore, like everything else during the apartheid era, legal education was reflective of the allocation of resources based on racial criteria.[339] The result was that entry into and membership of the legal profession did not reflect the demographic profile of South Africa.[340] The conclusion can therefore be drawn that many students did not have the opportunity to perform duties at law clinics and, in doing so, participate in practical training towards their future careers. It is submitted that this is an injustice done to many students in the past. This places an additional duty on universities to ensure that students are sufficiently trained in applying legal procedure and the principles of evidence when they enter legal practice so as to ensure that the law can be to the public's advantage in addressing their needs and protecting their constitutional rights. Sufficient training will furthermore contribute towards the students' graduate attributes and employability for entry into practice, thus creating equal opportunities for all law students for becoming a member of the legal profession.[341] In light of the fact that CLE has, from the start of clinical programmes in South Africa, exposed law students to active engagement with members of the public and developed significant methodologies of teaching students how to assist these members as far as consultations, drafting and litigation are concerned, it is submitted that it is the preferred teaching methodology to be employed when teaching the procedural law modules.

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337 *Ibid*.

338 See McQuoid-Mason 2000 132 in this regard.

339 Kaburise "The structure of legal education in South Africa" 2001 51(3) *Journal of Legal Education* 363 364.

340 *Ibid*.

341 See Chapter 5 in this regard.

It will further be argued that the relatively new LPA, when interpreted in the spirit of the Constitution – and therefore transformative constitutionalism – plays an equally important role in substantiating the argument that CLE is the preferred methodology by way of which procedural law modules should be taught.[342] Throughout this research, it will be made clear that various external factors can be taken into account in arriving at this conclusion. Until the advent of the democratic constitutional dispensation in 1994, external factors had been excluded in adjudication.[343] However, since 1994, it is neither new nor revolutionary in South Africa to make use of external factors, when interpreting legislation in order to construct legal arguments. In *AfriForum and Solidarity v University of the Free State*,[344] the court read into the Constitution in order to reach a conclusion.[345] This decision is discussed in more detail elsewhere.[346] It is submitted that the use of external factors achieves the same goal. External factors can include, but are not limited to, social and human elements, economic rights, education, self-development, quality services to the public, as well as those discussed earlier: the effect of apartheid on education, the efficacy of the more conventional teaching methodologies, *ie* the Socratic and case dialogue methodologies in teaching procedural modules,[347] as well as the impact of the Fourth Industrial Revolution.[348] It can bring meaning to the legislative text in order to achieve a specific purpose. In this regard, Van Marle states the following:[349]

> "Judges, like all legal scholars,…are caught up in a tension between freedom and constraint. Of course judges, because of the reality of constraint, will follow the Constitutional text and legal precedent as closely as possible. However, because of the impossibility of language to convey clear meaning in the sense of producing single neutral and objective truths, any text – also the Constitutional text – will be open for interpretation and the generation of different plausible interpretations. When interpreting, judges cannot but be guided by extra legal factors:…"

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342 *Ibid*.

343 Moseneke 2002 *South African Journal on Human Rights* 316.

344 CCT101/17; 2017 ZAC 48; 2018 2 SA 185 (CC); 2018 4 BCLR 387 (CC).

345 See 5 1.

346 *Ibid.*

347 See 3 3.

348 See 4 7 4.

349 Van Marle "Transformative Constitutionalism as/and critique" 2009 2 *Stellenbosch Law Review* 286 289. Also see Klare 2017 *South African Journal on Human Rights* 163 with regards to a judge's personal and political convictions when interpreting or adjudicating. The learned author agrees that such convictions cannot be excluded from the interpretive and/or adjudication process.

To put this in the context of this research: the need to create a better law graduate for legal practice is but one such external factor that influences the mentioned interpretation of the LPA and the Constitution. Parallel to that runs the various other factors already mentioned. The LPA contains no provisions directly relating to student education and training with the aim of producing a better graduate for legal practice. However, it will be argued that the LPA can be interpreted to contain certain implied imperatives for legal education to bring about better law graduates for legal practice.[350] The following statement by Klare is both complementary to this argument, as well as to what is stated by Van Marle:

> "As everyone knows, of course, adjudication runs head-long into the problems of interpretive difficulty and the indeterminacy of legal texts. Legal texts do not self-generate their meanings; they must be interpreted through legal work. Legal texts, particularly constitutions, are shot through with apparent and actual gaps…, conflicting provisions, ambiguities and obscurities… In the face of gaps, conflicts, and ambiguities in the available legal materials, what's a decisionmaker to do? Apart from abdication, there seems no option but to invoke sources of understanding and value external to the texts and other legal materials."[351]

Reform in higher education will however be both dangerous and counter-productive if it is driven by policy agendas and an absence of sound pedagogical considerations.[352] Quinot and Greenbaum state that this also applies to legal education.[353] They motivate this statement by referring to the current four year LLB programme offered by South African law schools.[354] A lack of pedagogical foundation could be partly to blame as far as the failure of the reforms that led to the introduction of the four year LLB degree, is concerned.[355] This statement requires some discussion in light of the preceding discussion, as well as the discussion that will follow.

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350 See Chapter 5.

351 Klare 2017 *South African Journal on Human Rights* 157-158; Van Marle 2009 *Stellenbosch Law Review* 289.

352 Quinot *et al* 2015 *Stellenbosch Law Review* 29.

353 *Ibid.*

354 *Ibid.*

355 *Ibid.*

The four year LLB degree is a 1997 product of the democratic government as part of attempts to transform the legal profession.[356] Prior to this, students could enrol for an undergraduate B.Iuris degree,[357] followed by a postgraduate LLB degree.[358] The B.Iuris degree would enable graduates to be employed as civil servants such as public prosecutors, but the LLB degree was required in order to be admitted as attorneys or advocates.[359] The alternative to this qualification was an undergraduate B.Proc degree,[360] followed by a postgraduate LLB degree.[361] The B.Proc degree enabled graduates to practice as attorneys; however, the LLB degree was required for admission as advocates.[362] Greenbaum summarises this transformation agenda as follows:[363]

> "The change was to address the historical legacy of an under-representivity of Blacks, and particularly Africans, in the legal profession as well as the perceived status differential between attorneys holding a B Proc degree and those who had completed a primary degree, followed by a postgraduate LLB. This distinction largely followed the lines of racial difference, and also determined access to the advocates' profession and ultimately, to the judiciary. The expense of completing two degrees and the additional years spent studying at university represented an impediment that most aspiring African lawyers were unable to afford."

The primary motivation for introducing a single academic qualification was the attempt to move away from a situation where different classes of legal practitioners are perceived, as well as that some are perceived to be better qualified than others.[364] The apartheid regime, filled with years of inequality in the provision of education, as well as socio-economic divide, contributed towards a necessity for such a

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356 South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper; Greenbaum "The four-year undergraduate LLB: progress and pitfalls" 2010 35(1) *Journal for Juridical Science* 1 1; Campbell "The role of law faculties and law academics: academic education or qualification for practice?" 2014 1 *Stellenbosch Law Review* 15 16; Maisel "Expanding and sustaining clinical legal education in developing countries: what we can learn from South Africa" 2007 30 *Fordham International Law Journal* 374 386. An extract from the Qualification of Legal Practitioners Act 78 of 1997, indicating this change, is enclosed in this research, marked "Appendix 1."

357 The unabbreviated description of this degree is *Baccalaureus Iuris*.

358 Greenbaum 2010 *Journal for Juridical Science* 7.

359 *Ibid.*

360 The unabbreviated description of this degree is *Baccalaureus Procurationis*.

361 The unabbreviated description of this degree is *Baccalaureus Legum*.

362 Greenbaum 2010 *Journal for Juridical Science* 2.

363 Greenbaum 2010 *Journal for Juridical Science* 1.

364 South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper; Campbell 2014 *Stellenbosch Law Review* 17.

transformation of the legal profession.[365] Therefore, efforts, with the aim of addressing these imbalances, became pressing in order to serve as a reflection of the new democratic government, as well as to effectively implement transformation.[366] The result of this transformative step would be that all prospective legal practitioners, whether they want to practice in private legal practice or in the public service, will be required to obtain an LLB degree.[367] The four year LLB degree was designed to serve an empowering purpose for a transitional period.[368] The pedagogic viability of such transformation had however received little thought.[369] There is evidence that the degree does not enable students to achieve the required graduate attributes within the minimum period of four years.[370] The result has already been made clear in Chapter 1: dissatisfaction from various stakeholders as to the quality of law graduates.[371] The intended meaning of "dissatisfaction" in this context must not be interpreted as referring to racial concerns, but rather to the quality of legal education provided, as well as the concomitant teaching and learning methodologies used in order to bring about such education. It is furthermore difficult to understand why more specific attention had not been directed a long time ago towards the improvement of teaching and learning of especially practice orientated law modules like the procedural law modules. The reality is that the majority of law school graduates are heading for professional life and, consequently, law schools have a certain degree of accountability for the competence of the graduates they produce.[372] The four year LLB degree provides entry into the legal profession. The change to a four year degree was a political decision; hence, the law cannot be isolated from politics in a superficial

365 Greenbaum 2010 *Journal for Juridical Science* 1.

366 *Ibid.*

367 South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper.

368 Whitear-Nel and Freedman "A historical review of the development of the post-apartheid South African LLB degree – with particular reference to legal ethics" 2015 21(2) *Fundamina* 234 246.

369 Greenbaum 2010 *Journal for Juridical Science* 1; Campbell 2014 *Stellenbosch Law Review* 17.

370 Whitear-Nel *et al* 2015 *Fundamina* 246. The required graduate attributes are discussed in Chapter 5.

371 See 1 1; Greenbaum 2010 *Journal for Juridical Science* 2; Whitear-Nel *et al* 2015 *Fundamina* 245.

372 Gravett "Pericles should learn to fix a leaky pipe – why trial advocacy should become part of the LLB Curriculum (Part 2) 2018 21 *Potchefstroom Electronic Law Journal* 1 2. This aspect is also discussed further, in context of the LPA, in Chapter 5.

and incomplete manner.[373] Teaching and learning of the law should therefore also not be divorced from this political ideal.

As access to the profession, and therefore, by implication success in the profession, is the driving force behind the implementation of the four year LLB degree, a logical reasoning would be that law students should be better prepared for aspects of the profession, *inter alia*, but not limited to trial advocacy. Although litigation plays a dominant role in legal practice,[374] trial advocacy, in this sense, should not only be interpreted as referring to court procedures.[375] Gravett explains this as follows:[376]

> "Trial advocacy is [t]he composition of fact-extraction, legal reasoning, strategic judgment, and persuasive speech, structured by…the rules of professional responsibility, evidence, procedure and stative rules. Thus, trial advocacy skills are not exclusively the skills of the courtroom, but they also live and breathe in the everyday practice of law. A skilful trial lawyer is not merely a technician trained in the mechanics of courtroom skills and etiquette, but a lawyer who is able to extract the pertinent facts from a seeming maze of information, integrate those facts with legal principles, and present a reasoned argument."

Therefore, skills taught in a trial advocacy module relate to nearly every aspect of the daily practice of law by legal practitioners, whether in their law firms or in the courtroom.[377] A successful legal practitioner must be skilled both inside and outside the courtroom.[378] However, in the courtroom, the full range of a legal practitioner's skills is tested in a demanding environment where all of the skills of a practitioner are integrated.[379] The ability to execute lawyering skills in a courtroom is an essential skill for every legal practitioner, whether actively while performing such skills in the courtroom, or passively, by being fully aware of their importance and impact.[380] Law schools therefore have a responsibility to train students in the basic skills of legal

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373 Van der Walt 2006 *Fundamina* 15, 21.

374 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 5.

375 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 5; Wolfe "Exploring trial advocacy: tradition, education, and litigation" 1980 16(2) *Tulsa Law Review* 209 211.

376 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 5-6. Also see Wolfe 1980 *Tulsa Law Review* 211 in this regard.

377 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 6. See 3 4 7 for a more detailed discussion of the advantages of a trial advocacy module in context of this research.

378 Wolfe 1980 *Tulsa Law Review* 211.

379 *Ibid.*

380 *Ibid.*

representation, because such training, taking place in a protected academic setting, constitutes the ideal basic preparation for a professional career in law.[381] The students are therefore not subjected to the demanding nature of the actual courtroom, as mentioned earlier, although it is submitted that they should be made fully aware of how demanding it can be. This training will further help to build a proverbial bridge over the gap between traditional legal education and legal practice.[382] Practical learning is therefore an inseparable aspect of proper cognitive learning and will lead to more complete comprehension, better retention and more adequate recall of applicable cognitive information.[383] Students will have a much better understanding of what it means to bring doctrinal knowledge, analytical methods, investigation, communication and persuasion skills to the treatment of complex problems in a professional manner.[384] The importance of such training cannot be over emphasised, because it will enable students to apply procedural, substantive and ethical rules of law.[385] In this way, students will develop confidence in their abilities to perform professional duties in ways that befit legal practitioners.[386] To strengthen this argument, Greenbaum convincingly states that legal education cannot be viewed in isolation from the national contextual framework of policy changes in South Africa.[387] According to Gravett, trial advocacy training should provide the opportunity to students not only to learn how to conduct a trial, but also why they should use their newfound skills in a particular way, as well as what the effect thereof would be.[388] It is submitted that, when these statements from both learned authors are connected, it speaks to the essence of transformative constitutionalism, *ie* justification. To ignore the contextual framework of policy changes, as well as not making students aware of how their newly acquired skills could influence the public, would result in ignoring the important role that the Constitution, as well as the LPA, can play in the enhancement of legal education, especially taking into account the injustices of the past and the impact thereof on

381 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 2.

382 *Ibid.*

383 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 2. Also see 4 2 with regards to the so-called "learning pyramid" where the benefits of practical training are clearly evident.

384 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 2-3.

385 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 6.

386 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 3.

387 Greenbaum 2010 *Journal for Juridical Science* 4.

388 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 24.

education. For this reason, it will be argued that education is a factor that can strengthen entry into the legal profession.[389] It must therefore be a factor that makes the employability of graduates attractive to prospective employers.[390] The transformational goal of the democratic government as far as the four year LLB degree is concerned, as discussed earlier, is significant in this regard. University law schools produce new law graduates every year.[391] These graduates are becoming more representative of the South African society.[392] However, many of them struggle to gain access to the legal profession, or to their preferred branch of the legal profession.[393] It may however be that they do get access to the profession; however, they may find themselves in circumstances that set them up for failure.[394] The reason for this failure has been stated to be that these graduates may be from historically disadvantaged groups and, consequently, from historically disadvantaged universities, which were products of the now defunct apartheid regime.[395] These universities suffered a severe lack of financial, material and human resources, resulting in serious inherent disadvantages for their students.[396] Although the apartheid regime is long gone, the mentioned disadvantages, or some of them, may still exist in some of these law schools.[397] Capacity building in these law schools is therefore a challenge that the government and the legal profession is facing.[398] Transformation plays an important role in this instance in that it must bring forth a legal profession that is representative of the diversity of the South African society in all its branches and at all levels.[399] This can be achieved by, *inter alia*, ensuring that historically disadvantaged graduates have the same opportunities to become successful in the legal

389 See 5 2 2 3 in this regard.

390 *Ibid.*

391 South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper.

392 *Ibid.*

393 *Ibid.*

394 *Ibid.*

395 *Ibid.*

396 *Ibid.*

397 *Ibid.*

398 *Ibid.*

399 *Ibid.*

profession.[400] The same also applies in the case of all other graduates.[401] It is submitted that education is pivotal in bringing about a change of this nature.

Law students should also not be taught to become practitioners in "cold-blooded commercial practice."[402] This means that law teachers should never train students to become money makers and ignore the importance of human rights and legal philosophy.[403] Law teachers may feel inclined to adopt this stance, because some students would want to be employed by some of the most prominent law firms in the country, firms which, maybe, do not invest much time in aspects like human rights, legal philosophy and social justice.[404] This may further fuel the conservative approach to law, as it may bring forth practitioners who would want to use the exact words of the law in order to ensure that their pockets remain full, while the possibility of transformation is rejected at the same time.[405] Such an attitude by law teachers may leave graduates inadequately equipped for legal practice, because graduates have never engaged critically with legal material.[406] The mentioned non-engagement with critical materials hampers the ability of graduates to become aware of their roles as responsible and conscientious future legal practitioners, as well as citizens.[407] For these reasons, Zitske argues that there is a responsibility on law teachers to realise the immense power that they possess, just being teachers.[408] They should therefore use this power to expose "…the illusions about the neutrality of law and [should be] teaching the tensions that underlie it."[409] Such a course of action will actively promote and fulfil the values of dignity, equality and freedom in a radical way.[410]

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400 *Ibid.*

401 *Ibid.*

402 Zitske 2014 *Acta Academica* 63.

403 Zitske 2014 *Acta Academica* 63. Also see Fourie 2016 *Potchefstroom Electronic Law Journal* 2, 20 in this regard.

404 *Ibid.*

405 *Ibid.*

406 Zitske 2014 *Acta Academica* 64.

407 *Ibid.*

408 *Ibid.*

409 *Ibid.*

410 *Ibid.*

It should however be made clear that the statements in the preceding paragraph are not, as far as this research is concerned, endorsed in any way to denote a definite stance taken on by law teachers. It is merely cited as the possibility of a training attitude that may occur at law school and, if so, needs to change. It is exactly on this point that Gravett's call for a trial advocacy module in the LLB curriculum is being criticised by Klopper.[411] Klopper states that he fails to see how the transformation of existing legal education, as well as the way in which it is taught, can lead to a more critical approach by the addition of a trial advocacy module.[412] He is of the opinion that, in suggesting a trial advocacy module, Gravett falls "…slave to the demands of practice,…" and that he should rather adopt a teaching approach where students are taught not to accept legal principles on the basis of authority, but based on the yardstick as set by the Constitution.[413] He reiterates that a formalistic approach to law is not reconcilable with what the constitutional dispensation expects of legal practitioners.[414] The following statement shows the central point of his opposing view to Gravett's theory:[415]

> "Today, the Constitution has created a new moral yardstick. Practice might have continued with its machine-like resoluteness after 1994, but that does not mean it is correct in doing so. This line of questioning is what Gravett is opposed to. He is opposed to the disturbance of the machine-like resoluteness, the status quo."

With all due respect to Klopper, it is submitted that his criticism of Gravett cannot be regarded as reasonable. In no way does Gravett, by proposing the inclusion of a trial advocacy module, apparently based on the traditional *modus operandi* of legal practice, pose a threat to the constitutional agenda of transformation. The reason for this submission is that traditional methods of litigation do not violate the values of the Constitution *per se*. In light of the statement earlier that litigation does not only include court proceedings, but also the remainder of the daily work of a legal practitioner, it can also not be said that such work goes against the values of the Constitution *per se*. Trial advocacy, in its collective form, will however go against the values of the

411 See Klopper 2018 *Pretoria Student Law Review* 40 in this regard.

412 Klopper 2018 *Pretoria Student Law Review* 41.

413 *Ibid.*

414 *Ibid.*

415 *Ibid.*

Constitution if the spirit of the Constitution, as well as transformative nature thereof, are not considered when promoting the course of justice as far as both substantive legal reasoning and legal procedure are concerned. It is submitted that Gravett does not imply this in any way. To have a vision to improve the quality of graduates by suggesting a trial advocacy module, and in the process improving their trial preparation and courtroom skills, is part and parcel of this research, but it does not mean that it is negative. Legal practice is one aspect of the legal fraternity that is available to lawyers to earn their income. For that reason, they do not necessarily become "cold-blooded" commercial practitioners, as was stated earlier, in following this route. It also does not mean that they defy the spirit of the Constitution in following such a route. Criminal legal practitioners can serve as good examples in this regard. Criminal legal practitioners defend the rights of accused persons on a daily basis in criminal courts, which may consist of bail applications, pleas of guilty, trials, appeals and reviews. An accused's right to a fair trial always features during all such proceedings. In assessing the right to a fair trial, the Constitution has set the threshold by way of section 35. In this way, traditional methods of litigation are still used, as far as court proceedings are concerned, however they are supplemented with a constitutional reasoning. Elsewhere, the constitutional scrutiny into some existing legal principles is discussed, clearly indicating that, although traditional trial advocacy methodologies had been followed, as far as legal procedure is concerned, a transformative and constitutional substantive reasoning brought change.[416] It is therefore submitted, once again respectfully, that Klopper is reading something non-existent into the suggestions by Gravett. That Gravett does not implicitly state something, cannot be taken to mean that he does not include the same in his suggestions, especially when considering that the learned author has made these suggestions well aware of the fact that the Constitution is the supreme law of South Africa. It is also submitted that it is highly unlikely that such a learned author would encourage the training of students based on a theory that goes against the grain of such a supreme law. Klopper does however admit that Gravett's suggestions might be fruit bearing to a certain extent:[417]

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416 See 4 3.

417 Klopper 2018 *Pretoria Student Law Review* 56.

> "Gravett's method of defence for the apparent world…by questioning the true world…may yet yield results, but if it is done without constraint, it runs the risk of destroying the true world in its entirety and with it crumbles the apparent as well."

Klopper's reference to the "apparent world" is the world of legal practice, while the "true world" refers to the world of theory and philosophy.[418] It is submitted that the converse is also true: too large a focus on the "true world" can also destroy the "apparent world." This will happen if students are not sufficiently trained in how exactly to execute substantive legal reasoning in the daily life of a legal practitioner or during court proceedings. The latter consequence supports the notion of a constitutional imperative on university law schools to prepare law students adequately for legal practice. In doing so, law schools should ensure that graduates become more aware of the vigilance that should be cultivated towards aspects that require change in light of the Constitution and its values.[419] It should further be noted that a pro-social justice and human rights approach, as well as community service, are also endorsed by the LPA. In this regard, it will be argued that such community service must be inclusive of *pro bono* services to the indigent members of society in order to ensure access to justice and ultimately bringing about transformation in their social conditions.[420]

Therefore, it is submitted that the transformation of legal education, as well as the teaching methodologies conventionally associated with legal education, are required. In this regard, the focus of this research falls only on procedural law modules. Graduates need to be trained adequately so as to ensure equality in qualification and competence, particularly with reference to graduates from historically disadvantaged institutions. This can be achieved, *inter alia*, in the following ways:[421]

(a) by encouraging legal academics and legal practitioners to teach the law in these in historically disadvantaged institutions;

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418 *Ibid.*

419 See 4 3 in this regard.

420 See Chapter 5 in this regard.

421 South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper.

(b) by providing training and support programmes for staff members at historically disadvantaged institutions;
(c) by increasing library and other research resources to a large extent;
(d) by arranging for exchange schemes as far as law teachers and students are concerned;
(e) by encouraging joint teaching and learning programmes with law schools that are well-established;
(f) by encouraging these well-established law schools to share some of their resources with historically disadvantage institutions; and
(g) by encouraging legal practitioners to present vacation programmes to students from historically disadvantaged institutions.

However, it is submitted that the focus should not only be on the transformation of legal education as far as historically disadvantaged students are concerned. Many students are studying law at universities that are not labelled as being historically disadvantaged institutions. To exclude students from these universities might result in a gross oversight of a large number of prospective legal practitioners who did not receive adequate legal training while being at law school. In the context of transformative constitutionalism in this research, a rethinking of teaching procedural law modules therefore applies to all students, irrespective of background. The past is gone, but the future is yet to be explored. For this reason, transformative constitutionalism plays a crucial role in setting law graduates up for success in legal practice by ensuring that they received proper training in procedural law modules while at university.

A major step in transforming the legal profession is the LPA.[422] The LPA seeks to address, *inter alia*, that the legal profession is not representative of the diversity of South African society, that there is a disproportionate distribution of legal practitioners delivering legal services to the public and that there is a lack of equality as far as qualification requirements for admission to the legal profession is concerned.[423] It is

[422] See Chapter 5 for a detailed discussion of the LPA as far as this research is concerned.
[423] South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper; see 5 1.

therefore submitted that the entire LPA can be seen as an instrument of transformative constitutionalism that is applicable to the legal profession. It is further submitted that university law schools, and therefore legal education, should not be left out of the ambit of the LPA. If the LPA is the regulator of who is allowed into the legal profession, as well as what qualities will be expected of such persons, it can definitely be argued that the LPA also has an influence of the type of education that such prospective entrants into the profession must receive prior to entry. This argument should apply to both university legal education, as well as practical vocational training in practice. Practical vocational training however falls outside the scope of this research.

2 4 LIMITATIONS TO A TRANSFORMATIVE CONSTITUTIONALISM APPROACH TO LEGAL EDUCATION

2 4 1 GENERAL PRINCIPLES APPLICABLE TO CONSTITUTIONAL LIMITATIONS

The rights in the Bill of Rights of the Constitution constitute standards of justification.[424] This means that they provide justification for any decisions that are being challenged in terms of their application and context.[425] These rights are however not absolute.[426] If these rights had been absolute, anything in conflict therewith would be automatically without any force and effect.[427] Instead, these rights can be limited in terms of section 36 of the Constitution. Section 36(1) provides as follows:[428]

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

424 Mureinik1994 *South African Journal on Human Rights* 33.

425 *Ibid.*

426 *Ibid.*

427 *Ibid.*

428 Also see Pieterse 2005 *South African Public Law* 163 in this regard.

Section 36(2) provides that no other law may limit any right entrenched in the Bill of Rights, except for as provided in section 36(1) or in any other provision of the Constitution.

The effect of section 36, also known as the limitation clause of the Constitution, is that a challenge under the Bill of Rights cannot be resolved by merely finding that the challenged decision is in conflict with the idea represented by the particular right.[429] When there is a challenge, the question arises as to what justification exists in support of such a challenge.[430] From the wording of section 36(1), it is clear that there are three standards of scrutiny in terms of which limitations of fundamental rights must be done, namely a law of general application, a limitation that is reasonable, as well as a limitation which is justifiable in an open and democratic society based on dignity, equality and freedom.[431] Furthermore, because the fundamental rights enjoy such a high level of protection, it is an indication that the limitation must be necessary.[432]

Reasonableness is an important consideration when considering the adjudication of constitutional rights[433] and, as evident from section 36, also the limitation thereof. In case of positive duties being placed on the state, the question is whether or not the chosen means are reasonably capable of facilitating the realisation of the particular rights.[434] In cases such as *Government of the Republic of South Africa and Others v Grootboom and Others*[435] and *Soobramoney v Minister of Health (Kwazulu-Natal)*,[436] the Constitutional Court has ruled that there is no direct and unqualified obligation on the state to provide social resource and services to members of the public on demand. The court therefore rejected an interpretation of socio-economic rights that would

429 Mureinik1994 *South African Journal on Human Rights* 33.

430 Pieterse 2005 *South African Public Law* 163; Mureinik1994 *South African Journal on Human Rights* 33.

431 Mureinik1994 *South African Journal on Human Rights* 33.

432 *Ibid.*

433 Liebenberg 2006 *Stellenbosch Law Review* 22.

434 *Ibid.*

435 (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000) par 46.

436 (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) par 36.

result in self-standing and independent positive enforceable rights.[437] The following are reasons for this decision by the court:[438]

(a) varying groups of people have different social positions and consequently also varying social needs;[439]
(b) unrealistic duties may be placed on the state, thereby making it impossible for everyone to immediately have access to the core service provided for by a particular right; and
(c) the incompatibility of a core service, provided for by a particular right, with the institutional competencies and roles of the courts.

Each case can however be determined on its own merits. In the *Grootboom* case, the Constitutional Court stated that evidence in a particular matter may be indicative of the minimum core of a particular service that should be taken into account in establishing whether or not the measures, adopted by the state, are regarded as reasonable measures.[440] The decisive question in each case must therefore be whether or not the means chosen are reasonably capable of facilitating the realisation of the particular rights.[441] Where disputes in this regard arise, attempts should be made to find just and equitable solutions in the context of the relevant factors present in a particular case.[442] Reasonableness must therefore bring about a flexible and context sensitive manner of reviewing socio-economic rights claims.[443] In this regard, the dignity interests of an affected group of people are taken into account, more specifically the impact that a refusal of such rights might have on such an affected group.[444] This can significantly contribute to transformation by taking into account socio-economic circumstances, in that the broader historical and social context of a systemic injustice should also be taken into account.[445] The courts must expose underlying patterns of

437 Liebenberg 2006 *Stellenbosch Law Review* 21.
438 Liebenberg 2006 *Stellenbosch Law Review* 22.
439 Also see the *Grootboom* case par 37 in this regard.
440 Par 33. Also see Liebenberg 2006 *Stellenbosch Law Review* 22.
441 Liebenberg 2006 *Stellenbosch Law Review* 22.
442 Liebenberg 2006 *Stellenbosch Law Review* 26.
443 Liebenberg 2006 *Stellenbosch Law Review* 30.
444 Liebenberg 2006 *Stellenbosch Law Review* 23.
445 Liebenberg 2006 *Stellenbosch Law Review* 34.

social injustice that produce particular deprivations.[446] In the context of this research, it will be argued that, *inter alia*, the fundamental rights to dignity, education, access to justice, as well as the aspirations of the LPA, will suffer injustice should the constitutional imperative, argued for in this research, not be realised.

The question arises, as far as legal education in the context of this research is concerned, what would constitute limitations on the argued constitutional imperative on universities to train graduates who are adequately prepared for legal practice. A further question is how these limitations would be evaluated in terms of section 36 of the Constitution. According to Mureinik:[447]

> "[t]he work of identifying the justified limitations on the Bill's rights calls for a supple and nuanced jurisprudence, not a rule of thumb, pinkie and index finger. The three categories are mechanical and arbitrary."

When interpreting the Constitution and considering limitations to such interpretation, it must be remembered that there is a fine line between "…the infinitely plastic and open-ended style of [constitutional] adjudication and the commitment to legal constrain."[448] In *S v Zuma*,[449] the court stated that the Constitution must be interpreted in a way that gives expression to the values that it seeks to cultivate for a future South Africa.[450] The court also stated that there is a mistaken belief that general language should be interpreted to have a single objective meaning.[451] It is also not easy to avoid the influence of a person's personal intellectual and moral preconceptions when interpreting.[452] Bringing all of these statements together, the court stressed that the Constitution simply cannot mean whatever someone might want it to mean.[453] In this regard, Moseneke states that the personal intellectual and moral preconceptions of judges have an influence on their adjudication.[454] He however suggests that, if this

446 *Ibid.*

447 Mureinik1994 *South African Journal on Human Rights* 34.

448 Klare 2017 *South African Journal on Human Rights* 149; Moseneke 2002 *South African Journal on Human Rights* 317.

449 1995 4 BCLR 401 (CC).

450 Par 17; Moseneke 2002 *South African Journal on Human Rights* 317.

451 *Ibid.*

452 *Ibid.*

453 Moseneke 2002 *South African Journal on Human Rights* 317; Zitske 2014 *Acta Academica* 56.

454 Moseneke 2002 *South African Journal on Human Rights* 317.

happens, they should acknowledge their political and moral responsibility in adjudication and strive towards transparent justification of their choices.[455]

This approach by Moseneke is the approach that will be followed in discussing some limitations of the constitutional imperative as argued for in this research. Arguments will be advanced in order to indicate why the constitutional imperative on universities should not be limited at all or, if such a suggestion is too wide, to a significant extent. Although this research is in favour of such a constitutional imperative, it would be incomplete not to also consider arguments that can be advanced against such a constitutional imperative. In order to follow a balanced approach in this regard, both sets of arguments will be stated and evaluated. Such an evaluation will only concern the constitutional imperative as far as procedural law modules are concerned. An evaluation of the constitutional imperative on all other law modules therefore falls outside of the scope of this research. All arguments made will be justified in order to bring justice and transparency to them, as per the approach by Moseneke.

2 4 2 ARGUMENTS AGAINST ANY OR SIGNIFICANT LIMITATIONS TO A TRANSFORMATIVE CONSTITUTIONALISM APPROACH TO LEGAL EDUCATION

The first argument is that education is necessary for the development and transformation of the legal profession from the situation it had been in during the past, to a profession based on equality as far as competence and opportunities are concerned. The legal profession has a vested interest in the LLB degree, because such a statutorily required qualification provides entry into legal practice to law graduates.[456] Gravett states that legal academics and legal practitioners have a joint obligation to serve the system of justice.[457] According to him, the "…task is clear and the challenge is at hand," and that challenge is that university law schools are not graduating even minimally functionally able legal practitioners.[458] He further states

455 *Ibid.*
456 Campbell 2014 *Stellenbosch Law Review* 20; s 26 of the LPA.
457 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 25.
458 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 26.

that, as such, the legal system, law students and society are being treated unfairly and that, therefore, the current state of events is unacceptable.[459] The learned author's conclusion is that, "[a]s a learned and public profession, we have a duty to set and enforce the highest standards of basic legal education of ethical conduct and of professional excellence."[460] In light of South Africa's past, filled with oppression and unequal opportunities, as well as the transformative spirit of the Constitution, it is difficult not to agree with Gravett. He admits that law school, on its own, cannot produce effective trial practitioners.[461] However, law schools should play a role in preparing students to become trial practitioners.[462] It can be accepted that law schools have succeeded reasonably well in preparing students in analysing the law, but not in teaching students how to transform such knowledge and skills into practice.[463] This transformational knowledge is required if prospective legal practitioners are to be competent in legal practice in order to play a role in advancing equality and access to justice. This will contribute to the transformation of the legal profession to being one that is based upon justification, not on conservatism and formalism, as discussed earlier.[464] Graduates will be more aware of and excited about the duty that they have to uphold the principles and values of the Constitution, as well as to contribute to transforming those areas of the law that require change.[465] For these compelling reasons, should this argument against a limitation not be seen as a legitimate one, it is submitted that any limitation in this regard should not be applied in a manner that severely limits the obligation of law schools to help prepare graduates adequately for legal practice.

The second argument relates to the progressive nature of the Constitution. Any limitation in this regard may curb the opportunity for graduates to develop to a maximum potential after graduation. As stated earlier, the legal profession has a vested interest in the legal education of law students. The other major stakeholder in

459 *Ibid.*
460 *Ibid.*
461 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 3.
462 *Ibid.*
463 *Ibid.*
464 See 2 2 3 in this regard.
465 Bauling 2017 *Potchefstroom Electronic Law Journal* 3.

this regard is the university law school. For this reason, law schools have to perform a dual function, *ie* to provide adequate doctrinal training as well as preparing graduates for legal practice. It is submitted that, if this does not happen, the university law school is not fulfilling its role as stakeholder in this regard as far as the development of the potential of future legal practitioners is concerned. A 2012 survey indicated that law graduates, who had become legal practitioners, were of the opinion that the LLB degree failed to provide them with the skills required to practice law.[466] These graduates clearly valued preparation for legal practice as the most significant purpose of the degree.[467] On the other hand, these graduates did not exclude the benefits of acquiring research and thinking skills at university level as being valuable for entering into legal practice.[468] This is indicative of the significant role that university law schools should play in the development of graduates, *ie* integrating doctrine with practice in order to ensure individual development in lieu of the Constitution. It should also be remembered that the 1997 changes to the LLB degree have brought about the possibility for many students, who could not afford the study of law in the past, to do so.[469] A quick and cheaper manner of qualifying for entry into legal practice has therefore become paramount.[470] If this is indeed so, it means that graduates need to be sufficiently equipped for legal practice as far as both doctrine and practice are concerned. Any limitation to such skills may impact upon the development of graduates for such purpose.

The third argument is the promotion of access to justice, especially as far as indigent and marginalised members of society are concerned. As far as legal rights and access to adjudication of cases are concerned, these members are not in a different position to other members of society, except for the fact that they cannot afford the services of legal practitioners. They are however entitled to quality legal services. Non-indigent members of society are entitled to the same quality legal services. In this regard, section 34 of the Bill of Rights provides as follows:

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466 Campbell 2014 *Stellenbosch Law Review* 27.

467 *Ibid.*

468 *Ibid.*

469 *Ibid.*

470 *Ibid.*

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

"Everyone" clearly includes both classes of members. Should these members appoint legal representatives to further their cases in a court or other forum, it can be expected that such representatives should be adequately skilled in performing such a task. If not, it is submitted that this constitutional right becomes worthless. Further to this argument, Campbell states the following:[471]

> "It has often been said that the strength of any constitutional democracy…is dependent on the quality of its legal profession, which of course is reliant in turn on the legal education that prepares graduates for that profession."

However, the members of society are usually voiceless stakeholders in this instance.[472] Therefore, university law schools and the legal profession have a joint responsibility to ensure that civil society, as the primary beneficiary of the administration of justice, is being served properly.[473] It is submitted that an improvement in the skills and overall quality of graduates should be geared towards the public interest. A significant aspect in this regard is the quality of practical vocational training that candidate legal practitioners should receive.[474] It speaks for itself that well trained candidate legal practitioners will render professional and quality legal services to members of the public, as it should be, especially in light of the provisions of the LPA.[475] The converse is also true: a candidate attorney who has not received the appropriate training, will not be in a position to render such services.[476] Indeed, this state of events is also happening.[477] Law graduates, and consequently candidate legal practitioners, must be trained to become "good lawyers", particularly in the current constitutional dispensation.[478] These good lawyers must have a

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471 *Ibid.*

472 *Ibid.*

473 *Ibid.*

474 See 5 2 2 1 in this regard for a more detailed discussion.

475 See Chapter 5 in this regard.

476 See 5 2 2 1.

477 SASSETA Research Department https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf 27; 5 2 2 1.

478 Campbell 2014 *Stellenbosch Law Review* 27.

substantial knowledge of the law, as well as how to apply it, particularly in light of the social justice values of equality, human rights and freedom.[479] Constitutional Court Bosielo J asked the following question at the LLB Summit, held on 29 May 2013 in Johannesburg:

> "Are we training and producing future lawyers who have an understanding and affinity for concepts like fairness, equity and justice or mere law technicians or technocrats whose driving philosophy is arid legalism?"[480]

The judge challenged universities to educate law students along the lines of ethical conduct, willingness to serve communities instead of chasing self-interest, furthering the spirit of *ubuntu*, as well as to develop social consciousness.[481] These are the values that will place graduates in a position to fulfil meaningful roles as members of a broader civil society, as well as to contribute to a society founded upon the constitutional vision of the advancement of human rights, specifically equality and freedom.[482] Dignity is also an important constitutional value in this regard. Campbell states that ethical conduct forms part of higher order intellectual skills that should be properly underpinned by theory and will therefore be best taught as part of an academic legal education.[483] During such training, the realities of professional legal practice should be fully taken into account.[484] This means that social justice values and professional ethics cannot be taught effectively by restricting them to a narrow exercise as part of practical vocational training.[485] Taking all of this into account, it is therefore submitted that university training should not be limited, so as to ensure that law graduates, when enrolled and admitted as candidate legal practitioners and later on as legal practitioners, are able to serve the public in an accountable manner by delivering legal services of acceptable quality.[486]

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479 *Ibid.*

480 Campbell 2014 *Stellenbosch Law Review* 28.

481 *Ibid.*

482 *Ibid.*

483 Campbell 2014 *Stellenbosch Law Review* 29.

484 *Ibid.*

485 *Ibid.*

486 See 5 2 2 1.

2 4 3 ARGUMENTS IN FAVOUR OF ANY OR SIGNIFICANT LIMITATIONS TO A TRANSFORMATIVE CONSTITUTIONALISM APPROACH TO LEGAL EDUCATION

The first argument in this regard is that the rights in the Bill of Rights may be limited by a law of general application. In this regard, the LPA provides for practical vocational training that must be provided to candidate legal practitioners for them to be admitted and enrolled as legal practitioners.[487] The question may therefore arise as to whether universities should become involved at all in training law graduates for legal practice. The argument is therefore that law schools should not be expected to take it upon themselves to prepare law graduates for legal practice. This is complementary to Gravett's statement that law schools cannot, on their own, produce trial practitioners.[488] The legal profession should play its part. It may be argued that this is the reason why practical vocational training is included in the LPA, and has been included in the now repealed Attorneys Act[489] and Admission of Advocates Act.[490] A counter argument in this regard, however, can consist of all the arguments in favour of the constitutional imperative, as mentioned earlier.[491] Furthermore, legal education is but one cog in the proverbial production line that produces law graduates and must therefore play its part in developing and preparing competent future legal practitioners.[492] This will enable law graduates to be successful on their career paths in legal practice. If this counter argument is not properly taken note of, it will mean that transformative constitutionalism has no effect on how the law is being taught, as well as on any attempt to transform legal education in order to ensure a high quality, professional, ethical and accountable legal profession that can serve the needs of the public. The notion of accountability of the legal profession towards the public is discussed in more detail elsewhere.[493]

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487 See s 26(1)(c), s 27 and s 28 of the LPA with regards to practical vocational training. These provisions are enclosed in this research, marked Appendix 2.

488 See 2 4 2.

489 53 of 1979.

490 74 of 1964.

491 See 2 4 2.

492 Also see Campbell 2014 *Stellenbosch Law Review* 20 in this regard.

493 See 5 2 2 1.

A second argument is that some law schools may not have the necessary funding to facilitate a more integrated teaching methodology. It can happen that there is no one at a particular law school who can present practical training to law students. It may also be that there is no funding available that can be utilised in order to appoint legal practitioners or other law teachers to assist with practical training. This may create the risk that all law students throughout South Africa do not receive the same quality of legal education. In this way, they may be deprived of equal opportunities for entry into the legal profession.[494] This marks the commencement of two important counter arguments. The first argument is that legal practitioners may be approached for assistance towards legal education on a *pro bono* basis.[495] This *pro bono* assistance may be able to eradicate such deprivation. The second argument is that such a deprivation may severely impact upon the fundamental rights to equality and dignity and furthermore may amount to discrimination against certain students. Discrimination is allowed, as long as it does not amount to unfair discrimination.[496] In *Prinsloo v Van der Linde*,[497] "unfair discrimination" was described as the treatment of people differently in a way that impairs their fundamental dignity as humans, who are inherently equal as far as dignity is concerned.[498] Fairness is a guiding factor in deciding whether or not discrimination should be prohibited.[499] As far as the right to equality is concerned, section 9(3) of the Bill of Rights provides that discrimination may not directly or indirectly take place on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. It should further be investigated as to what the impact of discrimination will be on the affected persons.[500] As the right to dignity may be affected, it is submitted that this impact will be severe. In *Naidoo &*

494 See 5 2 2 3 in this regard with specific reference to the LPA.

495 See 5 2 2 2 for a more detailed discussion of the rendering of *pro bono*-services by legal practitioners as far as legal education is concerned.

496 Currie *et al* 223; Business Tech "The meaning of unfair discrimination in South Africa" (24 March 2019) https:// businesstech.co.za/news/business/305896/the-meaning-of-unfair-discrimination-in-south-africa/ (accessed 2020-08-13).

497 1997 3 SA 1012 (CC), 1997 6 BCLR 759 (CC).

498 Par 31.

499 Currie *et al* 223.

500 *Ibid.*

Others v Parliament of the Republic of South Africa,[501] it was held that unfair discrimination may indeed impair human dignity or have a similar effect in a comparable manner.[502] The right to human dignity is, together with the right to life, regarded as the most important of all the fundamental rights contained in the Bill of Rights.[503] It is a personal right that is linked to the identity of a person, because it entails a sense of self-worth.[504] Section 10 of the Bill of Rights explicitly provides that everyone possesses inherent dignity and the right to have it respected and protected. It is therefore submitted that any discrimination of this right, particularly the type of discrimination that forms the basis of this discussion, will be unfairly discriminatory. It is forthwith submitted that a plea should be made to the government to provide the applicable funding for the development of a more integrated teaching methodology, as well as for the appointment of law teachers and/or legal practitioners to execute the applicable training. The Police and Prisons Civil Rights Union, better known as POPCRU, acknowledges the importance of funding in order to effectively situate learning, and therefore education, as the nerve centre of South Africa's national development at higher education institutions.[505] They state that, without funding, higher education institutions will be prevented from bringing national development into reality, because wealthy people will be enrolling their children in private education facilities both locally and overseas, resulting in the poor communities remaining poor, or to become even more impoverished.[506] Law schools can, from their side, also apply for external funding in order to fund such teaching opportunities and teaching staff.[507] Education can improve human dignity, which is a crucial motivator in favour of the constitutional imperative to produce a better graduate for legal practice. Therefore,

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501 (C 865 / 2016) [2018] ZALCCT 38; [2019] 3 BLLR 291 (LC); (2019) 40 ILJ 864 (LC) (12 December 2018).

502 Par 31

503 *S v Makwanyane and Another* paras 326-328*;* Currie *et al* 267.

504 Govindjee, Vrancken, Holness, Holness, Horsten, Killander, Mpedi, Olivier, Stewart (Jansen van Rensburg), Stone and Van der Walt *Introduction to Human Rights Law* (2009) 68; Van Rooyen "Dignity, religion and freedom of expression in South Africa" 2011 *HTS: Theological Studies* 1 3; Currie *et al* 251.

505 Police and Prisons Civil Rights Union https://www.justice.gov.za/commissions/FeesHET/hearings/set8/set8-d2-Andrews-Submission.pdf 4.

506 *Ibid.*

507 See 4 7 2 2 for a discussion about funding opportunities in order provide payment for legal practitioners who are involved in the practical training of law students. Such funding opportunities are equally relevant in this context.

the measures, suggested in this counter argument, should be issues of priority for law deans and heads of departments of law schools.

A third argument is time, or, otherwise phrased, the availability of opportunities for legal education and skills training to take place. The concern about time, in which sufficient legal training with regards to procedural law modules can be provided, is also discussed elsewhere.[508] Procedural law modules, in instances where they are part of a trial advocacy course, have limited aims, because there is a limited timeframe within which legal practitioners can present them to students, if legal practitioners are indeed the law teachers.[509] Even if legal practitioners are not the law teachers, or the only law teachers, there is still not sufficient time to teach everything that legal procedure encompasses. Furthermore, there is only so much information and skills that practitioners are interested in learning and therefore, it is not uncommon for people to focus on skills and work that can specifically better themselves.[510] Law students are no exception in this regard. For this reason, professional modules in trial advocacy must concentrate on skills that can be demonstrated, acquired, used and refined in rapid succession.[511] Gravett points out that, in South Africa, such professional modules can be limited, constrained and tightly focused[512] and that there is "…little space*, nor need there be,* for reflection and introspection." (my own emphasis).[513] This statement, especially the emphasised section, is not agreed with in the context of this research, because reflection and self-evaluation are always advantageous to development. However, the argument, in this instance, is that legal practice should provide more inclusive training to candidates during the compulsory term of practical vocational training and that therefore there can be no harm in teaching the bare minimum skills to law students. This argument complements an argument made earlier in this section, *ie* that law schools should not usurp the duties of legal practice as far as practical vocational training is concerned. Gravett however also offers a

508 See, *inter alia*, 3 2 2 2, 3 2 2 3, 3 2 2 4 and 3 4 2 in this regard.
509 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 3.
510 *Ibid.*
511 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 4.
512 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 3.
513 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 4.

counter argument in this regard. He states that trial advocacy training should be taught at law school and that it cannot simply be picked up during practical vocational training in legal practice.[514] At university level, a module in trial advocacy can be broadly paced, something that is not always possible in legal practice.[515] Such university training allows for the opportunity to merge substantive law, ethics and the skill of persuasion into a single module.[516] Skills can be taught in context, theory can be applied to practical scenarios and reflection can be done on legal approaches and arguments that work and the way in which they work.[517] This will help students become more responsible legal practitioners.[518] Gravett however states that law schools "…have more time to teach [these] skills in context."[519] This is however not always so. Time may be a severe limitation. A few variables may also have a profound effect on whether there is sufficient time or not, including but not limited to electricity loadshedding[520] that is commonplace in South Africa, student protests[521] which, since 2015, are also an annual occurrence in South Africa, as well as national or even international disasters like the COVID-19 pandemic, caused by the coronavirus,[522] which, at time of completing this research, is still plaguing the entire international community.

2 4 4 PREFERRED ARGUMENT IN RELATION TO A TRANSFORMATIVE CONSTITUTIONALISM APPROACH TO LEGAL EDUCATION

Moseneke states that the Constitution has reconfigured the way in which judges should do their work.[523] Judges are invited onto "…a new plane of jurisprudential

514 *Ibid.*

515 *Ibid.*

516 *Ibid.*

517 *Ibid.*

518 *Ibid.*

519 *Ibid.*

520 For a more comprehensive explanation about loadshedding, see Eskom "What is loadshedding?" (undated) http://loadshedding.eskom.co.za/LoadShedding/Description (accessed 2019-07-22). Also see 3 4 2.

521 See 3 4 2.

522 For more information on the nature of COVID-19, see National Institute for Communicable Diseases "COVID-19" (2020) https://www.nicd.ac.za/diseases-a-z-index/covid-19/ (accessed 2020-03-20).

523 Moseneke 2002 *South African Journal on Human Rights* 318.

creativity and self-reflection through legal method, analysis and reasoning consistent with its transformative roles."[524] He further states that a substantive, deliberate and speedy plan, in order to achieve an appropriate shift of legal culture in the courts, is necessary.[525] Without this shift, the judiciary may become an instrument of social retrogression and, in the process, lose its constitutionally derived legitimacy.[526] Furthermore, the constitutional order liberates the judicial function from the boundaries of the common law, customary law, statutory law and any other law as far as it is not consistent with the provisions of the Constitution.[527] The existing law therefore does not need to be changed unnecessarily; however, the competence to change the law exists, as long as it can be democratically justified.[528]

Based on this, graduates must be taught about the mentioned reconfiguration in interpreting the law and applying the same to legal problems. While undergoing such training, they should be afforded sufficient time to reflect and consider the creativity of their decisions, both doctrinal and practical, in light of the applicable constitutional values. In doing so, they will become increasingly aware of social justice and promoting equality and human dignity. Therefore, it is submitted that the preferred argument, in the context of this research, should be one against any limitation of the ambit of legal education.[529] Transformation of the way in which procedural law modules are being presented, as well as the profound influence that such an improved teaching and learning methodology can have on not only the graduate, but also on the public, should not be hampered if not absolutely necessary and justified. As is evident from the Preamble of the Constitution, as well as the postscript of the Interim Constitution, change and development of society in order to achieve equality, dignity and freedom are required.[530] The Constitution entrenches socio-economic rights in conjunction with other fundamental rights,[531] which reinforces the interrelatedness of

524 *Ibid.*
525 *Ibid.*
526 *Ibid.*
527 *Ibid.*
528 Van der Walt 2006 *Fundamina* 8.
529 This refers to the arguments as stated in 2 4 2, as well as the counter arguments in 2 4 3.
530 See 2 1.
531 Moseneke 2002 *South African Journal on Human Rights* 318; 2 2 3.

all fundamental rights.[532] The Constitution further has, as its primary purpose, the intervention in unjust, uneven and impermissible power and resource distributions.[533] This is done in order to restore substantive equality in the country.[534] It is therefore significant that Liebenberg states that[535]

> "…if social rights are to make a meaningful contribution to transformation, it is vital that they are substantively interpreted. If individuals and groups are unable to reliably enforce their claims to the provisions of substantive needs, the role of socio-economic rights in enhancing participatory parity becomes largely illusory."

Therefore, the manner in which law students are taught will play a role in shaping their futures. It is submitted that the manner in which university law schools prepare their legal practitioners of the future, will determine whether or not equal opportunities for entry into the profession will exist for them or not. Should the teaching and learning methodologies improve with regards to legal procedure in that the student has a firm grasp of not only the substantive legal principles, but also the application thereof in a practical setting, it is submitted that it will ultimately lead to a better quality graduate, as well as better quality legal services to the public. It will furthermore also lead to future employers having much more confidence in the capability of prospective candidate legal practitioners who can make a difference not only in their (legal practitioners') law firms, but also in the legal profession in its entirety.[536]

An argument against any limitation is therefore in the interest of the wellbeing of the legal profession, in the sense that the quality thereof, as well as its accountability to the public, are improved. The accountability of the legal profession towards the public is discussed in more detail elsewhere.[537] From a social justice point of view, higher education is in the public good and should therefore be regarded as a priority by the

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532 Moseneke 2002 *South African Journal on Human Rights* 318. Also see Liebenberg 2006 *Stellenbosch Law Review* 20 in this regard. In *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), the Constitutional Court confirm the interrelatedness and mutually supportive nature of all the rights in the Bill of Rights.

533 Moseneke 2002 *South African Journal on Human Rights* 318.

534 *Ibid.*

535 Liebenberg 2006 *Stellenbosch Law Review* 20-21.

536 See 5 2 2 3 in this regard.

537 See 5 2 2 1.

government.[538] It has the potential to raise the social and economic yield of South Africa, bring benefit to individuals personally, as well as to society in its entirety.[539] It is therefore submitted that it will not be reasonable to view the argued constitutional imperative on university law schools as one that should be limited. Where possible, government must assist law schools in providing the requested legal education to law students. Should there be factors substantiating any limitation, such factors must be clearly stated and thoroughly considered. The impact of such factors on the development of individuals, service to the public, as well as on the legal profession in general, should be of primary significance in deciding whether or not any limitation will be reasonable.

2 5 THE CURRENT LEVEL OF TRANSFORMATIVE CONSTITUTIONALISM INCORPORATED INTO THE LLB CURRICULUM – A FOCUS ON THE NELSON MANDELA UNIVERSITY

2 5 1 GENERAL

The 2013 LLB Summit[540] gave rise to a decision to have the LLB degree at all universities in South Africa re-evaluated. For the purposes of this re-evaluation, the four departments of the NMU Faculty of Law, namely Criminal and Procedural Law, Mercantile Law, Private Law and Public Law, were involved in a series of strategic planning events from 2013 until 2015 in order to facilitate this process.[541] The re-evaluation process entailed an institutional self-evaluation report (hereafter referred to as the "SER") to be drafted by the Faculty of Law, as well as a site visit to the law school and law clinic buildings and various interviews with a selection of the Faculty of Law staff members by a dedicated task team appointed by the Council on Higher

538 Police and Prisons Civil Rights Union https://www.justice.gov.za/commissions/FeesHET/hearings/set8/set8-d2-Andrews-Submission.pdf 7.

539 *Ibid.*

540 See Chapter 1. The LLB Summit had been held in Johannesburg on 29 May 2013. It had been attended by various stakeholders of the legal profession, including law deans, legal practitioners and members of the Law Society of South Africa (as it was known then).

541 Nelson Mandela University LLB-degree Institutional Self-evaluation report for Council on Higher Education 2016 7.

Education (hereafter referred to as the "CHE").[542] The Faculty of Law fully participated in this exercise during 2016 and also completed the required SER in which certain questions of the task team were answered. With reference to the SER, the focus of this discussion will be limited to the inclusion of transformative constitutionalism into the LLB curriculum, particularly as far as procedural law modules are concerned. In certain instances, other law modules will also be mentioned in order to indicate certain aspects of the inclusion, or not, of transformative constitutionalism into the LLB curriculum. It should also be made clear that this section is not intended to disparage the approach of NMU in any way or to mean that steps, in addition to what can be seen from the SER, are not included in the LLB curriculum at NMU. The intention is merely to analyse the SER in the abovementioned context and to search for the presence of transformative constitutionalism in the curriculum. This analysis will comprise of a literal interpretation of the SER, without any interviews being conducted with law school staff members in this regard. This is how task team also approached the re-evaluation process. Interviews were done by them afterwards. Instead of interviews with regards to this research, reference will be made to the commentary of the task team as far as the SER is concerned, complemented by submissions in the context of this research.

The NMU SER, as case study, has been chosen for the strategic reason that the author is a member of, as well as a presenter of some of the procedural law modules[543] and the legal practice module, in the NMU Law Faculty. As recurriculation of the LLB degree at the NMU is currently in progress and gradually phased in over a time period of four years,[544] it is submitted that the necessary foundational work should be done in order to ensure that the procedural law modules are presented in such a manner so as to equip law students with the relevant academic and practical skills that will enable them to enter legal practice with the ability to make immediate contributions. The

542 A copy of the SER is on file with the author of this research and can be made available upon request.

543 The author of this research teaches the Civil Procedure, Law of Evidence and Legal Practice modules at the NMU.

544 Phasing in of the new curriculum started in 2020 with the first academic year. The second academic year has been phased in in 2021, while the third and fourth academic years will be phased in in 2022 and 2023 respectively.

same reasoning is applicable as far as CLE is concerned. The procedural modules, in its recurriculated format, will be presented for the first time during 2022, while the recurriculated legal practice module will be presented during 2023. An analysis of the SER will enable detection of areas of improvement in the current curriculum, with specific emphasis on the procedural law modules and CLE. Improvement in this context includes revisiting the conventional methods of presenting procedural law modules in order to ascertain how such presentation can be changed so as to bring about better graduates for legal practice. Should CLE be the preferred methodology for presenting the procedural modules as such – which, in this research, is chosen as the preferred teaching methodology – it is equally necessary and important to evaluate ways in which CLE can be improved and adapted in order to optimally fulfil this function. Social justice and equality are important factors in this regard. These factors, as well as their importance in the context of transformative legal education, are discussed elsewhere in this research.[545] The importance of social justice and equality lies in the fact that both these factors constitute two of the foundational values of the NMU's Vision 2030.[546] It is therefore inevitable that these factors will be directly linked to the teaching and learning strategy of the law faculty in that students must be made aware of its importance as far as legal practice and the interests of their future clients are concerned. Social justice and equality are however not only important in a South African context, but throughout the world. With this in mind, the NMU Law Faculty could set a leading and spearheading example as to how CLE can be used to present the procedural law modules in a manner that will positively influence the practice of law by new law graduates in accordance with the LPA. This methodology could serve as an inspiration and motivation to other law schools to adapt the same methodology, resulting in better law graduates being produced throughout South Africa and, possibly, throughout the world. In order for the NMU Law Faculty to achieve this, the curriculum of the LLB degree, as well as the teaching and learning methodologies with specific reference to the procedural law modules, should be aligned with the

545 See 3 4 5.

546 The NMU's Vision 2030 has been recently formulated during the early stages of 2021. A document, explaining the vision, is on file with the author and can be made available on request. The other foundational values are excellence, integrity, *ubuntu*, respect for diversity and sustainable stewardship.

university's Vision 2030. This will ensure that the institutional values of the university run throughout the faculty's academic and training programmes, as well as into legal practice, affecting the lives of members of the public.

2 5 2 THE INSTITUTIONAL SELF-EVALUATION REPORT AND TRANSFORMATIVE CONSTITUTIONALISM

The SER states that:[547]

> "[t]he LLB programmes at the [Nelson Mandela University] respect and address the values and ethos of South Africa's constitutional democracy and transformative constitutionalism by recognising the Constitution as the supreme law of the land from which all law derives its source. We appreciate that transformative constitutionalism cannot be taught merely in one or two modules and the concept is therefore not addressed in this manner. Instead, we engage with the values and ethos of the Constitution in our teaching throughout the curriculum *by referring* to the constitutional values, mandate and paradigm as the basis against which all law should be landmarked." (my own emphasis)

The emphasised words are already of interest. In light of what has already been stated in this chapter as far as transformative constitutionalism is concerned, it should be questioned whether mere references to the Constitution in law modules are sufficient to amplify the transformative and progressive role of the Constitution to law students. As stated earlier, students should be taught why the said constitutional values and need for transformation are important and how they can benefit the development of the law in order to ensure compliance with the constitutional dispensation for the public, based on equality, dignity and freedom.[548] This approach is however evident from the description in the SER of some law modules:

(a) in the Family Law module, it appears that the impact of the Constitution is highlighted as far as same sex marriages are concerned. In this instance, the importance of the rights to equality, dignity and religion can clearly be seen and

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547 Nelson Mandela University SER 9.

548 See 2 1. The Preamble of the Constitution, as well as the postscript of the Interim Constitution, is important in this regard.

it is difficult to understand how the concept of a same sex marriage can be explained without referring to the transformative effect of the Constitution; and[549]

(b) in the Interpretation of Statutes module, it also appears that the transformative nature of the Constitution is highlighted in order to explain "…the constitutional basis underlying the application of interpretation theories" to students.[550]

What is however lacking from the description of the other modules is an awareness of the changes that can be brought about by interpreting the constitutional values in order to transform society wherever necessary. The SER does state that the LLB programme places a strong emphasis on the supremacy of the Constitution and that students are taught that it is the yardstick against which all law is to be measured.[551] Students are also taught that the transformative constitutional mandate and constitutional ideals and values must be advanced and reflected in all law.[552] In this regard, Mureinik's proverbial bridge should be noted and the following questions should be asked: firstly, is the module content explained against the backdrop that it stems from, namely a dispensation where severe rights violations took place, and secondly, can it be changed in order to ensure a better future for everyone, based on the constitutional values? As far as the Interpretation of Statutes module is concerned, it should be questioned as to whether the underlying values of the Constitution are only discussed as far as the interpretation of actual statutes are concerned, or whether interpretation of the law in general is also included.[553] This is an important consideration as far as a constitutional interpretation is concerned and should be implemented in all modules across the curriculum, including procedural law modules.

The two aforementioned questions can also be posed as far as all other law modules in the LLB curriculum are concerned. It must be made clear that it is in no way implied that the law school is not doing what it stated in the SER. It is however submitted that

549 Nelson Mandela University SER 9.
550 *Ibid.*
551 Nelson Mandela University SER 19.
552 *Ibid.*
553 See 3 5 in this regard.

the law school must follow through on such statements in order to ensure that transformative legal education takes place.

The SER further states that the focus of the law school is on:[554]

> "…teaching the law purposively against the backdrop of *substantive reasoning* and creating awareness of the importance of constitutional rights and values and the balancing of the respective rights and obligations whilst *ensuring the development of social justice*." (my own emphasis)

In light of the abovementioned focus, it can be questioned as to when students engage with the concepts of substantive reasoning, as well as how they go about doing so. It is pointed out elsewhere in this research that the time for teaching and learning is very limited[555] and, moreover, that teaching and learning to a large extent takes place by way of the Socratic and case dialogue teaching methodologies.[556] In short, this means that there is a great need for tutorial sessions during which aspects of transformative constitutionalism can be discussed with students in an interactive manner so as to afford students the opportunity to engage with the concept and to think creatively about possible solutions to legal conundrums that exist in the law relating to particular modules, more specifically the procedural law modules. Such opportunities will enable the students to view the constitutional changes in a holistic manner[557] so as to appreciate the full impact of the effect that a particular change can have on society as a whole. A suggestion in this regard is brought about by the following constitutional imperative as advocated for in this research: it may produce the required opportunities in order to teach the law in the manner stated by the law school. By "reading in" a constitutional imperative on university law schools to improve the teaching and learning of procedural law modules in order to produce a better law graduate for legal practice, a whole chain of events is brought to life, *ie*:

(a) self-development of the law graduate takes place, which is in line with the Constitution;

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554 Nelson Mandela University SER 10.

555 See 3 4 2.

556 See 3 3.

557 See 4 3 4 in this regard.

(b) the yield of the legal profession is improved, because legal professionals are produced who can provide quality legal services to the public and, consequently, be accountable as provided for by the LPA;

(c) the rendering of quality legal services will, *inter alia*, entail that legal practitioners are not only concerned with the *status quo* of the law and procedure, but also what it should be if substantive reasoning is applied to the *status quo* in order to assess whether it passes constitutional muster. If the *status quo* does not conform to the spirit and values of the Constitution, it stands to be changed, should there be justification for such a change, based on dignity, equality and freedom;

(d) legal professionals, with a background of transformative constitutionalism and the effect that it can have on society, will be more inclined to get involved in the rendering of community service and *pro bono* services in order to assist the indigent and marginalised members of society who otherwise may not be able to afford legal representatives. Members of society play an active role in this process, which is in support of their dignity and autonomy – confirmation of the principle of participatory parity;

(e) in this way, access to justice is improved in a major way, ensuring not only procedural justice, but also access to the courts as provided for by the Constitution; and

(f) seen collectively, all these elements amount to an advancement of social justice[558] for members of the public, as well as for the legal profession. In context of this research, it means that there are equal resources and opportunities available for the adequate training of future legal practitioners, as well as equal opportunities for all members of the public as clients of such legal practitioners, to receive professional, ethical and proper legal advice and assistance.

The aim of societal change gains new focus when the institutional strategic plan of the university is taken into account. This plan is underpinned by values such as, *inter alia*, respect for diversity, excellence, *ubuntu*, integrity and responsibility.[559] The SER

[558] See 2 2 1 for a definition of "social justice."

[559] Nelson Mandela University SER 15.

states that the strategic plan of the law school is "deliberately aligned" to the vision of the university, which is based on the institutional strategic plan of NMU. These values further contribute towards transformative constitutionalism, social justice and a concomitant need for substantive reasoning. It is however hard to recognise such substantive reasoning and transformative constitutionalism if looking at the description of some modules as per the SER descriptions, including:

(a) *Labour Law*: in terms of the SER, this module relies significantly on an understanding of constitutional law and human rights law;[560] and
(b) *Administrative Law*: the SER states that students are exposed to a number of important statutes, including the Promotion of Administrative Justice Act[561] and Promotion of Access to Information Act,[562] which both stem from a constitutional imperative.[563]

Although it is clear from these descriptions that the Constitution does play a role in these modules, it should be questioned as to whether the students are made aware of the significant role thereof in bringing about some of the provisions of the legislation applicable to the respective modules, *ie* the justification for such legislation being in force. Knowledge of this, as well as that transformation is an ongoing process, may put students in a position to think about whether or not the *status quo* is still appropriate, or whether there is justification for change. This is also relevant as far as other modules are concerned. Whatever the case may be, the law school has stated that one of the developmental opportunities in the curriculum is the creation of space for more critical thinking.[564] As example, the debating and critiquing of landmark Constitutional Court judgments is mentioned.[565] This is recommended, as long as it does not only take the form of the Socratic teaching methodology in that students are merely presented with the various points of view of the debates and critiques without

560 Nelson Mandela University SER 9.
561 3 of 2000.
562 2 of 2000.
563 Nelson Mandela University SER 10.
564 Nelson Mandela University SER 13.
565 *Ibid.*

playing any role in the exercise.[566] Although this methodology does allow for a level of participation between teacher and student, in that the teacher poses questions, which students must answer, it only leads to the teacher providing the answers to such questions.[567] It is submitted that this has the potential to absolve the student from any research and ultimately critical thinking. It should furthermore not only take the form of the case dialogue teaching methodology in that students must do the majority of the work on their own without sufficient input from the law teacher.[568] Moreover, a mere reliance on past cases lets the students predict what will happen to similar instances in the future without teaching them the underlying constitutional principles on the basis of which future decisions should be made.[569] Students should therefore actively participate in the process by researching and constructing appropriate and applicable legal information and arguments, while being made aware, by the law teacher, of the role that the values of the Constitution can play in the lives of people. This once again puts emphasis on the principle of participatory parity[570] and it is submitted that CLE is an appropriate teaching and learning methodology to bring about positive results in this regard as far as procedural law modules are concerned.

The SER indicates that the LLB programmes at NMU are responsive to the needs of the legal profession due to the close relationship between the Faculty of Law and members of the legal profession.[571] For this particular reason, the law school had an Advisory Board that met twice a year.[572] The purpose of this board, as well as the meetings with the law school, was to ensure that LLB programmes align to the needs of the legal profession.[573] The Advisory Board was however dissolved in 2016. It is submitted that the board should be re-instated, because in certain instances, academia can learn a lot from legal practice, and *vice versa*. These instances will be indicated where applicable. The SER specifically indicates that:[574]

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566 See 3 3 1.
567 *Ibid.*
568 See 3 3 2.
569 See 3 3 3.
570 See 2 3.
571 Nelson Mandela University SER 11.
572 *Ibid.*
573 *Ibid.*
574 *Ibid.*

> "[t]o this end various modules are dedicated to ensuring that legal education at the [Nelson Mandela University] responds and aligns to the needs of the profession (and broader society) in order to equip students to discharge their professional duties efficaciously."

In this regard, the following modules are mentioned:

(a) *Legal Skills*: this is a compulsory module. The development of research and reading skills, advocacy skills, numeracy skills, all required for, *inter alia*, legal practice, are addressed in this module.[575] However, the module is only presented during the first academic year. The question now arises as to whether consideration has been given about constant refresher courses that would constitute continuous learning in this regard. It appears that such courses do not feature in the curriculum. In this regard, Biggs and Hurter indicate that such a step must still be implemented.[576] The learned authors state that this will involve integration of skills from the Legal Skills module into the rest of the LLB curriculum so as to provide students with the opportunity to develop their skills further.[577] It will also provide an indication to the law school as to whether or not the Legal Skills module is effective in providing the students with a platform for developing their competence.[578] Another aspect that has not been mentioned, is whether the advocacy skills are being taught with a strong undertone of social justice and transformative constitutionalism, *ie* making students aware of the fact that, what they do in legal practice, must be towards the service of members of the public, and not merely to generate income for themselves;

(b) *Legal Practice*: this compulsory module is presented in the final academic year, *ie* three years after the Legal Skills module. It exposes students to CLE, ethics, trial advocacy, research and community engagement.[579] This particular module, as well as CLE, are discussed in detail elsewhere in this research.[580] Although

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575 Nelson Mandela University SER 11-12.

576 Biggs and Hurter "Rethinking Legal Skills education in an LLB curriculum" 2014 39(1) *Journal for Juridical Science* 1 4.

577 *Ibid.*

578 *Ibid.*

579 *Ibid.*

580 See Chapter 4.

this is such an important module as far as legal practice, legal procedure, the application of procedural law modules and social justice are concerned, it is only presented for one year. There is no connection between this and the Legal Skills module that would indicate any continuous learning by students. Furthermore, no information as far as the needs of the legal profession are concerned, is shared with the clinicians and other teachers of this module. Having stated this, the clinicians and teachers of this module are mostly practising and admitted attorneys and advocates – an aspect which advances the alignment of the content of this module with the current trends of legal practice. These clinicians and teachers are not only limited to staff of the law school, but include members of the legal profession. This contributes towards the preparation of students for legal practice to a certain extent. In light of the averments that legal practice is to a large extent still very conservative, it is submitted that legal practice can learn something from this module as far as social justice and transformative constitutionalism are concerned. In this way, further alignment between academia and legal practice can take place. There is however one concern relating to Legal Practice and procedural law modules, as is evident from the SER. It is stated that a developmental opportunity(ies), resulting from the #feesmustfall movement,[581] is that no part of the LLB programme delivery, as well as any form of allocation of teaching and assessment, should be outsourced to another institution or body.[582] If this is strictly applied, it may mean that legal practitioners may not be invited into the programme to participate in lectures and practical training of students, which will undermine the good standing that the law school has with the profession, as already indicated. The SER does however indicate that involvement of members of the profession will still be allowed, but

[581] For more detail on this movement, see #FeesMustFall: History of South African student protests reflects inequality's grip (10 October 2016) https://mg.co.za/article/2016-10-10-feesmustfall-history-of-south-african-student-protests-reflects-inequalitys-grip/ (accessed 2020-04-08) and Hauser "'Fees must fall:' anatomy of the student protests in South Africa" (22 September 2016) https://www.nytimes.com/2016/09/23/world/africa/fees-must-fall-anatomy-of-the-student-protests-in-south-africa.html (accessed 2020-04-08). In short, this movement involves students mainly protesting routinely against the escalating costs of tertiary education. However, other sources of dissatisfaction had been the lack of Black presence in the institutional system, despite the fact that Black people make up the majority of the population in South Africa, as well as the remaining effects of colonialisation. This has given rise to discussions about decolonising and Africanising, *inter alia*, as far as the LLB degree is concerned. See 3 4 5 in this regard.

[582] Nelson Mandela University SER 17.

subject to the control of the head of the particular law school department in which the practitioner is delivering services.[583] It is forthwith submitted that the law school should ensure that this involvement from the profession is not undermined in any way, as it may withhold valuable educational opportunities and training from students *en route* to becoming accomplished legal practitioners. This submission is further strengthened by the finding of the Council for Higher Education Quality Committee which, after considering the Faculty of Law's SER and interviews, reported that the law school should be commended on the involvement of the organised legal profession in Nelson Mandela Bay.[584] This includes the involvement of members of the profession in the teaching and learning activities of the law school, as well as affording students the opportunities to interact with members of the profession so as to enrich their knowledge of the law and the legal profession;[585]

(c) *Human Rights Law*: in this module, students are encouraged to become involved in community engagement activities and to develop the practice of disseminating core legal knowledge to selected target groups in need.[586] There is no connection between this module and a module like Legal Practice, in that the advantages of actual community engagement can be shared with students. It is submitted that this is an ideal module to significantly connect with both Legal Skills and Legal Practice in order to promote transformative constitutionalism; and

(d) *Moot Court*: this module, although only an elective, inculcates research, writing and advocacy skills that are required for the purpose of mooting.[587] It is presented on a weekly basis for an entire semester during the final academic year. This module constitutes a good platform for encouraging students to engage with transformative constitutionalism and certain skills of legal practice, including research, constructing legal arguments, analysing evidence, verbal skills and court etiquette. In this module, student teams compete against one

583 Nelson Mandela University SER 17-18.

584 Council on Higher Education "The national review of Bachelor of Laws (LLB) programmes" 2016-2017 HEQC Draft Report 23.

585 *Ibid.*

586 Nelson Mandela University SER 12.

587 *Ibid.*

another in moots on a round robin basis. They learn valuable practical skills in this way. This is promoted by the fact that a co-facilitator of the module is a practising advocate at the Port Elizabeth Bar.[588] Furthermore, members of the legal profession are actively involved in the judging of the mooting events,[589] which further advances input from the profession and the consequent education of students and preparing them for legal practice. The two best teams will compete in a final moot, held at the Port Elizabeth division of the High Court, in which event judges, the law dean, as well as members of the legal profession, are fulfilling the roles of presiding officers. This event presents students with an authentic and unique experience as far as legal practice is concerned. However, two crucial disadvantages of a module of this substantial educational value are firstly, that it is only an elective, and secondly, that student numbers are restricted. The majority of students will therefore never be exposed to these skills. A course in trial advocacy is presented as part of Legal Practice, but not on a continuous basis as is the case with this particular module, and also only during the final academic year. It is submitted that this module should become a core module so as to present practical advantages to all students. It is further submitted that the same caution, in possibly excluding members of the profession as was stated with regards to the Legal Practice module earlier, should be heeded with regards to this module, as it is clear what an important role legal practitioners play in training students in this respect.

It has been indicated that the integration of AI and information technology into the legal profession is an important development and an integral feature of transformative legal education.[590] The SER states that the LLB programmes have been very responsive to the demands of information technology by making use of blended learning[591] throughout the curriculum.[592] Blended learning involves the use of online activity in

588 *Ibid.*

589 *Ibid.*

590 See 2 1.

591 For a discussion on "Blended Learning", see De Klerk "Blended learning" (undated) http://www.sun.ac.za/english/faculty/arts/learning-teaching/blended-learning (accessed 2020-04-08).

592 Nelson Mandela University SER 12.

combination with face-to-face contact during classroom time or other sessions.[593] This approach is also applied in the teaching and learning of procedural law modules. This entails the use of technology in the classroom, including data projectors, computers and internet connections in order to disseminate information for law students.[594] Students and law teachers can also make use of online databases in order to conduct research, including My LexisNexis, Jutastat and Sabinet.[595] As far as procedural law modules are concerned, students can now conduct research as they would do in legal practice, having a plethora of sources and information at their fingertips. This, as well as the interactive potential of blended learning, addresses the kinaesthetic needs[596] and online preference[597] of the students in that they are not merely sitting and listening during lecture presentations – instead, presentations can be transformed into interactive, interesting and collaborative exercises. It is submitted that, in teaching students how to use digital technology, they should be made aware of the immense potential that it holds for their everyday life as legal practitioners, as well as how it can provide access to information required to serve the needs of their clients, thereby promoting access to justice and legal services of professional and high quality.

The SER also indicates that the law school effectively addresses the areas of applied competence of graduates identified in the qualification standard. This standard refers to the Qualification Standard for the LLB degree by the Council on Higher Education[598] and will be discussed in more detail elsewhere.[599] In this regard, the law school states that it ensures that law students are able to conduct themselves ethically and with integrity within their chosen career pathways.[600] Furthermore, students are provided with many opportunities to develop proficient communication, literacy, numeracy, problem solving, self-management, team work and technological skills.[601] The SER also indicates that the law school values the importance of agency, accountability and

593 De Klerk http://www.sun.ac.za/english/faculty/arts/learning-teaching/blended-learning.
594 Nelson Mandela University SER 12.
595 *Ibid.*
596 See 4 7 4 1 in this regard.
597 *Ibid*.
598 Council on Higher Education "Qualification Standard for Bachelor of Laws (LLB)" 2015.
599 See 5 3, as well as 1 2.
600 Nelson Mandela University SER 19.
601 *Ibid.*

community service in shaping and transforming the legal system and promoting the course of social justice in South Africa.[602] This is done by way of teaching and learning strategies in both doctrinal and practical law modules.[603] The purpose of this, according to the SER, is the production of skilled, knowledgeable, competent, accountable, responsible and ethical graduates who are able to function effectively within academic, professional and other social contexts.[604] This is a very important purpose and the law school can be commended for setting such a high threshold for law graduates emerging from the university. These are also qualities that can be inferred from the LPA.[605] The question is however whether or not this purpose is generally fulfilled, or capable of being fulfilled, by way of the current teaching and learning strategies, as stated. The procedural law modules deserve particular emphasis and focus in this regard. It is submitted that the current teaching and learning methodologies, which are primarily the Socratic and case dialogue methods,[606] on their own, cannot elevate the professional competence of law graduates to this threshold. This aspect is discussed in detail elsewhere.[607] As far as ethics and integrity are concerned, the SER states that modules like, *inter alia*, Legal Skills, Human Rights Law, Law of Evidence and Legal Practice, more specifically Street Law, ensure that students demonstrate competence in and have knowledge of the relevant ethical considerations in law so as to conduct themselves ethically within their career paths and *vis-à-vis* the public.[608] However, modules like Criminal Procedure, Civil Procedure and the CLE section of Legal Practice are notably absent from this list. In all these modules, students are made aware of and exposed to the importance of ethical and professional behaviour in the courts, towards clients and colleagues, as well as to have regard for the interests of especially clients, in line with the values of the Constitution. The CLE section of the Legal Practice module specifically focuses on the importance of access to justice for indigent members of society and that legal services, provided to them, must be of high quality and

602 Nelson Mandela University SER 19-20.
603 Nelson Mandela University SER 20.
604 *Ibid.*
605 See Chapter 5 in this regard.
606 See Council on Higher Education HEQC Draft Report 17 in this regard.
607 See 3 3 3.
608 Nelson Mandela University SER 87-88.

performed in an ethical and professional manner, having due regard to the constitutional rights of such clients, because legal aid is probably the only recourse that these clients have at their disposal.[609] The importance of community service, access to justice and social justice is however addressed in the SER.[610] Students are however also made aware that an equal responsibility exists as far as the clients of private legal practitioners in legal practice are concerned.

The Council on Higher Education Task Team evaluated NMU's SER, as well as the interviews conducted with staff and students. Based on this evaluation and interviews, the Higher Education Quality Committee has drafted a report about its findings, which has been submitted to the university.[611] As far as the inclusion of transformative constitutionalism in the curriculum is concerned, the committee resolved that:[612]

> "In engagements the panel had with staff and students and in our perusal of the documentary evidence provided, the panel found that there is an inadequate appreciation of the fundamental importance attached in the Preamble to the LLB Standard to this notion and that justice is not done to this in the curriculum."

The committee reiterated the notion that the Constitution is the primary instrument of transforming an unjust society to a just society.[613] For that reason, its values are pervasive throughout society as a whole, as well as the law.[614] Therefore, the meaning of teaching and practising law under the constitutional dispensation has a totally different meaning to what it had before.[615] The quality committee found that this particular aspect is not evident from the LLB curriculum.[616] A suggestion is that the law school should state the imperative nature of the Constitution boldly and upfront in every module.[617] The committee did however take into account the fact that, at the

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609 In this context, the practical duties that law students perform at the university law clinic, is being referred to.

610 Nelson Mandela University SER 97.

611 A copy of the report is on file with the author of this research and can be made available upon request.

612 Council on Higher Education HEQC Draft Report 3.

613 *Ibid.*

614 *Ibid.*

615 *Ibid.*

616 *Ibid.*

617 Council on Higher Education HEQC Draft Report 4.

time of evaluating the LLB curriculum at NMU, the LLB standard had only been in force for a year.[618] It may mean that, by the time of evaluation, the law school had not had sufficient time to adapt its teaching and learning to conform to the standard.[619] The committee nevertheless strongly recommended that the law school must, as soon as possible, seriously determine how it can make their students aware of the transformative nature and content of the Constitution, as well as of the supremacy of the Constitution in being educated as lawyers.[620]

As far as attention to social justice is concerned, the committee was satisfied overall with the efforts of the university. The committee stated the following:[621]

> "The panel is satisfied that the curriculum pays sufficient attention to the infusion in the students of a responsiveness to social justice. The Faculty highlights in particular the modules *Human Rights Law*, *Consumer Protection and Credit Law* and *Legal Practice* and provides a description of how social justice is infused into the module content. It is particularly commendable that the Faculty has a compulsory final-year module, *Legal Practice*, in which students are expected to participate in the Law Clinic as well as become exposed to the broader community through the Street Law component of the module."

From this statement, and in the context of this research, it can be inferred that the Legal Practice module is fulfilling two important constitutional purposes, namely access to justice, as well as social justice. By participating in the practical law clinic sessions, students are significantly involved in legal procedure and trial advocacy in that they take instructions from clients, provide legal advice in collaboration with the wishes of the client, analyse and interpret certain forms of evidence, conduct legal research that can further clients' cases, draft legal documents and assist in preparing matters for court appearances.[622] This module therefore also contributes towards the production of legal practitioners who are able to deliver quality legal services and, in doing so, create a legal profession that can be accountable to the public.[623] The students' work at the law clinic brings them into contact with real life problems,

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618 The LLB standard had been promulgated in 2015.

619 Council on Higher Education HEQC Draft Report 3-4.

620 Council on Higher Education HEQC Draft Report 4.

621 *Ibid.*

622 See Chapter 4 in this regard.

623 See Chapter 5 in this regard.

experienced by indigent and marginalised members of society and, in assisting them, students gain a positive awareness of the true impact of transformative constitutionalism. This impact can be amplified by the work of the students during Street Law sessions[624] and the NMU Faculty of Law's Mobile Law Clinic.[625] On this basis, it is submitted that, by applying the CLE methodology to the teaching and learning of procedural law modules, even more advanced results may be achieved as far as awareness of transformative constitutionalism, social justice and the knowledge of legal procedure and evidence are concerned.

The quality committee indicated that the university's engagement with the everchanging phenomenon of information technology is satisfactory.[626] A recommendation in this regard was that the elective module, Information Technology Law, presented in the final academic year, should become a core module of the curriculum.[627] This will provide all law students with the advantage of becoming more skilled as far as digital technology and the legal implications thereof are concerned, particularly in light of the fact that the legal profession is currently in the process of adapting to technological changes as a result of the impact of the Fourth Industrial Revolution.[628] The law school has since abided by this recommendation and, since 2019, Information Technology Law is presented as a core and compulsory final year module. In this regard, it must also be kept in mind that transformative legal education is inclusive of training in digital technology.[629] The law school is therefore advancing transformation by following the committee's recommendation.

In conclusion, it appears that the NMU Faculty of Law is doing its part to make the supremacy and importance of the Constitution visible in all the modules in the LLB curriculum. The question is however whether this is enough, or whether something additional is required in order to make students fully aware of the impact and potential of transformative constitutionalism. The quality committee is of the opinion that

624 A complete discussion of Street Law falls outside the scope of this research.
625 The Mobile Law Clinic is discussed at 4 7 2 3.
626 Council on Higher Education HEQC Draft Report 4.
627 Council on Higher Education HEQC Draft Report 5.
628 See 4 7 4 in this regard.
629 See 2 1.

something more is required and it is submitted that this opinion is plausible. In this regard, the following statement of the late Pius Langa CJ finds application:[630]

> "Much has been done to bring legal education in line with [constitutional] ideals. Constitutional and human rights law now form a much greater part of the curriculum and the vast majority of courses and text-books on traditional private or commercial areas devote sections to the impact of the Constitution on that field of law. However, we must be careful that the influence of the Constitution does not become simply another set of cast-in-stone legal principles. The change to legal education is a change in mind-set, not simply a change in laws."

It is submitted that the late Chief Justice is correct and this approach has been emphasised pervasively in this chapter, as it will be throughout the remainder of this research. It cannot be argued that, to a large extent, all law schools are merely teaching the law as it exists at present, thereby creating the impression that the Constitution is an entity on its own, with its own time and conditions of application. This approach should be substituted by a transformative approach in terms of which students are constantly reminded that, although what they are studying may be the *status quo*, they must question the *status quo* in order to ascertain whether or not there is room for improvement in light of the values underpinning the Constitution. As stated by Quinot, transformative constitutionalism should not become a "jurisprudential slot machine" and a "game of chance."[631] Langa indicated that there must always be a reminder that things can be different.[632] For that reason, South Africa must never "…slip into a useless self-congratulatory complacency, a misplaced euphoria that where [it is] now is the only place to be."[633] If that happens, it will be the end of change, and that, according to Langa, is the true challenge of transformation.[634] As stated earlier, transformation is an indefinite phenomenon[635] and law schools should treat it as such when planning their teaching content and methodologies. Modules cannot simply refer to the impact of the Constitution, but should adapt to include student engagement with the *status quo*, critically evaluating every single topic that is

630 Langa 2006 *Stellenbosch Law Review* 356.

631 Quinot "Substantive reasoning in administrative-law adjudication" 2010 3 *Constitutional Court Review* 111 139.

632 Langa 2006 *Stellenbosch Law Review* 360.

633 *Ibid.*

634 *Ibid.*

635 See 2 2 1.

discussed against the values of the Constitution. In this way, transformative constitutionalism is fully integrated in the teaching and learning of the law. Legal procedure and the principles of evidence are good platforms for such engagement, especially in light of the recent calls for decolonisation and Africanisation of the curriculum.[636] By justifying the need for change, students are brought to the realisation that the *status quo* needs to be questioned. They should however be made aware that, merely because something can change, it does not mean that it should change. The question should always be whether the change will place society in a better position than where it was in terms of the *status quo*. If the potential position does not appear to be an improvement over the former position, Mureinik's proverbial bridge should rather not be crossed. The reason for this is the submission that changes, where not absolutely necessary, can lead to uncertainty, as well as to a drive to change everything that belongs to the *status quo*. It is further submitted that, by way of the recommended student engagement, transformative constitutionalism comes alive in the presentation of the procedural law modules. The same can happen in all other law modules in the curriculum. It will prevent transformation from becoming stagnant and will promote the supremacy of the Constitution, as well as its progressive and transformative nature. An appropriate methodology is also required to deliver these results, *ie* a methodology that:

(a) provides a firm theoretical basis as to the law that is being studied;
(b) facilitates practical application of the applicable doctrinal principles in order to concretise the theory and make it easier for the students to remember;
(c) allows for engagement by the students with the applicable doctrinal principles and the appropriateness or not of its application, while guidance in this regard is provided by the law teacher, thereby inculcating participation by all relevant stakeholders in the study of law; and
(d) provides constant opportunities for reflection in that students look back at their engagement with the applicable legal principles in order to critically self-evaluate their own work.

[636] See Chapter 6 in this regard for practical examples. Both legal procedure and the principles of evidence are derived from English law, namely a colonial system that is still in existence in South Africa in both common law and statutory law.

It is submitted that CLE fulfils all these requirements and should therefore be considered as a methodology to be integrated with the presentation of the procedural law modules.

2 6 CONCLUSION

The late South African rights activist, Bram Fischer, stated that, when law becomes immoral, a higher duty arises: a refusal to recognise such law.[637] He stressed that the law must be moral and just in order to be worthy of the fidelity of its citizens.[638] Zitske points out that, despite the Constitution being in force since 1996, little has changed as far as legal culture is concerned.[639] In the context of the current research, statements like these should be pivotal motivators that make law teachers, especially of procedural law modules, question the conventional teaching methodologies relating to such modules and to instigate a movement in favour of a methodology more likely to prepare law graduates adequately for legal practice. Transformative legal education demands that law teachers re-evaluate what they are teaching, as well as how such content is being taught.[640] When in practice, law graduates will need to interact with clients, consult with clients, draft legal documents relevant to clients' cases, as well as appear in court. An appropriate teaching methodology therefore needs to prepare students for these tasks. It further needs to prepare students to consider the social circumstances of their clients before embarking on a particular legal procedural recourse in order to ensure that it is what the client really wants, or what the particular matter really requires in the best interests of the client. The following statement by United States Chief Justice Warren Burger finds application in this instance:[641]

> "The shortcoming of today's law graduate lies not in deficient knowledge of the law but that he has little, if any training, in dealing with facts or people – the stuff of which cases are really made. It is a rare graduate…who knows how to ask

637 *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 1 SA 133 (T) at 135H; Moseneke 2002 *South African Journal on Human Rights* 313.

638 Moseneke 2002 *South African Journal on Human Rights* 313.

639 Zitske 2014 *Acta Academica* 62.

640 Bauling 2017 *Potchefstroom Electronic Law Journal* 15.

641 Wolfe 1980 16 *Tulsa Law Review* 210-211; Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 6.

> questions – simple, single questions, one at a time in order to develop facts in evidence either in interviewing a witness or examining him in a courtroom. And a lawyer who cannot do that cannot perform properly – in or out of court."

As already stated, the theoretical basis underpinning this move towards a different teaching and learning methodology, is transformative constitutionalism.[642] Transformative constitutionalism supports a commitment to substantive equality.[643] What is required is an examination of whatever is violating such equality, as well as the relationship thereof to systematic forms of domination within a society.[644] In this way, systemic and entrenched disadvantages can be reordered, while simultaneously advancing human development.[645] This approach is cognisant of the indivisibility and interrelatedness of the various fundamental rights, including socio-economic rights.[646] This whole process is guided by the collective good by way of redistributive fairness in an open and accountable society.[647] The implication of this approach has already been made clear throughout the discussion in this chapter. Legal procedure, as well as the professional relationship between a legal practitioner and his or her clients, plays a vital role in legal practice. It forms the foundation of the daily life of almost all legal practitioners, especially those who are specialising in litigation. For this reason, legal practitioners need to be trained in a manner that will promote the exercise of litigious duties in practice in light of the instructions or desires of their clients. This training reaches a critical stage during at university level, because it is the first time in their educational careers where law students have contact with the principles of legal procedure. However, the conventional training methods used are the Socratic and case dialogue teaching methodologies, which unfortunately involves very little to no practical training.[648] In order to provide students with more adequate training, a teaching methodology is required where theory and practical aspects are blended in order to prepare a graduate for the realities of legal practice. Moreover, as a result of the constitutional dispensation present in South Africa, it is mandatory that a human

642 See 2 1.

643 Moseneke 2002 *South African Journal on Human Rights* 317.

644 *Ibid.*

645 *Ibid.*

646 *Ibid.*

647 *Ibid.*

648 See 3 3 for a detailed discussion of the Socratic and case dialogue teaching methodologies.

rights discourse should be infused into the entire LLB curriculum,[649] of course inclusive of the procedural law modules. As already stated, it is argued that CLE is the preferred teaching methodology in this regard.[650] The provision of an improved teaching methodology, like CLE, relating to procedural law modules will not only benefit the prospective legal practitioner, but also the general public. As far as prospective practitioners are concerned, a teaching and learning methodology that prepares graduates for entry into legal practice will provide them with better skills and a better understanding of how, and why, legal services, rendered by them, can improve the lives of members of the public, otherwise known as clients. CLE, integrated with procedural law modules, will provide students with a sound theoretical basis of legal procedure and the principles of evidence, while providing opportunities for the practical application of such theory.[651] The theory and practical application thereof can further be explored during tutorial sessions.[652] Students will also be presented with opportunities to reflect and critically evaluate their own understanding and comprehension of procedure and evidence, as well as the commitment of these areas of the law to the values and ideals of the Constitution.[653] The result will be that all law graduates are presented with equal opportunities in South Africa as far as entry into the job market is concerned, provided that such improved legal education is presented at all universities throughout South Africa.[654] As far as the public is concerned, legal services of an improved quality will be rendered to them, because practitioners will have a better understanding of the procedures that must be followed, as well as which procedures are the best in light of the social and financial settings of their clients. Students should therefore be trained adequately in legal procedure in order to appreciate the ways in which they can improve the lives of the public in particular social settings. This can be achieved by way of an integrated approach to particular law modules.[655] In the context of this research, this integration refers mainly to CLE as

649 Campbell 2014 *Stellenbosch Law Review* 17.

650 See Chapter 4 for a detailed discussion of CLE.

651 See Chapter 4 in this regard.

652 *Ibid.*

653 *Ibid.*

654 In this regard, see 5 2 2 3, where this aspect is discussed more specifically with reference to the LPA, in the sense that the LPA aims to remove all unnecessary and artificial barriers to the profession.

655 See Quinot *et al* 2015 1 *Stellenbosch Law Review* 41, as well as 1 1 in this regard.

methodology with the procedural law modules. Having obtained this knowledge and skills, students can put such knowledge in motion while performing practical legal duties at university law clinics, externships or other training facilities.[656] Congruence will then be present in the relationship between CLE and the procedural law modules.[657] This will provide graduates with a much improved theoretical and practical basis for entry into legal practice. When in legal practice, graduates will be enrolled as candidate legal practitioners, with right of appearance in certain courts. Enhanced university training will be of value to such candidate legal practitioners in adapting more easily to the procedures to be followed when appearing in court, as well as with the preparation of process and pleadings that are necessary paperwork for each case. When enrolled and admitted as attorneys, the practical experience that was built upon the enhanced university training should further have developed the skills of these newly admitted legal practitioners. Should it happen that some of these students accede to the judiciary, they will be commanded to watch over the transformative mission of the Constitution.[658]

The congruence between procedural law modules and CLE can be illustrated by referring to the new LLB curriculum of the NMU Faculty of Law. The law school has recently restructured its LLB curriculum. In doing so, all procedural law modules have been moved into the third academic year and have been converted to year modules. Clinical law, as part of the Legal Practice module, has always been a final year module and remains as such. The result is that, as from 2022, law students will study the principles and practical aspects of civil procedure, criminal procedure and the law of evidence during the third academic year. Thereafter, in the final academic year, students will participate in CLE sessions during which their knowledge of procedural law can be applied to real life scenarios when working at the university law clinic, another venue, or during simulations. The final year practical work therefore plays an important role in solidifying the knowledge of the student as far as doctrine and practice are concerned.

656 See Chapter 4 in this regard.

657 Quinot *et al* 2015 *Stellenbosch Law Review* 41-42.

658 See Moseneke 2002 *South African Journal on Human Rights* 319 in this regard.

The developmental process, described above, is an example of continuous learning. Continuous learning, on a personal level, refers to the constant expansion of skills and skillsets by way of learning and increasing knowledge.[659] On a professional level, continuous learning refers to the expansion of skillsets to a changing environment and new developments.[660] It involves daily practices that enable the increase of a person's knowledge, including the following:[661]

(a) asking for assistance when something is not clearly understood;
(b) observing more experienced colleagues at work;
(c) exploring new ways of getting things done, as well as alternative methods of doing so;
(d) practising what has already been learned; and
(e) exploring new ways in which to improve knowledge and skills.

A teaching methodology such as CLE will enable a law student to achieve these continuous learning goals. Students are taught essential theory, while being provided with the opportunity to expand such knowledge by practising it during practical sessions or tutorials.[662] In doing so, they will be under the supervision of their experienced law teachers who will be there to guide them where something is not clear. This whole experience will enable students to explore new ways of putting legal theory into practice, as well as to explore alternative ways of doing so. In this regard, procedural justice plays an important role. Students will, for example, learn to appreciate the importance of considering other ways of solving cases, based on the social and financial settings of members of the public.[663] In this regard, a simple apology may be preferred to drawn out and expensive legal proceedings.[664] This train

659 Explore Talent LMS "Continuous Learning" (undated) https://www.talentlms.com/elearning/continuous-learning (accessed 2020-03-24).

660 *Ibid.*

661 *Ibid.*

662 See Chapter 4 in this regard.

663 See 3 4 5 with regards to the importance of including an awareness of social and human elements in the training of law students.

664 See 3 4 5.

of thought might continue for the rest of the law graduate's career, enabling the graduate to further the socio-economic rights of clients, as well as the public, in line with the spirit of the Constitution.[665] Students should also be made aware of the important influence that transformative constitutionalism can have on legal procedure, namely the improvement from a system of authoritarianism to a system of justification. They should be able to provide ample justification for legal decisions.[666] To fully grasp the effect of justification for legal decisions, students need to be made aware of the past of South Africa, its people, their circumstances, as well as the legal system, in order to appreciate what the overall impact of an approach, based on transformative constitutionalism, can be.[667] Nicholson states the following in this regard:[668]

> "Clearly, law constitutes both a product and an instrument of social engineering. Without a grasp of the historical factors that influenced its development there can be no insight into where South African law is today and how it might develop in the future."

The learned author further states that a thorough study of the history and development of both local and foreign law is essential, due to the increasing emphasis on legal comparison.[669] A thorough understanding of the history, politics, economics and social context in which a legal system operates, will enable a comparativist to view legal development in context.[670]

An improved knowledge of substantive law and practical aspects, relating to legal procedure, will therefore be significant in achieving transformation in light of the Constitution. As juristic persons, universities are bound by the Constitution and, as a result thereof, by the constitutional imperative argued for in this research. The aforementioned development of the knowledge of students, from university level up to

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665 *See* Uphoff, Clark and Monahan "Preparing the new law graduate to practice law: a view from the trenches" 1997 65 *University of Cincinnati Law Review* 381 410 in this regard. The McCrate Report indicated that a prospective lawyers' professional development is a continuous process that continues throughout the lawyer's career. Such a timeline would include the lawyer's years at law school as a law student.

666 See 2 2 3.

667 See Zitske 2014 *Acta Academica* 67 in this regard.

668 Nicholson "The relevance of the past in preparing for the future: a case for Roman law and legal history" 2011 17(2) *Fundamina* 101 109.

669 Nicholson 2011 *Fundamina* 110.

670 *Ibid.*

the judiciary, emphasises the necessity of recognising such an imperative. It is therefore submitted that a central part of transformative constitutionalism is also to change the way in which law teachers approach the teaching of law, fully and at all times keeping in mind the values entrenched in the Constitution, as well as the transformative nature of regulatory legislation like the LPA. Quinot and Greenbaum make this point clear in stating the following:[671]

> "As a general point, Dennis Davis[672] has recently put his finger on the main implication of [transformative legal education] in South Africa when he asked '[w]hether the South African legal academy teaches students more than a blind acceptance of legal principles derived from existing authority or whether the teaching of law places the constitutional vision at the heart of legal education.'"

In this regard, law teachers are responsible for justifying their choices in designing teaching and learning activities in line with the culture of justification approach of the Constitution.[673] Law teachers should further ensure that there is a style of knowledge construction that takes place in a co-operative manner, *ie* involvement from both the law teacher and the students.[674] The student's learning responsibility should not be self-restricted, but to the benefit of other students as well.[675] These aspects of transformative legal education align with the educational needs of millennial and centennial students in that they do not want to sit passively in lecture venues. Instead, these students want to be active in learning new skills, *inter alia*, by way of watching, listening, talking, partaking in tasks, working in groups, to name but a few examples. It is submitted that there is also a further lesson to be learned from all of this: that students should be brought to the realisation that their own education will be used in order to serve the public when they (students) enter legal practice. Although there may be scepticism against this idealistic and imaginative approach to law,[676] the possibilities for South African law schools may yield interesting results.[677]

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671 Quinot *et al* 2015 *Stellenbosch Law Review* 37.

672 Davis "Legal transformation and legal education: congruence or conflict?" 2015 *Acta Juridica* 172 181-182.

673 Quinot *et al* 2015 *Stellenbosch Law Review* 37.

674 *Ibid.*

675 *Ibid.*

676 See 1 1 in this regard.

677 Zitske 2014 *Acta Academica* 66.

CHAPTER 3

PROCEDURAL LAW MODULES – OVERVIEW, CURRENT TEACHING METHODOLOGIES AND SHORTCOMINGS

3 1 INTRODUCTION

Procedural law plays an important role in the daily life of legal practitioners, especially that of attorneys, advocates and prosecutors who are actively involved with litigation in the courtroom. Litigation in this regard can relate to either civil or criminal cases. These practitioners need to be familiar with the law of procedure and admissibility of evidence in order to properly and professionally execute their duties in court when representing clients and interested parties. In both civil and criminal cases, evidence is required to substantiate the respective cases of the parties involved in the litigation process. It will not be a good reflection on such practitioners, or on the firms or institutions where they are employed, if they appear to be ignorant or confused about which procedure to follow at a certain stage of the relevant court proceedings. This ignorance or confused appearance can result in the loss of credibility in the practitioner, the firm or institution where the practitioner is employed, and even the legal profession as a whole, from the perspective of a client who expects a legal representative to be skilled and well-informed. Clients may even doubt the proper operation of the court system and whether their matters will be adjudicated properly.[1] Furthermore, inexperienced and seemingly ignorant conduct of legal practitioners will result in a waste of the court's time and competence to ensure justice in cases tried before it[2] In *Motsagki v S*[3] Sutherland J commented on the conduct of the legal

1 See Erasmus "Ensuring a fair trial: striking the balance between judicial passivism and judicial intervention" 2015(3) *Stellenbosch Law Review* 662 666 in this regard. Although the learned author is referring to the consequences of inexperienced prosecutors, it is submitted that the inexperience and inadequate legal representation by legal representatives will have a similar effect on the perception of clients and other citizens.

2 Erasmus 2015 *Stellenbosch Law Review* 666.

3 (2013/ A5043) [2014] ZAGPJHC 260 (14 October 2014) http://www.saflii.org/za/cases/ZAGPJHC/2014/260.html (accessed 2019-11-27).

representative who had been acting on behalf of the accused. It appeared, *inter alia*, that the cross-examination, conducted by the said legal representative, had been conducted "…with no plan or objective and was either blind to or inattentive to several material or potentially material details."[4] The learned judge stated that such conduct is disturbing in nature and troubling to the court.[5] He further stated that citizens should be comfortable in knowing that legal practitioners, as well as the police, are not delivering questionable services.[6]

Legal practitioners must therefore ensure that they are well-informed about the required procedures to be followed in a particular case, irrespective of whether the case is heard in a civil or criminal court,[7] maintenance court, domestic violence court, or even in Small Claims court.[8] The basic skills of procedural law in practice are however only instilled onto prospective legal practitioners when they enter legal practice after graduating from university. This means that a newly registered candidate attorney will not have any experience in executing even the most basic courtroom procedures when required to do so. An exception in this regard may be experience that students receive while undergoing moot court training. Such training teaches courtroom etiquette, drafting of heads of argument and presenting such argument verbally in a courtroom setting.[9] However, moot court training is not compulsory at all universities and therefore not all students will undergo courtroom training. The principal of a candidate attorney, as well as other staff members at the firm where the candidate attorney is employed, or staff of the particular court, will have

4 Par 65.

5 Par 66.

6 Par 66; Erasmus 2015 *Stellenbosch Law Review* 668.

7 This is relevant to both Magistrates' Court and High Court proceedings.

8 Although no legal representation is allowed in Small Claims Court, it is important for graduates to be familiar with the procedures applied in this court, which mostly inquisitorial in nature. This will be important when rendering advice to clients relating to conducting cases in Small Claims Court.

9 Moot court training is presented as an elective module to final year students at NMU. Training takes the form of interactive tutorials focusing on case analysis, drafting of heads of argument, writing skills and oral advocacy. Tutorials are facilitated by advocates and attorneys. Students work together in teams of 2 and are presented with a detailed set of facts at the beginning of the module. They are then required to research the law, draft a case analysis, drafts heads for both applicant and respondent and present the case before a bench comprising advocates. At the end of the module, the best 2 teams conduct the moot in the High Court in Port Elizabeth in front of a bench consisting of judges, law school staff members and legal practitioners. Also see Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* (2016) 90 in this regard.

to provide guidance throughout such proceedings. This approach, on its own, is not desirable. In this regard, Boon states that "[t]he Law Society…propos[ed] that ethics, together with knowledge and skills, should form the core elements of the legal education and training of solicitors "from the cradle to the grave".[10] Skills training should therefore be presented throughout the course of university legal studies at tertiary level. These skills include language, communication, writing and legal reasoning,[11] all integral to litigation.[12] If this training does not take place, it is questionable whether universities are contributing towards producing graduates who are reasonably fit for practice and litigation. Gravett states in this regard that "…if university law schools fail to contribute to establishing a substantial body of competent trial lawyers, our failure will ultimately take its toll on our system of justice."[13]

However, knowledge of and the ability to apply legal procedure is not only found in the courtroom, but already commences in the office of a legal practitioner. A practitioner does not simply enter a courtroom and start litigating – there is a sequence of procedural steps that needs to be completed before court proceedings can be embarked upon. This is important, especially in the case of civil proceedings, as process and pleadings need to be drafted by practitioners, issued by the clerk or registrar of the court, served by the sheriff of the court and eventually filed on the court file at the court.[14] Although there is not such an exhaustive presence of pleadings in criminal proceedings, there may sometimes be a need for practitioners to draft certain documents. Examples thereof are letters to the clerk or registrar in order to obtain copies of the content of a police docket in order to prepare for a trial, letters to a detention facility in order to arrange for a consultation with a detained person, pleas of

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10 Boon, "Ethics in legal education and training: four reports, three jurisdictions and a prospectus" 2002 5 (1 & 2) *Legal Ethics* 34 34.

11 Whitear-Nel and Freedman "A historical review of the development of the post-apartheid South African LLB degree – with particular reference to legal ethics" 2015 21(2) *Fundamina* 234 243. For a more circumspective discussion of thinking and logical reasoning, see Palmer and Crocker *Becoming a lawyer – fundamental skills for law students* 2ed (2007) 9-18.

12 The so called "vocational skills".

13 Gravett "Pericles should learn to fix a leaky pipe – why trial advocacy should become part of the LLB Curriculum (Part 2) 2017 21 *Potchefstroom Electronic Law Journal* 1 1.

14 Pete, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Civil Procedure – A practical guide* (2017) 132, 133; Rule 5 of the Magistrates' Court Act 32 of 1944; Rule 17 of the Superior Courts Act 10 of 2013.

guilty[15] or not guilty,[16] affidavits and heads of argument. It would be desirable that fresh graduates have knowledge about conducting these procedures, but the reality is something quite different: these skills are not focused on at university level.[17] It has been stated that law schools need to present better education as far as the essential lawyering skills and values are concerned.[18] Without generalising in this respect, it must be pointed out that university law clinics[19] do require students to draft certain pleadings and other documents in order to afford them an opportunity to practise these skills. However, this teaching method does not permeate throughout the curriculum and is mostly only employed for a year, or a semester, depending on the particular university. At NMU, drafting is incorporated in certain modules. For example, in the Insolvency Law module, students are required to draft affidavits relating to the surrender of a debtor's insolvent estate. In Civil Procedure, students are taught to draft a selection of process and pleadings, including a letter of demand, particulars of claim to a summons, plea and counterclaim and an affidavit. In the Law of Delict module, students have been taught to draft particulars of claim to reflect their understanding of the elements of various delicts.[20] However, professional drafting and practical legal procedures are not focal points of law schools, as the teaching of substantive law and doctrine enjoy priority. The result is that graduates enter legal practice without any proper practical knowledge of how to draft, or even what to draft, as well as when to draft it.[21]

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15 In terms of s 112(2) of the Criminal Procedure Act 51 of 1977.

16 In terms of s 115 of the Criminal Procedure Act 51 of 1977.

17 See Kruse "Legal Education and Professional Skills: Myths and misconceptions about theory and practice" 2013 45 *McGeorge Law Review* 7 10. In this regard, she states that law schools "…views the traditional case method of instruction in legal education as teaching "doctrine" and lumps together all other kind of instruction – legal writing, simulations, clinics, and externships – as teaching "skills". It aligns the teaching of doctrine with theory and the teaching of skills with practice."

18 Kruse 2013 *McGeorge Law Review* 8.

19 See Schneider "Rethinking the teaching of Civil Procedure" 1987 37(1) *Journal of Legal Education* 41 41 in this regard. She states "…a variety of movement within legal education, clinical legal education…is both directly and subtly influencing the way legal scholars think about and teach civil procedure." This substantiates the important role of law clinics and CLE in teaching procedural law modules.

20 Delicts refer to wrongful acts, also known as torts.

21 See Vukowich "Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" 1971 23 *Case Western Reserve Law Review* 140 152, as well as Stuckey and others *Best practices for legal education: a vision and a road map* 1ed (2007) 26 in this regard. Although the learned authors refers to practical legal experience in general, it is submitted that communication and drafting is included herewith. Vukowich states that, if law graduates do not get

In every legal matter, the law of evidence plays an important role. In South Africa, an adversarial or accusatorial litigation system is followed. In terms of this system, the parties[22] engage with each other, attempting to discharge or rebut a burden of proof by way of adducing evidence to court in support of their respective arguments. In this research, both civil and criminal proceedings will be discussed in this context. In civil proceedings, a party, the plaintiff, institutes a claim for monetary or alternative relief against another party, the defendant.[23] In criminal proceedings, the state prosecutes a person, accused of a certain crime.[24] In both civil and criminal proceedings, the presiding officer primarily acts as a referee in order to ensure that procedure is complied with and should be completely impartial.[25] Litigants need to be familiar with the rules of admissibility of evidence and how to apply the same in practice. A lack of knowledge or the ability to apply it in this regard may lead to cases not properly substantiated by appropriate and relevant evidence, which may again result in cases being lost, as well as client dissatisfaction, possibly resulting in damage to the reputation of a legal practitioner and his or her firm. At university, students study the law of evidence as far as basic substantive principles are concerned, but nothing more. There is no practical application of said principles to actual exhibits, as happens in a courtroom.[26] Students therefore enter legal practice without any experience in

practical experience, such graduates will be "…ill-equipped to artistically skillfully represent…clients." Drafting is of course an important part of client representation, as it is a form of communication between the legal representatives of clients. Stuckey states that most law graduates are not competent to provide legal services or to perform work expected of them in law firms. Again, although he refers to legal services in general, communication and drafting are undoubtedly included therein. He also specifically states that, as far as hiring legal practitioners are concerned, "[t]oday there is much less tolerance for a lack of client and communications skills;…"

22 These parties refer to the plaintiff and defendant, applicant and respondent and state and accused.

23 Pete *et al Civil Procedure – A practical guide* 178.

24 US Legal "Criminal Proceeding Law and Legal definition" (undated) https://definitions.uslegal.com/c/criminal-proceeding/ (accessed 2019-11-25).

25 Van Loggerenberg "Civil Justice in South Africa" 2016 3(4) *BRICS Law Journal* 125 134, 138. In Small Claims court proceedings, as well as in children's court proceedings, the presiding officer are more involved in the questioning of witness, meaning that such proceedings are more inquisitorial in nature. The presiding officer however still remains impartial. Also see 5 2 2 2 for an instance where, despite the adversarial system, the presiding officer can intervene in the proceedings between the parties.

26 At NMU, lectures are presented by applying the theory to practical examples in an attempt to make it more concrete. Furthermore, all assessments are in the format of (mainly) practical application of the theory. However, it is submitted that this still does not come close to interpreting evidence like it is done in a courtroom.

interpreting evidence, the actual procedures used to gather and preserve such evidence, as well as how to consider all evidence in a particular case from a global perspective instead of piecemeal.[27] The risk is that they may develop into legal practitioners, and even presiding officers, who struggle to apply the rules of evidence.[28] This unfortunate situation has another side effect: legal practitioners, who attempt to learn the principles of evidence and application thereof while practising, may blindly follow the application thereof by the above mentioned practitioners and presiding officers.[29] Consequently, they do not know when certain pieces of evidence should be permitted or excluded, as they do not understand the principles of the law of evidence adequately.[30]

Lastly, it is also worthwhile to mention real world issues as far as legal procedure is concerned. Students will be better prepared for practice if they are familiar with the social context within which legal practitioners operate.[31] For example, in civil actions, attorneys need to be familiar with what a client wants to achieve by way of a claim in society, not necessarily about purely technical issues about the most effective way in achieving it.[32] Van Marle and Modiri state that[33]

> "[in addition to the need to produce critical thinkers and intellectuals, law faculties need to inculcate in students an acute awareness of law not merely as a technical science and a set of rigid rules, but also as a system for resolution and reconciliation of conflicting social and economic interests and for the fulfillment of

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27 See Uphoff, Clark and Monahan "Preparing the new law graduate to practice law: a view from the trenches" 1997 65 *University of Cincinnati Law Review* 381 392 in this regard. Law graduates have described the theoretical study of the law of evidence to be "cold" and "abstract", not knowing where such rules must be applied. Hands-on experience would be of significant assistance and it would make the learning and understanding of the principles of evidence easier.

28 Uphoff *et al University of Cincinnati Law Review* 392. Also see 6 1 in this regard.

29 *Ibid.*

30 *Ibid.*

31 In this regard, see Klaasen "From Theoretician to Practitian: can Clinical Legal Education equip students with the essential professional skills needed in practice?" 2012 2(19) *International Journal of Humanities and Social Science* 301 303, McQuoid-Mason "Methods of teaching Civil Procedure" 1982 *Journal for Juridical Science* 160 161, Taslitz *Strategies and Techniques for teaching Criminal Law* (2012) 4, as well as Steenhuisen "The goals of clinical legal education" in Stilwell (ed) *Clinical Law in South Africa* (2004) 4.

32 Hurter "Access to justice: to dream the impossible dream?" 2011 44(3) *Comparative and International Law Journal of Southern Africa* 408 409.

33 Van Marle and Modiri "'What does changing the world entail?' Law, critique and legal education in the time of post-apartheid" 2012 129 *South African Law Journal* 209 211-212.

> needs, desires and aspirations of the people and communities that make up our society."

Van Loggerenberg has a similar perspective. He states that[34]

> "…civil procedure not only aims at moving forward the dispute between the parties up to the point of its eventual determination by a court, but also aims at reflecting the evolution…of society and its needs. Since all legal systems are closely linked to the historical, cultural, socio-economic and political milieu in which they developed and find application, the character of a civil procedural system must necessarily depend upon a variety of factors, juridical and non-juridical, that determine its character."

Legal practitioners therefore need to be able to ask themselves the following questions: What does my client want? Why does my client want that? Sometimes clients do not only approach legal practitioners in order for litigation to be instituted, but also for other outcomes to be achieved. A client may, for example, be more interested in an apology than monetary compensation, or merely for a warning to be issued because they want to maintain good relations with the counterparty as far as possible whilst, at the same time, making a clear statement about what is required. The concepts of access to justice, *audi alteram partem* and *ubuntu* will be discussed in this context. A more elaborate discussion on these concepts follows elsewhere in this chapter.[35]

The social context of legal practice is very important, as students do realise that, the way in which they study the law at university level, has very little connection with human transactions in the world.[36] The law, as well as procedure, should not be taught in a vacuum consisting only of substantive rules, but in close connection to human experience in everyday life.[37] Furthermore, law schools have not been very successful in integrating knowledge of substantive law, as well as skills, with subsequent stages

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34 Van Loggerenberg 2016 *BRICS Law Journal* 126-127.

35 See 3 4 5.

36 Hyams "On teaching students to 'act like a lawyer': what sort of lawyer?" 2008 13 *Journal of Clinical Legal Education* 21 25.

37 See Hyams 2008 *Journal of Clinical Legal Education* 22 in this regard. CLE excels in this regard, as students have the opportunity to experience interactions with clients, their emotions and their perceptions of their own matters, as well as the outcomes they would want to see in such matters. This is in sharp contradiction with the case dialogue method, that is discussed in 3 3 2, as the facts of clients' cases are almost never neatly arranged and presented as such to students.

of a practitioner's professional career.[38] Kennedy highlights this much needed social contextual tuition when he states the following:[39]

> "I would like to improve our lives as people living together; if critique is at times bitter, it is with that hope. It would not have occurred to me to write this paper if I did not think I could appeal to the sense of moral obligation which underlies the concepts of "teacher" and "lawyer", and to the urge for craftsmanlike "effectiveness" combined with social responsibility which brings most students here."

The constitutional dispensation in South Africa is also a factor that necessitates a different approach to the teaching and learning of procedural law modules. It must be kept in mind that, during the apartheid regime, the capacity of the courts to enforce and protect human rights had been hampered to a large extent by systems that supported apartheid.[40] The Constitution however brought an end to the apartheid regime and had as its goal a democracy founded on freedom, multi-culturalism, equality, equity, respect for human dignity and human rights.[41] All of this, as well as concepts like protection of socio-economic rights, positive duties on the state to ensure the enjoyment of human rights, and horizontal application of the Constitution, required social and political transformation that would bestow legitimacy onto the new constitutional and political order.[42] The existence of the Constitution must help to provide freedom for previously oppressed groups of people and to create a society that is equal and where the interests of everyone is protected.[43] For these reasons, South Africa has a transformative Constitution that requires transformative constitutionalism to be put in motion.[44] It is submitted that transformative constitutionalism requires transformative legal education in order for students to be professionally and adequately taught as to how to apply the law in order to bring about the goals of the Constitution when they enter legal practice as future legal

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38 Hyams 2008 *Journal of Clinical Legal Education* 25.

39 Kennedy "How the law school fails: a polemic" 1971 1(1) *Yale Review of Law and Social Action* 71 71. At the time of writing this article, Duncan Kennedy was a student at the Yale Law School.

40 Kibet and Fombad "Transformative constitutionalism and the adjudication of constitutional rights in Africa" 2017 17 *African Human Rights Law Journal* 340 346.

41 Kibet *et al* 2017 *African Human Rights Law Journal* 350.

42 *Ibid*.

43 *Ibid*.

44 Kibet *et al* 2017 *African Human Rights Law Journal* 350-351.

practitioners. Since all substantive rights and duties are enforced by way of legal procedure, this submission carries considerable substance. This is especially important if considering that South Africa's Constitution had been designed to specifically address issues that are peculiar to the country.[45] Currently in South Africa, it can be said that the culture of human rights and constitutionalism are both still fragile; hence, it cannot be said that the present South Africa constitutes an improvement over the South Africa that existed during the apartheid regime as far as the protection of human rights, the rule of law and constitutionalism is concerned.[46] Legal education must therefore be of such a nature that law graduates are produced who can immediately and effectively address issues of these nature upon entering legal practice. Further to this, law graduates must be trained in such a way that a firm foundation for constitutionalism, protection of human rights and procedural justice is laid, which foundation will support lifelong learning an an appreciation for rendering professional legal services to members of the public. This emphasises the constitutional imperative on law schools that has been discussed earlier in this research.[47] The law is an instrument of social and political change and the courts play pivotal roles in the transformation process, as relevant cases will be litigated in the courts.[48] Presiding officers and legal practitioners must therefore have the correct perspective as far as the law is concerned and must also relate the law to politics and society.[49] It is submitted that this can be interpreted to mean that future lawyers must be adequately taught in order to accomplish these tasks in practice. As legal procedure and the use of evidence are core aspects as far as court work is concerned, it can also be interpreted to mean that future lawyers must be adequately trained in making effective use of legal procedure and the principles of evidence. This can be accomplished as early as possible if law graduates are taught to practically engage with procedural law modules while still at law school. Without generalising, it is doubtful whether this is currently achieved by law schools.

45 Kibet *et al* 2017 *African Human Rights Law Journal* 352.
46 Kibet *et al* 2017 *African Human Rights Law Journal* 354.
47 See 2 1, 2 2 2 and 2 3 in this regard.
48 Kibet *et al* 2017 *African Human Rights Law Journal* 357.
49 *Ibid.*

In order to find a possible solution to the abovementioned apparent shortcomings concerning the presentation of the procedural law modules, it is necessary to investigate the current curriculum and syllabus content of these modules. In doing so, it will become clear exactly what is taught, how it is taught and when in the curriculum it is taught.[50] Recommendations will thereafter be made about what needs to be improved in order to cater, as far as procedure and the interpretation of evidence is concerned, for a better practically trained graduate.

3 2 PROCEDURAL LAW MODULES

3 2 1 GENERAL

This research will focus on the teaching of procedural law modules, namely Civil Procedure, Criminal Procedure, as well as the Law of Evidence, in a way that ensures that law students will be able to apply the legal procedures involved, in legal practice. This approach implies that these modules are not presently taught in a practical way or in a way that involves sufficient practical elements. From the aforementioned discussion,[51] it is imperative that such modules are presented in a manner that equips students with the required knowledge and skills in order to enter practice with confidence and the ability to start practising professionally. This will be to the advantage of their clients, as well as the reputation of the legal profession as a whole. It is therefore necessary to define each of these procedural law modules with reference to the current or most common teaching methodologies integral to each of them. This will create a better understanding as to why improvement in such teaching methodologies is required in order to produce better graduates. In this regard, it will be indicated that the teaching of these modules is mostly conducted in a theoretical manner, whereas a practical manner is required. It will further be indicated that a more practical teaching methodology will prepare students better for practice, as they will be able to practise drafting and verbal skills. Students will further have the opportunity

50 Also see Boon 2002 *Legal Ethics* 35 in this regard.

51 See 3 1.

to be made aware of human and social elements integral in every client's case and that they must be sensitive to the needs of clients.

3 2 2 CIVIL PROCEDURE, CRIMINAL PROCEDURE AND THE LAW OF EVIDENCE

3 2 2 1 INTRODUCTION

The significance of procedural law modules is that they aim to present students with the required knowledge of how to enforce rights and which rights form part of substantive law.[52] These rights include the right of one individual to institute legal action against another individual, or the right of the State to prosecute an individual for a crime allegedly committed by such individual. A group, or class, of individuals may also institute legal action against another individual or group of individuals – the so called "class action".[53] Substantive rights therefore stem from both private and criminal law. A comprehensive discussion about the substantive law in this sense falls outside the scope of this research. Certain substantive legal principles, relating to the proper application of all civil and criminal procedures, as well as the admissibility of evidence, will however be discussed where necessary and applicable. The main focus will be on adjectival law, *ie* the procedures by which substantive legal principles are enforced in a court of law.[54] As stated earlier, both civil and criminal court proceedings will be discussed in this research.[55] Apart from the enforcement of rights, students will also gain knowledge with regards to the rules relating to the admissibility of evidence. When enforcing substantive rights, evidence is required in order to prove an individual's case in a court of law as far as both civil and criminal cases are concerned. It is therefore not difficult to see why these modules play – or should play – a central role in the legal education of students.

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52 See Van Loggerenberg 2016 *BRICS Law Journal* 126 in this regard.

53 Pete *et al Civil Procedure* 36; s 38(c) of the Constitution of the Republic of South Africa, 1996.

54 US Legal "Adjective law and legal definition" (undated) https://definitions.uslegal.com/a/ adjective-law/ (accessed 2019-11-25). Adjectival law can be defined as the section of the law that deals with the rules governing evidence, procedure and practice. Procedural law is however a term that is used by most jurists nowadays.

55 See 3 1.

3 2 2 2 CIVIL PROCEDURE

Civil procedure is the section of procedural law that concerns the enforcement of private law claims.[56] Where party A (hereafter referred to as "A") is involved in a motor vehicle accident with party B (hereafter referred to as "B"), civil procedure will be the legal mechanism that A can utilise in order to claim damages, as a result of the accident, from B.[57] Whether A does have a right to claim damages from B, will have to be decided by studying the specific principles of substantive law relating to damages, namely the law of delict.[58] As simple as this may sound, civil procedure has been described by students as being tough,[59] as well as "…the most mystifying, frustrating, and difficult course…"[60]

It has been stated that civil procedure lies at the heart of the law and it is clear why: it is a procedure that can yield reasonably reliable conclusions by analysing frequently confusing sets of facts.[61] This module should therefore be treated as a core module in a law curriculum and not merely as a module aimed at prospective practising attorneys.[62] It is submitted that this approach is correct and that, for that reason, civil procedure should ideally not only be limited to a particular academic year. It should permeate through the LLB curriculum. Recommendations, on how it can be incorporated in other academic years of the LLB curriculum, are discussed elsewhere.[63]

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56 Pete *et al Civil Procedure* 2; McQuoid-Mason 1982 *Journal for Juridical Science* 160; Van Loggerenberg 2016 *BRICS Law Journal* 126.

57 See Pete *et al Civil Procedure* 2 in this regard.

58 Pete *et al* Civil Procedure 2; Neethling, Potgieter and Visser *Law of Delict* 2ed (1994) 21.

59 Oppenheimer "Using a simulated case file to teach Civil Procedure: The ninety-percent solution" 2016 6(1) *Journal of Legal Education* 817 817.

60 *Ibid.*

61 McQuoid-Mason 1982 *Journal for Juridical Science* 160. It is however doubtful whether students, in Civil Procedure, are taught the ability to handle and analyse these facts – McQuoid-Mason 1982 *Journal for Juridical Science* 161.

62 *Ibid.*

63 See 3 4.

Students, studying civil procedure, should therefore have a firm knowledge of private law rights and duties in order to recognise various claims in practice. They will also need to study the fundamental principles of civil procedure in order to know which route(s) to take in order to have such rights and duties enforced. These fundamental principles are found in substantive law. The civil procedure module at NMU proposes the following learning outcomes:[64]

> "Students, successfully completing this module, will be able to, with regards to mainly Magistrates Courts and Superior Courts:
> (a) investigate and evaluate the role of Civil Procedure;
> (b) investigate the influence of the Constitution 108 of 1996;
> (c) investigate the concept of "locus standi";
> (d) determine jurisdiction;
> (e) investigate the role, characteristics and content of both application- and action proceedings;
> (f) investigate the role, characteristics and content of appeal- and review proceedings;
> (g) investigate the basic operation of a selection of specific civil legal proceedings; and
> (h) recognize a selection of specific documents, including letters of demand, process and pleadings, as well as draft the essential content of some of these documents."

The syllabus content of Civil Procedure, at NMU, is the following:[65]

> "1. Introduction to and basic operation of Civil Procedure
> 2. Cause of action
> 3. *Locus standi in iudicio*
> 4. Jurisdiction
> 5. Letter of demand
> 6. Calculating *dies*
> 7. Service
> 8. Application proceedings, action proceedings, appeal and review-proceedings and a *capita selecta* of specific civil proceedings."

From this module layout, the teaching of doctrine is immediately evident. Krieger states in this regard that "[b]asic knowledge of substantive legal doctrine is a necessary pre-requisite to learning effective legal practice."[66] Therefore, apart from

64 Nelson Mandela University Faculty Module Guide on Civil Procedure 2019 7.

65 Nelson Mandela University Faculty Module Guide on Civil Procedure 2019 7-8.

66 Krieger "Domain knowledge and the teaching of creative legal problem solving" 2004 11 *Clinical Law Review* 149 149; Hall and Kerrigan "Clinic and the wider law curriculum" 2011 *International Journal of Clinical Legal Education* 25 27.

students having to have a firm knowledge about the substantive law principles, it is desirable that they practise these application routes. This can be done either by them drafting pleadings and other legal documents in simulated scenarios, or by them participating in law clinic activities, where they can be involved with the perusing and drafting of actual pleadings and other legal documents. The theoretical and practical components should not be separated when teaching civil procedure, as both components are essential in contributing to the students' knowledge and understanding of the principles and application of civil procedure, as sketched above.[67] It is in this context that students, as already indicated, believe that civil procedure is difficult, mystifying and frustrating: they do not have sufficient opportunities to view module material in a context that makes it appear to be real, and law teachers do not engage them by way of active learning when presenting the module.[68]

However, a practical teaching methodology is not currently employed with regards to civil procedure. The reasons are threefold. Firstly, civil procedure is generally taught by employing the Socratic teaching methodology,[69] which will be discussed elsewhere in more detail.[70] A discussion forms the foundation of a lecture. In addition to the Socratic teaching method, the case dialogue methodology is also used. This methodology is also discussed elsewhere in some detail.[71] Civil procedure, at NMU, is presented by way of directing students to fundamental principles in a prescribed textbook, as well as highlighting relevant sections of applicable legislation, mostly the Magistrates' Court Act (and Rules),[72] the Small Claims Court Act (and Rules),[73] the

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67 With regards to CLE in this context, see Welgemoed "Die balans tussen kliniese regsopleiding en regstoegang per se in 'n regskliniek – 'n delikate spankoord" 2016 2 *Litnet Akademies* 753 759. This provides a clear indication of the inherent benefit of CLE when integrated with a procedural module like Civil Procedure.

68 Oppenheimer 2016 *Journal of Legal Education* 817.

69 For a definition and discussion of the Socratic teaching methodology in this regard, see 3 3 1.

70 See 3 3 1. In short, this methodology refers to teaching by way of dialogue and questions and answers between a teacher and students in lecture-format.

71 See 3 3 2. According to this methodology, teaching revolves around the determining and analysis of legal rules by reading court cases or shortened versions thereof – see University of Denver "Method: Socratic (aka the Case Method)" (undated) https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method (accessed 2019-07-25).

72 32 of 1944.

73 61 of 1984.

Superior Courts Act (and Rules)[74] and the Constitution.[75] Secondly, the module has never been taught in a practical way, mainly because of the third reason, which is the fact that the module is presented as a semester module. There is not enough time to teach both substantive law principles, as well as to have practical sessions where such principles can be applied for factual scenarios that will involve drafting, mock trials and verbal arguments. Although it may be possible for tutorial sessions[76] to be arranged, such tutorials would mainly focus on a proper understanding of the substantive law principles, and not the practical application thereof, as students need to be prepared for the written semester tests and examination that are the prescribed assessment methods of this module. Furthermore, the module content is vast, creating the distinct possibility that there may not be time for anything else than substantive law principles to be dealt with. Tutorials would however be a manner in which to achieve more drafting and practical aspects, should there be adequate time and venues on the lecture timetable to accommodate them. With the inception of 2020, tutorials for civil procedure had been commenced with at NMU. A dedicated tutorial timeslot on the lecture timetable had been made available for civil procedure and the law of evidence during alternate weeks. However, these tutorial sessions have been cut short due to the outbreak of the Covid-19 pandemic, meaning that the overall success thereof, as far as civil procedure is concerned, cannot be determined.

As can be seen from item (g) of the mentioned learning outcomes, there is an attempt to afford the students some experience in drafting by prescribing certain legal documents, *ie* letter of demand, particulars of claim, plea and counterclaim and a founding affidavit, for examination purposes. This is achieved by providing the students with actual examples of such documents from practice and by requesting them to draft the same as part of assignments, tests and examinations. A selection of other relevant documents are also provided to the students in an attempt to make the theory more concrete,[77] *eg* summons, notice of motion, notice of intention to defend, expert notices, notice of set down and notice of appeal. It is important that students

74 10 of 2013.

75 108 of 1996.

76 See McQuoid-Mason 1982 *Journal for Juridical Science* 161, 163 in this regard.

77 See McQuoid-Mason 1982 *Journal for Juridical Science* 160.

have the opportunity to experience civil procedure in a more concrete way, as many of the concepts will be unfamiliar to them.[78] They might have heard about a summons, particulars of claim, notice of motion, affidavit, plea, as well as the various stages of trial proceedings, in other modules in academic years preceding the year in which civil procedure is presented, but they do not yet have a full appreciation of the importance of such concepts in a procedural context. This is understandable, as they have mainly been studying the substantive law principles relating to private law modules presented in earlier academic years, with little or no mention of procedures used in order to enforce substantive law rights. Civil procedure lectures, at NMU, are conducted by way of integrating examples of real life scenarios and experiences in an attempt to present the substantive rules in a more concrete manner. Certain problems from these scenarios are highlighted and students are encouraged to comment thereon and apply their theoretical knowledge in order to solve the problems. A complex factual scenario is also provided to the students at the start of the module. As the module progresses, written questions are posed to the students, relating to particular topics dealt with in class, which bear relation to the provided set of facts. Students are encouraged to attempt to answer these questions after completion of every lecture in order to test their progress and knowledge.[79] An example of these facts and questions is included in Appendix 3 to this research. MacQuoid-Mason is correct when he states that "[c]ivil procedure breathes life into substantive law – it is the law in action. Likewise the teaching of civil procedure should breathe life into the law curricula."[80]

As Civil Procedure is presented in the first semester of the final year of studies at NMU, students registered for the module are mostly also registered for the Legal Practice module. The Legal Practice module, which will be discussed in detail elsewhere,[81] entails, *inter alia*, that final year law students must perform practical work at the NMU Law Clinic over a period of one year. As such, the students undergo CLE. The concept of CLE, as well as the teaching methodology thereof, is discussed

78 *Ibid.*

79 Also see McQuoid-Mason 1982 *Journal for Juridical Science* 162 in this regard.

80 *Ibid.*

81 See Chapter 4.

elsewhere.[82] Such practical work provides the students with further opportunities to draft the aforementioned documents, as well as to obtain experience in other aspects of civil proceedings, namely consultations with clients in order to extract facts about cases, negotiating settlements, considering various legal options available to clients, as well as to do legal research where required. The Legal Practice module can therefore be a valuable practical component to civil procedure.[83] The only challenge in this regard is the fact that students have not yet completed civil procedure when they commence with practical sessions at the law clinic.[84] It is submitted that they would appreciate the context of the practical application of substantial law principles better had they first completed civil procedure, as they would then enter Legal Practice with some knowledge regarding procedure. This is usually the situation during the second semester of the final academic year, however only for a period of about 4 months, which is not sufficient to bestow practical civil procedural skills on a student. Students need sufficient time to learn to identify legal problems, critically analyse such problems and to arrive at potential solutions to such problems.[85] It is further important that students have the necessary research skills to look for information relating to potential solutions to legal problems, as well as to ensure that their knowledge of the law remains current.[86] This is required for the field of civil procedure, where the applicable regulatory legislation[87] changes frequently.

3 2 2 3 CRIMINAL PROCEDURE

Criminal procedure denotes the rules, principles, mechanisms and state structures that a country needs in order to prevent, detect, cope with and control criminal conduct.[88] It also regulates the duties and powers of criminal courts and prosecuting

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82 *Ibid.*

83 See McQuoid-Mason 1982 *Journal for Juridical Science* 161, 165-170 on this regard.

84 Civil Procedure and Legal Practice are currently presented in the fourth and final academic year of studies at NMU. As from 2022, Civil Procedure, as well as the other procedural law modules, will be presented in the third academic year of studies. Legal Practice will however remain in the final academic year of studies.

85 Klaasen 2012 *International Journal of Humanities and Social Science* 304.

86 *Ibid.*

87 Reference is made here to the Magistrates' Court Act and Rules, the Superior Courts Act and Rules and the Small Claims Court Act and Rules.

88 Joubert (ed) *Criminal Procedure Handbook* 11ed (2014) 5.

authorities, as well as the duties and powers of the South African Police Service (hereafter referred to as "SAPS").[89] It further regulates the rights of suspects and arrested persons, pre-trial procedures, bail, charge sheets and indictments, pleading, trial rights of the prosecution and the accused, the verdict, sentencing appeal or review proceedings, as well as mercy, indemnification and free pardon.[90] Criminal procedural rules commence after commission of a crime, when report of the same has been made to SAPS.[91] SAPS, and possibly other investigators,[92] will investigate such a crime and gather evidence that may assist the court in determining the guilt – or not – of the accused. The prosecuting authority will then decide whether to prosecute or not.[93] Should the accused be found guilty of the crime that he or she has been accused of and consequently prosecuted as such, the court will convict and sentence him or her accordingly.[94]

Students studying Criminal Procedure, should have a firm knowledge of the basic principles of criminal law in order to be familiar with the various types of crimes. They will also need to study the fundamental principles of criminal procedure in order to know which procedures are available to both the state and to accused persons in case of commission of crimes. It is therefore important for students to be familiar with both the substantive and adjectival law principles applicable to criminal procedure.[95] As far as the state and accused persons are concerned, principles relating to, *inter alia*, arrests, detention, search and seizure of property, bail applications are relevant.

Criminal Procedure, at NMU, involves the Socratic teaching methodology as far as the general principles, which form part of substantive law, are concerned. Students also watch relevant films and other video footage, which portray the criminal procedural principles in a more concrete way, making it easier for students to understand the

89 Joubert (ed) *Criminal Procedure Handbook* 6.

90 *Ibid.*

91 Joubert (ed) *Criminal Procedure Handbook* 65; Pete *et al Civil Procedure* 1.

92 For example, forensic investigators. In this regard, also see the discussion about the law of evidence elsewhere.

93 Joubert (ed) *Criminal Procedure Handbook* 68.

94 Joubert (ed) *Criminal Procedure Handbook* 325.

95 See Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe and Van Rooyen *Criminal Procedure Handbook* 1998 5 in this regard.

same in context. Students are furthermore required to attend a criminal trial and to write a report on the court procedures and presentation of evidence. This will contribute towards placing criminal procedure in practice in context with the substantive law. The learning outcomes of this module, at NMU, are the following:[96]

> "Students will be able to
> - Describe the constitutional framework within which the criminal justice system is taking place
> - Describe the legislative framework within which the criminal justice system development is taking place
> - Describe the criminal justice system
> - Identify legal issues relating to the criminal justice system
> - Identify and address compliance and enforcement challenges in the process of criminal procedure"

The syllabus content at NMU is as follows:[97]

- "The prosecuting authority and the criminal court structure
- Constitutional framework within which the criminal justice system operates
- Investigation of crime and search and seizure
- Methods of securing the attendance of an accused person in court
- Bail
- Assistance for the accused
- Plea procedures
- Conduct of a criminal trial
- Competent verdicts, previous convictions and sentencing
- Appeals and reviews"

As is the case with civil procedure, it is clear that practical development of students is once again lacking. It will be beneficial to students to undergo practical training with regards to some of the principles and procedures, *eg* identifying proper arrest procedures, conducting simple bail applications, drafting pleas in terms of sections 112(2) and 115 of the Criminal Procedure Act[98] and evaluating the admissibility of evidence procured by way of a search and seizure conducted in a particular way. All of these exercises can be done by way of simulations. As far as drafting is concerned, it is important that students understand that a factual and legal investigation should

96 Nelson Mandela University Faculty Module Guide on Criminal Procedure 2019 6.

97 *Ibid.*

98 51 of 1977. Also see Welgemoed *Litnet Akademies* 759 in this regard for the context relating to CLE, as well as Taslitz *Strategies and Techniques for teaching Criminal Law* 29-31 with regards to the importance of drafting documents.

precede the drafting of a document.[99] This would mean that, in case of a plea in terms of section 112(2) of the Criminal Procedure Act, students must know that a legal practitioner will have to interview his client in order to familiarise him or herself (the practitioner) fully with the facts of the case. There must be no ambiguities or uncertainties between the practitioner and his or her client. In addition to this, the practitioner needs to be clear about the legal basis of the case. In other words, in terms of the law relating to the specific crime, do the facts of the case point in the direction of the guilt or innocence of the client? It is also desirable that graduates should have adequate knowledge about how to read police dockets, as well as evaluate the evidence therein as far as the relevance and admissibility thereof is concerned.[100] If the law clinic of a university provides for the representation of accused persons, students can obtain such knowledge, as well as be involved in case preparation, legal research, accompanying the legal practitioners to court and observing the court proceedings – steps which will enhance their exposure to criminal legal practice. This experience will assist students to think critically, analyse the facts of a particular case and to reach conclusions with regards to the guilt or innocence of an accused person, all while giving effect to criminal law, the rules of evidence,[101] as well as learning more about criminal procedural rules. The NMU Law Clinic does not specialise in criminal cases at all; for that reason, students do not experience any practical training in this regard when undergoing CLE. However, in an attempt to bridge this gap, a criminal law and procedure expert presents a series of lectures to the students, which involves litigation in criminal courts, as well as drafting essential documents, including pleas of guilty and not guilty.

As is the case with Civil Procedure, time is also a challenge as far as Criminal Procedure is concerned. The module is presented in the second academic year of studies at NMU as a semester module, making it virtually impossible for anything more than basic substantial legal principles to be dealt with during lectures. There is therefore no time for tutorials in order to present practical application of key elements

99 Taslitz *Strategies and Techniques for teaching Criminal Law* 29.

100 Klaasen 2012 *International Journal of Humanities and Social Science* 303.

101 *Ibid*.

of the substantive law.[102] As the module is presented in the second year, it is also questionable whether or not the students will fully appreciate the importance thereof, without having a firm knowledge of criminal law. Criminal Law is also presented during the second academic year, but simultaneously with Criminal Procedure, resulting in the same challenge as was explained with regards to Civil Procedure.[103] Furthermore, Criminal Procedure is presented during the first semester, while specific crimes, as part of criminal law, is only presented during the second semester. This means that students undergo training in criminal procedure without having the requisite substantive knowledge of what specific crimes entails. This is another example of substantive law and adjectival law not complementing each other.

3 2 2 4 LAW OF EVIDENCE

The Law of Evidence concerns "evidence", a concept which can be defined as "…any information that a court has formally admitted in civil or criminal proceedings, or at administrative or quasi-judicial hearings."[104] Evidence can include a variety of information to be used, *eg* documents, written or verbal statements, electronic mail messages, photographs, tape recordings, video recordings, eyewitness observations as well as physical objects.[105] The South African legal system, relating to evidence, therefore contains legal principles relevant to evidence[106] and how it should be applied.[107] In the criminal justice system, evidence is collected and investigated by SAPS,[108] although it can also involve investigations by non-SAPS investigators.[109] Evidence is presented in criminal and civil matters by way of verbal testimony by witnesses, by way of affidavit in certain circumstances, or by submitting documents,

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102 See Taslitz *Strategies and Techniques for teaching Criminal Law* 35 with regards to tutorials.

103 See 3 2 2 2.

104 Bellengere, Palmer, Theophilopoulos, Whitcher, Roberts, Melville, Picarra, Illsley, Nkutha, Naude, Van der Merwe and Reddy *The Law of Evidence in South Africa – Basic principles* (2016) 3.

105 Bellengere *et al The Law of Evidence* 3; Schmidt *Bewysreg* (1993) 3.

106 Zeffertt and Paizes *The South African Law of Evidence* (2017) 31.

107 Schmidt *Bewysreg* 1; *Tregea v Godart* 1939 AD 16 30-31.

108 Benson, Jones and Horne "Forensic investigation of crime, irregularities and transgressions" in Zinn and Dintwe (eds) *Forensic Investigation: legislative principles and investigative practice* (2016) 14.

109 See Zinn *et al Forensic Investigation* 15-18 in this regard. Forensic investigators serve as an example.

tape recordings, objects or video recordings to the court for consideration.[110] The court will evaluate such evidence, attach evidentiary weight to it and in that way make a decision on whether or not the evidence is conclusive to a particular issue that must be proven in a matter.[111] The study of evidence is therefore a study of the treatment of facts.[112] There is a wide variety of doctrines involved in treating these facts,[113] or evidence, as can be seen from the outline of the Law of Evidence module's syllabus content outline later in this discussion.[114] For example, there are different rules applicable in order to test the admissibility of confessions, documentary evidence, real evidence and information subject to privilege of whatever nature.

The law of evidence involves the consideration of both substantive law principles and procedural law principles.[115] Substantive law principles are relevant in order to determine the rights, duties and liabilities in a particular branch of the law,[116] *eg* the law of delict. If a delict is committed, all the elements of a delict, namely conduct, wrongfulness, fault, causation and damage, must be proven in order succeed with a claim for delictual damages. However, procedural law principles determine the way in which evidence relating to such elements must be presented to a court, including who has the duty to adduce evidence, as well as the extent of the right to cross-examine a witness relating to the evidence that he or she has presented, to mention but a few examples.[117] The law of evidence involves a close connection to criminal procedure in particular, as it may be significant to determine whether or not evidence, obtained under certain conditions, is admissible in court.[118] On the other hand, criminal procedure also has a significant bearing on the law of evidence, as it prescribes the

110 Bellengere *et al The Law of Evidence* 33.

111 Bellengere *et al The Law of Evidence* 33-34.

112 Murphy "Teaching Evidence, Proof, and Facts: Providing a background in factual analysis and case evaluation" 2001 51(4) *Journal of Legal Education* 568 570.

113 Murphy 2001 *Journal of Legal Education* 570.

114 The syllabus content of the Law of Evidence module at NMU is provided elsewhere in this discussion.

115 Schwikkard, Van der Merwe, Collier, De Vos, Skeen and Van der Berg *Principles of Evidence* (2005) 1.

116 *Ibid*.

117 *Ibid.*

118 Bekker *et al Criminal Procedure Handbook* 6.

guidelines on how evidence must be obtained in certain situations, *eg* during identification parades and suspect interrogation sessions.[119]

The learning outcomes of the Law of Evidence module, presented at NMU, are as follows:[120]

> "– Investigate the basic principles of the Law of Evidence;
> – Investigate the basic principles relating to certain specific categories of evidence;
> – Evaluate the importance of evidence as part of procedural law; and
> – Apply their knowledge of the Law of Evidence to sets of facts."

The syllabus content is as follows:[121]

1. "Defining 'Evidence'
2. Sources of the Law of Evidence
3. Impact of the Constitution on the Law of Evidence
4. Admissibility and weight of evidence
5. Proof: *prima facie*, conclusive, sufficient
6. Oral evidence
7. Evidence of children
8. Competence and compellability of witnesses
9. Trial stages and the production of evidence
10. Refreshing memory
11. Trial-within-a-trial
12. Documentary evidence
13. Real evidence
14. Finger- and body prints
15. Blood typing- and DNA-evidence
16. *Sui generis*- and electronic communications
17. Judicial Notice
18. Presumptions
19. Admissions
20. Pointing-outs
21. Confessions
22. Relevance
23. Unconstitutionally obtained evidence in criminal cases
24. Similar fact evidence
25. Opinion evidence
26. Expert evidence
27. Character evidence

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119 Bekker *et al Criminal Procedure Handbook* 6. For a comprehensive discussion on whether or not evidence had been obtained in accordance with the provisions of the Constitution, see Steytler *Constitutional Criminal Procedure* 1998 35-40, Bellengere *et al The Law of Evidence* 234-245 and Zeffertt *et al The South African Law of Evidence* 16-28.

120 Nelson Mandela University Faculty Module Guide on the Law of Evidence 2019 7.

121 Nelson Mandela University Faculty Module Guide on the Law of Evidence 7-8.

28. Evidence in sexual offences-related cases
29. Self-corroboration
30. Collateral evidence
31. *Res gestae*
32. Previous consistent statements
33. Hearsay evidence
34. Privilege
35. Entrapment
36. Circumstantial evidence
37. Demeanour
38. Assessment of mendacity"

Once again, a dedicated practical application of the substantive rules is markedly absent. Generally, the Law of Evidence is taught in a classroom setup by employing the Socratic teaching methodology.[122] This means that students only study the theory relating to the abovementioned substantive and procedural law principles with very little or no application of the same to simulated or real life scenarios. Knowing the substantive rules of evidence, and applying such rules to a practical scenario, differ from one another; therefore students should be learning these rules by applying them.[123] Hearsay evidence serves as an example in this regard: the concept can be fairly easily defined, but the proper application is not always clear to students.[124] A more practical way of teaching the concept of evidence will enhance the true significance and meaning thereof in the context of a trial.[125] For example, use two students as role players: student A will "testify" during a "trial" about what student B has "stated" or "done" on a previous occasion. For the sake of completeness, student B can say or do something to concretise this action. This demonstration will make it clear to students that, if A testifies about B's words and/or act or omission, it will generally constitute inadmissible hearsay evidence if B will not later confirm such testimony under oath at the same "trial."[126] This may appear to be a simple exercise, but it is submitted that it will go a long way in ensuring a better comprehension by students about the concept of hearsay evidence. If students correctly understand this foundation of hearsay evidence, it is further submitted that they will have a better

122 See 3 3 1. The case dialogue method is also used – see 3 3 2 for a discussion thereof.
123 Gravett 2017 *Potchefstroom Electronic Law Journal* 8.
124 *Ibid.*
125 *Ibid.*
126 Bellengere *et al The Law of Evidence* 293, 295, 297.

appreciation for the inherent dangers in allowing hearsay evidence, as well as the various statutory criteria that should be considered before allowing it.[127]

Consequently, what is required is a teaching method that can enable students to analyse facts and evaluate an entire case by applying the various rules of evidence.[128] At NMU, the lectures are however presented by providing the students with a variety of practical examples in order to give a more concrete appearance to the substantive law principles and the application thereof. As with the Civil Procedure module, as the module progresses, written questions are provided to the students, relating to particular topics dealt with in class. Students are encouraged to attempt to answer such questions after completion of every topic in order to test their progress and knowledge. An example of these facts and questions is included in Appendix 4 to this research. As Law of Evidence is also a semester module, there is no proper time for weekly tutorials in order to engage with practical application of theory by way of simulations. The enormity of the module content also contributes to time being an issue in this regard. However, as stated earlier,[129] tutorial sessions have been implemented for civil procedure and they are shared with the law of evidence tutorials in that the law of evidence is presented every alternative week. The outbreak of the Covid-19 pandemic however brought an end to such tutorials for the remainder of 2020. As is the case with civil procedure, there is therefore no manner in which to determine the overall success of these tutorial sessions as far as the law of evidence is concerned.

3 3 SOCRATIC AND CASE DIALOGUE TEACHING METHODOLOGIES

3 3 1 SOCRATIC TEACHING METHODOLOGY

The Socratic teaching method is defined as a method "…relating to Socrates, the ancient Greek philosopher (= a person who studies the meaning of life), or to his

[127] The concept of hearsay evidence is governed by s3 of the Law of Evidence Amendment Act 45 of 1988.

[128] Murphy 2001 *Journal of Legal Education* 571.

[129] See 3 2 2 2.

philosophy or method of teaching by dialogue (= discussions) between teacher and student: The Socratic method is extremely effective for the training of attorneys."[130] This is accomplished by way of presenting lectures in a classroom setup, involving very little or no practical training at all. The Socratic teaching methodology has been, since the second half of the 19th century[131] – and still is – applied in universities as an inexpensive form of professional education, especially in law schools with high student numbers.[132] It is characteristic of the legal pedagogy applied in law schools in the United States of America.[133] It is also applied in law schools all over the world, as well as African law schools, including South Africa and Ethiopia.[134] Students are referred to a textbook, legislation and (sometimes) to actual legal documents, or extracts thereof, in order to make some of the theory more concrete. Lectures also involve questions and answers and discussions of topics that are being dealt with at a specific stage of a module.[135] It can thus be said that an exchange of information takes place: law teachers provide students with information and clarify certain concepts that students may not understand, while students ask questions and express their views on certain topics. However, little or no drafting, or other practical work, generally takes place.[136]

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130 Cambridge Dictionary "Socratic" (2020) Socratic | meaning in the Cambridge English Dictionary (accessed 2020-12-10). Also see Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the profession of law: Summary* (2007) The Carnegie Foundation for the Advancement of Teaching 4 in this regard.

131 Regassa "Legal Education in the New Ethiopian Millennium: towards a law teacher's wish list" 2009 2(2) *Ethiopian Journal of Legal Education* 53 56.

132 Barnhizer "The Clinical Method of Legal Instruction: its theory and implementation" 1979 30 *Journal of Legal Education* 67.96; Wizner "The Law school clinic: legal education in the interests of justice" 2002 70(5) Fordham Law Review 1929 1931.

133 Regassa 2009 *Ethiopian Journal of Legal Education* 56.

134 *Ibid.*

135 Regassa 2009 *Ethiopian Journal of Legal Education* 56; Wizner 2002 Fordham Law Review 1931.

136 An example that had has already been discussed earlier, is Civil Procedure. At NMU, this module is presented by way of directing students to fundamental principles in the prescribed textbook, as well as highlighting relevant sections of applicable legislation. Students are also presented with examples of actual pleadings and other relevant legal documents and are also required to be able to draft a selection of these pleadings and documents. Both theory and drafting feature in module assessments. It is however mostly during assessments where drafting takes place, and not on a continuous basis throughout the module. Time constraints play a significant role in this regard. The same can be said about Criminal Procedure. Drafting does however take place during CLE, which is discussed in Chapter 4.

The question that needs to be answered is whether or not drafting and practical training should take place. On the one hand, it is proposed that skills training must take place.[137] Skills, in this regard, refers to practical skills. On the other hand, there are proponents in favour of a purely theoretical and traditional Socratic pedagogy in tertiary legal education.[138]

The Carnegie Foundation for the Advancement of Teaching[139] states that the Socratic method of teaching is the signature pedagogy as far as law is concerned.[140] The law teacher will ask a question, which must then be answered by the students.[141] The question must be formulated in such a way that it will direct the students towards a specific solution which has been tested by the law teacher.[142] The students arrive at the solution by asking the law teacher questions. The answers to these questions must be structured in such a manner as to guide the students towards the solution by enabling them to eliminate all unjustified possibilities and intuitions that have no bases.[143] It can thus be said that the students arrive at the answer to the questions themselves,[144] guided by the responses of the law teacher. This methodology is participatory, because it enables the student to think critically and to effectively present ideas and answers to the applicable question.[145]

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137 Dickinson "Understanding the Socratic teaching method in law school after the Carnegie Foundation's Educating Lawyers" 2009 31(1) *Western New England Law Review* 97 98.

138 *Ibid.*

139 See Silverthorn "Carnegie Report 10 Years later: live like a lawyer" (26 August 2016) https://www.2civility.org/carnegie-report-live-like-lawyer/ (accessed 2019-01-23) with regards to the Carnegie Report and the importance, which is summarised as follows: "Almost ten years ago, a group of non-profit educators released what's come to be known as the law school "Carnegie Report." The report, actually entitled 'Educating Lawyers Preparation for the Profession of Law', was part of a series of professional education reform reports produced by the Carnegie Foundation for the Advancement of Teaching. In all its reports, Carnegie broke down professional education into three apprenticeships – cognitive…, practical…and identity… A successfully integrated curriculum combines all three apprenticeships, intellectual, practical and professional. And that last, the professional identity part, is crucial."

140 Dickinson 2009 *Western New England Law Review* 99.

141 Dickinson 2009 *Western New England Law Review* 105.

142 Dickinson 2009 *Western New England Law Review* 105; McQuoid-Mason 1982 *Journal for Juridical Science* 162.

143 Dickinson 2009 *Western New England Law Review* 105.

144 McQuoid-Mason 1982 *Journal for Juridical Science* 162.

145 *Ibid.*

The Socratic teaching method can sometimes appear to be integrated with the case dialogue teaching methodology, or case dialogue method, which is discussed elsewhere.[146] The reason for this is that, during the case dialogue method, a law teacher may direct certain questions at the students based on their analysis and research with regards to a particular court case. The answer from the students may be met with further questions and answers, which, in effect, reflect the Socratic methodology.[147] The significance thereof is that there is a constant exchange of information between law teacher and student, where practical application of theory and skills training should actually be focused on as far as procedural law modules are concerned. The Socratic and case dialogue methods however remain two different phenomena, theoretically speaking.[148]

The Socratic teaching method has been criticised for having a destructive psychological effect on students, in that students develop a feeling of inferiority to law teachers as far as skills and abilities are concerned.[149] This may result in students having doubts about their own intelligence and personal worth.[150] Furthermore, what is apparent is that there is no provision for practical application of theory.

3 3 2 CASE DIALOGUE TEACHING METHODOLOGY

As far as the teaching of law is concerned, the case dialogue method,[151] also referred to as the case method, is another teaching methodology.[152] This is a student centered teaching methodology that can equip students with skills relating to critical thinking, communication and interpersonal skills.[153] It was developed in the previous century by Professor Christopher Columbus Langdell of the Harvard Law School faculty with

146 See 3 3 2.

147 McQuoid-Mason 1982 *Journal for Juridical Science* 164.

148 University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method.

149 McQuoid-Mason 1982 *Journal for Juridical Science* 164.

150 *Ibid*.

151 Also see McQuoid-Mason 1982 *Journal for Juridical Science* 161, 164-165 in this regard.

152 *Ibid.*

153 Schwartz "Teaching methods for case studies" (2014) https://www.ryerson.ca/content/dam/learning-teaching/teaching-resources/teach-a-course/case-method.pdf (accessed 2019-07-08).

the goal of revolutionising American legal education.[154] The basis of this methodology was that students would be required to read appellate cases in order to see what the courts found in the past, with the view to predict what the courts may do in future.[155] Two elements are combined when using this method: a case, as well as a discussion of such case.[156] Students get the opportunity to engage with complex real world problems, necessitating them to take action by applying their theoretical knowledge to the problem at hand.[157] Students may also have to do research in order to find adequate information on how to solve the problem.[158] This methodology can also be used to teach some real world and professional skills, as students will have to manage their time in completing these assignments, as well as to organise the content of their assignments.[159] They will further need to collaborate with one another and write and communicate effectively in order to complete the assignments.[160] Since all these aspects occur in practice on almost a daily basis, this can be seen as an attempt to bridge the gap between theory and practice.[161] These are the skills that practising lawyers are looking for in the context of client representation.[162]

How does this method operate? In order to answer this question, the structure and content of the methodology needs to be analysed and evaluated. Students will solve problems by way of analysing court decisions and legislative rules.[163] The work is done by the students: they must analyse the various relationships and events in the case, identify options in law available to the parties, evaluate the best option(s) in the

154 Wizner 2002 Fordham Law Review 1930.

155 *Ibid.*

156 What is teaching with the case method? https://serc.carleton.edu/sp/library/cases/what.htm (accessed 2019-07-08)

157 Dickinson 2009 *Western New England Law Review* 99; What is teaching with the case method? https://serc.carleton.edu/sp/library/cases/what.htm; University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method. Students get the opportunity to apply the law to factual scenarios, although such scenarios had been edited to some extent.

158 Dickinson 2009 *Western New England Law Review* 99.

159 *Ibid.*

160 Dickinson 2009 *Western New England Law Review* 99; What is teaching with the case method? https://serc.carleton.edu/sp/library/cases/what.htm.

161 Schwartz https://www.ryerson.ca/content/dam/learning-teaching/teaching-resources/teach-a-course/case-method.pdf; Dickinson 2009 *Western New England Law Review* 99.

162 Dickinson 2009 *Western New England Law Review* 100.

163 McQuoid-Mason 1982 *Journal for Juridical Science* 164.

circumstances of the case, as well as predict the outcome of the application of such option(s).[164] Students therefore develop a sense of how legal practitioners argue and eventually arrive at an acceptable solution to the problem at hand.[165] They also learn how to defend certain ideas and choices.[166] It has been stated that the case dialogue method is a very good way of "learning-by-doing", as it influences the manner of thinking and disposition of students.[167] In this context, it is appropriate to say that the case dialogue method successfully helps students to "think like lawyers."[168] Students can appreciate the lawyer's role in a dialogue based setting and also learn to understand the law.[169] This method therefore appears to be an improvement on the Socratic teaching method, as it encourages active participation by the students,[170] thus removing the notion of inferiority and self-doubt by students *vis-à-vis* their law teachers.[171]

The case dialogue methodology is however not always applied as such. Law teachers will sometimes teach according to the teaching method they appreciated most when they were students.[172] It can therefore happen that a law teacher will mention a particular case, or refer students to read a particular case, and thereafter highlight how relevant legal principles had been applied in such case. This takes the responsibility away from the students to find the law and look for ways in which to apply it. They must now merely study the law. In order to make a success of the actual case dialogue method, there must be true dialogue between the law teacher and students in the sense that discussions and conversations take place[173] – seemingly combining the

164 What is teaching with the case method? https://serc.carleton.edu/sp/library/cases/what.htm.

165 Dickinson 2009 *Western New England Law Review* 105, 106.

166 Dickinson 2009 *Western New England Law Review* 106.

167 Dickinson 2009 *Western New England Law Review* 107.

168 See Dickinson 2009 *Western New England Law Review* 102, more specifically the response of a student, Ann Marie Pedersen, with regards to the Socratic teaching method, in this regard; University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method; Silverthorn https://www.2civility.org/carnegie-report-live-like-lawyer/.

169 Dickinson 2009 *Western New England Law Review* 111.

170 McQuoid-Mason 1982 *Journal for Juridical Science* 165; University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/ socratic-case-method.

171 See 3 3 1 in this regard.

172 Dickinson 2009 *Western New England Law Review* 108.

173 Dickinson 2009 *Western New England Law Review* 109-110.

case dialogue method with the Socratic method. It will ensure that students realise that they have a role in the process of and conversation about the law.[174]

Since the case dialogue method can be time consuming,[175] as well as leave students with a big responsibility to study the majority of the work on their own,[176] it is generally easier and more practical to discuss a particular topic in class and allow for questions from students for the purpose of clarification. It will also decrease the risks that some important topics will go by untaught[177] and consequently not fully appreciated by the students. This is primarily how the procedural law modules are taught at NMU. It ensures that the maximum amount of time can be directed towards covering the large amount of content in the respective modules. However, apart from applying legal principles to hypothetical factual scenarios, there is otherwise no practical exercises that form part of this teaching methodology.

3 3 3 EFFECTIVENESS OF THE SOCRATIC AND CASE DIALOGUE TEACHING METHODOLOGIES RELATING TO PROCEDURAL LAW MODULES

The point of departure, in considering the success of these teaching methodologies in the context of this research, is illustrated by the following question: do the Socratic and the case dialogue teaching methodologies assist the student to be "client ready" and, consequently, ready to enter into legal practice?[178] In order to answer this question, an evaluation of the results of these teaching methodologies is required. From the abovementioned discussion, it is clear that, although real and complex problems are used in the case dialogue method, and although law teachers discuss topics with students during classroom sessions, this method of teaching remains mainly theoretical. The Carnegie Foundation has proposed significant curricular and pedagogical changes to American legal education for this reason, aiming primarily at

174 Dickinson 2009 *Western New England Law Review* 112.
175 What is teaching with the case method? https://serc.carleton.edu/sp/library/cases/what.htm.
176 *Ibid.*
177 *Ibid.*
178 See Dickinson 2009 *Western New England Law Review* 100 in this regard.

more real world training, skills training and more effective teaching methodologies.[179] Following the publication of the Carnegie Report in 2007,[180] Holmquist posed the following question to a selection of legal practitioners, judges and mediators, who acted as the Law Professional Skills Advisory Board of the UC Berkeley School of Law: "What lawyering skills don't law schools teach that we should?"[181] The main suggestions from these participants can be summarised as follows:

(a) law students must learn to recognise the complexity and desired outcomes of their clients' stories;[182]
(b) law students must have a broad historical and contemporary knowledge about the roles of legal practitioners in relation to their clients, different institutions and in society;[183] and
(c) law students must develop the necessary confidence and judgment emanating from experience.[184]

Stuckey asks the following question, which relates to these suggestions:

> "Have we really tried in law school to determine what skills, what attitudes, what character traits, what quality of mind are required of lawyers? Are we adequately educating students through the content and methodology of our present law school curriculums to perform effectively as lawyers after graduation?"[185]

As already stated,[186] legal practitioners have remarked that law students, upon exiting law school, lack the basic practical skills that would enable them to make a good start in practice. It has been stated that, until the legal profession has a clear perspective on the answer to the abovementioned question by Stuckey, as well as possibly to the

179 Klaasen 2012 *International Journal of Humanities and Social Science* 306.

180 See fn 139 above for a summary of the basis of the Carnegie Report.

181 Holmquist "Challenging Carnegie" 2012 61(3) *Journal of Legal Education* 353 353.

182 Holmquist 2012 *Journal of Legal Education* 353.

183 Holmquist 2012 *Journal of Legal Education* 354.

184 *Ibid.*

185 Stuckey, Barry, Dinerstein, Dubin, Engler, Elson, Hammer, Hertz, Joy, Kaas, Merton, Munro, Ogilvy, Scarnecchia and Schwartz *Best practices for legal education: a vision and a road map* (2007) vii.

186 See Chapter 1.

comments of the members of the UC Berkeley Law School Advisory Board, legal education, with the aim to further the legal profession as a whole, will be aimless.[187]

The initial question can be rephrased as follows: are law schools, using the Socratic teaching method and/or case dialogue methodologies, training law graduates in such a manner that will enable them to enter the legal profession with the required legal knowledge, professional mindset and appropriate practical skills? It is submitted that the answer to this question is, without any doubt, in the negative. An academic, who remains anonymous, has commented that the current 4 year LLB curriculum is producing "legal barbarians" who might be trained in law, but who are not equipped to appreciate the true functioning of a lawyer with regards to society and the existing power dynamics.[188] Wade agrees, stating that emphasis on these teaching methodologies results in the "…old Langdellian model of a law school – segregated physically, lost in rarefied appellate casebooks, with little knowledge, skill, resources or desires to achieve multiple levels of competency in students."[189] It is submitted that the "power dynamics", as referred to earlier, is an apt summary of the elements highlighted by the UC Berkeley Law School Advisory Board. It also aptly relates to the question asked by Stuckey. Further to this, Wizner correctly states that reliance cannot be placed on the case dialogue methodology, as students are constantly referred to past cases in order to predict what may happen in the future, instead of being taught the underlying methods and principles of legal thought that brings about legal decisions.[190] This is especially important, because the law does not remain static, but is constantly changing and evolving in ways that cannot be predicted by way of studying appellate decisions of the past.[191]

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187 Stuckey *et al Best practices for legal education* vii.

188 Du Plessis "Designing an appropriate and assessable curriculum for clinical legal education" 2016 49(1) *De Jure* 1 2.

189 Wade "Legal skills training: some thoughts on terminology and ongoing challenges" 1994 5(2) *Legal Education Review* 173 182. The term "Langdellian" refers to professor Christopher Columbus Langdell – see 3 3 2 in this regard.

190 Wizner 2002 Fordham Law Review 1931.

191 *Ibid.*

How should law graduates be trained in order to enter legal practice with adequate knowledge and practical skills? A possible point of departure is the realisation that the skills and values of competent legal practitioners are developed in a continuous manner: it commences before entry into law school[192] and continues for the duration of the legal practitioner's professional career, with its most critical and formative stage in the course of the law school years.[193] Therefore, the training provided at university level should be of such a nature that the student is shaped into a competent and professional thinking legal practitioner who can render quality legal services to the public.[194] Kruse shares this point of view in stating that "…the basic programme of legal education needs to be restructured to move students in an orderly way through the acquisition of basic legal knowledge, essential lawyering skills, and underlying professional values."[195] Whitear-Nel and Freedman state that "[t]he way lawyers conceive of themselves as legal practitioners, and their role in society, is profoundly affected by their experience of legal education. It is a truism that "the law is what lawyers are, and the law and lawyers are what the law schools are…"[196]

It is submitted that law schools cannot teach students everything that they need to know about the law and legal practice.[197] However, law schools can lay a proper foundation on which legal practice can build after the student's exit from university. Stuckey correctly identifies this foundation as including "…an integrated combination of substantive law, skills, and market knowledge…"[198] He further correctly remarks, in this regard, that "…legal education is to prepare law students for the practice of law

192 In this regard, the author probably refers to whether or not a particular person possesses traits of professionalism in very early stages of his or her life. Such traits are then developed during his or years of legal studies and during the years of legal practice.

193 Stuckey *et al Best practices for legal education* vii.

194 See Lamparello "The integrated law school curriculum" 2015 *SSRN Electronic Journal* 1 4. He suggests that "…the curriculum should effectively integrate doctrinal, practical skills, and clinical instruction to create a competency-based curriculum in which students practice like lawyers."

195 Kruse 2013 45 *McGeorge Law Review* 8.

196 Whitear-Nel *et al* 2015 *Fundamina* 237.

197 Also see Stuckey *et al Best practices for legal education* 7.

198 Stuckey *et al Best practices for legal education* viii. Also see Sullivan *et al Educating Lawyers* 8 in this regard.

as members of a client centered public profession."[199] In this context, law schools should consider the following approach:

> "A more adequate and properly formative legal education requires a better balance among the cognitive, practical and ethical-social apprenticeships. To achieve this balance, legal education will have to do more than shuffle the existing pieces. It demands their careful rethinking of both the existing curriculum and the pedagogies law schools employ to produce a more coherent and integrated initiation into a life in the law."[200]

It however appears that this desired outcome of legal education, at university level, is not fully appreciated. There could be many reasons for this, including the following:

(a) law schools do not have staff members who are experienced in training students for legal practice;[201]
(b) law schools do not include skills training, legal ethics and legal professionalism in their curricula, but focus solely on instilling substantive law with the students;[202] and
(c) law schools have practical programmes, which include basic elements of skills training, ethics and legal professionalism in their curricula, but such programmes are presented too late during the years of study and only for a short duration.[203]

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199 *Ibid.*

200 Stuckey *et al Best practices for legal education* 4.

201 In this regard, see Vukowich 1971 *Case Western Reserve Law Review* 143, where it is stated that "…legal educators are persons who – though they possess the credentials to practice law – have decided that law practice is not their "cup of tea." One could thus assume that they see more merit in the intellectual than in the practical. Among most law school faculties, professional experience ranks relatively low among the qualifications for faculty employment. Consequently, many legal educators have little practical experience themselves and are unable or disinclined to teach practical matters. Since the materials which are emphasised in any curriculum are those which the educators are best able or most eager to teach, the faculty's paucity of interest and experience in practice is a prime cause for the lack of any meaningful practical training in law school." Also see Marson, Wilson and Van Hoorebeek "The necessity of clinical legal education in university law schools: a UK perspective" August 2005 *Journal for Clinical Legal Education* 29 30 in this regard.

202 Kruse 2013 45 *McGeorge Law Review* 8.

203 These "practical programmes" refer mainly to CLE. At NMU, North-West University, University of Johannesburg and the University of Pretoria, Clinical law is presented in the final academic year and involves, *inter alia*, practical sessions at the university law clinic. See Nelson Mandela University LLB-curriculum (2019) https://www.mandela.ac.za/academic/Courses-on-offer/Qualification-Details.aspx?appqual=LL&qual=54100&faculty=1500&ot=A1&cid=72 (accessed 2019-01-22), North West University LLB-curriculum (undated) http://law.nwu.ac.za/sites/law.nwu.ac.za/files/files/Law/The%20LLB%20 curriculum.pdf (accessed 2019-01-22), University of Johannesburg LLB-curriculum (2018) https://www.uj.ac.za/faculties/law/Documents/FACULTY%20REGULATIONS%2001%20AUGUST%202018.pdf (accessed 2019-01-22) and University of

Accordingly, the end result of a successfully completed LLB degree is a graduate who does not possess a proper understanding of real life factual situations or how to interact with them.[204] Although law teachers are good at utilising the casebook method and conventional doctrinal lecture methods, they do not teach students how to engage the daily activities of a legal practitioner,[205] which include engaging with civil procedure, criminal procedure and aspects of evidence in a practical way. The case dialogue methodology emphasises neatly edited cases, but excludes complicated and confusing human facts that legal practitioners so often have to deal with.[206] The work is therefore compartmentalised in "neat and artificial categories" for students.[207] This is very different from practice, where facts must be collected, collated, analysed, verified and expressed in various forms, including by way of correspondence and as part of arguments during litigation.[208]

Having said this, Schultz asks the following question: "Don't educators have a primary obligation to consider what lawyers should know as members of a privileged profession, instead of what the bar wants them to know in order to succeed in practice?"[209] Chaskalson states that "[l]aw graduates emerge from the university with a theoretical training, but without any basic knowledge of, or practical training directed specifically to, the practice of law."[210] Some practical aspects, *eg* drafting and consultation, are occasionally employed in selected doctrinal modules, but not very often, and are more generally stand-alone modules at most universities.[211] There is thus no general integration of practical aspects into all doctrinal modules and

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Pretoria LLB-curriculum (2019) https://www.up.ac.za/media/shared/10/ZP_Files/fb-law-2019-2020.zp165426.pdf (accessed 2019-01-22) in this regard. Some programmes may only be for a semester, but even where it is for a year, it does not present sufficient time in which students can acquire sufficient practical skills.

204 Vukowich 1971 *Case Western Reserve Law Review* 140-141.

205 Holmquist 2012 *Journal of Legal Education* 355.

206 Holmquist 2012 *Journal of Legal Education* 357.

207 McQuoid-Mason 1982 *Journal for Juridical Science* 161.

208 *Ibid.*

209 Schultz "Teaching 'Lawyering' to First-Year Law students: An experiment in constructing legal competence" 1996 52(5) *Washington and Lee Law Review* 1643 1662.

210 Chaskalson "Responsibility for practical legal training" 1985 (March) *De Rebus* 116 116.

211 Holmquist 2012 *Journal of Legal Education* 356.

consequently no opportunity for the students to observe and experience the law in action during the greatest part of their legal studies. Law schools therefore produce law graduates who lack the required practical skills in order to practice as competent legal practitioners.[212] At the LLB Summit of 2013, it was repeated that law schools are not producing law graduates who can further a justice and rights culture.[213] In this regard, it must be made clear that the aim of this research is not to discredit the competency of law schools in any way.[214] Law schools do contribute to students acquiring some essential skills and required knowledge, which are important for legal practice.[215] Students are being taught to "think like lawyers",[216] but are not necessarily instilled with the competency to execute their knowledge in practical situations. In this regard, Wizner states that "…learning to think like a lawyer is only part of what a law student needs to learn in order to be a well-educated lawyer."[217] Law schools are

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212 Vukowich 1971 *Case Western Reserve Law Review* 141; Holmquist 2012 *Journal of Legal Education* 356.

213 Whitear-Nel and Freedman 2015 *Fundamina* 237. Also see 239 in this regard, where the role of higher education, with regards to societal development and transformation, is discussed. It is stated that, at a 2010 summit, held by the Department of Higher Education and Training, it was agreed that it was the duty of higher education to produce socially responsible graduates who are well aware of their roles in society. They must further be made aware that they are leaders of economic development and social transformation. It was further agreed that the curricula of universities should therefore endorse social relevance, as well as enable and motivate students to become socially engaged leaders and citizens. It is submitted that experiential learning, especially at law clinics, can significantly enhance the teaching and learning of law students in this regard.

214 In this regard, also see Kennedy "How the law school fails: a polemic" 1971 1(1) *Yale Review of Law and Social Action* 71 71. He states the following: "Let me begin with a brief statement of the values to which I appeal. First, I am very glad to be a member of the community of the Law School; my motives in writing are anything but destructive. I would like to do something to improve our lives as people living together; if the critique is at times bitter, it is with that hope. It would not have occurred to me to write this paper if I did not think I could appeal to the sense of moral obligation which underlies the concepts of "teacher" and "lawyer," and to the urge for craftsmanlike "effectiveness" combined with social responsibility which brings most students here."

215 Stuckey *et al Best practices for legal education* 7.

216 Boon 2002 *Legal Ethics* 34; Sullivan *et al Educating Lawyers* 5. Sullivan *et al Educating Lawyers* at 6, states that "[m]ost law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients." In the same context, it is stated that "…law school's typically unbalanced emphasis on the one perspective can create problems as the students move into practice." The case dialogue method also contributes to the students' abilities to "think like lawyers" – see University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method.

217 Wizner 2002 *Fordham Law Review* 1931.

however not generally committed to preparing law students for legal practice.[218] The LLB curriculum thus needs to be developed in order to accommodate the more adequate and professional preparation of law students for legal practice. As the procedural law modules can be said to lie at the heart of legal practice,[219] this is an important development that must take place. Consequently, it is submitted that the answer, to the question posed by Schultz, should therefore be that legal educators should ensure that legal education, especially with regards to the procedural law modules, should be a combination of what lawyers should know, as well as what the bar is expecting.

Therefore, on their own, both the Socratic and case dialogue teaching methodologies are not suitable for teaching procedural law modules in a manner that will produce better graduates for legal practice.

3 4 SHORTCOMINGS OF THE CURRENT CURRICULUM AND TEACHING METHODOLOGIES

3 4 1 GENERAL

From the aforementioned discussion, it already became clear that the current learning outcomes and syllabi content, as well as teaching methodologies relating to the procedural law modules, are not adequate in all respects for preparing graduates for entry into legal practice. Something more is required. This section highlights a few important issues that require revisiting as well as restructuring. In this section, the aim is not to propose individual solutions to the problems that are identified and so creating the impression that a more practical approach to teaching is not necessary. The aim is merely to identify problematic areas that require improvement, as well as to suggest how it can be improved. The improvements can be attempted on wholesale scale by

218 *Ibid.*

219 In this regard, see McQuoid-Mason 1982 *Journal for Juridical Science* 160, where he states that "[c]ivil procedure is said to lie at the heart of the law." The same can be said about Criminal Procedure and the Law of Evidence. In any litigious case, procedure and evidence play a central role.

implementing a more practical teaching methodology, *ie* CLE, that is discussed elsewhere in this research.[220] The issues, mentioned in this section, do not constitute a *numerus clausus*.

3 4 2 NEED FOR TUTORIALS

It has already been indicated that each of the procedural law modules at NMU is presented for one semester only.[221] The syllabus content of each module is also very large. All available time during a semester is utilised towards working through the prescribed syllabus. There is consequently almost no time for tutorial sessions. From 71 law lectures being presented in a full week,[222] only 16.43% of such lectures comprise of tutorials. This percentage refers to tutorials for all law modules and not only to a specific academic year. The current tutorial sessions for civil procedure and law of evidence, as already mentioned, are included in this percentage and only include one double lecture per week. This means that, in a given month, there will only be two tutorials for Civil Procedure and two tutorials for the Law of Evidence. There are no practical sessions to be included here as far as the procedural law modules are concerned.[223] This can be compared to another discipline, namely Biochemistry, Chemistry and Microbiology in the Faculty of Science at NMU, where 16.90% out of 71 lectures per week comprise of tutorials, but an additional 42,25% comprise of practical sessions.[224] This percentage is however only applicable to first year students and furthermore only to the indicated discipline. What is further apparent from this science programme is there are plenary sessions for some modules, followed by either a tutorial and a practical session, or by both a tutorial and a practical session for the same modules. The conclusion is therefore that legal

220 See Chapter 4.

221 With the inception of 2020, a new curriculum will be adopted by the NMU Faculty of Law. The procedural law modules will all be presented in the 3rd academic year of studies, meaning that Civil Procedure, Criminal Procedure and the Law of Evidence will be taught for the first time in 2022 as part of this new curriculum. Furthermore, these modules will all be presented as full year modules and no longer as semester modules.

222 The 2020 first semester lecture timetable of the Faculty of Law have been consulted in this regard.

223 The only practical sessions are that pertaining to the Legal Practice module, which are conducted at the NMU Law Clinic.

224 The 2019 first semester lecture timetable of the Faculty of Science at NMU, more specifically the Department of Biochemistry, Chemistry and Microbiology, have been consulted in this regard.

training should include more tutorial sessions in their academic programme, as well as practical sessions. Time for legal education and training should therefore be carefully planned and arranged in order to provide sufficient time for tutorials and practical sessions. The mentioned science programme clearly shows that this is possible.

Tutorial sessions could be used in order to conduct contact sessions with students outside of conventional lecture timeslots in order to revise the theory dealt with during the lecture(s) preceding such tutorial. In doing so, the students can reflect on what they did not understand during the lecture and the law teacher and/or the tutorial leader can answer their questions. The aim of the tutorials should not be to re-lecture the students, but to discuss problems and uncertainties emerging from a particular lecture. Tutorials can thus be utilised to correct any misconceptions that arose during lectures or as a result of the context of prescribed or other textbooks.[225] It could also be utilised for teaching practical application of the theory. It is submitted that, in the context of this study, this should be the most important role of a tutorial as far as procedural law modules are concerned. Where the topic of a particular lecture had been, *eg* the summons and particulars of claim in Civil Procedure, students can be taught how to draft such documents during a tutorial. The same principle applies to work dealt with during Criminal Procedure and Law of Evidence lectures and tutorials. The challenge however is to find time, and possibly also venues, for the presentation of such tutorials. However, it is submitted that, should the university see the need to invest in tutorials, they should plan for the availability of more venues where such tutorials can be presented. The lecture timetable is also congested. Other modules also utilise tutorials that can affect the student's time to attend tutorials relating to the procedural law modules. Furthermore, unexpected and expected occurrences like student protests, loadshedding[226] and public holidays also have an impact on the time

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225 Wood "Tutorials and small group teaching" 1988 16(1) *Biochemical Education* 13 13.

226 For a more comprehensive explanation about loadshedding, see Eskom http://loadshedding.eskom.co.za/LoadShedding/Description. According to Dictionary.com (undated) https://www.dictionary.com/browse/load-shedding (accessed 2019-07-22), loadshedding refers to "the deliberate shutdown of electric power in a part or parts of a power-distribution system, generally to prevent the failure of the entire system when the demand strains the capacity of the system." Loadshedding has been periodically implemented in South Africa since 2008 in an attempt to alleviate the strain that the electricity grid is taking as a result of defective power stations. This may negatively

available for tutorials. Tutorials are also labour intensive,[227] as it would be desirable to work with smaller groups of students. This may result in more than one tutorial session being presented, due to the large numbers of students who are enrolled for certain modules, including the procedural law modules and CLE.[228] Time therefore becomes a major factor to deal with.[229]

Whatever the case may be, tutorials can greatly benefit the teaching of the procedural law modules in a more practical way and there must be an attempt to schedule designated times for them. It is suggested that law schools should evaluate their modules in order to ascertain in which modules tutorials can make an impact on preparing students for legal practice and prioritise the scheduling of tutorials for those modules. The procedural law modules should undoubtedly rank top of the priority list. Another challenge may be that attendance of tutorial sessions may not be compulsory for some of the modules concerned. It is suggested that, because of the importance it holds for practice, tutorials for procedural law modules must be compulsory to attend. As tutorials are actually extensions of particular lectures, it is suggested that lectures for procedural law modules should also be compulsory to attend.[230] If the primary law teacher is not always available to present tutorials, senior students, Masters students or other contract staff can assist with the presentation thereof.[231]

3 4 3 EFFECTS OF LARGE STUDENT NUMBERS

The Socratic teaching method is beneficial in teaching large student numbers.[232] Large student numbers is currently a reality at almost all law schools in South Africa. This presents problems, as it may not be possible to conduct any or adequate practical

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influence the presentation of lectures and tutorials, due to the need for lights and electronic equipment, to name but a few items.

227 Wood 1988 *Biochemical Education* 14.

228 See 3 4 3 with regards to large student numbers.

229 Wood 1988 *Biochemical Education* 14.

230 Lectures for procedural law modules at NMU are not compulsory to attend.

231 See Taslitz *Strategies and Techniques for teaching Criminal Law* 35 in this regard. He indicates that upper class students are often willing to present tutorials gratuitously and that they are left with a feeling of satisfaction from helping others. They also seem to remember the information better for purposes of the upcoming bar examination.

232 See 3 3 1 in this regard.

methods in order to teach students.[233] The availability of venues, large enough to accommodate all the students, may also be problematic. Furthermore, large student numbers may also have an impact on student behaviour and discipline in class, lecture organisation and time management.[234]

It is much easier for a law teacher to get tasks completed, review such tasks, as well as to respond to queries within a particular lecture period when dealing with a small number of students.[235] Communication between law teacher and student, as well as between student and student, also becomes easier in a smaller class.[236] This is important in the context of law, and especially the procedural law modules, where communication plays a pivotal role. Students now have the opportunity to become familiar with speaking and expressing themselves. This may have been a problem in a larger class, where students might be too shy to speak in the presence of a large group of other students. Law teachers can also now ask more challenging questions, with group work and discussions in that regard following with more ease.[237] This can lead to students learning to support one another and becoming a community in class, resulting in a positive milieu and ethos, as well as in higher learning expectations.[238] In the case of small classes, there is also more physical space in a particular classroom,[239] creating the opportunity to compose a setup like a makeshift court room in order to facilitate mock trials or moot courts. This will make lectures more interesting and eliminate boredom from setting in amongst students.[240] Setups like these are also

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233 Also see Du Plessis "Clinical Legal Education: the challenge of large student numbers" 2013 38(2) *Journal for Juridical Science* 17 18-19 in this regard where it is stated that, even for CLE, large student numbers is a challenge. For clinical law modules, the ideal staff-student ratio should be between 1:7 and 1:12. According to the UK and US models, ratios of 1:12 and 1:8 are suggested respectively. It must be remembered that these ratios are suggested ratios as far as CLE, and not procedural law modules, are concerned. Wood states that the ideal staff-student ration would be 1:10, and, although this statement was made in the context of biochemistry, it falls within the ambit of the aforementioned ratios, clearly showing what an ideal staff-student ratio should be – see Wood 1988 *Biochemical Education* 14. It is submitted that it would however be easier to work with smaller student numbers even as far as procedural law modules are concerned.

234 McGlynn "The pros and cons of small group teaching" (13 June 2018) http://www.sec-ed.co.uk/best-practice/the-pros-and-cons-of-small-group-teaching/ (accessed 2019-07-22).

235 *Ibid.*

236 *Ibid.*

237 *Ibid.*

238 *Ibid.*

239 *Ibid.*

240 *Ibid.*

important for teaching procedural law modules, as students will have the opportunity to get a glimpse of conducting litigation in a court room. It is submitted that this experience will further contribute to the positive ethos and higher learning expectations among students. A small group of students will also enable the law teacher to handle differentiation better by being more familiar with the capabilities of each student individually and adapting learning outcomes and targets accordingly.[241]

When conducting practical training methods, students are trained to be reasonably fit for entry into practice after graduation. However, with the current large student numbers, it can be questioned as to where all the students are going to secure employment. This is an important consideration, taking into account the exceptionally high unemployment statistics that are currently a reality in South Africa.[242] Law schools must therefore refrain from contributing towards the unemployment rate in the legal profession. It is however not in any way suggested that law schools are doing this, either without realising it, or on purpose. A suggestion in this regard is to restrict the intake of the number of law students at first year level. However, a proposed intake number falls outside the ambit of this study. A further suggestion is to ensure that both the practical and theoretical training of law students is of such high quality that students become high in demand after graduation as far as employability is concerned.[243] The latter point will however be relevant as long as there are employment opportunities available. Employing adequately trained students may result in students, who have a lot to contribute professionally towards legal practice, securing employment.[244]

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241 *Ibid.*

242 For precise statistics on employment and unemployment rates in South Africa, see Statistics South Africa "Quaterly Labour Force Survey: Quarter 1: 2019" (14 May 2019) http://www.statssa.gov.za/publications/P0211/P02111stQuarter2019.pdf (accessed 2019-07-12). In the second quarter of 2019, the unemployment rate reached a staggering 29%, the worst since 2008 – Omarjee "SA unemployment rate jumps to 29%, the worst since 2008" (30 July 2019) https://www.fin24.com/Economy/just-in-sa-unemployment-rate-jumps-to-29-the-worst-since-2008-20190730?fbclid=IwAR1wBLFfbhUDbHZFJtrg7kcyln7tGExGi1O10uYA3ygaAS-QL6OMJ_BB3tZM (accessed 2019-07-30). It has been recorded that 6.7 million people, between the ages of 15 and 64 are unemployed.

243 See specifically 5 2 2 3 and 5 3 6 2 with regards to "employability."

244 See 5 2 2 3 in this regard.

3 4 4 EFFECTIVE COMMUNICATION – DRAFTING AND VERBAL SKILLS

Noone and Dickson state that, in order for a legal practitioner to be considered a professionally responsible person, frequent, open and clear communication with a client is, *inter alia*, necessary.[245] Legal practitioners however also communicate with other relevant parties apart from their clients.[246] Communication can take place either by way of physical conversations between parties, or in writing by way of drafting necessary and applicable documents. The importance of this resides in the fact that persuasion is at the heart of a lawyer's work.[247] Legal representatives must use their skills in order to persuade various parties regarding their point of view in a particular case. Communication skills and literacy are set as a qualification standard for the LLB degree by the Council for Higher Education.[248] This standard provides the following:[249]

> "The graduate is proficient in reading, writing, comprehension and speaking in a professional capacity, to specialist and non-specialist alike, and is therefore able to:
> (a) communicate effectively by choosing appropriate means of communication for a variety of contexts;
> (b) demonstrate effective oral, written, listening and non-verbal communication skills;
> (c) apply communication skills to situations and genres relevant to professional practice; and
> (c) engage with diverse audiences as identified by culture, language and gender."

It has already been emphasised that drafting is of paramount importance for legal practice. Drafting is an important and everyday means of communication and students should therefore undergo adequate practical training in drafting applicable legal

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245 Hyams 2008 *Journal of Clinical Legal Education* 22; Swanepoel, Karels and Bezuidenhout "Integrating theory and practice in the LLB curriculum: some relfections" 2008 (Special Issue) *Journal for Juridical Science* 99 103. Communication, in this regard, consists of both writing and verbal skills.

246 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* (2018) 365.

247 Van Blerk *Legal Drafting – Civil Proceedings* (1998) v.

248 Snyman-Van Deventer and Van Niekerk "The University of the Free State Faculty of Law Write/Site intervention – supporting broader access with the skills for success" 2018 43(1) *Journal for Juridical Science* 39 42.

249 Council on Higher Education "Qualification Standard for Bachelor of Laws (LLB)", 2015, Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 42.

documents and correspondence.[250] Communication, whether verbal or in writing, is the lifeblood of a lawyer's profession[251] and lawyers should therefore possess effective communication skills.[252] Law schools should therefore ensure that communication skills are laid down as a firm foundation as from the first academic year.[253] It cannot be done only for one semester and furthermore on a small scale as is currently the situation with the procedural law modules at NMU.[254] Drafting needs to be repeated often in order for students to fully appreciate the importance thereof.[255] Drafting – and writing in general – enhances thinking, and thinking enhances writing.[256] This will benefit students in the context of procedural law modules, as they will have the

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250 In this regard, see McQuoid-Mason "Can't get no satisfaction: the law and its customers: are universities and law schools producing lawyers qualified to satisfy the needs of the public?" 2003 28(2) *Journal for Juridical Science* 199 200, where it is stated that law schools will probably agree that it is not within the ambit of their duties to, *inter alia*, train students to communicate either verbally or in writing. This point of view of law schools can be criticised, because of the importance of communication in the everyday life of a lawyer.

251 McQuoid-Mason 2003 *Journal for Juridical Science* 202; Wimpey "Drafting letters" in De Klerk (ed) *Clinical Law in South Africa* 2ed (2006); Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 365. See Stuckey *et al Best practices for legal education* 78 with regards to a survey of the Arizona Bar done in 2005 by Gerry Hess and Stephen Gerst. Lawyers and judges were requested to assess the importance of a variety of professional skills in relation to the success of an associate legal practitioner at the end of the first year of practice in a small general law firm. The results were, *inter alia*, the following: written communication = 96%; drafting legal documents = 92%; listening skills = 92%; verbal communication = 92%; interviewing and questioning = 87%; counselling = 58% and negotiation = 57%. The important role, that communication skills play in everyday legal practice, can clearly be seen from these statistics.

252 Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 293; Snyman-Van Deventer and Swanepoel "Teaching South African law students (legal) writing skills" 2013 24(3) *Stellenbosch Law Review* 510 510. Snyman-Van Deventer *et al* correctly point out that legal writing skills is critical for legal practice – see 511.

253 McQuoid-Mason 2003 *Journal for Juridical Science* 202; Stuckey *et al Best practices for legal education* 77. The American Bar Association (hereafter referred to as the "ABA") requires law schools to ensure that students acquire substantial tuition in, *inter alia*, verbal communication and writing in a legal context, including at least one rigorous writing experience in the first academic year of studies and at least another rigorous writing experience after the first academic year of studies. Also see Lamparello 2015 *SSRN Electronic Journal* 25 in this regard. He states that comprehensive legal writing training spans the entire curriculum. Also see Wimpey "Legal Writing one – Writing letters" in Stilwell *Clinical Law in South Africa* 91. Snyman-Van Deventer and Swanepoel "The need for a legal-writing course in the South African LLB curriculum" 2012 33(1) *Obiter* 121 122 states that legal writing is developed and improved over many years of practice and that law schools and the legal profession should accept joint responsibility for that.

254 See Swanepoel *et al* 2008 *Journal for Juridical Science* 103 in this regard. Very little attention is given to writing skills in all theory modules in law schools.

255 See Redding "The counterintuitive costs and benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 58 in this regard. He states that, in order to become proficient in the profession, one needs to perform work "…over and over again, on a daily basis…as part of the process of being socialised into the profession." Teaching effective communication skills therefore need to permeate through the LLB curriculum.

256 Lamparello 2015 *SSRN Electronic Journal* 26.

opportunity to draft real life documents[257] which constitutes an important drafting exercise for them. Despite the critical role that legal writing plays in legal practice, a dedicated core legal writing module has been largely absent from the LLB degree.[258] This is concerning, because the ability to prepare legal documents for submission to court and other parties is an essential skill, especially for civil court legal practitioners.[259] It is consequently submitted that, should law students enter legal practice with adequate skills to draft legal documents, a good impression towards the practical training by law schools will be created in legal practice.

As will be discussed later,[260] drafting is also integrated into the Legal Practice module at NMU.[261] In this case, students engage in drafting at the NMU Law Clinic. They however only perform fortnightly duties of 90 minutes per student at the law clinic,[262] which is not enough time for them to acquire reasonable skills in this regard, taking into account that they must also consult with clients, complete file notes and perform various administrative tasks during those 90 minutes. It can also happen that the students are approached by clients who do not require any documents to be drafted.[263] These students will then be deprived of the opportunity to draft any documents.

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257 *Ibid.*

258 Snyman-Van Deventer *et al* 2013 *Stellenbosch Law Review* 510.

259 Van Blerk *Legal Drafting – Civil Proceedings* v.

260 See Chapter 4.

261 Also see Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 365 in this regard.

262 The Legal Practice module at NMU consists of two components, namely CLE and Street Law. A discussion of the Street Law component falls outside the ambit of this research. The CLE component is however discussed in Chapter 4. In terms of the CLE component, students must, *inter alia*, attend compulsory practical sessions at the NMU Law Clinic. This is done for an entire year. Because of the large student numbers, all students cannot attend the law clinic sessions on a weekly basis. Students are divided in two groups based on their surnames: students with surnames starting with A-Mb are in one group (Group 1), while students with surnames starting with Mc-Z are in another group (Group 2). During a given week, Group 1 will work at the law clinic, while Group 2 will participate in the Street Law sessions. During the next week, the groups swop: Group 2 will work at the law clinic, while Group 1 will participate in the Street Law sessions. Students therefore only attend to the law clinic once every two weeks, which significantly impact on the time available for practical experience.

263 Some clients only approach law clinics in order to obtain legal advice.

Verbal communication underpins almost all work done by legal practitioners.[264] Verbal skills are also practised on a minor scale at university level,[265] mainly during moot court and/or trial advocacy programmes, or even during tutorial sessions.[266] Students will also get the opportunity to further their verbal skills during practical sessions at the university law clinic in consulting with clients,[267] or even during simulated consultation exercises. They can further improve verbal skills during negotiations with applicable parties on behalf of their clients[268] at law clinics, or during simulated negotiation exercises. A well rounded graduate must also have a basic knowledge of the litigation process as far as both civil and criminal law,[269] as well as the admissibility of evidence, is concerned. A trial advocacy programme can be useful in this regard.[270] However, for the same reasons as is the case with drafting, there is not sufficient time to develop these skills adequately.

In order to develop a legal writing module – and, is submitted, verbal exercises as well – language training should be included in the LLB curriculum.[271] It is an intrinsic requirement by the CHE Qualification Standards for the LLB degree.[272] These standards provide, *inter alia*, the following in this regard:

(a) that universities must "…produce law graduates who have a systematic and coherent body of knowledge and an understanding of relevant concepts and principles; a high level of cognitive and other generic skills including problem-solving and the practical application of principles; *written and spoken*

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264 Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 293, 294.

265 *Ibid.*

266 McQuoid-Mason 2003 *Journal for Juridical Science* 202.

267 *Ibid.*

268 *Ibid.*

269 McQuoid-Mason 2003 *Journal for Juridical Science* 203. Even if the student wants to specialise in non-litigous work like conveyancing after graduation, it is still important that he acquires basic skills in litigation.

270 Stuckey *et al Best practices for legal education* 77-78. The ABA also requires that students acquire tuition in certain other professional skills that can be regarded as necessary for the effective and responsible practice of law, including trial and appellate advocacy, alternative dispute resolution, counselling, consulting, negotiation and problem solving.

271 Snyman-Van Deventer *et al* 2012 *Obiter* 122.

272 South African Qualifications Authority "Registered Qualification: Bachelor of Laws" (undated) http://regqs.saqa.org.za/viewQualification.php?id=22993 (accessed 2019-10-29); Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 43.

communication, numeracy and computer literacy; and competence in applying knowledge through basic research methods and practice [my own emphasis];"[273]

(b) that students must "…[p]ossess or have sufficient potential to develop good communication skills, both verbally and in writing…";[274]

(c) that students must "…[b]e able to communicate what they have learned coherently, accurately, and comprehensively in the required medium of instruction…";[275] and

(d) that students "…will have acquired the ability to communicate effectively in a legal environment by means of written persuasive methods and sustained discourse" and that the student "…is able to demonstrate adequate legal writing skills to operate in a wide variety of legal environments".[276]

Furthermore, and quite unsurprisingly, a study into graduate attributes has revealed that, *inter alia*, proficiency in English and communication skills are important for the purposes of employability of students after graduation.[277] Although many countries prepare students in this regard by laying an adequate foundation at school level already,[278] it is submitted that the failing school system in South Africa currently hampers this. Students are not prepared adequately for higher education, as they lack the basic skills of spelling, the use of grammar and writing correctly.[279] This aspect needs to be addressed by higher education.[280] At university level, more specifically in law schools, this can be achieved by including sufficient writing exercises in all theory and content based modules.[281] As extensive writing and verbal skills are connected to civil procedure, criminal procedure and the principles of evidence in practice, it goes without saying that these modules can benefit to a great extent from such an inclusion.

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273 South African Qualifications Authority http://regqs.saqa.org.za/viewQualification.php?id=22993.

274 *Ibid.*

275 *Ibid.*

276 *Ibid.*

277 Griesel and Parker "Graduate attributes: a baseline study on South African graduates from the perspective of employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 19.

278 *Ibid.*

279 Snyman-Van Deventer *et al* 2013 *Stellenbosch Law Review* 512, 513.

280 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 19.

281 Council on Higher Education "Qualification Standard for Bachelor of Laws (LLB)", 2015, Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 43.

If required, law teachers will also have to undergo language training themselves in order to ensure that the proper writing and verbal skills are taught to the students.[282] Furthermore, in presenting adequate communication training, theory and practice should not be separated. Such skills cannot be taught without a good theoretical basis having first been laid.[283] For example, if students are taught to draft a letter of demand based on a motor vehicle collision, they will need to know the theory about proving a delict, as well as about the nature and content of a letter of demand. If the letter of demand is based on an outstanding debt that falls within the ambit of the National Credit Act,[284] students will need to be familiar with the relevant provisions of the act that regulates the content to be included in a letter of demand before the commencement of litigation against a prospective defendant.[285] Students therefore need to understand legal concepts and how to effectively communicate the same.[286] This is significant in the South African context, as well as in the United States of America, where theory and especially writing skills have been separated – only doctrinal law is mainly being taught.[287] It furthermore speaks for itself that law teachers, teaching communication skills, must have extensive experience in practice in order to do so.[288] This is unfortunately not always the case,[289] amounting to another important motivator as to why CLE, and therefore law clinics, play a pivotal role in teaching these skills.

Students furthermore need to be able to communicate in plain language. Legalese should be minimised and not be used in a dramatic way in order to intimidate

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282 *Ibid.*

283 Snyman-Van Deventer *et al* 2013 *Stellenbosch Law Review* 512-513.

284 34 of 2005.

285 S 129(1)(a) of the National Credit Act 34 of 2005 provides that "[i]f the consumer is in default under a credit agreement, the credit provider may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date;…" s 129(1)(b) provides that no legal proceedings, in order to enforce the agreement mentioned in ss (a), may be commenced unless a notice in terms of ss(a) had been given to the consumer. Also see Pete *et al Civil Procedure* 125 in this regard.

286 Snyman-Van Deventer *et al* 2013 *Stellenbosch Law Review* 513.

287 *Ibid.*

288 Van Blerk *Legal Drafting – Civil Proceedings* v.

289 *Ibid.*

opponents or other addressees,[290] or even to impress readers. "Legalese" can be defined as the conventional language in which legal documents are drafted.[291] They need to use communication in order to protect clients without the students getting lost along the way in doing so.[292] This means that language should not only be used in a plain way, but also in a way that leaves no spectrum for misinterpretation, or ambiguity, by readers or addressees. The reason why this is important is that conventional legal language, as used in legal documents and sometimes in verbal conversations, is not easy to understand. The Cambridge Dictionary's definition of "legalese" illustrates this by defining the concept as "…language used by lawyers and in legal documents that is difficult for ordinary people to understand."[293] Too many words, grand words and Latin terms can cause a reader to be overwhelmed and be confused by the content of a legal document or conversation.[294] Students must therefore be taught that plain language will put their target audiences in a better position to understand the message that is being conveyed to them more clearly.[295] In legal practice, this can be a time saver, as practitioners do not have to explain the meaning of the communication.[296] It will also facilitate the drafting and interpretation of contracts as functional documents, as contracting parties will be clear about what they are signing and thus agreeing to.[297] Vague and complicated documents may result in legal actions being instituted.[298] Students should be made aware that legal practitioners would not want to undergo this, as it will bring their drafting to the scrutiny of the court and, moreover, result in legal costs for their clients that could have been avoided by way of a properly drafted legal document.[299] This principle is not only applicable to civil proceedings, but also to criminal proceedings. Criminal defence practitioners need to draft pleas of guilty and plea explanations with the utmost care in order to ensure that such documents

290 Gootkin "Nothing plain about plain drafting" 2013 (April) *De Rebus* 19 19.

291 *Ibid.*

292 *Ibid.*

293 Cambridge Dictionary "Legalese" (2020) https://dictionary.cambridge.org/dictionary/english/legalese (accessed 2019-11-11).

294 Gootkin 2013 *De Rebus* 19.

295 *Ibid.*

296 Gootkin 2013 *De Rebus* 20.

297 *Ibid.*

298 *Ibid.*

299 *Ibid.*

are accepted by the court because they clearly reflect the instructions of the accused. Although these documents can be corrected if the court does not accept them, a practitioner does not want to create the impression that he or she is incapable of drafting such documents in a field where the practitioner professes to be an expert. Furthermore, the practitioner does not want to create an adverse impression about his or her skills with the client, who is investing money in the skills of the practitioner. The possibility also exists that unclear documents, whether in civil or criminal proceedings, can be the subjects of appeal and/or review at a later stage, processes that are time consuming and expensive.

Students must understand that legal practitioners with good drafting and verbal skills will attract prospective clients to their firms.[300] For this reason alone, it is beneficial for them to invest in appropriate and professional communication skills as early as possible in their careers, which will save considerable editing and correction time at a later stage.[301]

3 4 5 IMPORTANCE OF SOCIAL AND HUMAN ELEMENTS

Students study countless legal doctrines and legislation by reading textbooks and other relevant material. However, the law does not exist in the abstract, but should be understood in its relationship with individual people, as well as society.[302] Van Marle and Modiri state the following:[303]

> "South African law schools need a decidedly dynamic and radically different curriculum which does not lock students into a teaching style based on traditional

300 *Ibid.*

301 *Ibid.*

302 Bon "Examining the crossroads of law, ethics, and education leadership" 2012 22 *Journal of School Leadership* 285 293; Kahn "Freedom, autonomy, and the cultural study of law" 2001 13 *Yale Journal of Law and the Humanities* 141 141. Kahn states that "[t]he rule of law…is not just a set of rules to be applied to an otherwise independent social order. Rather, law is, in part, constitutive of the self-understanding of individuals and communities."

303 Van Marle and Modiri 2012 *South African Law Journal* 212. Also see Modiri "The crises in legal education" 46(3) 2014 *Acta Academica* 1 1 in this regard, where it is stated that "…the value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and judiciary, but rather how it contributes to a new jurisprudence suited to the legal, *social* [my own emphasis] and political transformation of South Africa." Although the author's point of view relating to the legal profession and judiciary is not acceptable for purpose of this treatise, it is submitted that he is correct as far as social transformation is concerned.

> modes of analysis and ill-defined learning outcomes, but rather opens them up to a diversity of approaches and places an emphasis on certain social and ethical commitments that underlie any democratic legal system."

Law schools do invest effort in teaching students logic, analytical skills as well as reasoning in an attempt to chisel their intellectual skills.[304] The training that is provided for practice is however not convincing.[305] Noone and Dickson mention further minimum requirements for a legal practitioner in order to be considered a professionally responsible person, namely, *inter alia*, someone who is competent to perform the work that they should, as well as someone who does not encourage the use of the law to bring about injustice, oppression or discrimination.[306] McQuoid-Mason states that students need to be taught about the duty of lawyers to become involved in social justice issues in society.[307] He further states that many of these skills and values can be incorporated into the teaching of substantive and procedural law.[308] Former Chief Justice Langa stated that the "…tradition of analytical argument and a full knowledge of the legal principles that govern everyday human interaction and form the main part of a lawyer's work…" must be carried over to law students and, consequently, to the public.[309] Students must therefore be taught to be mindful of their prospective clients' interests in order to ensure that proper legal advice and guidance are given in accordance with what the client really wants.

The next question that needs to be considered is how a legal practitioner can determine what the client really wants. Generally, the assumption would probably be

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304 Hyams 2008 *Journal of Clinical Legal Education* 22; Stuckey *et al Best practices for legal education* 79.

305 Hyams 2008 *Journal of Clinical Legal Education* 22. Also see Stuckey *et al Best practices for legal education* 79 in this regard. Students, graduating from law schools, have not always been exposed to basic important skills relating to legal practice. Also *see* Kennedy "Legal education as training for hierarchy" (2014) https://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20HierarchyPolitics%20of%20Law.pdf (accessed 2019-01-23) where it is stated that "[l]aw schools are intensely political places despite the fact that they seem intellectually unpretentious, *barren of ambition or practical vision of what social life might be* [my own emphasis]."

306 Hyams 2008 *Journal of Clinical Legal Education* 22.

307 McQuoid-Mason "The four-year LLB programme and the expectations of law students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: some preliminary results from a survey" 2006 27(1) *Obiter* 166 169. Also see 2 3 in this regard. Law students should not only be taught to become commercial legal practitioners, but practitioners who promote social justice by upholding and promoting the spirit and purport of the Bill of Rights.

308 McQuoid-Mason 2006 *Obiter* 169.

309 Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 355-356.

that a practitioner should consult with a client, listen closely to his or her account of events and thereafter suggest legal remedies in order to solve the client's dilemma. If the client requires professional assistance with regard to a civil matter, the rules of civil procedure will also play an important role in respect of how the case must be brought to court. Schneider however states that the traditional way of teaching civil procedure is completely neglecting the social and human context of a civil case.[310] The implication is that students are brought under the impression that lawyers are only involved in litigation, whereas there is a lot more involved, *eg* settlement negotiations and mediation.[311] Civil procedure should not be restricted to technical questions relating to the most effective way of dealing with and solving disputes, but should also include considerations of what a party wants to achieve in society.[312] Students must therefore be taught that, although the law provides for it, litigation is not the only route that a client may want to follow in a particular case. Where a client approaches a practitioner after having been served with a divorce summons by the sheriff of the court, it is not always necessary for the practitioner to immediately defend the matter and proceed with the usual subsequent pleadings, *ie* a plea and counterclaim. The practitioner should first enquire from the client whether a settlement will be possible in the circumstances. If so, settlement negotiations can be entered into with the other party or his or her legal representative without the need for the drafting, service and filing of further pleadings. This will not only be a time and cost saving experience for the client, but will also possibly ease the stress that the divorce matter is already placing on the shoulders of the client. Students need to be made aware of these aspects, as well as the implications thereof on a client and his or her matter. Human elements are therefore addressed directly, *ie* the client, and probably the counterparty, as well as the emotions and financial resources of the respective parties. Proper training in this regard will inculcate ethical professionalism in students, involving an altruistic commitment towards helping people in need, as well as treating them in an engaged, sensitive and empathetic manner.[313] This directly involves legal ethics and

310 Schneider "Rethinking the teaching of Civil Procedure" 1987 37(1) *Journal of Legal Education* 42.

311 *Ibid.*

312 Hurter 2011 *Comparative and International Law Journal of Southern Africa* 409.

313 Nicholson "Education, education, education: legal, moral and clinical" 2008 42(2) *Law Teacher* 145 146.

professionalism in the teaching and practical upbringing of the students. Active and experiential learning can yield positive results in this regard.[314] Simulations will enable students to view the crises of clients from the sides of both the client and the opponent and may develop empathy with the situation in which a client may find him or herself.[315]

Access to justice should also be considered.[316] "Justice" can have a wide meaning in this regard. Apart from denoting easier access to the courts in less expensive ways,[317] it can refer to "procedural justice", *eg* the application of the *audi alteram partem* principle in that both parties should be listened to when a matter is before a court or a tribunal.[318] This emphasises impartiality when a matter is decided by such court or tribunal.[319] Procedural justice, also referred to as "procedural fairness", thus refers to the fairness of the court's procedures and practices.[320] For some people, this "justice" may also refer to a specific outcome, *eg* financial compensation, the happening of a specific occurrence or even the delivery of an apology.[321] The notion of a heartfelt apology is nothing new in the context of South African law.[322] In *Norton and Others v*

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314 Nicholson 2008 *Law Teacher* 160.

315 *Ibid.*

316 See Hurter 2011 *Comparative and International Law Journal of Southern Africa* 408. Also see Vawda "Access to justice: from legal representation to promotion of equality and social justice – addressing the legal isolation of the poor" 2005 26(2) *Obiter* 234 239, where it is stated that "[a]ccess is the core of social rights: that is, to make law and justice effectively accessible to all. This…posed a major challenge to the legal system to become meaningful to those marginalised from full participation in the social, economic and cultural life of society because of poverty… The access to justice movement is, therefore, "the very core of the new 'social' conception of law and justice" implying both a radical new way of conceptualising the law, as well [as] the intention to promote far-reaching reforms."

317 Van Loggerenberg 2016 *BRICS Law Journal* 146. Also see Langa 2006 *Stellenbosch Law Review* 353 in this regard. One of the biggest obstacles, in attaining transformative constitutionalism in South Africa, is the disparities of power and wealth. There are many people who cannot afford legal services due to the expensive nature thereof.

318 Hurter 2011 *Comparative and International Law Journal of Southern Africa* 414; Van Loggerenberg 2016 *BRICS Law Journal* 134. Also see 2 3 for the importance of listening to clients in order to ascertain what legal advice should be given to them, in context of their social circumstances, by legal practitioners.

319 *Ibid.*

320 LaGratta and Bowen "To be fair: procedural fairness in courts" (November 2014) https://justice innovation.org/publications/be-fair-procedural-fairness-courts (accessed 2020-07-30).

321 Hurter 2011 *Comparative and International Law Journal of Southern Africa* 414. See Whitehead "Apologise!?" 2010 (December) *De Rebus* 24 24 for a comprehensive discussion on the remedy of an apology.

322 Whitehead 2010 *De Rebus* 24.

Ginsberg[323] the defendants pleaded that they had apologised to the plaintiffs by way of letter. More recently, in the case of *Dikoko v Mokhatla*,[324] the Constitutional Court appeared to conclude that an apology without damages might be an appropriate order to make.[325] The court stated that the purpose of such an order would be[326]

> "…to restore the dignity of a Plaintiff who has suffered the damage and not to punish a defendant. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws."

The concept of an apology can thus be seen as part of the concept of *ubuntu*, which the interim Constitution has already placed firmly in the legal sphere.[327] *Ubuntu* is derived from the Nguni belief that *moto ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu*, meaning that a person is a person through other persons.[328] It denotes cooperation instead of competition, character instead of achievement, tolerance instead of condemnation,[329] as well as reconciliation instead of punishment or retribution.[330] To accept an apology from a wrongdoer may therefore be more desirable than to embark on litigation against such person. Mokgoro J argued that the Constitution should be interpreted to embody the spirit of *ubuntu.*[331] In *Dikoko v Mokhatla*,[332] Sachs J stated that *ubuntu*

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323 1953 4 SA 537 (A).

324 2006 6 SA 235 CC; 2007 1 BCLR 1 CC.

325 Whitehead 2010 *De Rebus* 26.

326 Par 68; Whitehead 2010 *De Rebus* 26.

327 With regards to *ubuntu*, see Mollema and Naidoo "Incorporating Africanness into the legal curricula: the case for criminal and procedural law" 2011 36(1) *Journal for Juridical Science* 49 51, as well as Mokgoro "Ubuntu and the law in South Africa" 1998 1 *Potchefstroom Electronic Law Journal* 1 1.

328 Mokgoro 1998 *Potchefstroom Electronic Law Journal* 2; Mollema *et al* 2011 *Journal for Juridical Science* 51.

329 Mollema *et al* 2011 *Journal for Juridical Science* 51.

330 Himonga, Taylor and Pope "Reflections on judicial views of Ubuntu" 2013 16(5) *Potchefstroom Electronic Law Journal* 370 381.

331 Mokgoro 1998 *Potchefstroom Electronic Law Journal* 7, 11; Mollema *et al* 2011 *Journal for Juridical Science* 51.

332 2006 6 SA 235 CC; 2007 1 BCLR 1 CC.

> "…is intrinsic to and constitutive of our constitutional culture… In present-day terms it has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution."[333]

The court went further to state that *ubuntu* "…is highly consonant with rapidly evolving international notions of restorative justice. Deeply rooted in our society, it links up with worldwide striving to develop restorative systems of justice based on reparative rather than purely punitive principles."[334] This is important, especially if taking into account that Africanisation and decolonisation of the LLB curriculum in South Africa have been much talked about during the past few years.[335] These concepts require explanation. Africanisation refers to the incorporation of African philosophy, ontology[336] and epistemology into the curriculum.[337] This stems from the criticism that, *inter alia*, procedural law had been described as "white man's law", due to its Eurocentric nature.[338] This means that only Western legal concepts, and no African values and cultures, are incorporated into the law.[339] However, there is no single source from which the African world derives his or her knowledge, as Africa is home to a plurality of cultures.[340] For this reason, it has been argued that "South Africanisation" or "indigenisation"[341] might be better terms to use.[342] The Africanisation notion originated

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333 Par 113.

334 Par 114. Also see Himonga *et al* 2013 *Potchefstroom Electronic Law Journal* 372 in this regard.

335 See Himonga *et al* "Reflections on judicial views of Ubuntu" 2013 *Potchefstroom Electronic Law Journal* 371 in this regard. *ubuntu* is closely connected to the transformative nature of the Constitution. It is inherently forward-looking and aims to transform the South African society over time.

336 Philosophy Terms "Ontology" (undated) https://philosophyterms.com/ontology/ (accessed 2019-11-29). Ontology refers to the study of existence and being. It describes things that exist and the categories they belong to.

337 Mollema *et al* 2011 *Journal for Juridical Science* 50. With regards to the meaning of "epistemology", see Stanford Encyclopedia of Philosophy "Epistemology" (December 2005; revised April 2020) https://plato.stanford.edu/entries/epistemology/ (accessed 2019-11-29). It refers to the study of knowledge and justified belief. Sources, structure and limits of knowledge are important to consider in this regard.

338 Mollema *et al* 2011 *Journal for Juridical Science* 49.

339 *Ibid.*

340 Mollema *et al* 2011 *Journal for Juridical Science* 50.

341 The term "indigenisation" is also use by Ndlovu-Gatsheni in "Meanings and implications of decolonization for Higher Education in South Africa".

342 Mollema *et al* 2011 *Journal for Juridical Science* 51.

from a statement by South African judge Hlope, during early July 2009, when he stated the following:[343]

> "I believe that people need law that embodies their own culture and their values. We need to Africanise our law and make it relevant to the masses. There is a huge void in our legal system… If we do not transform the legal system we will have a problem because people will not identify with the system. We need to have the situation where people obey the law not because they fear being sent to jail, but because they feel that it is the right thing to do and something they are proud of."

It is submitted that the learned judge's argument is convincing. According to him, if people feel that the law reflects their own aspirations and identity, even only in part, they would be more inclined to respect and uphold the law.[344] In this context, the concept of decolonisation should be defined. Due to colonialism in South Africa, the common law is based on Roman-Dutch law.[345] Procedural law, including the law of evidence, is almost exclusively[346] derived from English law.[347] Ndlovu-Gatsheni describes decolonisation as "[t]he search for a liberating perspective within which to see ourselves clearly in relationship to ourselves and to others in the universe."[348] He further states that an important part of decolonisation is that South Africans must attentively perceive what colonialism has done to them in the context of the world.[349] It is submitted that the learned author refers to a move away from the effects of colonialisation and more towards a unique South African identity for all South African

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343 Wood "Yes, we should "Africanise" our law" (13 July 2009) https://constitutionallyspeaking.co.za/yes-we-should-africanise-our-law/ (accessed 2019-11-29). Judge Hlope is currently the Judge President of the Western Cape Division of the High Court of South Africa.

344 Wood https://constitutionallyspeaking.co.za/yes-we-should-africanise-our-law/; LaGratta *et al* https://justiceinnovation.org/publications/be-fair-procedural-fairness-courts.

345 Lenel "The history of South African law and its Roman-Dutch roots" (2002) https://www.lenel.ch/docs/history-of-sa-law-en.pdf (accessed 2019-11-29) 1 10; Erasmus "The interaction of substantive and procedural law: the Southern African experience in historical and comparative perspective" 1990 (3) *Stellenbosch Law Review* 348 348.

346 See De Vos "South African civil procedural law in historical and social context" 2002 (2) *Stellenbosch Law Review* 236 243 in this regard. Some elements of Roman-Dutch procedural law have remained in the current South African law of procedure. An example hereof is the doctrine of provisional sentence that can still be found in civil procedure. This principle is now codified in s 14A of the Magistrates' Court Act 32 of 1944 and in High Court rule 8 of the Superior Courts Act 10 of 2013.

347 Bellengere *et al The Law of Evidence* 6; De Vos 2002 *Stellenbosch Law Review* 241-242; Erasmus 1990 *Stellenbosch Law Review* 348.

348 Ndlovu-Gatsheni "Meanings and implications of decolonization for Higher Education in South Africa".

349 *Ibid.*

people. As far as tertiary education is concerned, the learned author suggests a move away from just being a university in Africa to being an African university.[350] Teachers, including law teachers, will therefore need to place Africa in the centre of the knowledge domain.[351] Disciplines and doctrines and its fitness for purpose, reading material and normative foundations for critical theory will have to be re-evaluated in an African context.[352] This may result in reorganisation of knowledge, reformulations of the existing curriculum and the transformation of pedagogies.[353] How to go about doing this, may however be a challenge.[354] One of the challenges is that academics, who are the conveyors of knowledge, are products of westernised universities.[355] The implication is therefore that, if a change of consciousness and mentality does not take place with academics, colonialism will be promoted long after the end thereof.[356] The idea is therefore that teachers should learn to unlearn in order to re-learn.[357] This means that they will have "…to forget what [they] have been taught, to break free from the thinking programmes imposed…by education, culture, and social environment, always marked by the Western imperial reason."[358] This is a fundamental motivator for rethinking the teaching methodologies relating to procedural law modules, as already discussed.[359] A move away from the Socratic and Langdellian methodologies to a more interactive methodology, such as CLE, will mean that decolonisation takes place in the teaching of procedural law modules. In this sense, there is a move away from a traditional methodology to a methodology that is more progressive and transformative, as it allows for the appreciation of social justice as well as critical self-evaluation.[360]

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350 *Ibid.*

351 *Ibid.*

352 *Ibid.*

353 *Ibid.*

354 *Ibid.*

355 Ndlovu-Gatsheni *Decolonizing the university and the problematic grammars of change in South Africa* Keynote address paper delivered at the 5th Postgraduate Student Conference on Decolonizing the Humanities and Social Sciences, University of KwaZulu-Natal (October 2016) 21.

356 *Ibid.*

357 Ndlovu-Gatsheni *Decolonizing the university and the problematic grammars of change in South Africa* 26.

358 *Ibid.*

359 See 3 3.

360 See Chapter 4 for a detailed discussion on CLE.

With regards to Africanisation and decolonisation, the law of procedure and evidence may be affected in significant ways, including the following:

(a) in the majority of customary law institutions, there are no legal representatives acting for either party;[361]
(b) evidentiary rules are flexible, because the purpose of the hearing is for both parties to have the opportunity to put their versions before the institution;[362]
(c) a solution is sought, and not a verdict depicting a winner;[363]
(d) when criminal cases are tried in traditional African courts, the accused must usually prove his innocence;[364]
(e) trials, in traditional African courts, are conducted in an inquisitorial manner and no evidence is excluded;[365]
(f) traditional African court proceedings are generally informal, but conducted in an orderly manner;[366] and
(g) as far as jurisdiction is concerned, both the Magistrates' Court and the traditional African court may be a court of first instance in case of matters that involve African law.[367]

Social and human elements also have an impact in the context of criminal law and procedure. If these elements are duly considered, a social dimension is given to the notion of access to justice.[368] An example hereof is a claim of self-defence. In order to understand this claim in a particular matter, a concept like the "battered woman syndrome"[369] can play an important role as far as the strengths and weaknesses of

361 Mollema *et al* 2011 *Journal for Juridical Science* 51.
362 *Ibid.*
363 *Ibid.*
364 Mollema *et al* 2011 *Journal for Juridical Science* 59.
365 *Ibid.*
366 Mollema *et al* 2011 *Journal for Juridical Science* 60.
367 Mollema *et al* 2011 *Journal for Juridical Science* 62.
368 Hurter 2011 *Comparative and International Law Journal of Southern Africa* 415.
369 Healthline "Battered Woman Syndrome" (5 July 2017) https://www.healthline.com/health/ battered-woman-syndrome (accessed 2019-07-17). Battered Woman Syndrome is a subcategory of post-traumatic stress disorder than can be the result of long term and serious domestic abuse and violence. This can lead to a belief of helplessness on the side a female that she deserves the abuse that her partner is inflicting upon her. This in turn results to less cases of this nature being reported to the police.

such claim are concerned.[370] In this way, social justice is achieved by way of procedural justice.[371] Students must be made aware of the social and scientific aspects of a concept like the battered woman syndrome in order to appreciate how such a claim for self-defence can influence trial proceedings in a case of murder.[372] The essence hereof is that the students must understand that, when a victim of crime has a voice in the criminal justice process[373] in that they can address the court on relevant points at appropriate times, procedural justice and fairness is upheld by the justice system.[374] It is submitted that this will enhance procedural justice and fairness to a significant extent, as there is, generally speaking, no system of restitution of any nature for victims of crime in South Africa.[375] The least that can therefore be done, is for legal practitioners and court officials to listen to victims of crime and to take all their personal circumstances into account in order to determine what the legal system should do to let justice prevail. Although a person, making use of a ground of justification like self-defence, is the accused in a criminal matter, it must be kept in mind that a crime has possibly been committed against such a person in order to give rise to the action that led to the claim for self-defence; hence, such accused person can also be seen as a victim of crime. As far as gender based violence is concerned, it is submitted that, should a victim retaliate and kill an attacker, particular and thorough attention should be paid to the circumstances surrounding such a killing. This will determine the true mindset of the victim in order to understand what the victim had been going through so as to give rise to the killing. Thus, students should be taught to listen to their clients with the required compassion and understanding,[376] especially

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370 Taslitz *Strategies and Techniques for teaching Criminal Law* 4.

371 Hurter 2011 *Comparative and International Law Journal of Southern Africa* 415.

372 See Singh *Self-defence as a ground of justification in cases of battered women who kill their abusive partners* (Doctoral thesis, University of Pretoria) 2009 11, 13, 14 and 15, as well as Goosen "Battered women and requirement of imminence in self-defence" 2013 16(1) *Potchefstroom Electronic Law Journal* 71 73, 117 in this regard.

373 See Government of Canada Department of Justice "Who is a victim of crime" (6 December 2016) https://www.justice.gc.ca/eng/cj-jp/victims-victimes/rights-droits/who-qui.html (accessed 2020-08-26). A victim's testimony is an important component of the State's case against an accused person.

374 LaGratta *et al* https://justiceinnovation.org/publications/be-fair-procedural-fairness-courts.

375 Von Bonde "Victims of crime in international law and constitutional law: is the State responsible for establishing restitution and State-funded compensation schemes?" 2010 2 *South African Journal of Criminal Justice* 183 208.

376 See Sunday World "Healing other victims of gender-based violence through prayer and caring" (10 August 2020) https://sundayworld.co.za/sponsored-content/healing-other-victims-of-gender-based-violence-through-prayer-and-caring/ (accessed 2020-08-26) where it is indicated that it is

taking into account that access to justice for victims of gender based violence is severely lacking in South Africa.[377]

A plea for social elements, to be introduced in the law curriculum, is not new. As far back as the 1960s, there were pleas elsewhere for this to be done. Kahn-Freund advances this topic when discussing the case dialogue method.[378] He states that it is inevitable that law students will be reading decided cases.[379] However, from an educational perspective, there are inherent dangers in doing so.[380] The reason for this is that a lawyer generally concentrates on things that are socially marginal, *eg* a person or a case that should be handled in a certain manner.[381] The reality is however that the cases, which students normally read, are typically about very serious issues; yet, very little is stated about the economic, social and cultural life of the parties involved.[382] This may cause students to view the reality of the law in a "distorted mirror",[383] because they are expected to know the intricacies of the law without appreciating the basic principles of human life and existence. In this regard, the learned author compares legal education, based on case law, to medical education, in that law students may be exposed to anatomical and pathological matters of a unhealthy nature without having been taught the anatomy and physiology of a healthy body.[384] This means that students may be taught about complicated issues without having an understanding about solutions to simple legal problems.[385] Kahn-Freund's argument is convincing. These real world and social concepts, as well as the possible impact of Africanisation and decolonisation of the law of procedure and evidence, do not form part of the conventional curriculum.[386] In order to ensure that a student is well informed about

important to listen to victims of gender-based violence with compassion and to provide the necessary support for them in a safe space.

377 Shoba "Access to justice for victims and survivors of sexual violence remains elusive" (26 August 2020) https://www.dailymaverick.co.za/article/2020-08-26-access-to-justice-for-victims-and-survivors-of-sexual-violence-remains-elusive/ (accessed 2020-08-26).

378 Kahn-Freund "Reflections on legal education" 1966 29(2) *The Modern Law Review* 121 127, 128.

379 *Ibid.*

380 *Ibid.*

381 *Ibid.*

382 *Ibid.*

383 *Ibid.*

384 *Ibid.*

385 *Ibid.*

386 Also see McQuoid-Mason 1982 *Journal for Juridical Science* 161 in this regard.

these concepts, the important impact they can have on a case, as well as the potential changes that they may bring to the law in the future, a study of these concepts should be included in the curriculum. It will equip students with, *inter alia*, the skills to communicate more effectively with clients and other interested parties, recognise their clients' financial, commercial and personal constraints and priorities, as well as effectively advocate a case on behalf of a client.[387] Students are subsequently placed in a position where they are able to consider the effects of their actions on society at large, the administration of justice, as well as the general performance and reputation of the legal profession.[388] Thus, they should be taught not only how to conduct trials, but also why they need to do so, as well as what the result of such an action would be.[389]

Holmquist summarises this section accurately when she states the following:

> "If, as these literatures assert, law is a manifestation of more general social and cultural forces, and lawyering is but a version of human problem solving and persuasion, then thinking like a lawyer is far more multi-faceted and content-laden than the doctrinal analysis and application most first-year law students master…"

The Constitution must always be considered with regards to creating an awareness of social elements in teaching procedural law modules. The Preamble mentions phrases like "…united in our diversity…", "…[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;…" and "…every citizen is equally protected by the law;…" Although the Preamble does not contain any positive norms, it constitutes an important source for interpreting the foundations of the Constitution,[390] as it sets out the guiding principles and purpose of

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387 See Stuckey *et al Best practices for legal education* 77 in this regard. It is submitted that, creating an awareness among students regarding social and human elements in the context of the law, will equip them with professional skills required by legal practice.

388 Stuckey *et al Best practices for legal education* 77; Silverthorn https://www.2civility.org/carnegie-report-live-like-lawyer/.

389 Gravett 2017 *Potchefstroom Electronic Law Journal* 1; Silverthorn https://www.2civility.org/carnegie-report-live-like-lawyer/. Students should never be brought under the impression that these aspects fall outside the legal sphere of a matter, as they can conclude that these aspects are "…secondary to what really counts for success in law school – and in legal practice."

390 Venter "The meaning of the provisions of the 1996 Constitution" 1998 1(1) *Potchefstroom Electronic Law Journal* 1 1.

the Constitution.[391] The Constitution must be interpreted by judges in a way that facilitates the transformation of society – thus, transformative constitutionalism.[392] In this way, it will become mandatory for concepts like *ubuntu* to be taken into account when dealing with litigious matters, thus making it essential to the teaching of procedural law to students. Specifically with regards to civil procedure, Van Loggerenberg states that the post-apartheid socio-economic and political order is placing pressure on civil procedure to adapt to the changing needs of society.[393] He further indicates that this is possible, because civil procedure is not cast in stone, but subject to change in accordance with the Constitution in order to protect the public's fundamental rights as enshrined in the Constitution.[394] It is submitted that Van Loggerenberg's sentiment in this regard is equally applicable to both criminal procedure and the admissibility of evidence. Further to this, Kibet and Fombad state that:

> "…transformative constitutionalism…[gives] the law and, by extension, the courts a prominent place in the transformation process. This requires a judicial consciousness of the historical background that informs the present social and political situations it seeks to redress. In addition, it necessarily demands less insistence on legal and procedural technicalities that quite often defeat the enforcement of substantive rights and duties under the law."[395]

Therefore, in the context of transformative constitutionalism, the judiciary is in a vital position to interpret and enforce fundamental rights.[396] It is submitted that the judiciary should also, in certain instances, be willing to relax the strict adherence to procedural rules that may inhibit the adjudication of rights, especially where such a strict adherence may lead to procedural injustice for one of the parties to a particular case. An example hereof, in civil cases, is a postponement based on a pleading that is not correctly drafted, or not allowing evidence that has not been disclosed in a discovery affidavit prior to the commencement of a civil trial. The prejudice is twofold: additional

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391 Department of Justice and Constitutional Development "Basic provisions of the Constitution" (undated) https://www.justice.gov.za/legislation/constitution/basicprov.html (accessed 2019-08-05).

392 Himonga *et al* 2013 *Potchefstroom Electronic Law Journal* 371. See Chapter 2 as well as 3 5 3 for more detailed discussions in this regard.

393 Van Loggerenberg 2016 *BRICS Law Journal* 146.

394 *Ibid.*

395 Kibet *et a*l 2017 *African Human Rights Law Journal* 366.

396 *Ibid.*

legal costs for the defaulting party, as well as deferred finalisation of the case for both parties. In light of the enormity that legal fees can take on, as well as congested court rolls and the long time it can take for some cases to finalised due to, *inter alia*, (unnecessary) postponements, such prejudice is not conducive towards access to justice. The social position of the parties may be that they cannot afford any further legal fees, or that the outdrawn case emotionally affects them. The advantage is that procedural and substantive justice takes place, in that the rights and duties of the respective parties enjoy priority. Social justice, in the spirit of the Constitution, now takes place. It is submitted that students should be taught to spearhead such changes when constructing arguments in favour of their clients, as well as the finalisation of the case, during litigation. Changes like these will make students aware of the immense potential that transformative constitutionalism, in the context of social and human elements, holds for procedural justice. Fourie argues for the inclusion of constitutional values, including dignity, freedom, equality and *ubuntu*, into the mainstream curriculum of law schools.[397] According to her argument, this will enable students to critically engage with the constitutional values and develop a commitment towards such values.[398] The said inclusion will furthermore ensure a teaching methodology that can be a solution to the transformative challenges that legal education in democratic South Africa is currently facing.[399] It is submitted that this argument by Fourie constitutes an important motivator towards revisiting the manner in which the procedural law modules are currently taught. It is an equally important motivator for the argument that CLE is the appropriate and desired methodology by way of which such modules should be taught.[400]

3 4 6 INCLUSION OF SCIENCE AND PHILOSOPHY OF EVIDENCE

A module on evidence includes the terms “evidence”, “proof” and “probability”.[401] Usually, the law and rules of evidence are dealt with during lectures, as opposed to

397 Fourie “Constitutional values, therapeutic jurisprudence and legal education in South Africa: shaping our legal order” 2016 19 *Potchefstroom Electronic Law Journal* 1 3.

398 *Ibid*.

399 *Ibid.*

400 The importance and relevance of CLE in this regard is discussed in Chapter 4.

401 Murphy 2001 *Journal of Legal Education* 568.

the science and philosophy relating to such terms.[402] This however prevents an evaluation of what the true meaning and significance of such terms is.[403] The inclusion of the science and philosophy behind evidence can have the following benefits for the Law of Evidence module:[404]

(a) students will be able to investigate the mechanics of judicial reasoning behind facts;
(b) the history of evidence can be explored;
(c) It creates a legal basis for the use of evidence in a courtroom in order to reconstruct past events;
(d) It will highlight the philosophical underpinnings depended on, as well as assumptions made, in making use of evidence;
(e) It can indicate the relationship between logic and rhetoric in factual inquiries; and
(f) It will be an explanatory source on how exclusionary rules have been developed in order to limit the logical use of evidence during trials.

In presenting the law of evidence at NMU, the law teachers do invite experts, mainly DNA evidence and ballistics experts, to address the students in an attempt to explain certain scientific aspects relating to those types of evidence. However, this scientific content is rarely included in the module content, as well as in module assessments. Certain philosophies, relating to the inclusion or exclusion of certain types of evidence, are discussed during lectures as well as included in module assessments, *eg* background relating to the residual rules of evidence, as well as the cautionary rules. These are however almost the only philosophies that are discussed. It is therefore suggested that the Law of Evidence module can be improved to a large extent by including more scientific and philosophical elements in the module content. Such an addition to the Law of Evidence will align with the need for justification that millennial students are seeking.[405]

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402 *Ibid.*
403 *Ibid.*
404 *Ibid.*
405 See 4 7 4 1 in this regard.

3 4 7 KNOWLEDGE, SKILLS AND ABILITIES OF STUDENTS

Lamparello states that law schools carry the ethical responsibility to provide students with the required skills to practice law.[406] The importance of training a law graduate at university level, who has adequate knowledge about doctrine and practice, has already been discussed in Chapter 1. It is however necessary to make mention of that again in this chapter, as it is submitted that the current teaching methodologies have an effect on the quality of law graduates: they are unfit for entering into legal practice.

The National Prosecuting Authority (hereafter referred to as the NPA) states that the LLB curriculum should equip students with substantial in depth knowledge and comprehension of the principles, concepts, values and substantive rules of the legal system in South Africa.[407] They further require students to possess the same knowledge about the legal institutions and procedures integral to the South African legal system and that students should be equipped with the necessary skills and abilities required to practice law in either the public or private sector.[408]

The Society of Law Teachers of Southern Africa has stated that law schools should produce well rounded law graduates who are able to deal with legal concepts in a meaningful way and, as such, contribute towards the law and society in a meaningful way.[409] It is submitted that, in order to contribute in this manner, students will need to have adequate knowledge of not only theory and doctrine, but also of practical aspects. Klaasen convincingly states that:[410]

> "[t]he ability to think critically and to have well developed research ability is unfortunately not the only skills the graduate is going to need when entering practice. … In my view legal graduates should have mastered at least the following: consultation skills, file and case management, numeracy skills, practice management, legal research and writing the writing of opinions, drafting skills and trial advocacy. I would also include professional and ethical conduct as a skill desperately needed by any young graduate entering the workplace."

406 Lamparello 2015 *SSRN Electronic Journal* 31.

407 Klaasen 2012 *International Journal of Humanities and Social Science* 302.

408 *Ibid.*

409 Klaasen 2012 *International Journal of Humanities and Social Science* 303.

410 *Ibid.*

These are merely two further instances expressing the paramount importance of both theoretical and practical skills in graduates. It is submitted that, when planning the syllabus content of the procedural law modules, as well as the teaching methodologies thereof, law teachers ensure that the outcomes will include a student who is equipped with knowledge of the applicable substantive and procedural law, as well as how to apply such principles in practice. According to Chaskalson law teachers must ask themselves, when conducting the said planning, "…whether it can be done better, or whether it can usefully be done differently."[411]

Trial advocacy, as mentioned by Klaasen above, is an important skill that must be focused on during tertiary education. Gravett states the following in this regard:[412]

> "Obviously, law school alone cannot create effective trial lawyers. At the inception of the process, however, law schools must help prepare students to become trial lawyers. The law schools have performed reasonably well in preparing students in legal analysis, but they have not performed well at all in teaching students how to translate those intellectual skills into practice."

Trial advocacy is broadly defined as the composition of fact extraction, legal reasoning, strategic judgment and persuasive speech that are shaped by the rules of professional responsibility, evidence, procedure and stative rules.[413] The reason for such a broad meaning is that trial advocacy also refers to life in everyday legal practice.[414] Gravett states that a skilful trial practitioner is also able to apply his or her skills in order to extract facts from complicated sets of information, integrate such facts with applicable legal principles and to formulate a well-reasoned argument based on the same.[415] These are skills that future trial practitioners undoubtedly need, as they will be confronted with clients who present rather complicated factual scenarios that require analysis and solutions based on such analysis. Gravett further states that an effective university trial advocacy module can achieve some minimum goals:[416]

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411 Chaskalson 1985 *De Rebus* 116.
412 Gravett 2017 *Potchefstroom Electronic Law Journal* 3.
413 Gravett 2017 *Potchefstroom Electronic Law Journal* 5.
414 *Ibid.*
415 Gravett 2017 *Potchefstroom Electronic Law Journal* 5-6.
416 Gravett 2017 *Potchefstroom Electronic Law Journal* 3.

(a) students will graduate with a significantly enhanced knowledge of trial advocacy;
(b) students will have an increased and well-founded confidence in their own abilities as trial practitioners; and
(c) students will graduate from university with enough knowledge of effective trial advocacy in order to assess their own performance and to strive towards consistent competence in a court of law.

A module in trial advocacy can therefore be beneficial to students, but is limited in South Africa.[417] The primary skills, that can be taught to be an effective trial advocacy module, are the formulation of questions, to exercise control over witnesses, as well as persuasive presentation of a client's case in court.[418] Gravett states that a trial advocacy module transcends the four walls of the courtroom, because students receive more in depth training about the skills needed by trial practitioners: fact analysis, legal integration, persuasive speech, courtroom etiquette and demeanour, question formulation with the aim of eliciting favourable responses, as well as effective verbal presentations.[419] A trial advocacy module also presents students with the ideal opportunity to apply the rules of substantive law, procedural law and ethics in order to prove or defend a particular cause of action.[420] Students will, *inter alia*, be presented with the opportunity to dress in court attire, organise their "cases", develop their examination-in-chief and cross examination skills, as well as deliver opening and closing arguments.[421] It is presented in a protected academic setting, which is ideal in preparing students for what lies ahead in legal practice.[422] Simulations are recommended for such training.[423] The reason for this is that students are not placed in a situation of conflict when learning these skills.[424] It is therefore a safe environment in which students can learn to bridge the gap between traditional legal education and

417 Gravett 2017 *Potchefstroom Electronic Law Journal* 3. NMU does include a course in trial advocacy in the final academic year as part of Legal Practice module.
418 *Ibid.*
419 Gravett 2017 *Potchefstroom Electronic Law Journal* 1.
420 *Ibid.*
421 Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 87.
422 Gravett 2017 *Potchefstroom Electronic Law Journal* 2.
423 Gravett 2017 *Potchefstroom Electronic Law Journal* 12.
424 *Ibid.*

what really happens in legal practice.[425] This is pivotal as far as practical training is concerned, as advocacy education cannot simply be acquired in legal practice.[426] There are many layers of theory and procedure that require explanation.[427] The effective dissemination of these layers, at tertiary level, results in a pedagogical advantage that is much more broadly paced than what could be achieved by any other practical module.[428] It allows for the merging of substantive law, procedural law, ethics, persuasion, as well as reflection by the students with regards to what has been learned.[429] A clinical setting is most suitable for the presentation of trial advocacy training, because the CLE methodology is geared towards teaching legal skills in context.[430] It further involves discussions of substantive law to practical situations, as well as reflection on work that has been done.[431] Furthermore, because students have no right of appearance in a court of law, the clinical setting by way of simulations, is the most appropriate way in which to present trial advocacy training.[432]

NMU presents a course in trial advocacy as part of the Legal Practice module. It is presented in the second semester of the final academic year by a senior advocate of the Port Elizabeth Bar and a legal practitioner from Legal Aid South Africa. The course consists of plenary sessions in a classroom setting, as well as practical sessions. During the plenary sessions, the theoretical basis of trial advocacy is explained to the students, as well as the essential elements and rules of the various stages of the trial process. Students are taught to properly conduct opening statements, examination-in-chief, cross-examination, re-examination, heads of argument and closing statements. Court etiquette also forms part of the training. During the practical

425 *Ibid.*

426 Gravett 2017 *Potchefstroom Electronic Law Journal* 4.

427 *Ibid.*

428 *Ibid.*

429 *Ibid.*

430 *Ibid.*

431 *Ibid.*

432 See however Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 87. In some jurisdictions, law students do have right of appearance in lower courts in order to represent clients under the supervision of experienced legal practitioners. It is furthermore recommended in this research that consideration should be given to students appearing in courts in certain matters in an attempt to, *inter alia*, enhance their practical and professional skills – see 5 2 2 in this regard.

sessions, students are divided into groups of approximately six students. A set of facts, mostly based on criminal law, is provided to each group.[433] As a group, they must conduct the trial process in the presence of the trial advocacy teachers during dedicated timeslots, which are on Saturdays. Should a group not deliver a satisfactory performance, they are allowed a further opportunity to improve. They receive constructive criticism from the trial advocacy teachers that they have to incorporate into their presentation. After conducting a presentation, the trial advocacy teachers furnish all students with constructive feedback on their presentations. This allows students to reflect on their trial advocacy skills so that they know how to improve them.

The importance of a module in trial advocacy is therefore clear. It forms part of civil and procedure, as well as the effective and persuasive presentation of evidence. Students therefore need these skills as they are proceeding towards professional life.[434] It can therefore be said that law schools carry the responsibility to train students with regards to the basic skills of legal representation.[435] They have some accountability for the competence of the students who graduate from the university.[436] Gravett is correct in stating that every legal dispute has the potential to be tried in a court of law or in an alternative dispute resolution forum, thus requiring the use of trial advocacy skills.[437] Members of the public have the right to expect that trial practitioners are competent in order to discharge their duties in the courtroom or other forum.[438] During trial proceedings, a client experiences the conduct of a legal practitioner in quite a visible way.[439] Legal practitioners should therefore be aware that their performance can strengthen or diminish a client's confidence in their competence.[440] This may have a significant impact on the public's view towards the justice system.[441] For this reason, a module in trial advocacy should be compulsory

433 See Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 89 in this regard.

434 Gravett 2017 *Potchefstroom Electronic Law Journal* 2.

435 *Ibid.*

436 *Ibid.*

437 Gravett 2017 *Potchefstroom Electronic Law Journal* 5.

438 Gravett 2017 *Potchefstroom Electronic Law Journal* 7.

439 *Ibid.*

440 *Ibid.*

441 *Ibid.*

in the LLB degree. Yet, such a module is not present in all LLB curricula.[442] In this regard, it should be kept in mind that time constraints and the time consuming nature of a trial advocacy module,[443] as well as the relatively large content ratio of a trial advocacy module, may affect the availability of opportunities to include such practical skills in the respective syllabi of the procedural law modules at present. Large student numbers may also present problems to the effective presentation of a trial advocacy module.[444]

3 4 8 NECESSITY FOR MODULE REVIEW

It is assumed that review, or revision, of a module is done by most law teachers in an attempt to tie the module content together in a logical and coherent way. If it is not done, it is recommended that it must be implemented, especially with regards to procedural law modules. Some of the important reasons for this recommendation are the following:[445]

(a) usually, only one topic is being dealt with in a particular lecture. It will not make contextual sense if not connected to the module as a whole. When a review is done, students will be enabled to see how the different topics, dealt with during respective lectures, interrelate with one another;
(b) as students do not remember everything that they have learned from a single exposure to a particular topic, review can assist them to refresh their memories. As was previously stated, they will also be in a position to see the interconnections between topics by being reminded of what they have dealt with earlier; and
(c) complex factual scenarios can be used as examples when doing review, because review covers more than one topic at the same time. In this way, students' analytical skills are developed.

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442 *Ibid.*

443 Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 90.

444 *Ibid.*

445 Taslitz *Strategies and Techniques for teaching Criminal Law* 36. Although this part was mainly written with regards to the teaching of criminal law, it is submitted that it is of equal importance to civil procedure and the law of evidence as well.

The procedural law modules can benefit significantly from this reasoning. Criminal Procedure serves as an example: students deal with arrests, detention, trials and sentencing in separate lectures, and thus in a narrow sense, but revision will put all these aspects together as part of the broader criminal justice system. Students can identify gaps in what they do and do not understand and address those issues.[446] Reviews can be done at the end of the module, or as a set of smaller reviews throughout the module.[447]

Review should be viewed as critical to student learning.[448] Because of large amounts of module material to be covered, as well as limited time to cover the same, module review can easily be seen as time consuming[449] and may consequently not happen at all. It is recommended that law teachers ensure that sufficient time is reserved for the purposes of review. Review can even be done during tutorial sessions in order to preserve lecture time.

3 4 9 APPROPRIATE MODULE ASSESSMENT

3 4 9 1 TRADITIONAL ASSESSMENT – TESTS AND EXAMINATIONS

History is clear on the fact that universities have developed a series of sophisticated and significant assessment methods.[450] Summative assessment methods, *eg* written examinations, are firmly entrenched in the South African education system. The implication is that many modules, including the procedural law modules, are assessed by way of written examinations, either at the end of a particular semester, or at the end of an academic year. The student's results, obtained in such an examination, together with his or her term mark, will determine whether or not the student has successfully completed a module. Examinations require students to study a particular

446 Taslitz *Strategies and Techniques for teaching Criminal Law* 37.

447 Taslitz *Strategies and Techniques for teaching Criminal Law* 36, 37.

448 Taslitz *Strategies and Techniques for teaching Criminal Law* 36.

449 *Ibid.*

450 Ali "The design of curriculum, assessment and evaluation in higher education with constructive alignment" 2018 5(1) *Journal of Education and e-Learning Research* 72 74.

section of work, which students must remember in order to answer questions directed at them in an examination question paper. Students are usually bound by strict time limits when conducting examinations[451] – when the time has been depleted, students are required to hand in their answer scripts for assessment. Examinations emphasise fast thinking and quick returns.[452] It is easy for students to develop a feeling of being overwhelmed by the volume of work they had to study, to become nervous during an examination and consequently fail to remember the necessary and relevant details required in order to successfully complete an examination. Biggs describes activities, such as tests and examinations, as low cognitive level activities which entails the recalling of somewhat isolated pieces of knowledge.[453] These activities do not lead to any reflection or feedback and are not aligned with the curriculum.[454] He further describes such assessments as norm-referenced and that they provide not-so-well performers with the impression that they (the performers) lack the required cognitivie abilities required to pass a particular module.[455] Biggs concludes that examinations are not the best assessment methods.[456]

Kahn-Freund refers to an examination as a "necessary evil."[457] He makes a few noteworthy remarks regarding examinations, namely:[458]

(a) examinations are utilised in order to test students' memories;
(b) if modules were not distributed over the spectrum of an examination timetable, the students' memories would be overburdened; and
(c) because students mostly write more than one examination, they are in fact expected to forget what they have studied for the module that they have just been

451 See Biggs *Teaching for quality learning at university* 2ed (2003) 5 in this regard.

452 Gravett 2017 *Potchefstroom Electronic Law Journal* 10.

453 Biggs "Assessment and classroom learning: a role for summative assessment?" 1998 5(1) *Assessment in Education* 103 103.

454 *Ibid*.

455 Biggs 1998 *Assessment in Education* 103; Biggs "Constructive alignment in university teaching" 2014 1 *HERDSA Review of Higher Education* 5 5.

456 Biggs *Teaching for quality learning at university* 20.

457 Kahn-Freund 1966 *The Modern Law Review* 134.

458 Kahn-Freund 1966 *The Modern Law Review* 132.

examined on and focus on the next examination. There is thus no long-term memory goal.

Another perspective in this regard is that the examination system promotes problem solving skills, perseverance, hardiness, resilience, self-control and ambition.[459] However, it discourages critical thinking, as there is usually only one correct answer, with little or no room for anything else.[460] Students therefore do not have the opportunity to present innovative ideas as part of their answers or to challenge textbooks or even their educators.[461] In a legal context, it is imperative to allow students the opportunity to challenge existing doctrines and to express their views with regards to possible changes, obviously well motivated by other legal principles and/or social aspects. Furthermore, examinations present little or no feedback to students.[462] Consequently, students are not made aware of areas of improvement in their knowledge and can it therefore not be said that their learning experience is complete.[463]

Kahn-Freund's remarks do not remain unqualified. He states that he is:

> "…not seeking to argue that, on any view of the purposes of legal education, memory can be entirely neglected in testing the students, but I submit that if it is the aim of our work to let the students see the law in its social context, to give them what I have called a general legal education, and at the same time to make them do specialised work in a few chosen fields, then new methods of examining them will have to be devised."[464]

Having said this, Kahn-Freund further states that conventional ways of testing, *ie* tests and examinations, that should be completed within a particular time, are not the ideal methods to examine whether students can argue sensibly or present their thoughts in

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459 VT "Pros and cons of exam-oriented education" (2 February 2018) https://blogs.lt.vt.edu/2018grad5114pedagogy/2018/02/02/pros-and-cons-of-exam-oriented-education/ (accessed 2019-07-23).

460 *Ibid.*

461 VT https://blogs.lt.vt.edu/2018 grad5114pedagogy/2018/02/02/pros-and-cons-of-exam-oriented-education/. Also see Biggs *Teaching for quality learning at university* 5 in this regard.

462 Ali 2018 *Journal of Education and e-Learning Research* 76.

463 *Ibid*.

464 Kahn-Freund 1966 *The Modern Law Review* 133.

a clear manner.[465] What this achieves, is to place the students in a position of discomfort where they must devise answers to sometimes complicated questions.[466] Furthermore, in completing such examinations, students most often do not have access to the material from which they can get proper answers; yet, this is one of the main skills that they should be tested on: their abilities to access the law and to find relevant information.[467]

It is submitted that Kahn-Freund is correct in his reasoning. Memory testing should not be neglected at all. Graduates will be expected to have fundamental knowledge about the law for the purposes of providing legal advice to clients or in knowing which procedures to follow in order to achieve a specific result. However, when law students enter legal practice, they will not remember everything that they have studied at university. They will however need to know where to find the relevant law when required to research the same for a particular case or other purpose.[468] One of the goals of assessment should therefore be to teach students where to find the law. In an attempt to partially do this, students at NMU are allowed to keep relevant legislation with them at all times during semester tests, assignments and examinations as part of the Civil Procedure module. During lectures, procedural rules are discussed as well as highlighted in the legislation in order for students to become familiar with the wording of the legislation. Students are encouraged to make notes of important sections in the legislation for assessment purposes. In this context, Kahn-Freund's abovementioned qualification plays an important role – students must have a good basic knowledge of the relevant law in order to know where to find more on a certain topic. Students must therefore be able to identify certain legal issues or procedures in order to know where in the legislation to look for solutions and/or procedures. In the same way as legal practitioners, students need to be able to think strategically and plan a route within the law in order to achieve a certain goal.[469] In order to effectively

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465 *Ibid.*

466 *Ibid.*

467 *Ibid.*

468 Kahn-Freund 1966 *The Modern Law Review* 133. He states in this regard that "…a good lawyer…is a man or woman who knows where to find the law, only fools burden their memories with details they can look up in half a minute or even in half an hour."

469 Gravett 2017 *Potchefstroom Electronic Law Journal* 10.

plan such a route, they need to evaluate both positive and negative consequences, the various legal options available, as well as possible alternative options that are available.[470] Risk assessment can then be done, culminating in deciding on the best option in the circumstances of a particular case.[471] This approach requires structural knowledge of the law[472], which in return requires time, and large amounts of time in some instances – something that examinations do not offer students. It is submitted that assignments, instead of examinations, are appropriate assessment methods in this regard. It combines the declarative knowledge aspect of examinations with hands-on research type activities.[473] Assignments do not require strict time limits and students do not have to rely on memory in order to complete it.[474] The result is deeper learning by the student, as more sources can be consulted, leading to a more expansive knowledge base and also more effective synthesis of information.[475] It might be easier for students to commit plagiarism in such instances, but that could be countered by limiting the time allowed for completing the assignment, *eg*, by requiring overnight completion of the assignment and submitting it the day after the assignment instruction was handed out.[476]

3 4 9 2 THE FOCUS OF ASSESSMENTS

In designing assessments, it is clear that the starting point should be that, when teaching takes place, teachers must be certain about what they want the students to learn.[477] Teaching should not be teacher-centred, as is traditionally the case, in that the focus is on what work must be covered by the teacher by way of the default lecturing method, culminating in norm-referenced assessments.[478] Teaching should

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470 *Ibid.*

471 *Ibid.*

472 *Ibid.*

473 Biggs *Teaching for quality learning at university* 6.

474 *Ibid*.

475 *Ibid*.

476 *Ibid*.

477 Biggs "Aligning teaching for constructing learning" (undated) Microsoft Word – Biggs.doc (heacademy.ac.uk) (accessed 2021-04-02).

478 Biggs 2014 *HERDSA Review of Higher Education* 6.

be learner-centred.[479] Biggs states that the most appropriate assessment method is a method that best realises the objectives that a teacher wants to achieve in relation to a particular module.[480] As far as CLE is concerned, Du Plessis states that the outcomes of a clinicial programme are relevant as far as the needs of society, the students and the legal profession are concerned.[481] These outcomes must be assessed.[482] Du Plessis's perspective is both relevant and applicable as far as procedural law modules are concerned, as it is proposed in this research that the CLE methodology should be used to teach procedural law modules. A challenge however is to find assessment methods that can provide effective assessment aligned with the objectives of the particular module.[483] When considering assessment methods, the overall objectives and intended learning outcomes of a particular modules should be considered,[484] but assessments should not only be limited to those aimed at testing cognitive disciplinary skills, including critical evaluation and problem solving.[485] Assessment methods, other than or in addition to tests and examinations, should therefore be considered to ensure the maximum knowledge and skills transfer to students. Assessment should also take place continouously and throughout the course of a module[486] and should reflect the intended learning outcomes of the module.[487] If so, the student will be learning the entire syllabus of the particular module.[488] In considering alternative methods of assessment, the outcomes thereof must, *inter alia*, present the law in a social context[489] to students, and not merely focus on theory and doctrine. Furthermore, such assessment methods must provide practical training and experience to students. Mock trials, moot courts and the preparation of simulated

479 See 2 3 in this regard.

480 Biggs *Teaching for quality learning at university* 1.

481 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* (2016) 32.

482 *Ibid*.

483 Ali 2018 *Journal of Education and e-Learning Research* 74.

484 Also see Stuckey *et al Best practices for legal education* 40, 42 in this regard.

485 Ali 2018 *Journal of Education and e-Learning Research* 74.

486 Ali 2018 *Journal of Education and e-Learning Research* 76; Barnhizer 1979 *Journal of Legal Education* 133.

487 Biggs Microsoft Word – Biggs.doc (heacademy.ac.uk).

488 *Ibid*.

489 See again Kahn-Freund's abovementioned statement, as well as 2 4 5. It is submitted that there is no purpose in instilling the values of social and human experiences in students without including the same in assessments.

client and court files could serve a valuable purpose in this regard.[490] Students can be divided into groups that will work together as if they are law firms. A set of facts can be provided to each group and, in order to ensure the integrity of the exercise and that student firms will not copy each other's work, it is recommended that different sets of facts should be allocated to the various firms. This type of assignment is beneficial, as it is reasonable to expect students to be able to solve problems that occur in the real world.[491] The setting of various sets of facts may bring about more work for the teacher, but will ensure that the respective student firms apply their minds to the exercise instead of merely copying information from other firms. As far as civil procedure is concerned, students will have to analyse facts, decide on an appropriate cause of action by using their knowledge of substantive law, draft letters, process, pleadings and other legal documents, organise their client files neatly and eventually index and paginate the court file. The client and court files can essentially be one compilation. Students must however be made aware that, because of the confidential nature of correspondence and notes between a legal practitioner and a client, such correspondence and notes will not form part of the court file, unless the confidentiality is dispensed with by the client. With regards to criminal procedure, the student firms can be provided with simulated charge sheets. The content of these charge sheets must once again differ from firm to firm in order to prevent the mere copying of work by the firms. As the module continues, more documents could be provided to the students, including medico-legal report documentation,[492] witness statements, photographs and other documentary evidence. Students should be able to draft pleas of guilty and not guilty,[493] witness statements in affidavit format as well as heads of argument. The importance of evidence should constantly be highlighted in both civil

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490 Case studies of this nature is also supported by Biggs – see Biggs *Teaching for quality learning at university* 18.

491 Biggs *Teaching for quality learning at university* 31. Biggs recommends that six such problems should be given to students during the course of a semester. Whether there is sufficient time for such a number of these assignments, taking into account time that must also be allocated towards plenary sessions in class, other practical exercises, tutorials, time for assessing assessments as well as preparation for lectures and sessions by law teachers, is however, with all due respect, questionable.

492 This refers to Form J88 that can be obtained from the Department of Justice and Constitutional Development website at "Form J88 – Report on a medico-legal examination by a health care practitioner" (undated) https://www.justice.gov.za/forms/other/J088.pdf (accessed 2019-12-03).

493 This refers to s 212(2) and s 215 respectively in the Criminal Procedure Act 51 of 1977.

and criminal exercises. Students should be able to determine which evidence will be required in order to prove a cause of action in a civil matter or to prove all the elements of a particular crime in a criminal matter. Each compilation of documents should contain a report relating to the evidence in a particular matter, as well as why the evidence may or may not be relevant and admissible in proving a fact in dispute[494] or the elements of a crime.[495] The entire compilation of documents will then be assessed by the teacher;[496] however, specific elements thereof could also be assessed individually, *eg*, the drafting of specific pleadings and the analysis of certain types of evidence.[497] After individual elements of a compilation have been assessed, it must then be determined how the student has handled the compilation as a whole, and for that reason, the student must also have achieved such an outcome in order to satisfactorily complete an assessment task.[498] Neatness, chronology, formatting of documents, content of documents and correct spelling should be decisive factors in the assessment. Assessment by way of a rubric could work well.[499] This casefile method is also supported by Gravett.[500] He states that, because students will spend the duration of the module on a single case file and one scenario, they will gain relatively good control over a factual scenario that may be complex in nature.[501] They will be in a position to evaluate and re-evaluate information in the context of refining their case theories and arguments.[502] In the process, they will be compelled to concentrate very hard on all aspects of the case.[503] In doing this, they will experience an appreciation for the case by fully preparing it, thus bringing them close to what

494 In civil proceedings.
495 In criminal proceedings.
496 Biggs *Teaching for quality learning at university* 18.
497 See Biggs *Teaching for quality learning at university* 18 in this regard.
498 Biggs *Teaching for quality learning at university* 18.
499 See 3 4 9 5 for a more elaborate discussion on rubrics.
500 Gravett 2017 *Potchefstroom Electronic Law Journal* 19.
501 Gravett 2017 *Potchefstroom Electronic Law Journal* 20.
502 *Ibid.*
503 *Ibid.*

cases look and feel like in legal practice.[504] Assessments of this nature can be classified as qualitative assessments,[505] the purpose of which is twofold, *ie*:[506]

(a) developmental, in the sense that it will provide an indication of what the students are understanding, or of their skills as far as a particular domain, *eg*, professional letter writing or consultation skills, is concerned. The focus falls on discipline based knowledge; and

(b) ecological, in the sense that it will be revealed as to whether or not students are able to perform tasks that can be described as worthwhile, significant and meaningful. In this regard, the focus is on application and problem solving. An example hereof would be whether or not students have adequately researched the law, applicable to a particular legal issue, and have furthermore applied the law in a satisfactory manner to the legal issue so as to create possible solutions to the legal issue.

3 4 9 3 THE IMPACT OF THE NEEDS AND ABILITIES OF STUDENTS ON ASSESSMENTS

Research has shown that educational institutions do not always consider the development of different types of assessment for different types of students by, *inter alia*, taking into account their needs and abilities.[507] If this is indeed the case, it is submitted that a paradigm shift by educational institutions is required. In this regard, the needs of millennial and centennial students should be considered.[508] Millennial and centennial students are both active in using technology and are active in gathering information and completing tasks. They furthermore desire feedback relating to their

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504 *Ibid.*

505 See ScienceDirect "Qualitative assessment" (2021) Qualitative Assessment – an overview | ScienceDirect Topics (accessed 2021-05-03) for a definition of a qualitative assessment. It refers to an assessment where the aim is not to look at large numbers. Instead, a relative value is assigned to work completed by using arbitrary labels or values, *eg*, high, medium or low. It is submitted that rubric based numbers, like a scale from one to five, can also be used for qualitative assessments.

506 Biggs "Assessing for learning: some dimensions underlying new approaches to educational assessment" 1995 41 *Alberta Journal of Educational Research* 1 4.

507 Ali 2018 *Journal of Education and e-Learning Research* 75.

508 See 4 7 4 1 and 4 7 4 2 with regards to millennial and centennial students.

efforts.[509] It must be kept in mind that millennials and centennials have grown up, or were born, into a world where technology plays a major role and that, therefore, alternative provisions should be made in order to support their needs.[510] Technology should therefore be considered in constructing assessments, which will enhance education as well as lifelong learning.[511] Blended learning[512] and online assessments are plausible options in this regard. The casefile method, discussed earlier, could be adapted into an electronic format. This could be a useful assessment in creating awareness among students of modern trends in the legal profession brought about the Fourth Industrial Revolution,[513] more specifically referring to a system like Caselines as far as civil proceedings are concerned.[514] It will provide practical preparation to the students relating to what they can expect in law firms that have already adapted to the digital age, and may furthermore provide students with practical skills that they can use in practice to assist firms, that have not yet adapted digital measures, to move into the digital age.[515] The language and learning capabilities of students can also be factors dictating various types of assessments.[516] Therefore, attempts should be made to address the needs of different students by way of multiple channels of assessment.[517] The effect will be that assessment methods remain flexible and are aligned with the needs of the students.[518] Therefore, the special needs of students should play a decisive role in devising assessments and achieving the learning outcomes of modules.[519] In this regard, it is submitted that assessments could be constructed in more than one language, taking into account which languages are the most prominent and prevalent in the vicinity where the educational institution is situated. It is not acceptable to merely react to the special needs of students by adapting assessment methods to cater for such needs[520] – educational institutions

509 *Ibid*.
510 See 4 7 4 1; Ali 2018 *Journal of Education and e-Learning Research* 75.
511 Ali 2018 *Journal of Education and e-Learning Research* 75.
512 See 2 5 2, 4 3 3, 4 3 4 and 4 7 4 2 with regards to blended learning and the importance thereof.
513 See 4 7 4 with regards to the impact of the Fourth Industrial Revolution on the legal profession.
514 See 4 7 4 2 with regards to the Caselines system.
515 See 2 1 in this regard.
516 Ali 2018 *Journal of Education and e-Learning Research* 77.
517 *Ibid*.
518 *Ibid*.
519 *Ibid*.
520 *Ibid*.

must be proactive in this regard. It is submitted that this is a valuable and valid argument in context of this research that firmly underscores the notion of transformative constitutionalism in legal education so as to produce better graduates for legal practice. Equality and diversity are taken into account, fully supported by the Constitution, and all students will have equal opportunities to be assessed in ways and in languages that they feel comfortable in. This may motivate students to express themselves and ultimately perform better, as they may feel that their special circumstances are catered for and looked after. Transformative legal education now takes place. As a result, students may get a better perception of how they fit into practice and what they are capable of in the working world. The practicality of the mentioned adaptations must however be considered, as not all institutions might be in the position to implement the suggested multiple channels of assessments. Funding, technology, equipment and additional human resources might play an important role in this regard, the absence of which may severely limit such implementation.[521]

3 4 9 4 THE IMPACT OF ASSESSMENT ON THE EMPLOYABILITY OF STUDENTS

Formative assessment can enhance the communication goals of a law teacher in that real-time feedback is available to the students relating to their progress and requirements.[522] Feedback to the students will provide a breakdown and evaluation of their attempts and will assist to remodel their thoughts, understanding and their skills.[523] This may bring about more influential ideas and capabilities on the part of the students.[524] On the part of the teacher, it may constitute an indicator as to where the students are experiencing problems, which will enable the teacher to focus or refocus their teaching efforts.[525] This will provide guidance to the teacher as to what strategies to employ in approaching tasks that require assessment, as well as how to resolve

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521 See 2 4 3 with regards to the effect of a lack of especially funding and teaching staff. This can impose a serious limitation on achieving transformative legal education in that equal opportunities for all students are not created.

522 Ali 2018 *Journal of Education and e-Learning Research* 75.

523 Ali 2018 *Journal of Education and e-Learning Research* 74.

524 *Ibid*.

525 Ali 2018 *Journal of Education and e-Learning Research* 75.

problems that students may experience in relation to such tasks.[526] In this regard, the teacher must be mindful not only of the precise requirements of the particular module, but also of the broader impact of the module.[527] This means that the teacher must take into account aspects like how assessment may influence the employability of the student and, in that way, construct assessment methods that will help the student to develop into a graduate who can display responsibility in the working world.[528] It however seems that employability is rarely taken into account as far as teaching and learning and assessment is concerned.[529] Employability is an aspect that can have a significant impact on the type of assessment that a university may decide upon.[530] It may mark a departure from conventional tests and examinations, which tests and examinations are merely intended to help students to pass a particular module and consequently progress through the given curriculum.[531] Instead of merely passing modules, students should be exposed to life skills and real-world experiences and assessed accordingly. A lack of inclusion of such skills in the curriculum and assessments may result in students not becoming employed at all, or looking for employment in other fields of work.[532] The type of assessment may have a significant impact on the teaching and learning approach that is being decided upon, which may on its part play a pragmatic role in shaping the students into graduates who are employable.[533] It is submitted that a useful assessment in this regard, that could serve as a final and extensive assessment, should be one that evaluates the complete experience of the student and the totality of the learning that the student has undergone.[534] This type of assessment bears close relation to capstone opportunities,

526 *Ibid*.

527 *Ibid*.

528 Ali 2018 *Journal of Education and e-Learning Research* 75. See 2 3, 3 4 3, 3 4 4, 4 7 2 1, 4 7 4 2, 5 2 2 3, 5 3 2, 5 3 6 2 and 5 4 with regards to the importance of employability and the significant role that teaching and learning, at university level, can play in order to enhance that.

529 Ali 2018 *Journal of Education and e-Learning Research* 75.

530 *Ibid*.

531 *Ibid*.

532 Ali 2018 *Journal of Education and e-Learning Research* 75. See 5 2 2 3 with regards to the importance of education as far as entry into the legal profession is concerned. It is submitted that appropriate assessment methods could significantly enhance the employability of graduates in order to assist them to obtain employment in the legal profession with greater certainty.

533 Ali 2018 *Journal of Education and e-Learning Research* 75.

534 Barnhizer 1979 *Journal of Legal Education* 133.

which will be discussed elsewhere in more detail.[535] Such an assessment could enable the student to view the complete learning experience as a whole, reflecting on all aspects learned and skills acquired. It could furthermore provide indication as to where there is a need for additional training to be added[536] in order to ensure that the student acquires sufficient and professional legal education, skills and practical experience to become more employable. Law teachers must take due note of the student's strengths and needs that will be revealed as such, as it could guide them to devise future teaching and learning strategies and assessments that will advance the development of students as employable future legal practitioners and address the needs that they might have.

3 4 9 5 CONSTRUCTIVISM, CONSTRUCTIVE ALIGNMENT AND THE IMPACT THEREOF ON APPROPRIATE MODULE ASSESSMENT

The paragdigm behind the mentioned alternatives to conventional tests and examinations needs to be investigated and evaluated. It must be kept in mind that the objective of the alternative assessment methods must be contributory towards producing a better graduate for entry into legal practice. For that reason, constructive alignment, as discussed earlier in this research, is submitted to be the main paradigm behind a module specification, its learning outcomes and its assessment criteria.[537] According to Biggs, constructive alignment entails that what students are required to learn, as well as how they should express their learning, need to be clearly stated to them before teaching commences.[538] Constructive alignment can be divided into two main streams, *ie*, what the students do in order to learn, as well as what the teachers do in order to synchronise their learning activities with the learning outcomes.[539] The paradigm of constructive alignment is therefore underscored by the principle that the learning activities and assessment tasks are aligned with the intended learning outcomes, as well as with what the students are required to be able to do or

535 See 4 7 1.

536 Barnhizer 1979 *Journal of Legal Education* 133.

537 Ali 2018 *Journal of Education and e-Learning Research* 73. See 2 3 for a discussion relating to constructive alignment.

538 Biggs 2014 *HERDSA Review of Higher Education* 5.

539 Ali 2018 *Journal of Education and e-Learning Research* 73.

demonstrate in order to achieve the said learning outcomes.[540] The teacher should be clear on what the students will be able to do as far as assessments are concerned.[541] Constructive alignment forms part of the philosophy of constructivism, as already discussed elsewhere in this research.[542] The idea behind this philosophy is that knowledge is not merely transmitted to someone else, but rather constructed by way of interacting with the surroundings that a person might find him or herself in.[543] Learning is achieved by way of the activities that the students partake in and how they engage with it, not what the teacher does.[544] Du Plessis agrees and states that the most valuable (clinical law) programmes are those where considerable responsibility is placed in the hands of the students.[545] This will result in a greater level of trust being placed on the students that will facilitate their learning more effectively than what can be achieved by any other strategy.[546] This active way of student participation in the learning process can also be interpreted to mean that the task of feedback could be given to the students in that they must perform self-assessment in relation to their work and progress.[547] Self-assessment is however not often employed in higher education.[548] Capturing the students' performance on video could be a useful exercise as far as self-assessment is concerned.[549] This will enable students to measure their performance against a checklist of desired behavioural aspects and, thereafter, discuss their performance in parallel with the teacher's rating of their performance.[550]

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540 Ali 2018 *Journal of Education and e-Learning Research* 73; Biggs "Constructive alignment" (undated) Constructive Alignment | John Biggs (accessed 2021-04-02); Biggs 2014 *HERDSA Review of Higher Education* 5-6, 7. Also see Biggs 1998 *Assessment in Education* 103-104 in this regard. Teachers should rethink their role, as well as their perceptions of teaching and assessment. Pre- and in-service teacher education and staff development may be important considerations in this regard. Also see Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 58-59 in this regard as far as CLE is concerned. It is submitted that Du Plessis's perspective is relevant in this instance, in light of the fact that this research proposes integrating the CLE methodology in the teaching and learning of procedural law modules. It is further submitted that Du Plessis's perspective is reflective of constructive alignment.

541 Ali 2018 *Journal of Education and e-Learning Research* 73.

542 See 2 3 with regards to the philosophy of constructivism.

543 Ali 2018 *Journal of Education and e-Learning Research* 73.

544 Biggs Constructive Alignment | John Biggs.

545 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 16.

546 *Ibid*.

547 See Biggs 1998 *Assessment in Education* 104 in this regard.

548 *Ibid*.

549 Biggs *Teaching for quality learning at university* 14.

550 *Ibid.*

However, it should be kept in mind that assessment tasks are still resorting students to an assessment situation.[551] This means that some students may behave different from the manner in which they would have behaved if they were not observed in performing their tasks and/or assessed, which may result in a distortion of the assessment result relating to such students.[552] The risk hereof can be minimised by providing plenty of formative assessment opportunities prior to the final assessment and letting the student observe their performances, *eg*, having been recorded on video.[553] In this way, the students get an idea of how they are performing and will it be easier for them to indicate when they are prepared for the decisive and final assessment.[554]

Keeping in mind that the philosophy of constructivism is based on the premise that knowledge is found and not learned, it is necessary that the learning outcomes should be communicated to students at the beginning of the module.[555] An assignment, relating to drafting of legal documents, could indicate that the students must focus on the mechanics of writing, grammar, punctuation and spelling.[556] Students may further be required to pay close attention to the format and presentation of such documents.[557] In this way, students can share the responsibility of achieving the intended learning outcomes.[558] The idea behind this responsibility is that the students should participate in their learning experiences.[559] The particular type of assessment must therefore verify the intended learning outcomes.[560] As is the case in legal practice, assignments can contain problems that are ill-formed and divergent in the sense that there may be several correct answers and ways in which to approach such problems.[561] The student should however indicate how such a problem should reasonably be

551 *Ibid*.
552 *Ibid*.
553 *Ibid*.
554 *Ibid*.
555 Ali 2018 *Journal of Education and e-Learning Research* 73.
556 Biggs *Teaching for quality learning at university* 7.
557 *Ibid*.
558 *Ibid*.
559 Ali 2018 *Journal of Education and e-Learning Research* 73.
560 *Ibid*.
561 Biggs *Teaching for quality learning at university* 14.

approached and, in the process, how previously taught information and resources are being utlised and also how contingencies are being taken into account as far as the possible solutions to the problem is concerned.[562] For example, if the assessment concerns consultation skills and the provision of legal advice, the students should indicate several options available to a client in which the client's legal problem could be approached and solved. In the process, the students should also draw the client's attention to which options might be more preferable than others, based on the client's circumstances or the nature of the particular legal problem. Assessments of this nature follow an open-ended approach and assessment processs.[563]

The assessments should concretise the educational intentions of the teacher and also provide an evaluation of the students' improvement and progress through a module.[564] Also, an assessment must reflect to what extent the students have achieved the intended learning outcomes, as opposed to assessment in tests and examinations, *ie*, how well students report back to the teacher based on what they have been taught or what they have read.[565] It is important that, after assessing the students' work, feedback is provided by teacher, which feedback can be used by the students in order to improve their learning.[566] Such an assessment method, where feedback facilitates the learning experience, is typical to formative assessment.[567] Furthermore, the feedback may also provide the teachers with information as to how their teaching can be realigned in order to serve the needs of the students.[568] Regular feedback will ensure constructive alignment and provide a constant flow of information to students so as to enable them to identify their weaknesses and construct ways in which to overcome them.[569] Teachers must also be prepared to learn from their mistakes and

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562 *Ibid*.

563 *Ibid*.

564 Ali 2018 *Journal of Education and e-Learning Research* 73, 74.

565 Biggs Constructive Alignment | John Biggs.

566 Ali 2018 *Journal of Education and e-Learning Research* 73; Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 73.

567 Ali 2018 *Journal of Education and e-Learning Research* 74.

568 Ali 2018 *Journal of Education and e-Learning Research* 73.

569 Ali 2018 *Journal of Education and e-Learning Research* 74; Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 73.

successes.[570] It is submitted that this provides for a flexible approach as far as learning outcomes and assessment methods are concerned. Such a flexible approach is in alignment with the core idea of this research, *ie*, that legal education, especially as far as the procedural law modules are concerned, should transform out of its conventional mould into a more practice orientated teaching and learning experience with a view of producing graduates who can advance the spirit and purport of the Constitution.

Constructive alignment suggests an interdependence between learning outcomes, teaching methods, assessments and evaluation.[571] If all these elements are integrated, effective student learning can be achieved.[572] Formative assessment, as explained, is desirable, especially taking into consideration the challenges that higher education is experiencing.[573] It is submitted that, in context of this research, the most important challenge is producing graduates who are suitable for entry into legal practice. This does however not mean that there is no place for summative assessments, as will be pointed out hereunder.

To summarise constructive alignment, based on the philosophy of constructivism, as the operational framework for a teaching design at university level, Biggs sets out the process as follows:

(a) provide a description of the intended learning outcomes;[574]
(b) create a learning environment by making use of teaching and learning activities;
(c) make use of assessments that will indicate to what extent students' performance meet the assessment criteria. In this regard, a rubric can be used[575]; and
(d) transform the findings, mentioned in (c), into final grades. Final grades are important in the sense that it assists a module to retain its credibility, as well as

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570 Ali 2018 *Journal of Education and e-Learning Research* 73.
571 *Ibid*.
572 *Ibid*.
573 Ali 2018 *Journal of Education and e-Learning Research* 74.
574 Biggs 2014 *HERDSA Review of Higher Education* 8.
575 Biggs Constructive Alignment | John Biggs.

to move the students to take the module seriously and devote sufficient time thereto.[576]

It is submitted that one such assessment method, as suggested by Biggs, is the casefile method that was discussed earlier.[577] This method is submitted to be a primary and superior assessment method as far as procedural law modules are concerned. Simulated casefiles and portfolios of evidence, being open-ended formats, will provide students with the opportunity to produce their own evidence that they have achieved the required assessment criteria.[578] This will provide students with flexibility in demonstrating their learning, removing arguments that such an approach to assessment is in any way rigid and/or predetermined.[579] It is submitted that, should the students be provided with the opportunity to demonstrate or explain the format of their casefiles and/or portfolios, such a demonstration or explanatory presentation will have strong links with self-evaluation. The reason for this submission is simple: the student provides an overview of the work done, which overview will have been prepared by the student before the actual demonstration or presentation. In preparing for such demonstration or preparation, the student will be able to form a perception of the casefile or portfolio and so identify areas of amendment and/or improvement before submitting the final product for assessment. In making such amendments and improvements, the student is already displaying knowledge, skills and how one should go about to ensure that a task is completed adequately and satisfactorily.

It is worthwhile to evaluate rubrics as far as assessments are concerned. Rubrics can enhance teaching and learning for the reason that they focus on how teachers teach and how students learn.[580] They provide assistance to teachers as far as the identification of module goals and the allocation of module priorities are concerned.[581]

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576 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 105. Although Du Plessis is referring to a clinical law module in this regard, it is submitted that the statement is true for all other modules as well. This translates especially well in light of the suggestion, in this research, that procedural law modules should be assessed in ways other than conventional tests and examinations.

577 See 3 4 9 2.

578 Biggs 2014 *HERDSA Review of Higher Education* 12.

579 *Ibid*.

580 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 93.

581 *Ibid*.

When teachers teach in line with the module goals, and thereafter assess students according to a rubric, teachers reach consistency in assessing the students based on what they have been taught.[582] This will enable teachers to focus on the module goals and to refine their teaching skills where required.[583] Rubrics may also constitute revelations relating to the complexity of a particular module.[584] Furthermore, rubrics can be indicative of the continued improvement and weaknesses of students, their development over a period of time, any omission of blindspots, omissions and strengths in the module programme as well as relating to the teaching of the module.[585] Unlike conventional grading in tests and/or examinations that has been described as arbitrary, inconsistent and promotive of an unfair ranking system, rubrics can actually function as effective teaching tools.[586] In this regard, students must be provided with a rubric that clearly explains the assessment criteria.[587] These criteria must be based on the learning goals of the particular module.[588] If so, such a rubric enhances learning in that it in fact constitutes feedback to the students. Students now learn more effectively in that they have been supplied with the relevant criteria in accordance with which they will be evaluated.[589] This can be achieved by making the rubric, clearly displaying the relevant criteria, available to the students during the currency of the assessment.[590] As a result, the student will obtain detail about where the goals of the assessment had not been achieved, together with recommendations as to how such goals can be achieved, as well as how the student can improve.[591] Rubrics allow the teacher to assess consistently and may facilitate discussions between teacher and student should the student want to challenge the assessment in any way.[592] It is therefore submitted that rubrics are reflective of constructive alignment in that it moves the teacher to align the objectives of the particular module with the intended learning

582 *Ibid*.
583 *Ibid*.
584 *Ibid*.
585 *Ibid*.
586 *Ibid*.
587 *Ibid*.
588 *Ibid*.
589 *Ibid*.
590 *Ibid*.
591 *Ibid*.
592 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 94.

outcomes that will be assessed. It furthermore, by way of feedback, facilitates the learning process of the students in that students can measure their performance against a threshold. As a result, students become better prepared for entry into the working world.

Although the casefile method is submitted to be superior as far as the assessment of procedural law modules are concerned, it does not mean that it is the only assessment method that can be used or should be considered. Written tests can also be used, mainly as summative assessment methods, in order to test the substantive law and procedural law knowledge of the students relating to the work that they are doing.[593] Legal drafting and writing legal opinions can be evaluated in this manner.[594] Spot tests can be used as "wake-up calls" to students and will also alert the teacher as to the performance and progress of the students.[595] Written assignments can be used as summative assessments to assess the students' abilities to understand, evaluate and to synthesise matters.[596] This may be a beneficial assessment method to facilitate legal research and legal analysis.[597] Written assignments are relatively easy to set and can result in good grades, mainly because students have control over the outcome of the assignment.[598] It is furthermore not cumbersome to grade written assignments.[599] It can however be time consuming to assess written assignments and the assignments may lack authenticity.[600] Fairness might also be a challenge where more than one law teacher is involved in the assessment process.[601] Another effective assessment method is a verbal examination.[602] This can be used to assess the abilities of the students to verbally relay knowledge that they have gained.[603] It is quick and easy to grade these assessments and feedback can be given instantly.[604] It is

593 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 66.
594 *Ibid*.
595 *Ibid*.
596 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 69.
597 *Ibid*.
598 *Ibid*.
599 *Ibid*.
600 *Ibid*.
601 *Ibid*.
602 Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 71.
603 *Ibid*.
604 *Ibid*.

submitted that this type of assessment will be appropriate in order to assess mock trials, moots and the presentation of legal opinions. It is further submitted that a combination of all the mentioned assessment methods can also be used in assessing procedural law modules. Theoretical knowledge and understanding can be assessed by way of written tests, assignments and examinations, while practical skills and application of the law can be assessed by way of mock trials, moots and the production of simulated casefiles.

The implementation of these assessment methods may however pose problems.[605] Additional law teachers may be required to assist with the teaching and student facilitation process, which will require funding.[606] The appointment of additional teachers is an important consideration, especially keeping in mind the large student numbers that universities have to handle currently.[607] If no additional teachers are employed, the workload of the existing teachers will increase, leaving them with very little time to reflect on their teaching methods and, accordingly, to bring about innovation where required, as well as to provide quality feedback to the students as far as their assessments are concerned.[608] Furthermore, some law teachers might resist changes to their existing teaching methods,[609] which methods will include the way in which they plan and set assessments.

3 4 10 INTER-RELATIONSHIP BETWEEN THE PROCEDURAL LAW MODULES

A more practical approach to procedural law modules will be meaningless if students are not made aware of the synergy between such modules. They must gain a clear appreciation of the fact that evidence is not dealt with isolation, but adduced during civil and criminal proceedings. They must further understand that an occurrence like a motor vehicle collision may give rise to civil proceedings, namely respective claims for patrimonial damages, as well as to criminal proceedings, for example reckless and

605 Biggs 2014 *HERDSA Review of Higher Education* 15.

606 *Ibid*.

607 See 3 4 3, 3 4 7, 4 3 2, 4 3 4, 4 7 2 1 and 4 7 5 regarding the impact of large student numbers on the quality of legal education.

608 Biggs 2014 *HERDSA Review of Higher Education* 15.

609 *Ibid*.

negligent driving, culpable homicide, intentional damage to property, or even murder. They should also understand what various kinds of evidence can be utilised to prove the issues in different types of cases, whether civil or criminal. This will enable them to understand the substantive law of evidence in context of substantive civil or criminal principles. In addition to this, students should also understand how to adduce, as well as to object to, the use of various kinds of evidence in proving the issues in both civil and criminal cases. In this way, they learn to appreciate the admissibility, or not, of evidence in a procedural context. In this regard, capstone opportunities become important, *ie* opportunities where the various areas of law could be brought together so as to make it clear to students that the law should not be compartmentalised.[610]

Time constraints, as well as large amounts of module content, can however easily cause this synergy to be overlooked. However, as stated above, law schools have a responsibility to teach skills to students,[611] and it is submitted that legal analysis is an important skill that students should master. Students must be able to understand that, where a person has been arrested for the possession of allegedly stolen property, the principles of the law of things[612] will be used to determine whether or not such property indeed belongs to another person so as to be capable of being stolen. If students are not able to make such analyses in practice, it is submitted that their competence to exercise discretion in legal matters will be severely impaired. It is therefore imperative for law schools to ensure that sufficient time for capstone learning is provided for in the LLB curriculum. It is submitted that CLE can play a significant role in this regard. This aspect will be discussed in detail in Chapter 4.[613]

610 See 4 7 1 in this regard, as well as for a more detailed discussion of capstone learning.
611 See 3 4 7.
612 Also referred to as the law of property.
613 See 4 7 1.

3 5 LEGAL INTERPRETATION – AN INTEGRATED TEACHING AND LEARNING APPROACH WITH PROCEDURAL LAW MODULES

3 5 1 INTRODUCTION

The importance of effective communication skills in the daily life of a legal practitioner has already been discussed.[614] Communication must be clear, direct and unambiguous; otherwise, the door is left open for misinterpretations by various stakeholders. This may, *inter alia*, result in court cases being lost and adverse cost orders granted against a practitioner's client, or even against the practitioner. Practitioners must also ensure that they interpret communication, addressed to them and/or their clients, properly. This will avoid any misunderstandings between parties, resulting in matters being finalised quicker and less expensive. Practitioners must not only interpret such communication, but must also respond to them. It is however only once a practitioner has a clear comprehension of the intended meaning of communication that he or she can effectively respond to it.[615]

Practitioners also need to be able to interpret legislation properly. The reason for this is that legal texts do not self-generate their meanings.[616] Furthermore, many legal texts, more specifically constitutions, contain a lot of apparent and actual *lacunae*, contradictory provisions, ambiguities and hidden meanings.[617] Mokgoro J explains this point as follows in *S v Makwanyane and Another* as far as constitutional interpretation is concerned:[618]

> "…the interpretive task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself where these principles constitute the historical context in which the text was adopted and which help to explain the meaning of the text… To achieve the

614 See 3 4 4. Also see Finch and Fafinski *Legal Skills* 3ed (2011) 237 in this regard.

615 Palmer *et al Becoming a lawyer – fundamental skills for law students* 31.

616 Klare "Legal culture and transformative constitutionalism" 2017 14(1) *South African Journal on Human Rights* 146 157.

617 *Ibid.*

618 (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 par 302, 304.

> required balance will of necessity involve value judgments. This is the nature of constitutional interpretation."

It is submitted that Mokgoro's statement applies equally to conventional statutes. A complete discussion of statutory interpretation, as well as legal interpretation in general, falls outside the ambit of this research. However, recommendations will be made on how to integrate the teaching and learning of interpretation skills effectively with the procedural law modules in order to lay a foundation for logical and justifiable interpretation in practice. As far as legal interpretation is concerned, it forms part and parcel of trial advocacy, problem solving, legal writing and litigation skills. It does not matter whether a person is employed at a law firm, a government agency or public interest organisation – analysis and interpretation of statutes will be important and relevant.[619] The tools and techniques of interpretation will provide a practitioner with an understanding of the particular implications that a statute might hold for a client's case.[620] It is therefore submitted that, by way of inferential reasoning, legal interpretation must *per se* be regarded as important in training law students for legal practice as far as the procedural law modules are concerned.

The supremacy of the Constitution in the context of statutory interpretation will be the focal point of statutory interpretation in this study. The Constitution is however not only important with regards to statutory interpretation, but also with regards to common law interpretation.

3 5 2 OBJECTIVE GUIDELINES TO STUDENTS IN ORDER TO FACILITATE DRAFTING AND INTERPRETATION OF DOCUMENTS

Legal practitioners draft and read various documents every day. Each document contains a purpose and a message, or sometimes more than one purpose and message, which is directed at someone else. The recipients of such documents must

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619 The Writing Center at Georgetown University Law Center "A guide to reading, interpreting and applying statutes" http://kacca.org/wp-content/uploads/2018/03/A-Guide-to-Reading-Inter preting-and-Applying-Statutes.pdf (accessed 10 September 2020).

620 The Writing Center at Georgetown University Law Center http://kacca.org/wp-content/uploads/2018/03/A-Guide-to-Reading-Interpreting-and-Applying-Statutes.pdf.

be able to read them and make sense of the content thereof in a meaningful way. In doing so, deductive reasoning is applied, *ie* a process of attempting to reach a conclusive inference.[621] Facts can be ascertained with reasonable precision, but this is not always the case with words.[622] This is resulting from the way in which sentences are constructed, which might be inappropriate, or as a result of the ambiguous meaning of certain words, phrases or sentences. Should there be no agreement between parties about the meaning that should be attached to a specific piece of writing, such a matter may eventually lead to the piece of writing being brought before a presiding officer in a court of law. The presiding officer must then attempt to make sense of such writing by applying variables that he or she believes should be preferred in order to make sense of the content, or specific section of content, of such writing.[623] The meaning of such writing will therefore be a meaning that the presiding officer prefers to attach to such writing,[624] as long as such meaning can be justified by valid arguments. The possibility also exists that a presiding officer may be guided by "personal, intellectual, moral or intellectual preconceptions" in reaching a decision.[625] This process refers to inductive reasoning, *ie* an attempt to prove an argument by way of reliance on various starting premises in order to show the probable truth of such an argument on a balance of probabilities.[626] This may however lead to cases being prolonged, as well as escalating legal costs. Furthermore, such an interpretive excursion might constitute a futile attempt to discover the true legal meaning of a text, because a text does not have a true meaning.[627] Interpretation leads to understanding, meaning that a text is only accessible after it has been interpreted.[628] Various interpretations of the same text might be compared in an attempt to determine the proper meaning thereof, instead of the true meaning.[629]

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621 Palmer *et al Becoming a lawyer – fundamental skills for law students* 11.

622 University of Stellenbosch Guide on Legal Writing 2014 8; Barak "What is legal interpretation?" (undated) http://assets.press.princeton.edu/chapters/s7991.pdf (accessed 2019-07-31); Palmer *et al Becoming a lawyer – fundamental skills for law students* 11. Also see Carr, Carter and Horsey *Skills for Law students* 275 in this regard.

623 *Ibid.*

624 *Ibid.*

625 See Langa 2006 *Stellenbosch Law Review* 353 in this regard.

626 Palmer *et al Becoming a lawyer – fundamental skills for law students* 11.

627 Barak http://assets.press.princeton.edu/chapters/s7991.pdf 9.

628 *Ibid.*

629 *Ibid.*

It is submitted that, at university level already, students should be taught to follow certain objective guidelines when drafting, which are aimed at facilitating the proper meaning and proper interpretation of their writing. These guidelines include the following:

(a) keep sentences short[630] and simple. Use plain language, but avoid slang at all times;[631]
(b) what is written, must clearly state what is actually meant by the writer. Avoid verbal clutter, a misguided focus and sentence structures that do not make sense;[632]
(c) make correct use of punctuation;[633]
(d) use words consistently within the same document, *eg* "car" and "motor vehicle" – do not use the two words interchangeably,[634] as it may create confusion, especially where more than one automobile is mentioned in such document; and
(e) be careful of where the word "only" is used in a sentence, because its placement in a sentence can easily change the meaning of such a sentence in a radical way.[635]

These guidelines do not constitute a *numerus clausus* and more examples can be added.

It is submitted that interpretation should be approached from two perspectives in this regard: students must be taught not only how to properly and effectively interpret, but also to produce documents that enable others to be able to interpret such documents with relative ease. These principles and guidelines should enable students to produce

630 Palmer *et al Becoming a lawyer – fundamental skills for law students* 34, 38.
631 Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 365, 366.
632 Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 365, 366. Also see Palmer *et al Becoming a lawyer – fundamental skills for law students* 33 in this regard.
633 Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 365, 366; Finch *et al Legal Skills* 244.
634 Bodenstein *Law Clinics and the Clinical Law movement in South Africa* 366.
635 *Ibid.*

written work that is easy to interpret. It should also not be problematic for recipients to make sense of the content of such written work. The question should be: will the recipient understand what is expected of him or her after reading such a document?[636] However, as indicated above, there may still be differences in interpretation in an attempt to find the true meaning of a text.

The aforementioned discussion indicates that it is important to assist students with the interpretation of documents. The school system is collapsing,[637] which is unfortunate, as that is the system that should instil interpreting skills in students from an early stage. It is not possible to teach them all the guidelines with regards to drafting and interpretation; however, attempts can be made to teach them the most important guidelines and to let them develop on their own from there.[638] Mistakes will be made, but they will learn from them.[639]

Interpretation should not be taught in isolation, but as part of an integrated teaching methodology.[640] This means that it must be linked to other law modules and should incorporate suitable practical examples and references to applicable legislation where possible.[641] This is an attempt to break down the arbitrary boundaries between the various areas of law.[642] It will place students in a position to link the rules and principles of interpretation with real world problems and will also emphasise the interrelationship between interpretation and other areas of the law.[643] The Law of Succession module serves as an example in this regard. A client wants a will to be

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636 *Ibid.*

637 Botha *Statutory interpretation – an introduction for students* 5ed (2012) v.

638 Botha *Statutory interpretation – an introduction for students* vi, vii.

639 Botha *Statutory interpretation – an introduction for students* vii.

640 Botha *Statutory interpretation – an introduction for students* vii; Frequently asked questions about integrated learning at RMS (undated) https://www.rtsd.org/cms/lib/PA01000218/Centricity/Domain/918/integrated%20learning%20overview.pdf (accessed 2019-08-01). An integrated learning programme operates on the basis that, in the real world, people are required to execute tasks and show skills that may run across more than one academic field.

641 *Ibid.*

642 See Frequently asked questions about integrated learning at RMS https://www.rtsd.org/cms/lib/PA01000218/Centricity/Domain/918/integrated%20learning%20overview.pdf in this regard.

643 *Ibid.*

drafted. The will must include a usufruct[644] in favour of the client's spouse. The will is however drafted in such a way that, from the wording and context, it is impossible to distinguish whether reference is made to a usufruct of merely a *habitatio*.[645] This particular interpretation can also be highlighted during Law of Evidence lectures with regards to the interpretation of documentary evidence.[646] Other examples can include contracts, correspondence or pleadings that contain words, phrases and sentences susceptible to more than one interpretation, in which case the rules of interpretation can be integrated with Law of Contract and Civil Procedure lectures respectively. It is submitted that this integrated approach will contribute to preparing students for practice to a significant extent, as they will be made aware of how important it is to pay close attention to the interpretation of the content of documents when in practice due to the (possible adverse) consequences of inappropriate and unjustified interpretation.

It is submitted that the abovementioned approach to interpretation should not be viewed as being cast in stone or applied in a rigid manner. The preference of a presiding officer can be a dangerous conclusion if it is too conservative and as such not in alignment with the spirit and purport of the Constitution.[647] The same goes for the interpretation by legal practitioners. It does not mean that, because one legal practitioner interprets a self-drafted document in a particular manner, another legal practitioner will interpret it in the same manner. It furthermore does not mean that either practitioner's interpretation will measure up to an interpretation in lieu of the spirit and purport of the Constitution.[648] Due to the Constitution being the supreme law of the country, the conventional rules of interpretation can never overshadow an

644 In Olivier, Pienaar and Van der Walt *Law of Property – Students' Handbook* 2ed (1992) 238, a usufruct is defined as "…a personal servitude which grants the usufructuary a limited real right to use the thing of another and the fruits thereof with the obligation to eventually return the thing essentially intact to the owner."

645 In Olivier *et al Law of Property – Students' Handbook* 241, a *habitatio* is defined as "…the entitlement to occupy the house of a third party. This entitlement may be alienated but does not grant the right to collect fruits."

646 With regards to the interpretation of wills, the primary rule is that a will must be read and interpreted in totality. Every clause must be read an interpreted in context of the entire will – De Waal and Schoeman *Erfreg – Studentehandboek* 2ed (1996) 171.

647 See 3 5 3.

648 See Klaasen 2017 *De Jure* 14 in this regard. When a person engages in the act of interpretation, such a person will interpret a series of events from his or her own perspective.

interpretation in line with the spirit and purport of the Constitution.[649] This is elaborated on in the next section of this research.[650]

3 5 3 STATUTORY AND CONSTITUTIONAL INTERPRETATION

Legal practitioners do not only read and interpret correspondence, pleadings and other legal documents, but also legislation. It is therefore necessary for them to be familiar with the rules of statutory interpretation. Where legislation plays a central role in a litigious matter, a legal practitioner needs to know how to interpret the relevant and applicable provisions thereof in order to substantiate favourable legal arguments,[651] or legal arguments against the approach of an opponent, should the opponent rely on the provisions of legislation. For this reason, it is desirable that law students are also trained in applying such rules in the context of the procedural law modules.

This approach is important as far as civil procedure, criminal procedure and the admissibility of evidence are concerned. In addition, the Constitution[652] plays a pivotal role in the interpretation of statutes, as the Constitution is the supreme law of the Republic of South Africa.[653] Any law, including statutory law, inconsistent therewith, will be invalid and therefore of no force and effect.[654] Constitutional interpretation determines statutory interpretation, because the outcome of constitutional interpretation will determine whether a statute, or certain provisions thereof, is valid or not.[655] This means that statutory provisions must be interpreted in conformity with the

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649 See Klaasen "Constitutional interpretation in the so-called 'hard cases': revisiting *S v Makwanyane*" 2017 *De Jure* 1 2, 14. The first source of judicial decision making is the Constitution, followed by statutory law, common law, customary law, precedent, foreign and international law, in so far as all of these sources are not in conflict with the Constitution.

650 See 3 5 3.

651 See Carr *et al Skills for Law students* 274 in this regard.

652 Act 108 of 1996.

653 S 2 of the Constitution provides that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."; Botha *Statutory interpretation – an introduction for students* 12, 21. Also see Chapter 2 in this regard.

654 S 2 of the Constitution provides that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."; Botha *Statutory interpretation – an introduction for students* 21.

655 Du Plessis *Re-interpretation of Statutes* (2002) viii.

Constitution and not according to what the legislature intended.[656] Students must therefore be trained to analyse legislative provisions thoroughly in order to ascertain whether or not it is inconsistent with the provisions of the Constitution. This rule is also applicable as far as interpretation in general by legal practitioners, as discussed earlier, is concerned. In training students to become future lawyers, in this manner, they will be made aware of the importance of transformative constitutionalism, as well as to embrace it.[657] The result of such training will be that students should develop a preference for an interpretive approach that is not formalist, literalist and legalist.[658] The aim of transformative constitutionalism in this regard is to liberate judicial decisions from a strict adherence to the legalism.[659] Le Roux equates the interpretation of the Constitution with the interpretation of a musical score by a musician: it must be done in such a way so as to bring the Constitution to life.[660] The result will be substantive practical reasoning, underscored by good judgment.[661] This is a necessary development, because legal interpretation in South Africa purports to be highly structured, technical, literal and rule bound.[662] A less restrictive approach is required. Many South African lawyers still attempt to deduce meaning from words only in order to reach a specific conclusion.[663] While this approach is important, other styles of argument and interpretation are also required.[664] A wider approach will enhance the transparency of the legal process, contributing to a strengthening of the democratic process[665] and the discussion that follows will illustrate exactly why this is of the utmost importance. Transformative constitutionalism has already been discussed in some detail in Chapter 2. As stated, it denotes a change in order to improve life by way of

656 Du Plessis "Theoretical (dis)position and strategic leitmotivs in constitutional interpretation in South Africa" 2015 18(5) *Potchefstroom Electronic Law Journal* 1332 1337.

657 Mbenenge "Transformative Constitutionalism: a judicial perspective from the Eastern Cape" 2018 32(1) *Speculum Juris* 1 6.

658 Du Plessis 2015 *Potchefstroom Electronic Law Journal* 1353.

659 Klaasen 2017 *De Jure* 4.

660 Le Roux, W "The aesthetic turn in the post-apartheid constitutional rights discourse" 2006 1 *Tydskrif vir die Suid-Afrikaanse Reg* 101 110.

661 Le Roux 2006 *Tydskrif vir die Suid-Afrikaanse Reg* 112.

662 Van Marle "Transformative Constitutionalism as/and critique" 2009 2 *Stellenbosch Law Review* 286 290. Also see 2 1 in this regard.

663 *Ibid.*

664 *Ibid.*

665 *Ibid.*

adherence to a constitutional system of government.[666] In the South African context, transformative constitutionalism is transformative in itself, meaning that it is an ongoing process and not a finite event.[667] During the pre-1994 apartheid regime, the law had been based on a culture of authority and coercion.[668] The constitutional dispensation however presented a move away from the culture of authority and coercion towards a culture of justification.[669] This means that all actions are now expected to be justified by the government, a system of law totally different to that which existed during the apartheid regime.[670] Persuasion, and not coercion, is decisive.[671] Constitutional interpretation should be used in order to bring about justification for decisions and actions.[672] An example of justification is found in the wording of the right to just administrative action in the Constitution.[673] This wording makes it clear that everyone is entitled to written reasons should administrative actions, which appear to be unlawful, unreasonable or procedurally unfair, affect their rights.[674]

This culture of justification is quite significant in light of the attitude of the millennial student. The millennial student also seeks justification with regards to all actions and requests from teachers. This aspect is discussed elsewhere in more detail.[675] It is submitted that this culture of justification is to the benefit of the public, as it will greatly enhance the attitude of legal representatives towards information received with regards to their clients' cases: if legal representatives are not satisfied with information provided in a particular case, or with the reasons why it cannot be provided, the search

666 Mbenenge 2018 *Speculum Juris* 2; 1 2 2.

667 *Ibid.*

668 Mureinik "A bridge to where? Introducing the Interim Bill of Rights" 1994 (10) *South African Journal on Human Rights* 31 32; 1 2 2; 2 2 3.

669 Mureinik1994 *South African Journal on Human Rights* 32; Langa 2006 *Stellenbosch Law Review* 353; Klare 2017 *South African Journal on Human Rights* 147; 1 2 2; 2 2 3.

670 Mureinik1994 *South African Journal on Human Rights* 32; Quinot "Substantive reasoning in administrative-law adjudication" 2010 3 *Constitutional Court Review* 111 113; 1 2 2; 2 2 3.

671 Mureinik1994 *South African Journal on Human Rights* 32; 1 2 2; 2 2 3.

672 *Ibid.*

673 S 33, of which applicable and relevant subsections provide as follows:
(1) "Everyone has the right to administrative action that is lawful reasonable and procedurally fair.
(2) Everyone whose rights had been adversely affected by administrative action has the right to be given written reasons…"

674 Also see Mureinik1994 *South African Journal on Human Rights* 38-39 in this regard.

675 See 4 7 4 1.

for reasons for such action can continue until an answer or reasons can be furnished to a client. Mbenenge illustrates this point well in stating the following:[676]

> "At the core, transformative constitutionalism teaches us not to be content with the status quo, it is informed by a desire to continuously seek better ways to transform the society in ways that continuously enhances the lives of the people. In this context the courts would seek to interpret law in a way that promotes, protects and fulfils the rights and freedoms enshrined in the Constitution. ...[T]he courts use their judicial power and interpretive powers to articulate a progressive approach of how best the laws can be applied to better serve the people."

Presiding officers can therefore no longer rely on the directives of Parliament or technical reading of legislation as justifiable bases for their decisions.[677] A transformative constitution, like the one in South Africa, places the responsibility on them to justify all decisions by way of authority, ideas and values as found in the Constitution.[678] In this regard, some statutory provisions, relevant to procedural law modules, have already become the objects of constitutional scrutiny. The following are examples in this regard:

(a) with regards to civil procedure, sections 65J(2)(a) and (b) of the Magistrates' Court Act[679] have been challenged in the case of *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of*

676 Mbenenge 2018 *Speculum Juris* 3.

677 Langa 2006 *Stellenbosch Law Review* 353.

678 *Ibid.*

679 32 of 1944; Pete *et al Civil Procedure* 13. S 65J(2)(a) provides that "[a]n emoluments attachment order shall not be issued unless the judgment debtor has consented thereto in writing or the court has so authorised, whether on application to the court or otherwise, and such authorisation has not been suspended;…" S 65J(2)(b) provides that "a]n emoluments attachment order shall not be issued unless the judgment creditor or his or her attorney has first (i) sent a registered letter to the judgment debtor at his or her last known address advising him or her of the amount of the judgment debt and costs as yet unpaid and warning him or her that an emoluments attachment order will be issued if the said amount is not paid within ten day of the date on which that registered letter was posted; and (ii) filed with the clerk of the court an affidavit or an affirmation by the judgment creditor or a certificate by his or her attorney setting forth the amount of the judgment debt at the date of the order laying down the specific instalment, the costs, if any, which have accumulated since that date and the balance owing and declaring that the provisions of subparagraph (i) have been complied with on the date specified therein."

Stellenbosch Legal Aid Clinic and Others.[680] In this matter, it was stated that emoluments attachment orders will only be constitutional if there is judicial oversight over the emoluments attachment order process.[681] The effect of this is that the court itself, and not merely the clerk of the court, must issue an emoluments attachment order.[682] In doing so, the court must satisfy itself that the issuing of such an order is equitable in the circumstances of the case.[683] The basis of the constitutional invalidity was the fact that section 65J(2) did not require any judicial oversight over the issuing of an emoluments attachment order.[684] However, in terms of section 34 of the Constitution, "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."[685] It is therefore clear why the mentioned provisions of the Magistrates' Court Act were declared unconstitutional;

(b) with regards to criminal procedure, the constitutionality of the death penalty as a form of sentence for the crime of murder was challenged in the case of *S v Makwanyane and Another*.[686] The Constitutional Court found that the death penalty was unconstitutional,[687] as it amounted to cruel, degrading and inhuman punishment.[688] This matter was decided with the Interim Constitution[689] of the Republic of South Africa still in force[690] and, although the Interim Constitution did not specifically provide anything in relation to the death penalty, it did prohibit cruel, inhuman or degrading treatment or punishment.[691] Chaskalson J stated

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680 CCT 127/15 ZACC 32 [2016]; 2016 (6) SA 596 (CC); (2016) 37 ILJ 2730 (CC); 2016 (12) BCLR 1535 (CC).

681 Par 203; Pete *et al Civil Procedure* 13.

682 *Ibid.*

683 Parr 209-210; Pete *et al Civil Procedure* 13.

684 Par 204.

685 Also see par 32 of the *University of Stellenbosch Legal Aid Clinic* case in this regard.

686 (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1.

687 Himonga *et al* 2013 *Potchefstroom Electronic Law Journal* 376.

688 Par 373; Olivier "Interpretation of the Constitutional provisions relating to international law" 2003 6(2) *Potchefstroom Electronic Law Journal* 27.

689 200 of 1993.

690 Himonga *et al* 2013 *Potchefstroom Electronic Law Journal* 376.

691 S 11(2), which provided that "[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment."

that, because the words "cruel, inhuman or degrading treatment or punishment" had not been defined at that stage, the court will have to give meaning to it themselves.[692] The fundamental rights to life and dignity were, *inter alia*, taken into account in reaching the final decision,[693] as was the principle of *ubuntu*.[694] This shows that even social and human elements[695] are taken into account in order to interpret the appropriate ambit of justice; and

(c) with regards to evidence, a statutory presumption created by s21(1)(a)(i) of the Drugs and Drug Trafficking Act[696] was challenged in *S v Bhulwana; S v Gwadiso*.[697] The Constitutional Court had to consider whether or not a person, in possession of dagga exceeding 115 grams, would be considered a dealer in terms of this Act.[698] The court concluded that section 21(1)(a)(i) is unconstitutional,[699] as it violates the right of an accused person to be presumed innocent.[700] The basis of the decision of the court had been that the said section amounts to a reverse onus clause[701] The State carries the onus to prove the guilt of an accused beyond reasonable doubt.[702] Furthermore, the Interim Constitution[703] provided that "[e]very accused person shall have the right to a fair trial, which shall include the right…to be presumed innocent…"[704] The court

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692 Par 8.

693 Par 17. In this regard, s 9 of the Interim Constitution provided, with regards to the right to life, that "[e]very person shall have the right to life." With regards to the right to dignity, s 10 of the Constitution provided that "[e}very person shall have the right to respect for and protection of his or her dignity." Also see Currie and De Waal *The Bill of Rights Handbook* 6ed (2013) 260 in this regard.

694 Par 374.

695 See 3 4 5 for a discussion of social and human elements.

696 140 of 1992. This section provides that "[i]f in the prosecution of any person for an offence referred to in s 13(f) it is proved that the accused (i) was found in possession of dagga exceeding 115 grams…it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance;…" S 13(f) refers to a contravention of s 5(b). S 5(b) provides that "[n]o person shall deal in…(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance…"

697 1996 1 SA 388 (CC).

698 Bellengere *et al The Law of Evidence* 18; Currie *et al The Bill of Rights Handbook* 756.

699 Par 34.

700 Parr 19, 29 and 30; Bellengere *et al The Law of Evidence* 18.

701 Par 2; Bellengere *et al The Law of Evidence* 18. A reverse onus clause is a statutory provision that requires the accused to prove or disprove an element of an offence on a balance of probabilities.

702 Bellengere *et al The Law of Evidence* 34.

703 S 25(3)(c) of the Interim Constitution 200 of 1993. This case had been decided when the Interim Constitution had still been in force.

704 Par 2. This provision is now contained in s 35(3)(h) of the Constitution 108 of 1996.

> further stated that "…it is clear that, while the presumption exists, there is a risk that a person may be convicted of dealing in dagga despite the existence of a reasonable doubt as to his or her guilt."[705]

In each of the mentioned cases, the court interpreted the law on a legal and justifiable basis. Students need to be taught to reason along the same lines, when entering legal practice, with regards to interpreting legislation that may appear to be in conflict with the Constitution. The aim should be to make students aware that, in doing so, justice is served.[706] They must develop a state of mind that brings the Constitution to the forefront when constructing legal arguments. This is important when keeping in mind that the South African legal culture is somewhat conservative as far as analytical traditions is concerned, *ie* that strong reliance is placed on the precision, determinacy and self-revealing of texts.[707] It is as if the participants of such legal culture follow the intellectual know-how thereof without questioning it.[708] These participants are often not aware, or only partially aware, of the power of the legal culture to shape their ideas and reactions to legal scenarios and problems.[709] However, as the legal profession moves into the future, it has been stated that future generations will not judge the Constitutional Court by how precisely it followed conventional and traditional analytical strategies, but by the way in which it contributed towards social and political transformation, including aspects relating to equality, social justice, democracy, multiracialism and dignity.[710] It is submitted that, should this not be done, and should law students not be taught to interpret the law in this manner, transformation will not take place. The reason for this argument is that reliance will only be placed on the conventional and conservative manner of interpretation that the legal profession has grown used to.

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705 Par 30.

706 See Du Plessis *Re-interpretation of Statutes* xiv, xv, xvi in this regard.

707 Van Marle 2009 *Stellenbosch Law Review* 290.

708 Klare 2017 *South African Journal on Human Rights* 167.

709 *Ibid.*

710 Van Marle 2009 *Stellenbosch Law Review* 291.

It is however submitted that a mind shift in interpretation, on the basis of transformative constitutionalism, should not be without any boundaries. To put it differently: students should not be taught that legal interpretation in this way means that the law, as it was, should be disregarded and that the meaning of clear wording and statutory provisions can be distorted. This argument is based upon Klare's argument that, in the context of a transformative constitutionalism approach to interpretation, judges and lawyers are not completely free to say and do as they please on the basis of whatever personal vision of freedom they possess.[711] Kentridge AJ stated this point as follows in *S v Zuma*:[712]

> "While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single "objective" meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean."

A balance is therefore required between judicial interpretation and interpretation on the basis of the substantively progressive aspirations of the Constitution.[713] If this can be achieved, law and legal practices can jointly form a foundation of democratic and responsive social transformation.[714]

As stated before, the millennial student should welcome an approach of this nature, as justification plays an important part in what the law provides and why it is provided as such. A teaching methodology along these same lines will emphasise the role of the Constitution – and transformative constitutionalism – as a bridge between an unstable past and an uncertain future.[715] The goal is to cross this bridge, remember what needs to be changed, effect the necessary changes and imagine new and better ways of life.[716]

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711 Klare 2017 *South African Journal on Human Rights* 149.

712 1995 4 BCLR 401 (CC) par 17; Klare 2017 *South African Journal on Human Rights* 149.

713 Klare 2017 *South African Journal on Human Rights* 188.

714 *Ibid.*

715 Langa 2006 *Stellenbosch Law Review* 354.

716 *Ibid.*

3 5 4 RECOMMENDATIONS FOR AN INTEGRATED APPROACH

It can be argued that the law relating to interpretation is already part of the curriculum as a separate module and that, therefore, there is no need to consider integrating it with procedural law modules. It is submitted that such an argument should be reconsidered. Although it is true that legal interpretation is presented as a separate module at universities,[717] it should be integrated into the respective modules in order to put interpretation in clear context with regards to the various legal fields, as well as to emphasise the importance thereof. As stated by Botha, "[l]aw students may consider interpretation of statutes boring, confusing and instantly forgettable, but the legislation and Government Gazettes and Green Papers will still be waiting out there, and the principles, rules and maxims needed to interpret legislation will accompany all lawyers for the rest of their careers."[718]

The abovementioned cases and legislation[719] are indicative of how interpretation skills can be integrated with procedural law modules. If integrated into various modules, students will be able to concretise the rules of interpretation and in so doing, not study them in isolation. This should result in a better and deeper understanding of not only the law of interpretation, but also of the particular procedural law module and module content to which interpretation is applied.[720] This should prepare students for interpreting legislation in practice, as in the real word, daily occurrences are not compartmentalised.[721] Students will thus gain an appreciation for multi-disciplinary, or in this case, interdisciplinary occurrences[722] that will help them to see and experience the law in context. They should develop higher level thinking skills and feel more motivated to succeed when entering legal practice.[723] It must however be noted that there are arguments against the integration of legal interpretation with other modules

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717 Legal Interpretation is presented at NMU as a semester module in the second academic year.

718 Botha *Statutory interpretation – an introduction for students* vi.

719 See 3 5 3.

720 Mezni "What is integrated instruction? The Pros and Cons" (14 June 2017) https://www.teachingideas4u.com/2017/06/what-is-integrated-instruction-pros-cons.html (accessed 2019-08-01).

721 See Mezni https://www.teachingideas4u.com/2017/06/what-is-integrated-instruction-pros-cons.html in this regard.

722 *Ibid.*

723 *Ibid.*

when training future legal practitioners, in that an integrated approach will overlook common themes, shared techniques and skills that are pervasive throughout the law.[724] This point of view is however not agreed with, as can clearly be inferred from the abovementioned argument.

The recommendation is thus for an introductory module relating to the law of interpretation to be included in a first year module, *eg* Legal Skills, or Introduction to Law,[725] and not to present it in isolation. In doing so, the basic rules of interpretation can be explained in order for students to have a thorough understanding thereof. The more substantial and complex rules should be integrated with various modules, including the procedural law modules. In doing so, time during the lecturing day is freed up,[726] as the teaching of interdisciplinary rules is now combined in a single lecture period, meaning that there is more time available that can be used for tutorials and other educational activities.

The teacher of the particular procedural law module will carry the task of reading documents and legislation with the students and clearly explaining how effective and logical interpretation should be done. Alternatively, that task can be assigned to a law teacher who is an expert in legal interpretation. Teachers therefore have the opportunity to collaborate.[727] It is submitted that the latter suggestion is however not necessary, as all lawyers should be skilled in interpretation and should therefore be able to guide students through the applicable rules of legal interpretation in their respective modules.

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724 Kirby "Statutory interpretation: the meaning of meaning" (2011) http://classic.austlii.edu.au/au/journals/MelbULawRw/2011/3.html (accessed 2020-09-11).

725 At NMU, both Legal Skills and Introduction to Law are presented as introductory modules in the first academic year.

726 *Ibid.*

727 This is however not always possible. See Mezni https://www.teachingideas4u.com/2017/06/ what-is-integrated-instruction-pros-cons.html in this regard. Teachers of various disciplines might not be willing to change their already established systems, which change may not necessarily deliver exceptional results. Furthermore, teachers will need to exchange ideas on how to deliver collaborative presentations, which may be difficult to achieve.

3 6 CONCLUSION

Traditionally, law schools focus on teaching mostly substantive law rather than on procedural and practical aspects.[728] The teaching of law therefore remains academic to a large extent, removed from, and consequently indifferent to developments in the legal profession.[729] The way in which law students are taught has an effect on the quality of legal services rendered to clients when graduates enter legal practice.[730] It is a big disadvantage of the doctrinal way of teaching that professional ethical behaviour is largely separated from conventional legal education and taught mostly during the vocational stages in legal practice.[731] If such training only occurs during the vocational stages, it is too late, as law graduates and prospective legal professionals should be shaped early on in their educational careers to treat clients and their cases with the utmost care and to the advancement of the clients' interests. These ethical and professional principles should ideally be taught pervasively throughout the curriculum and included in all compulsory modules.[732] Transformation plays an important role in this regard, as the mentioned principles instilled in them will shape the future legal landscape.[733] In this regard, former Chief Justice Langa correctly states that law students can no longer be taught to accept legal principles merely because of authority.[734] Students must be able to critically engage with the values of the Constitution and develop a willingness to implement such values when practising law after completion of their studies.[735] The former Chief Justice further states that, in order to transform South Africa, the Constitution must play a central role in legal education.[736] Law must therefore be taught as being an integral part of social life and students need to appreciate it as such by virtue of the teaching methodology of the law teacher.[737] This will make it clear to students that, while the law was used in the

728 McQuoid-Mason 2003 *Journal for Juridical Science* 199.
729 Regassa 2009 *Ethiopian Journal of Legal Education* 70.
730 McQuoid-Mason 2003 *Journal for Juridical Science* 199.
731 Nicholson 2008 *Law Teacher* 147.
732 Nicholson 2008 *Law Teacher* 162.
733 Langa 2006 *Stellenbosch Law Review* 355.
734 Langa 2006 *Stellenbosch Law Review* 356.
735 *Ibid.*
736 *Ibid.*
737 *Ibid.*

past as an instrument to oppress, it should rather be used in the future to transform society.[738]

For the purposes of this research, the inclusion of human and social elements, as well as ethical and professional principles in the procedural law modules is obviously emphasised. A discussion relating to the inclusion thereof in other modules falls outside of the scope of this research. Time is an important factor to consider in this regard, as law teachers are already involved in schedules that are loaded with responsibilities and duties, including lecture preparation, student consultations, assessment, meetings, research and publication.[739] As permeation throughout the curriculum in other modules is also suggested, law teachers will also have to keep possible overlaps in mind when planning how to include these principles in their presentations.[740]

The importance of the procedural law modules has been amplified in this chapter. The conclusion has been reached that, despite the importance of these modules, very little attempt is made to teach these modules with the aim of producing a graduate who will be reasonably fit for practice and conducting litigation after completing his or her university studies. The discussion in this chapter has made it clear that, in many instances, procedural law modules are being taught in a mainly theoretical manner, resulting in very or little practical application of what is being taught. It is not easy to understand how this can be done, and furthermore why it has not been changed, if it is kept in mind what the purpose of procedural law is.[741] From a practical perspective, the law is primarily the legal practitioner's law and for that reason, legal education must focus on the profession, with the result that legal education should mimic the profession.[742] Although it is impossible for a university to teach a student everything that he or she needs to know for practice, it is submitted that greater attempts must be made with the aim of preparing graduates who are skilled in conducting procedure, as

738 *Ibid.*

739 See Nicholson 2008 *Law Teacher* 163 in this regard.

740 Nicholson 2008 *Law Teacher* 163.

741 See 3 1.

742 Regassa 2009 *Ethiopian Journal of Legal Education* 71.

well as analysing and interpreting evidence. In this regard, law schools should present law students with professional legal education.[743] It is therefore submitted that, if sufficient attention is not invested in teaching law students how to apply the theory that they are studying during procedural law sessions, it cannot be said that law schools are delivering professional legal education. Students should not be ignorant of how to apply the law if the very nature of the modules, that they are studying, is exactly aimed at such a result. If students are indeed ignorant in this regard, it means that law schools should evaluate the need to make necessary changes to the way in which procedural law modules are presented. In doing so, law schools should take into account the bigger picture, *ie*, how the student will be able to employ procedural law after graduation. One aspect of the bigger picture is that many students will want to pursue careers in litigation and court work. Another aspect of the bigger picture is that, in specialising in litigation and court work, legal practitioners need to attend to the interests of their clients in a manner that promotes the spirit and purport of the Constitution. This will enable such practitioners to make informed decisions as to where the law, both substantive and adjectival, does not favour their clients in that it presents inconsistencies with what the Constitution requires. With specific emphasis on procedural law, practitioners will then need to devise suggestions as to how procedural justice can be achieved. It is submitted that, in order for legal practitioners to be able to do so as early as possible in their careers in legal practice, a sound and professional legal training, encompassing the theory and practical application of procedural law, is required. If not, agreement must be reached with Harris in that he states that

> "…if law schools continue to stray from their principal mission of professional scholarship and training, the disjunction between legal education and the legal profession will grow and society will be the worse for it."[744]

This point of view by Harris confirms the problem statement as set out earlier in this research.[745] Some law firms have laid emphasis on the importance of preservation of

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743 Edwards "The growing disjunction between legal education and the legal profession: a postscript" 1993 91(8) *Michican Law Review* 2191 2191.

744 *Ibid*.

745 See 1 1.

the honourable status of the legal profession with specific reference to its duty towards the public.[746] Further to this, a survey has revealed that, out of 500 attorneys, only 31% of them are of the opinion that the LLB degree prepares law graduates for entry into and succeeding in the legal profession.[747] As far as the same survey is concerned, only 50% of the attorneys opined that the standard of general education will show an improvement in the next 5 years.[748] The results of this survey had been released during 2012, meaning that improvement in general education should have taken place by latest 2017. It is submitted that, in light of the quality of law graduates raised by various stakeholders in the legal profession,[749] this has not happened. Moreover, the fact that only 50% of legal practitioners, who where part of the survey, believed that education would improve, provides a clear indication that there are serious doubts over whether education is successful at preparing graduates for entry into the legal profession, as well as making a success of their careers. Based on the fact that legal procedure and evidence fulfil central and important roles in legal practice, it is submitted that legal education, as far as procedural law modules are concerned, deserve improvement in that law graduates should be trained practically in using legal procedure and evidence to the benefit of their clients when entering legal practice. This may significantly contribute towards restoring confidence in the legal education process as far as preparation of law graduates, to promote the honorouable legal profession in a professional manner, is concerned.

As far as teaching trial procedure and court etiquette, a module in trial advocacy can be very useful for the practical training of students. However, such a module is generally absent from many LLB curricula.[750] It is not clear why this absence occurs, especially taking into account that trial proceedings play a central role in the justice process.[751] It should therefore be imperative for all law students to be sufficiently and effectively trained in conducting themselves professionally and ethically in a

746 Edwards 1993 *Michican Law Review* 2195.
747 Klaasen 2012 *International Journal of Humanities and Social Science* 301.
748 *Ibid*.
749 See 1 1.
750 Gravett 2017 *Potchefstroom Electronic Law Journal* 5.
751 *Ibid.*

courtroom, as well as when working with clients and their cases at their offices when they enter legal practice after graduation.

In the next chapter, it will be illustrated how CLE can assist with the transfer of some of these skills.

CHAPTER 4

CLINICAL LEGAL EDUCATION – DEFINITION, TEACHING METHDOLOGIES AND SUGGESTED FOCUS AREAS RELATING TO PROCEDURAL LAW MODULES

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4 1 INTRODUCTION

Teaching equals hard work.[1] Teachers must have a thorough understanding of educational motivators, different learning styles, legal theory, legal practice, as well has how to transfer such knowledge to others in a comprehensible manner.[2] In Chapter 3, it was stated that the current teaching methodologies with regards to procedural law modules do not sufficiently focus on practical training which is necessary to prepare graduates to be better prepared for legal practice. It was also mentioned that law is taught in a rather neatly packaged and compartmentalised manner, creating clear divisions between different modules. However, something more is required in order to instil practical reasoning and skills in students with the aim of giving them the proper foundation to execute substantive legal rights by way of the proper legal procedures. CLE should be considered in this regard. In the same ways as other teaching methodologies, it also requires an understanding of what teaching techniques will best suit the applicable module outcomes.[3] In this case, the desired outcome would therefore be to not only cultivate a proper theoretical knowledge base with students, but also to enable them to effectively apply such knowledge to practical scenarios by employing appropriate legal procedures. Theory and practice should therefore not be separated, but addressed in a symbiotic manner.

In this chapter, it will be argued that CLE is the most appropriate teaching methodology with which this goal can be achieved. It forms part of the LLB curriculum at most South

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1 Mlyniec "Where to begin? Training new teachers in the art of clinical pedagogy" 2011-2012 (18) *Clinical Law Review* 505 507.

2 *Ibid.*

3 *Ibid.*

African and overseas universities.[4] It is an experiential learning methodology by which law students acquire practical skills by delivering legal services to indigent members of society in a social justice environment, mostly at university law clinics.[5] "Experiential learning" can be defined as "…the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience."[6] The knowledge of the student, which is conceptualised in the abstract, becomes more concrete in being actively applied to practical scenarios.[7] At the same time, students have the opportunity to observe how to execute a particular task, as well as to reflect upon the experience.[8] Experiential learning provides the ideal opportunity for more integrated teaching and learning, as explained elsewhere,[9] because it involves a clear link between thinking and doing.[10]

Law clinics play an important role in training law students for their entry into legal practice after graduation.[11] Wizner correctly explains this type of teaching methodology as follows:[12]

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4 Du Plessis "Clinical Legal Education Models: Recommended assessment regimes" 2015 18(7) *Potchefstroom Electronic Law Journal* 2778 2778.

5 McQuoid-Mason "The four-year LLB programme and the expectations of law students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: some preliminary results from a survey" 2006 27(1) *Obiter* 166 168; Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* (2018) 43; Ortiz "Going back to basics: changing the law school curriculum by implementing experiential methods in teaching students the practice of law" (June 2011) https://www.law.cuny.edu/wp-content/uploads/page-assets/strategic-planning/future/changes-in-legal-education/Ortiz-2012.pdf (accessed 2019-10-01) 4; Bleasedale, Rizzotto, Stalker, Yeatman, McFaul, Ryan, Johnson and Thomas "Law clinics: what, why and how?" in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 8. Also see Dednam "Knowledge, skills and values: balancing legal education at a transforming law faculty in South Africa" 2012 26(5) *South African Journal of Higher Education* 926 927, where it is stated that the South African law curriculum must increasingly provide for social justice issues.

6 Kolb "Experiential learning: experience as the source of learning and development" (26 August 2005) https://www.academia.edu/3432852/Experiential_learning_Experience_as_the_source_of_learning_and_development 20 (accessed 2020-03-25); Quinot and Greenbaum "The contours of a pedagogy of law in South Africa" 2015 1 *Stellenbosch Law Review* 29 47.

7 Quinot *et al* 2015 *Stellenbosch Law Review* 47.

8 *Ibid.*

9 See 1 1.

10 See Quinot *et al* 2015 *Stellenbosch Law Review* 48 in this regard.

11 Marumoagae "Preparing for the future: university law clinics training candidate attorneys" 2013 (September) *De Rebus* 34 34; Cantatore "The impact of pro bono law clinics on employability and work readiness in law students" 2018 25(1) *International Journal of Clinical Legal Education* 147 147.

12 Wizner "The Law school clinic: legal education in the interests of justice" 2002 70(5) *Fordham Law Review* 1929 1930; Du Plessis and Dass "Defining the role of the university law clinician" 2013 13(2) *South African Law Journal* 390 395; Evans, Cody, Copeland, Giddings, Joy, Noone and Rice *Australian Clinical Legal Education: designing and operating a best practice clinical program in an Australian Law School* (2017) 2.

> "…the law school clinic is a teaching office where students can engage in faculty-supervised law practice in a setting where they are called upon to achieve excellence in practice and to reflect upon the nature of that practice and its relationship to the law as taught in the classroom and studied in the library. It is a method of teaching law students to represent clients effectively in the legal system, and at the same time to develop a critical view of that system. Law students in the clinic learn that legal doctrine, rules and procedure, legal theory, the planning and the execution of legal representation of client, ethical considerations, and social, economic and political implications of legal advocacy, are all fundamentally interrelated."

He further correctly points out that there is an important relationship between legal education, legal practice and the functioning of the legal system.[13] It is desirable that law students undergo adequate practical training at university level in order to become competent legal practitioners.[14] The university law clinic is ideal for this purpose through the employment of CLE.[15] Students should be taught to become ethical, socially responsible and competent legal practitioners.[16] They undergo such training while rendering legal services to indigent members of society,[17] thus creating a quasi-working environment for them and in the process probably makes this experience the most real life experience of their tenure at law school. The clinical teacher, known as a clinician, who is providing practical legal training at a law clinic, must therefore fulfil a dual function, namely that of a law teacher, as well as a legal practitioner.[18] The ideal premise is not to isolate the teaching of substantive doctrine from clinical aspects, but to integrate the two concepts throughout the student's learning experience while in law school.[19] The law clinic, and consequently CLE, should not be seen as something that is removed from the conventional LLB curriculum.[20] However, there is

13 Wizner 2002 *Fordham Law Review* 1929.

14 See Wizner 2002 *Fordham Law Review* 1929 in this regard.

15 See Wizner 2002 *Fordham Law Review* 1930 in this regard. Also see Du Plessis "Clinical legal education: planning a curriculum that can be assessed" 2011 36(2) *Journal for Juridical Science* 25 25 where it is sated that CLE is the best guide to assist law students with their transition from law school to practice.

16 Wizner 2002 *Fordham Law Review* 1930.

17 Marumoagae 2013 *De Rebus* 34.

18 Du Plessis *et al* 2013 *South African Law Journal* 395; Maisel "Expanding and sustaining clinical legal education in developing countries: what we can learn from South Africa" 2007 30 *Fordham International Law Journal* 374 377.

19 Hall and Kerrigan "Clinic and the wider law curriculum" 2011 *International Journal of Clinical Legal Education* 25 26. Also see 3 3 3 for the importance of the classroom component.

20 *Ibid.*

a tendency to treat it in this way.[21] Furthermore, CLE can assist with the removal of the law being taught in compartments.[22] Students, undergoing clinical training, are confronted with real life problem situations that are not neatly packaged, but rather messy and often complex.[23] In this way, innovative thinking by the students can be promoted, as the clinician allows them to think freely and "…setting free the lawyer who is struggling to get out of the law student."[24] This notion aligns well with breaking out of the mould of the case dialogue teaching methodology, as students can discover various ways of thinking and underlying legal principles in order to reach conclusions, instead of concentrating on what courts have found in the past and merely applying that rigidly to the case at hand.[25] It creates the opportunity for students to learn law rather than rules, as well as skills rather than answers, resulting in them being more flexible in what they could achieve when in practice.[26] As stated by Ortiz, "[t]he clinical process is thus a blueprint for professional growth and introduction to the practice of law."[27]

Although some may see this breakaway from traditional teaching methods, in order to teach procedural law modules, as a radical change, it is not a strange phenomenon at all. Quinot argues that theories of teaching must be considered in order to ensure improved legal education.[28] He states that theory about legal education is markedly

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21 Hall *et al* 2011 *International Journal of Clinical Legal Education* 25. Also see De Klerk "University law clinics in South Africa" 2005 122(4) *South African Law Journal* 929 948, where it is stated that CLE is sometimes limited to stand-alone modules, remaining on the outskirts of the LLB curriculum.

22 Du Plessis "Access to justice outside the conventional mould: creating a model for alternative clinical legal training" 2007 32(1) *Journal for Juridical Science* 44 45. Also see Snyman-Van Deventer and Swanepoel "The need for a legal-writing course in the South African LLB curriculum" 2012 33(1) *Obiter* 121 125 with regards to compartmentalisation of the law. They explain that students consider each subject to exist within its own compartment and tend to neglect to apply or link the theory, that they have learnt in one module, to that learnt in others.

23 Vawda "Learning from experience: the art and science of clinical law" 2004 29(1) *Journal for Juridical Science* 2004 *Journal for Juridical Science* 116 121.

24 *Ibid.*

25 See 3 3 2 and 3 3 3.

26 Kennedy "Legal education as training for hierarchy" (2014) http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20HierarchyPolitics%20of%20Law.pdf (accessed 2019-01-23) 54 65.

27 Ortiz 2011 https://www.law.cuny.edu/wp-content/uploads/page-assets/strategic-planning/future/changes-in-legal-education/Ortiz-2012.pdf 8.

28 Quinot "Transformative Legal Education" 2012 129 *South African Law Journal* 411 411.

absent[29] and that there is a dearth of academic writing on the topic in South Africa.[30] He further refers to Klare, who notes a disconnect between the current legal culture and the commitments of the Constitution in South Africa to social change.[31] In this regard, little value is placed on values and policy.[32] Quinot states that:[33]

> "…Klare calls for the development of a legal culture that embraces the normative framework put forward by the Constitution in its methodology. This involves not only overt substantive reasoning but also recognition of the possibilities for creativity in applying and developing the law to meet the aims of social transformation."

Klare states the following:[34]

> "The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals…On my reading, the Constitution suggests not only the desirability, but the legal necessity, of a transformative conception of judicial process and method."

The implications of this for legal education are the following:

(a) the substance of what is being taught should be different from what it had been in the past;[35] and
(b) students should not only be educated in the new substance of the law, but also according to a new method or reasoning mode.[36] If the "judicial process and method" need to be transformed, students need to be taught along such lines in order for them to effectively apply the same when entering practice.

Of importance is not only what is taught, but also the manner in which it is taught.[37] This becomes relevant especially when considering that many law schools have in

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29 Quinot 2012 *South African Law Journal* 411; Van der Merwe "A case study in advocating for expanded clinical legal education: the university of Stellenbosch module" 2017 28(3) *Stellenbosch Law Review* 679 681.

30 Quinot 2012 *South African Law Journal* 411-412.

31 Quinot 2012 *South African Law Journal* 414; Klare "Legal culture and transformative constitutionalism" 2017 14(1) *South African Journal on Human Rights* 146 156.

32 Quinot 2012 *South African Law Journal* 414.

33 *Ibid.*

34 Klare 2017 *South African Journal on Human Rights* 156.

35 Quinot 2012 *South African Law Journal* 414.

36 Quinot 2012 *South African Law Journal* 415.

37 Quinot 2012 *South African Law Journal* 416; Van der Merwe 2017 *Stellenbosch Law Review* 681.

fact abandoned their proper function by placing an emphasis on abstract theory rather than on practical scholarship and pedagogy.[38] Legal education is disconnected from the everyday issues that legal practitioners and presiding officers face.[39] There are increasing pleas from the profession to do more in order to bridge this disconnect between the law school and the profession as far as the training and preparation of law students are concerned.[40] It is submitted that change is required. Employing the CLE methodology to teach the procedural law modules is aligned to the abovementioned implications. The substance of such modules will contain different elements, namely more practical and social elements, and furthermore students will be taught to consider proper reasoning in coming to conclusions, and not merely by relying on what courts did in the past, which is the approach that is advocated by the case dialogue method. Should a change in methodology not be considered, Quinot states that:[41]

> "…we may…not be aware of the significant influence that these practices have on what we do in class, and hence their impact on law graduates' perceptions of the law and their role in society. Significantly, these practices can have a limiting effect not only on law graduates' inclination to drive transformation but indeed also on their ability to be innovators under the Constitution."

What is of importance with regards to CLE is that the focus should be about the education of the student, not about rendering professional services to the community.[42] This however does not mean that students should not be made aware of being socially conscious to the needs of members of the public. If this is ignored, CLE would not be advancing the spirit and purport of the Constitution and could be seen as being against transformative constitutionalism. It simply means that priority should be given to education, even when rendering professional services. In this regard, students should not be overloaded with so much practical work that they do

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38 Ewards "The growing disjunction between legal education and the legal profession: a postscript" 1993 91(8) *Michigan Law Review* 2191 2191; Chemerinksy "Why write?" 2009 107 *Michigan Law Review* 881 883.

39 Chemerinksy 2009 *Michigan Law Review* 885.

40 Kloppenberg "Educating problem solving lawyers for our profession and communities" 2009 61(4) *Rutgers Law Review* 1100; Kloppenberg "Training the heads, hands and hearts of tomorrow's lawyers: a problem-solving approach" 2013 1 *Journal of Dispute Resolution* 103 105.

41 Quinot 2012 *South African Law Journal* 416-417.

42 Du Plessis *et al* 2013 *South African Law Journal* 397; Welgemoed "Die balans tussen kliniese regsopleiding en regstoegang per se in 'n regskliniek – 'n delikate spankoord" 2016 2 *Litnet Akademies* 753 764; Du Plessis "Clinical Legal Education: the challenge of large student numbers" 2013 38(2) *Journal for Juridical Science* 17 21.

not have the opportunity to reflect on the work that they have done.[43] On 18 November 2019, at the SAULCA Workshop and AGM in Johannesburg, Deputy Minister of Justice, Mr John Jeffery, also posed the question about whether CLE or access to justice is the most important function of a university law clinic. According to him, these two components are complementary to each other. There should thus be a balance between them.

At first, law clinics were established to render legal services to the indigent members of society by letting students assist them and, in doing so, students underwent practical training.[44] Students still fulfil this task today, as South African university law clinics follow the "socially conscious perspective" approach, which has as its objective the representation of the client by the student.[45] Students however do not represent clients in the courtroom, because students do not have the right of appearance in courts of law. The objectives of South African universities are threefold: teaching, community service and academic research.[46] If the clinical law module at a university is compulsory, a stronger emphasis is placed on the training of students in a law clinic setting, and not on client representation.[47] Access to justice by the public becomes a secondary component in this regard, but, as already stated, should not be seen as being unwanted as far as student training is concerned.[48] The reason is that student training, as part of the live-client model, concerns the rendering of limited legal services by students to members of the public.[49] In this regard, Du Plessis states that, where CLE is a compulsory component of the LLB degree, the role of a law clinic in the academic environment becomes more emphasised than access to justice.[50]

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43 See Maisel 2007 *Fordham International Law Journal* 415 in this regard. Too much time spent on client representation will mean that there is less time for the education of the student.

44 Du Plessis 2007 *Journal for Juridical Science* 45-46.

45 Du Plessis 2007 *Journal for Juridical Science* 46.

46 *Ibid.*

47 Du Plessis 2007 *Journal for Juridical Science* 46. This is the case at the NMU Law Clinic as far as the student contingent is concerned.

48 Welgemoed 2016 *Litnet Akademies* 764.

49 "Limited", in this regard, firstly refers to the fact that university law clinics may not engage in all types of matters. Conveyancing, Road Accident Fund claims, administration of deceased estates and administrations in terms of section 74 of the Magistrates' Court Act 32 of 1944 are excluded from the ambit of law clinics. Secondly, it refers to the fact that law students may not appear in any courts in order to represent clients, because they do not possess the required right of appearance in courts.

50 Du Plessis 2007 *Journal for Juridical Science* 46-47; Du Plessis *et al* 2013 *South African Law Journal* 397; Welgemoed 2016 *Litnet Akademies* 764-765.

Consequently, a stronger emphasis is placed on the academic training of students in this regard.[51] It becomes the duty of the clinician to strike a balance between the academic teaching and training of the students and the rendering of services to the community.[52]

De Klerk echoes this sentiment by stating that students are incurring academic fees in order to complete clinical law modules while at university.[53] In return for this payment, they have legitimate expectations of the benefits that they should receive.[54] For this reason, De Klerk states that the clinical training should never be merely incidental or secondary to the practice of law, because teaching remains the core business of a university law clinic.[55]

Wizner also emphasises the educational aspect. He states that skills training, by way of client representation, was to be the methodology of CLE.[56] However, the educational goal of CLE is far more ambitious than client representation.[57] The true nature of this goal is to get students away from the classroom and into the real world, from where they would return to the classroom with a much deeper understanding of legal doctrine and theory, as well as what actually works and what does not.[58] In this way, students are being trained in the actual functioning, as well as malfunctioning, of the legal system, as well as about the value of and duty to render services to the public.[59] He also states that these pedagogical aspects of CLE distinguish it from the work that law students perform while rendering practical work during their years at law school.[60] The law clinic, and consequently CLE, provide an instructional programme,

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51 *Ibid.*

52 *Ibid.*

53 De Klerk "Unity in adversity: Reflections on the clinical movement in South Africa" 2007 12 *International Journal of Clinical Legal Education* 95 98; Du Plessis *et al* 2013 *South African Law Journal* 397; Welgemoed 2016 *Litnet Akademies* 765.

54 *Ibid.*

55 *Ibid.*

56 Wizner 2002 *Fordham Law Review* 1934.

57 *Ibid.*

58 *Ibid.*

59 *Ibid.*

60 Wizner 2002 *Fordham Law Review* 1930.

which is an integral component of the law student's legal education, intellectually situated within the legal curriculum.[61]

The question of the significance of CLE becomes relevant here. It is submitted that institutional prejudice against CLE[62] should be considered in this regard. It is not a new occurrence to experience opposition to clinical law programmes or the benefits it can hold for students.[63] Institutional prejudice stems mainly from a lack of knowledge about CLE.[64] It may further emanate from the belief that legal practice – and not universities – should train law graduates for practice;[65] hence the importance of the reference by Wizner about the distinction between clinical legal training and training in law offices, as stated above. In this regard, it is submitted that it may become easy for someone, who does not know that CLE is in fact about student education, to dilute the true meaning of the methodology in thinking that law clinics should merely assist members of the public *en masse*. This may result in a neglect of the importance of clinical training, as explained by Du Plessis, De Klerk and Wizner, as well as other aspects of CLE, most importantly tutorials and reflection.[66] It is further submitted that such a point of view may possibly also lead to clinical law programmes being left out of the curriculum, leaving professional staff to keep law clinics alive without any students to assist and/or to observe. This would be a tragedy in the world of CLE, as clinical training contains all the essential components to adequately train students for legal practice.

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61 *Ibid.*

62 See De Klerk 2007 *International Journal of Clinical Legal Education* 102-103, as well as Van der Merwe 2017 *Stellenbosch Law Review* 681 in this regard.

63 De Klerk 2007 *International Journal of Clinical Legal Education* 102; Vawda 2004 *Journal for Juridical Science* 124; Evans and Hyams "Independent valuations of clinical legal education programs" 2008 17(1) *Griffith Law Review* 52 56 footnote 13. Also see Giddings *Influential factors in the sustainability of clinical legal education programs* (Doctoral thesis, Griffith University) 2011 i in this regard.

64 See De Klerk 2007 *International Journal of Clinical Legal Education* 103 in this regard.

65 See Vukowich "Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" 1971 23 *Case Western Reserve Law Review* 140 143 in this regard, where it is stated that it, at university level, it is easier to teach knowledge than it is to develop skills. Also see Vukowich 1971 *Case Western Reserve Law Review* 148-149, as well as Campbell "The role of law faculties and law academics: academic education or qualification for practice?" 2014 1 *Stellenbosch Law Review* 15 15 in this regard. At 15, Campbell, asks the important question: "[s]hould the university law school train lawyers for practice or pursue a broader, academic legal education?"

66 See 4 3 2 and 4 3 4 with regards to reflection and tutorials respectively.

The argument that CLE contains the relevant content to shape practice ready graduates should be used to advocate for a clinical law module to become compulsory at every university. There is strong support in South Africa and abroad that CLE should become mandatory.[67] In this regard, Holness confirms that CLE, which *inter alia* involves practical duties at a university law clinic, is not compulsory for many law students in South Africa.[68] He has no doubt that the LLB degree, as a vocational qualification, should adequately prepare law graduates for entry into legal practice.[69] He points out that it would be a major shortcoming if the LLB curriculum fails to provide such adequate training.[70]

Holness further states that "[t]his also needs to be seen within the context of universities having an ethical obligation to meaningfully contribute to the social upliftment of the areas in which they exist."[71] This is a convincing statement for two reasons: firstly, universities support community service, and secondly, law students need to be taught more about social and human elements in society, as has already been discussed.[72] By way of a mandatory clinical law module, and the inclusion of social and human elements in the clinical curriculum, more students can be trained. Training in this regard should not only focus on skills, but also on the impact that these skills and practical actions can have on a client and his or her matter.[73] This is a significant contribution that CLE can make towards transformative legal education, which is based on transformative constitutionalism.[74] It can enhance the students' sensibilities with regards to the context in which the South African society lives, as well as access to justice and promotion of the goals of social justice, especially in relation to the indigent and marginalised members of society.[75] Students must therefore be taught to perform skills in a social justice context. Moreover, a study into graduate

67 Van der Merwe 2017 *Stellenbosch Law Review* 680.

68 Holness "Improving access to justice through compulsory student work at university law clinics" 2013 (16)4 *Potchefstroom Electronic Law Journal* 328 333; Van der Merwe 2017 *Stellenbosch Law Review* 680.

69 Holness 2013 *Potchefstroom Electronic Law Journal* 333.

70 *Ibid.*

71 Holness 2013 *Potchefstroom Electronic Law Journal* 333-334.

72 See 3 4 5; Evans *et al* 2008 *Griffith Law Review* 61.

73 Evans *et al Australian Clinical Legal Education* (2017) 109-110.

74 Quinot *et al* 2015 *Stellenbosch Law Review* 49. See 2 1 with regards to transformative legal education and its goals.

75 Quinot *et al* 2015 *Stellenbosch Law Review* 49.

attributes has revealed that career skills should be included in the education of students.[76] These skills include soft skills, life skills and work ethics.[77] Soft skills refer to time management, networking, team work, creative thinking and conflict resolution.[78] Life skills refer to skills needed by a person to make the most out of life and include communication skills, interpersonal skills, decision making skills, problem solving skills, creative thinking skills, critical thinking skills, self-awareness, empathy, emotional intelligence, assertiveness, self-control and resilience.[79] Work ethics include reliability, dependability, work dedication, continuous productivity, cooperation, team work and self-discipline.[80] The graduate attributes study however indicates some uncertainty as to which institution or at which level of education such skills must be taught;[81] however, it will be suggested in this research that CLE is an appropriate methodology for teaching these skills to law students. However, should CLE become mandatory, especially employing the live-client model, the real issue is whether law clinics are in a position to effectively supervise large numbers of students without any prejudice to the objectives and quality of clinical training.[82]

In this chapter, the meaning of CLE will be defined so as to show its practical significance. Each of the components of CLE, namely practical training at a law clinic or in a simulated environment, classroom teaching and tutorial sessions will be discussed. The advantages of clinical training, as well as integrating such training methodology with the teaching of procedural law modules will also be discussed.[83] The significance and importance of this chapter should be made clear: in order to recommend that procedural law modules should be presented by way of the CLE methodology, a well-structured and effective clinical law programme should be firmly in place at law schools. If not, law teachers of procedural law modules will not be

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76 Griesel and Parker "Graduate attributes: a baseline study on South African graduates from the perspective of employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 20.

77 *Ibid.*

78 Doyle "What are soft skills?" (revised 24 June 2020) https://www.thebalancecareers.com/what-are-soft-skills-2060852 (accessed 2020-04-20).

79 Skills You Need "Life skills" (undated) https://www.skillsyouneed.com/general/life-skills.html (accessed 2020-04-20).

80 Schreiner "Five characteristics of a good work ethic" (29 January 2019) https://smallbusiness.chron.com/five-characteristics-good-work-ethic-10382.html (accessed 2020-04-20).

81 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 20.

82 Vawda 2004 *Journal for Juridical Science* 124.

83 See 1 1 with regards to the importance of integrating CLE with procedural law modules.

equipped to adequately teach students according to this methodology. The focus will be on clinical training according to the live-client model, although simulations will also be discussed. Finally, some suggested focus points of the clinical training methodology, specifically with regards to the procedural law modules, will also be discussed.

4 2 DEFINING CLINICAL LEGAL EDUCATION

The following statement by Kennedy, although not about CLE, provides a basis for this discussion:[84]

> "The law school classroom…is also engaging. You are learning a new language, and it is possible to learn it. Pseudoparticipation makes one intensely aware of how everyone else is doing, providing endless bases for comparison. Information is coming on all sides, and aspects of the grown-up world that you knew were out there but didn't understand are becoming intelligible. The teacher offers subtle encouragements as well as not-so-subtle reasons for alarm. Performance is on one's mind, adrenaline flows, success has a nightly and daily meaning in terms of the material assigned. After all, this is the next segment: one is moving from the vaguely sentimental world of college, or the frustrating world of office work or housework, into something that promises a dose of 'reality', even if it's cold and scary reality."

The aim of this research had already been made clear: it will benefit both the legal fraternity and law students if aspects of legal practice, with specific focus on procedural law modules, are taught in a practical and engaging way in order to provide law students with suitable practical knowledge when entering legal practice after graduation. It will benefit students if, when they receive information "coming on all sides", it is made more intelligible to them, especially as far as legal practice and the "grown-up world", definitely a "cold and scary reality" to them, is concerned. Kloppenberg convincingly states that "[l]awyers have brains, but also must employ other lawyering skills and use judgment when counseling clients."[85] In developing these lawyering skills, students will need encouragement from their teachers, but also the "not-so-subtle reasons for alarm". This will encourage students to focus on the careers in legal practice awaiting them after graduation, and to perform accordingly in

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84 Kennedy http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20HierarchyPolitics%20of%20Law.pdf (accessed 2019-01-23) 56.

85 Kloppenberg 2009 *Rutgers Law Review* 1103.

striving towards success. With regards to the particular teacher in this regard, it was stated in 1908 already that:[86]

> "[t]he ideal law teacher is the one who naturally has the teaching power, who has had practical experience at the bar, and whose practical experience has been supplemented by the labors of the scholar to such an extent that he is a master of the ordinary problems that lie within the field of his specialty and well equipped for the solution of the extraordinary ones."

It is submitted that these qualities are still relevant and applicable today. For this reason, it may be of significant value to employ CLE in this endeavour.[87] The question can be asked as to why CLE is the suggested – and, ultimately, preferred – teaching methodology for procedural law modules in order to provide better skills training to law students. In an attempt to answer this question convincingly, the point of departure is a basic description of CLE. McQuoid-Mason provides the following summary:[88]

> "I like to define clinical law as a method of teaching practical legal skills to law students using interactive, reflective learning methods in a social justice environment. Such a methodology may include classroom and service components or a classroom-only component that uses simulations to provide students with experience in dealing with clients. Students are confronted with real-life situations and play the role of legal practitioners to solve legal problems. They do this by interacting with clients or each other to identify and resolve legal issues and are subjected to critical review by their teachers or peers. Clinical legal education enables law students to play an active role in the learning process and to see how the law operates in real-life situations."

Actual experience of the legal process therefore forms the core of CLE.[89] CLE integrates substantive knowledge, skills training and the development of ethical judgment.[90] It is immediately clear that CLE differs from the Socratic and case dialogue teaching methodologies, as discussed in Chapter 3[91] – it is student centred, very interactive and involves reflection.[92] According to De Klerk, academic legal

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86 Hutchins "The Law Teacher – his functions and responsibilities" 1908 8 *Columbia Law Review* 362 368.

87 Vukowich 1971 *Case Western Reserve Law Review* 149.

88 McQuoid-Mason "Introduction to clinical law" in Mahomed (ed) *Clinical Law in South Africa* 3ed (2016) 1; McQuoid-Mason 2006 *Obiter* 168.

89 De Klerk 2005 *South African Law Journal* 937; Quinot *et al* 2015 *Stellenbosch Law Review* 49.

90 Quinot *et al* 2015 *Stellenbosch Law Review* 49; Maisel 2007 30 *Fordham International Law Journal* 375.

91 See 3 3. Because students are actively participating in their own training, they do not have any reason to feel inferior to the clinician(s). The Socratic teaching methodology had quite the opposite effect.

92 McQuoid-Mason in Mahomed (ed) *Clinical Law in South Africa* (2016) 2.

education is equal to commercial business being conducted on wholesale level, while CLE conducts such business at retail level.[93] CLE is therefore much more intensive and specific than conventional academic training. The clinical teaching methodology is employed to deconstruct the otherwise neatly organised legal principles and to expose students to a more unstructured appearance of the law, as can be found in practice.[94] CLE therefore goes beyond the artificial boundaries and compartments that academic training imposes on the law.[95] Students must be made aware of the difficulties that can be experienced in applying legal theory and doctrine in practical situations.[96]

McQuoid-Mason stated that CLE involves reflection. The concept of reflection is described by Giddings as an intensive small group or solo learning experience which furnishes each student with the responsibility to attend to the legal or law related work of clients.[97] These clients can be part of a live-client or simulated environment.[98] The responsibilities of the students in this regard are executed in collaboration with their clinical supervisors.[99] This enables students to learn from their experiences by reflecting on various issues, including their interactions with clients, colleagues and supervisors, any ethical issues relating to cases, as well as what the impact of the law and legal procedures would be on cases.[100] The impact of the law in this regard will undoubtedly include consideration as to whether or not legal measures, both doctrinal and procedural, are furthering the spirit and purport of the Constitution in specific instances. The significance of reflection is further discussed elsewhere.[101]

Adewumi and Bamgbose explain the significance of the concept of "education", in the context of CLE, clearly when they state that education cannot be confined to a

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93 De Klerk 2007 *International Journal of Clinical Legal Education* 100; Welgemoed 2016 *Litnet Akademies* 758-759.

94 *Ibid.*

95 *Ibid.*

96 *Ibid*.

97 Giddings *Promoting justice through clinical legal education* (2013) 14; Du Plessis "Clinical legal education: identifying required pedagogical components" 2015 40(2) *Journal for Juridical Science* 64 66.

98 *Ibid.*

99 *Ibid.*

100 *Ibid.*

101 See 4 3 2.

classroom setting.[102] Rather, education is a process that exists in everything that is seen, heard, said and done.[103] All human activities, as well as the environment in which these activities are conducted, serve the purpose of education.[104] These activities can include the commencement of an action, the conclusion of an action or just developing a consciousness of a part of the environment.[105]

In order to consolidate the abovementioned statements, Du Plessis and Dass state that CLE is not a course or module that can be neatly packaged into the LLB degree.[106] CLE is a teaching methodology and comprises of a process in terms of which knowledge, skills and values are combined with a live interaction with actual clients.[107] This stands in contrast to academic legal education, where traditional classroom sessions are still used as the predominant teaching methodology.[108] Furthermore, the traditional classroom methodology is used to teach the law in a systematically organised manner,[109] which is not how the law appears in legal practice. Instead, CLE makes use of the practice of law, whether in a live-client or simulated environment, to teach legal doctrine, ethics, professional skills, effective interpersonal relations, as well as the ability to integrate law, facts and legal procedure.[110] Du Plessis and Dass emphasise that "clinical", in CLE, refers to the attempt to study and teach law by way of making use of legal skills directed towards solving client problems, as well as the drawing of useful generalisations from such an experience.[111] However, the fact that CLE differs from the traditional classroom method of teaching and learning does not mean that classroom sessions do not play any role in CLE, as will be indicated elsewhere.[112]

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102 Adewumi and Bamgbose "Attitude of students to Clinical Legal Education: A case study of Faculty of Law, University of Ibadan" 2016 3(1) *Asian Journal of Legal Education* 106 106.

103 *Ibid.*

104 *Ibid.*

105 *Ibid.*

106 Du Plessis *et al* 2013 *South African Law Journal* 394.

107 *Ibid.*

108 *Ibid.*

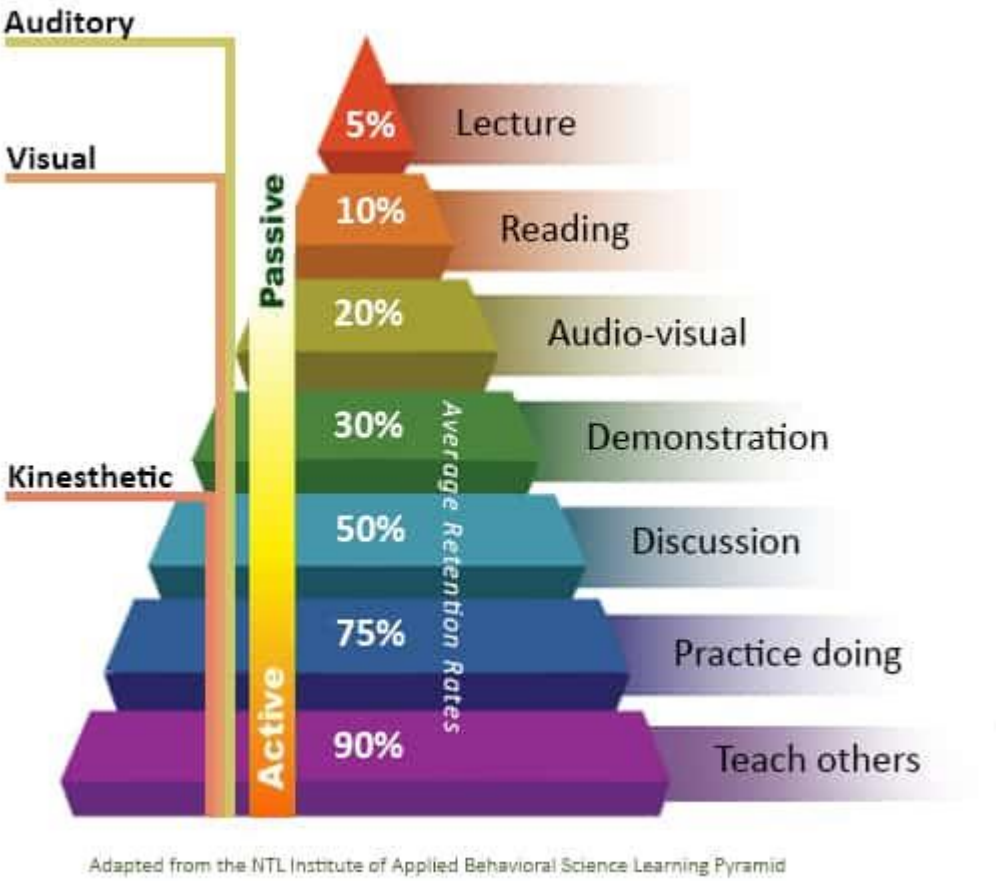
109 *Ibid.*

110 Du Plessis *et al* 2013 *South African Law Journal* 395.

111 *Ibid.*

112 See 4 3 3 with regards to a discussion of the classroom component in the context of CLE.

The full value of CLE is perceived when considering the so-called "learning pyramid"[113] or "cone of learning".[114] A graphic depiction of the learning pyramid is included in the following figure:[115]



Adapted from the NTL Institute of Applied Behavioral Science Learning Pyramid

In this regard, it is desirable that, whatever students learn by way of CLE, should be fully appreciated by them when entering legal practice. Therefore, the learning pyramid indicates the following:[116]

113 McQuoid-Mason in Mahomed (ed) *Clinical Law in South Africa* (2016) 2; Education Corner "The Learning Pyramid" (undated) https://www.educationcorner.com/the-learning-pyramid.html (accessed 2019-08-20).

114 Education Corner https://www.educationcorner.com/the-learning-pyramid.html.

115 The figure can be found at Education Corner https://www.educationcorner.com/the-learning-pyramid.html.

116 McQuoid-Mason in Mahomed (ed) *Clinical Law in South Africa* (2016) 2; Education Corner https://www.educationcorner.com/the-learning-pyramid.html.

(a) when the lecturing method is used, students remember 5% of what they heard during lectures;
(b) when students read, they remember 10% of what they have read;
(c) when using audio-visual methods of teaching, students remember 20% of what they are expected to;
(d) when students participate in discussions in small groups, they remember 50% of the particular topic discussed;
(e) when shown a demonstration and afforded the opportunity to actually perform what was demonstrated, students will remember 75% thereof; and
(f) in the case of Street Law and clinical law programmes, where students teach other people and provide legal advice, they remember 90% of the applicable information.

The learning pyramid makes particular sense in the context of CLE and the value that it can hold for procedural law modules. This requires some explanation. The further one progresses towards the base of the pyramid, the more active, and consequently less passive, the student participation becomes, because students are required to interact with others, rather than just sitting and listening to information being presented to them.[117] This aligns well with the goal of training students to be fit for legal practice. Procedural law modules involve practical aspects of the law to be used in legal practice. CLE involves practical training. Therefore, in an integrated format, CLE can significantly contribute towards the teaching and learning of procedural law modules so that students are better prepared for entry into legal practice. In this regard, McQuoid-Mason states that CLE provides law students with the tools that will lay the foundation for their future careers as lawyers.[118] He further states that, while traditional educational methods have as their focus the theoretical content of the law, CLE focuses on skills that students will need for legal practice.[119] In this context, the CLE curriculum becomes important, especially when considering the complaints of legal practitioners regarding the level of preparation of law graduates employed by their law firms.[120]

117 See Education Corner https://www.educationcorner.com/the-learning-pyramid.html in this regard.
118 McQuoid-Mason 2006 *Obiter* 168.
119 *Ibid.*
120 Du Plessis "Designing an appropriate and assessable curriculum for clinical legal education" 2016 *De Jure* 1 3.

It should however be noted that the learning pyramid has attracted some criticism. It has been described as proclaiming a myth, especially with regards to efficiency of how much information students remembers when performing whatever was demonstrated to them or when they transfer information to others.[121] One argument in this regard is that, if a student remembers 90% of information as a result of teaching others, and the student has learned such information by way of a lecture, how did the student come to learn such an amount of information if only 5% is retained by listening to a lecture?[122] Does this mean that the student actually only transfers the 5% of information to the listener?[123] Furthermore, how much information would the listener retain?[124] Another argument concerns the combination of some of these methods, more specifically the demonstration and transfer of knowledge.[125] For example, if a student teaches a listener by way of the demonstration method, it cannot mean that the student will now remember 120% of the information taught, because one cannot remember more than 100% of information.[126] The learning pyramid has thus been described as illogical.[127] The percentages cannot be counted on, as there are a lot variables that may have an effect on memory retrieval.[128] These variables include the following:[129]

(a) the type of information that is being recalled;
(b) the age of the subjects used to determine the amount of memory retrieval;
(c) the delay between the subjects studying the particular information and the actual memory retrieval test taking place;
(d) the particular instruction given to the subjects, *eg* reading, demonstrating or transferring knowledge to others;
(e) the manner in which the subjects' memory had been tested; and

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121 The Effortful Educator "The pyramid of myth" (undated) The Pyramid of Myth – The Effortful Educator (accessed 2021-04-26).

122 *Ibid*.

123 *Ibid*.

124 *Ibid*.

125 *Ibid*.

126 *Ibid*.

127 *Ibid*.

128 Strauss "Why the 'learning pyramid' is wrong" (6 March 2013) Washington Post (accessed 2021-04-26).

129 *Ibid*.

(f) the subjects' existing knowledge about the information that they were required to remember.

There appears to be uncertainty regarding the origin of the percentages used in the pyramid.[130] The pyramid has however always been linked to and propagated by the National Training Laboratories Institute (hereafter referred to as "NTL") in Maine, United Stated of America.[131] If the methodology and data, supporting the percentages in the learning pyramid, cannot be verified, it is not possible to evaluate such percentages.[132] It has also been argued that there is no empirical research that could support the claim that the learning pyramid reflects an adequate description of learning and the retention of what was learned.[133] NTL has indicated that they are not in a position to present any empirical studies that could support the pyramid.[134] This has led to the conclusion that any empirical interpretation of the learning pyramid might produce arbitrary results, as the correctness of the claims and percentages cannot be tested against any threshold(s).[135]

Whatever the case may be, it has been stated that each of the methods in the pyramid leads to the retention of information.[136] None is superior to the other and all of them are effective in specific contexts.[137] The latter argument is supported in this research, as continuous reference is made of the benefit of CLE and practical training for students. For this reason, it is submitted that, despite the criticism against the validity of the learning pyramid, there is enough authority to support the argument put forth in this research that, in the context of CLE, learning by doing and transferring knowledge to others are factors that will assist students to exit university as better trained candidates for entry into legal practice. Furthermore, according to Letrud, the

130 Jones "The learning pyramid: true, false, hoax or myth?" (11 October 2009) The learning pyramid: true, false, hoax or myth? – The Weblog of (a) David Jones (wordpress.com) (accessed 2021-04-26); Letrud "A rebuttal of NTL Institute's learning pyramid" 2012 113(1) *Education* 117 118.

131 Jones The learning pyramid: true, false, hoax or myth? – The Weblog of (a) David Jones (wordpress.com); Letrud 2012 *Education* 118.

132 Letrud 2012 *Education* 119.

133 Letrud 2012 *Education* 120.

134 *Ibid*.

135 *Ibid*.

136 Jones The learning pyramid: true, false, hoax or myth? – The Weblog of (a) David Jones (wordpress.com)

137 *Ibid*.

problems of the learning pyramid might be solved if the percentages in the pyramid is viewed from an additive, and not discrete, perspective.[138] This is convincing, as learning is a lifelong experience, as is stated elsewhere in this research.[139] Letrud however qualifies such statement in stating that and additive interpretation will give rise to major difficulties in separating the effect of the various learning methods from the effect of repetition.[140] It is submitted that this statement cannot be supported. As far as CLE is concerned, repetition does take place in that students are being lectured during classroom sessions.[141] Students get many opportunities to execute the knowledge, gained during the classroom sessions, when working with clients at live-client law clinics or during simulations.[142] Tutorial sessions also present opportunities to further discuss and refine students' knowledge, skills and experience obtained from both classroom and law clinic sessions.[143] Keeping in mind that education is a lifelong learning experience, students will continue learning and executing their knowledge and skills when entering legal practice. This will undoubtedly expose them to more theory behind some practical tasks, demonstrations, performing tasks and transferring their knowledge to others. This repetition of knowledge, skills and experience, carried over from university into legal practice, renders moot the criticism with regards to most of the variables against memory retrieval that had been indicated earlier. It is therefore clear that even an additive interpretation of the learning pyramid can be done and that it will benefit the law student as a future legal practitioner. The conclusion is therefore that the criticism against the learning pyramid, as indicated, cannot be supported in context of this research. Furthermore, it is submitted that the percentages can even be ignored and the focus merely placed on the effect of the particular methods of learning. Such an approach will dismiss the criticism against the allegedly arbitrary effect that the percentages may have. In the context of CLE, it is argued that the cumulative effect of lecturing, discussions, learning by doing and transferring knowledge to others, is decisive. The cumulative effect also supports the argument that theory and practical training are integral components of CLE.[144]

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138 Letrud 2012 *Education* 121.

139 See 5 2 2 3 and 5 2 3.

140 *Ibid*.

141 See 4 3 3.

142 See 4 3 4. In this regard, it is important that sufficient time is allocated for practical training – see 4 7 5. Sufficient time for practical training will enable repetition.

143 See 4 3 5.

144 See, *inter alia*, 1 2 3 and 1 4 4.

CLE involves a variety of content and clinical methods in order to serve the dual purposes of the methodology,[145] namely student training and the provision of legal services to indigent members of society.[146] Broadly speaking, it can include university law clinics, externships, community education projects, simulated activities, a variety of other skills training opportunities and interactive teaching methodologies.[147] Elsewhere in this chapter, the content of the NMU Legal Practice module, as far as CLE is concerned, will be set out and analysed.[148] It should be noted that the module content is quite diverse in order to ensure the maximum exposure of law students to various aspects and areas of legal practice.[149] The module content, and what students should learn, is very important, as law clinics are expensive to maintain.[150] The implication therefore are that, should the learning outcomes not be clear and structured, law clinics where student training is paramount, can be seen as not fulfilling their tasks and, at most, may become obsolete and disappear, leaving no practical avenue for student training in the way that CLE can provide.

4 3 TEACHING METHODOLOGY

4 3 1 GENERAL

CLE is known worldwide as a methodology that provides (mainly) final year law students with practical legal experience in that they attend to practical legal aspects at law clinics and/or in the classroom.[151] Tutorial sessions are also essential in this regard.[152] Each of these components therefore requires discussion and will be done in the sections that follow.[153]

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145 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 43.

146 Du Plessis 2016 *De Jure* 3.

147 Maisel 2007 30 *Fordham International Law Journal* 378.

148 See 4 3 1.

149 See 4 3 1 and 4 3 3.

150 Du Plessis 2016 *De Jure* 5; Van der Merwe 2017 *Stellenbosch Law Review* 680.

151 Du Plessis 2016 *De Jure* 5-6; Welgemoed 2016 *Litnet Akademies* 758.

152 Du Plessis 2016 *De Jure* 7-8.

153 Also see Chavkin "Experience is the only teacher: meeting the challenge of the Carnegie Foundation report" (2007) http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html (accessed 2019-06-20) and Du Plessis 2015 *Journal for Juridical Science* 64 with regards to the various components of CLE.

Vawda lists the following skills that law clinics, and consequently CLE, can teach students that will enable them to practice in a competitive environment:[154]

(a) development of litigatory and non-litigatory skills;
(b) identification and exercise of core ethics and professional values; and
(c) appreciation of broader societal issues with regards to legal problems,[155] as well as the development of skills and strategies to address such issues.

At NMU, CLE and clinical law forms part of the Legal Practice module and is presented in both semesters of the final academic year. The learning outcomes of the module are as follows:[156]

> "Students, successfully completing this module, will be able to:
> - Investigate and evaluate the importance of Clinical Legal Education;
> - Investigate and evaluate the importance of Access to Justice;
> - Investigate and evaluate the importance of ethical behaviour in legal practice;
> - Perform the basic duties encountered in an attorney's office, including consulting with clients, drafting legal letters, drafting legal documents and negotiating settlements between parties in a variety of scenarios, including general civil matters, divorces, drafting of Wills, as well as other matters handled at that specific time by the Law Clinic."

The core content of the module is the following:[157]

(a) the meaning and importance of CLE and access to justice;
(b) the general operation of the NMU Law Clinic, as well as the role of the learners at the law clinic;
(c) letter writing skills, general drafting skills and consultations; and
(d) general practice ethics.

From the learning outcomes and module content, it can be deduced that the module is structured in such a way as to instil in students an awareness of various aspects of

154 Vawda 2004 *Journal for Juridical Science* 119.

155 An example of this is the human emotions that accompany the clients – see Vawda 2004 *Journal for Juridical Science* 121 in this regard.

156 Nelson Mandela University Faculty of Law Module Guide on Legal Practice, 2019 13.

157 *Ibid.*

legal practice. The reason for this is that, in no other module in the LLB curriculum, are students made familiar with the inner workings of the legal profession. It is however important that, because the LLB degree is a prerequisite for entry into legal practice,[158] law graduates possess a sound knowledge of the operation of legal practice and the various aspects thereof. This is one of the main reasons why clinical law is probably one of the most important modules in the LLB curriculum, as well as why CLE should be employed as the teaching methodology for teaching the procedural law modules. Procedure denotes ways in which to execute steps and, because of the obvious practical approach required by procedural law modules, the CLE methodology fits the teaching requirements more than satisfactorily. Moreover, in order to produce graduates who are adequately trained for legal practice, law schools do not have to search too far for innovative ways in which to teach procedure – they can merely use an existing methodology and apply it in an innovative manner. This apparent easy integration may be an encouraging factor in moving law schools to consider, and eventually adopt, such a teaching methodology with regards to procedural law modules and possibly other modules as well. McQuoid-Mason supports this approach:[159]

> "Although clinical legal education learning methods are traditionally used to teach lawyering skills such as interviewing and counselling, legal writing and drafting, fact finding, case analysis, trial preparation and trial advocacy, they can also be used to teach substantive and procedural law courses."

Based on the above, the outcomes connected to CLE can be summarised as "…the stated abilities, knowledge base, skills, personal attributes and perspectives on the role of law and lawyers in society."[160] The outcomes should be relevant to the needs of students, society as well as the profession.[161] Skills training should include

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158 See s 26(1)(a) of the LPA in this regard, which section provides that
"[a] person qualifies to be admitted and enrolled as a legal practitioner, if that person has satisfied all the requirements for the LLB degree obtained at any university registered in the Republic, after pursuing for that degree a course of study of not less than four years,…"

159 McQuoid-Mason 2006 *Obiter* 169.

160 Du Plessis 2016 *De Jure* 8.

161 *Ibid.*

attitudinal skills,[162] cognitive skills, communication skills and relational skills.[163] All these skills are required for effectively participating in legal practice and therefore clinicians should ensure that the same is included in the learning outcomes of a clinical law module.

Constructive feedback is also necessary following students' work in a clinical or simulated setting.[164] This is addressed elsewhere in this research.[165]

4 3 2 PRACTICAL SESSIONS AT A UNIVERSITY LAW CLINIC

Swanepoel, Karels and Bezuidenhout provide an insightful discussion about the true meaning of a "law clinic." They state that, according to the Cambridge Online Dictionary, a "clinic" refers to a building, which is often part of a hospital, where people can go in order to receive medical advice and/or care.[166] However, as time progressed, the word "clinic" has gained an extended meaning to include the practice and teaching of law.[167] In this context, a "clinic" can be defined as a place, under the auspices of a university or institution of higher education, where members of the public can obtain legal services.[168] It can also be a place where law students can assist legal practitioners to render legal services to the public, or render such legal services themselves under the supervision of legal practitioners.[169] In this way, law students

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162 See Malamed "A quick guide to attitudinal training" (2019) http://theelearningcoach.com/elearning_design/attitudinal-training/ (accessed 2019-08-22) with regards to attitudinal training. It is defined as follows: "Attitudinal goals, therefore, are those that ask a learner to *choose* to do something under certain circumstances. The intent of attitudinal training is to influence or persuade a person to make a decision in the desired direction. It may involve changing attitudes as well as associated feelings, values, motivations and beliefs." Training of this nature is crucial in teaching students, in a clinical setting, how to make decisions with regards to their clients' cases.

163 Du Plessis 2016 *De Jure* 8. With regards to relational skills, see Rush "What are relational skills within the workplace?" (revised 29 April 2019) https://bizfluent.com/info-8265233-relational-skills-within-workplace.html (accessed 2019-08-22). Relational skills, in this context, relates to "[r]elational skills in the workplace [and] can include listening, patience, trustworthiness and approachability." These are all skills required by legal practitioners and should undoubtedly be included in the learning outcomes of a clinical law module.

164 Du Plessis 2016 *De Jure* 10.

165 See 4 5.

166 Swanepoel *et al* 2008 *Journal for Juridical Science* 105.

167 *Ibid.*

168 *Ibid.*

169 *Ibid.*

learn the practice of law either by taking part in it or by merely observing how it is done.[170]

Fabio similarly states that a law clinic, or legal clinic, as it is sometimes called, is "…a program organised through law school that allows students to receive law school credit as they work part-time in real (not simulated) legal service atmospheres."[171] The experience must therefore be of practical significance to students. At law clinics, practical experience can take the shape of simulations,[172] the live-client model, or a combination of both.[173] The live-client model entails that students consult with members of the public in need of legal advice and/or representation in a matter. Such consultations take place under the close supervision of clinicians.[174] Quality supervision is one of the key ingredients in the overall quality of a clinical training programme.[175] Students can be required to, *inter alia*, provide legal advice to such members, as well as draft letters and other legal documents, all while acting ethically and professionally.[176] They also have the opportunity to apply their knowledge of the law to the analysis of legal scenarios.[177] They furthermore experience clients' divergent personalities, how to work with difficult clients and how to solve office related problems, including finding missing files, resolving client dissatisfaction and explaining their own inappropriate conduct. Experiential learning of this nature is extremely desirable at university level, as it creates a proverbial runway for law students from which their careers in legal practice can be launched, as they can have a similar experience as practising attorneys,[178] or, at least observe what practising attorneys

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170 *Ibid.*

171 Fabio "What is a Legal Clinic in law school? https://www.thoughtco.com/what-is-a-legal-clinic-2154873 (accessed 2019-10-30).

172 This is contrary to what Fabio is stating.

173 See Hall *et al* 2011 *International Journal of Clinical Legal Education* 33; Bloch "A global perspective on clinical legal education" 4 2011 *Education and Law Review* 1 3, as well as Du Plessis *et al* 2013 *South African Law Journal* 395 in this regard.

174 Bleasedale *et al* in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 26.

175 Evans *et al* 2008 *Griffith Law Review* 70.

176 Welgemoed 2016 *Litnet Akademies* 758.

177 Welgemoed 2016 *Litnet Akademies* 758; Van der Merwe 2017 *Stellenbosch Law Review* 679.

178 Du Plessis *et al* 2013 *South African Law Journal* 396. It speaks for itself that such an experience will take place under the proper supervision of a clinician.

are experiencing.[179] It is widely accepted that experience is the best teacher.[180] The live-client model is especially significant in this regard, as it provides students with the opportunity to actively participate in real life situations when they consult with clients, are confronted with real life problems and are educated about the operation of the law, all at the same time.[181] They have to explore the legal system and "…explore the hinterland of expectations, promises and fears engendered by the legal process."[182] Students generally respond to these challenges in a positive way: they are motivated and take note of the whole experience, something that cannot easily be achieved by way of simulated activities.[183] Simulated activities are however also beneficial, especially because they are more resource friendly, predictable and more manageable than the live-client model.[184] It furthermore exposes students to more practical scenarios, providing them with the opportunity to apply their doctrinal knowledge.[185] However, experiences like the live-client model are of the utmost importance to law students, as the legal profession has been criticised for failing to teach social context aspects to its members.[186] The preparation of law students for entry into legal practice entails much more than training them to perform mechanical tasks akin to lawyering.[187] The law interacts with the social aspects of life, legal development, as well as ethics.[188] In Chapter 2, the important function of the law, as far as social justice is concerned, was discussed. The Constitution has brought along new values and principles on the

179 Vukowich 1971 *Case Western Reserve Law Review* 149; McQuoid-Mason "Introduction to clinical law" in Mahomed (ed) *Clinical Law in South Africa* (2016) 1; Bloch 2011 *Education and Law Review* 2; Welgemoed 2016 *Litnet Akademies* 760; Du Plessis 2015 *Journal for Juridical Science* 69, 70; Holness *Potchefstroom Electronic Law Journal* 335; Du Plessis *et al* 2013 *South African Law Journal* 396.

180 Vawda 2004 *Journal for Juridical Science* 120.

181 McQuoid-Mason in Mahomed (ed) *Clinical Law in South Africa* 1; Adewumi *et al Asian Journal of Legal Education* 112; Marson, Wilson and Van Hoorebeek "The necessity of clinical legal education in university law schools: a UK perspective" August 2005 *Journal for Clinical Legal Education* 29 29; Du Plessis 2016 *De Jure* 1; Evans *et al Australian Clinical Legal Education* (2017) 41.

182 Hall *et al* 2011 *International Journal of Clinical Legal Education* 34.

183 *Ibid.*

184 Hall *et al* 2011 *International Journal of Clinical Legal Education* 31.

185 See Krieger "Domain knowledge and the teaching of creative legal problem solving" 2004 11 *Clinical Law Review* 149 149 in this regard. This approach exposes students to "real world" situations. Also see Evans *et al Australian Clinical Legal Education* (2017) 44-45 with regards to the benefits of simulations.

186 See 3 4 5; Whitear-Nel and Freedman "A historical review of the development of the post-apartheid South African LLB degree – with particular reference to legal ethics" 2015 21(2) *Fundamina* 234 236; McQuoid-Mason in Mahomed (ed) *Clinical Law in South Africa* (2016) 6;

187 Stuckey and others *Best practices for legal education: a vision and a road map* 1ed (2007) 17.

188 *Ibid.*

basis of which the law should function and be interpreted.[189] Furthermore, the LPA,[190] which is discussed in more detail elsewhere,[191] envisages that the legal profession must be restructured and transformed according to constitutional imperatives in order to reflect the diversity and demographics of South Africa.[192] It is submitted that such a restructuring and transformation will further advance social justice, as new appointees from various backgrounds and demographics will be more appreciative and understanding of the social position of some members of the public whom they will serve. The LPA also provides that the values underpinning the Constitution must be embraced and that the legal profession should be accountable to the public.[193] Therefore, law students should be trained to be more aware of their role in society.[194] The law school, at university, presents the obvious place and time to provide students with this greater dimension of the law[195] and the constitutional imperatives. In this way, law students can be made aware of the special responsibility that lawyers in society should possess,[196] which should make them aware of the role that lawyers play in society.[197] Significant operational responsibility is placed in the hands of the students and such a high level of trust encourages their learning in a more effective manner than any other strategy.[198] Barnhizer makes some significant comments on the importance of learning this responsibility in a clinical setting. He states that, in such a setting, students find themselves in important relationships with clinical teachers and other students.[199] These relationships can assist them to examine their own abilities and attitudes as far as professional behaviour is concerned, as well as guide them into the future.[200] It must be kept in mind that the experiences of

189 See Chapter 2 in this regard.

190 28 of 2014.

191 See Chapter 5 in this regard.

192 Summary and Preamble of the Act.

193 Preamble. This is discussed in more detail in Chapter 5.

194 Stuckey *et al Best practices for legal education* 17.

195 *Ibid.*

196 Whitear-Nel *et al* 2015 *Fundamina* 236; Barnhizer "The Clinical Method of Legal Instruction: its theory and implementation" 1979 30 *Journal of Legal Education* 67 68. It is stated that the facilitation of professional responsibility cannot be consistently achieved by way of other teaching methodologies and that CLE is uniquely suited for this purpose.

197 Wizner 2002 *Fordham Law Review* 1935.

198 Du Plessis 2015 *Journal for Juridical Science* 68; Hall *et al* 2011 *International Journal of Clinical Legal Education* 30. It is argued that CLE has the potential to engage student imagination and enthusiasm in a way that no other methodology can achieve.

199 Barnhizer 1979 *Journal of Legal Education* 73-74.

200 *Ibid.*

employment and entry into legal practice can place severe economic, political and peer pressure on students in order for them to conform to expected standards.[201] These pressures might have the effect of distracting students from the need to reflect on their new experiences, as well as to understand the roles that they fulfil in light of such experiences.[202] Furthermore, it is submitted that these pressures might not always be in line with what is expected of legal practitioners. It is therefore important that law students develop an awareness of their responsibility as future legal practitioners while at university; otherwise, they may not know which of the economic, political and peer pressures are good and righteous for their legal careers.[203] For example, it will not be advantageous for students' careers if the law is taught to them as being a rigid and formalistic system, as was explained in Chapter 2.[204] Such an approach will defy transformative constitutionalism and the wellbeing of members of society, especially taking into account that social and human elements must play an elevated role in legal education.[205] When students enter legal practice after graduation and encounter a conservative approach to law, they need to be able to recognise such an approach and be aware of their responsibility to contribute towards the change thereof, in line with constitutional expectations. However, if students are only familiar with a conservative approach to law due to being taught that way, they will view this as being the norm of the law that must be practiced;[206] consequently, their responsibilities will be adapted accordingly. The same may happen if there are no standards of professional behaviour against which the rightness of a professional's own behaviour can be compared.[207]

Based on Barnhizer's perspective, it is submitted that students will act more responsibly if they are more confident about their own abilities to succeed in legal practice. They will be more confident if they have a better understanding of the practical application of their knowledge and what is expected of them in applying such knowledge. Practical work at a law clinic is the ideal setting in which they can develop

201 *Ibid.*
202 *Ibid.*
203 *Ibid.*
204 See 2 1.
205 See 3 4 5.
206 Barnhizer 1979 *Journal of Legal Education* 74.
207 *Ibid.*

a better understanding as such, to build their confidence and consequently, to act more responsibly in performing practical work. It is also submitted that, where students have not developed a "workable system of professional responsibility", adequate guidance by clinicians will assist in bringing about the awareness of such responsibility. Furthermore, it is submitted that, in South Africa, there are standards by which to judge the rightness of professional behaviour: several guidelines and practice directives by the Legal Practice Council,[208] as well as the former Law Societies, court precedents, guidance by legal practitioners, as well as a plethora of books, journal articles, other publications and foreign influences on this topic.[209]

It is especially the existence of role assumption and context that distinguishes the skills taught in a clinical setting, from those taught in other modules.[210] This experience supersedes knowledge and skills gained by way of simulations, as students are aware that simulations are merely exercises or games and that they do not have to immerse themselves in them in the same way that they would with real life situations.[211] Moreover, during live-client consultations, students experience people with real problems at levels that simulations cannot achieve.[212]

Wizner lists the following that can be learned by students by undergoing practical training at a law clinic:[213]

(a) that social problems, *eg* poverty, can be seen and acted upon as legal problems;[214]

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208 See Department of Justice and Constitutional Development Notice 81 of 2017 – Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities in this regard.

209 See De Klerk "Professional and ethical conduct" in Mahomed (ed) *Clinical Law in South Africa* 3ed (2016) 36-37 in this regard.

210 Mlyniec 2011-2012 *Clinical Law Review* 536.

211 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

212 *Ibid.*

213 Wizner 2002 *Fordham Law Review* 1935.

214 Also see Quinot 2012 *South African Law Journal* 415 in this regard, where he reinforces the idea of including the importance of social and human elements in modern teaching methodologies. He states that "[m]atters of morality and policy, even politics, can no longer be excluded from legal analysis. This means that such matters should also enter the law lecture hall. Law teachers will be failing their students if they do not enable them to engage with these ostensibly extra-legal considerations in dealing with the law."

(b) that legal representation is necessary for the resolution of complex legal problems to both indigent and affluent members of society;[215]
(c) that legal theory and doctrine can be applied in a practical way by representing clients;
(d) that the legal system can be used in order to bring about social change; and
(e) that there are limitations in law in solving individual and social problems.

This awareness thus already starts at university level and can be built upon when the graduate enters legal practice. Support for this point of view is found in the Carnegie Report of the United States. This report states that there is a way in which to combine the elements of legal professionalism, *ie* conceptual knowledge, skill and moral discernment, into the capacity for judgment, guided by professional responsibility.[216] This can be achieved by uniting the two sides of legal knowledge, namely formal knowledge and practical experience.[217] The report further states that a wider and more integrated form of legal education should be imagined by educators.[218]

Students must be taught to concentrate on the interests of their clients and only on their (clients') rights. Younger legal practitioners are inclined to do just the opposite at the start of their careers.[219] It is only later on that they learn to put their clients' interests first.[220] Students are also very rights orientated when they commence their practical sessions at law clinics. It is submitted that this is not surprising at all, as it flows from the manner in which they have been taught from the start of their academic careers at law school. They only focus on the remedies that they have studied in textbooks and other material. Later on they realise that there are other ways in dealing with legal problems, *eg* that settling a matter is often much better than seeking a final judgment

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215 Further see Wizner 2002 *Fordham Law Review* 1937, where he states that the legal system provides justice for all citizens, as far as is practically possible, and not only for the rich. Students must be taught in this direction and, after graduation, strive to make access to justice available to all.

216 The Carnegie Report, 2007, 12; Hall *et al* 2011 *International Journal of Clinical Legal Education* 26.

217 *Ibid.*

218 *Ibid.*

219 Boshoff "Professional legal education in Australia – Emphasis on interests rather than rights" 1997 (January) *De Rebus* 27 27.

220 *Ibid.*

in court.[221] Law clinics are proper fora at which this reasoning can be taught to students as part of their practical sessions from the very beginning of their clinical law training. For example, in divorce matters, students are inclined to immediately issue a Notice of Intention to Defend, Plea and Counterclaim after consulting with a client who has indicated that he or she possibly wants to defend the matter. This inclination stems from the fact that these are the steps they have been taught in Civil Procedure. In a clinical setting, they will be made aware of the fact that a settlement might be preferable to drawn out court proceedings preceded by several pleadings that must be drafted. Such a settlement will benefit their client both financially and emotionally and, in this way, they have addressed the interests of their client directly.

The infrastructure for the live-client model in South Africa is well established.[222] Statistics of the South African University Law Clinics Association, better known as SAULCA,[223] indicate that only four university law clinics in South Africa are not utilising the live-client model.[224] One of these university law clinics has however indicated that they allow students to consult with law clinic clients on a voluntary basis.[225] The SAULCA statistics furthermore indicate that 13 law clinics make use of a combination of the live-client model and simulations for the purposes of student training.[226] The NMU Law Clinic engages the live-client model without any simulations[227] and has been doing so for the entirety of its existence. This law clinic, which started out as the University of Port Elizabeth Legal Aid Clinic during the early 1980s, started to function

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221 *Ibid.*

222 Du Plessis 2016 *De Jure* 5.

223 These statistics can be viewed on the website of the South African University Law Clinics Association (SAULCA) (undated) www.saulca.co.za (accessed 2020-11-09).

224 SAULCA https://www.saulca.co.za/file/5af2b2cdebb34/rpt-45-until-47.pdf. Although the 2016 statistics are available on the SAULCA website, the statistics for this particular aspect were not available on the website at time of completion of this research. For that reason, the 2015 statistics are referred to. The 2016 statistics have however been made available to the author for purposes of this research and indicate that only 3 law clinics are not utilising the live-client model. These statistics are on file with the author of this research and can be made available on request.

225 Welgemoed 2016 *Litnet Akademies* fn 48.

226 SAULCA https://www.saulca.co.za/file/5af2b2cdebb34/rpt-45-until-47.pdf. Although the 2016 statistics are available on the SAULCA website, the statistics for this particular aspect were not available on the website at time of completion of this research. For that reason, the 2015 statistics are referred to. The 2016 statistics have however been made available to the author for purposes of this research and indicate that 11 law clinics make use of a combination of the live-client model and simulations for purposes of student training. These statistics are on file with the author of this research and can be made available on request.

227 Simulated exercises are only used during classroom sessions, *eg* writing letters and drafting documents.

in its current form[228] on 1 April 1992, when the first director was appointed.[229] The law clinic, as well as all other university law clinics in South Africa, however only assists indigent members of the public. This means that prospective clients must undergo a means test in order to determine whether or not they qualify for legal assistance at the law clinic.[230] Once the means test has been successfully completed, the students may consult with the client. The clinician, duly assisted by two postgraduate assistants (hereafter referred to as "PGAs"), supervises the duties of the students in this regard.[231] All executive tasks of the students must be approved by the clinician. This is essential for maintaining quality legal services to the public, as well as for the professional, ethical and effective practical training of the students.

The average number of students, partaking in CLE at NMU over the last four years, is about 150. Student activity at the law clinic is currently facilitated by a clinician, who is an admitted attorney and law teacher. The clinician is permanently employed by the university, assisted by two PGAs of the law school, who are both employed on a contractual basis. These PGAs are primarily law students who graduated from the university the year before their appointment. They render lecturing and other academic services to the law school while completing their Master of Laws (LLM) studies. Due to the fact that these PGAs have successfully completed the clinical law programme and are therefore familiar with the operations of the law clinic, as well as the Legal Practice module, they constitute a welcome addition to the practical training of clinical law students.

Large student numbers can be an obstacle to adequate and thorough supervision over student activities by clinicians.[232] Unfortunately, large student numbers is currently a

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228 The "current form" of the NMU Law Clinic refers to it as functioning in a way similar to conventional law firms, complete with administrative staff, and, most importantly, training law students for legal practice.

229 Mr RDJ Coetzee, a practising attorney, had been appointed as first director of the current NMU Law Clinic. A document, substantiating this information, is on file with the author of this research and can be made available on request.

230 The NMU Law Clinic is currently engaged in a financial cooperation agreement with Legal Aid South Africa. For this reason, the law clinic is employing the official means test of Legal Aid South Africa in order to determine the eligibility of prospective clients for legal assistance.

231 With regards to assistance to clinicians, see Vawda 2004 *Journal for Juridical Science* 130. He states that, where resources permit it, graduate or student assistants can be hired in order to assist clinicians.

232 Maisel 2007 *Fordham International Law Journal* 390.

reality in South African universities and therefore clinicians must find a way around it in order to ensure a quality CLE experience for students. In order to accommodate the large amount of students taking part in CLE at NMU, students are divided into two main groups: students whose surnames start with A-Mb and students whose surnames continue from Mc-Z. The A-Mb student group will attend practical clinical law sessions during one week, whereas the Mc-Z student group will attend sessions the following week, and thereafter, this pattern repeats itself for the duration of the module.[233] Students work at the law clinic in groups of not more than six students. There are also designated times for each group, *ie* on Mondays to Thursdays at 8:00-9:30, 9:30-11:00, 11:00-12:30, 12:30-14:00 and 14:00-15:30, while only the 8:00-9:30-timeslot is available on Fridays. Each student group must choose one of these timeslots per semester and remain in that timeslot for the duration of the semester. This means that students undergo clinical training for at least 90 minutes every other week, depending on their surname group. The importance of remaining in a particular timeslot during a semester is merely to create certainty for the clients, assisted by the students, so as to know when they can attend to consultations with their relevant student consultants. When the following semester commences, students choose new timeslots, as they will have different modules that may coincide with their timeslots in the previous semester. This system works well in order to accommodate large student numbers; however, limited time for student activities and the two-week interval between sessions are sometimes problematic. In order to bridge the two-week interval, students of one surname group collaborate with students of the alternative surname group with regards to assisting clients. For example, where an important document like a will needs to be drafted, it is undesirable to let the client wait for 14 days, as something may happen to the client prior to the proper signing of the will. If students in surname group A-Mb drafted the will in week one, they draft the will, but lodge a request to students of surname group Mc-Z to assist the client with the completion of the will in week two. This system also works well and advances the professional collaboration and group work between students.

[233] The Legal Practice module at NMU consists of two sections, namely CLE and Street Law. In order to accommodate the large student numbers in either component, the Faculty of Law decided to divide the students into these groups. The significance hereof is that, when one group is undergoing CLE training, the other group participates in the Street Law sessions, and *vice versa* during the following week.

Simulations might also work equally well with regards to teaching the procedural law modules, especially taking into account how big modern-day classes are. In other words, simulated scenarios can be presented to students, from which they must analyse facts and identify legal problems in order to be able to construct appropriate and relevant legal advice, draft letters and other legal documents, suggest the use of applicable and relevant evidence, as well as conduct mock trials.[234] Evans and Hyams state that it is doubtful as to whether problem-first modules, *ie* modules involving live-client work, are superior to simulation based activities in the development of professional responsibility.[235] Based on this, live-client work and simulations appear to be treated as equal components.[236] The learned authors consequently believe that any assumption that live-client work is superior to simulated activities, should be challenged.[237]

An important aspect of clinical work is student reflection. Students must be afforded the opportunity to look back upon their work and identify their achievements and challenges. It is said to be an indispensable part of the learning experience that leads to further learning.[238] It has also been convincingly stated that "…reflection was not possible without experience, but experience was meaningless without reflection."[239] Steenhuisen explains that reflection enables students to learn from experience.[240] This is important, because their performance forms the core of their clinical

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234 CLE, by way of simulations, is presented by the University of Limpopo Turfloop Campus Law Clinic. A telephonic interview with one of the clinicians of that clinic, held on 4 May 2020, revealed that the students are provided with a set of facts that must be analysed. The students must analyse the legal problem, research the law, find a solution, apply the law to the legal problem and provide advice accordingly to the imaginary client. Should students decide that this matter must be resolved in court, the students must explain the trial advocacy procedure fully, as well as draft the applicable process and pleadings. These exercises are all completed by the students having been organised in groups. The groups of students must switch roles from attorneys for the plaintiff to attorneys for the defendant, depending on which documents are being drafted. For example, when drafting a summons and particulars of claim, students will be "acting" for the plaintiff, whereas students will be "acting" for the defendant when drafting a notice of intention to defend or a plea (and counterclaim, if applicable).

235 Evans *et al* 2008 *Griffith Law Review* 63.

236 *Ibid.*

237 *Ibid.*

238 Polding, Catchpole and Cripps "Interaction and reflection: a new approach to skills and accounts teaching on the Legal Practice Course 2010 24(1) *International Review of Law, Computers and Technology* 83 86; Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 45.

239 Evans *et al Australian Clinical Legal Education* (2017) 158.

240 Steenhuisen "The goals of clinical legal education" in De Klerk (ed) *Clinical Law in South Africa* 2ed (2006) 271.

experience.[241] To facilitate reflection, clinicians must provide students with models against which they (students) can measure their own performances, as well as contemplate their future performances.[242] Clinicians must further encourage students to learn from self-critique, critique from clinicians themselves, as well as from peer and group assessments.[243]

Although this can be done as part of tutorial sessions,[244] it can also be included as part of the practical law clinic sessions. At NMU, students are required to submit portfolios of evidence as part of the Legal Practice module assessment. Dedicated reflection documents must form part of these portfolios.[245] Each student in a particular law clinic group must complete such a reflection document. At the conclusion of each clinical session, the clinician discusses the content of the individual reflection documents with the students as a group.[246] In doing this, students get the opportunity to learn from their challenges in a critical manner[247] and to strive towards developing their skills and to avoid such challenges wherever possible, all with the support of the clinician.[248] At the end of a particular semester, the students complete a similar document in which they reflect on their overall experience of CLE. From these reflection documents, the clinician can monitor the development of the students and adapt the teaching methodologies where necessary in order to improve the practical experience of the students.[249] Reflection forms part of the goals of any educational programme and should therefore not be omitted for any reason.[250] It should therefore also be part of the procedural law modules, especially in the context of this study. If so, students will be able to reflect on their achievements and challenges with regards to procedure and evidence and, together with the law teacher, make improvements wherever necessary. They also have the opportunity to reflect on whether they have

241 *Ibid.*

242 *Ibid.*

243 *Ibid.*

244 See 4 3 4.

245 Welgemoed 2016 *Litnet Akademies* 767. Also see Hyams "On teaching students to 'act like a lawyer': what sort of lawyer?" 2008 *Journal of Clinical Legal Education* 21 27 in this regard. The learned author endorses reflective journals by students in order to provide a structure format for the development and nurturing of meaningful and considered student reflection.

246 *Ibid.*

247 Hyams 2008 *Journal of Clinical Legal Education* 27.

248 Welgemoed 2016 *Litnet Akademies* 768.

249 Welgemoed 2016 *Litnet Akademies* 767-768.

250 Steenhuisen in De Klerk (ed) *Clinical Law in South Africa* 270.

adequately attended to their clients' interests rather than focusing only on their rights.[251] Effective mentoring and guidance by clinicians in this regard will result in students knowing how to perform the functions of legal practitioners more effectively by way of experiential learning.[252]

4 3 3 CLASSROOM COMPONENT

Stuckey states that legal education should consist of "…an integrated combination of substantive law, skills, and market knowledge, and embracing the idea that legal education is to prepare law students for the practice of law as members of a client centred public profession."[253] Therefore, the teaching of theory forms part of CLE and should never be left out, nor should either theory or practical training be favoured one over the other.[254] Students should not only be expected to learn certain skills by consulting with clients and/or observing what others do by way of osmosis.[255] They should attend classroom sessions and tutorials in order to be presented with lessons about skills required when working with clients.[256] It will assist with the expanding of skills required during their practical sessions at the law clinic, including but not limited to the rules of evidence, ethics and professional conduct.[257] This approach is indicative of the importance of CLE for procedural law modules, especially when these modules are presented in the curriculum earlier than the legal practice module:[258] students can now be well prepared in advance for what they can expect when working at a law clinic or simulation of practice. They have the opportunity to critically evaluate their own performance on behalf of their clients against what is being taught and discussed during the plenary sessions.[259] They can gain more useful insights by raising questions about issues that have arisen in their work at the law clinic, as well

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251 Boshoff 1997 *De Rebus* 27.

252 Boshoff 1997 *De Rebus* 27; Evans *et al Australian Clinical Legal Education* 41.

253 Stuckey *et al Best practices for legal education* viii.

254 Welgemoed 2016 *Litnet Akademies* 760.

255 Du Plessis 2016 *De Jure* 5-6.

256 Du Plessis 2016 *De Jure* 6; Evans *et al Australian Clinical Legal Education* 90-91. Also see Mlyniec 2011-2012 *Clinical Law Review* 558 in this regard.

257 Du Plessis 2016 *De Jure* 6; Mlyniec 2011-2012 *Clinical Law Review* 558 in this regard; Du Plessis 2015 *Journal for Juridical Science* 72; Cratsley "Clinical-legal education in the United States: goals, models, and a proposal" 1971-1972 (3) *Singapore Law Review* 236 244.

258 *Eg* where the procedural law modules are presented in the third academic year and legal practice in the final academic year. NMU is adopting this approach with the inception of 2020.

259 Cratsley 1971-1972 *Singapore Law Review* 244.

as listen to other students discussing their problems, which might be mutual.[260] Question and discussion sessions of this nature can also take place during tutorial sessions. Tutorials are discussed elsewhere.[261]

Topics, like certain types of work done by practitioners, the importance of social and human elements and other elements, which can be difficult to teach in a practical environment, suit the classroom component.[262] Transformative constitutionalism permeates through all these topics. Discussions with students must emphasise the important role that transformative constitutionalism plays in restructuring the legal profession in order to ensure accountability and legal services of the highest quality to the public. The LPA is particularly relevant and important in this regard, as it will be argued that the LPA, underpinned by transformative constitutionalism, places a constitutional imperative on law schools to train law students who are better prepared for entry into legal practice.[263] Social justice must also be emphasised, clearly explaining how transformative constitutionalism should play an active role in improving the lives of members of the public in light of the values of the Constitution. Students must be taught that the law does not exist in abstract, but in a relationship with individuals and society.[264] In this regard, it will also be argued that the LPA, by envisaging an accountable legal profession, expects legal practitioners to ensure that social justice prevails in all cases handled by them.[265] Keeping in mind the learning pyramid, it is submitted that this approach will result in students being knowledgeable and skilled even more when reaching the practical stage of training, especially if the classroom component involves lots of demonstrations, drafting and group work,[266] eventually enabling them to leave university with adequate knowledge of the law of procedure and evidence. The correct balance between classroom and practical sessions will have students invest more or less equal time in each of these components,[267] thus enhancing their teaching and learning of both theory and practice.

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260 *Ibid.*

261 See 4 3 4.

262 Du Plessis 2016 *De Jure* 6.

263 See Chapter 5.

264 Bon "Examining the crossroads of law, ethics, and education leadership" 2012 22 *Journal of School Leadership* 285 293.

265 See Chapter 5.

266 See 4 2.

267 Cratsley 1971-1972 *Singapore Law Review* 245.

The Faculty of Law at NMU makes ample use of the classroom component of the Legal Practice module in order to equip the students with additional skills and information required for legal practice. The classroom component outline for the entire module is as follows:[268]

"Section 1: Law Clinic (practical)
Section 2: Street Law (practical)
Section 3: Clinical Legal Education and Professional Ethics (classroom)
Section 4: Criminal Practice (classroom)
Section 5: Medico-legal Practice (classroom)
Section 6: Labour Practice (classroom)
Section 7: Civil Practice (including Costs and Administration of Deceased Estates) (classroom)
Section 8: Trial Advocacy (practical)
Section 9: Business Management (classroom)"

The topics are diverse, specifically aimed at providing students with information and skills about a variety of issues that practice may present to them. These lectures are also presented with the focus on practice. During the clinical law lectures, students are taught about professional drafting and writing etiquette, as well as required to actually draft letters and legal documents that would be acceptable in practice. As part of administration of deceased estates lectures, students are taught about various aspects of the administration process, including the importance of having a will, reporting a deceased estate, as well as the liquidation and distribution account. They are furthermore required to draft a will. Similarly, students draft pleas of guilty and not guilty as part of criminal legal practice lectures. They do research on evidence and medical law as part of the medico-legal practice lectures. The costs lectures are presented in such a way as to be indicative of how high legal costs can be and how important it is for practitioners to consider cost-effective ways in which to assist clients so as to ensure that clients will return to their offices for additional business. The trial advocacy sessions consist of plenary sessions in the classroom, but also practical sessions in the form of mock trials presented by an advocate from the bar and a practicing attorney from Legal Aid South Africa. The approach is thus to foster an appreciation of the realities of legal practice in the students.

[268] Nelson Mandela University Faculty of Law Module Guide on Legal Practice 2019 6.

A significant advantage of classroom sessions is that it establishes a selection of readings and collected experiences that, over time, will comprise the basic materials for the teaching of a well-established clinical law module.[269] This selection can be adjusted and updated every year in order to ensure that the latest and best possible information is made available to the students.[270] Various journal articles, applicable precedents, sets of facts with questions based thereon, as well as practical scenarios and simulations can form part of this collection of material. The teaching of the procedural law modules can also benefit from such a selection of module material. To facilitate blended learning, *ie* "…integration of online education technology and traditional teaching and learning methodologies…",[271] module material can be posted online on a dedicated e-learning site. This material can be adapted for the diverse needs of students, *eg*, hyperlinks to further detail relating to certain topics, could be included in the text in order for students, who want to read further on particular topics, to do so.[272] Should a student prefer not to explore topics further, they can read the provided text without following any of the hyperlinks.[273]

4 3 4 TUTORIAL SESSIONS

Students should not only engage in practical sessions at law clinics, or in simulated environments, and attend lectures where they obtain additional information relating to practical skills; they should also be guided through such learning experiences.[274] Tutorial sessions can fulfil this task. They can enhance the learning process "…through action, verbalization of thoughts and an active engagement with ideas through consultation, discussion and feedback involving peers and clinicians."[275] During tutorial sessions, clinicians and students can meet in order to discuss students' experiences in a practical environment. The clinician can address both problematic

269 Cratsley 1971-1972 *Singapore Law Review* 244.

270 See Du Plessis 2015 *Potchefstroom Electronic Law Journal* 2779 in this regard. The learned author states that CLE is continuously evolving. It is therefore submitted that, as CLE evolves, module material will also expand.

271 Crocker "Blended learning: a new approach to legal teaching in South African law schools" 2006 31(2) *Journal for Juridical Science* 1.

272 Crocker 2006 *Journal for Juridical Science* 5.

273 *Ibid.*

274 Du Plessis 2016 *De Jure* 7; Hyams 2008 *Journal of Clinical Legal Education* 29.

275 Du Plessis 2016 *De Jure* 7; Swanepoel, Karels and Bezuidenhout "Integrating theory and practice in the LLB curriculum: some reflections" 2008 (Special Issue) *Journal for Juridical Science* 99 108.

areas and achievements and, in this way, students can learn more about their own actions or inactions. It is a good forum where legal and practice ethics can also be discussed.[276] Tutorials are a superior pedagogy to that of lectures being presented to large student numbers in a lecture venue, because they are an intense experience and approach learning the law and processes in a holistic manner.[277] However, large student numbers is a reality in all universities; therefore, new ways must be found in order to ensure quality tutorial experiences to small groups of students. Du Plessis indicates that the allocation of students to student firms, and consequently tutoring each such firm, is a way around this problem.[278] Another way to address this problem is to create dedicated tutorial lectures, which should not be confused with the classroom component already discussed,[279] to divide the larger body of students into two or more smaller groups and to tutor them during such times. At NMU, the Street Law component of the Legal Practice module follows mainly this approach. As discussed earlier,[280] the students are divided into two main groups, namely students with surnames starting with A-Mb (Group 1), as well as Mc-Z (Group 2). When Group 1 is undergoing clinical law training at the Law Clinic, Group 2 attends Street Law tutorials. In the following week, the groups alternate. The advantage of such a system is that tutorial sessions are indeed conducted with a smaller student body; however, considering that the current number of students registered for Legal Practice is about 130,[281] approximately half thereof is still too large for tutorial purposes. If those two groups can each be divided into two more groups, it may be easier to facilitate tutorial sessions. However, time, venues and additional tutorial facilitators may be problematic. Lecture timetables are already congested, appropriate venues are not always available and there may not be funds available to appoint further facilitators.

Tutorials are also geared towards client protection. During the discussion sessions with students, clinicians can transfer valuable information to students to enable them

276 *Ibid.*

277 Du Plessis 2015 *Journal for Juridical Science* 74.

278 *Ibid.*

279 See 4 3 3.

280 See 4 3 2.

281 Since about 2016, the number of students, usually registered for Legal Practice at NMU, has almost doubled to reach almost 187 during 2019. During 2020 however, these numbers have decreased to about 130.

to work with clients at a law clinic without creating any risks for the client's case.[282] Du Plessis states that clinical experiences are of the highest quality when a clinician is able to strike the appropriate balance between the autonomy of the student to explore various options while, at the same time, preventing any harm to the client.[283] Tutorials will assist the students to think like legal practitioners and not like students.[284] This line of thinking will contribute towards the development of professionalism, which they are expected to have when entering legal practice.[285] It will enable students to test their thinking and reasoning against hypotheses and consider different options and risks with regards to their clients' cases,[286] all facilitated by the tutorial facilitator. In this way, they are placed in a good position to present their clients with the best legal advice possible, taking into account all aspects of the clients' cases and weighing it up against possible risks, all done in light of the values in the Constitution. These are matters that students do not always think about. With careful guidance by the tutorial facilitator, they will learn to see a client's position in a more holistic way. In this regard, Barnhizer explains that the educational purpose of tutoring is not achieved only because of the students getting experience in representing actual clients.[287] The tutorial facilitator should create a learning experience for each student and to clearly show to them the implications of some experiences about which they may not otherwise think.[288] This approach is supported by McQuoid-Mason. He states that, where the opportunity for tutorials and practical sessions arises, a wide variety of interactive CLE methods can be introduced in order to explain the substantive and procedural law curriculum to students.[289] This can include role playing, simulations, moots, mock trials, case studies, discussions by small groups of students, debates, developing arguments and encouraging students to think creatively.[290]

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282 Du Plessis 2015 *Journal for Juridical Science* 75.

283 *Ibid.*

284 *Ibid.*

285 Marson *et al* 2005 *Journal for Clinical Legal Education* 32.

286 Du Plessis 2015 *Journal for Juridical Science* 75.

287 Barnhizer 1979 *Journal of Legal Education* 75.

288 *Ibid.*

289 McQuoid-Mason 2006 *Obiter* 169.

290 *Ibid.*

The need for tutorials with regards to procedural law modules, as well as the advantages thereof, have already been discussed.[291] Time can be a significant obstacle in creating tutorial sessions, especially in the case of large student numbers.[292] At NMU, the lecture timetable is already congested to such an extent that it is not always easy for students to schedule working hours at the university law clinic. Further to this, the law clinic is situation on another campus that is 30 minutes away from the main campus where all their lectures are presented. Travelling time thus takes up another hour of their academic day, resulting in less time for tutorials. In addition to this, students must attend tutorials for other modules as well, making it more difficult for them to fit in further tutorials. In the past, there has been no dedicated tutorial sessions for CLE presented at NMU. However, to circumvent this apparent problem, the clinician was using 10 to 15 minutes of each practical session at the law clinic to consult with students about their experiences and challenges, as well as to provide them with information relating to advancing or improving their work. Plans to include dedicated CLE tutorial sessions into the lecture timetable were finally realised during 2020, signalling the importance of and necessity for this teaching method. These planned tutorial sessions are similar in time structure to the Street Law tutorial sessions discussed earlier. Thus, while Group 1 of Street Law is participating in Street Law training in a particular week, Group 2 of Street Law is attending CLE tutorials. The opposite then happens the following week.

Another way in which tutorials can be presented is by blended learning.[293] This is especially beneficial in addressing large student numbers, a problem that most universities are experiencing at present. Instead of frequent tutorials, as discussed, problematic and complex issues can be discussed online by the clinician on a dedicated e-learning site by way of a frequently-asked-questions section (hereafter referred to as an FAQ section). The clinician may even prefer to produce a video recording where problems and issues experienced during practical sessions at the law clinic, are discussed. This recording can be posted online on the e-learning site where students can watch it, learn from it and pose questions to the clinician on a thread

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291 See 3 4 2.

292 Also see Du Plessis 2015 *Journal for Juridical Science* 74 with regards to the challenge of large student numbers.

293 Crocker 2006 *Journal for Juridical Science* 1. Also see 3 3 3.

provided on the site. The clinician can respond to the questions. On 18 November 2019, at the SAULCA Workshop and Annual General Meeting in Johannesburg, Dr Lynn Biggs[294] addressed delegates on the concept of blended learning at university level and the importance thereof for academic student development. She stated that it is important to equip students with the ability to use technology at university level in order to enable them to use the same in the future when they commence their professional careers. Therefore, where possible, use the following in order to teach:

(a) online learning platforms;
(b) podcasts;
(c) video clips; and
(d) academic support hubs.

In this regard, postgraduate students may provide support to students and assistance to academics.

In order to get started, the following 3 steps may prove valuable:

(a) train teachers in the use of digital pedagogy and provide support to them should they struggle with it;
(b) define the technological ecosystem in a particular setting, *eg* which technological tools are being used by students as study aids. Many students use cellular telephones, tablets, laptops and computers and therefore have access to one or other technological tool; and
(c) compose user manuals and FAQ sections for teachers and students who may be struggling with the use of technology.

A blended learning practice can save a lot of time spent presenting tutorials *in persona* and furthermore addresses all the students, registered for the module, at once. Students can attend the e-learning site at a time that suits them, as long as they are encouraged to attend as soon as possible after the tutorial was made available. Moreover, this blended learning practice fits into the LLB exit level outcomes as set by

[294] Dr Lynn Biggs is the Deputy Dean (Teaching and Learning) of the NMU Faculty of Law.

the NQF[295] as well as into the milieu of the Fourth Industrial Revolution, a concept that is discussed elsewhere in detail.[296] The technological side of blended learning also forms a component of transformative legal education, which has already been discussed.[297] It will also provide an opportunity for students who are shy or feeling uncomfortable, to approach and ask questions of a clinician, in order to get their questions answered.[298]

4 4 ADVANTAGES OF CLINICAL LEGAL EDUCATION FOR PROCEDURAL LAW MODULES

CLE clearly displays a unique educational potential,[299] as it can expand teaching processes and strengthen the bridges between law schools, the legal profession and society.[300] It is, however, not possible to employ CLE in order to teach a student everything that needs to be known about legal practice and the role of a lawyer in legal practice. There is barely enough time during an academic year[301] to introduce students to the basic elements of professional ethics,[302] drafting skills, consultation skills and various other practical aspects, *eg* conveyancing, notarial practice and administration of deceased estates. It may therefore be of major importance to consider the introduction of CLE earlier in the LLB curriculum, in other words, not to

295 Crocker 2006 *Journal for Juridical Science* 4.

296 See 4 7 4.

297 See 2 1.

298 Crocker 2006 *Journal for Juridical Science* 6.

299 Barnhizer 1979 *Journal of Legal Education* 67.

300 Barnhizer 1979 *Journal of Legal Education* 70; Evans *et al* 2008 *Griffith Law Review* 62, where reference is made to Rice and Coss *A guide to implementing clinical teaching method in the law school curriculum* 1996 Centre for Legal Education: Sydney who states that "…a legal centre will introduce to students, not for the first time in their studies, but in the most intense fashion, the need to learn law critically, to see a lawyer's role in an inherently conservative system and to analyse it."

301 This statement is based upon the assumption that CLE is only presented for one year during the four year LLB studies of a law student.

302 See Whitear-Nel and Freedman 2015 *Fundamina* 234-235 with regards to an elaborate description of "legal ethics". It is defined as "…the principles and values which, along with professional rules and conduct and statutory and common law, regulate lawyers' behaviour." It is stated that legal ethics includes both extrinsic and intrinsic controls on lawyer's conduct. It is further stated that extrinsic controls include applicable provisions of the Attorneys' Act 53 of 1979, as well as the codes, rules and regulations of the relevant professional societies. It is submitted that the Admission of Advocates Act 74 of 1964 is also relevant in this regard. Intrinsic controls include values and principles of a personal nature, most prominently honesty, a standard symbolising ethical and professional practice by both society and the legal profession. It should be noted that both the Attorneys Act and Admission of Advocates Act had been repealed by the LPA. The LPA however presents its own extrinsic control measures.

limit it to only one academic year, most commonly the final year.[303] This earlier introduction of CLE may prove to be useful, especially taking into account that clinical programmes also play an important role in preparing law students in how to transfer information, specifically referring to transfer of legal advice and legal services, other than what was already mentioned earlier, to members of the public in legal practice.[304] CLE thus has an important goal to achieve in this regard; however, clinical law modules are presented shortly before students graduate and enter legal practice, resulting in not much time to be adequately prepared in transferring information.[305] Furthermore, it may prove to be useful, practically and theoretically speaking, to integrate CLE in the teaching of procedural law modules, namely the Law of Evidence, Criminal Procedure and Civil Procedure.[306] Students will be taught the essential theory of these disciplines in a classroom setting. After a particular lecture, or series of lectures, students should be engaging with the theory in a more practical sense in a clinical setting by doing practical work. These practical sessions can take place either at a law clinic or another venue, *eg* a classroom, court, advocates' chambers or law firm, and may involve either simulations or the live-client model. The said practical sessions, especially keeping the live-client model in mind, may require legal practitioners to become involved in the teaching and practical training of law students, thus providing further teaching and learning opportunities to universities and law schools.[307] The involvement of legal practitioners is discussed elsewhere.[308]

The central idea of the CLE methodology is that the students experience a more hands-on approach to the procedural law modules than by merely attending a lecture

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303 See Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 2016 40-44 in this regard. The majority of LLB curricula at South African universities present CLE in the final academic year, including but not limited to NMU, University of the Witwatersrand, University of Pretoria, University of Johannesburg and University of the Free State. North West University also presents CLE in the final academic year.

304 Bowman and Brodoff "Cracking student silos: linking legal writing and clinical learning through transference" 2019 25 *Clinical Law Review* 269 274.

305 *Ibid*.

306 The Law of Evidence, Criminal Procedure, Civil Procedure and Legal Practice (comprising of CLE and Street Law) are modules in the Department of Criminal and Procedural Law at the Faculty of Law of NMU, Port Elizabeth, South Africa.

307 Lopez "Leading change in legal education – educating lawyers and best practices: good news for diversity" 2008 (31) *Seattle University Law Review* 775 778-779 in this regard. Students will now have the opportunity to meet members of the legal profession. This is especially important for students who do not know any attorneys and/or other members of the profession.

308 See 4 7 2 1.

and absorbing theory. In this regard, Bamgbose states that CLE is a multi-disciplinary and multi-purpose teaching methodology that can assist with the development of future legal practitioners as well as ideals that can strengthen the legal system.[309] The learned author further states that CLE is a "…new pattern of legal education, as distinguished from the traditional method of education which focused on theory and provided minimal opportunity for law students to learn and apply practical problem-solving skills." It speaks for itself that the procedural law modules, duly taught in light of transformative constitutionalism, form the basis of legal practice and therefore, from a practical perspective, supplemented by substantive theory, will provide an invaluable legal education experience to law students by equipping them with introductory practical skills. Furthermore, upon reaching their final year of studies (assuming that the procedural law modules are presented in earlier years than the final year, preferably in the third year),[310] students will, with relative confidence, know how to apply such knowledge to legal problems, which may facilitate their work at law clinics to a significant extent.[311] By the time they leave university, they will have a firm knowledge of evidence, procedure and practice, as well as practical skills. This knowledge and skills are what practitioners require in a prospective candidate attorney. This will strengthen links between law schools and private law firms, as highly employable graduates are now produced by the law schools.[312]

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309 Bamgbose "Access to justice through clinical legal education: a way forward for good governance and development" 15 2015 *African Human Rights Law Journal* 378 385.

310 Quite a few universities in South Africa present the procedural law modules, or some of it, during the third year of studies. At NMU, these modules will be presented in the third year as from 2020. At Rhodes University, it is presented in the third year; however, both Civil Procedure and Criminal Procedure are presented in the 3rd and 4th years. At the University of Johannesburg, these modules are presented in the third year. At North West University, Criminal Procedure is presented in the 2nd year, while the Law of Evidence is presented in the 3rd year and Civil Procedure in the third and final years. At the University of Pretoria, the Law of Evidence is presented in the third year, while both Civil Procedure and Criminal Procedure are presented in the final year. For more information in this regard, see North West University LLB curriculum (undated) http://law.nwu.ac.za/sites/law.nwu.ac.za/ files/files/Law/The%20LLB%20curriculum.pdf (accessed 2019-01-22). Rhodes University LLB curriculum (2018) https://www.ru.ac.za/media/rhodesuniversity/content/law/documents/Law%20Handbook%202018.pdf (accessed 2019-01-22). University of Pretoria LLB curriculum (2019) https://www.up.ac.za/media/shared/10/ZP_Files/fb-law-2019-2020.zp165426.pdf (accessed 2019-01-22). Nelson Mandela University LLB curriculum (2019) https://www.mandela.ac.za/academic/Courses-on-offer/Qualification-Details.aspx?appqual=LL&qual=54100&faculty=1500 &ot=A1&cid=72 (accessed 2019-01-22). University of Johannesburg LLB curriculum (2018) https://www.uj.ac.za/faculties/law/Documents/FACULTY%20REGULATIONS%2001%20AUGUST%202018.pdf (accessed 2020-02-12).

311 This statement refers to students working at university law clinics during their time of studies at the university. It does not imply that a law clinic is the only institution where they will be able to execute their theoretical knowledge.

312 Marson *et al* 2005 *Journal for Clinical Legal Education* 42.

Links between law schools and the local community are also strengthened. This is achieved by way of quality services being rendered by law students to members of the community. In this regard, students assist with the handling of legal matters of community members at a university law clinic.[313] The university law clinic forms part of the school of law. The sooner students understand legal procedure and the admissibility of evidence, as well as how to apply the same, the more efficient and professional they will be in the practical execution thereof. In light of this, it is clear that university law clinics, by employing the CLE methodology, offer mostly positive results towards law schools, the community and to law firms.[314] Indigent members of the community, who are the clientele of university law clinics, will greatly benefit from such improved legal services by the students, as their cases will be attended to with greater confidence and precision.[315] Furthermore, it ensures that students are being trained to practice law with compassion, as well as with a sense of social responsibility, fully taking notice of what really happens in society on a daily basis.[316] This strengthens their awareness of social justice and to consider the cases and social context of all clients in light of the values of the Constitution. Combe states that students have indicated that the clinical experience is the most meaningful experience that they have during their years at law school.[317] The live-client model also provides motivation to students in ways that the most enthusiastic and energetic teaching methods cannot.[318] To ensure that students indeed share in these experiences, clinicians have a key role to play as stewards of programmes that can inspire and educate students whilst making a difference to their community."[319]

313 *Ibid*.

314 *Ibid.*

315 Also see Van der Merwe 2017 *Stellenbosch Law Review* 695 in this regard.

316 Vawda "Access to justice: from legal representation to promotion of equality and social justice – addressing the legal isolation of the poor" 2005 26(2) *Obiter* 234 246-247. Also see Van der Merwe 2017 *Stellenbosch Law Review* 695 in this regard.

317 Combe "Selling intra-curricular clinical legal education" 2014 48(3) *The Law Teacher* 281 295.

318 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

319 Van der Merwe 2017 *Stellenbosch Law Review* 686; Combe 2014 *The Law Teacher* 295.

CLE is therefore the preferred and a valuable teaching methodology.[320] Chemerinsky seems to be in agreement with this when stating that there is no better way to prepare students for legal practice than to let them participate in clinical training.[321] Law clinics provide opportunities for students to practice law under closely supervised conditions and therefore are valuable sources of education as far as lawyering skills and professional values are concerned.[322] These are the skills and values that they will be using when practising law, whether in private legal practice, or in the government or at public interest organisations.[323] Thus, the law may appear to be very abstract during classroom sessions, but becomes more concrete when students engage in consultations with clients, in negotiations or partake in activities similar to litigation in a courtroom.[324]

Definitions and descriptions of CLE have already been provided elsewhere.[325] From these definitions, it can be deduced that CLE enables students to apply their theoretical knowledge of the law to practical scenarios, where such scenarios involve actual clients, which is preferred to mere simulated exercises. This is especially important as far as procedural law modules are concerned. The reason for this is that it is more beneficial for students to know how to apply the principles of evidence to actual cases, as well as which steps to follow and documents to draft when dealing with civil and criminal procedures, than it is for them to merely study the relevant theory from textbooks and other sources.[326] Law students have indicated that CLE assists them to gain more knowledge.[327] To substantiate this indication, students have stated that they gained more clarity with regards to complex legal issues through a more practical approach[328] Students have furthermore indicated that CLE provides them

320 See 4 8 in this regard. This statement should not be interpreted as being absolute. The idea is that CLE is very relevant and appropriate for the teaching of practical skills as far as procedural law modules are concerned.

321 Van der Merwe 2017 *Stellenbosch Law Review* 686-687; Chemerinsky "Why not clinical education?" 2009 16 *Clinical Law Review* 35 35.

322 Chemerinsky 2009 *Clinical Law Review* 35.

323 *Ibid.*

324 Chemerinsky 2009 *Clinical Law Review* 35. The "argue to a judge" phrase mentioned by Chemerinsky, in a South African CLE related context, does not imply that students appear in courts, because they cannot. It can however refer to students participating in mock trials or moot courts.

325 See 4 2.

326 See Bamgbose *African Human Rights Law Journal* 385 in this regard, where it is stated that CLE contributes to students learning the "how to" of the law.

327 Adewumi *et al Asian Journal of Legal Education* 112.

328 *Ibid*.

with an understanding of the interplay between the law and the realities of life and living in a society.[329] This interplay is paramount in light of transformative constitutionalism and how the law can be used to improve the lives of members of society. In a similar context, the procedural law modules should therefore not be studied in the vacuum of theory, but by applying the theory to factual scenarios.[330] This will provide the students with a better understanding of how civil and criminal procedure, as well as the rules of evidence, are applied in practice and how constitutional and procedural justice can better the lives of members of society. Furthermore, students will gain an awareness and appreciation of professional responsibility as far as procedural law is concerned in that they will be educated regarding the importance of drafting legal documents properly, complying with time limits as well as having respect for the institution of the courts. In this regard, professional responsibility and legal ethics become very important qualities that must be instilled in law students, especially when considering the goals that the LPA has for the legal profession.

CLE clearly differs from the conventional classroom method, because it is mainly presented in a practical way[331] and involves active student participation.[332] Du Plessis submits that, in the context of CLE, substantive legal principles should be integrated into practical sessions at a law clinic. She also states that this teaching method will be more interesting to students, as they can see how the law is applied to real life situations.[333] CLE is dynamic, resulting in students being more open, eager and reflective by virtue of their participation in this methodology.[334] This will result in students enjoying the same experience in studying civil procedure, criminal procedure and the law of evidence. CLE also provides the opportunity to train students to become proficient in practical skills that they will need immediately when entering legal

329 *Ibid.*

330 See Swanepoel *et al* 2008 *Journal for Juridical Science* 102 in this regard. Theoretical knowledge of substantive law and legal skills go hand in hand. They should not be studied separately.

331 Du Plessis 2015 *Journal for Juridical Science* 64.

332 Vawda 2004 *Journal for Juridical Science* 120.

333 Du Plessis 2015 *Journal for Juridical Science* 68. Also see Van der Merwe 2017 *Stellenbosch Law Review* 688 in this regard. What is normally very abstract, will become more real to students when they engage in activities that are associated with legal practice.

334 Barnhizer 1979 *Journal of Legal Education* 82.

practice.[335] This stands in sharp contrast to abstract theoretical knowledge that is only important and relevant when students have to memorise it.[336] In Chapter 3, it was noted that the memorising of theory, especially for the purposes of examinations, is not long-term – students forget what they have studied in one module the moment they have to study for another module.[337]

CLE furthermore involves collaborative work by students.[338] In arriving at solutions to legal problems, students can meet and consult with one another, clinicians, candidate attorneys, researchers as well as with other support staff.[339] Learning therefore takes place by way of mutual inquiry[340] which mimics legal practice, as often, legal practitioners will consult with other colleagues in order to obtain a second opinion or guidance with regards to finding solutions to legal problems that they are working on. This learning experience can be strengthened by incorporating mock trials and moot courts in the module content of the procedural law modules.[341] This will provide students with the experience of working together on presenting cases in a court orientated setting. This manner of learning incorporates the transformative legal education notion of participatory parity, which was discussed earlier.[342] It furthermore stands in stark contrast to the Socratic and case dialogue teaching methodologies, in which students mainly listen to presenters in a classroom setting without practically engaging with the work.[343] CLE therefore has a much better potential than the Socratic and case dialogue methodologies to equip students with practical skills that will enable them to make a good start in legal practice.[344] Students will be able to understand the true functioning of a legal practitioner in the context of society and existing power dynamics.[345]

335 Van der Merwe 2017 *Stellenbosch Law Review* 688.
336 *Ibid.*
337 See 3 4 9.
338 Vawda 2004 *Journal for Juridical Science* 122.
339 *Ibid.*
340 *Ibid.*
341 Swanepoel *et al* 2008 *Journal for Juridical Science* 106.
342 See 2 3.
343 See 3 3 3 in this regard.
344 *Ibid.*
345 *Ibid.*

Students' participation in a more practical orientated module will result in them enjoying it, as there is evidence that the majority of students in fact do enjoy the CLE experience.[346] It is extremely beneficial to the study of any discipline if students enjoy it, because it ensures active student engagement in the process of learning. The reasons for students enjoying CLE, typically in a law clinic setting, are the following:[347]

(a) students can perceive how other people – their clients – benefit from their work;
(b) students can see the academic importance of the skills they are using during their law clinic sessions; and
(c) by allowing students to partake in practical work, they are handed empowerment and professional responsibility, which they have never encountered before during their years of study.

This teaching methodology is therefore very innovative.[348] Its praises have been sung and it has already been shown that there is merit in this methodology.[349]

As already stated, CLE should focus on the education of the student rather than community service. It is however a fact that law clinics handle many types of cases and therefore have the tendency to draw heavy caseloads.[350] Although this can provide students with a wide variety of experience in legal procedure and evidence, the possibility exists that the educational interests of the students might be neglected in favour of community service.[351] This imbalance can be corrected by lightening the caseload. Even though a heavy caseload, with corresponding lesser opportunity for teaching and learning, is undesirable, this situation might yield positive results, as students are guaranteed exposure to a wide variety of legal problems and procedures, including the reality of the legal process.[352]

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346 Marson *et al* 2005 *Journal for Clinical Legal Education* 38. Also see Vawda 2004 *Journal for Juridical Science* 120 in this regard where he mentions that, once students are familiar with the CLE approach, the transformation in their attitudes and responses are remarkable.

347 *Ibid.*

348 Bloch 2011 *Education and Law Review* 3.

349 Swanepoel *et al* 2008 *Journal for Juridical Science* 105-106.

350 Cratsley 1971-1972 *Singapore Law Review* 241.

351 *Ibid.*

352 Cratsley 1971-1972 *Singapore Law Review* 241; Barnhizer 1979 *Journal of Legal Education* 74.

The integration of CLE with especially the procedural law modules is an important consideration, as CLE enhances creativity and vitality in legal education.[353] Yet, there is a tendency to view CLE and student activity at a university law clinic as something separate from the conventional law curriculum.[354] This separation can pose disadvantages to law students,[355] as they will be deprived of experiencing legal education as it should be: preparing them adequately for the real and practical world that awaits them after graduation. The integration of CLE with the teaching of procedural law modules will cause the learning experience of the students to become more engaging, challenging and valuable.[356] Hall and Kerrigan correctly argue that "…[i]t might be time for [the] clinic to emerge from the margins and come to centre stage in legal education."[357] An integrated approach will equip students with a more complete legal education.[358] No longer should university law clinics be viewed as repositories where legal aspects that are excluded from the substantive curriculum, are taught.[359] CLE should be employed to teach law students by letting them participate in the activities of the university law clinic, as well as possibly performing duties at private law firms.[360] In this way, students will gain skills that are essential for future legal practitioners.[361] What makes this even more important is the fact that such skills are instilled in students during the formative stages of their legal careers.[362] It is submitted that, like children growing up under the constant supervision and leadership

353 Hall *et al* 2011 *International Journal of Clinical Legal Education* 26.

354 Hall *et al* 2011 *International Journal of Clinical Legal Education* 26; Holmquist "Challenging Carnegie" 2012 61(3) *Journal of Legal Education* 353 377. Also see Kennedy http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarcy Politics%20of%20Law.pdf 60 in this regard.

355 Hall *et al* 2011 *International Journal of Clinical Legal Education* 27. Also see Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the profession of law: Summary* (2007) 6 in this regard. Students are sometimes told that issues like social consequences and/or ethical aspects fall outside the scope of the "precise and orderly legal landscape". This creates the impression that such issues are totally secondary to what is really important in practice, as well as for success in law school. It is submitted that an improper understanding of the application of the procedural law modules can lead to serious social consequences to members of the public, as well as reflect on the professional and ethical upbringing of the legal practitioner.

356 Hall *et al* 2011 *International Journal of Clinical Legal Education* 27.

357 *Ibid.*

358 Hall *et al* 2011 *International Journal of Clinical Legal Education* 37.

359 *Ibid.*

360 Hall *et al* 2011 *International Journal of Clinical Legal Education* 37. This aspect is discussed in more detail in 4 7 2 1.

361 Marson *et al* 2005 *Journal for Clinical Legal Education* 32.

362 *Ibid*.

of their parents and/or guardians, law students will carry such skills with them into legal practice in order to become skilled and successful lawyers.

It has been mentioned that students will benefit if CLE can already be introduced in the earlier stages of their academic careers. Should the procedural law modules be presented in the third (or earlier) academic year, and be presented using the CLE methodology, this will be a step in the right direction. As was stated earlier, students will have more time to practice transfer of information and, in the process, it will be a more viable and effective process to use CLE to achieve such an important goal. At NMU, the procedural law modules will be presented during the third academic year as from 2022. The Legal Practice module will remain in the final academic year. The law teachers for the procedural law modules have already undertaken to meet regularly in order to discuss the interrelationship between the various topics in the respective modules, as well as to present it in a more practical manner. Furthermore, if these modules could be presented utilising the CLE methodology in the third academic year, mostly by way of simulations, students will enjoy an extension thereof during the Legal Practice module in their final year, experiencing live clients. The reason why simulations are the preferred option in the third academic year is merely the fact that there will already be final year students who are undergoing training at the university law clinic or in other practical instances, *eg* externships. Capacity and resources are therefore problematic in this instance. This problem might however be overcome by way of a new project by the NMU Faculty of Law, *ie* a mobile law clinic, that is discussed elsewhere.[363]

Although the benefit of simulations had already been discussed elsewhere,[364] this topic needs to be elaborated on in order to show how simulations can impact on the teaching and learning of procedural law modules. Simulations are even important in cases of the live-client model of CLE in that it serves as a supplementary teaching method.[365] In the context of the live-client clinic, it will allow students to mimic the skills of actual legal practitioners in a classroom setting before attempting to apply

363 See 4 7 2 3.

364 See 1 2 3.

365 Stuckey *et al Best practices for legal education* 180.

such skills as far as tasks involving real clients are concerned.[366] The same result will be obtained even where the students are not partaking in live-client activities as part of a clinical law module, but mimicking lawering activities in other modules as well. Simulations will encourage students to apply their minds to facts and critically think like legal practioners.[367] In this way, cognitive knowledge is converted to experiential learning on a continuous basis.[368]

In order to achieve success, students will have to have a thorough knowledge of the substantive legal theory on a particular topic in order to properly demonstrate their proficiency in required skills relating to whatever activity they are partaking in.[369] The theory would have been imparted to students during a lecture, meaning that students must, after conclusion of such a lecture, carefully study the said theory in preparation for the practical simulated activity that will follow. The drafting of a letter of demand can serve as an example. During a lecture on civil procedure, the teacher should teach the theory behind letters of demand and the significance thereof to students. Students should also be taught about instances in law where letters of demand will be mandatory prior to the commencement of formal litigation. Legislation like the Institution of Legal Proceedings against Certain Organs of State Act[370] and the National Credit Act[371] requires mandatory demands prior to litigation. In terms of section 3 of the Institution of Legal Proceedings against Certain Organs of State Act, no legal proceedings for the recovery of a debt may be instituted against an organ of state unless the creditor has given the organ of state written notice of the creditor's intention to institute such legal proceedings.[372] In terms of section 129 of the National Credit Act, when a consumer is in default under a credit agreement, a credit provider may draw such default to the notice of a consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, the consumer court or ombud with jurisdiction over the matter, in an attempt to resolve any dispute that may exist under such a credit agreement, as well

366 *Ibid*.

367 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 219.

368 *Ibid*.

369 *Ibid*.

370 40 of 2002.

371 34 of 2005.

372 S 3(1)(a); Pete, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Civil Procedure – A practical guide* (2017) 124.

as to agree on a payment plan in order to bring payments under such a credit agreement up do date.[373] Section 129 further provides that no legal proceedings, relevant to the said credit agreement, may be instituted unless the mentioned written notice to the consumer had been given.[374] Section 130 of the same act provides that the court will only try legal proceedings in terms of such a credit agreement if, *inter alia*, the provisions of section 129 had been complied with.[375] After studying the relevant provisions of these instances of legislation, opportunities should be made available to students where they can draft letters of demand based on such legislation. It is further recommended that a set of facts should be provided to the students, clearly setting out the context within which such a letter of demand will be applicable. In this manner, the students get an appreciation of the relevance of the demand, as well as a practical scenario within which such a demand will be relevant. It might happen that, in the following year when students are enrolled for the clinical law programme, they are confronted with a similar situation when consulting with actual clients at the university law clinic or elsewhere. It is submitted that they will be knowledgeable in how to properly handle such a situation and the eventual drafting of the letter of demand for the reason that they have had the opportunity to practice it on an earlier occasion.[376] It is further submitted that simulations of this nature should happen on a continuous basis throughout the procedural modules in order to guarantee the maximum conversion of cognitive knowledge to practical experience. In this way, simulations help to not only firmly ground theoretical knowledge in the minds of the students, but also to transcend the detached theoretical book learning relating to the particular subject matter.[377]

Simulations will also provide students with valuable experience that they will need to complete tasks when they enter legal practice after graduation.[378] To facilitate this, simulated activities should be designed in order to resemble professional situations found in legal practice, as well as to allow for specific assessment needs in doing so.[379]

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373 S 129(1)(a); Pete *et al Civil Procedure – A practical guide* 125.

374 S 129(1)(b)(i).

375 S 130(3)(a); Pete *et al Civil Procedure – A practical guide* 125.

376 See 2 6, 4 5 3 and 4 5 4 in this regard.

377 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 219.

378 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 219; Stuckey *et al Best practices for legal education* 181.

379 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 220.

For example, when conducting mock trials and moots, the teacher can mimic a court bench consisting of legal practitioners from private practice, as well as presiding officers. The presence of these practitioners and presiding officers will depend on their willingness and availability. For a criminal mock trial, the teacher could invite a public prosecutor or state advocate to act as prosecutor for the state, while the students act as legal representatives for the accused. Once again, public prosecutors and state advocates must be willing and available to fulfil such a task. In this way, simulations can bring the reality of legal practice into the educational environment and students have the opportunity to learn from experts in the field. These experts can help the students to concretise the theory so that they have a more complete picture of how legal procedure, as well as practical application of substantive law, is managed in legal practice. Furthermore, simulations can provide the basis for teaching students the ethical side of legal practice.[380] This can be achieved by letting students resolve ethical, technical and professionalism related problems in contexts that resemble issues in legal practice.[381] Teachers can, for example, set up a simulated consultation in which students must consult with a wife in a divorce matter, but it later transpires that someone else in the students' "law firm" has already taken on the husband, in the same divorce matter, as a client. Another example is a slightly more drawn out and real-time exercise in terms of which students must issue a letter of demand, the summons and particulars of claim on behalf of a plaintiff, as well as monitor the reaction of the defendant in the same matter. In this way, students can learn that it is professional to keep to the time limits that the relevant legislation prescribes for the service and filing of pleadings. Further in relation to this, students can also learn that, in some instances, legal practitioners allow their opponents to serve and file documents outside the statutorily prescribed time limits due to contingencies on the side of the opponent or their clients. This may be useful in showing students how to approach collegiality in legal practice and that they can allow a relaxation of time limits where possible, as they might need the same favour from their opponents at some point in the future. In this way, simulations play a crucial and active role in preparing law students for entry into legal practice with confidence and being aware of what awaits them. In this regard, it is not possible for a law school to produce accomplished

380 Stuckey *et al Best practices for legal education* 181.

381 *Ibid*.

legal practitioners; however, it is possible, as well as preferred – and recommended in context of this research – that students should be trained to move past first level mistakes that can hamper their performance in legal practice.[382] It is therefore of crucial importance to allow students to make mistakes and to receive assistance at an educational institution to reflect upon such mistakes.[383] This will enable students to develop insight into why such mistakes had been made, as well as how to rectify it. The result is therefore that simulations can contribute to producing law graduates who are not immune to making mistakes, but who will be accustomed to learning from their mistakes when entering legal practice.[384]

Based on the aforementioned, simulations should not be omitted from any clinical law programme.[385] It is furthermore clear that simulated activities can provide valuable teaching and learning aids to students as far as the procedural law modules are concerned.[386] It will not only help to transform the abstract nature of procedural law and evidence into more concrete cognitive structures, but also to prepare students, practically speaking, for applying procedural law and the principles in legal practice, both when working at law clinics or after graduation. Students can learn a lot from simulations in that they will be supervised, be allowed to reflect on their activities and receive feedback from their teachers.[387] Feedback and debriefing sessions are important, as it will provide clarity to students as to how to resolve complex situations and legal problems, as well as serve as an evaluation of the simulated exercise.[388] This is especially helpful where multiple students in a student group experienced the same complexities and accompanying problems.[389]

382 Stuckey *et al Best practices for legal education* 182.

383 *Ibid*.

384 *Ibid*.

385 See Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 220, as well as Stuckey *et al Best practices for legal education* 187 in this regard.

386 Also see 4 5 4 for a related discussion.

387 Stuckey *et al Best practices for legal education* 179.

388 Stuckey *et al Best practices for legal education* 187.

389 *Ibid*.

4 5 PROSPECTIVE OUTCOMES OF INTEGRATING CLINICAL LEGAL EDUCATION WITH PROCEDURAL LAW MODULES

4 5 1 IMPROVED OVERALL EDUCATION

By integrating CLE into the teaching of the procedural law modules, a more rounded legal education will be obtained,[390] as there will be a balance between academic teaching and the practical application of legal principles. The teaching of the procedural law modules by way of CLE will therefore result in a sound grasp of substantive law, effective problem solving as result of the mentioned sound grasp of substantive law and the acquisition of expert problem solving skills.[391] This will be the case whether the live-client model or simulations is employed. What is important, is that CLE should be presented alongside the Socratic and case dialogue teaching methodologies and viewed as part and parcel of the core teaching methodologies of a law school, not merely as a supplementary method used to teach practical skills.[392] The ultimate goal of law school training has been said to be effective advocacy.[393] This is explained as the persuasion of a person to move from point A to point B by using language.[394] The components of effective advocacy are the following:[395]

(a) problem solving;
(b) legal analysis and reasoning;
(c) legal research;
(d) factual investigation;
(e) communication;
(f) counselling;
(g) negotiation;
(h) litigation and alternative dispute resolution;

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390 See Hall *et al* 2011 *International Journal of Clinical Legal Education* 32 in this regard.

391 See Hall *et al* 2011 *International Journal of Clinical Legal Education* 28 in this regard.

392 Hall *et al* 2011 *International Journal of Clinical Legal Education* 32-33. Also see Swanepoel *et al* 2008 *Journal for Juridical Science* 102 in this regard. The teaching of legal skills should not only be left for skills based modules, but should be included in theory based modules as well. Hence, it will benefit the procedural law modules to a significant extent.

393 Snyman-Van Deventer *et al* 2012 *Obiter* 126.

394 *Ibid.*

395 Snyman-Van Deventer *et al* 2012 *Obiter* 127.

(i) organisation and management of legal work; and
(j) recognising and resolving ethical problems.

By incorporating theory, practice and tutorial sessions as already explained,[396] CLE can assist with the development of all these skills as far as procedural law modules are concerned.

4 5 2 IMPROVED SKILLS TRAINING

Although the teaching of traditional legal skills, including advocacy, negotiation and interviewing techniques is important in any clinical training programme, students should also be trained to "act like lawyers".[397] Management skills, including time management, people skills and case management, should also be taught.[398] It is therefore clear that CLE can be holistic in preparing students for practice in the sense that various skills, to be used in and out of practice, can be taught.[399] In the context of the procedural law modules, these are the skills that students need in order to be able to do the following:[400]

(a) to draft letters and legal documents accurately and to apply their minds when drafting such letters and legal documents;
(b) to be on time for court appearances in order to conduct their clients' cases;
(c) to act professionally and ethically correct in the office, as well as in the courtroom, and to treat their office staff, as well as court staff, with the required respect and professionalism; and
(d) to organise their work schedules in such a way as to pay due diligence to all their cases and also make time to collect, inspect and evaluate relevant evidence.

Further to this, professional responsibility is important as far as procedural law modules are concerned and it is submitted that CLE is probably the only teaching

396 See 4 3.
397 Evans *et al* 2008 *Griffith Law Review* 68.
398 *Ibid.*
399 *Ibid.*
400 This list does not constitute a *numerus clausus*.

methodology with which it can consistently be facilitated.[401] Students must be made aware of the importance of drafting proper and neat process and pleadings and complying with time limits for serving and filing pleadings in civil proceedings, the content of various pleas and properly drafted affidavits in criminal proceedings, as well as how to handle and disclose evidence in both types of proceedings. In this way, it can be said that CLE facilitates the learning of professional responsibility "…in a meaningful, internalised way sufficient to form an affirmative structure capable of guiding behavior in a manner consistent with the stated public norms of the legal profession."[402] Barnhizer explains the importance of the underlying practical and professional principles, central to the mentioned "norms of the legal profession." He states that the rules and issues of civil, criminal and administrative procedure, included in legal education, only represent one formalised component of legal procedure.[403] However, knowledge of the formal and informal aspects of legal procedure involves far more than what is contained in textbooks.[404] It includes unwritten and informal processes that often play significant roles in reaching favourable resolutions of clients' cases.[405] It can therefore be a creative and tactical tool in the hands of legal practitioners.[406]

4 5 3 PREPARATION OF STUDENTS FOR A CLINICAL LAW MODULE

Where Civil Procedure, Criminal Procedure and the Law of Evidence are presented in the third year of studies, and Legal Practice,[407] more specifically CLE, is presented in the final academic year, the integration of CLE into the procedural law modules will be very beneficial as far as preparing students for their law clinic experience is concerned. A sound theoretical foundation is therefore laid in the third year for the full-scale

401 Barnhizer 1979 *Journal of Legal Education* 71-72.

402 Barnhizer 1979 *Journal of Legal Education* 72.

403 Barnhizer 1979 *Journal of Legal Education* 77.

404 *Ibid.*

405 *Ibid.*

406 *Ibid.*

407 Legal Practice, as presented at NMU, currently consists of two main components: Street Law and CLE. CLE is presented at the university's Law Clinic. Legal Practice is presented in both semesters in the final year of studies, meaning that students have the benefit of experiencing practical work at the law clinic for an entire year. CLE is also presented in the final year of studies at North West University, University of Johannesburg and University of the Witwatersrand, while it is presented in the third year of studies at Rhodes University.

practical work that students will undertake in their final year.[408] The law clinic experience in the final year will thus be less intimidating for the students[409] and can be seen as an opportunity to further their knowledge of the procedural law modules with confidence. Support for this point of view can be found in the suggestions of some American authors. They suggest that law schools should place more emphasis on the third academic year by transforming it into a capstone opportunity for students.[410] This will enable students to develop specialised knowledge, engage in clinical training and collaborate with the law school and peers.[411] It will further provide them with the opportunity to seriously and comprehensively reflect on their educational experience and strategies so as to further the growth of their professional careers.[412] This however applies to the position in the United States of America. It differs from the South African context where the fourth year of studies will provide the capstone opportunity for students.[413] Authors from England and Wales seem to agree with the point of view that a firm foundation, both theoretical and practical, should be created by law schools. It would appear that the sooner this happens, the more advantageous it will be to the student, especially taking into account the benefits that it holds for effective transfer of information by the student, which had been discussed elsewhere.[414] Grimes refers to the ACLEC report and indicates that, in this report, a need is expressed for a continuum in which universities and colleges play a principal role of serving the educational needs of the students.[415] This involves a liberal educational experience that is closely related to career development beyond graduation, which should promote intellectual and practical knowledge, understanding and skills.[416]

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408 See Barnhizer 1979 *Journal of Legal Education* 82 in this regard. NMU is currently planning a recurriculation of the LLB degree. In terms of this recurriculation, Civil Procedure, Criminal Procedure and the Law of Evidence will be presented as year modules during the third year of studies. The significance of this is that law students can now be better prepared for a year of full-scale practical work at the university law clinic, or elsewhere, during the final year.

409 Barnhizer 1979 *Journal of Legal Education* 82.

410 Sullivan, Colby, Wegner, Bond, and Shulman, *Educating Lawyers – Preparation for the profession of law: Summary* (2007) The Carnegie Foundation for the Advancement of Teaching 9.

411 *Ibid.*

412 *Ibid.*

413 An extended LLB curriculum is available at NMU. Should students enrol for this curriculum, they will study for five years. Their fifth year of studies will therefore be their capstone opportunity.

414 See 4 4.

415 Grimes "The ACLEC Report – Meeting Legal Education Needs in the 21st Century?" (undated) http://www.austlii.edu.au/au/journals/LegEdRev/1996/12.html (accessed 2018-09-25) 3.

416 *Ibid.*

The ACLEC report requires a brief explanation. In England and Wales, the Lord Chancellor's Advisory Committee on Legal Education and Conduct, or ACLEC, compiled a report in 1996, which, *inter alia*, identified the need for intellectual rigour, core and contextual knowledge, legal values, ethical standards, as well as analytical, conceptual and communication skills in law degree curricula.[417]

It does not, however, mean that, if CLE is presented in the same academic year as all or some of the procedural law modules, students will be at a disadvantage when working with clients in a clinical setting. It must be kept in mind that LLB curricula are not the same at all universities and for this reason, procedural law modules and CLE may coincide in a particular year.[418] Classroom instructions must however be amplified in such a case in order to ensure that students have the necessary knowledge about certain aspects that will be required of them during consultations with clients, for example the rules of evidence or procedural legal rules.[419] It is however submitted that the preferred approach is for procedural law modules to be successfully completed by students before they advance to CLE. Evans and Hyams have a similar sentiment to this assertion and state that it cannot be assumed that students will gain abilities to practice law in a positive fashion by simply consulting with clients and thereafter attempt to find solutions to the legal problems identified.[420] They propose simulations that will enable students to practice particular lawyering skills in order to sharpen their capabilities.[421] Their line of reasoning brings about the same conclusion as the one regarding a good theoretical foundation made in the third academic year: it will prepare the student better for what is yet to come.[422]

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417 Grimes http://www.austlii.edu.au/au/journals/LegEdRev/1996/12.html 2.

418 Du Plessis 2015 *Journal for Juridical Science* 72.

419 *Ibid.*

420 Evans *et al* 2008 *Griffith Law Review* 63.

421 Evans *et al* 2008 *Griffith Law Review* 53.

422 See 4 4 in this regard. The actual practical experience in the final academic year is therefore an extension of what they have already learnt the previous year.

4 5 4 INTEGRATION OF THEORY WITH PRACTICE

The aforementioned integrated approach will advance the creativity of law students in gaining knowledge and also executing such knowledge. For this reason, they need to be afforded sufficient time to complete tasks and absorb information, especially keeping in mind that they are engaging with new doctrinal knowledge and practical processes which they have not encountered before.[423] In this regard, it will be submitted, as part of the teaching methodology proposed in terms of this research, that there should be a good balance between doctrinal presentations and practical application in order for the student to fully appreciate the application of theoretical knowledge. For example, during a particular civil procedure lecture, the substantive requirements relating to a letter of demand can be explained. In a following lecture, students should be afforded the opportunity to draft a letter of demand according to the doctrinal knowledge obtained, as well as to get feedback from the law teacher as to whether or not they have completed such a task satisfactorily.[424] Extensive feedback and evaluation of efforts is an essential characteristic of CLE.[425] All clinicians should provide students with feedback.[426] Students are directed to particular actions that they have followed or choices that they have made.[427] In providing feedback on those actions or choices, clinicians seek to improve the performance of the students by reporting on their observations, considering the students' goals and motivation as a basis for their actions or choices, as well as the students' performance techniques.[428] In the context of the previous example, this feedback will enable students to draft such a letter with a certain degree of confidence when involved in a real matter at a law clinic or when engaging in a simulation. This confidence and newly gained skill will accompany students into legal practice after graduation.

Furthermore, in this regard, it has already been stressed that formal drafting is an essential skill of any legal practitioner.[429] Students can, at university level, practice

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423 Krieger "Domain knowledge and the teaching of creative legal problem solving" 2004 11 *Clinical Law Review* 204.

424 Also see 4 4 for a related discussion as far as simulations are concerned.

425 Vawda 2004 *Journal for Juridical Science* 123.

426 Mlyniec 2011-2012 *Clinical Law Review* 568.

427 *Ibid.*

428 *Ibid.*

429 See 3 4 4; Marson *et al* 2005 *Journal for Clinical Legal Education* 37.

their drafting skills on a weekly basis in a law clinic and/or simulated setting.[430] They should also constantly be made aware of the importance of the training that they are undergoing and that the focus should be on their careers after graduation. At the same time, students should be reminded that, in a live-client situation, they are rendering a professional service to members of the community who would otherwise not have access to justice.[431] The realisation, that their drafting may be viewed by presiding officers in courts, as well as by other legal practitioners in practice, may assist in opening students' minds to the fact that they must deliver their utmost when engaging in such tasks because of the sheer importance thereof for their careers as future legal practitioners.[432] There is no reason why this approach could not also apply to simulations.

The integration of theory with practice, as explained above, will inevitably lead to legal research by the students. In a clinical law programme, students are faced not only with the complexities of legal issues as far as live-client clinics are concerned, but also with the need to sometimes conduct research in a speedy, efficient and refined manner as may be required by a client's circumstances.[433] The process method of research is relevant in this instance, as students are taught how to conduct research with the view of solving legal problems.[434] This research method is linked to experiences that can be found in clinical programmes and includes research in order to draft legal memoranda, legal opinions, responses to simulated activities as well as responses to live-client encounters.[435] Proper research of this nature will enable students to discover and construct substantial responses to problem-based questions,[436] whether for the purpose of responding to a client in a live-client clinic or to excercises conducted by way of simulations.[437] In a clinical programme, an active research process must

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430 *Ibid*.

431 See Maisel 2007 *Fordham International Law Journal* 376-377 in this regard. While law clinics cannot, on their own, solve the problem relating to access to justice to indigent members of society, they are often key providers of legal representation to such members, both in South Africa and around the world.

432 *Ibid*.

433 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 251.

434 *Ibid*.

435 *Ibid*.

436 *Ibid.*

437 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 253.

be undertaken when a student consults with a client, as the following must be established:[438]

(a) the relevant facts in the matter;
(b) the law applicable to the relevant facts;
(c) the legal issues that require research;
(d) the legal sources that need to be consulted; and
(e) application of the legal rules to the facts of the matter.

Research of this nature will enable the student to learn the law and construct legal arguments.[439] Students will also be able to draft documents and conduct transactions in order to assist clients.[440] In following this route to serve clients, students learn how to practice law.[441] The more the students engage with research, the easier it will become for them to do.[442] It is submitted that process research is fully underpinned by the philosophy of constructivism in that students discover the relevant law and its application to practical situations for themselves.[443] The fact that CLE presents students with opportunities to conduct research of this kind, either by way of the live-client model or by way of simulations, will therefore be of valuable assistance to students in acquiring the skill of legal research in order to solve legal problems.[444] Clinicians and law teachers should regularly meet with students in order to have a discussion relating to legal matters that the students are handling when working at a law clinic.[445] These discussions will create opportunities for students to be informed about how the research process should be conducted.[446] It will also create opportunities for clinicians and law teachers to monitor the students' research efforts.[447] Research will enable the students to actively engage with the facts of a

438 Maisel and Greenbaum *Introduction to law and legal skills* (2001) 108-109; Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 252.

439 Rowe "Legal research, legal writing and legal analysis: putting law school into practice" 2009 29 *Stetson Law Review* 1 1; Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 252.

440 Rowe 2009 *Stetson Law Review* 1.

441 *Ibid*.

442 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 252.

443 See 2 3 for a discussion on constructivism.

444 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 252.

445 *Ibid*.

446 *Ibid*.

447 *Ibid*.

matter and the applicable law.[448] This allows for an active integration of theory with practice. It will further familiarise students with the skill of where to find applicable law.[449] The teaching of this skill to students promote good lawyering,[450] which is required for producing law graduates who are suitable for entry into legal practice. In this regard, Rowe states that most candidates attend law school with the goal of becoming legal practitioners.[451] While at law school, they can learn the skill of researching, analysing and writing, which are essential skills in becoming a legal practitioner.[452] This skill can be refined during their years at law school, as well as during the careers in legal practice.[453] This supports the notion of lifelong learning that has already been mentioned elsewhere.[454]

As stated earlier, this skill of process research can also be taught by way of simulations. In order to mimic the live-client model, more specifically a "client" that might be in need of urgent legal assistance, simulated activities can be set that require students to conduct the research within a limited time. This will provide an indication to students as to how time constraints can put pressure on them to conduct appropriate, yet effective and thorough research in the shortest possible time in order to provide legal assistance to someone in need thereof.

The process method of research, as discussed above, differs from traditional academic research. When doing academic research, the purpose is to promote intellectual debates and jurisprudential advancement in one or other way.[455] It can also be used to advance the development and reform of the legal regulatory framework.[456] It is submitted that, although the process method of research is useful in a clinical environment, the traditional research method should not be ignored. This is especially relevant as far as transformative constitutionalism is concerned. Students may want to conduct research in order to substantiate ideologies and arguments that could promote transformation, which transformation will be to the benefit of a client

448 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 253.
449 *Ibid*.
450 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 254.
451 Rowe 2009 *Stetson Law Review* 23.
452 *Ibid*.
453 *Ibid*.
454 See specifically 1 2 3 and 4 2 with regards to the importance of lifelong learning.
455 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 251.
456 *Ibid*.

and the client's case. It is further submitted that, in doing so, theory and practice are being brought together in that researched theory is being made directly applicable to a practical scenario in order to concretise how that particular situation in real life might be when adequately transformed. In this way, students can acquire the skill of researching theory and building debates and arguments that may be of use in promoting the spirit and purport of the Constitution in practice whenever and wherever necessary. It is submitted that this skill will prepare them, as future legal practitioners, for protecting the legal interests of their clients, which will lead to a more accountable legal profession, as envisaged by the LPA.[457]

Feedback, provided to students, must include feedback on their research skills, as well as their ability to integrate theory with practice. Feedback must always be constructive in order to make students understand how a particular situation arose and to support them in delivering a satisfactory outcome in such a situation.[458] Feedback must be very specific and not delivered in a generalising manner, because specific weaknesses and areas that require correction must be pointed out with certainty.[459] The focus of feedback must be on the task at hand, not on the particular student, and should be objective, forward looking and non-judgmental.[460] Due to a shortage of time, opportunities for detailed feedback, as desired, might not always be at the disposal of clinicians, resulting in feedback sessions becoming mere corrective suggestions.[461] It is submitted that tutorial sessions can also be used for this purpose in order to ensure that students receive the most detailed feedback possible.

4 5 5 HOLISTIC APPROACH TO PROCEDURAL LAW MODULES

CLE can also assist students with their learning of the procedural law modules in a more holistic way. The various components of procedural law modules form a unity in practice and cannot be treated in a piecemeal fashion.[462] For example, in both civil and criminal matters, various items of evidence cannot be viewed individually, but

457 See 5 2 2 1 in this regard.
458 Vawda 2004 *Journal for Juridical Science* 123.
459 Vawda 2004 *Journal for Juridical Science* 123; Mlyniec 2011-2012 *Clinical Law Review* 568.
460 Mlyniec 2011-2012 *Clinical Law Review* 568.
461 *Ibid.*
462 See 1 1 in this regard.

holistically in the context of the whole case. Furthermore, legal proceedings, both criminal and civil, are conducted by placing evidence before a court of law.[463] Therefore, evidence plays a dominating role in legal procedure; hence, the type of procedure will determine how evidence should be presented in court.[464] With this in mind, students must be aware of the fact that evidence, adduced in criminal trials, must prove the guilt of the accused beyond reasonable doubt, while evidence in a civil trial must prove the liability of the defendant on a balance of probabilities.[465] Students must further be aware of the nature of the two types of legal proceedings: criminal proceedings are utlised in order to punish an accused person by way of a fine or imprisonment or both a fine and imprisonment, while civil proceedings are utilised in order to claim damages from a defendant or to demand delivery of goods or performance of some kind of service from a defendant.[466] Fortunately, CLE is a pedagogy that allows students to learn by way of application, verbalisation of their thoughts and active engagement with ideas through consultation, discussion and feedback from a variety of peers and clinical supervisors.[467] In this way, they are placed in a position where they can integrate all of these processes in arriving at conclusions in a holistic way.[468] Students therefore have the opportunity to indicate to clinical supervisors and law teachers where they do not fully understand the application of evidence in a particular procedure, or even which procedure is ideal for their client's factual situation. Clinical supervisors and law teachers can now engage with students in order to clarify the situation for them. An example in this instance is the following: X collides with the motor vehicle of Y. Y may want to have X arrested for reckless and negligent driving, which action will result in a criminal case in which X may be found guilty of such an offence. It will not result in the payment of damages for Y's motor vehicle. Therefore, it is best for Y to institute a civil claim against X in terms of which Y claims damages.[469]

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463 Pete *et al Civil Procedure – A practical guide* 3.

464 *Ibid*.

465 See Pete *et al Civil Procedure – A practical guide* 1 in this regard.

466 Pete *et al Civil Procedure – A practical guide* 1

467 Vawda 2004 *Journal for Juridical Science* 120.

468 *Ibid*

469 See Pete *et al Civil Procedure – A practical guide* 2 in this regard.

To see the procedural law modules in a holistic way might be a new and somewhat overwhelming experience to students. They will realise that the law is wide-ranging and complex[470] and that the procedural law modules are no exceptions in this regard. When first consulting with a client, students may be inclined to conentrate so hard on the merits of the matter that they do not take into account the applicable evidence required to substantiate the client's case. It might also be that students are under the impression that conventional legal proceedings can be instituted in a particular instance, whereas it cannot be the case. For example, a client instructs the students that a motor vehicle accident had occurred as a result of which the client sustained serious bodily injuries. The students might be under the impression – and might even suggest to the client that such an impression be pursued – that the driver of the vehicle, who (according to the client) caused the accident, be sued for damages on account of the client's bodily injuries. In fact, this cannot be done in general, as legal recourse must be taken against the Road Accident Fund in claiming damages for the client.[471] Therefore, holistically, the evidence and knowledge of legal procedure should have guided the students in reaching this conclusion. However, students will not always have immediate advice available to a client and may have to conduct some research in order to construct adequate legal advice.[472] Students will therefore need to develop the ability to conduct research effectively.[473] This research differs from academic research. Firstly, the aim of this advice is not to effect legal reform, but to arrive at a solution to the client's legal problem.[474] There may however be instances where a holistic view of legal procedure and evidence may give rise to research necessitating legal reform. Several examples in this regard have already been mentioned elsewhere in this research.[475] One such example can briefly be repeated for the sake of convenience: a statutory presumption, created by section 21(1)(a)(i) of the Drugs and

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470 Kok "Legal research and writing opinions" in Mahomed *Clinical law in South Africa* 139.

471 In terms of s 21 of the Road Accident Fund Act 56 of 1996, a claim that should be instituted against the Road Accident Fund based on the wrongful and negligent driving of a motor vehicle that caused injuries to a person, may not be instituted against the owner of the motor vehicle or the driver of such a motor vehicle, if the owner was not the driver. A claim of this nature may be instituted against the ownder or driver if the Road Accident Fund is unable to pay such a claim.

472 *Ibid*.

473 *Ibid*.

474 Kok "Legal research and writing opinions" in Mahomed *Clinical law in South Africa* 140.

475 See 3 5 3 in this regard.

Drug Trafficking Act,[476] was challenged in *S v Bhulwana; S v Gwadiso*.[477] The issue was whether or not a person, in possession of dagga exceeding 115 grams, would be considered a dealer in terms of this Act.[478] The Constitutional Court held that section 21(1)(a)(i) is unconstitutional,[479] because it violates the right of an accused person to be presumed innocent[480] and that the said section amounts to a reverse onus clause.[481] The reverse onus clause would have imposed an unfair burden on the accused when proving his innocence. In this instance, proper knowledge of legal procedure, inclusive of the principles of evidence, brought about reform in procedural law. It speaks for itself that the accused's legal representatives must have fully researched the law on the topic, its application in light of their client's situation, how the law would affect their client's rights and why such impact on his rights would be undesirable, especially in light of the Constitution. Secondly, as far as academic research is concerned, academics sometimes have several weeks or months available during which to conduct research.[482] In legal practice, such a long time for research is generally not available, as legal practitioners might be put under pressure by their clients to conduct research in the shortest possible time.[483] For this reason, it is imperative that students are trained to listen closely to their client's instructions during a consultation in order to form a clear picture of what the issues are.[484] Students must then conduct research relating to these issues, not separating legal procedure and the principles of evidence, thus approaching the research from a holistic perspective. The client would want a clear answer as far as the legal issues are concerned and this emphasises the need to view legal procedure and evidence holistically so that professional and adequate legal advice can be provided to a client. If not, it cannot be said that procedural justice has been advanced in that all aspects of legal procedure

476 140 of 1992. This section provides that "[i]f in the prosecution of any person for an offence referred to in s 13(f) it is proved that the accused (i) was found in possession of dagga exceeding 115 grams…it shall be presumed, until the contrary is proved, that the accused dealt in such dagga or substance;…" S 13(f) refers to a contravention of s 5(b). S 5(b) provides that "[n]o person shall deal in…(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance…"

477 1996 1 SA 388 (CC).

478 Bellengere *et al The Law of Evidence* 18; Currie *et al The Bill of Rights Handbook* 756.

479 Par 34.

480 Parr 19, 29 and 30; Bellengere *et al The Law of Evidence* 18.

481 Par 2; Bellengere *et al The Law of Evidence* 18. A reverse onus clause is a statutory provision that requires the accused to prove or disprove an element of an offence on a balance of probabilities.

482 Kok "Legal research and writing opinions" in Mahomed *Clinical law in South Africa* 139.

483 *Ibid*.

484 *Ibid*.

and evidence, as well as the interests of the client, had not been considered properly.[485] The interests of the client includes any social and human elements that may have an influence on the client's case and the advice that is being sought.[486] The following set of facts may serve as an example in this regard: Mrs X is charged with the murder of her husband, Mr Y. There is evidence that, during their marriage, Mr Y has constantly abused Mrs X both physically and mentally. This abuse has reached such a stage that Mrs X could not live with it any longer. She eventually shot Mr Y in an attempt to escape this abusive lifestyle that has become second nature in her life. Mrs X consults with her legal representative and wants to know if she is now destined for a life in prison or whether there is anything in the law that might ameliorate her situation. She pleads not guilty to a charge of murder at the eventual trial. She advances necessity as ground of justification and her legal representative adduces evidence to court about the abusive lifestyle. If this ground of justification will succeed, Mrs X's conduct will not be classified as unlawful and will she be acquitted on the charge of murder. Should the ground of justification however not be successful, the legal representative can build a convincing case for a reduced sentence, emphasising that the so-called "battered woman syndrome" has influenced Mrs X's life in such a manner that she did not see any other way out of the situation other than by killing her husband, the source of her abusive lifestyle, which she, as a human being, did not deserve. It is submitted that this is a simple, yet effective example, to illustrate how a holistic perspective of procedural law can influence the outcome of a case. The practitioner must be familiar with the substantive law relating to murder and grounds of justification, as well as with the adjectival law relating to criminal procedure in order to conduct the trial in a manner that serves the best interests of the client. The practitioner must further be familiar with the principles of evidence so as to be in a position to adduce the evidence to court in such a way to substantiate the argument of the client. The evidence will however only serve the best interests and argument of the client if the client's personal circumstances had been taken into account.[487] The conclusion can be reached that students need to be trained to link various elements

485 See 3 4 5 with regards to procedural justice.

486 See 3 4 5 with regards to the importance of social and human elements as far as procedural law modules are concerned.

487 See 3 4 5 for a detailed discussion about the importance of social and human elements as far as procedural law is concerned.

from the different procedural law modules to a client's case, including substantive law, procedural law, as well as the principles of evidence.

It is submitted that simulated exercises could assist students to become more familiar with a holistic approach to procedural law and evidence. However, a live-client situation should be more convincing, as students will be able to see how the theory and practice relating to procedural law modules are applied in a holistic manner to address an actual problem of an actual human being whose personal situation cannot be ignored in searching for a solution. It is further submitted that transformative constitutionalism plays an active role in this regard, as the social and human elements, attached to the client, forces the students to look past a conservative and rigid application of the law towards a more flexible approach that will advance the rights and improve the life of the client.

4 5 6 ENHANCED AND CREATIVE ASSESSMENT METHODS

For assessment purposes, the knowledge of the students, as well as all their drafting assignments, can culminate in a portfolio of evidence that, at regular intervals during a particular module, must be assessed by law teachers in order to monitor students' progress. The compilation of a portfolio of evidence can originate from a set of facts given to students. This set of facts can be used throughout the module and serve as the basis for the drafting of applicable module and topic related documents.[488] In addition to this, mock trials and moots, also based on the given set of facts, can be conducted in order to assess the oral and overall court room skills of the students. Periodical tests and examinations can also be conducted in order to test the knowledge of students as far as substantive principles are concerned. Du Plessis states that the primary purpose of assessments should be to ascertain whether or not students are learning what they are expected to learn.[489] This is precisely what the suggested forms of assessment are aimed at. Du Plessis further supports the

[488] Also see Oppenheimer "Using a simulated case file to teach Civil Procedure: The ninety-percent solution" 2016 6(1) *Journal of Legal Education* 817 821 in this regard. The syllabus can be constructed around a simulated case file. This case file can constitute the portfolio of evidence that must be submitted for assessment.

[489] Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* (2016) 57.

argument that a portfolio of evidence and tests and examinations must be used, by suggesting that assessment methods should preferably include both formative and summative assessment methods.[490] She further suggests that these assessment methods should be able to grade the skills learned by the students.[491] In this regard, tests and examinations can be graded in the conventional manner by allocating marks for answers provided. As far as the portfolio of evidence and other practical activities are concerned, assessment rubrics can be utilised. These rubrics should be completed by different clinicians in order to ensure that the students are assessed even-handedly.[492]

Inclusive, and integrated into both of these types of assessments, should be sufficient provision for aspects of transformative constitutionalism. With regards to a formative assessment, this could take the form of a verbal legal argument as to why a certain aspect, or aspects of procedural law or principles of evidence should change in light of the provisions of the Constitution. As far as a summative assessment is concerned, it might take the form of a written assignment, or be included in a test or examination. The central element of assessing this content is that the students must provide justification for their answers in accordance with the purport of the constitutional dispensation, clearly indicating how a new and constitutional approach will trump an older and purely formalistic approach.[493]

The combination of portfolios of evidence, mock courtroom sessions, tests and examinations will ensure that there is a good balance between testing knowledge and the practical application of this knowledge. It is submitted that, if such a practical foundation is firmly laid at university level by law schools, law graduates entering legal practice, can build on this foundation by exercising their knowledge, both theoretical and practical. In this way, an almost seamless integration between university and legal practice may be established. It should be kept in mind that legal practitioners

490 *Ibid.*

491 *Ibid.*

492 See Du Plessis *Law Clinic Curriculum Design and Assessment Tools* 70, 72 in this regard.

493 See Chapter 2 in this regard, specifically 2 1 and 2 2 3.

must apply doctrine in the context of the circumstances of a particular client and must therefore possess theoretical knowledge integrated with practical skills.[494]

Furthermore, assessments, being an integral part of the curriculum, must be incremental and developmental in the formation of student abilities and addressing the outcomes of the particular module.[495] These outcomes must include preparation of the students for their final academic year when they will participate in clinical work, as well as to ensure that students have proper knowledge and skills relating to procedural law and evidence. CLE in the final academic year can intensify this knowledge and skills in order to further contribute towards the students' preparation for legal practice. In this way, the module content and assessments become significantly developmental.

4 5 7 EMPHASISING THE ROLE OF CLINICIANS AS LAW TEACHERS

The primary teachers of the practical aspects of the procedural law modules, by way of CLE, should be clinicians themselves. They are much better equipped, compared to conventional academic law teachers, to perform this function.[496] The reason for this is that clinicians are already teaching "on the ground", meaning that they are combining their years of experience in practice with the applicable doctrinal teachings.[497] The aforementioned should however not be construed to mean that other law teachers, including academics and practitioners, should not be involved in teaching any of the practical components of the procedural law modules. In their own right, they may – and certainly do, especially practitioners – have valuable practical information and skills to transfer to law students. However, in light of the social and human aspects attached to all clients and their cases, clinicians must be aware of how human traits and institutional character can influence the handling of a client's interests and his or her case. If not, clinicians might not have the required expertise and legal skills in order to attend to a client's interests in the best possible way.[498] Furthermore

494 Krieger 2004 *Clinical Law Review* 155.

495 See Du Plessis "Clinical legal education: planning a curriculum that can be assessed" 2011 36(2) *Journal for Juridical Science* 25 43 in this regard.

496 Bloch 2011 *Education and Law Review* 2.

497 *Ibid*.

498 Mlyniec 2011-2012 *Clinical Law Review* 536.

in this regard, because student training and education should be the primary focus of CLE, it can also mean that these skills are not instilled in the students.

4 6 POSSIBLE CRITICISM AGAINST INTEGRATING CLINICAL LEGAL EDUCATION WITH PROCEDURAL LAW MODULES

Possible criticism against promoting the integration of CLE with procedural law modules must also be considered. Earlier in this chapter, it was mentioned that there is an existing institutional prejudice against CLE.[499] Although this fact is not *ipso facto* a criticism in this regard, it is submitted that its existence may give rise to anti-integration arguments as far as CLE and procedural law modules are concerned.

One possible argument against such integration may be that this approach has as its focus the preparation of law students for legal practice, but that not all students wish to become legal practitioners.[500] This might be so, and indeed, it might be true that producing legal practitioners is certainly not the only aim of law schools.[501] It can however be argued that producing legal practitioners is definitely one of the purposes of students attending law school.[502] Chemerinsky states that "[t]he preeminent purpose of law schools is educating our students to be lawyers. There is simply no better way to do this than through clinical education. Indeed, there is no way to do this without clinical education."[503] It is submitted that Chemerinsky is correct in this approach. Legislation can be used as a good foundation upon which to build an argument in this regard. In order for a person to become a legal practitioner, the person must comply with the provisions of the LPA.[504] Section 24(1) provides that a person may only practice as a legal practitioner if such a person is admitted and enrolled to practice as such in terms of the LPA. Section 24(2) provides, *inter alia*, that the High Court must admit and enrol to practice any person who, upon application, satisfies the court that he or she is duly qualified as set out in section 26 of the LPA.

499 See 4 1.

500 See Van der Merwe 2017 *Stellenbosch Law Review* 687 in this regard, as well as Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 39.

501 Van der Merwe 2017 *Stellenbosch Law Review* 687.

502 *Ibid*.

503 Chemerinsky 2009 *Clinical Law Review* 41; Van der Merwe 2017 *Stellenbosch Law Review* 687.

504 28 of 2014.

Section 26(1) provides, *inter alia*, that a person qualifies to be admitted and enrolled as a legal practitioner, if that person has satisfied all the requirements for the LLB degree obtained at any university registered in South Africa. "LLB degree" is defined in the LPA as "…a Bachelor of Laws, also referred to as a degree of *baccalaureus legum*, referred to in section 26;…"[505] It is submitted, in the context of the legal practice, that in order to enter legal practice, a person must have adequate theoretical and practical knowledge about the law. It cannot be expected of legal practitioners to be the sole practical trainers of graduates. Their duty of guidance, during a graduate's period of articles of clerkship, will be met with considerable ease if the graduate already possesses the basic skills to find his or her feet in practice. An argument against this might be the definition of "candidate legal practitioner" in the LPA, namely "…a person undergoing practical vocational training, either as a candidate attorney or as a pupil;…"[506] "Candidate attorney" and "pupil" are defined similarly, namely "…a person undergoing practical vocational training with a view to being admitted and enrolled as an attorney" or, in the case of a pupil, to be admitted and enrolled as an advocate."[507] These definitions might create the impression that practical vocational training is the duty of practice, and not of university law schools. However, the training would mean nothing without a proper foundation having been built at university level. It cannot be expected of legal practitioners to teach graduates everything that they need to know about legal practice, especially when keeping in mind the busy schedules of legal practitioners both in and out of the courtroom. This argument will be elaborated on elsewhere in this research.[508]

Another possible argument, linked to the theoretical basis of this research, is that CLE may exclude political and philosophical aspects of the law as far as legal training is concerned.[509] This can be equated to Klopper's criticism of Gravett's stance as far as trial advocacy is concerned, which has already been discussed.[510] If Condlin is understood correctly, this means that CLE might focus too much on techniques and

505 S 1.

506 *Ibid*.

507 *Ibid.*

508 See 5 2 2 1.

509 Condlin "The moral failure of clinical legal education" (undated) https://core.ac.uk/download/pdf/56353436.pdf 321 (accessed 2020-04-27).

510 See 2 3.

how “good” a legal practitioner should be, which he categorises as psychological concepts.[511] In the context of this research, this can be interpreted to mean that clinicians will only teach students to focus on legal procedure and the interpretation of evidence in order to manipulate cases in favour of their clients, even to the detriment of the opponent, without practising restraint as far as their own behaviour is concerned.[512] This implies that no attention will be paid to transformative constitutionalism, the social circumstances of the parties and important constitutional values like *ubuntu* and that students are only trained for “cold-blooded commercial practice”, as mentioned elsewhere.[513] While this may be possible, and while there is no guarantee that this will not happen, it is submitted that the teaching of procedural law modules will inevitably involve the dissemination and preference of certain techniques and procedures which clinicians have found to work most effectively in certain instances. This should however not be taken to mean that, in coming up with such techniques, clinicians have not considered the constitutional impact that such techniques may have on not only their client, but on the case as a whole. To illustrate this statement, an eviction can serve as an example. Evictions, as far as urban properties are concerned, are regulated by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (hereafter referred to as the “PIE Act”).[514] In order for a property owner to evict the occupants of property belonging to the owner, proof of ownership of the property is required.[515] It can, for example, happen that property has been allocated to a person in terms of a government subsidy scheme, but that the property has not yet been registered in the person’s name. This means that, should anyone, apart from the “owner”, commence occupation of this property, the “owner” will not be able to evict them due to the lack of proof of registration. It is submitted that it would be completely unethical and unprofessional to teach students to let the client pay a deposit to the attorney and to approach the court merely on the argument that registration is not necessary because of the allocation of the property to the client. It must be remembered that, although the property has been allocated to the client,

511 *Ibid.*

512 *Ibid.*

513 See 2 3 in this regard.

514 19 of 1998.

515 This is a civil procedural directive as far as evictions are concerned. Futhermore, s 1(ix) of the PIE Act defines an owner as the registered owner of land, including an organ of state. The owner must therefore possess written proof of ownership.

registration is still required to prove ownership. This approach to the case is undesirable, because the legal practitioner does not justify, and ultimately clarify why the provisions of the PIE Act should be differently interpreted in this instance. Should the eviction then be dismissed by the court, the legal practitioner would have earned money, to the detriment of the client and his or her social position, as the client had to part with funds, could not gain possession of the relevant property and received no justification for the legal practitioner's argument in court. This results in ineffective representation of the client by the legal practitioner and may be an indication that the law teacher, and ultimately the university law school, is responsible for this.[516] Instead, it is submitted that a more preferable argument in this regard will be that it is in the interests of social justice that there should be no need for the required proof of registration, based on the fact that the property had already been allocated to the client. In this case, the court must be informed that proof of registration may actually hamper social justice and, consequently, the rights to housing and property as entrenched in the Constitution.[517] Clinicians must therefore constantly be on the lookout for opportunities of this nature in order to advance legal procedure based on a transformative and social justice approach, as well as to make law students aware of such possibilities. This will ensure that Condlin's argument cannot, and should not, be regarded as the general stance as far as a CLE approach to law is concerned. What is of significance in this regard is that clinicians generally work with the best interests of indigent members of society in mind and are therefore in a good position to teach students not to ignore political elements of the law.

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[516] See Tyler and Catz "The contradictions of clinical legal education" 1980 29 *Cleveland State Law Review* 693 693 in this regard.

[517] S 26(1) provides that everyone has the right to access to adequate housing. S 25(1) provides that no one may be deprived of property, except in terms of a law of general application and, furthermore, that no law may permit arbitrary deprivation from property. It is submitted that, should there be an insistence on the written proof of ownership, the person in the example may be arbitrarily deprived of access to the lawfully allocated property.

4 7 SUGGESTED FOCUS POINTS IN THE EXISTING CLINICAL LEGAL EDUCATION CURRICULUM AND METHODOLOGY WITH REGARDS TO PROCEDURAL LAW MODULES

4 7 1 EMPHASISING CAPSTONE LEARNING OPPORTUNITIES

Individual law modules are taught in neatly packaged sections or compartments.[518] To mention an example, the Law of Evidence is taught in different sections, including but not limited to documentary evidence, electronic evidence, circumstantial evidence and factual and legal inferences to be drawn from evidence. Furthermore, the law in general is also taught in the same compartmental manner, *ie* clear divisions between, *inter alia*, civil procedure, criminal procedure, law of evidence, law of succession, law of contract and criminal law. By creating capstone opportunities, various sections of a particular discipline are made clear to students in order for them to have a better understanding thereof, as well as to put the various legal disciplines and their subdivisions into perspective. One problem with a compartmental approach is that students study the law in this manner and, after being assessed on a particular section and starting with a new one, they seem to forget what they have previously studied. They therefore fail to link or apply the theory that they have been taught in a variety of modules.[519] Legal practice is in stark difference to this. When a client approaches a legal practitioner in order to obtain legal advice and/or assistance with regards to a legal problem, the client almost always presents the practitioner with a rather messy and unorganised set of facts which cannot be classified as compartmentalised at all.[520] Different areas of law may also be involved. Consider the following example:

(a) according to client A, he is renting a residential house from landlord B. B wants to evict A from the house;

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518 Quinot and van Tonder "The potential of capstone learning experiences in addressing perceived shortcomings in LLB training in South Africa" 2014 17(4) *Potchefstroom Electronic Law Journal* 1350 1356. Also see 1 1 in this regard.

519 Snyman-Van Deventer and Swanepoel "Teaching South African law students (legal) writing skills" 2013 24(3) *Stellenbosch Law Review* 510 513-514.

520 Marson *et al* 2005 *Journal for Clinical Legal Education* 39.

(b) A however refuses to vacate the house, because he has made certain improvements to it and consequently wants to be compensated for such improvements before considering vacating; and

(c) It furthermore transpires that, by renting the house to A, B transgressed certain municipal by-laws, as the property may not be rented for the purpose that A is renting it from B. Both A and B are thus prosecuted for contravening the by-laws.

It is clear that the law of lease (the renting of the house), the law relating to evictions in urban areas, the law of property and unjustified enrichment (improvements to the house), as well as criminal law (prosecution in terms of the municipal by-laws) is present in this scenario. Civil procedure becomes important when it must be investigated whether eviction proceedings were instituted in the correct way and in the correct court. Criminal procedure will govern the prosecution and defence of the respective parties in a criminal court for contravening the applicable by-laws,[521] while the principles of evidence will govern the admissibility of various types of evidence at the disposal of the parties in order to prove their respective cases. Yet students have the tendency to not notice these various components[522] and to only focus on one component at a time. Furthermore, in a module relating to only one of the mentioned components, *eg* criminal law, the focus will be on the content of the municipal by-laws and what the parties did that amounts to a transgression thereof; hence, no focus on the other legal disciplines is involved. It is submitted that, for this reason, it is not difficult to comprehend why students are inclined to view the law – and want to study it – as being sorted into compartments. They need to be taught that the law operates holistically and that it should also be approached as such. The diverse elements of their coursework need to be integrated into a coherent and mature conception[523] of the law that operates with elements frequently interrelating with each other. If students do not become aware of this, they might find it difficult to apply their foundational legal knowledge to client representation when entering legal practice.[524] In this regard, capstone opportunities become important and it is submitted that CLE provides a valuable opportunity to orientate students to view the law as such. Should it be found

521 Contravening a municipal by-law will obviously only be subject to prosecution if the by-law makes it clear that contravention thereof is a criminal offence.

522 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1356-1357.

523 Durel "The capstone course: a rite of passage" 1993 21(3) *Teaching Sociology* 223 223.

524 Bowman *et al* 2019 *Clinical Law Review* 274.

that students are indeed struggling in applying their knowledge of the law in providing legal assistance to members of the public, clinicians and law teachers should focus on that aspect.[525]

A capstone can be defined as:[526]

> "…a crowning course or experience coming at the end of a sequence of courses with the specific objective of integrating a body of relatively fragmental knowledge into a unified whole. As a rite of passage, this course provides an experience through which undergraduate students both look back over their undergraduate curriculum in an effort to make sense of that experience and look forward to a life by building on that experience."

From this definition, it is clear that students will have to reflect upon the knowledge that they have already gained in order to apply it in future. It will also place them in a position to make sense of their undergraduate academic and training experience.[527] Capstone opportunities can exist as single exit level modules or can be spread out over different modules and/or learning activities.[528] It need not be confined to a specific law module, as it can form part of community engagement or other work environment.[529] CLE can play a pivotal role in this regard, especially where students have already completed the procedural law modules in academic years preceding the year in which they partake in CLE. CLE can function as a link between the academic studies in the preceding years and the practical work done at a university law clinic by assisting clients. By looking back at their classroom studies of procedural law modules, students can form an overall picture as to where it fits into the bigger picture that is riddled with facts, other areas of law and other relevant factors.[530] This is in line with the theory of continuous learning, as discussed elsewhere:[531] consolidating skills and knowledge that were built up throughout the earlier academic years.[532] Students

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525 *Ibid*.

526 Durel 1993 *Teaching Sociology* 223; Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1354; Butler, Coe, Field, McNamara, Kift and Brown "Embodying life-long learning: transition and capstone experiences" 2017 43(2) *Oxford Review of Education* 194 195; Bauling "Towards a sound pedagogy in law: a constitutionally informed dissertation as capstone course in the LLB degree programme" 2017 (20) *Potchefstroom Electronic Law Journal* 1 6.

527 Bauling 2017 *Potchefstroom Electronic Law Journal* 6-7.

528 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1354.

529 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1354, 1357.

530 See Butler *et al* 2017 *Oxford Review of Education* 196 in this regard.

531 See 2 1.

532 Bauling 2017 *Potchefstroom Electronic Law Journal* 8.

have to analyse legal problems that are not always restricted to a particular area of law and must combine their knowledge of substantive law and legal skills.[533] This constitutes an integrated approach in applying the law,[534] a skill that law students will need for entry into legal practice. Not only are students being guided towards entrance into the legal profession, but they are also being inculcated to develop the capacity for lifelong learning and to recognise the importance thereof.[535] In doing so, decompartmentalisation of the law starts.[536]

Capstone learning experiences have been described as rites of passage or initiations, which illustrates this point clearly.[537] A rite denotes a change in social status and existential condition and, anthropologically speaking, involves three stages:[538]

(a) separation stage, whereby the initiated person – in this case, the law student – is transformed from a previous status, being that of an undergraduate student studying theory and skills in neatly packaged compartments;
(b) marginality or liminality stage, whereby the threshold is set at which the student will undergo redefinition. This refers to connections, constructions and applications, provided to students, which form a bridge between the role of the student and that of a more critical citizen.[539] This threshold is provided by the content of the capstone module or learning experience;[540] and
(c) incorporation stage, in terms of which the student is reunited into the group as a new member, disconnected from his or her previous identity. This denotes a disconnection from the student's undergraduate status[541] and incorporation as a law graduate, ready to assess situations critically and to act responsibly in society.

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533 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1366; Du Plessis 2007 *Journal for Juridical Science* 59.

534 *Ibid.*

535 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1359; Du Plessis 2007 *Journal for Juridical Science* 59.

536 Du Plessis 2007 *Journal for Juridical Science* 59.

537 Durel 1993 *Teaching Sociology* 223.

538 *Ibid.*

539 Durel 1993 *Teaching Sociology* 224; Butler *et al* 2017 *Oxford Review of Education* 195.

540 Durel 1993 *Teaching Sociology* 223.

541 Butler *et al* 2017 *Oxford Review of Education* 196.

Capstone learning advances the development of skills and producing students who are better prepared for professional life.[542] These skills, which are key attributes of law graduates, and eventually of legal practitioners, include problem solving, decision making, critical thinking, development of ethical judgment and social and human relationship skills.[543] Capstone experiences further provide assistance to students to make the transition from law student to legal practitioner.[544] This is essential especially for students in their final academic year, as this year often presents students with a lot of elective modules.[545] These electives may result in the approach to teaching law in the final academic year becoming disjointed and lacking the required structure.[546] The result of this may be that graduates will enter practice without a proper understanding of their ethical and professional obligations.[547] It is submitted that, at the majority of South African university law schools, this should not constitute a problem, as the final academic year does not consist mostly of electives, but also of modules central to professional life, including Legal Practice, Civil Procedure, Criminal Procedure and the Law of Evidence. What could however be a notable obstacle is that a capstone approach is not followed in the legal practice module or in other modules, *eg* the procedural law modules. Such an absence may result in students not getting the opportunity to reflect on their previous academic years and the interrelationship between the law modules already completed. This interrelationship will become particularly visible to students who engage with clients in terms of the live-client model at university law clinics, as already stated. Another obstacle is that no single capstone module can thoroughly assess all skills of an LLB graduate.[548]

If the live-client model is not followed, but merely simulations, capstone learning can still be relevant. Moot courts can be implemented where students present arguments on different sides of the problem.[549] Mock trials can also be effective in this regard.

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542 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1361; Evans *et al Australian Clinical Legal Education* (2017) 24.

543 *Ibid.*

544 Butler *et al* 2017 *Oxford Review of Education* 195.

545 Butler *et al* 2017 *Oxford Review of Education* 198.

546 *Ibid.*

547 Butler *et al* 2017 *Oxford Review of Education* 198. See Chapter 5 with regards to graduate attributes that are required for legal practice, as well as the imperatives that LPA imposes on the quality of legal professionals and, by implication, on how they should be trained.

548 Bauling 2017 *Potchefstroom Electronic Law Journal* 9.

549 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1375.

Students will have to do research in order to find motivation for their arguments, which will not be restricted to just one area of the law. In this way, they reconnect with the substantive law that they studied in earlier academic years, as well as undergo skills training by drafting heads of argument and presenting such arguments orally. This method can be used irrespective of whether or not the live-client model or simulations form the practical component of CLE. For students partaking in the live-client model, these exercises can be scheduled during tutorial sessions or at another dedicated time as allowed for by their own schedules and the university timetabling schedule. In this way, students can practice the application of their foundational knowledge to practical problems and become fully aware of the importance thereof for legal practice.

There are however limitations with regard to using CLE as a capstone methodology. One limitation in this regard is that law clinics only provide a limited number of legal services, meaning that students will not experience an integrated approach to all areas of the law.[550] Be that as it may, law clinics do engage in civil procedure, criminal procedure and applying the principles of evidence and, since these modules are the focus points of this research, it is submitted that such a limitation is moot in this instance. At the time of completing this research, a total of 17 law clinics are actively engaged with civil and criminal procedure, as well as evidence, being integrated into both procedural systems.[551] The most important limitation – and probably the most concerning one – is the fact that clinical law is not a compulsory module at some universities. This means that, if clinical law is the only module in which students will be exposed to capstone learning experiences, many students will never have the opportunity to learn to view and appreciate the law holistically.[552] Should this be the case at a particular university, a dedicated capstone module is recommended.[553] Alternatively, capstone learning experiences must be integrated into other law

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550 Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1366.

551 See SAULCA https://www.saulca.co.za/file/5f044c93aca81/part-8-summary-of-all-cases-civil-and-criminal-handled-in-2016-by-17-law-clinics.pdf in this regard. At time of completion of this research, only the 2016 statistics were available from SAULCA.

552 See Kloppenberg 2009 *Rutgers Law Review* 1106-1107 in this regard. She states that, at Dayton University, they were troubled by the fact that many students were not exposed to comprehensive problem based modules. If they were, they would have been better prepared for legal practice. It is submitted that this same point of view is applicable to CLE not being compulsory at some universities, *inter alia* for the reason that no capstone opportunities are offered to law students.

553 See Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1375 for an example of the content of such a module.

modules, *inter alia*, procedural law modules, as explained hereafter. The most desirable suggestion is that such universities should adopt clinical law as a compulsory module in order for all students to undergo definite capstone learning experiences especially by way of the live-client model.

It is submitted that, in teaching procedural law modules by way of the CLE methodology, the capstone learning opportunities should be spread out over the various learning activities, because these modules are not capstone modules in themselves. Various factual scenarios can be used as the basis for such activities. The following serve as examples in this regard:

(a) A, while driving his motor vehicle, collides with the motor vehicle of B, driven by B and wants to claim damages from B. The applicable civil procedure lecture concerns the drafting of a letter of demand or Particulars of Claim. In explaining the importance of setting out the *facta probanda*[554] relating to the claim, the presenter can include an overview of the delictual liability in that regard. The presenter can also discuss possible *facta probantia*[555] and, in doing so, emphasise the role of evidence in constructing a proper case for the upcoming civil trial. Also, reference can be made to possible criminal steps, based on reckless and negligent driving, or even driving under the influence of alcohol or another intoxicating substance, that may be instituted against the driver. The students would already have studied these aspects as part of criminal law. In referring the students to these aspects, they are made aware of the interrelationship between civil and criminal law; and

(b) C is arrested for assault on his domestic partner. The applicable criminal procedure lecture concerns a bail application. Apart from explaining the bail application procedure, the presenter can present a basic overview of domestic violence as an offence in terms of the Domestic Violence Act,[556] which students

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554 Pete *et al Civil Procedure – A practical guide* 24, 89; Bellengere, Palmer, Theophilopoulos, Whitcher, Roberts, Melville, Picarra, Illsley, Nkutha, Naude, Van der Merwe and Reddy *The Law of Evidence in South Africa – Basic principles* (2016) 26, 32. *Facta probanda* refers to the issues or elements that need to be proven in a case in order to succeed with a claim.

555 Pete *et al Civil Procedure – A practical guide* 89; Bellengere *et al The Law of Evidence* 26, 32. *Facta probantia* refers to all the evidence that can be used to prove the *facta probanda*.

556 116 of 1998.

might already have been taught as part of either the law of persons or criminal law.

The law teacher should carefully select a capstone topic for integration with every lecture presented in the main module. In this way, capstone learning is integrated into every lecture of a particular module. A notable question in following this approach is how extensive the capstone integration should be. Too narrow an integration will render the exercise worthless. Too wide an integration will impact on the topic for the particular lecture underway in the sense that the topic may be obscured or diluted. It is suggested that the law teacher should provide a basic overview of the particular integrated topic, as well as request students to revise the law in that regard. In order to ensure that students in fact adhere to such a request, elements of the integrated topics should be included in module assessments. The Civil Procedure module at NMU includes this approach. In discussing the cause of action in a civil case, examples of contracts and delicts are usually used. Students are required to familiarise themselves with the *essentialia* of contracts, as well as with the elements of delictual liability, although these aspects are strictly speaking not part of the procedural law module. During assessments, factual scenarios are provided containing sufficient facts from which the students can recognise these aspects. Students are also required to answer certain questions relating to these aspects. The mark allocation for these questions however forms a minimal part of the assessment in order to avoid overshadowing the main module. A similar approach is followed by other law clinics in clinical law modules, *eg* the Limpopo University Turfloop Campus Law Clinic. From the outset, this law clinic informs students that, because substantive law plays an important role in litigation, reference will frequently be made to applicable substantive legal principles. In order to prepare students, the substantive principles relating to wills, contracts and delict are briefly revised.[557] Although this approach is taken during the clinical law module, it is still commendable because it provides a refresher opportunity for students in the context of legal procedure. CLE takes places by way of simulations where students must analyse sets of facts, research and apply the law in order to generate solutions. These simulations involve drafting of process

[557] This information had been provided by one of the clinicians at the Limpopo University Turfloop Campus Law Clinic by way of a telephonic interview on 4 May 2020.

and pleadings, in which exercises substantive law inevitably plays a vital role.[558] Capstone opportunities are also provided to final year students at the University of the Free State as part of the Civil Procedure module in a similar way to that of NMU. Furthermore, the Legal Practice module at the University of The Free State also provides capstone opportunities to final year students in that students are reminded of the essential elements of mainly contract and delict, which were mentioned in the Civil Procedure module, when undergoing practical training at the university's law clinic. This approach establishes a substantial connection between the two modules, consolidating the knowledge and skills of the students.[559]

In recommending an emphasis on capstone learning, it should not be misconstrued as implying that this approach is not followed by law clinics in South Africa. It may indeed be – and is the case – that some law clinics definitely apply this methodology. The contrary may however also be true, and it would be quite understandable – time limitation and congested module content may restrict some law clinics from integrating dedicated capstone learning with their existing curricula. The importance of capstone opportunities was also recognised at the LLB Summit of 2013. There, it was suggested that legal practice and ethics could be viewed as capstone modules.[560] This should enable students to integrate their knowledge of substantive and procedural law across all legal modules, already taught, by way of problem solving.[561] This will also provide the opportunity for ethics to be taught in context, as well as to expose students to social responsiveness in legal practice.[562] Law clinics have been identified as the ideal fora to present such capstone training.[563] This strengthens the argument that CLE provides a suitable platform from which capstone learning can be presented.

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558 See fn 234 for an explanation of the CLE methodology, conducted by way of simulations, followed by the University of Limpopo Turfloop Campus Law Clinic.

559 This information has been obtained from a former clinician of the University of the Free State Law Clinic, who is currently a law teacher in the University of the Free State Faculty of Law, by way of a telephonic interview on 5 May 2020.

560 Whittle "Legal Education in a crisis? Law Deans and legal profession to discuss refinement of LLB-degree" (undated) https://www.lssa.org.za/upload/documents/LLB%20SUMMIT%20PRESS%20RELEASE.pdf (accessed 2019-11-08).

561 *Ibid.*

562 *Ibid.*

563 *Ibid.*

Overall, capstone learning seems to be advantageous for the professional development of law students, especially preparing them to enter legal practice with a holistic view of the law and its application, both theoretically and practically speaking. It can address multiple and diverse needs and can be arranged in broad and flexible manners.[564] It can assist final year students in developing essential lifelong learning skills, including the management of uncertainty and an increase in resilience, self-confidence and self-efficacy.[565] Law schools therefore have a responsibility to provide for capstone opportunities in order to prepare the student for life after graduation.[566] A question that arises in this regard is the following: how will law teachers and clinicians, presenting capstone opportunities, know whether or not certain aspects of a particular module had been presented to students for them to have knowledge about it? It is submitted that the most obvious answer is that teachers and clinicians can assume that the most important and prominent aspects of law modules had indeed been discussed in some detail during lectures. Bowman and Brodoff put forth another suggestion: law teachers should audit one another's modules.[567] In this way, they can learn in detail what is being taught in one another's modules.[568] Bowman and Brodoff however also state that this could be an exercise that require significant time and effort on the part of law teachers; however, the educational benefits could be advantageous for both the students and for the law teachers.[569] It is submitted that Bowman and Brodoff's suggestion is plausible, but that the time and effort aspects are convincing. The programmes of law teachers are already congested, taking into account lecture preparation, large student numbers, assessment duties and their own research, to name but a few items. Therefore, they may not be amenable to such a suggestion. Furthermore, it is submitted that auditing of other modules may place the teacher of that particular module in an akward position in the sense that the teacher might feel, albeit erronesouly, that the module is not managed adequately. This misconception can obviously be corrected if the purpose of the module audit is clearly communicated to all members of a law school. Yet, some law teachers may still not feel comfortable with colleagues attending their lectures. Should they however be

564 Butler *et al* 2017 *Oxford Review of Education* 203.
565 *Ibid.*
566 *Ibid.*
567 *Bowman et al* 2019 *Clinical Law Review* 273.
568 *Ibid*.
569 *Ibid*.

open to such a suggestion, it is submitted that law teachers can appoint senior student assistants to attend the lectures and compile a report on the key content thereof. This suggestion might however also pose its own problems, including the availability of student assistants and whether such a duty will not interfere with their academic programmes, remunerating them for such a duty and the availability of funds for such remuneration.

Whatever the case may be, Kloppenberg also shares the view that law schools have a responsibility to present capstone opportunities and indicates that the legal profession also has a role to play in presenting capstone learning experiences to law students. In this regard she states that law students must be better prepared for legal practice without sacrificing a strong and broad foundation as far as analytical thinking and legal doctrine are concerned.[570] However, when students enter externships for additional training, or legal practice after graduation, training will also take place while employed.[571] Whatever the case may be, capstone modules can assist in this regard in order to bridge the gap between academia and legal practice by involving collaborative teaching efforts between academics and legal practitioners.[572]

As mentioned by Kloppenberg, externships[573] could facilitate capstone learning. In the next section, the role of legal practitioners in the professional training of law students will be considered. It will also be indicated how they can assist with creating capstone learning opportunities for law students. But are capstone experiences only directed at students who want to enter the legal profession? Butler *et al* answers this

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570 Kloppenberg "Lawyer as a problem solver: curricular innovation at Dayton" 2007 38 *University of Toledo Law Review* 547 547; Quinot *et al* 2014 *Potchefstroom Electronic Law Journal* 1375.

571 *Ibid.*

572 Kloppenberg 2007 *University of Toledo Law Review* 547; Uphoff, Clark and Monahan "Preparing the new law graduate to practice law: a view from the trenches" 1997 65 *University of Cincinnati Law Review* 381 413; Kruse "Legal Education and Professional Skills: Myths and misconceptions about theory and practice" 2013 45 *McGeorge Law Review* 7 30.

573 CFI "What is an externship?" (2015, revised 2020) https://corporatefinanceinstitute.com/resources/careers/jobs/externship-internship/ (accessed 2019-09-05). An externship can be defined as "…a short, unpaid and informal internship where students spend anywhere from a single day to a few weeks getting exposure to what it's like to work at a company." This is contrary to "internship", which denotes on-the-job-training, *ie* more like what students are doing at a law clinic. See Diffen "Externship vs internship" (undated) https://www.diffen.com/difference/Externship_vs_Internship (accessed 2019-09-05). Also see Kruse 2013 45 *McGeorge Law Review* 33 in this regard. During externships, students are placed in practice, which settings are external to the law school.

question in the negative. They state that, irrespective of their future destinations, students will inevitably have to make a transition after graduation.[574] The acquisition of lifelong learning skills has however been shown to turn the transition from law student to post-university life into a smooth process while enhancing creativity, motivation and initiative in the workplace.[575] Students will also acquire higher order cognitive skills, including critical thinking.[576] The significance hereof is that some students may want to return to the university law schools as law teachers and, in doing so, may have an important role to play in furthering capstone learning experience for future students. They are products of the success story of capstone learning experiences and are therefore fully cognisant of the role it can play in the development of students into young professionals.

4 7 2 EXTENDING CLINICAL LEGAL EDUCATION BEYOND THE UNIVERSITY

4 7 2 1 INVOLVEMENT OF LEGAL PRACTITIONERS

Du Plessis states that the challenge for a law clinic resides in the extension of its boundaries.[577] This can be achieved by finding and implementing alternative and cost-effective ways in which to render legal services to the indigent members of society while, at the same time, strengthening and expanding the existing academic teaching and learning of students.[578] Such an expansion can significantly enhance the curriculum.[579]

Based on Du Plessis's statement, it should be considered how law clinics can extend their boundaries in order to render legal services to the community and, especially, how such an extension can advance the teaching and learning of the law students to prepare them for legal practice. It is submitted that legal practitioners from various fields of legal practice should become actively involved in the practical legal training

574 Butler *et al* 2017 *Oxford Review of Education* 206.
575 *Ibid.*
576 *Ibid.*
577 Du Plessis 2007 *Journal for Juridical Science* 48.
578 *Ibid.*
579 *Ibid.*

of students.[580] The reason for this is that practitioners will be able to provide first hand practical skills training, which will assist in the shaping of graduates who will be reasonably fit for practice[581] and, in this way, invest in the university's employability strategy.[582] In the context of this research, and in light of the fact that many legal practitioners resort to the law of procedure and principles of evidence on a daily basis while working on cases, it is not difficult to see why such an involvement will be invaluable to the training of students. CLE programmes, based on externships in a professional setting, have also proven to be very effective in developing students' skills for legal practice.[583] A law graduate in Australia stated the following with regards to the need for a more mentoring role from the side of the legal profession in order to support emerging graduates with their transition from students to young professionals:[584]

> "…maybe it's something that the law firms kind of have to, it's kind of like a collaborative effort it's not just at the universities, it's also at the law firms. It's the way their culture is set up for you know for mentoring the young lawyers. I think that's also lacking as well … I don't expect the law schools to do everything but there has to be some from industry they also have to come to the table as well as to make the transition for a young graduate easier…the support network is not there for a young solicitor."

It therefore appears that, over and above their conventional law teachers, students desire the input and support from the profession in order to assist them to exit university as graduates capable of finding their feet when entering legal practice. The viability of such valuable training opportunities is however subject to the willingness of legal practitioners to become involved. In addition, the availability of the resources and infrastructure of legal practitioners, in order to accommodate this active involvement, as well as whether or not there are any negative implications to the curriculum as result of their involvement, must forthwith be evaluated and considered.

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580 Kruse 2013 *McGeorge Law Review* 10.

581 See Vukowich 1971 *Case Western Reserve Law Review* 151 in this regard.

582 Bleasedale *et al* in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 13. See 5 2 2 3, 5 3 5 3 and 5 4 for a more detailed discussion on the employability of law graduates as a graduate attribute.

583 Quinot *et al* 2015 *Stellenbosch Law Review* 51.

584 Butler *et al* 2017 *Oxford Review of Education* 201.

It has been suggested that a legal institution must involve a variety of teaching and learning opportunities in order to gain the educational benefits of diversity.[585] This will benefit students in that they will gain experience in assisting diverse groups of clients, as well as working with diverse groups of colleagues.[586] A variety of legal practitioners, involved in the teaching and practical training of students, will ensure such diversity at university level. Students, working with legal practitioners at their offices or chambers, will be exposed to working with clients who can afford legal services. In this regard, students will be able to learn about legal fees and costs, the drafting of bills of costs to clients and opponents, taxation, as well as the operation of private law firms in general. This is in contrast to the general operation of university law clinics and the clients whom they normally work with there. Such diverse working environments will enhance the students' realisation of the need that exists in some communities for legal aid. It will also be an indication of why they, as future legal practitioners, should become skilled in practising law with precision in order for them to also be of assistance to indigent communities, and also to train future students to do the same. However, this should not be misconstrued as implying that law clinics in general are incapable of teaching students about aspects like fees, costs and taxation. There are law clinics that are indeed doing so. The University of the Witwatersrand (hereafter referred to as "Wits University") Law Clinic provides one double lecture on bills of costs to all clinical law students. However, no drafting of bills of cost takes place during such training.[587] The NMU Law Clinic provided students with basic training of legal costs and exercise in the practical drafting and taxation of bills of costs in the past, but such training had to be abandoned due to time constraints.[588] The NMU Law Clinic, in a similar manner to the Wits University Law Clinic, also currently presents one double lecture on bills of costs to clinical law students. The University of Pretoria Law Clinic provides a practical assignment as far as bills of costs are concerned. Firstly, a plenary session about costs is presented to all clinical law students. Secondly, students are requested to draft a bill of costs on any client file that they are working on

585 Lopez *Seattle University Law Review* 780.

586 *Ibid*.

587 This information has been obtained from the Director of the University of the Witwatersrand Law Clinic by way of a telephonic interview on 4 May 2020.

588 Students had to allocate legal fees and disbursements, for simulation purposes only, to every step that has been taken on selected client files. Students were furthermore also taught about the structure of an account in litigious matters, but never instructed to draft the same.

at the law clinic. Thirdly, this bill of costs is assessed and detailed feedback is provided to students.[589] The University of the Free State's law school also provides training in the drafting of bills of costs as part of the Legal Practice module in the final academic year. Students must also complete a practical assignment in terms of which a bill of costs must be drafted. The students are also lectured in broad terms about costs in the Civil Procedure module, which is also presented in the final academic year.[590]

Some university law clinics also have specialised units that can provide valuable guidance and training to students who are interested in practising in specific legal fields. The Consumer Unit, of the Wits University Law Clinic is an example hereof.[591] Students undergo training in practical and drafting skills relevant to both Magistrates' Court and Consumer Affairs Court litigation processes.[592] Candidate attorneys, allocated to the unit, provide supplementary training to the students.[593] Specialised units are however not present in all law clinics. In such an instance, training by legal practitioners can prove to be invaluable. Students may undergo specialised training at various law firms in the same way as provided by the Consumer Unit of the Wits Law Clinic. Many law firms employ candidate attorneys who can assist with student training. In the process, the candidate attorneys also develop their own skills. The further benefit of this exercise is that, when the students currently undergoing the training are appointed as candidate attorneys,[594] they will be familiar with the importance of practical training and ready to assist future students in preparing for practice.

Students can also learn from practitioners in their (practitioners') contribution towards access to justice by way of *pro bono* work. In this context, practitioners can educate

589 This information has been obtained from a former clinician of the University of Pretoria Law Clinic by way of a telephonic interview on 4 May 2020.

590 This information has been obtained from a former clinician of the University of the Free State Law Clinic, who is currently a law teacher in the University of the Free State Faculty of Law, by way of a telephonic interview on 5 May 2020.

591 See Du Plessis 2007 *Journal for Juridical Science* 52 in this regard. For a further discussion on specialisation, see Du Plessis 2015 *Journal for Juridical Science* 76.

592 Du Plessis 2007 *Journal for Juridical Science* 58.

593 *Ibid.*

594 See Bleasedale *et al* in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 15-16 in this regard. Clearly there is benefit for both students and employers in this regard: the student gains knowledge and skills, while the legal practitioner, as future employer, gains insight into potential candidates that may be recruited after graduation.

communities about their basic rights during weekend workshops.[595] They can involve students in this exercise. The students will be able to learn how practitioners approach certain legal issues that are of concern to members of particular communities. This is also known as service learning and will enhance the potential for students to serve the community.[596] Legal services practices of this nature are said to be far more intellectually stimulating and demanding than the work of corporate lawyers with a large caseload, creating an experience of "fun" for the students.[597] Furthermore, should practitioners prefer to render *pro bono* services by way of acting as Small Claims Court Commissioners,[598] it may be of practical and educational significance to be accompanied by students. Students will be able to observe the practical application of the law from the view of a presiding officer, as well as the functioning of an entity like Small Claims Court, which they mostly only read about in textbooks.

Professional writing and drafting can also benefit from the contribution by practitioners. Since simple, clear and effective communication is used in legal practice on a daily basis,[599] practitioners are the obvious choice to impart their knowledge and skills in this regard to students. Snyman-Van Deventer *et al* states in this regard that "…[l]aw teachers in a writing course must be equipped to speak and teach authoritatively on 'legal language'. If they are able to do so, the redundant conventions…that have been established over the centuries may slowly start to disappear from legal texts."[600] Legalese, legal jargon and improper content are just a few examples of what professional legal writing should not contain and practitioners, skilled in drafting proper letters and documents, should be recruited to instil such skills in students. The same principle applies to verbal skills: legal practitioners who are skilled orators in courts should be the principal teachers of modules in trial advocacy, mock trials and moot courts. The procedural law modules, as well as CLE, can benefit from such input.

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595 Williams and Van't Riet, "Access to justice by the poor: the role of the legal profession" 2012 5(12) *Without Prejudice* 10 11.

596 Evans *et al Australian Clinical Legal Education* (2017) 27.

597 Kennedy http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20HierarchyPolitics%20of%20Law.pdf 64.

598 *Ibid.*

599 See 3 4 4.

600 Snyman-Van Deventer *et al* 2012 *Obiter* 131.

Time is however a factor because time, invested in the practical training of students, might be considered time wasted in the sense that it could have been devoted to the teaching of substantive legal theory.[601] Time constraints might also be exacerbated by the disruption of academic activities at universities as the result of protests which are, since 2015, annual phenomena, occurring more than once every year at South African universities. This apparent time related obstacle might however be a valuable motivator in order to consider the extension of CLE beyond the classroom and law clinic and into legal practice itself. This will entail that the students experience practical training at law firms, either during university recesses, or during the academic semester. Vukowich correctly states that such training "is probably far superior to any which could be given by law schools, under the tutelage of the experienced practitioners in the law offices with which they become associated."[602] This method may however hold considerable cost implications for both the law school and the law firm. The law school will in all probability have to pay the particular legal practitioners at the law firm for their services in supervising and teaching the students.[603] Although this may require the law school to reach deeper into its own pockets, or to secure additional funding for this purpose, it will result in greater educational effectiveness.[604] It may be that law firms volunteer their services to law schools in this regard, which may relieve the law school of the aforementioned financial burden. There is however no guarantee that law firms will do this, particularly in light of the fluctuating and uncertain economic climate currently overshadowing South Africa. It is also worthwhile to investigate whether time, spent by law firms in this way, can qualify as the rendering of *pro bono*[605] and/or community service in terms of the LPA.[606] If so,

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601 Vukowich 1971 *Case Western Reserve Law Review* 146. It is not the point of view, as far as this research is concerned, that time, devoted to practical training, will result in "waste of time" in this context.

602 Vukowich 1971 *Case Western Reserve Law Review* 146.

603 Vukowich 1971 *Case Western Reserve Law Review* 148.

604 Sullivan *et al Educating Lawyers* 11.

605 The concept of *pro bono* services is defined, in rule 25 of the Rules for the Attorneys Profession 2016, as "…legal work done free of charge, in the public interest for those who cannot afford it." This particular rule only applies to the Cape Law Society and its members. In terms of rule 25.6, the Cape Law Society may "…from time to time identify projects, programs or initiatives to be undertaken on a *pro bono* basis by its members." Whether educational projects, like practical training for students, is included, is not clear. However, these rules have now been repealed by the LPA. Its past application might however have persuasive force as far as future considerations in terms of attorneys' practice is concerned.

606 28 of 2014. See Emdon "More clarity on *pro bono* under Legal Practice Act" 2017 January/February *De Rebus* 26, where it is stated that it is still uncertain as to what the proper meaning of "community service" is and whether *pro bono* services, as it had been known, is included in the rendering of

firms will probably be much more eager and willing to render educational services of this nature, as they are currently under the obligation to render community service to members of the public.[607] This aspect is discussed elsewhere.[608] The large student numbers, currently enrolled for law at universities, is a further factor that may determine whether or not this possibility is viable.

With regards to *pro bono* work, the Deputy Minister of Justice, Mr John Jeffery confirmed on 18 November 2019, at the SAULCA Workshop and AGM in Johannesburg, that the LPA does not contain any reference to *pro bono* work by legal practitioners. Reference is however made of "community service" in the LPA. However, *pro bono* services and community service are not the same concepts. The Deputy Minister however stated that *pro bono* services could possibly form part of community service. This aspect is addressed elsewhere.[609]

A major financial implication for law firms is the loss of valuable billable hours.[610] Billable hours refer to the amount of time that legal practitioners spend working on cases, often structured in hourly sections, that generate income for the law firm. It is doubtful whether law schools would be able to compensate law firms for the loss of billable hours because of the supervision and training of law students. The reason for this is that the fees of legal practitioners are known to be expensive[611] and law schools have set fee structures with regard to external law teachers that may not be on par with such fees. It is however submitted that legal practitioners should invest in the professional upbringing of law students with a view to their success in practice. This will directly involve legal practice in the teaching of law students and in shaping law students to be more prepared for legal practice upon their exit from universities. In doing so, they will contribute to the professional training of students whom they might appoint as candidate attorneys and later as associates, partners or co-directors,

community service. Since it had been indicated in fn 605 that it is not clear whether or not practical training for students by legal practitioners is included in the meaning of *pro bono* services, this uncertainty remains at present for purposes of community service.

607 See s 29 of the LPA in this regard.

608 See 5 2 2 2.

609 *Ibid.*

610 See 5 2 2 1.

611 Dugard "Closing the doors of justice: an examination of the Constitutional Court's approach to direct access, 1995-2013" 2015 31 *South African Journal on Human Rights* 112 112-113. This is true, especially for poor South Africans.

thereby generating further possibilities of additional billable hours.[612] Suggestions with regard to raising funds in order to compensate attorneys for their educational services will be discussed in the next section.[613]

From the above discussion, it is clear that legal practitioners can add great value to the teaching and practical training of law students. They can provide students with a realistic view of legal practice and bring diversity to the curriculum.[614] There may be some opportunities, including the popular vacation work programmes offered to law students by law firms. However, keeping the large number of enrolled students in mind, it is submitted that these opportunities are unlikely to meet demand. Some law teachers have expressed the opinion that students would learn better if they have worked with legal practitioners outside the classroom, as well as in a legal aid context.[615] This argument is fully supported in this research. It is submitted that students will also learn better if they have worked with legal practitioners inside the classroom, as well as outside the classroom as an extension of the CLE methodology, *ie* experiencing practical training at the offices of legal practitioners.[616] This will not only further the preparation of students for entry into legal practice,[617] but may provide motivation and encouragement to students who have not performed well academically.[618]

Kloppenberg explains the significance of externships as follows:[619]

> "What law students encounter in their externships, part-time jobs, and summer clerkships also informs how they study, absorb and apply material in courses. Students sometimes bring work problems, including ethical issues, into conversations with law faculty members. Through our new curriculum, we seek to

612 See Kloppenberg "Training the heads, hands and hearts of tomorrow's lawyers: a problem-solving approach" 2013 1 *Journal of Dispute Resolution* 103 127 in this regard. Externships had been shown to be very successful, leading to job connections and opportunities.

613 See 4 7 2 2.

614 Du Plessis 2016 *De Jure* 6.

615 Kloppenberg 2009 *Rutgers Law Review* 1104.

616 See Kloppenberg 2009 *Rutgers Law Review* 1106. Externship placements can enhance the training of law students.

617 Stetz "Best schools for practical training" (undated) https://bluetoad.com/publication/?i=482098&article_id=3038646&view=articleBrowser&ver=html5#{%22issue_id%22:482098,%22view%22:%22articleBrowser%22,%22article_id%22:%223038646%22} (accessed 2019-06-24). Practical training will allow students to graduate from law school with added confidence and expertise.

618 Kloppenberg 2009 *Rutgers Law Review* 1104, 1106.

619 Kloppenberg 2009 *Rutgers Law Review* 1108.

> formalize this type of dialogue, make it ongoing, and provide opportunities for reflection with guidance from faculty members and lawyers. Students benefit not only from exposure to the "real world" of practice, but also from the opportunity to reflect upon these experiences, positive and negative, with classmates and faculty members."

What appears to be apparent from the approach suggested by Kloppenberg, is the integration of the externship with conventional law school activities. It is submitted that this is the correct approach. In an attempt to integrate practical training by external stakeholders with law school pedagogies, there should not be anything that purports to make the practical component look like a mere add on to the curriculum. Kloppenberg supports this argument. The learned author states that, when students engage with real clients, legal practitioners or even actors in simulated activities, the role of a lawyer manifests beyond mere case analysis.[620] Students experience human aspects and communication, which emphasise the priorities, interests and needs of clients.[621] Learning inside and outside the classroom are linked in that students start to develop their own professional identities.[622] This learning opportunity also promotes reflection by the students, as well as integration of their personal values and professional roles in the context of what they are studying.[623] This integration is similar to the Marianist tradition[624] and may result in students being trained to become skilled in problem solving, serving clients, the justice system and communities ethically and with integrity.[625] The characteristics of Marianist Education include integral quality

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620 Kloppenberg 2009 *Rutgers Law Review* 1108; Kloppenberg 2007 *University of Toledo Law Review* 549.

621 *Ibid.*

622 Kloppenberg 2009 *Rutgers Law Review* 1108; Kloppenberg 2007 *University of Toledo Law Review* 549. Also see Kruse 2013 *McGeorge Law Review* 33 in this regard. Externships will provide students with opportunities to observe and/or assist legal practitioners or other legal professionals with the day-to-day work taking place in legal practice. It is submitted that this interaction and exposure will influence the development of the professional identities and roles of students.

623 Kloppenberg 2009 *Rutgers Law Review* 1108; Kloppenberg 2007 *University of Toledo Law Review* 549.

624 The characteristics of Marianist Education are listed on Chaminade College Preparatory School "Mission Statement/Philoshophy" (2017) https://www.chaminade-stl.org/about-us/mission-statementphilosophy (accessed 2019-09-10).

625 Kloppenberg 2009 *Rutgers Law Review* 1108; Kloppenberg 2007 *University of Toledo Law Review* 549. Also see McQuerrey "How to improve employability skills" (revised 24 July 2020) https://work.chron.com/improve-employability-skills-9852.html (accessed 2020-02-17) in this regard. Professionalism and integrity are important skills to master, irrespective of the line of work that is being done. It is important to familiarise with people in the same industry whose professionalism can be respected and whose actions and behaviour can be emulated.

education, educating for justice, service and peace, as well as educating for adaptation and change.[626] Marianist education refers to a Catholic teaching methodology.[627]

Anticipated criticism against the involvement of legal practitioners in training law students can be addressed by the following question: is the legal practitioner really a law teacher and will he or she know how to teach? This criticism is anticipated based on the fact that there is an existing prejudice towards the provision of practical training in many law schools.[628] To attempt to formulate an argument in this regard, the point of departure is the reality that there is a prevailing tension between student training and community service that clouds law clinics.[629] Despite this, the general view is that the main focus of law clinics should be the teaching and learning of students and not the provision of legal services to the community.[630] Law clinics and CLE form part of training presented by universities, and universities are institutions where education is presented.[631] Consequently, when students work on cases at a law clinic, they are in charge, not the clinician.[632] The rationale behind this approach is simply that the student must do the work in order to experience education and not merely observe how it is being done.[633] Clinicians therefore merely teach and assist the students in this regard.[634] They therefore facilitate the professional education of the students. The role of legal practitioners, assisting with the training of law students, should be viewed in a similar way. Although they are not full time academic employees of the university, their duties are to train students and not to conduct cases or further their own practices in the process. Therefore, just as there should not be a misconception that clinicians are not fully-fledged academics because they teach in a clinical setting,[635] it is submitted that there should not be existing opposition against legal practitioners as law teachers merely because they mainly work in a practical

626 Chaminade College Preparatory School https://www.chaminade-stl.org/about-us/mission-statementphilosophy.

627 *Ibid.*

628 See 4 1.

629 Du Plessis 2011 *Journal for Juridical Science* 30. Also see Welgemoed 2016 *Litnet Akademies* in this regard, an entire article based on this topic.

630 Du Plessis 2011 *Journal for Juridical Science* 30; Welgemoed 2016 *Litnet Akademies* 761.

631 Cambridge Dictionary "University" (2020) https://dictionary.cambridge.org/dictionary/english/university (accessed 2018-08-01); Welgemoed 2016 *Litnet Akademies* 761.

632 Du Plessis 2011 *Journal for Juridical Science* 31; Du Plessis 2015 *Journal for Juridical Science* 66.

633 *Ibid.*

634 *Ibid.*

635 Du Plessis 2011 *Journal for Juridical Science* 32-33.

environment. The answer to the initial question must consequently be answered in the affirmative. The following statement by Hutchins is indicative of the important role of the law teacher, whether the law teacher is an academic, clinician or practitioner:[636]

> "…in the exercise of [his daily routine of study and instruction and his general work in the field of legal education] and other functions…, he brings to bear a distinct molding force upon the young men who are committed to his care and direction, and that to a large degree their futures are determined, not only by the quality of his instruction, but by his example and influence, the real opportunities of his life and the serious responsibilities of his calling must be appreciated. Neither the profession nor the public can regard the work of the law teachers as unimportant or the responsibilities as slight when confronted by the fact that the professional standards of the future are really in their hands. The influence that is exerted in the training in the principles of the law and in the ethics of the profession…is certainly far-reaching; and no conscientious teacher can devote his life to work in this field without a profound sense of the responsibilities that attach to the calling."

Law teachers carry the moulding force of students in their hands and have an important responsibility to fulfil. Legal practitioners are able to do this with regard to practical aspects found in the everyday life of the legal profession and should therefore not be subjected to any prejudice with regard to not being actual teachers. For example, as far as trial advocacy is concerned, Geraghty indicates that legal practitioners are conveying their enthusiasm about litigation and trial work to students in a manner that convinces students that litigation and trial work are worthwhile.[637] It is not likely that such enthusiasm, nature, energy, creativity and a sense of productivity of this nature can be instilled in students merely by the law school setting.[638]

As stated previously, externships completed by students at the offices of legal practitioners, or elsewhere, must be incorporated in the activities of law schools if it involves training of students. Based on this, and also because practitioners involved in the training of law students fulfil all the qualities of a law teacher set forth by Hutchins, *ie* moulding students towards the future, providing quality instruction, example and influence, taking responsibility for conveying professional standards to students, as well as training students with regards to principles of the law and professional ethics, it is argued that there is no alternative to them being law teachers.

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636 Hutchins "The Law Teacher – his functions and responsibilities" 1908 8 *Columbia Law Review* 362 373-374.

637 Geraghty "Teaching trial advocacy in the 90s and beyond" 2012 (66) *Notre Dame Law Review* 687 694.

638 *Ibid.*

However, when acting as a law teacher, the practitioner must be in touch with the needs of the students and also be open to the teaching of substantial legal principles; there is no room for indifference in this regard.[639] If the practitioner is not certain as to what action to take, the practitioner should follow the examples of the conventional law teachers in this regard.[640] In this regard, legal practitioners should never lose sight of the fact that their learned profession has a firm and substantial basis that was nurtured in law school.[641] Legal practitioners must never rank legal practice above the substantial teachings at university level. Legal practitioners should further not allow "professional jealousy" to develop between him or herself and the clinical staff involved in the clinical law programme for the mere fact that he or she is a practitioner and they are academics.[642] The legal practitioner should be committed to the educational goal of CLE in supervising students at his or her firm, namely student education.[643] This commitment will ensure a balance between skills training and substantive doctrine, which reinforces the notion that neither of the two concepts should be taught on its own, but collectively. A good working relationship between the law school and the supervising legal practitioner can ensure productive results in this regard.[644]

The Carnegie Report can also be interpreted as promoting the integration of legal practitioners in the practical training of students. It states that experts in the legal profession have worked out systematic approaches to legal issues based on their practical experience in the field rather than their academic knowledge.[645] They should therefore train students in order to convey their expert practice to them, as well as to develop the identity and purpose of the students, as future legal practitioners, by bringing them into contact with the community of legal practitioners.[646] Exposure of this nature will place the students in a position to learn diverse practical aspects that are necessary for entry into legal practice.

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639 See Hutchins 1908 Columbia Law Review 372 in this regard.

640 *Ibid.*

641 *Ibid.*

642 See Barnhizer 1979 *Journal of Legal Education* 142 in this regard.

643 Barnhizer 1979 *Journal of Legal Education* 142, 143.

644 Evans *et al Australian Clinical Legal Education* (2017) 55.

645 Morgan "The changing face of legal education: its impact on what it means to be a lawyer" 2011 *GW Law Faculty Publications & Other Works* 1 21.

646 *Ibid.*

Another important factor to consider is the selection of stakeholders involved in the teaching of the practical content when CLE is extended outside the university and its law clinic. There are a few options available, including the primary module law teachers themselves, legal practitioners, magistrates, judges and prosecutors.[647] Externships or placement programmes are conducted in the United Kingdom in terms of which students are placed in private law firms or in non-governmental or community organisations, with staff members of such firms or organisations tasked to supervise the students.[648] The same happens in South Africa where students are involved in vacation work programmes at private law firms and there is no reason why it cannot apply to any other institution where students can undergo practical training.[649] Legal secretaries are also familiar with pleadings, procedure and the general management of an attorney's office and may offer invaluable support to students. In this regard, although not formally recognised, the concept of the "para-lawyer", or legal assistant, becomes important.[650] Due to their familiarity with and contribution towards pleadings, procedure and the daily operations of legal practitioners, their duties fall between that of a competent secretary and a qualified legal practitioner.[651] Messengers can teach students about service and filing of pleadings at other legal practices and at the various courts. It will greatly benefit the students if all these stakeholders could partake in their practical training. In this way, students can gain more insight into the various legal worlds of the various stakeholders.[652] The availability of finances at the disposal of law schools is however a factor that may hamper such a possibility as it will cost more to employ one or more of the aforementioned stakeholders to exercise more intensive supervision over the students than the current *status quo*.[653] Financing opportunities, that may help to alleviate this problem, are discussed in the next section.[654]

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647 See Marson *et al* 2005 *Journal for Clinical Legal Education* 36 in this regard.

648 Evans *et al* 2008 *Griffith Law Review* 54.

649 See McQuoid-Mason "Can't get no satisfaction: the law and its customers: are universities and law schools producing lawyers qualified to satisfy the needs of the public?" 2003 28(2) *Journal for Juridical Science* 199 205 and Stetz https://bluetoad.com/publication/?i=482098&article_id=3038646&view=articleBrowser&ver=html5#{%22issue_id%22:482098,%22view%22:%22articleBrowser%22,%22article_id%22:%223038646%22} in this regard. Some practical training programmes entail students working at relevant government departments for short periods of time.

650 Dean "Searching for competence" 1983 188 *De Rebus* 387 390.

651 *Ibid.*

652 Marson *et al* 2005 *Journal for Clinical Legal Education* 36.

653 Vukowich 1971 *Case Western Reserve Law Review* 146, 147; Marson *et al* 2005 *Journal for Clinical Legal Education* 30.

654 See 4 7 2 2.

If the active involvement of legal practitioners can be secured, they will be directly integrated with CLE programmes. It is submitted that such a step will lead to greater success in the practical training of law students, as students receive training from professionals with first-hand experience of what they are teaching, thus concretising legal theory. This will provide students with a realistic perspective of legal practice and will bring more diversity to the presentation of CLE.[655]

4 7 2 2 FUNDING OPPORTUNITIES FOR THE INOLVEMENT OF LEGAL PRACTITIONERS

The most basic suggestion for obtaining additional funds is for law clinics and law schools to be on the constant lookout for potential funders and to apply for funding that can serve as compensation for legal practitioners. Suggestions relating to potential funders however fall outside of the scope of this research. The goal of the funding must be clear, *ie* to employ legal practitioners for the purpose of assisting with the preparation of law students for entry into legal practice after graduation. When motivating such funding applications, law schools will have to face the truth: that currently, law students are not adequately prepared for entry into practice, and that clinicians and private legal practitioners can assist in changing this. Law schools should not be shy to admit that the current LLB curriculum is not perfect, in which event funders may question the necessity for the required funding. Law schools must be committed towards transforming the profession by starting with the quality of student that is released from the university.

At present, all university law clinics receive funding from the Legal Practitioners' Fidelity Fund[656] in the amount of R224,700.00 per year.[657] The purpose of this funding

655 Du Plessis 2016 *De Jure* 6.

656 The Legal Practitioners Fidelity Fund had previously been known as the Attorneys Fidelity Fund. With the coming into operation of the remainder of the LPA on 1 November 2018, the name has changed.

657 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 41. However, since the inception of the Legal Practice Council and the Legal Practitioners Fidelity Fund, no university law clinic has received this funding. The reason(s) for this is still unknown. The fact that law clinics have not received this funding for 2019 and 2020 had been telephonically confirmed by the president of SAULCA on 26 November 2020. According to the president of SAULCA, the funds will

is the development of student skills.[658] These funds can therefore, *inter alia*, be utilised to compensate legal practitioners for their contribution towards student training. This is not something completely new, as some university law clinics may already follow this route; however, there may be law clinics that have not adopted such an action plan. The NMU Faculty of Law utilises part of this funding to finance payment of two advocates from the Port Elizabeth bar for their investment in trial advocacy in the Legal Practice module.

Some law clinics are engaged in financial cooperation agreements with Legal Aid South Africa in terms of which funding is provided to the law clinic by Legal Aid South Africa. Such funding is then utilised by the law clinic for specific purposes.[659] The NMU Law Clinic is a signatory to such an agreement with Legal Aid South Africa. The funding is directed towards the salaries of the candidate attorneys who are undergoing their articles of clerkship at the law clinic, as well as towards running costs including mail, travel expenses to and from the various courts and telephone calls. In return for this funding, Legal Aid South Africa is allowed to use the monthly statistics of the law clinic as an addition to their own statistics, thereby raising the yield of the community sector as far as access to justice is concerned. In light hereof, it might be a possibility to apply to Legal Aid South Africa for funding in order to compensate external legal practitioners. The justification for such an application should be twofold, at least, namely:

(a) that students are receiving hands-on practical training from experts in the field. This training will enable them to provide better legal services to the indigent members of society, which will result in an improvement of access to justice. Since the motto of Legal Aid South Africa is "Your Voice. For Justice",[660] this could be an important consideration for them when furnished with an application in this regard; and

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in future be paid by the Legal Practice Council, and not the Legal Practitioners Fidelity Fund. It is however not clear when payment will resume.

658 Bodenstein (ed) *Law Clinics and the Clinical Law movement in South Africa* 42.

659 Du Plessis "Access to justice outside the conventional mould: creating a model for alternative clinical legal training" 2007 32(1) *Journal for Juridical Science* 44 50.

660 See the Legal Aid South Africa website at Legal Aid South Africa (undated) Legal Aid South Africa (legal-aid.co.za) (accessed 2020-12-03).

(b) that Legal Aid South Africa will be contributing towards improved legal education for law students in general. Legal Aid South Africa also appoints candidate attorneys on an annual basis. In the same way that the legal profession has its reservation about the quality of law graduates, Legal Aid South Africa might experience the same. For that reason, they will also contribute towards their own wellbeing, as it may happen that some law graduates, trained by private legal practitioners at university level, may be employed by Legal Aid South Africa at a later stage.

It may happen that Legal Aid South Africa would see the need to involve some of their own legal practitioners in order to provide training to students. Such a practice will also be welcome, as Legal Aid South Africa has good training programmes presented on a regular basis. Their staff members, presenting such training, will therefore know how to convey knowledge and skills to students and may be a welcome addition to the practical upbringing of the students.

Funding from the Safety and Security Sector Education and Training Authority (hereafter referred to as "Sasseta") should also be considered.[661] Sasseta was created to facilitate education and training to a wide variety of safety and security providers and services in South Africa.[662] It is mandated by the Skills Development Act[663] and is empowered to implement and support the skills aligned to the safety and security sector.[664] The mentioned providers include, *inter alia*, the Legal and Justice Sector Educational and Training Authority.[665] The broad function of such training is to

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661 The Sasseta website can be found at iEducation SETA South Africa "Safety and Security Sector Education and Training Authority" (undated) https://www.vocational.co.za/sasseta-safety-and-security-sector-education-and-training-authority/ (accessed 2019-06-13).

662 iEducation SETA South Africa https://www.vocational.co.za/sasseta-safety-and-security-sector-education-and-training-authority/.

663 97 of 1998.

664 SASSETA Research Department "Sasseta Research Report: assessment of learning conditions of candidate attorneys during a transformation attempt" (March 2019) https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf (accessed 2020-01-14) 20.

665 https://www.vocational.co.za/sasseta-safety-and-security-sector-education-and-training-authority/.

improve the skills of the South African workforce as a whole.[666] The more specific commitments of Sasseta include the following:[667]

> "1. to develop a culture of top quality learning that would last a lifetime for any learner;
> 2 to foster skills development in the formal sector of **SASSETA** for both productivity and the growth of employment potential and possibilities;
> 3 to stimulate and support the development of skills in small business in South Africa;
> 4 to promote skills development that would make more people employable and enable them to have sustainable livelihoods via a variety of social development initiatives;
> 5 to assist new entrants to the industry (or sector) find employment."

It is therefore clear that the practical education of law students also falls within this classification. Law schools should therefore consider applying to Sasseta in order to obtain funding that can be utilised to pay legal practitioners for providing practical training to law students. The Local Government Seta indicated that an amount of R150 million would be spent within the strategic areas adopted by Sasseta.[668] It therefore appears that there are funds available that can be applied for to compensate legal practitioners.

Lastly, law schools and university trusts should also contribute towards funding for legal practitioners. It may be that there are some law schools who do not support their law clinics and their funding at all. The same goes for university funds in general. However, university law clinics play an important role in community service and access to justice, which is promoting the name of the university and of the law school. Therefore, universities and law schools must invest funding into the training of students in order to enable them to promote access to justice in a qualitative manner.

4 7 2 3 NELSON MANDELA UNIVERSITY FACULTY OF LAW'S MOBILE LAW CLINIC SERVICES

In an attempt to promote access to justice for indigent members of society, the NMU Faculty of Law commenced with conducting mobile law clinic services during 2019.

666 *Ibid.*
667 *Ibid.*
668 *Ibid.*

This entails the taking of basic legal services into the community and eliminating the need for the community to travel to the university law clinic. The mobile law clinic team is made up of the Street Law facilitator, the clinician at the NMU Law Clinic, a law teacher who is an admitted attorney and former coordinator of the Legal Practice module, a member from the NMU Refugee Rights Centre, candidates from the School for Legal Practice, as well as approximately 15 student volunteers. The NMU staff members in the team also act as supervisors over the student activity. This team works in collaboration with the Human Settlements Action Group (hereafter referred to as "HAG"). The mobile law clinic is conducted in selected areas in the vicinity of the university. When an area, date and venue have been arranged, HAG arranges for the public advertising and announcements of the event in such areas in order to ensure that the community has knowledge thereof. Social media is also used as an advertising platform. HAG reimburses members from the university for their travel expenses to and from the particular venue. Since the inception of the event, some private legal practitioners and candidate attorneys have also volunteered their services and support this initiative.

The students involved in this team are mostly final year students, although a number of third year students have also participated. The students find this exercise very informative and valuable, as they engage with the community for approximately five continuous hours as opposed to the 90 minutes per fortnight at the university law clinic. They experience client emotions to a greater extent and have the opportunity to learn from practitioners while actively involved in the practical process. They participate in consultations, drafting and research in order to find solutions to clients' legal problems. This project is viewed and treated as an extension of CLE, as students, who participate, will receive credit for missing their conventional university law clinic sessions for that particular day, provided that they have not arranged any appointments with existing clients at the university law clinic. The fact that third year students are also involved, contributes towards CLE being presented earlier on in the academic curriculum.

Participation in this initiative extends CLE beyond the walls of the university into the community. It brings students into contact with the realities of life that await them after graduation. This realisation also enables students to note how the law is applied in

practice, whether such application is effective in promoting the values of the Constitution, as well as where the law should possibly change in order to improve access to justice to members of society. The team of supervisors should draw the attention of the students to the relevance and importance of transformative constitutionalism in this regard. A major disadvantage of this system is that not all students get the opportunity to participate in such clinics. It is furthermore mostly the same students who volunteer their services for each clinic. A possibility in this regard is to divide all final year students, registered for legal practice, into groups and to assign each group to a particular mobile law clinic date and venue. The availability of the supervisors and travelling fees may then become additional problems to address. Despite these disadvantages, a project of this nature appears to be very beneficial to the training of students for legal practice and should be invested in by law schools.

This project is an excellent platform for students to develop an appreciation for the situation of a client, as well as empathy for the situations in which they find themselves in.[669] A big advantage in this regard is that no roleplay or simulations are necessary in creating this awareness among students. The students are experiencing matters for real, which is more likely to facilitate the development of empathy and maturity in them than what simulations can do in this regard.[670] The importance of these aspects, as well as the students' experiences, should be analysed and discussed during tutorial sessions. This will focus the attention of the students upon these aspects, as well as why it is important for the success of a career in legal practice: the more a client notices that his or her legal practitioner has a caring stance towards him or her and his or her matter, the more the legal practitioner can be guaranteed of a returning client as well as for a positive reaction to his or her legal services.

The Street Law facilitator has provided valuable insight into the manner in which the students experience and appreciate this project. According to her, the overall feedback from the participating students is overwhelmingly positive. Students appreciate the fact that they are confronted with real life problems that members of the

669 See 3 4 5 with regard to the importance of social and human elements in the training of law students.

670 Nicholson "The relevance of the past in preparing for the future: a case for Roman law and legal history" 2011 17(2) *Fundamina* 101 161.

various communities require legal assistance with. At the same time, students have indicated that a big challenge is how to put their theoretical knowledge of the law into practice when attempting to assist members of the public. In this regard, students value the presence of the supervisors in that the supervisors provide instant assistance to them in instances where the students might struggle with understanding the applicable law, as well as legal procedure(s) that must be followed. It also appears that students, who are regularly participating in this project, quickly learned which legal procedures to follow, how to adequately use precedents of documents when conducting drafting on behalf of clients, as well as how to assist members of the public with increased confidence.

It is submitted that this project has the potential to advance constructive learning to a large extent.[671] Although supervisors are available to assist and guide the students in their efforts to help clients, students are encouraged to find the solutions to their questions themselves. The students are further reminded that they are handling the problems of real people and their (students') actions might have consequences for such people and their legal position. In this way, students learn to assume greater responsibility for their actions.[672] The mobile law clinic presents excellent opportunities for the students to undergo capstone learning, as many clients approach the mobile law clinic with unorganised and sometimes complex issues, some of which the students have never encountered before.[673] This will require the students to do research in relation to what they do not know and to further link certain areas of the law that they are more familiar with. The students therefore learn to approach the law from a holistic perspective and to break down the silos or compartments of the law that they have been traditionally taught. These capstone-like learning opportunities symbolise substantial catalysts in helping the students to develop into future legal practitioners.[674]

Technology may be useful at a mobile law clinic and is indeed utilised by the NMU Mobile Law Clinic. In this regard, students bring laptop computers with them to the

671 See 2 3 with regards to constructivism and constructive legal education.
672 See 1 2 3 and 4 8 with regards to the importance of professional responsibility.
673 See 4 7 1 with regards to the importance of capstone learning.
674 See 4 7 1.

venue where the law clinic is held and, if they are not in possession of computers, computers are supplied to them for use during the mobile law clinic sessions. In this way, students are, for example, able to draft a last will and testament for a client in need of such a document. If a notice of intention to defend in a civil action or a notice of intention to oppose in a civil application must be served and filed on an urgent basis after a client has been served with a summons or notice of motion, the students can draft such documents for the client. The documents will be drafted in the name of the client, but the client will be informed that, should further assistance be required, the client can appoint the NMU Law Clinic as legal representatives. Students will use their knowledge of civil procedure, as well as examples of the said documents, to be of assistance as far as the required drafting of documents is concerned. This constitutes a clear example of how theory, practice and technology complement one another in order to bring about not only quality transformative legal education for the student, but also social justice for the client. It furthermore shows how the Fourth Industrial Revolution can improve the lives and social circumstances of indigent members of society and play a role in legal practice outside the law firm, conventional law clinic or court system.

The entire mobile law clinic experience is transformative in nature. In this regard, it is prudent to consider how the term "transformation" finds application.[675] Transformation indicates change.[676] The concept of a mobile law clinic brings about change in the conventional clinical programme in that students are rendering legal assistance off campus. Moreover, in rendering such assistance, students are undergoing legal education that marks a departure from the conventional manner of teaching law at university level, *ie*, the Socratic and case dialogue methodologies.[677] This change in teaching methodology can bring about social change in that it steers legal education and social justice in a new direction in that students are being more adequately trained for entry into legal practice.[678] This can give rise to the development of high performance, effectiveness and excellence on the part of the students.[679] In the

675 See 2 2 1 for a discussion on transformation.
676 *Ibid*.
677 See 3 3 for a discussion on the Socratic and case dialogue teaching methodologies.
678 See 2 2 1.
679 *Ibid*.

process, access to justice is made available to marginalised and indigent members of society. The microjustice approach of a mobile law clinic assists disvantaged and marginalised persons to make effective use of the possibililties in the legal system in order to improve their economic and social situation.[680] A mobile law clinic therefore provides more than legal advice to people – it empowers people, making them aware of their rights and provides them with the confidence and capacity to claim such rights.[681] It can thus be said that, in this way, access to justice, as a disadvantage, is removed for many people[682] in that mobile law clinics constitute important tools that inform people about their righits.[683] This will cause equality and dignity, as fundamental rights, to stand out, as the needs of people are addressed significantly by the rendering of legal assistance.[684] Poverty is a widespread obstacle to access to justice, not only in South Africa, but all over the world.[685] Legal representation and court fees can be expensive.[686] Moreover, illiteracy is also an obstacle in that many people will not be able to read an interpret official documents and pleadings.[687] The implication is therefore that indigent and illiterate persons will be dependant on the assistance of others in order to gain access to legal representation and assistance.[688] There might also be other economic and social obstacles in this regard.[689] The mobile law clinic therefore re-inforces the importance of the fact that access to justice is not only available to affluent people. The entire experience brings about additional access to education for law students.[690] As students integrate theory and practice in order to render legal assistance to members of the public, they are presented with an additional opportunity to engage with the law of procedure and evidence from a practical

680 Roder *Mobile courts, legal clinics and microjustice: how to improve access to justice for people in fragile contexts?* RSF Hub Impulse Paper (2 December 2018) 1 1, 4.

681 Mauro "Mobile legal aid clinics: vehicles of empowerment and justice in the Gambia" (8 December 2014) https://www.unv.org/Success-stories/Mobile-Legal-Aid-Clinics—Vehicles-Empowerment-and-Justice-Gambia (accessed 2021-05-14).

682 See 2 2 1.

683 Roder *Mobile courts, legal clinics and microjustice* 3.

684 See 2 2 1. Also see Roder *Mobile courts, legal clinics and microjustice* 4 in this regard. In townships especially, many underlying inequalities and discrimination need to be addressed.

685 Roder *Mobile courts, legal clinics and microjustice* 2.

686 *Ibid*.

687 Roder *Mobile courts, legal clinics and microjustice* 2. Also see Mauro https://www.unv.org/Success-stories/Mobile-Legal-Aid-Clinics—Vehicles-Empowerment-and-Justice-Gambia in this regard.

688 *Ibid*.

689 *Ibid*.

690 See 2 2 1.

perspective in a live-client environment. In doing so, they are developing into improved candidates for entry into legal practice.[691]

4 7 2 4 NELSON MANDELA UNIVERSITY FACULTY OF LAW'S LEGAL INTEGRATION PROJECT

During 2017, one of the law teachers at the NMU Faculty of Law created the Legal Integration Project. This project has as its main aim the enrichment of theoretical and practical knowledge of law students from all academic years. The law teacher, who is also an admitted attorney, realised the value of practical experience and arranges for weekly gathering of the group of participants in order to engage with them regarding legal matters. Participation in this project is voluntary. Students are however required to commit themselves to all activities and meetings when they decide to join the project. These matters include private legal practitioners addressing the students on professionalism, ethics, legal drafting, court procedures, evidence and the professional life of legal practitioners in general. Experts in ballistics, DNA, fingerprints, questioned documents and sexual assault cases also conduct workshops with students. Students do tours of the local morgues and attend autopsies under close supervision of the district surgeon on duty. Opportunities for vacation work are also arranged for students and during both 2019 and 2020, private legal practitioners were very cooperative in letting students undergo vacation training at their offices. Vacation training also takes place at the university law clinic.

Although many of these meetings and activities take place at the university and are not integral parts of CLE, this project can be seen as an opportunity to extend legal education outside the ambit of the university training. On specific occasions, invitations to events are extended to all clinical law students. The interaction with private legal practitioners brings students into direct contact with professionalism, ethical behaviour, services to members of the public, as well as the management of a legal practitioner's office. This is a valuable teaching method to ensure that students undergo legal training during student recesses or even outside of their normal university hours. The fact that not all students undergo these training opportunities is

691 *Ibid*.

again a disadvantage. Further disadvantages are the congested university timetable and the busy schedules of the students, resulting in some students not being able to attend all the project activities. It is at present not clear how to address these issues. Despite these obstacles, students are showing a growing interest in the project and have expressed their desire to learn more about the law and its application.

According to the law teacher who is the incumbent behind this project, the students are expressing great enthusiasm in relation to the project and its activities. Students have indicated that the work experience they have acquired from private law firms, have added a practical component to their academic studies – something that they have not encountered anywhere else or in any other way during their academic studies before this project. In doing practical work, students can make mistakes and learn from these mistakes in a safe environment before venturing into legal practice after graduating from university. Students feel that the project teaches them about legal practice, while the conventional law curriculum does not do that at all. According to them, this is an important and necessary addition to their knowledge base, because, when they enter legal practice, it is assumed that they are familiar with the practical side of the law. The project also aids students in developing important skills, including organising, teamwork, drafting, communication in general and listening skills. Furthermore, students have indicated that their interaction with vulnerable communities has taught them about the immense need that exists for assisting indigent members of society and, as such, to provide and promote access to justice.

The Legal Integration Project offers the opportunity for students to enhance their legal education by way of additional learning experiences. It is submitted that this supports continuous and lifeling learning.[692] Lifelong learning is a factor that can have an influence on the employability of the graduate,[693] an aspect that will be highlighted as this discussion develops. As stated, students get the opportunity to work in the offices of legal practitioners and to interact with experts in the field of law, which will enable the students to learn more from legal professionals, real-life case scenarios and as such gain valuable graduate attributes that they will need when entering legal practice.

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692 See 5 2 2 1 with regards to lifelong learning.

693 See 5 3 6 2. Also see 5 2 2 3 with regards to the aspect of the importance of employability of law graduates.

Students have the opportunity to reflect on theses experiences during project gatherings and to share their experiences with the law teacher and other students. In this way, other students are presented with additional opportunities to learn from fellow students. However, it is also an opportunity for the law teacher to learn from the students. Firstly, the teacher can gather new information that can be shared with other students.[694] Secondly, the teacher can construct an informed impression about what learning experiences are important and valuale to the students and arrange more of the same experiences in order to enhance learning. The project content is therefore adapted to what suits the educational needs of the students and is fully supported by the doctrine of constructive legal education.[695] In this way, the project content remains flexible and continuously open to change. It is submitted that such a flexible approach is transformative in itself, in that, as stated before,[696] it marks a departure from traditional and rigid teaching and learning and is conducive to the presentation of quality education to students. Although no formal assessments are conducted as part of the Legal Integration Project, it does not mean that students do not learn from their experiences. From their practical experiences and what they observe from legal practitioners and other experts, as well as what they are learning during other project engagements, students can improve their professional efforts in future when they enter legal practice.[697]

By observing legal practitioners and how they use the law in order to assist their clients, students can learn more about the importance of social justice.[698] They also have the opportunity to learn more about legal procedure and how important the law of procedure, as well as evidence, is to give effect to substantive law in legal practice. It might happen that students observe instances where the law is not applied so as to advance procedural or social justice in that the social and personal circumstances of clients are not heeded. This creates the opportunity for students to make suggestions as to how the matter can be approached in order to accomplish the required procedural and social justice. Such suggestions may be an indication to the legal practitioner that

694 See 2 3.
695 See 2 3.
696 See 4 7 2 3.
697 See 5 2 2 1 in this regard.
698 See 2 2 3 in this regard.

the student is actively thinking about the law and how it can be used to improve the lives of members of the public. Once again, the student can share this experience with the law teacher and with other students who are part of the project, contributing towards an awareness about transformative constitutionalism. The student's reaction to the needs of the client however presupposes that the student has received sufficient training at law school in order to recognise instances where social and procedural justice can be improved. Whaterver the case may be, the student's attitude in this regard might also create a favourable impression with the legal practitioner as far as the employability of the student is concerned. Based on this impression, the practitioner might consider offering an employment opportunity to the student in future. It is suggested that, by way of legal education, law schools should regard the employability of law students as a serious issue.[699] It is submitted that the Legal Integration Project, by fact of its very existence as part of the NMU Law Faculty, is indeed doing so.

4 7 2 5 NELSON MANDELA UNIVERSITY LAW CLINIC CANDIDATE ATTORNEY ACTIVITIES AT REGIONAL COURT

From 2008 until 2011, the NMU Law Clinic, in collaboration with the New Law Courts in Port Elizabeth, embarked on a project in terms of which candidate attorneys from the law clinic would work at the court on a weekly basis. The nature of their work at court entailed rendering assistance to members of the public in completing concept particulars of claim documents for divorce matters. A candidate attorney would be stationed at court for an entire week. The following week another candidate attorney would take up that position and so this project continued. The candidate attorneys worked unsupervised at court; however, they always had access to their principals at the law clinic should questions or the need for assistance arise. Staff of the court also assisted wherever possible. These staff members, as well as members of the public, were very satisfied with this service, as it became easier for the public to understand their rights in this regard and to ensure that the particulars of claim is drafted correctly and contains all relevant information, including maintenance, pension fund and medical aid scheme claims.

699 See 5 2 3. Employability should also be a factor influencing the type of assessments that are being given to students – see 3 4 9 4 in this regard.

It may be very beneficial and educational for students to fulfil the same task as the candidate attorneys. Student groups can be assigned to such court duties on a rotational basis, ensuring that they undergo training both at the court and at the law clinic. Before sending students to court, they should undergo training sessions during which the proper drafting of a particulars of claim is dealt with. They should also know how to approach maintenance, pension fund and medical aid scheme claims. The advantage of performing such services is that students are working at the court and will come into contact with court staff and presiding officers from whom they can learn extensively as far as courtroom procedures, court etiquette and the need for adequately and professionally drafted legal documents are concerned. Contrary to the candidate attorneys, students should however not be left to work unsupervised at the courts. It is advised that a clinician and/or candidate attorney should supervise student activities in this regard and assist where possible. A major obstacle to efficient training in this regard will be time: students may not have more than the conventional 90 minutes per week to perform these services. Moreover, clinicians and candidate attorneys may also not have sufficient time to travel to the court and supervise students.

A challenge concerning a project like this will be for a law teacher to justify why this exercise is relevant at law school level and why it cannot wait until the graduate's entry into legal practice.[700] For this reason, the law teacher will have to indicate that the project has clear educational objectives that can form the basis of discussions with the students, as well as reflected on by students, during the currency of the project.[701] In this regard, the value of such a project needs to be analysed and discussed. Projects of this nature will enable students to receive first hand experience as far as legal procedure is concerned. There is nothing artificial about such experiences, as students will work in contexts that are similar to what they can expect after graduation.[702] Although the focus of this section is mainly on civil courts, students could also be placed at criminal courts in order to assist the clerk of such court in performing certain administrative issues. The students will be able to learn more about

700 Stuckey *et al Best practices for legal education* 200.

701 *Ibid*.

702 Stuckey *et al Best practices for legal education* 199.

criminal legal practice in this way. In executing practical duties at the courts, students can become more familiar with the justice system and how it affects the rights and lives of people.[703] Students should also be tasked with attending certain court proceedings in order to observe the practical application of the law and legal procedure. This should make the students more aware of whether or not the law is indeed used in order to improve the lives of people, as well as whether or not the rights of accused persons are properly attended to in practice. Students will be able to examine how people react to the manner in which the law is being applied, an experience that simulated activities cannot provide.[704] Such observations have the potential to serve as important learning curves as far as transformative constitutionalism is concerned. Students should learn about the effect of the law on people's lives while still at law school, and not only after they have entered legal practice.[705] This will provide significant insights into the social and human side of how a client experiences the law and may constitute important reasons for consideration changes to the current application of the law or legal procedure. Students' observations can also give rise to valuable discussions and reflection on issues relating to professionalism.[706] In this regard, students will be able to observe how legal professionals act in the presence of court officials, how they interact with and address court officials, how they interact and address their own clients, as well as to which extents they go to protect the rights and well-being of their clients.

4 7 2 6 EDUCATIONAL CONTROL

The educational methods, discussed in this section, occur outside the ambit of the university, as well as outside the confines of the university law clinic. The question may thus be asked whether this can truly be seen as extensions of CLE. It may also be questioned as to whether or not the clinician – and ultimately the university – will not relinquish control over what is being taught to the students, as well as the manner in which it is taught. It is submitted that, should appropriate educational control be applied by clinicians and relevant law teachers, this can be classified as extensions of

703 See Stuckey *et al Best practices for legal education* 199 in this regard.
704 Stuckey *et al Best practices for legal education* 199.
705 *Ibid.*
706 *Ibid*.

CLE. This means that, after completion of a session, or selected series of sessions, the mechanics of such sessions, as well as lessons and challenges therefrom, need to be analysed and discussed by clinicians and students during tutorial sessions. This will necessitate adequate communication between clinician and external supervisor in order for the clinician to stay abreast of the progress and development of the students. It is also submitted that external supervisors should let students complete reflection documents after each session, on which they (the students) can clearly express their experiences and challenges relating to particular situations. These documents should be submitted to the clinician for the purpose of tutorial discussions with students. It is furthermore submitted that external supervisors should be invited to tutorial sessions in order to facilitate discussions with students in the presence of the clinician. In this way, the clinician stays in control of the educational process, being fully aware of what the students are being taught. Possible *lacunae* can be identified and the external supervisor can be requested to address such aspects during future practical sessions. Alternatively, the clinician can attend to such aspects during conventional CLE training sessions. This is an ideal opportunity for law teachers and legal practitioners, as well as other stakeholders in legal practice, to strengthen relationships and to ensure quality training for law students that will enable them to enter legal practice as properly trained and well prepared graduates.

4 7 3 ENSURING THE SUSTAINABILITY OF UNIVERSITY LAW CLINICS

The logistical and financial situations at all law schools are not the same.[707] It may therefore not be possible for some law schools to obtain the services of legal practitioners as clinicians to assist with the training of law students. There could be various reasons for this, namely lack of finances, lack of obtaining external funding, unwillingness of legal practitioners to participate in such a programme, or other applicable reasons. These financial and logistical obstacles could be overcome by having a sustainable and flexible law clinic in the law school. It will necessitate the appointment of legal practitioners,[708] or clinicians, who should also act as law

[707] See Maisel 2007 *Fordham International Law Journal* 388 with regards to the obstacles of stable funding as far as university law clinics are concerned.

[708] How many legal practitioners should be employed, depends upon the financial capability of the law school, as well as how big the law clinic is envisaged to be. For a small law clinic, it is submitted that at least 2 legal practitioners should be appointed.

teachers. In doing this, law schools do not have to employ too many external legal practitioners to assist with the professional training of law students. Additional available funds could rather be invested in training and/or staff development courses for the appointed clinicians. Clinicians can assist with the professional and practical training of law students as far as, *inter alia*, the procedural law modules are concerned. The classrooms can be used for small, intensive tutorial discussions and/or simulations, while the law clinic sessions can be used for a more hands-on teaching method, bringing concreteness to the classroom and tutorial discussions. Furthermore, students can accompany clinicians to court in order to observe their actions and demeanour in the courtroom, thereby absorbing legal professional skills and ethics by way of osmosis.[709] In this way, law clinics could truly become the laboratories that they are envisaged to be:[710] the CLE teaching methodology, employing experiential learning,[711] enables the student to utilise the knowledge, acquired during the classroom and tutorial sessions, in order to gain practical experience.[712] Holmquist correctly states that "…[w]ell-run [law] clinics certainly provide these invaluable experiences to…students."[713] Clinicians should also ensure that they provide sufficient opportunities for students to reflect on the work that they have done and also to pose appropriate doctrinal questions to the students relating to the practical work done on a particular case.[714] If this is done, students will recognise and appreciate the connection between doctrine and practice and will be able to view their client's legal issue in the full context of the specific area(s) of the law applicable.[715]

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709 Du Plessis and Dass *South African Law Journal* 396; Welgemoed 2016 2 *Litnet Akademies* 760.

710 In this regard, see Professor Vivian Lawack's contribution to the LLB Summit of 2013 in Dicker "The 2013 LLB Summit" (August 2013) http://www.sabar.co.za/law-journals/2013/august/2013-august-vol026-no2-pp15-20.pdf16. Professor Lawack correctly stated that "…law clinics, smaller tutorials and libraries were the 'laboratories' of legal education." Also see Barnhizer 1979 *Journal of Legal Education* 73 in this regard where it is stated that "[n]ot only does [the clinical method] enable the student to synthesise the previous educational experience of the law school; it provides a laboratory in which students are placed in a controlled educational environment where their mistakes and successes are formed into a positive learning experience…"

711 Stuckey *et al Best practices for legal education* 165, where 'experiential learning' is described as "…those courses that rely on experiential education as a significant or primary method of instruction. In law schools, this involves using students' experiences in the roles of lawyers or their observations of practicing lawyers and judges to guide their learning."

712 Welgemoed 2016 2 *Litnet Akademies* 759.

713 Holmquist 2012 *Journal of Legal Education* 377.

714 Krieger 2004 *Clinical Law Review* 200.

715 Krieger 2004 *Clinical Law Review* 200. Also see Boshoff 1997 *De Rebus* 27 with regards to the importance of reflection.

Sustaining such a valuable and powerful "laboratory" within the law school should therefore be a priority at every university.

Barnhizer states that the involvement in a substantial CLE programme should be a prerequisite for graduation from law school.[716] This would result in an increase of the resources that are necessary in order to support clinical education.[717] Although clinical training is a prerequisite for obtaining the LLB degree at many universities in South Africa, it is not a general requirement. It is submitted that, should clinical training become such a prerequisite – therefore, compulsory – law schools will realise the importance of this module and will have no other option than to invest in sustaining their law clinics. This will not only benefit the future and development of CLE, but also create more possibilities for integrating CLE with other modules, including procedural law modules.

4 7 4 IMPACT OF THE FOURTH INDUSTRIAL REVOLUTION AND RELATED FACTORS

4 7 4 1 BACKGROUND

Socrates stated that knowledge only truly exists in human interaction.[718] In order to substantiate this, he used a paper and pen as examples: a reader and whatever is written on the paper with a pen cannot engage in a conversation.[719] The answer will never change, but will remain what is written on the paper with no additional explanation the next time it is read.[720] The World Economic Forum poses the following questions with regards to the time that society currently finds itself in:

716 Barnhizer 1979 *Journal of Legal Education* 148.

717 *Ibid.*

718 Katz "Expert Robot: using artificial intelligence to assist judges in admitting scientific expert testimony" 2014 24(1) *Albany Law Journal of Science & Technology* 1 1.

719 *Ibid.*

720 *Ibid.*

(a) are the current technologies tools that people can identify, take control of and consciously use in manners to improve people's lives?[721] or

(b) are the current technologies powerful objects and enablers that have an influence of human perception of the world, that can change our behaviour as well as the human perception of what it means to be human?[722]

The World Economic Forum respond to these questions as follows:[723]

> "Technologies are emerging and affecting our lives in ways that indicate we are at the beginning of a Fourth Industrial Revolution, a new era that builds and extends the impact of digitization in new and unanticipated ways. It is therefore worthwhile taking some time to consider exactly what kind of shifts we are experiencing and how we might, collectively and individually, ensure that it creates benefits for the many, rather than the few."

The Fourth Industrial Revolution can be defined as the advent of cyber-physical systems,[724] which have new capabilities for people and machines in store, including new forms of machine intelligence.[725] This digital tech renaissance, as it has been described,[726] appears to be a time of great promise, but not without any dangers.[727] Apart from any apparent dangers, there is no real doubt that digital technology and AI have the potential to revolutionise the legal profession. Morgan remarks the following in this regard:[728]

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721 World Economic Forum "What is the fourth industrial revolution?" (19 January 2016) https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution/ (accessed 2019-09-18).

722 *Ibid.*

723 *Ibid.*

724 Ptolemy Project "Cyber-physical systems" (undated) https://ptolemy.berkeley.edu/projects/cps/ (accessed 2019-09-18). Cyber-physical systems (hereafter referred to as CPS) refer to integrations of computation, networking and physical processes. The physical processes are controlled by embedded computers and networks.

725 World Economic Forum https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution/. On 18 November 2019, at the SAULCA Workshop and AGM in Johannesburg, Mr Lourens Grove from the University of Pretoria Law Clinic, confirmed that the Fourth Industrial Revolution is now in progress. The first revolution concerned steam, the second was electricity, the third had been nuclear power, while the digital world and interactive communication forms the basis of the fourth.

726 "A take on the Legal Innovation & Tech Fest" (19 June 2019) https://www.futureslawfaculty.co.za/a-take-on-the-legal-innovation-tech-fest/?mc_cid=d3c1dd635a&mc_eid=2744c002ab&utm_campaign=Oktopost-Legal+Innovation+Tech+Fest&utm_content=Oktopost-facebook&utm_medium=social&utm_source=facebook (accessed 2019-06-24).

727 World Economic Forum https://www.weforum.org/agenda/2016/01/what-is-the-fourth-industrial-revolution/.

728 Morgan "The changing face of legal education: its impact on what it means to be a lawyer" 2011 *GW Law Faculty Publications & Other Works* 1 8.

> "Indeed, we may not be far from future development of "expert systems" that can even begin to do basic legal reasoning and analysis. For as long as computers are restricted to dealing with language rather than abstracts concepts, human beings are likely to be better at discerning patterns in apparently disparate information. There seems little doubt, however, that in areas of the law where words are regularly used in patterns, expert systems may indeed be possible."

It has already been argued that sophisticated algorithms are gradually performing a number of tasks normally performed by paralegals and legal practitioners.[729] For the purposes of this research, it is important to investigate and evaluate the potential impact that the Fourth Industrial Revolution, and factors surrounding it, may have on CLE, as well as on its integration with the teaching and learning of procedural law modules. It ihas been stated that the use of technology, both proven and in the experimental stage, will continue to show growth and transform some aspects relating to legal education.[730] In this context, Kloppenberg states that law students, law teachers and the legal profession have shared concerns for the many challenges facing legal education, *inter alia*, the learning needs and styles of the millennial student, as well as the influence of technology on legal practice.[731] But who are these millennials and what are their needs and styles when it comes to education? Furthermore, what about the educational needs and styles of the current generation succeeding the millennials?

Millennials are also referred to as Generation Y or the digital generation, born between the early stages of the 1980s up to around 2000.[732] A study has shown that they use technology differently to Generation X, the previous generation, in that technology is in fact embedded in their lives.[733] This hardly comes as a surprise, considering that modern society is employing technology in basically all facets of daily life, whether for personal or business purposes. The internet and access to electronic media are phenomena without which society cannot sufficiently function any longer. This

729 Hutchinson "Legal research in the Fourth Industrial Revolution" 2017 43(2) *Monash University Law Review* 567 569. Also see Frey and Osborne *The future of employment: how susceptible are jobs to computerisation?* Paper presented at Machines and Employment Workshop, Oxford University (September 2013) 1 2-3 in this regard.

730 Stuckey *et al Best practices for legal education* 159.

731 Kloppenberg 2009 *Rutgers Law Review* 1100; Kloppenberg 2007 *University of Toledo Law Review* 547; Kloppenberg 2013 *Journal of Dispute Resolution* 105-106.

732 Laskaris "How to engage millennials: 5 important moves" (2016) https://www.efront learning.com/blog/2016/03/5-strategies-to-engage-the-millennials.html (accessed 2019-09-18).

733 *Ibid.*

technological lifestyle has become an extension of the millennial's body and, for that reason, it is expected that millennials will strive towards teaching, learning and training experiences that are aligned with their lifestyle.[734] The five R's are important in this regard:[735]

(a) *research-based methods*: millennials prefer a broader spectrum of learning strategies. They require material that caters for their audio-visual and kinaesthetic[736] needs. Their attention span is much shorter and they prefer learning methods that involve collaboration with peers and emulations of the working environment;
(b) *relevance*: millennials are very skilled at looking up information on search engines like Google in order to discover new information, especially information that is relevant to their lives. The e-learning environment should therefore be connected to the performance context of the learners in order for them to be convinced of its relevance to them;
(c) *rationale*: millennials were not brought up in the same authoritative environment as Generation X. Generation X used to follow commands merely for the reason of complying with them, thus responding quite well to an authoritarian teaching style. Millennials, to the contrary, are looking for justification for actions and decisions. If trainers can therefore provide reasons for policies and practices in the teaching environment, they are more likely to receive a positive reaction from learners;
(d) *relaxed*: millennials prefer a more relaxed learning environment where they can express themselves, exercise their creativity, have sufficient time to complete assignments and have minimal pressure placed on them; and
(e) *rapport*: millennials want attention and personal connection from their trainers. Trainers must therefore show interest in their training, development and achievements.

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734 *Ibid.*

735 *Ibid.*

736 See Roel "The kinesthetic learning style: traits and study strategies" (11 September 2018) https://www.thoughtco.com/the-kinesthetic-learning-style-3212046 (accessed 2019-09-18) in this regard. Kinaesthetic learning refers to activities where the learners are physically engaged during the learning process, *eg* sports. Learners have the need for the mind and body to work together and consequently, they often need to move in order to embed something in their memory.

Towards the end of this section, it will be indicated to what extent these learning experiences align with CLE and its effectiveness to teach the procedural law modules in a more efficient and practical manner. Particular focus will be placed on a kinaesthetic approach to teaching and learning. In order to arrive at such discussion, the point of departure is to investigate the impact of the Fourth Industrial Revolution on the legal profession specifically.

As was stated earlier that millennials had been born between the early stages of the 1980s up to approximately 2000, it means that a new generation has already started to experience the academic and professional world. This generation is called Generation Z[737] or the iGen[738] and the individuals are referred to as centennials.[739] The approximate date of birth of centennials are between 1995 and 2010.[740] Centennials had grown up with the internet at hand, as well as being familiar with social media.[741] With this in mind, they have been stereotyped as being addicted to technology, anti-social and nicknamed "social justice warriors."[742] In fact, centennials are hypercognitive, having no problem in gathering and cross-referencing large amounts of information by way of both offline and online methods.[743] They appear to add more value to education and absorbing information than any generation before them and see connections between their education, their personal goals and financial goals.[744] They want to be actively involved in their education and do not want to merely listen to lectures,[745] much like their millennial counterparts. Online methods are

737 Francis and Hoefel "'True Gen': Generation Z and its implication for companies" (12 November 2018) Generation Z characteristics and its implications for companies | McKinsey (accessed 2021-04-02).

738 Business Insider "Generation Z news: latest characteristics, research and facts" (2021) Generation Z: Latest Gen Z News, Research, Facts & Strategies | Business Insider (accessed 2021-04-02).

739 *Ibid*.

740 Francis *et al* Generation Z characteristics and its implications for companies | McKinsey. As stated, these dates are approximate. It has been stated that these dates could also span from 1997-2012 – see Business Insider Generation Z: Latest Gen Z News, Research, Facts & Strategies | Business Insider.

741 Business Insider Generation Z: Latest Gen Z News, Research, Facts & Strategies | Business Insider; Francis *et al* Generation Z characteristics and its implications for companies | McKinsey; TTI Success Insights "10 Defining characteristics of Generation Z" (16 January 2019) 10 Defining Characteristics of Generation Z (ttisi.com) (accessed 2021-04-02); O'Hara "Who is Generation Z?" (8 December 2020) Who Is Generation Z? | Psychology Today (accessed 2021-04-02).

742 Business Insider Generation Z: Latest Gen Z News, Research, Facts & Strategies | Business Insider.

743 Francis *et al* Generation Z characteristics and its implications for companies | McKinsey.

744 O'Hara Who Is Generation Z? | Psychology Today.

745 *Ibid*.

however preferred, especially as far as learning is concerned.[746] Centennials are supporters of experiential learning and would easily exchange formal education for work integrated learning if they feel passionate about a particular job.[747] They are constantly pursuing the truth, individuality and avoid stereotyping.[748] They are willing to advance various causes and believe in dialogue in an attempt to solve disputes.[749] Centennials construct decisions in an analytical and pragmatic manner and relate to institutions who assist them in doing so.[750] Technology and online connectivity have built unprecedented connections between centennials themselves and the rest of the world, with the effect that technological trends are sped up.[751] This makes it easier for them to become entrepreneurs.[752] For businesses, including the legal profession, this may present new challenges, but also exciting opportunities.[753] Businesses must however be open to attempt and accept these new challenges and opportunities.[754] This is especially important as far as the legal profession is concerned, as the legal profession is not known to adapt progressively as far as technology is concerned.[755]

Centennials view their work as important to earn a living.[756] It therefore appears that they would prefer working for financial gain, even if they do not enjoy what they are doing.[757] Enjoyment of employment is not a necessity for Generation Z.[758] Centennials are also very competitive in nature and expect immediate results, effectively meaning that patience may not be one of their best qualities.[759] They also prefer to work independent, contrary to millennials, who prefer to collaborate.[760] They have strong opinions and are adamant about being heard, also in the working

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746 Francis *et al* Generation Z characteristics and its implications for companies | McKinsey.
747 O'Hara Who Is Generation Z? | Psychology Today.
748 Francis *et al* Generation Z characteristics and its implications for companies | McKinsey.
749 *Ibid*.
750 *Ibid*.
751 *Ibid*.
752 TTI Success Insights 10 Defining Characteristics of Generation Z (ttisi.com).
753 *Ibid*.
754 *Ibid*.
755 See 4 7 4 2.
756 TTI Success Insights 10 Defining Characteristics of Generation Z (ttisi.com); O'Hara Who Is Generation Z? | Psychology Today.
757 TTI Success Insights 10 Defining Characteristics of Generation Z (ttisi.com).
758 *Ibid.*
759 *Ibid*.
760 *Ibid*.

environment.[761] This may help them to easily compete and voice their points of view in the workplace.[762] Towards the end of this section, it will be indicated to which extent these qualities, relevant to centennials, can influence teaching and learning methodologies as far as CLE and procedural law modules are concerned and also what impact centennials can have on the workplace.

Beaton states that very few law schools have commenced preparing students for the fast changing world of legal practice.[763] In the United States, research has shown that legal practitioners, with up to seven years of post-qualification practical experience, lack training in business skills.[764] This can be ascribed to law schools still focusing on traditional legal knowledge, while traditional law firms and law departments, in the process of transforming, as well as new forms of legal services delivery, require different skills to be taught.[765] Beaton does not specifically refer to the impact of the Fourth Industrial Revolution, but his statement finds equal application in a discussion surrounding this phenomenon. In light of the fact that society is operating in the digital age and with many applications involving AI,[766] it speaks for itself that the latest innovation and developments in technology will influence all sectors of life, including the legal profession. Based on this, it will necessitate law schools to adapt their teaching methods in order to assist the millennials and centennials to achieve their teaching and learning goals, as well as to ensure that they enter practice with a proper knowledge of how it operates, or can operate, in the digital age. Should students be aware of all the possibilities that the digital age holds for legal practice, especially for the law of procedure and evidence, they can further contribute to the development, advancement and refinement thereof. Law schools should therefore focus on training future legal practitioners by keeping in mind all the changes that society and the business world are undergoing, as such changes will undoubtedly have an impact on

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761 *Ibid*.

762 *Ibid*.

763 Beaton "When will legal education catch the wave?" (2 October 2018) https://www.collaw.edu.au/news/2018/10/02/when-will-legal-education-catch-the-wave (accessed 2019-01-24).

764 *Ibid.*

765 *Ibid.*

766 Merriam-Webster "Artificial intelligence" (undated) https://www.merriam-webster.com/dictionary/artificial%20intelligence (accessed 2019-09-18). "Artificial intelligence" is defined as "a branch of computer science dealing with the simulation of intelligent behaviour in computers" and as "the capability of a machine to imitate intelligent human behaviour."

the success, or lack thereof, of the law firms of the future.[767] It is submitted that this approach provides a firm and material theoretical basis for the inclusion of digital technology in the teaching and learning of law students. This approach is furthermore part and parcel of transformative legal education[768] and can consequently not be left out of the curriculum. Clinicians and other law teachers therefore have an important task in this regard.

The digital age, as well as AI, deserves some discussion. This will clearly illustrate some of the operational aspects of technology, as well as the role that it can play in legal practice.

AI has enjoyed steady development since the 1950s, but its current capabilities became evident in 2011.[769] In this year, IBM Watson, a supercomputer, running on AI and built by IBM, beat two human champions of the Jeopardy game show.[770] In order to achieve this, Watson had been programmed with basic language rules and possessed more than 100 separate modules, each with their unique algorithms, attempting to determine the correct answers to the questions posed during the game show.[771] In addition to the mentioned algorithms, Watson also has a separate layer of algorithms that balances the results, generated by the various computing modules, in order to arrive at the correct answer.[772] In order to choose the correct answer, Watson had to break down the clues provided in order to make sense of what is being asked and, thereafter, provide an answer to the question. This was achieved by way of a software architecture called DeepQA.[773] This software allowed the dissemination of information that appeared in both the clues provided by Jeopardy as well as what

767 Also see Quinot *et al* 2015 *Stellenbosch Law Review* 51 in this regard.

768 See 2 1.

769 Baker "2018: A legal research odyssey: Artificial Intelligence as Disruptor" 2018 110(1) *Law Library Journal* 5 7.

770 Best "IBM Watson: the inside story of how the Jeopardy winning supercomputer was born, and what it wants to do next" (9 September 2013) https://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/ (accessed 2019-09-18); Ford *Rise of the robots: technology and the threat of a jobless future* (2015) xiv; Baker 2018 *Law Library Journal* 7. The name "Watson" was derived from the name of IBM's founder, Thomas J Watson.

771 Baker 2018 *Law Library Journal* 7.

772 *Ibid.*

773 Best https://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/; Baker 2018 *Law Library Journal* 8.

is stored within Watson.[774] The research, towards the information stored within Watson, took 20 researchers approximately three years to reach a level where it was appropriate to compete with a human competitor.[775]

DeepQA operates as follows:[776]

(a) it works out what it is that the question is demanding;
(b) thereafter, it generates possible answers according to the information at hand;
(c) for each of these answers, a thread is created;
(d) every thread makes use of hundreds of algorithms that study the evidence by looking at the type of information, the content of the information, the reliability of the information and the relevance of the information;
(e) thereafter, it weighs up each answer individually against what Watson has already found is likely to be the correct answer; and
(f) based on that, a list of answers is generated complete with evidence for the answers, ranked in order of priority.

In doing this, Watson was not allowed to connect to the internet in order to obtain information.[777] It further had to have the capability to generate an answer within seconds in order to ensure that it "presses the buzzer" before the other two competitors.[778] Watson clearly achieved this.

While this is all good in the context of a game show, it would obviously be very beneficial for the professional world if technology such as Watson and DeepQA can be used as part of its daily routine. IBM has already planned to use Watson in the medical field and customer service.[779] What distinguishes Jeopardy from the

774 Best https://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/.

775 *Ibid.*

776 Best https://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/; Ferruci, Levas, Bagchi, Gondek and Mueller "Watson: Beyond Jeopardy!" 2013 *Artificial Intelligence* 93 94; Baker 2018 *Law Library Journal* 8, 9.

777 Best https://www.techrepublic.com/article/ibm-watson-the-inside-story-of-how-the-jeopardy-winning-supercomputer-was-born-and-what-it-wants-to-do-next/.

778 *Ibid.*

779 Ford *Rise of the robots* xiv.

professional world is that the questions on the game show are quite structured. However, when clients or patients visit professionals, their instructions are sometimes all but structured – there are lots of variables that may have an influence on the advice provided to them. The question is thus: should the Watson and DeepQA AI be used in such cases, can correct answers be guaranteed? Humans have always fulfilled this task, as they are uniquely adapted to do so.[780] It is however not unthinkable that machines may have a role to play in this regard, as they can process large amounts of data on a scale that would be impossible for humans.[781] IBM Watson's defeat of the Jeopardy champions has already proven that. It is foreseen that, in the coming years, DeepQA will be applied to various fields.[782] The reality is that computers are improving at performing specialised, routine and predictable tasks to such an extent that they may soon be able to outperform the people who are currently employed to perform such tasks.[783] This may lead to a loss of jobs for many humans; however, this aspect falls outside of the scope of this research. These technological developments indicate a need for enhanced training, as it will have an impact on legal research and critical thinking skills.[784] It will furthermore influence the way in which legal practitioners – as well as the courts – conduct their day-to-day activities.

4 7 4 2 ARTIFICIAL INTELLIGENCE IN LEGAL PRACTICE

The achievements of Watson and DeepQA raise expectations as to how AI can transform legal practice. From the outset it can be said that, regardless of what type of legal career law graduates pursue, they will need to be skilled in computer based technology in order to execute their work effectively.[785] The development of these skills during legal education is not only a manner of preparing law students for legal practice, but also of promoting a lawyer's role in society.[786] In light of transformative constitutionalism and transformative legal education, this may play an important role on the value that a lawyer, especially a legal practitioner, can add to the daily wellbeing

780 Baker 2018 *Law Library Journal* 8.
781 *Ibid.*
782 *Ibid.*
783 Baker 2018 *Law Library Journal* 9.
784 Hutchinson 2017 *Monash University Law Review* 574.
785 Quinot *et al* 2015 *Stellenbosch Law Review* 57.
786 *Ibid.*

of members of the public who require legal assistance and representation in furthering and protecting their fundamental rights.[787] The nature of a legal practitioners' daily work has not really changed much since the Industrial Revolution[788] in comparison to the other professions.[789] This includes a quality movement and standard measures of legal services quality and value.[790] It is submitted that technological development can add value to legal services and legal procedures. Katz states as follows with regards to technological development in the legal field:[791]

> "In the field of law, practitioners have fairly readily adopted law office, case management, and communications technologies, for better or for worse. But the acceptance of technological assistance with handling the substance of the law and in the courts has been slower."[792]

It is foreseen that technology will influence the courtroom and accompanied procedures in some major ways, namely:[793]

(a) the manner in which legal representatives present evidence and arguments on behalf of their clients;
(b) changes in the discovery system by way of electronic documents; and
(c) the manner in which legal practitioners start and maintain their cases. In this regard, social media, electronic filing systems and advanced legal research will play an important role.

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787 See Bleasedale *et al* in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 47, where it is stated that technology is transforming the delivery of legal services and administration of justice.

788 See History.com "Industrial Revolution" (undated) https://www.history.com/topics/industrial-revolution/industrial-revolution (accessed 2019-09-19) in this regard. The Industrial Revolution started in Britain in the latter half of the 18th Century and spread to America and the rest of the world between 1830 and 1840.

789 Baker 2018 *Law Library Journal* 13. Also see Linna "Evaluating legal services: the need for a quality movement and standard measures of quality and value – chapter in research handbook on big data law" (12 March 2020) https://www.legaltechlever.com/2020/03/evaluating-legal-services-the-need-for-a-quality-movement-and-standard-measures-of-quality-and-value-chapter-in-research-handbook-on-big-data-law/ (accessed 2020-08-10) in this regard.

790 Linna https://www.legaltechlever.com/2020/03/evaluating-legal-services-the-need-for-a-quality-movement-and-standard-measures-of-quality-and-value-chapter-in-research-handbook-on-big-data-law/.

791 Katz 2014 *Albany Law Journal of Science & Technology* 3.

792 Also see Heyink "An introduction to cloud computing – legal implications for South African law firms" 2012 Law Society of South Africa 2, where the author states the law in South Africa has fallen behind as far as the advancement of new technologies is concerned.

793 Knoetze "Courtroom of the future – virtual courts, e-courtrooms, videoconferencing and online dispute resolution" 2014 (October) *De Rebus* 28 28-29.

However slow, the legal profession has indeed started to adapt to the digital age. This adaptation had also been prompted by the growing pressures for change in the profession.[794] There are several expert systems that have been developed for use by attorneys.[795] There were instances, up until very recently, where some maintenance and domestic violence courts used to issue duplicate applications and court orders by making use of carbon paper. Such courts have also now implemented computerised systems in terms of which such applications and orders are completed in a typed format and printed out. At law firms, legal practitioners are using a multitude of platforms and sources: legislation, website links and hardcopies.[796] During litigation, computer generated images (hereafter referred to as "CGI") can be used in the courtroom in order to display or recreate certain events, thus contributing towards the evidence being presented.[797] Machine learning and AI have also been used to advise judges without making the ultimate decisions for them.[798] These systems are merely consultative and advisory tools that save time and bring consistency to decisions.[799] For example, in Brazil, judges make use of a computer programme which is programmed with an algorithm that enables it to review past court precedents and recommend results in traffic collision matters.[800] Judges can make use of expert systems in order to view sentencing on similar convictions in the past, evaluate the convict's record, the seriousness and frequency of the offence, as well as various other factors that might impact on sentencing.[801] Furthermore, these systems can weigh up various factors and provide judges with reasons for their findings.[802]

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794 Barnhizer 1979 *Journal of Legal Education* 68.

795 Baker 2018 *Law Library Journal* 13; Katz 2014 *Albany Law Journal of Science & Technology* 28. See Bregman "Must-have apps for iPads and other devices" 2013 (March) *De Rebus* 19 19. More applications and programmes have been developed up to time of writing this research, but it is evident that legal practice is adapting to the demands of the Fourth Industrial Revolution. Although all applications are not directed specifically at the legal profession, the legal profession can equally make productive and efficient use thereof.

796 Hutchinson 2017 *Monash University Law Review* 572.

797 Katz 2014 *Albany Law Journal of Science & Technology* 29.

798 Baker 2018 *Law Library Journal* 13-14.

799 Baker 2018 *Law Library Journal* 14.

800 Katz 2014 *Albany Law Journal of Science & Technology* 33; Baker 2018 *Law Library Journal* 14.

801 *Ibid.*

802 *Ibid.*

Similar technology can be used by legal practitioners to determine the probable outcome of civil cases.[803] The computer can use data from previously decided cases, analyse the set of facts at hand and indicate the probability of being successful or not in a claim.[804] Such technology could work well in assisting legal practitioners to quantify non-patrimonial delictual damages in civil matters. In this regard, the AI system could be fed with information about damages awarded in past matters with regards to various scenarios. Relevant variables, including factors surrounding the act, grounds of justification, type of fault as well as whether or not there is any contributory fault from the opponent, factors in mitigation of damages, can assist the AI system to arrive at possible solutions that can be adjusted by practitioners in making the final calculations.

Expert evidence may also benefit from AI in the sense that trustworthy and consistent resources might be at the disposal of presiding officers in order to assist them with the analysis and determining the weight of such evidence.[805] The findings of the AI system therefore only provide assistance to the presiding officers and do not substitute their duty with regards to findings relating to the relevance and admissibility, or not, of such evidence. This approach will ensure that the law of evidence in this regard remains unchanged in that expert evidence is not elevated to such an extent that presiding officers lose sight of their own capabilities and responsibilities.[806] Therefore, expert evidence of this nature should be relevant – and consequently admissible – where it can be of assistance or helpful to the court.[807] It has already been mentioned that CGI could be used in order to recreate or demonstrate certain events. As such, CGI is used by experts in their testimony or, in certain instances, the CGI constitutes the expert.[808] The use of CGI as such can play an important role in order to improve outcomes in complex matters in order to ensure consistency, accuracy, efficiency and fairness in trials when science and law overlap.[809]

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803 Groot "New trends facing lawyers" 2014 (June) *De Rebus* 20 21.

804 *Ibid.*

805 Katz 2014 *Albany Law Journal of Science & Technology* 26.

806 Bellengere *et al The Law of Evidence* 397.

807 *Ibid.*

808 Katz 2014 *Albany Law Journal of Science & Technology* 33.

809 Katz 2014 *Albany Law Journal of Science & Technology* 33-34

Sentencing and expert evidence are not the only areas where AI can play a significant role. As far as drafting is concerned, there are document assembly systems that assist legal practitioners to draft legal documents much faster.[810] Hotdocs is an example of document generating software that is currently used by Legal Aid South Africa in order to facilitate the drafting of civil process and pleadings.[811] In short, the drafter can select a document, *eg* Particulars of Claim. The Hotdocs system then allows for the entry of various information, including details of the plaintiff(s) and defendant(s), cause of action and prayers. After all relevant information has been entered and the correct programme parameters have been selected, the software will generate the particulars of claim. The generated document can however still be edited by the drafter, should it be necessary. A similar system is set to be used by the NMU Law Clinic in the near future and plans in this regard are now nearing the stage of implementation. Such software can save legal practitioners considerable time in the assembly of legal documents in accurate ways and can also contribute to the overall quality of legal documents.

For legal research, the ROSS Intelligence System, powered by IBM Watson, can be used.[812] ROSS, a legal robot, makes use of machine learning technology to refine its research methods and can be accessed by way of a subscription service via a computer.[813] Legal practitioners can ask ROSS a research question in natural language in the same way as they would ask another person.[814] ROSS will peruse the law, collect evidence, draw inferences and deliver highly relevant evidence based answers.[815] ROSS also has the capability to monitor the law at all times in order to notify its users of new court decisions that could affect their research question.[816] In doing this, ROSS learns from all the practitioners, making use of it, to generate better results on a continuous basis.[817] It has been shown that ROSS can save practitioners

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810 Baker 2018 *Law Library Journal* 14.

811 For more information on the Hotdocs system, see Hotdocs (2020) https://www.hotdocs.com/products/ (accessed 2020-05-05).

812 Baker 2018 *Law Library Journal* 14. For more information on ROSS, visit the official website at ROSS (undated) https://rossintelligence.com/ (accessed 2019-09-19).

813 Baker 2018 *Law Library Journal* 15; ROSS https://rossintelligence.com/. The subscription cost starts at US$69 per month. There is also an option to try ROSS for free.

814 Baker 2018 *Law Library Journal* 15.

815 *Ibid.*

816 *Ibid.*

817 *Ibid.*

up to 30% of researching time, similar to the amount of time that attorneys usually spend on research.[818]

Juta and Co Ltd, a well-known South African publishing company, has created Jutastat Evolve, an AI system that is set to significantly impact on how legal professionals conduct legal research and prepare for trials and legal arguments.[819] The system is capable of enhancing the depth of legal research while providing sufficient information for constructing legal arguments.[820] It is described as a "…cognitive analytical research solution for fast, accurate and reliable discovery, data, insights and analytics."[821] Evolve is powered by award winning cognitive technology and can quickly work through large amounts of data in order to find, construct, connect and visualise the required information.[822] On 18 November 2019, at the SAULCA Workshop and AGM in Johannesburg, Mr Stefan Kruger from Juta Publishers addressed the delegates on Jutastat Evolve. He stated that Evolve is a major improvement over the already well-known Jutastat. Evolve is basically an advanced AI engine that is able to draw logical inferences from provided information in order to generate advanced search results. A knowledge graph can display various pieces of information that are relevant to a specific court case, including a piece of legislation, names of attorneys, names of advocates and names of presiding officers. Jutastat Evolve is currently an active system.

Technology such as ROSS and Jutastat Evolve definitely have the capability to make research easier and more productive. However, computers do not yet have the ability to move beyond natural language understanding, making it impossible for them to do effortless expert legal research.[823] Research requires creativity that requires context and pragmatic level understanding in order to be performed adequately.[824] This is

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818 *Ibid.*

819 "A take on the Legal Innovation & Tech Fest" https://www.futureslawfaculty.co.za/a-take-on-the-legal-innovation-tech-fest/?mc_cid=d3c1dd635a&mc_eid=2744c002ab&utm_campaign=Oktopost-Legal+Innovation+Tech+Fest&utm_content=Oktopost-facebook&utm_medium=social&utm_source=facebook.

820 Juta "Jutastat Evolve" (undated) http://web.juta.co.za/cn/ara9w/evolve?s=twitterad1 (accessed 2019-09-25).

821 *Ibid.*

822 *Ibid.*

823 Baker 2018 *Law Library Journal* 20.

824 *Ibid.*

well-known to all who have entered a catch phrase into a search engine like Google: the results are not always in the same context as what was actually being searched for. The computer is thus not able to read the human mind and understand what it truly wants. Law can therefore challenge AI to articulate an accurate basis for its findings, because law is an area filled with complexity, uncertainty, defeasibility and conflict.[825] Christopher Columbus Langdell, Dean of Harvard Law School between 1870 and 1895, stated that the law is a science and that the library is its laboratory.[826] Since his time, some significant changes have occurred, *inter alia*, that a plethora of information has been made accessible by way of computers and the internet.[827] It is almost impossible to conduct an online search with no results.[828] This should however not be an excuse for students and legal practitioners to neglect the importance of adequate legal research. Students must therefore be encouraged to use the research, advanced by the AI system, as a guideline and to verify such findings by way of additional research and assessments of their own. They must confront the ability of the AI system to generate an accurate list of all options and risks linked to a client's case after relevant and unstructured information about the case have been fed to the computer. Although the outcome may be fairly accurate, students should never depend on such an assumption. As future legal practitioners, their duty in this regard should not be neglected, especially taking into account the professional responsibility and accountability that they have towards their clients and the legal profession. The process can be compared to utilising a GPS device: although a GPS may generate a route towards a destination, that route may not always be the best or the shortest route. It is therefore left to the driver to differentiate between the best or shortest route, and the choice generated by the GPS. Students however depend too much on whatever their search results yield, whether the information discovered is entirely relevant or applicable to the question or set of facts at hand:

> "…students…rely too much on the machine, they rely too much on search results but they don't really have that kind of critical or original thinking to drive the research ideas. So I think in terms of training, that I think it's a starting point, the machine, the search platform, everything is a tool – it's not something that they

825 Baker 2018 *Law Library Journal* 21.

826 Baker 2018 *Law Library Journal* 20.

827 *Ibid.*

828 Hutchinson 2017 *Monash University Law Review* 576.

> expect the machine and result to be the answer. I think that's part of the education. That is your job."[829]

Experience will play a pivotal role in this regard. This experience should already start at law school and CLE is aptly suited to develop it. It has been suggested that a good way of teaching such skills is for law teachers to encourage students to find specific material and thereafter analysing and evaluating that material.[830] Any negative outcomes of such research must also be pointed out by the law teacher.[831] Such an approach involves critical thinking, problem solving, reflection[832] as well as effective research skills.

DeepQA is a good point of departure in finding relevant case law, but more complex cases, as well as cases not occurring regularly and therefore unpredictable, may pose a challenge to it.[833] It will be a better option for clients, involved in such cases, to simply consult with attorneys without the involvement of AI than for attorneys to attempt to embark on an extensive search for results that they may not even find.[834] However, if viewed from another perspective, there may be another opportunity in this regard for legal practitioners, including law clinics. In easy, regularly occurring cases, many people settle without the involvement of attorneys.[835] Such persons may however be in need of a professionally drafted settlement agreement in order to afford protection to them. In such cases, AI systems could fulfil the role of paralegals assisting those people. Self-help stations could be created at various venues, including at law clinics, where people can enter their information into a computer for the purpose of generating settlement agreements. This principle can also apply to undefended divorces: an AI system can be fed with information for the purpose of drafting a summons and particulars of claim, as well as a deed of settlement. Similar systems can be made applicable to contracts of lease and/or sale, acknowledgements of debt and also income and expenditure sheets for maintenance cases. AI systems of this nature will significantly advance access to justice, as well as be cost effective

829 Hutchinson 2017 *Monash University Law Review* 587.
830 Hutchinson 2017 *Monash University Law Review* 576.
831 *Ibid.*
832 *Ibid.*
833 Baker 2018 *Law Library Journal* 22.
834 *Ibid.*
835 *Ibid.*

for society as far as legal costs are concerned. This will then leave legal practitioners, clinicians, students and administrative staff more time to deal with more serious and complex cases. It will also make more time available for student training. These self-help stations must however not be left unattended. It is submitted that a paralegal or even a clinical law student can be posted at such station in order to facilitate the self-help process and to provide assistance to clients wherever necessary. For the student, this opportunity will provide an enhancement of skills and additional learning opportunities in that the student's self-confidence, drafting skills and ability to communicate with members of the public may be improved. After the computer has generated the applicable documents, the paralegal or student can peruse it in order to ensure that everything is accurate. When inaccuracies occur, programmers must reprogram the computer so as to avoid such inaccuracies in the future. In this way, the ability of the computer to assist people "on its own" is refined.

It is clear how beneficial the mentioned AI systems can be to legal practice, CLE and the procedural law modules. Digital technology brought along many changes and CLE programmes provide the opportunity for students to engage with these changes in order to familiarise themselves with the transforming legal landscape and also increase public access to legal advice and legal guidance.[836] Students therefore need to be made aware of AI systems and the benefits they can hold for their future law careers,[837] whether they are opening their own practices or taking up employment as court officials, *eg* presiding officers. Creating this awareness is important, as the world is engulfed by technology and advancements in the business world and students need to have knowledge about modern trends that could set their future practices and careers apart from others in a competitive market. Although many law clinics do not use these AI systems, or parts thereof, awareness of the impact of the Fourth Industrial Revolution on legal practice could be propagated during classroom sessions and tutorials. Even during practical sessions at the law clinic, during simulations, or during procedural law module lectures taught by way of the CLE methodology, students should be reminded of the advantages of AI:

836 Bleasedale *et al* in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 47.

837 See Bleasedale *et al* in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 48 in this regard.

(a) when drafting legal documents, students can be informed about the time saving effect of having document assembly systems in their future practices;

(b) when researching, the ROSS system and its time saving advantages can be highlighted; but

(c) students must also understand that AI is merely there to assist them. The application of AI systems in relation to adducing expert evidence in the courtroom, as discussed earlier, serves as an example in this regard. In the same way as presiding officers must approach such expert evidence, legal practitioners should not use AI as an excuse to relinquish their professional responsibility towards their clients and to the legal profession. They must therefore learn to be in control of AI when making use of it, *ie* collaboration between the practitioner and the AI system must exist. As future practitioners, students should not be taught to blindly follow whatever results AI generates for their clients and their cases; and

(d) more use could be made of blended learning, as already discussed.[838] Blended learning is a current national and international trend[839] and is another manifestation of the impact of the Fourth Industrial Revolution that speaks directly to the millennial student. It can contribute to maintaining the highest quality of tertiary education that is possible.[840] On a micro level, it can achieve educational equity by individualising cognitive aspects of study materials.[841] On a macro level, it may bring about a variety of educational advancements that may facilitate a move to commence engagement in a competitive global market.[842] In this way, students are stimulated for the world of employment and practice where online activity is a necessity in everyday life.

As far as the classroom component of CLE is concerned, technology enables the recording and broadcasting of classroom sessions and tutorials.[843] Classroom

838 See 4 3 3 and 4 3 4 in this regard.

839 Crocker 2006 *Journal for Juridical Science* 8, 13-15.

840 Crocker 2006 *Journal for Juridical Science* 23.

841 Crocker 2006 *Journal for Juridical Science* 23. This was already discussed in 4 3 3, *ie* that study materials may be enhanced by way of hyperlinks that some students may prefer to follow in order to conduct additional reading on certain topics. Other students may prefer not to do so and, in doing so, just study the text as provided with no additional information.

842 Crocker 2006 *Journal for Juridical Science* 23.

843 Stuckey *et al Best practices for legal education* 160.

sessions can be presented from anywhere in the world and can involve a variety of guest speakers and guest teachers, including legal practitioners. The same study content, that would have formed the topics of conventional classroom sessions, can now be discussed with students during online training sessions via applications like Microsoft Teams,[844] Zoom,[845] Skype[846] and Whatsapp,[847] to name but a few. Students still have the opportunity to ask questions verbally, as well as to type questions in text fields provided, which questions can be answered by the clinician. Student attendance must be compulsory as far as these online sessions are concerned in order for students to receive immediate answers to any questions that they might have. However, due to many variables, including but not limited to time constraints, the availability of electronic devices, the availability of data and proper online connectivity, all students cannot attend the said sessions at a given time. Due to these classroom sessions being recorded, students can watch and replay these sessions at any time during the day or night when it is suitable to them.[848] Should they have questions, they can direct such question at the clinician during the next live classroom session, tutorial session, or contact the clinician via e-mail or other online communication forum in which message the questions are clearly phrased. Tutorials can be conducted in exactly the same manner. The mentioned applications fulfil a valuable function as far as CLE is concerned, as its screen sharing function allows clinicans to present documents and other presentations online in order to facilitate the topics under discussion. This system has been implemented as part of the Legal Practice module at NMU and delivers satisfactory results. As far as assessments are concerned, online teaching and learning platforms like Moodle[849] can accommodate, *inter alia*, online quizzes and assignments that could be useful in teaching the theoretical knowledge, research and drafting skills of students.[850] Technology and AI therefore hold many new and exciting possibilities for CLE and work at law clinics.

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844 Microsoft "Microsoft Teams" (2021) Download Microsoft Teams Desktop and Mobile Apps | Microsoft Teams (accessed 2021-05-17).

845 Zoom (2021) Video Conferencing, Web Conferencing, Webinars, Screen Sharing – Zoom (accessed 2021-05-17).

846 Microsoft "Skype" (2021) Skype | Communication tool for free calls and chat (accessed 2021-05-17).

847 Whatsapp (2021) WhatsApp (accessed 2021-05-17).

848 See Stuckey *et al Best practices for legal education* 160 in thie regard.

849 Moodle (2021) Moodle - Open-source learning platform | Moodle.org (accessed 2021-05-17).

850 Also see Stuckey *et al Best practices for legal education* 161 with regards to the role of technology as far as assessments in CLE are concerned.

In the early stages of the 2000s, it was stated that computers and AI would assist legal practitioners to solve legal problems, analyse questions, as well as to access the correct and appropriate common law and statutory law.[851] In this way, a machine can achieve in minutes what a legal practitioner could possibly only achieve in thousands of hours.[852]

There are already universities that provide CLE by way of virtual and digital means. An example is the Open Justice Law Clinic at the Open University in the United Kingdom.[853] This law clinic opened its doors in 2017.[854] Presenting training to students in a meaningful way however presented some logistical and other problems, especially considering that long-distance students also had to be served with education.[855] The virtual setting however proved to be successful and valuable. The law clinic provides an industry standard online platform through which legal services are delivered via a secure web portal.[856] Students can therefore work remotely and, in doing so, assist members of the public with legal advice and solutions to legal problems in the same way that actual consultations would have taken place in conventional law clinics.[857] The Open Justice Law Clinic is an excellent example to show that CLE is ready to take a firm stance as far as legal education in the digital era is concerned. It can provide a good opportunity to teach, *inter alia*, communication skills to law students as part of advocacy of legal matters, as well as technological developments in the procedural law modules. It further contributes towards the employability skills of graduates.[858] Another excellent example of a law clinic that uses technology in order to provide not only legal education to students, but also promote access to justice, is the Virtual Law Clinic (hereafter referred to as the "VLC") at Cumbria University.[859] The VLC is an online law clinic managed by a partnership of

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851 Kirby "A law libraries love affair" 2004 12(4) *Australian Law Librarian* 7 10-11; Hutchinson 2017 *Monash University Law Review* 570.

852 *Ibid.*

853 Bleasedale *et al* in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 48.

854 *Ibid.*

855 *Ibid.*

856 *Ibid.*

857 *Ibid.*

858 The concept of "employability", as an important graduate attribute, is discussed in Chapter 5.

859 See Thanaraj and Sales "Lawyering in a digital age: a practice report introducing the Virtual Law Clinic at Cumbria" (undated) Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf (accessed 2021-05-15) 1.

students, supervising tutors and *pro bono* legal practitioners from legal practice.[860] The aim of the project is to provide initial and general information and legal advice towards the solution of non-complex legal disputes.[861] Students work, discuss legal matters with clients online, as well as handle all transactions from an office within a secure digital environment.[862] All aspects of cases are being recorded and stored in archives.[863] The supervising tutors receive new cases, after which they will consider the educational benefit, estimate time that the case will demand, as well as complexity of the case.[864] If the matter cannot be handled by the VLC, the supervising tutors will suggest alternative legal assistance to the applicants by working collaboratively with local law firms.[865] If the matter can be handled by the VLC, clients get the opportunity to upload all relevant and applicable documents that students will need during a consultation.[866] Students consult with clients, draft letters and communicate with other stakeholders on behalf of clients, which communications include negotiations and settlements.[867] The VLC should however not be viewed as a simulated activity, as some people have thought it to be.[868] The VLC aims to deliver experiential learning while generating confidence in law students in working in a practical environment.[869] Supervising tutors fully realise that the success of students is determined by their own efforts as far as application of their knowledge, reflection and self-evaluation is concerned.[870] In this way, students are presented with opportunities to explain why they decided to take certain legal actions, as well as to discuss and reconsider such legal actions.[871] This approach fully supports constructive legal education.[872] Students furthermore get opportunities to evaluate social and legal issues to a significant extent and, in the process, develop skills in research, communication, consultation, drafting, negotiation and problem solving.[873] The work that the students

860 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 2.
861 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 7.
862 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 7-8.
863 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 8.
864 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 9.
865 *Ibid*.
866 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 10.
867 *Ibid*.
868 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 20.
869 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 13.
870 *Ibid*.
871 *Ibid.*
872 See 2 3 with regards to constructivism and constructive legal education.
873 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 13.

do also creates an awareness of ethics and the professional responsibility and conduct associated with legal practitioners.[874] This will enable students to appreciate the position of people in society, as well as contribute towards the students' maturity and professional responsibility.[875] Furthermore, in light of the digital nature of the VLC, the work enables students to appreciate the changes that the future will bring as far as the delivery of legal services is concerned, which includes alternative and cost-effective means which are affordable and accessible to members of the public.[876] The intended learning outcomes of the VLC are the following:[877]

(a) to address changes in the manner that legal services are delivered;
(b) to undertake and dissemante research relating to CLE in the digital domain; and
(c) to present law students with opportunities to partake in digital lawyering experiences.

The VLC can make law graduates more capable of rendering legal services to members of the public in a modern and efficient manner.[878] Thanaraj and Sales propose that law schools should add a clinical component to their law clinic and other experiential training methods that would present students with opportunities to utilise technology in order to promote the delivery of legal services.[879] This will equip students with core competencies that will be required for the legal profession as it adapts to technological changes.[880] It will furthermore play a role in bridging the gap between access to justice by way of online services in the most accessible and convenient matter on the one hand, and equipping law students with more modern and digital legal education on the other hand.[881] This will help to prepare law graduates as the future of the legal profession.[882] It is therefore clear that the time is ripe for adopting technology as a central part of learning towards becoming a legal practitioner.[883]

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874 *Ibid*.
875 *Ibid*.
876 *Ibid*.
877 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 4.
878 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 1.
879 *Ibid*.
880 *Ibid*.
881 *Ibid*.
882 Thanaraj and Sales Thanaraj & Sales – Virtual Law Clinic at Cumbria.pdf 7.
883 *Ibid*.

In light of the discussion relating to the developments at the Open Justice Law Clinic and the Cumbria VLC, it is submitted that law schools should make it a priority to introduce digital clinical components in their CLE programmes, as well as equipping their law clinics with the necessary and applicable technology in order to not only train law stutdents for legal practice, but also to promote access to justice. In doing so, law schools will significantly advance transformative legal education.

It seems that the NMU Faculty of Law is moving in this direction. The NMU Law Clinic is currently involved in negotiations with the law firm Cliffe Dekker Hofmeyr (hereafter referred to as "CDH") with regards to collaboration between the two entities. A formal structure in this regard has already been devised at the time of completing this research. The collaboration will basically involve a digitisation of the law clinic's workflow to align with the trends of the modern business world.[884] The law clinic will, *inter alia*, have access to template generating software, as referred to earlier, and a cloud-based database from which various online legal templates and document generating software would be available for use by clinicians, candidate attorneys and clinical law students. Cloud storage will also be available, in essence substituting and/or supplementing the paper-based filing system of the law clinic. Paper based client files will be supplemented by electronic files, accessible by both law clinic staff and students from off campus venues. Online legal library sources, used by CDH, will also be at the disposal of the law clinic. Furthermore, legal practitioners from CDH will be available at certain times via online platforms, including Microsoft Teams, to collaborate with clinicians, candidate attorneys and students in cases where issues may be experienced as far as the utilisation of the digital system is concerned, thus incorporating external expertise into the workflow. This will undoubtedly strengthen the link between the legal profession and the university and contribute to the professional and practical training of law students. It will furthermore bring AI within the realm of the law clinic and help to prepare students for the modern trends that await them after graduation. If this system proves to be successful as far as the NMU Law Clinic is concerned, it could be rolled out to other law clinics in South Africa, bringing university

884 The project is referred to as "Law Lab." Meetings between CDH and the NMU Law Clinic is, at time of completing this research, still ongoing. At time of completing this research, the Law Lab has not been implemented and/or tested at the NMU Law Clinic.

law clinics to the forefront of technological development as far as legal aid institutions are concerned.

As far as civil procedure is concerned, the digital age has also attracted the attention of the South African judiciary towards a need for change in the manner in which the administration of matters is handled. The Minister of Justice and Correctional Services, Ronald Lamola, has indicated that the budget for information technology and modernisation has already been increased from R529 million to R688 million.[885] The country is looking towards implementing a paperless digital courtroom system by making use of Caselines,[886] a global provider of digital evidence management that will enable presiding officers and legal practitioners to perform their work in an online but secure environment.[887] This system can replace paper based court and client files, while simultaneously removing the need to make countless copies of documents, transporting such files to and from court, as well as the possibility of losing files.[888] The software will initially be used for all civil litigation across South Africa and will be an entirely digital platform without the need for any paper based elements.[889] It provides for the creation and presentation of a fully digital court bundle, consisting of evidence in multimedia format, tools for pre-trial preparation and secure videoconferencing for virtual hearings.[890] The system is already used in the United Kingdom and the Common Market for Eastern and South Africa and is set to bring the

885 Ensor "Ronald Lamola commits to modernisation of justice system (23 July 2020) https://www.businesslive.co.za/bd/national/2020-07-23-ronald-lamola-commits-to-modernisation-of-justice-system/ (accessed 2020-07-24).

886 See the Caselines website at Caselines (undated) OCJDCS (caselines.com) (accessed 2020-11-23) and at Caselines (2020) Cloud-Based Legal Evidence Management Platform - CaseLinesCaseLines (accessed 2020-11-23).

887 Biz Community "South African OCJ implements digital justice system" (14 May 2019) https://www.bizcommunity.com/Article/196/546/190753.html (accessed 2019-05-17). On 18 November 2019, at the SAULCA Workshop and Annual General Meeting held at Johannesburg, Mr Lourens Grove, from the University of Pretoria Law Clinic, confirmed that Justice Mlambo stated at a media briefing that a paperless court system could be reality before the end of 2020. The only reason, as to why a legal practitioner would set foot in a courtroom, would be to argue a case. He also confirmed that the legal profession is very slow to adapt to technological changes and advances. He emphasised the notion that students must be taught to use technology with confidence.

888 Biz Community https://www.bizcommunity.com/Article/196/546/190753.html; Makinana "New justice minister Ronald Lamola to digitise SA's paper-laden courts" (3 July 2019) New justice minister Ronald Lamola to digitise SA's paper-laden courts (timeslive.co.za) (accessed 2020-11-24).

889 *Ibid.*

890 Biz Community https://www.bizcommunity.com/Article/196/546/190753.html. Also see the discussion of the future courtrooms elsewhere.

world fully into the digital age as far as procedure is concerned.[891] The limiting of losing court files is especially appealing, as it has been an ongoing struggle for legal practitioners to arrive at court only to be informed by the Clerk or Registrar of the particular court that the court file is missing. Files also sometimes go missing or get misplaced in the offices of legal practitioners. The risk of losing files is obviously a great one: documents can fall into the hands of anyone, thus compromising the confidentiality principle between attorney and client. Furthermore, justice can be compromised by court files going missing in that matters will have to be postponed in order to create "dummy files". Postponements of this nature also postpone justice for parties seeking relief. This modernisation is endorsed by Chief Justice Mogoeng Mogoeng. With reference specifically to electronic filing and record keeping, he opines that modernisation and automation would facilitate the efficient management of cases, the speedy finalisation thereof, as well as minimising the disappearance of court files.[892] The Chief Justice also states that such a modern system will allow for greater access to justice.[893] He however does not state how this will be accomplished. It is submitted that the self-help stations, as previously discussed, should be one of the options, as it will bring the law and procedure closer to the people at a fraction of the price that they would normally have to pay when employing the services of legal practitioners.

The Caselines system will further eliminate the need for presiding officers to travel long distances at difficult hours in order to review legal documents in urgent matters.[894] It will also eliminate the need for attorneys to travel long distances for attending pre-trial conferences, the viewing of evidence, as well as hearings. It is however not clear when this system will be fully introduced into the legal profession. At this stage, it is only available in selected divisions of the High Court of South Africa.[895] Scepticism

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891 Biz Community https://www.bizcommunity.com/Article/196/546/190753.html; Groot 2014 *De Rebus* 21. These trends are gaining popularity in many overseas countries.

892 O'Reilly "Chief Justice Mogoeng seeks judicial independence" 2013 (June) *De Rebus* 7 7.

893 *Ibid.*

894 Biz Community https://www.bizcommunity.com/Article/196/546/190753.html.

895 See Gauteng Attorneys Association "Consolidated directive court operations High Courts of Gauteng National State of Disaster 18 September 2020" (2020) Consolidated Directive Court Operations High Courts of Gauteng National State of Disaster 18 September 2020 - Gauteng Attorneys Association (gaa.org.za) (accessed 2020-11-23) in this regard. Clause 4.1 of the consolidated court directives make mention of the Gauteng divisions of the High Court. Also see Jele "Implementation of the Caselines system in the Gauteng Division of the High Court" (29

has been indicated as far as the introduction of a more modern system is concerned, as it has been in the planning for the past 20 years, but never materialised.[896] Its introduction will however transform legal education radically in that students will have to be taught new ways of conducting civil procedure, as physical actions like serving and filing documents will most probably be eliminated or limited to instances where electronic serving and filing are not possible. A pilot of a full paperless trial simulation took place during July 2020 in South Africa during which all parties where able to use their own electronic devices to access and refer to digital versions of case material.[897] CLE and the teaching of civil procedure will be important in preparing students for this practice. It is submitted that criminal proceedings can be handled in a similar manner: police dockets and other documents like charge sheets, medico-legal reports, documents from the medical examiner as well as the list of an accused's previous convictions can be stored on a cloud-based system and retrieved from there for trial and related purposes. However, access of presiding officers to docket content may need to be restricted in order to ensure impartiality in matters.

It will be interesting as to whether or not legal practitioners will react positively to such new and innovative technological developments in legal practice, especially taking into account the risks and more stringent responsibilities relating to maintaining client confidentiality. Irrespective of their reaction, it appears that technological development and advancement are inevitable for modern society and the legal profession is not overlooked by these developments. Electronic documents, electronic filing, virtual courtrooms via videoconferencing and AI systems performing the work of legal practitioners may soon be a reality on a global scale. Whether South Africa is ready for such a change, remains to be seen. Affordable data, availability of electronic devices, especially to indigent members of society and online connectivity may be the main factors that need to be addressed. It is especially in these circumstances that self-help stations at law clinics, as already discussed, can serve the fundamental purpose of providing additional access to justice. Clinicians and law teachers need to be privy of these developments and prepare students for what may await them in

January 2020) Implementation of the CaseLines system in the Gauteng Division of the High Court – De Rebus (accessed 2020-11-23) in this regard.

896 Ensor https://www.businesslive.co.za/bd/national/2020-07-23-ronald-lamola-commits-to-modernisation-of-justice-system/.

897 *Ibid.*

practice. As soon as these changes are implemented, CLE needs to adapt its teaching methodology to facilitate the training of students in the use of technology. The same goes for the procedural law modules. Appropriate use of these technologies cannot remain theoretical. A practical approach, demonstrating its use and possibilities, is necessary. Technological development should not be left out of the curriculum and left only to legal practice to be taught. Knoetze captures the importance of adapting to the technological changes in the following statement:[898]

> "Some members of the legal profession may view these modern communication devices as a threat; others may dismiss them as mere gadgetry. It should, however, be viewed as an opportunity for imaginative and constructive use in furthering our goal of administering justice properly and promptly. Digitising of the legal world will not only improve access, but also change the way litigators practise law."

During the Covid-19 pandemic, courts in South Africa did not have another choice than to conduct certain court proceedings, like motion proceedings, online.[899] In this way, the rather conservative court system in South Africa had been forced to adapt to modern trends and to employ technology actively in the litigation process. It is submitted that this is an ideal opportunity for litigants and court officials to pay attention to the benefits that technology may hold for legal practice.

The Covid-19 pandemic has also forced universities to adapt in order to facilitate quality education to students. Law schools are no exception in this regard as far as CLE is concerned. In this regard, online legal education fulfils a vital role, as physical class attendance, as well as physical attendance relating to other academic acitivites became impossible in that physical academic activities had been suspended to a large extent.[900] The CLE programme at NMU was no exception in this regard. The approach, followed by NMU and broadly discussed in this section, should not be construed as the only and/or most desirable approach that should be followed in

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898 Knoetze 2014 *De Rebus* 32.

899 See Manolios and Baiphaphele "South Africa: Litigation in times of lockdown" (9 May 2020) https://www.mondaq.com/southafrica/litigation-contracts-and-force-majeure/930362/litigation-in-times-of-lockdown (accessed 2020-10-14) in this regard. Former Chief Justice Dikgang Moseneke confirmed that he had listened to witness testimony as well as conducted motions by electronic means during this time – Moseneke *All rise: a judicial memoir* presented at webinar (21 October 2020).

900 Welgemoed "Clinical legal education during a global pandemic: suggestions from the trenches – the perspective of the Nelson Mandela University" 2020 23 *Potchefstroom Electronic Law Journal* 1 2.

instances of this nature, but as but one manner in which CLE can presented during testing and uncertain times.[901] It is submitted that that it should furthermore be construed as but one approach towards the online presentation of CLE which law schools, who has never presented CLE in an online manner, could find very useful. As CLE could not reach a complete standstill, the clinical programme at NMU had to be reworked in a very short period of time.[902] The predominantly used live-lient model had to be sacrificed for more written online educational methodology.[903] Although it is not ideal for the live-client model to be dispensed with, albeit temporarily admidst the currency of the pandemic, legal education could continue in the spirit that "no student will be left behind."[904] In order to achieve CLE of the best possible quality, the online teaching and learning platform of NMU, Moodle, became valuable and extremely useful.[905] The Moodle site for the Legal Practice module had been used for the dissemination of information to students, as well as for submission of assignments.[906] Students had to work through written sets of facts, analyse such facts, conduct legal research, provide legal advice and draft documents in order to assist clients in a simulated manner in writing.[907] Initially, online lecturing via online applications like Microsoft Teams and Zoom did not take place, as ways were sought to bring education to students in a speedy, effective but also cost-effective manner.[908] This does however not mean that live online sessions with students should be left out of sight. Live plenary sessions could be arranged and presented via online platforms. Live online sessions could serve as significant information dissemination sessions for students during trial advocacy presentations.[909] Furthermore, students can conduct mock trials and moots live online and, in doing so, their performance could be assessed by clinicians.[910] It is submitted that the manner, in which NMU has adapted to presenting CLE during testing and changing times, constitutes transformative legal education. Despite the devastating nature of the pandemic, the university was forced

901 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 21.

902 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 10.

903 *Ibid*.

904 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 11.

905 *Ibid*.

906 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 14.

907 See Welgemoed 2020 *Potchefstroom Electronic Law Journal* 13-17 in this regard.

908 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 14-15. This situation however changed in 2021 with the introduction of online lectures and tutorials in the CLE programme at NMU.

909 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 19.

910 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 19-20.

to consider alternatives to the conventional manner of delivering CLE. This is one manner in which the Fourth Industrial Revolution firmly situates itself in legal education. Law schools and law clinics can furthermore share their experiences in this regard with one another in order to learn new ways of providing quality CLE to students in new and innovative ways.[911]

It should also not be left out of context that education with regards to digital technology is a requirement in terms of SAQA. In terms of the standard for the LLB degree, SAQA provides, *inter alia*, the following in this regard:

> "The learner will, where practicable, have acquired computer literacy to effectively communicate, retrieve and process relevant data in a legal environment.
> Supporting specific outcomes
> - Communicate by using electronic mail.
> - Search and retrieve information over the Internet using search engines and electronic facilities."

These technological developments are very appealing to both Generations Y and Z. Millennials, and especially centennials, are constantly operating devices and computers and are fond of experiencing new ways of conducting activities and even studies. The digital age, as well as the "new" environment in which society currently finds itself, therefore speaks directly to their needs as far as lifestyle and study methods are concerned. In order to provide the best possible training to millennials, the five R's play a pivotal role:[912]

(a) *with regards to research-based methods*: computers and AI provide a new learning strategy to millennial students, as they can navigate multiple websites and information links in order to arrive at study material. This caters for their audio-visual and kinaesthetic needs. Because their attention span is much shorter than that of Generation X, lectures should be shortened and the remaining time replaced with research based or practical assignments and/or activities, including problem solving, moot courts and mock trials. In this way, students do not have to sit still, but can actively participate in the learning experience in a manner that simulates a professional working environment;

911 Welgemoed 2020 *Potchefstroom Electronic Law Journal* 25.

912 See 4 7 4 1.

(b) *with regards to relevance*: the relevance of a particular lesson should be clearly indicated to students. In this way, students will be more amenable to search for information by using various search engines;

(c) *with regards to rationale and a more relaxed learning experience*: millennials are constantly looking for justification for certain actions or policies. It should however not be problematic to convince them to employ digital methods of studying when requiring them to complete assignments and conduct research in light of the fact that they are very active in the digital domain. Furthermore, when addressing the kinaesthetic needs of millennials, they will become more creative when participating in assignments and activities; and

(d) *with regards to rapport*: clinicians and law teachers must ensure that they provide individual attention to students and to their activities. By providing constructive feedback and discussions with students about their progress, it will ensure motivation to students to constantly reflect on their actions and strive to improve in their development towards future legal practitioners.

It is submitted that the five R's relates to transformative legal education, in that it integrates the digital era to the teaching and learning of students, as well as its contribution towards constructivism, in that students learn and acquire knowledge by way of new experiences.[913] CLE, although not exclusively,[914] provides for all these needs. The methodology is interactive, practical and elastic so as to adapt to the changes of the legal profession. It prepares students for legal practice; therefore, should new trends engulf the legal profession, those trends also need to be taught to students. There is therefore not doubt that CLE should be the preferred teaching methodology in teaching the procedural law modules in a more practical manner, incorporating the modern developments that await the legal profession in the near future.

As far as centennials are concerned, it is equally imperative that modern developments should be incorporated in teaching the procedural law modules by way

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913 See 2 1.

914 It is also possible that computer skills and new trends in AI can be taught to law students in another module involving digital technology. However, it is argued that, as far as the legal profession is concerned, CLE *inter alia* being an inherent practical teaching methodology, is apt for teaching such skills.

of CLE. Due to the fact that centennials had been born amidst the internet and rapid rise of technology and that they prefer online teaching and learning methods,[915] traditional teaching methodologies will have to be revisited. Furthermore, as centennials appear to be competitive and adamant about financial gain in the workplace, as well as voicing their opinions in order to make a contribution wherever they can,[916] it is submitted that they should be taught in a practical manner that will enable them to enter the legal profession with confidence, ready to make constructive changes wherever they can. In this regard, it must also be kept in mind that centennials prefer experiential learning to traditional teaching and learning methodologies.[917] The mentioned constructive changes could benefit the profession especially as far as the use of technology is concerned, as centennials are fairly skilled in using technology in order to obtain quick and efficient results. Also, centennials are passionate about using dialogue and discussion in order to solve disputes,[918] which may result in them being able to thoroughly discuss, analyse and solve legal issues between parties. Considering all of these aspects, quicker access to justice and ultimately greater client satisfaction could be promoted, ultimately resulting in a more professional and accountable legal profession as envisaged by the LPA.[919] In this way, the legal profession will be forced to adapt more rapidly to the changes brought about by the Fourth Industrial Revolution. A concern might be that the goal of financial gain in the workplace might potentially divert centennials' attention from the best interests of their clients. This concern however emphasises the duty on law schools to adequately prepare students for legal practice as far as professionalism, ethics, legal procedure and the social and human elements attached to all cases, are concerned. It is submitted that law clinics and CLE, with its focus on social justice for especially the indigent members of society, are suitable ways by way of which this concern can be addressed. Not only will the students be taught how to effectively use legal procedure in practice, but will they also be schooled not to become cold-blooded legal practitioners who are only interested in achieving financial prosperity.[920]

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915 See 4 7 4 1.

916 *Ibid*.

917 *Ibid*.

918 *Ibid*.

919 In this regard, see 5 2 2 1.

920 See 2 3 in this regard.

Some of these changes are already anticipated and being prepared for by law clinics all over South Africa. At a workshop, hosted by SAULCA[921] from 18-20 November 2019 in Johannesburg, the implications of the Fourth Industrial Revolution, AI and blended learning for law clinics and CLE, were discussed in some detail. In this way, clinicians are being prepared for changes in the way that law clinics may operate in the future, as well as for changes in legal procedure and the use of evidence. It should also be noted that SAULCA is presenting workshops on a regular basis in order to keep its members, who are the various university law clinics in South Africa, abreast of new developments in legal practice and CLE.

The revolutionary possibilities that technology present for legal practice, as well as for law clinics and the training of law students, should be considered in light of the questions of the World Economic Forum, as stated earlier.[922] It is submitted that this consideration will also provide a proper summary about the benefits of technology and AI for CLE, procedural justice, legal education, members of the public, as well as transformative constitutionalism, keeping in mind the discussion about the role of AI in legal practice as set out in this section.

Firstly, as to whether technology can be controlled in order to improve people's lives, the question should be answered in the affirmative. For students, it means that sufficient time should be invested in training students to use technology and AI in legal practice with a view towards advancing the rights of members of the public. Online consultations, self-help stations, document assembly software and online court proceedings can be life changing concepts in this regard. In training students as such, it means that they are presented with opportunities to develop valuable graduate attributes for use in executing practical duties and in legal practice after graduation. For members of the public that have online connectivity, online consultations can bring about legal advice in instances where they cannot visit law clinics, mobile law clinics, law firms or other instances where they can obtain legal advice. In a country like South Africa, this is an important consideration in light of the fact that poverty has brought about many issues in society. Members of the public, especially those residing in

921 See the SAULCA website at www.saulca.co.za.

922 See 4 7 4 1.

informal settlements or rural areas, might not always have the necessary financial resources in order travel to a law clinic. Some members may have the necessary resources to travel, but may be bedridden due to incapacity, illness or a disability. Moreover, mobile law clinics might not be active in the vicinity where such members are residing. Online consultations, with the concommitent provision of online legal advice, will keep these members informed of their rights and legal position and, in the process, save them traveling time, traveling costs and bringing legal assistance to their doorstep in an instant. They do not have to sit and wait for appointments and, in doing so, waste valuable time. Legal advice can be conducted via Skype, Facebook,[923] Whatsapp, Microsoft Teams, Zoom, as well as other online platforms.[924] It is submitted that this significantly advances access to justice[925] and that it constitutes transformative constitutionalism in action. The member's rights are attended to and due regard is paid to the human element, *ie*, the member's personal circumstances and how technology can help to cater for that. In order to achieve this, university law schools should ensure that law clinics are equipped with proper online connectivity and the required hardware and software in order to accommodate online consultations. During CLE sessions, students should also be trained as far as online etiquette is concerned in order for them to properly conduct such consultations. Adequate supervision over the students should also be available at all times during a consultation. As far as online court proceedings are concerned, CLE can play an important role in the teaching and learning of procedural law modules, as well as advancing transformative constitutionalism. Online litigation in itself holds the benefit of serving and filing of pleadings happening faster, which may bring about quicker allocation of trial dates by the various courts. The availability of all stakeholders in a trial should be facilitated by the online process in the sense that traveling to the location of particular court is eradicated. An obstacle might be where some stakeholders, most probably members of the public, do not have adequate connectivity, in which case, they could attend the trial online from the law clinic who is representing them. If they cannot travel to the law clinic, the possibility still exists that the law clinic can look into the provision of data to the said member to facilitate attendance of the trial. Whatever

923 Facebook (2021) https://www.facebook.com/ (accessed 2021-05-17).

924 See Roder *Mobile courts, legal clinics and microjustice* 3 in this regard.

925 Roder *Mobile courts, legal clinics and microjustice* 3. Roder agrees that access to justice can be improved by employing digital technology.

the case may be, online litigation holds benefits for both legal education and for access to justice. During the currency of the trial, law students can observe the trial proceedings in order to actively learn from clinicians as to how to conduct an online trial. After conclusion of the trial, or during adjournments, the clinician can debrief the students on important aspects of the trial and any complexities that the online process might have brought about. The students should also be made aware of how beneficial technology is to the client in that, when litigation is being conducted quicker, justice is being served quicker. Justice is not served when trial proceedings are constantly postponed and online litigation might limit postponements significantly. In this way, it is submitted that the acceleration of justice is transformative in that members of the public do not have to go weeks, months and sometimes even years without legal relief. Law students should be able to appreciate the fact that this brings about procedural justice. The significance of self-help stations had already been discussed earlier and requires no further elaboration. As far as document assembly software is concerned, it speaks for itself that it will improve upon the time that it takes to draft letters, pleadings, contracts and other legal documents. This could be a useful improvement in the conventional workflow of law clinics and especially student activity, especially in light of the fact that the students are only working at a law clinic for a limited time. A proper approach to document assembly can therefore benefit students, as well as clinicians, in that it can save time in drafting relevant and applicable documents that clients and their cases require. Students should be trained well in approaching document assembly in that they do not spend more time on mastering the skill during the actual process and so delay the speedy drafting of the required documents. It could therefore benefit the teaching and learning process, as well as practical work at a law clinic, if tutorials and practice sessions in document assembly are being conducted prior to students commencing work at a law clinic. It is submitted that lectures for procedural law modules can serve as valuable platforms in this regard. It will furthermore ensure that the presentation of procedural law modules is keeping up with the modern trends and developments in the world as well as in legal practice. This contributes to lifelong and continuous learning, as students will be able to use such skills during their sessions at the law clinic, as well as in legal practice after graduation. Once again, the client will benefit from quicker access to justice: the quicker documents are drafted, served and filed, the quicker the matter can go to trial and the quicker justice can be served in a court of law.

Secondly, as to the question whether the current technological development can influence human perception and change their behaviour and perception of what it means to be human, it is submitted that the answer should also be in the affirmative. From the abovementioned discussion, it can be concluded that technology brings renewal and faster working methods than what existed before. However, law teachers and clinicians should be careful not to be overwhelmed by the might of technology to such an extent that they leave out one of the most important aspect of teaching and learning: the human element, *ie*, students as well as members of the public. Technology and AI should not overshadow law students and their training, as well as clients and their expectations to receive adequate and professional legal advice and assistance, but should be utilised in such a way to improve the lives of everyone, economically and socially speaking. As far as students are concerned, law teachers and clinicians should be flexible with submission times for assigments, as it may be a possibility that not all students have reliability connectivity.[926] It may further be that some students are not familiar with the digital platforms and online tools that are being used in the teaching and learning and assessment process.[927] Law teachers and clinicians must therefore show empathy for students and their diverse needs and support them wherever possible.[928] For example, if students are not able to meet demands on time, law teachers and clinicians should be appreciative of that and attempt to accommodate the students in this way.[929] Students should also be afforded sufficient time to reflect on their experiences,[930] which reflection can help them to approach similar experiences in future with more insight and confidence. Reflection promotes lifelong learning and should be included in all teaching and learning activities.[931] Law teachers and clinicians should be appreciative of the fact that technology can contribute towards the dignity and employability of law graduates in that, in using technology effectively, graudates will develop invaluable skills necessary when entering legal practice. In this regard, law teachers and clinicians must keep in

926 See All Digital School "How to keep the 'human element' in online teaching" (21 April 2020) How to Keep the "Human" Element in Online Teaching – All Digital School (accessed 2021-05-18).

927 All Digital School How to Keep the "Human" Element in Online Teaching – All Digital School.

928 See All Digital School How to Keep the "Human" Element in Online Teaching – All Digital School in this regard.

929 *Ibid*.

930 All Digital School How to Keep the "Human" Element in Online Teaching – All Digital School.

931 *Ibid*.

mind that the Fourth Industrial Revolution is bringing about changes in legal practice, irrespective of how slow such changes might be taking place. Law teachers and clinicians must further keep in mind that, in training students to use technology effectively, students will be able to use such technology in order to assist clients with their cases. In this sense, law teachers and clinicians recognise the importance of the client as a human being and that something like technological innovation can improve the life and situation of such client, thus emphasising the very existence of the client. The students should also not let technology overshadow their perception of a client and the client's case. They should learn an appreciation for the fact that technology can facilitate the rights and duties of their clients on a daily basis.[932] Technology can present opportunities for the empowerment of people living in disadvantaged and marginalised contexts.[933] In this sense, it is submitted that the equality and dignity of people are significantly enhanced in circumstances where it might not have happened. An example in this regard is the employment of a person who is HIV positive.[934] If this person is discriminated against by prospective employers based on the HIV status and does not have sufficient funds to afford legal representation and assistance in order to address such discrimination, an online consultation with a law clinic might present the person with the appropriate legal advice. In addition, online dispute resolution between the students and/or clinicians at the law clinic and the prospective employer, might bring an end to the discrimination, resulting in the employment of the person. In the process, the client is treated equally to other employees in the workplace, resulting in the client's dignity being restored. Furthermore, the client will socially and economically be in a better position than before in that the new position of employment will generate an income for the client. The client's lifestyle and career opportunities now improve and, as human being, the client is much better off than before. Situations of this nature will be confirmation to students about how important human live is and how they should perceive social and human elements as far as all their clients, at either a law clinic or in legal practice in future, are concerned.[935] The question should

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932 See Roder *Mobile courts, legal clinics and microjustice* 4 in this regard.

933 Roder *Mobile courts, legal clinics and microjustice* 4.

934 See Webber Wentzel in alliance with Linklaters "HIV/AIDS discrimination in the workplace" (31 May 2016) HIV/AIDS Discrimination in the Workplace (polity.org.za) (accessed 2021-05-16) with regards to discrimination against people with HIV positive status in the workplace.

935 See 3 4 5 with regards to the importance of social and human elements in teaching law, especially as far as procedural law modules are concerned.

be asked whether AI will not become a substitute for human intelligence, which may have a detrimental effect on the perception of what it means to be human.[936] The thinking behind this is as follows: as AI increases, the value of human prediction skills will decrease.[937] However, it is suggested that this should not influence the perception of what it means to be human.[938] The reason for this suggestion is simple: as AI increases, so will the need for human judgment skills increase.[939] Legal practice will therefore be in need of more human judgment in order to measure the adequacy of AI in particular instances.[940] Thus, keeping in mind that was stated earlier with regards to how AI can assist with research, analysis of case scenarios and evidence as well as construct concept judgments, it is submitted that AI can save humans a lot of time in performing these tasks. However, humans will have to peruse the AI generated outcomes carefully in order to ensure that the outcome is applicable and efficient in the circumstances of the case. If not, the human beings, who are affected by the outcomes, are left out of sight. Furthermore, it might mean that sufficient attention is not being paid to transformative constitutionalism, as the outcome might be conservative, rigid and not sufficiently taking into account all the personal and social circumstances of the parties to the particular case. With this in mind, CLE programmes and law clinics should make students aware of these aspects relating to AI and technology. Students must appreciate that the human element comes first and that technology should not replace human perception. In this regard, Smith states that

> "…we should surely ensure that any decision derived from AI and affecting the public sphere, especially in relation to justice…, is both explicable in human terms and something for which some real person is accountable."[941]

It is submitted that Smith is correct and that this argument is in line with the expectations of the LPA as far as the accountability of the legal profession towards members of the public is concerned.[942] If students are trained to carefully peruse the

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936 See Smith "Digital delivery of legal services to people on low incomes" 2017 Half Year Update 11 in this regard.

937 Smith 2017 Half Year Update 11.

938 *Ibid*.

939 *Ibid*.

940 *Ibid*.

941 Smith 2017 Half Year Update 16.

942 See 5 2 2 1 with regards to the accountability towards the public expected of legal practitioners by the LPA.

outcomes generated by AI, they will become aware of what it means to deliver quality and professional legal services to their clients.[943]

Overall, the whole process of integrating AI in the legal profession is transformative in nature, because the legal profession is very slow to adapt to changes. From the abovementioned discussion, it is clear that AI can help the legal profession to break out of its rigid and conservative views in order to improve access to justice and the lives of clients in quicker and more efficient ways than before. It must be kept in mind that the conservative manner of practising law in legal practice has been adopted by law clinics as well. Therefore, should the legal profession change, law clinics will have to change in order to ensure that students deliver the same services at law clinics than what practitioners deliver in legal practice. The opposite can also happen: if students are sufficiently trained during CLE programmes to use technology and AI, they can apply such skills when entering legal practice, thus playing an important role in helping the legal profession to adapt to the demands of the Fourth Industrial Revolution. In doing so, students enhance access to justice, the delivery of faster, more efficient and professional legal services to clients, as well as transformative constitutionalism in improving the lives of their clients. As far as the aforementioned discussion on AI, CLE, law clinics and access to justice is concerned, the following questions and answers by Smith provide an apt conclusion to this section:[944]

> "So, can technology solve what has become widely known as the justice gap? No, it can't. But, can technology help alleviate the justice gap? Yes, it can."

4 7 5 ALLOCATING MORE TIME TO PRACTICAL LEGAL TRAINING

It has already been stated elsewhere that the academic timetables of law schools are congested and that there may consequently not be sufficient time for the practical training of law students.[945] This is an apparent anomaly based merely on semantics: students are about to enter into legal practice after graduation, but did not experience the provision of sufficient time for practical training. The word "practise", as a verb,

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943 See 5 2 2 1 with regards to the delivery of quality legal services to the public, as expected by the LPA.

944 Smith 2017 Half Year Update 55.

945 See 4 7 2 1.

means “to carry out” or “to apply”, “to do or perform often, customarily or habitually”, “to be professionally engaged in”, “to perform or work at repeatedly so as to become proficient” and “to train by repeated exercises”.[946] As a noun, “practice” means “actual performance or application”, “a repeated or customary action”, “the usual way of doing something”, “the form, manner and order of conducting legal suits and prosecutions”, “systematic exercise for proficiency”, “the condition of being systematic through proficient exercise”, “the continuous exercise of a profession” and “a professional business”.[947] By looking at these explanations, it can be submitted without any doubt that there is a big disparity between what and how students are trained, and where they are heading after completion of such training, *ie* the legal profession that is practical in nature. In the context of this research, they need extensive training in civil and criminal procedure, as well as in the application of the principles of evidence, as such disciplines form the centrepiece of legal practice. Furthermore, South Africa has relatively new legislation governing the legal profession, *ie* the LPA. Although the LPA is discussed in more detail elsewhere as far as the context of this research is concerned,[948] it suffices to make mention of relevant provisions in the context of the current discussion. The preamble of the LPA mentions section 22 of the Constitution that entrenches freedom of trade, occupation or profession and that it will be regulated by law.[949] It also states that the legal profession must be accountable to the public.[950] This wording did not appear in the predecessors of the LPA, namely the Attorneys Act[951] and the Admission of Advocates Act.[952] It can thus be safely assumed that the legislator intended for the legal profession in the millennial era to be proficient in the execution of its tasks when assisting the public. For that reason, law students need to be adequately trained for legal practice already at university level. Since nearly all cases are solved by employing civil or criminal procedure, as well as the principles of evidence, these subjects should be at the forefront when providing for adequate time to teach and train students. The same goes for CLE.

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946 Merriam-Webster “Practice” (undated) https://www.merriam-webster.com/dictionary/practice (accessed 2019-09-11).

947 *Ibid.*

948 See Chapter 5.

949 S 22 of the Constitution states that “[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

950 Also see s 3(c) in this regard.

951 53 of 1979.

952 74 of 1964.

Despite this assumed plea of the legislator and the importance of the procedural law modules and CLE, sufficient time is not provided for adequate training in these subjects. Students receive limited skills training during CLE, and only towards the end of their careers in law school.[953] This training opportunity therefore comes "too little too late" in order to furnish the students with meaningful skills and retention of them.[954] It has been stated that such limited training does not impress prospective employers as they are not convinced that students are ready for legal practice.[955] The training spans a whole year, but taking into account that university lectures and other academic activities usually only commence in February and end towards the end of October, and that there are public holidays and student recesses during this period, students do not even enjoy a full year of practical training. The reality of large student numbers also severely impacts the time available for practical training. It has already been explained elsewhere how large student numbers are dealt with by the NMU Law Clinic, but for the sake of convenience it is summarised here.[956] Students are divided into two main groups, *ie* A-Mb and Mc-Z surname groups. The A-Mb student group attends law clinic sessions during one week, whereas the Mc-Z student group attends such sessions in the following week. Thereafter, this pattern is repeated. This means that there is even less time available for students to undergo proper clinical law training. This should however not be construed as CLE being inappropriate for adequate skills training of law students. The main problem in this regard is the lack of sufficient time to teach such skills. Time constraints, combined with the huge module load associated with CLE, resonate in the following statement by Rosenthal:[957]

> "Another response to the case for greater skills training is the claim that law schools can reserve skills training for a discrete portion of the curriculum, such as clinical courses, which have emerged in significant part because of the concern that traditional law school curricula fail to impart foundational skills. This puts an enormous burden on clinical courses, however; they must not only teach students how to handle real clients and cases, but also provide the foundational skills not found elsewhere in the curriculum. Even aside from this, there is reason to question how much clinical and experiential education can accomplish. Of

953 Redding "The counterintuitive costs and benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 58.

954 *Ibid.*

955 Redding 2016 *Wisconsin Law Review Forward* 59.

956 See 4 3 2.

957 Rosenthal "Those who can't, teach: what the legal career of John Yoo tells us about who should be teaching law" 2011 80(4) 1563 1618; Redding 2016 *Wisconsin Law Review Forward* 59.

> necessity, clinical and other experiential education involves relatively unsophisticated, small-stakes litigation and therefore is unlikely to do much to develop the skills that will enable a student to practice at a higher level."

Rosenthal is correct in stating that clinical law modules carry an enormous burden in teaching skills and doctrine, as well as foundational skills not fitted into the curriculum. It is therefore submitted that, should there be more time for skills training, students will be trained more adequately and completely. Barnhizer agrees:[958]

> "The quality of representation being received by clients is also substantially dependent upon the time students can reasonably spend on the cases. The needs of clients require a certain minimum amount of time, and with too many competing factors, the student cannot consistently give the time needed to protect clients' interests."

Time constraints force clinicians to find time to teach students only the most important practical skills, if they can find enough time to do even that, especially considering the protests and disruption of university activities that have impacted the academic schedules of universities since 2015. It further leaves no time for constructive repetition and practice of such skills, resulting in students often forgetting what they have learned from particular experiences.[959] A lack of time for practical teaching will furthermore undoubtedly contribute to the teaching of legal doctrine in isolation from practical skills. The consequence may be that students, not having such skills when entering practice, will complain about how difficult it is to acquire them.[960] Should this be a reality in law school, students will not have no alternative but to learn these practical skills after graduation.[961]

4 7 6 CLINICAL LEGAL EDUCATION MUST BE COMPULSORY

It has already been stated that CLE is not compulsory at some universities. Throughout this chapter, the benefits of CLE, both on its own and being used as a methodology to teach procedural law modules, have been pointed out; therefore, it is

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958 Barnhizer 1979 *Journal of Legal Education* 101.

959 See 4 2 for a discussion as to the significance of repetition as far as the learning methods in the learning pyramid, viewed from an additive perspective, are concerned.

960 Kennedy http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20HierarchyPolitics%20of%20Law.pdf 65.

961 *Ibid.*

not necessary to repeat them. The following statement by Du Plessis summarises the importance of CLE and amply substantiates the argument that it must become compulsory for all law students, which the learned author also supports:[962]

> "In the South African landscape, O'Regan J said that the lives of law graduates 'are determined in a real sense by the skills and habits that they have acquired at law school' and that 'much of the test of what constitutes a competent lawyer is skills-based rather than content-based.' De Klerk agrees and posits that he 'cannot see how any law school could claim to produce competent graduates without requiring them to undergo a clinical experience.' He is of the opinion that '[t]here is no substitute for the real thing, and clinical legal education should therefore form a core part of any law degree.' A practising advocate, in noting on pupilage and access to the profession, calls for aspirant jurists to be exposed to a more learn-by-doing experience. She calls on law schools to be more proactive in producing lawyers, for which a solution can be found in clinical legal education. McQuoid-Mason holds that '[f]or the practicing lawyer…known facts are a luxury...The ability to handle facts…must be developed in an environment in which the presentation of facts resembles that in the real world.' This can be achieved through clinical legal education."[963]

The above extract reflects the point of view from the legal profession and law teachers. Students, both from South Africa and other countries are equally in agreement about the benefits of CLE, namely:[964]

(a) that it presents some of the best learning experiences yet;
(b) that working at a university law clinic presents the opportunity to work with clients and in that way make it clear to students what they want to practice after they graduate, *eg* becoming a family law legal practitioner;
(c) that working at a law clinic inspires the kind of self-confidence in students and learning opportunities that cannot be taught in the classroom according to the traditional teaching methodologies;
(d) that there will be no other time in a student's career where a supervisor's primary goal will be to truly teach a student how to be a legal practitioner in a practical and meaningful manner;
(e) that it presents opportunities to focus on legal writing, trial advocacy skills, communication skills, value judgment skills, as well as how to extract information;

962 Du Plessis 2015 *Potchefstroom Electronic Law Journal* 2782.

963 Du Plessis 2011 *Journal for Juridical Science* 28; Du Plessis 2013 *Journal for Juridical Science* 23.

964 Du Plessis 2011 *Journal for Juridical Science* 29-30. Reference in this regard is made to American students. Also see Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 19-20 in this regard.

(f) that it functions as a valuable stepping stone into legal practice;
(g) that it presents one of the first opportunities to put knowledge into practice; and
(h) that it presents humbling experiences of serving people who can easily go unnoticed in society. It emphasises the existence of human beings, beyond the familiar, as well as that they have real problems and real emotions.

This shows the enthusiastic attitude from students towards CLE. Furthermore, it shows development in their careers as aspiring lawyers and practitioners, something that the very institution teaching them the law, should not deny them in any way. It is therefore submitted that, where not yet so, CLE must become compulsory.[965] If not, ideological opposition, changing educational trends or the reduction of resources may undermine its relevance and importance.[966] The student feedback, mentioned earlier, is an undisputable indication of how relevant and important CLE is. Furthermore, students spend as much as 95% of their time reading and discussing the law and cases when in law school, while in legal practice, that is rarely done.[967] Instead, they will be engaged in drafting, reviewing and negotiating.[968] These are necessary skills for the effective teaching of procedural law modules and skills that can be taught to all students if CLE becomes compulsory.[969] Despite this, "…experiential legal education…remains at the periphery of law school curricula."[970] According to Ortiz, "…experiential legal education must be a component of a professionally responsible legal education."[971]

965 Also see Ortiz "Going back to basics: changing the law school curriculum by implementing experiential methods in teaching students the practice of law" (June 2011) https://www.law.cuny.edu/wp-content/uploads/page-assets/strategic-planning/future/changes-in-legal-education/Ortiz-2012.pdf 1 (accessed 2019-10-01) in this regard. He confirms that, at many law schools, experiential learning currently remains on the outskirts of legal education. Therefore, the teaching and learning of practical skills are frequently overlooked, which skills are of paramount importance for legal practice. Experiential learning will enhance students' knowledge of legal theory and doctrine and should therefore form part of legal education.

966 Du Plessis 2013 *Journal for Juridical Science* 23.

967 Du Plessis 2013 *Journal for Juridical Science* 23; Du Plessis *Clinical Legal Education: Law clinic curriculum design and assessment tools* 18.

968 *Ibid.*

969 *Ibid.*

970 Ortiz 2011 https://www.law.cuny.edu/wp-content/uploads/page-assets/strategic-planning/future/changes-in-legal-education/Ortiz-2012.pdf 1.

971 *Ibid.*

It is submitted that there is an apparent conflict between the abovementioned attitude of law teachers, legal professionals and students towards CLE on the one hand, and the reality of what is happening in law school on the other hand. It is common cause that one of the basic duties of a law school relates to the preparation of students for legal practice.[972] This is not an unreasonable or far-fetched expectation, since formal legal education vests a virtual monopoly over the preparation of law students for entry into legal practice.[973] For this reason, law schools are, or should be, the main source of instilling the relevant and applicable skills, necessary for the practice of law, in law students.[974] It is irrelevant that some students would want to pursue other career opportunities than that of a legal practitioner – law schools should still prepare those students, who want to become legal practitioners, for entry into legal practice.[975] Law schools are schools of lawyering that should feature legal education by way of a good blend of doctrinal courses, skills courses, live-client courses and simulated exercises.[976] All of these components are important and students should be exposed to all of them while at law school.[977] This holistic inclusion supports the view that theory and practice should be combined in legal education. The combination of theory and practice will provide students with a broad knowledge base at the end of their academic studies at law school.[978] This knowledge base will prepare them to show initiative and to learn lessons from experiences that they will encounter as future legal practitioners.[979] The bulk of the future legal practitioner's learning therefore takes place in legal practice after graduation from law school. However, law school provides the critical foundation for law graduates to not only think like lawyers, but also how to mobilise such thinking in legal practice.[980] In executing theoretical legal knowledge in legal practice, and to know how to do so, students need to undergo theoretical and practical training in especially procedural law modules while at law school.

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972 Stuckey *et al Best practices for legal education* 16.

973 *Ibid*.

974 *Ibid*.

975 See Aaronson "Thinking like a fox: four overlapping domains of good lawering" 2002 9(1) *Clinical Law Review* 1 42, as well as Stuckey *et al Best practices for legal education* 16-17 in this regard.

976 Aaronson 2002 *Clinical Law Review* 1 42.

977 *Ibid*.

978 *Ibid*.

979 *Ibid*.

980 *Ibid*.

CLE is the preferred teaching methodology by way of which the theoretical knowledge base and practical training can be accomplished while the student is still at law school. This implies that, for all law students to benefit from CLE, it must be a compulsory and core module in the curriculum. Yet, it is not yet compulsory at all law schools. This means that law schools can make significant improvements to preparing law students for their first professional positions of employment after graduation.[981] It unfortunately also means that law schools are simply not committed enough to produce graduates who are prepared for entry into legal practice.[982] If so, CLE would have been a compulsory module at all law schools and would moreover be used increasingly to teach other modules, especially procedural law modules that would prepare students for legal proceedings and working with evidence in handling clients' cases in legal practice. Law schools therefore need to pay attention to the well-being of law students.[983] Probably one of the most important considerations in this regard is that capstone opportunities need to be created. It has already been stated that CLE is ideal in order to accommodate capstone learning in the curriculum.[984] Capstone opportunities will help students to not study the law in compartments, as well as to grow accustomed to the somewhat unorganised way in which facts can be presented by clients in legal practice.[985] Capstone learning will be instrumental in helping students to consolidate their skills and knowledge and to use it to solve practical problems.[986] In this way, students develop towards handling complex legal problems associated with factual scenarios in legal practice and to recognise how important it is to view the law from a holistic perspective instead of compartmentalised. This will help the student to leave the mould of a student behind and to be more like a legal practitioner.[987] It speaks for itself that, in practice, a client does not approach a legal practitioner with a legal problem and, for example, ask the practitioner to explain the law relating to a certain topic. The client will instead present the legal practitioner with a factual scenario filled with complex issues that may stretch over several areas of the law. Students therefore need to be trained to recognise these various areas of the law

981 Stuckey *et al Best practices for legal education* 18.
982 *Ibid*.
983 *Ibid*.
984 See 4 7 1.
985 *Ibid*.
986 *Ibid*.
987 *Ibid*.

and to know how these areas interrelate and interact with one another. Students further need to know the legal procedures that are necessary in order to give effect to the various substantive legal principles, as well as how to handle and interpret evidence that will be used to substantiate arguments in their clients' cases. Training of this nature will however not be possible if capstone opportunities are not available as part of the curriculum. If such opportunities are indeed available as part of a CLE programme, but such a CLE programme is only an elective module, it means that only a selected number of students will undergo such training, thus completely defeating the importance of capstone learning and the consequent adequate preparation of students for entry into legal practice.

More adequate preparation of law students at university level will impact on the equality of law students to be adequately trained for entry into legal practice and to pursue their profession of choice in terms of the Constitution.[988] As stated earlier in this research, there should be a constitutional imperative on universities and law schools to produce more competent law graduates for entry into legal practice.[989] Education is a solution to unemployment and therefore it can break down barriers of entry into the working world. This aspect is discussed elsewhere in this research.[990] Further to this, it has been stated that undergraduate modules need to be more reflective of the working world.[991] In context of this research, it is submitted that such goal can only be achieved if CLE becomes a core and compulsory module at all law schools. If so, CLE can play a pivotal role not only as far as procedural law modules are concerned, but also in relation to other modules in the curriculum. This will increase the opportunity for transformative legal education provided that all students are taught with transformative constitutionalism as overarching and guiding philosophy.[992] If so, students will be exposed to the influence of transformative constitutionalism on both substantive and procedural law and how the lives of members of the public can be improved. Students will also be exposed to the influence of the Fourth Industrial Revolution on the legal profession, which is an aspect that

988 See 5 2 2 3 in this regard.
989 See 2 1.
990 See 5 2 2 3 in this regard.
991 *Ibid*.
992 See 2 1 in this regard.

especially the centennial students should find useful.[993] Since the use of technology is integrated into almost all forms of business all over the world, it is submitted that exposure to technology is an important motivator for CLE to become a compulsory and core module. In this regard, law clinics and clinical law programmes must train students in the use of technology as they would experience it in legal practice. A point of concern in this regard is that some law clinics or law schools may not have electronic facilities and software available by way of which students could be skilled in the use of technology to further their work in practice. The use of technology in the legal profession can result in innovative and faster ways in which legal practitioners can handle and manage their cases and, in the process, advancing the interests and well-being of their clients.[994] Students will furthermore learn to be active as far as their own education is concerned in terms of the philosophy of constructivism.[995] This will help students to discover knowledge for themselves, guided by law teachers and clinicians who will facilitate the learning process.[996] It is submitted that this will facilitate the ability of the students to research and find information when they enter legal practice and have to construct legal arguments on behalf of their clients.

It cannot be disputed that, if students are more adequately prepared for entry into legal practice, they will be more competent in providing legal services to clients and to serve the law firms, where they will be employed, in a better way soon after graduating from law school.[997] The legal profession desires the development of both substantive and procedural expertise, especially in light of the fact that specialisation is increasingly taking place.[998] Clients must be in a position to be represented by legal practitioners who can demonstrate at least minimal competence in the practice of law.[999] This will make a client confident in the abilities of the legal representative.[1000] It is submitted that a legal representative of this nature will conform to the vision of a legal practitioner

993 See 4 7 4 in this regard.
994 See 4 7 4 2.
995 See 2 3 in this regard.
996 *Ibid*.
997 See Stuckey *et al Best practices for legal education* 26 in this regard.
998 Stuckey *et al Best practices for legal education* 26.
999 *Ibid*.
1000 *Ibid*.

who can be accountable to the public as stipulated in the Preamble of the LPA.[1001] In this regard, the legal profession can be compared to the medical profession: a patient reasonably expects that a doctor has performed medical procedures under supervision of properly qualified supervisors before performing such procedures without any supervision.[1002] As far as the legal profession is concerned, a client should have the same expectation of a legal representative, especially a new entrant into legal practice. Without the future legal practitioner undergoing adequate and compulsory training in legal theory, as well as how to apply such legal theory by way of legal procedure, a client cannot have such an expectation.[1003] Consequently, it is not difficult to visualise why CLE, by way of which such training can be accomplished, should be made a compulsory and core module in the law curriculum at all law schools.

4 8 CONCLUSION

This chapter illustrates that the main objective of a clinical law programme is to teach a practical and critical understanding of legal practice and the law by exposing students to real life clients and their legal problems.[1004] Instead of the live-client model, simulations can also be used. Although CLE is sometimes treated as the "stepchild" of the law school, it is submitted that it is essential for the practical legal training of law students, as well as for integration into core and central modules like Civil Procedure, Criminal Procedure and the Law of Evidence. Van der Merwe states the following, which provides a firm theoretical basis for this argument:[1005]

> "It is by no means argued that CLE…ha[s] a perfect or exclusive claim to catering for the contemporary teaching and learning requirements discussed above. It would be naïve and simplistic to suggest that CLE has all the answers to some of the ongoing and complex criticisms of the LLB curriculum. There are various other modules presented at the Faculty which are (or should be) sensitive to these needs. CLE, however, presents the ideal opportunity for the Faculty to strengthen its pedagogical offering to current and prospective students."

1001 See 5 2 2 1 for a discussion on the accountabililty of a legal practitioner in terms of the LPA and the importance of legal education in that regard.

1002 Stuckey *et al Best practices for legal education* 26.

1003 See Stuckey *et al Best practices for legal education* 26 in this regard.

1004 Evans *et al* 2008 *Griffith Law Review* 52-53.

1005 Van der Merwe 2017 *Stellenbosch Law Review* 689.

Evans and Hyams agree and elaborate as follows:[1006]

> "…at its heart, clinical legal education is simply the best way to teach normative law and the skills of normative analysis, and to instil the sense of professionalism in students which a sceptical client community increasingly considers essential in lawyers."

It is submitted that the views expressed by these authors are correct. It has already been stated that it is not possible for law schools, even if the CLE methodology is employed, to teach the students everything they need to know about legal practice and specifically the procedural law modules. By incorporating classroom sessions, practical sessions and tutorials into one dynamic methodology, CLE is certainly able to provide an appropriate foundation to law students to enter practice, theoretically and practically speaking. The module content contains a variety of topics that can often appear to be a lot of work for students to master. It must therefore be kept in mind that students also have other modules and commitments to attend to; therefore, it may be difficult for them to sometimes meet the module outcomes connected to CLE.[1007] Clinicians must attempt not to overburden students, yet to provide the most circumspective practical training possible. This remains a constant challenge for CLE.[1008]

For CLE to be able to fulfil the outcomes as set out in this chapter, it needs to be compulsory in the LLB curriculum. The most important role player in ensuring that CLE becomes compulsory, is the applicable law school.[1009] It is therefore recommended that law schools, if they have not done so yet, should strongly invest in the benefits of clinical law training as offered and developed by their respective law clinics.[1010] In doing so, they will not only become more familiar with the operations of the law clinic, but they will also experience the attitude of the students towards engaging with practical work and the educational benefits it holds for them (the students). Upon realising these educational benefits, law schools may be more amenable to recognising CLE as a suitable teaching methodology to teach important

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1006 Evans *et al* 2008 *Griffith Law Review* 55.

1007 Van der Merwe 2017 *Stellenbosch Law Review* 695.

1008 *Ibid.*

1009 Van der Merwe 2017 *Stellenbosch Law Review* 700.

1010 *Ibid.*

modules like the procedural law modules. Many of the skills taught by way of CLE are equally important to procedural law modules, *eg* professional and ethical conduct, consultation skills, file and case management, legal research, drafting letters and other legal documents, alternative dispute resolution and trial advocacy.[1011] CLE also creates the opportunity for students to act with responsibility when handling clients' cases.[1012] This responsibility is important in the context of this research. Firstly, by letting students consult with clients, risks are created for both the students and the clients.[1013] The risk for the student is that he or she may learn to approach the handling of legal matters incorrectly and unprofessionally. The risk for the client is that he or she may be represented by someone who is not skilled in the practical handling of legal matters, especially matters that are serious and complicated in nature. Secondly, such responsibility is paramount in the context of the procedural law modules, as incorrect procedures and oversight of applicable and relevant evidentiary rules may lead to cases being lost and adverse cost implications. Students must be made aware of such risks and taught to take all precautionary measures possible to guard against them. Although it is not within the scope of this research to discuss this, it must be mentioned that law schools may also want to adopt the CLE methodology in order to teach other modules in the LLB curriculum in a more practical way. Evans and Hyams however point out that "[a]chieving continuing majority support from law deans for CLE has been slow to develop and is still proceeding cautiously,…"[1014] Although this was written in an Australian context, it is true for many other countries. The role of the law school is important and law deans must work carefully in order to facilitate considerations that can pave the way for students to move forward.[1015] In an attempt to address this, clinicians must create an "[a]wareness…of…[the] experiential, clinical methodology as the ascendant, integrated approach to Western legal education…"[1016] They however do not have to embark on this endeavour on their own – there may be several *alumni*, especially in the judiciary and government, who have completed the

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1011 Du Plessis 2011 *Journal for Juridical Science* 41-42.

1012 See 4 3 2 in this regard.

1013 Barnhizer 1979 *Journal of Legal Education* 72.

1014 Evans *et al* 2008 *Griffith Law Review* 53.

1015 Kloppenberg 2007 *University of Toledo Law Review* 547; Lopez "Leading change in legal education – educating lawyers and best practices: good news for diversity" 2008 (31) *Seattle University Law Review* 775 780. A law dean plays in important role in improving legal education in his or her law school. Lasting curricular and educational changes emanate from the law school and, in this regard, the dean plays a pivotal role in using the power of his position to move for educational reform.

1016 Evans *et al* 2008 *Griffith Law Review* 56.

clinical law module at university level, who would be willing to participate.[1017] *Alumni* can present motivational sessions or express their viewpoints in academic writings. Chemerinsky states in this regard that[1018]

> "…academic writings,…, can serve many different audiences and meet many different goals: helping law students, aiding judges and lawyers, and advancing knowledge and insight. Achieving these goals is the answer to the question of why write."

In this manner, *alumni* can convey the message of the implications of CLE in order to emphasise its importance to law deans, students and the legal profession as a whole. This may create a bigger awareness of the importance of CLE and, if integrated with procedural law modules, the advantages it holds for the preparation of future legal practitioners.[1019] This may lead to CLE becoming compulsory at more universities and teaching methods for procedural law modules to be adapted accordingly.

Another factor, motivating law deans and ultimately law schools to move towards compulsory CLE, is the success stories of various university CLE programmes. Kloppenberg, former Dean of Dayton University Law School, states the following with regards to the programme followed by Dayton University in the United States of America:[1020]

> "Clinical and externship opportunities exposing students to the legal profession flourished. Over 85% of respondents offered some in-house, live-client clinics, averaging three clinics per schools, and 30% offered off-site, live-client clinics. Nearly all respondents provided at least one externship opportunity, and without exception, placement opportunities have increased in each externship category since 2002. The 2010 Survey notes the abiding commitment to clinical legal education among respondents and emphasizes that, since 2002, schools say they have "added and diversified live-client clinical opportunities and externship placements, enhanced existing courses with professional skills instruction, and added separate labor-intensive professional skills offerings." More law schools said in the 2010 Survey responses that they "highly recommend" a clinical experience – up from 14% in 2002 to 25%. The most frequent clinical opportunities offered included: General Civil; Criminal Prosecution/Defense; Family Law;

1017 Evans *et al* 2008 *Griffith Law Review* 56. Also see Maisel 2007 *Fordham International Law Journal* 391 as far as other infrastructural options for law clinics are concerned. As part of the *alumni*, Maisel suggests that candidate attorneys should be employed at reduced salaries in order to assist with the supervision of students. Whether candidate attorneys will do this, especially in the current economic climate of South Africa, is a debatable topic.

1018 Chemerinksy 2009 *Michigan Law Review* 883.

1019 This does not mean that, on its own and without being integrated directly into another module, CLE does not have advantages.

1020 Kloppenberg 2007 *University of Toledo Law Review* 115.

> Juvenile Law; Economic Development/Business; and a host of others offered by a fewer number of schools."

Chavkin poses the following question: "If clinical education is so universally effective, why do we not have clinical law schools?"[1021] It appears that tradition, vested interests of existing academics and costs are prime factors in this regard.[1022] These factors were mentioned in this chapter. Whatever the case may, should the importance of CLE be recognised by law schools, as well as the value that the methodology holds for other modules in the curriculum, with specific reference to the procedural law modules, it is submitted that the result will be law graduates who can "hit the ground running" when entering legal practice.[1023] This is necessary in a competitive job market,[1024] especially in the case of South African university law schools, due to the large number of law students who graduate every year. CLE can equip students with unique skills and qualities that are necessary in order to provide the best possible professional service to clients.[1025] Non-legal skills can also help to separate some students from the crowd.[1026] In this regard, social and human aspects are paramount.

It is worthwhile to mention that there have been doubts as to whether CLE really transfers sufficient knowledge to law students in order to prepare them for legal practice.[1027] Yet, student training at law clinics, if undertaken seriously and rationally, is generally considered to be valuable to the practical upbringing of law students.[1028] The focus during such training should be on two things: how law is practised at a real life law firm,[1029] as well as analysing the practical experience in order to draw applicable legal theory from it.[1030] In this way, the clinician ensures that the student appreciates the interrelationship between legal doctrine and legal practice. The

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1021 Chavkin http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html.

1022 *Ibid.*

1023 See Kloppenberg 2009 *Rutgers Law Review* 1102 in this regard.

1024 Kloppenberg 2009 *Rutgers Law Review* 1102.

1025 Morgan 2011 *GW Law Faculty Publications & Other Works* 31.

1026 Morgan 2011 *GW Law Faculty Publications & Other Works* 31-32.

1027 Marson *et al* 2005 *Journal for Clinical Legal Education* 30.

1028 *Ibid*.

1029 The legal fees aspect will not be relevant here, as law clinics render legal services for free. Clients are, however, sometimes required to pay the disbursements incurred by the law clinic in their matters.

1030 Marson *et al* 2005 *Journal for Clinical Legal Education* 30-31.

academic studies of the students are now combined with practice[1031] – the preferred teaching methodology. Moreover, students are familiarising themselves with the concept of transformative constitutionalism and social justice while working at law clinics or even during simulations. The reason for this is that they can practically experience how the values of the Constitution can be used in order to improve the lives of members of society.

This practical experience has been proven to motivate students for legal practice.[1032] In support of this statement, some law firms have observed that "…[t]he closer to real practice and the more realistic training is the more effective it will be".[1033] Gravett states that an LLB course in trial advocacy is long overdue, as it presents law students with practical opportunities as they are transitioning to legal practice after graduation.[1034] It is submitted that the same can be said about employing CLE to teach the procedural law modules. It does not mean that law schools must produce students who are polished practitioners.[1035] It means that students will have usable skills upon graduation, which will assist in their interaction with facts and people.[1036] With rapid advancements in the digital domain and AI and the possibilities they hold for legal practice, as discussed in this chapter, it appears that an exciting time may be ahead as far as the teaching and learning of the millennial and centennial law student is concerned. As far as the influence of the Fourth Industrial Revolution in the legal profession is concerned, former Chief Justice Moseneke is of the opinion that it should be supported.[1037] Embracing the Fourth Industrial Revolution will necessitate reform of legal education, as the result can be immensely beneficial to legal practice, *ie* to present practice with tech ready graduates who possess adequate digital skills and progressive mindsets that fully support technology.[1038] Taking into account especially the kinaesthetic needs of the millennial student, the time has come for clinicians and

1031 Marson *et al* 2005 *Journal for Clinical Legal Education* 36.
1032 Marson *et al* 2005 *Journal for Clinical Legal Education* 31.
1033 *Ibid*.
1034 Gravett 2017 *Potchefstroom Electronic Law Journal* 25.
1035 Gravett 2017 *Potchefstroom Electronic Law Journal* 3.
1036 Gravett 2017 *Potchefstroom Electronic Law Journal* 25.
1037 Moseneke *All rise: a judicial memoir*.
1038 Ministry of Law, Singapore "The road to 2030: legal industry technology & innovation roadmap report" 2020 30.

law teachers to realise that the manner of training students for legal practice will have to be adapted in a significant way.

CHAPTER 5

THE LEGAL PRACTICE ACT – RELEVANCE AND IMPACT ON PROCEDURAL LAW MODULES

5 1 INTRODUCTION

It is indicated throughout this research that there are many debates about the impact of legal education on the legal profession and academia.[1] The South African legal profession has recently undergone a process of reform and therefore the reform of legal education is also becoming increasingly relevant.[2] The profession is regulated in that there is legislation and a governing body overlooking its day to day business.[3] Legislation, *ie* the LPA[4], has however been enacted very recently in order to regulate the profession in a new and transformative way. The fact that new legislation has been enacted necessarily implies that improvements were imminent as far as the previous dispensation is concerned. This does not come as a surprise, since the legislation governing the profession in the previous dispensation, was promulgated during the pre-1994 political dispensation in South Africa. Some of the problems in the previous dispensation of the legal profession are, *inter alia*, the following:[5]

(a) that the legal profession does not represent the diversity of the South African society;
(b) that the distribution of practising legal practitioners, delivering legal services to the public, is disproportional. This means that the majority of practitioners practice in the cities and render legal services to mostly relatively wealthy people.

1 Quinot and Greenbaum "The contours of a pedagogy of law in South Africa" 2015 1 *Stellenbosch Law Review* 29 29.

2 Quinot *et al* 2015 *Stellenbosch Law Review* 29. The remaining provisions of the LPA 28 of 2014 came into operation on 1 November 2018.

3 This regulation is in the form of the LPA and the Legal Practice Council, established in terms of this Act.

4 28 of 2014.

5 South African Government "Transformation of the legal profession: discussion paper" (undated) https://www.gov.za/documents/transformation-legal-profession-discussion-paper (accessed 2020-01-21).

Furthermore, rural legal practitioners are mostly white males who generally render legal services to white farmers and local business. There is therefore not a sufficient number of legal practitioners, as well as practitioners with adequate resources, who serve townships and rural areas where black people live;[6]

(c) that practising legal practitioners are not sufficiently involved in providing legal aid assistance to the indigent members of society;

(d) that paralegals are not recognised and/or regulated by statute; and

(e) that there is a lack of equality within the legal profession as far as qualification requirements for admission to legal practice is concerned, leading to the perception that some practitioners are worthy of a higher status than others.

The LPA aims to transform the legal profession in significant ways.[7] A complete discussion of all the changes to be brought about by the LPA falls outside of the scope of this research. The main focus of this chapter will be on the implications that the LPA holds for the manner in which future legal practitioners must be trained, with specific emphasis on procedural law aspects. A creative interpretation of the LPA will be done due to the fact that the LPA does not contain any specific provisions as far as tertiary level training of law students is concerned. The commencement of the LPA, as well as the establishment of the Legal Practice Council, also steer the legal profession into a new direction where there is not much certainty as to how exactly all operations will be conducted.[8] More details about what will constitute "community service", as well as how legal services will be made more affordable to the public, constitute but two examples in this regard. Both these aspects are discussed elsewhere in this chapter.[9] This uncertainty however creates the opportunity for a creative interpretation of the LPA in the spirit of transformation of the legal profession. It will be argued that the spirit of the LPA, as well as the transformative nature thereof, read with the Constitution,[10] creates a constitutional imperative on law schools to train

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6 South African Government https://www.gov.za/documents/transformation-legal-profession-discussion-paper.

7 Goosen "Ethics as a driver of transformation of the legal profession" 2019 2(1) *South African Judicial Education Journal* 61 61; SASSETA Research Department "SASSETA Research Report: assessment of learning conditions of candidate attorneys during a transformation attempt" (March 2019) https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf (accessed 2020-01-14) 18.

8 Goosen 2019 *South African Judicial Education Journal* 61.

9 See 5 2 2 2.

10 108 of 1996.

students who are adequately prepared for entry into legal practice after graduation. In this way, transformative constitutionalism plays a pivotal role in advancing legal education, which can influence the entire legal profession in significant ways, as will be discussed in this chapter. Since transformative constitutionalism is the central ideology that underpins the Constitution,[11] the aforementioned argument, relating to a constitutional imperative on law schools, is well justified.

Creative interpretations of legislation, based on transformative constitutionalism, have been done before. An example hereof is the judgment of the Constitutional Court in the case of *AfriForum and Solidarity v the University of the Free State*.[12] The following issues had to be resolved in this case: whether the adoption of a language policy about the discontinuation of Afrikaans as primary instruction medium at the University of the Free State is constitutionally valid, as well as whether the university's policy is consistent with the Ministerial Language Policy Framework.[13] Universities, where Afrikaans had been the primary instruction medium, were well resourced in order to benefit primarily white, Afrikaans students.[14] In the process, Afrikaans as a language was also very well developed.[15] However, all African universities were deliberately deprived of similar resources and development.[16] This inequality and prejudice had to be considered in the context of the Ministerial Language Policy Framework in order to provide an indication of how transformation could be deflated, should Afrikaans be retained as the primary medium of instruction.[17] Afrikaans has been associated with power[18] and cannot be separated from a past of racial separation.[19] In the judgment, Mogoeng Mogoeng CJ stated that retaining Afrikaans as a major instructional medium at the University of the Free State is not "reasonably practicable", as such a retention can have an adverse effect on race relations.[20] The phrase "reasonably practicable"

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11 Kibet and Fombad "Transformative constitutionalism and the adjudication of constitutional rights in Africa" 2017 17 *African Human Rights Law Journal* 340 365.

12 CCT101/17; 2017 ZAC 48; 2018 2 SA 185 (CC); 2018 4 BCLR 387 (CC); Van Staden "The dangers of 'transformative constitutionalism'" (19 June 2019) https://www.politicsweb.co.za/ opinion/the-dangers-of-transformative-constitutionalism (accessed 2020-02-20).

13 Paras 1, 9.

14 Par 2.

15 *Ibid.*

16 *Ibid.*

17 *Ibid.*

18 Par 3.

19 Par 4.

20 Par 62.

is found in section 29(2) of the Bill of Rights. It provides that everyone has the right to be educated in their official language of choice where such education is reasonably practicable. The judge clearly read something into the Bill of Rights that is not explicitly there.[21] According to Van Staden, and based on the writings of Klare,[22] one of the implications of transformative constitutionalism, evident from the judge's statement, is that the law cannot be neutral with respect to the distribution of social and economic power.[23] In light hereof, it appears that the judge, with the rest of the court concurring, did not interpret the Bill of Rights in a textual way by respecting the actual words and values therein.[24] Instead, they interpreted section 29(2) on the basis of social justice.[25] Van Staden summarises the context of the court's interpretation as follows:

> "In their minds, South Africa's history, with Afrikaans as the predominant language being forced on unwilling participants, meant that there needed to be a 'redistribution' of 'social power' away from Afrikaans speakers at UFS."

This summary clearly shows how wide the interpretation of the court had gone in order to elevate the transformative spirit of the Constitution, as well as to advance social justice and the values contained in the Bill of Rights. Legal reasoning has become much more overtly and substantively open ended; however, it should not be construed as a regime where any substantive considerations can be advanced as justification for particular legal rules.[26] It must be kept in mind that the Constitution commits to a particular social agenda in light of transformation.[27] Transformation will therefore determine the outcome, as well as the method that should be pursued,[28] as is clear from the *AfriForum* case. This constitutional commitment confirms the fact that the

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21 Van Staden https://www.politicsweb.co.za/opinion/the-dangers-of-transformative-constitutionalism.

22 Klare "Legal culture and transformative constitutionalism" 2017 14(1) *South African Journal on Human Rights* 146 150.

23 Van Staden https://www.politicsweb.co.za/opinion/the-dangers-of-transformative-constitutionalism; Klare 2017 *South African Journal on Human Rights* 150.

24 Van Staden https://www.politicsweb.co.za/opinion/the-dangers-of-transformative-constitutionalism.

25 *Ibid.*

26 Quinot *et al* 2015 *Stellenbosch Law Review* 35.

27 *Ibid.*

28 *Ibid.*

law plays an active role in the process of transformation.[29] This role of the law is a key component of transformative constitutionalism.[30]

Although the merits of the *AfriForum* case are unrelated to the topic of this research, it is submitted that the constitutional and transformative interpretation by the Constitutional Court, as set out above, is analogous to the interpretation of the LPA, read with the Constitution, that will be done in this chapter. As stated by Pieterse, the Constitution poses the most significant challenge to the judiciary and legal community in South Africa.[31] The effect of constitutional provisions can be actively seen by way of interpretation and application in concrete contexts.[32] This can sometimes lead to controversy, especially when those, who are tasked with such interpretation and application, must do so in order to achieve political goals that are sought by such provisions.[33] According to Van Staden, a "…healthy constitutional discourse requires a multiplicity of ideological and theoretical points of view to be put forward, debated, tried, and tested;…"[34] It is submitted that the interpretation of the LPA, in light of the Constitution and its values, constitutes but one of these points of view and as such deserves consideration.

The LPA is not the first legislative instrument regulating the legal profession in South Africa. Before the enactment thereof, the Attorneys Act[35] and the Admissions of Advocates Act[36] had been in force. The Attorneys Act regulated the practice of law by attorneys and candidate attorneys, while the Admission of Advocates Act regulated that of advocates and pupils. These acts, together with the respective codes of conduct that accompanied each of them, regulated legal practice for several decades before the enactment of the LPA. Both Acts have been repealed by the LPA.[37] Several of the provisions of these acts were incorporated into the LPA. Furthermore,

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29 Quinot *et al* 2015 *Stellenbosch Law Review* 35; Pieterse "What do we mean when we talk about transformative constitutionalism?" 2005 20 *South African Public Law* 156 164.

30 *Ibid.*

31 Pieterse 2005 *South African Public Law* 164.

32 *Ibid.*

33 *Ibid.*

34 Van Staden https://www.politicsweb.co.za/opinion/the-dangers-of-transformative-constitutionalism.

35 53 of 1979.

36 74 of 1964.

37 S 119, read with the Schedule to the Act.

these acts, as well as court precedents based thereon, may possibly have persuasive value with regards to interpreting the provisions of the LPA. Therefore, these acts cannot be left out of consideration for the purposes of this research. They must be considered in order to ascertain whether or not significant changes in student training are required under the LPA that were not previously required, or sufficiently emphasised.

This chapter is important in more than one respect. Firstly, it will be indicative of the fact that legal practitioners should possess, by implication, certain attributes that will enable them to render quality legal services to the public. This means that legal education should take cognisance of such attributes and that teaching methodologies should be adapted accordingly to ensure that such attributes are developed in law students. The pervasive argument so far, that CLE is the preferred methodology to impart these attributes to students, will be strengthened by this point. Secondly, it will be argued that the LPA paves the way for more people to have access to justice. It has already been stated elsewhere that justice in this sense is referred to as "procedural justice."[38] The proposed capping of legal fees, as well as equipping advocates with the capability to have an intake of clients without these clients being referred to them by attorneys, are examples that will be used in this argument. This means that the LPA carries forth the spirit of the Constitution in ensuring that more people have access to having their legal issues adjudicated in a court of law and that the law is not a commodity that is only available to the affluent. Based on this argument, law graduates should be adequately trained in order to facilitate access to justice, meaning the provision of legal services of professional quality. Once again, the argument is that CLE is the preferred methodology to provide such training. In this regard, it should be kept in mind that access to justice, and adjudication by courts, involve legal procedure; therefore, integrated training, involving theoretical knowledge of and practical experience in legal procedure, is required. Thirdly, it will be argued that, because the LPA also aims to promote entry into the profession by prospective legal practitioners, such entrants must have a substantial knowledge of theory and procedure, as well as how to apply them in order to make a contribution to the promotion of and access to justice right from the moment of entry into the profession.

[38] See 3 4 5.

In light of the importance of this chapter as explained, it is submitted, and will be argued in this chapter, that CLE can play an important role in addressing the problems relating to legal practice during the previous political regime, as identified earlier. The role of CLE in this regard can be summarised as follows:

(a) teaching and learning by way of CLE can promote diversity in the legal profession. Diversity in this regard is being used in a narrow context in that it mainly refers to race and gender.[39] The LPA seeks to restructure and transform the legal profession in that it must be more representative of all demographics in South African society.[40] It will be argued that CLE can be used as teaching methodology to train law graduates from all demograhphics in such a manner that they can more easily become self-funding and pursue a profession or vocation in legal practice of their choice. In this way, they can live dignified lives, while the legal profession is becoming increasingly representative of more diverse legal practitioners. [41] Furthermore, students will be able to appreciate how to work with a diverse group of clients when entering legal practice.[42] It is submitted that such a result is transformative and aligned with the spirit and purport of the constitution in that the lives of students, as future legal practitioners, are improved from what it had been in the past;

(b) CLE can play a role in bringing greater proportionality to the number of legal practitioners delivering legal services in rural areas and not only in the larger towns and cities. In this regard, law graduates should be taught about the importance of providing access to justice to people who cannot afford legal services and who have no recourse to the law unless the law is brought to their doorsteps.[43] This means that students should be made more aware about the

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39 See Iya "Diversity in provision of clinical legal education (CLE): a strength or weakness in an integrated programme of curriculum development?" 2008 (Special issue) *Journal for Juridical Science* 34 38 with regards to a more broader definition of diversity. It can refer to a mixture of similarities and differences based not only on race and gender, but also sexual preference, disabilities, culture, class, language, affiliation, education, experience and geographic location. It is submitted that, in the same way fhat CLE can advance diversity in legal practice based on race and gender, as argued in this reseach, it can also advance diversity as far as all these similarities and differences are concerned.

40 See 5 2 2 1 in this regard.

41 See 5 2 2 3 with regards to diversity and entry into the legal profession.

42 See 5 2 2 1.

43 See 5 2 2 2 in this regard.

transformative nature of *pro bono* legal services and how it could constitute life-changing events in the lives of indigent and marginalised members of society and members of rural communities who have no access to justice. CLE can therefore be used to teach students to not only pursue lucrative causes as far as the rendering of legal services are concerned, but also to bring the law to the people and to help transform their lives. In the process, more legal practitioners become engaged in delivering *pro bono* legal services to the needy, which may serve as an inspiration to other practitioners to follow their example. As part of *pro bono* services, legal practitioners can possibly also become involved in legal education and, in that way, train law students in using legal procedure and evidence, as well as inspire them about improving the lives of people by providing quality legal education to them (students);[44]

(c) students, as paralegals in delivering legal services at law clinics, mobile law clinics or externships, are not currently regulated in terms of a statute like the LPA. Such regulation could help to present students with more responsibility, which can contribute to their appreciation of legal professionalism and accountability. This becomes especially relevant should the law change in allowing students to appear in court.[45] In allowing students to handle some court appearances, CLE could be enhanced to a significant extent in that students can exercise their presentation and verbal skills while simultaneously providing access to justice.[46] This means that students will not only be involved consultations with clients and the drafting of legal documents, but also in appearing in court in some instances as far as those cases are concerned; and

(d) CLE can play a role in removing unnecessary and artificial barriers into the legal profession. Qualification for entry into the legal profession should not be determined by factors like gender, age, race or social class.[47] Furthermore, entrants should also not be excluded on account of the (sometimes assumed) quality of their legal education, mostly based on where they have undergone such legal education. There should thus be equal opportunities for all law students to enter the legal profession. It is submitted that, if CLE is utilised as

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44 *Ibid*.

45 *Ibid*.

46 *Ibid*.

47 See 5 2 2 3.

training methodology, students will be able to enter legal practice with a better understanding of legal theory, as well as how to apply such theory. This may create equal opportunities for all students, irrespective of gender, age, race or social class to enter legal practice. For this to realise, it will be required that all law schools adopt CLE as traning methodology in order to ensure equal quality as far as teaching and learning is concerned.

Law graduate attributes will also be evaluated in this chapter. This evaluation will include graduate attributes in general, as well as graduate attributes as specified by the Council on Higher Education for the LLB degree. This will provide an indication of the extent to which the LPA will be of significance as a motivating factor to train future legal practitioners.

5 2 IMPLIED IMPACT OF THE LEGAL PRACTICE ACT ON LEGAL EDUCATION

5 2 1 GENERAL

The aim of this section is to construct an argument that the LPA in fact places an implied constitutional imperative on law schools to train law students adequately for practice. Tasks, involving legal procedure and evidence will become an important part of the daily professional world of graduates when they enter legal practice and therefore they must be able to execute these tasks with confidence and in a professional manner. These tasks should be an effort to, *inter alia*, empower previously excluded societies by way of social justice and the protection of their socio-economic rights.[48] A broad view of the concept "justice" is therefore essential.[49] Such a view may require a lesser emphasis on technicalities and procedure in order for the realisation of substantive rights to be amplified.[50] For the professional upbringing of law students, this means that students should be taught that, in order to achieve justice, procedures other than formal litigation may be necessary and applicable in

48 Kibet *et al* 2017 *African Human Rights Law Journal* 353.
49 *Ibid.*
50 *Ibid.*

certain cases, *eg* a simple apology instead of drawn out formal legal proceedings. This has been discussed in some detail elsewhere.[51]

It will further be argued that such enhanced training can be seen as being part and parcel of transformative constitutionalism in the sense that the mentioned constitutional imperative requires a rethinking of the teaching and learning methodologies employed in order to teach procedural law modules.

5 2 2 AMBIT OF THE IMPACT OF THE LEGAL PRACTICE ACT

5 2 2 1 QUALITY LEGAL SERVICES TO THE PUBLIC

The LPA was assented to on 20 September 2014. One of the main purposes of the LPA is "[t]o provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives so as to facilitate and enhance an independent legal profession that broadly reflects the diversity and demographics of the Republic;…"[52] This purpose is pivotal as far as the legal profession is concerned, as it had been pointed out that one of the shortcomings of the profession is that it is not reflective of the South African society as a whole.[53] Furthermore, in terms of the Preamble of the LPA, the following are also purposes of the act:

(a) to provide a legislative framework for the transformation and restructuring of the legal profession into a profession which is broadly representative of the Republic's demographics under a single regulatory body;
(b) to ensure that the values, underpinning the Constitution, are embraced and that the rule of law is upheld;
(c) to ensure that legal services are accessible;
(d) to regulate the legal profession, in the public interest, by means of a single statute;

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51 See 3 4 5.

52 Summary of the Act; SASSETA Research Department https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf 18.

53 See 5 1.

(e) to remove any unnecessary or artificial barriers for entry into the legal profession;
(f) to strengthen the independence of the legal profession; and
(g) to ensure the accountability of the legal profession to the public.

The LPA applies to all legal practitioners and candidate legal practitioners.[54] A "legal practitioner" is defined as an advocate or attorney who is admitted and enrolled in terms of the provisions of section 24 and section 30, respectively, of the Act.[55] A "candidate legal practitioner" is defined as a person who is undergoing practical vocational training either as a candidate attorney or pupil.[56] A "candidate attorney" is defined as a person who is undergoing practical vocational training in order to be admitted and enrolled as an attorney.[57] A "pupil" is defined as a person who is undergoing practical vocational training in order to be admitted and enrolled as an advocate.[58] "Practical vocational training" is defined as training that is, in terms of the LPA, required in order to be qualified as an attorney or an advocate and to be admitted and enrolled as such.[59] The concepts of an "attorney" and an "advocate" are simply defined as persons who are admitted and enrolled as such in terms of the LPA.[60]

The Preamble of the LPA also makes mention of the constitutional right to freedom of trade, occupation or profession,[61] as well as that access to justice is not accessible to many people in South Africa. The right to freedom of trade, occupation and profession, in the context of this research, requires some discussion and analysis. It is an individual right that consists of several underlying values. In this regard, it denotes the following:

54 S 2.
55 S 1.
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 *Ibid.*
60 *Ibid.*
61 S 22 of the Constitution 108 of 1996. It provides that "[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law." Also see 4 7 5 in this regard.

(a) that the public has an interest in allowing individuals to perform work for the purpose of their own living, rather than being supported by any public funds;[62] and

(b) that the public also has an interest in benefitting from the skills of such individuals.[63]

This right enables an individual to be self-providing and also to live a profitable, dignified and fulfilling life.[64] It speaks for itself that the legal profession falls within the definition of "profession" in this context. The word "profession" is defined as any type of work that needs special training or a particular skill, often one that is respected because it requires a high level of education.[65] A person who exercises a profession is called a professional person. "Professional" is therefore an adjective that describes work that needs special training or education, or it can describe a particular type of work that has the same qualities that are connected with trained and skilled people, such as effectiveness, skill, organisation and seriousness of manner.[66] It therefore describes a type of work that is respected due to its requirement of a high level of education and training.[67] If consideration is given to these descriptions, the mould of the legal profession can easily be recognised. The constitutional right, entrenched in section 22, in fact establishes a vocation.[68] This denotes a relationship to the human

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62 See Rautenbach "The right to choose and practice a trade, occupation or profession – the momentous and meaningless second sentence of section 22 of the Constitution" 2005 4 *Tydskrif vir Suid-Afrikaanse Reg* 851 854 in this regard; *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another* 2005 6 BLCR 529 (CC) par 59; Currie and De Waal *The Bill of Rights Handbook* (2013) 465.

63 *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another* par 60; Currie *et al The Bill of Rights Handbook* 465.

64 *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another* par 59; Currie *et al The Bill of Rights Handbook* 465.

65 Cambridge Dictionary "Profession" (2020) PROFESSION | meaning in the Cambridge English Dictionary (accessed 2020-12-10).

66 Cambridge Dictionary "Professional" (2020) PROFESSIONAL | meaning in the Cambridge English Dictionary (accessed 2020-12-10).

67 *Ibid.*

68 University of Texas at Austin School of Law "Apotheken-decision" (1 December 2005) https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=657 (accessed 2020-10-13). S 22 is similar in nature to s 12(1) of the German Constitution; hence, German jurisprudence, relating to the interpretation of s 12(1), has significant comparative value when interpreting s 22. The leading German case with regards to s 12(1) is the *Apotheken* decision (*Pharmacy* case) – see Currie *et al The Bill of Rights Handbook* 462; *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another* par 59; Currie *et al The Bill of Rights Handbook* 465.

personality in its entirety.[69] A vocation denotes a relationship that shapes and completes a person over a lifetime of devoted activity.[70] Furthermore, a vocation is the foundation of a person's existence through which that person contributes to the totality of a social product.[71]

In this context, it is both necessary and relevant to evaluate the nature of a legal practitioner's work. In order to become a legal practitioner, a person needs to obtain a LLB degree.[72] This degree is the only qualification that a graduate requires in order to enter the legal profession and will also enable the graduate to progress to the judiciary.[73] It is therefore submitted that his degree should equip students with specialised training and education in order for them to become trained and skilled legal practitioners, having the required effectiveness, skill, organisation and seriousness of manner that the legal profession expects. In light of this, it is worthwhile to mention "occupation", which is also included in section 22 of the Bill of Rights. An occupation is an activity through which persons want to provide for their own needs, not only in a material sense, but also in the idealistic sense of self-development.[74] In this sense, an occupation becomes a vocation.[75] The ideal of self-development is underpinned by the Constitution and has been discussed elsewhere.[76]

Being vocational and professional in nature, the legal profession has always been respected and seen as noble. It is viewed as the upholder and protector of the law.[77] It is service oriented in the sense that legal practitioners serve society.[78] Organisation,

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69 University of Texas at Austin School of Law https://law.utexas.edu/ transnational/foreign-law-translations/german/case.php?id=657; *Affordable Medicines Trust and Others v Minister of Health of the Republic of South Africa and Another* par 59; Currie *et al The Bill of Rights Handbook* 465.

70 *Ibid.*

71 *Ibid.*

72 S 26, read with s 1 of the LPA.

73 Greenbaum "The four-year undergraduate LLB: progress and pitfalls" 2010 35(1) *Journal for Juridical Science* 1 2.

74 Currie *et al The Bill of Rights Handbook* 465.

75 *Ibid.*

76 See 2 1, 2 2 1 and 2 4 2 in this regard.

77 Legit Quest "Legal profession: a noble profession" (30 January 2018) https://www.linkedin.com/pulse/legal-profession-noble-legit-quest (accessed 2020-01-21).

78 *Ibid.*

learning and public service form the core of the legal profession.[79] In *Indian Council of Legal Aid and Advice v Bar Council of India*,[80] the court stated the following:

> "Since the duty of a lawyer is to assist the court in the administration of justice the practice of law has a public utility flavour and, therefore, he must strictly and scrupulously abide by the Code of Conduct behoving the noble profession and must not indulge in any activity which may tend to lower the image of the profession in society."

This statement equally applies to the legal profession in South Africa. Members of society consider the courts to be their guardians in that they can have recourse to them, should they have suffered loss of whatever nature, as well as injustice.[81] The courts are protectors of many rights, including the all-important constitutional right to dignity.[82] The late Bram Fischer stated that honourable people must make honourable choices.[83] This is, without any doubt, applicable to a noble profession such as the legal profession. In this regard, it has already been indicated that one of the stipulations, in the Preamble of the LPA, is that the legal profession must uphold the values underpinning the Constitution, as well as the rule of law.[84] In representing clients with their cases in court, legal practitioners make a significant contribution towards the protection of these rights and, in a sense, therefore act as social engineers.[85] However, in order to protect such rights in a court of law, it is submitted that legal practitioners should not only know how to do legal research and know where to find the law applicable to a particular case, but also how to present such a case in court during a trial. The public has a right to expect that trial practitioners will be competent in the execution of their duties.[86] For this reason, it is submitted that legal practitioners should also be skilled in legal procedure in order to project a positive and confident outlook to the public as far as legal professionalism and the nobility of the legal profession are concerned. It has already been mentioned that, should a legal practitioner appear to be ignorant of the applicable legal procedures while conducting

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79 *Ibid.*

80 1995 1 SCC 732; Legit Quest https://www.linkedin.com/pulse/legal-profession-noble-legit-quest.

81 *Ibid.*

82 *Ibid.*

83 Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative adjudication" 2002 18 *South African Journal on Human Rights* 309 313.

84 This is also stipulated in s 3(a) of the LPA.

85 *Ibid.*

86 Gravett "Pericles should learn to fix a leaky pipe – why trial advocacy should become part of the LLB Curriculum (Part 2) 2018 21 *Potchefstroom Electronic Law Journal* 1 7.

cases in court, it may create an adverse impression relating to the practitioner, the justice system and the legal profession, in the eyes of clients and the public at large.[87] In this regard, Gravett states that there is no other time than during courtroom proceedings that a legal practitioner's conduct is so visibly essential to the judicial process, as well as intensively experienced by a client.[88] An incompetent practitioner may represent the totality of contact with the legal system and the law of a paying client who must watch such a practitioner succeed or fail because of a court appearance.[89] It is therefore submitted that the public may question the type and quality of the training that such a legal practitioner has undergone during his or her years in law school. For this reason, it is further submitted that law schools must ensure that students are adequately trained as far as legal procedure is concerned.

The integration of CLE with procedural law modules can play a significant role in this regard. By creating opportunities for students to engage with the law and procedure during mock trials and moots, they will be able to explore legal procedure and court etiquette.[90] In this regard, all law students will undergo such training, meaning that a diverse group of students, referring to students of all ages, races, genders and ethnic backgrounds, will be presented with equal educational opportunities to develop these important skills. In doing so, students are constructively contributing towards their professional upbringing and their vocation. It is submitted that a course in trial advocacy, as part of a CLE programme,[91] can also enhance the skills of students in this regard,[92] especially keeping in mind that trial advocacy not only concerns the legal practitioner's role as far as litigation is concerned, but also covers broader aspects of the practitioner's daily life at the office.[93] It is further submitted that, by working together in groups, the students can support each other's needs and contribute towards each other's knowledge base. In this way, diverse groups of students learn to collaborate in a practical manner, which may not only strengthen their skills as far

87 See 2 1, as well as Erasmus "Ensuring a fair trial: striking the balance between judicial passivism and judicial intervention" 2015(3) *Stellenbosch Law Review* 662 666 in this regard.

88 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 1 7.

89 *Ibid.*

90 See 3 4 3 with regards to the importance of mock trials.

91 Trial advocacy is presented as part of the CLE programme at NMU – see 4 3 3.

92 See 2 3, 2 4 3, 3 4 4 and 3 4 7 with regards to the importance of trial advocacy as educational programme.

93 See 3 4 7.

as court proceedings and profession etiquette is concerned, but also promote diversity in legal practice, as these students may form alliances that may continue to last into legal practice. Holistically, this contributes towards more diverse and skilled future legal practitioners. CLE therefore clearly promotes professional and practical skills, as well as diversity, for purposes of entry into legal practice in the following ways:[94]

(a) when students are fully aware of diversity, it will enable them to engage with their working environment in a more positive way and to directly respond to the needs of their clients. It is submitted that this aspect is closely related to the very next one;
(b) engagement with a diverse environment will give rise to different viewpoints and experiences. In the process, students will be encouraged and better prepared to appreciate the external world, global trends and, in doing so, become better law graduates for entry into legal practice. This is important, as the legal profession is increasingly becoming global by dealing with legal issues that involve multi-cultural considerations;[95]
(c) clinicians and law teachers can use a diverse environment for the purpose of training future legal practitioners to be able to work with clients from different cultural and economic backgrounds. It is submitted that clients of different race and gender can also be classified in this category; and
(d) students will be able to consider their own perspectives in a larger context in light of their experiences with people from different racial and cultural backgrounds. This will further place students in a position to reflect on any bias that might be existing on their side and to reconcile any differences by way of appropriate dialogue.

In the process, CLE is the catalyst for training a diverse group of students to be able to render quality legal services, as future legal practitioners, to members of the public. CLE considerably enhances transformative constitutionalism in this regard, as it concretises the phrase "…united in our diversity…" as found in the Preamble of the Constitution.[96]

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94 Iya 2008 *Journal for Juridical Science* 42.
95 Iya 2008 *Journal for Juridical Science* 49.
96 Also see Iya 2008 *Journal for Juridical Science* 41 in this regard.

The LPA further stipulates as its purpose the creation of "…a single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession;…"[97] This body refers to the Legal Practice Council, a body corporate with full legal capacity which exercises jurisdiction over all legal practitioners and candidate legal practitioners as contemplated in the LPA.[98] Another purpose of the LPA is the creation of a framework for the "…development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners;…"[99] If the legal profession should be held accountable for its actions, such accountability is towards the public, as mentioned before. However, to be held accountable for something in the professional world also has a somewhat negative connotation attached to it in the sense that something might have gone wrong in one or other way.[100] An explanation of the term, in this regard, is that someone, who is accountable, is totally responsible for what they did and must be able to provide a satisfactory reason, or reasons for their actions.[101] In the context of the LPA, this would mean that a legal practitioner or candidate legal practitioner, who delivers legal services of acceptable quality, will not be held accountable in a negative way, as the client would be completely satisfied with the legal services delivered. In ensuring quality legal services, which comprise of sound legal knowledge, a sound knowledge and experience in legal procedure and the handling of evidence, ethical and professional behaviour and respect for the law, law schools can make a significant contribution. They can do so by ensuring that the legal education, provided at tertiary level, lays a firm foundation in this regard. It is submitted

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97 S 3(c); Goosen 2019 *South African Judicial Education Journal* 70. The legal profession should be accountable through the operation of its structures of governance, *ie* the Legal Practice Council. Legal practitioners are required to comply with the standards of professional conduct that is expected of them, which conduct is also set out in the Code of Conduct of the LPA, as set out in Notice 81 of 2017 of the Department of Justice and Constitutional Development.

98 S 4; SASSETA Research Department https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf 18.

99 S 3(g)(i).

100 Fowler "If you are holding accountable, something is wrong (and it isn't what you think)" (7 October 2013) https://leaderchat.org/2013/10/07/if-you-are-holding-people-accountable-something-is-wrong-and-it-isnt-what-you-think/ (accessed 2020-01-23); Rocco "Accountability: is it good or bad? (29 November 2017) https://www.etechgs.com/blog/leadership/accountability-good-bad/ (accessed 2020-01-23).

101 Cambridge Dictionary "Accountable" (2020) ACCOUNTABLE | meaning in the Cambridge English Dictionary (accessed 2020-12-10).

that, if adequate training starts as early as possible at law school, it will make for better graduates because they will have had sufficient time to practice their skills. It is further submitted that training, in this context, should not commence during practical vocational training, but already during higher education. The rationale behind this argument is that learning never ends and that learners should be educated to such an extent that, when they leave school, they can function on their own without the aid of their teachers.[102] Learners, and consequently students, should be encouraged to adopt the mindset of lifelong learning in order to further their education on a daily basis for the rest of their lives.[103] In the context of higher education and as far as procedural law modules are concerned, this means that the training must be of such a nature that, when the student graduates from university and enters legal practice, the student will be in a position to conduct work in order to fulfil the expectations of the community. This places a big responsibility on law schools and law teachers, as well as requiring a reconsideration of teaching and learning methodologies. The result could be a graduate who is well trained in legal procedure and who will, in the execution of office and court duties that involve procedure, display the required professional and ethical qualities that are expected of a practitioner who is proud to be part of a noble profession. In this regard, Goosen states that, with regards to accountability, professional ethics should be a driver of the transformation of the legal profession as envisaged by the LPA.[104] He also states that the Constitution calls for transformative adjudication by the courts in order to establish a society based on human dignity, equality and freedom.[105] In this regard, litigants are the important stakeholders who decide which cases are brought before courts, a right which is entrenched in section 34 of the Constitution.[106] Section 34 provides that everyone has the right to have any dispute, that can be resolved by applying the law, decided in a fair public hearing before a court or other independent and impartial tribunal or forum. Therefore, as much as the courts need to meet their obligations as far as the adjudication of cases

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102 Wabisabi Learning "Learning never ends" (undated) https://www.wabisabilearning.com/blog/6-lifelong-learning-skills (accessed 2020-01-23). Also see 2 6 in this regard.

103 Wabisabi Learning https://www.wabisabilearning.com/blog/6-lifelong-learning-skills.

104 Goosen 2019 *South African Judicial Education Journal* 62.

105 Goosen 2019 *South African Judicial Education Journal* 69.

106 *Ibid.*

is concerned, the legal profession needs to ensure that such cases are presented before the courts in accordance with the highest standards of professional ethics.[107]

Goosen further states that:

> "…today is the history of tomorrow. How we act today, what course we choose, what steps we take in the profession, shape the days to come and will, inevitably, be viewed and appraised from the perspective of tomorrow."[108]

In the context of this research, these statements by Goosen can be interpreted to mean that, in getting the quality of the profession to a standard where accountability of legal practitioners towards the public stands out, the prospective legal practitioners of the future become important considerations. He states that legal practitioners should not only examine their own ways of practice, but also how they train and provide guidance to others.[109] For this reason, law schools should revisit the manner in which prospective legal practitioners are educated. Professional ethics, in the context of the duties of legal practitioners, plays a crucial role in the functioning of the courts.[110] It maintains the integrity of the adjudicative functions of the courts and serves as a precondition for the fulfilment by the courts of their role under the Constitution.[111] Since the commencement of the Interim Constitution,[112] the courts have been the guardians of transformation in the sense that landmark judgments, affirming resolute commitments to human rights and a new order in general, have been handed down.[113] Professional ethics can therefore be seen as an essential condition for the process of transformation as required by the Constitution.[114] Legal practitioners should thus be knowledgeable and skilled in approaching the law and procedure when engaging in litigation. In this way, the legal profession ensures its accountability towards the public as far as the delivery of quality and progressive legal services are concerned.

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107 *Ibid.*

108 Goosen 2019 *South African Judicial Education Journal* 64-65.

109 Goosen 2019 *South African Judicial Education Journal* 69.

110 *Ibid.*

111 *Ibid.*

112 200 of 1993.

113 Kibet *et al* 2017 *African Human Rights Law Journal* 348.

114 Goosen 2019 *South African Judicial Education Journal* 69.

The accountability of the profession towards the public becomes important in light of modern developments in society, specifically the stratospheric growth of the internet and social media platforms over the past decade. Times have changed in that social media platforms have placed professional conduct and ethics at the centre of the public domain.[115] Social media has brought about tremendous transparency in the conduct of everyday life, including the legal actions taken by legal practitioners.[116] Over the years, various stories of legal practitioners and legal practice have been placed on social media platforms, leading to the public airing their views quite vehemently regarding them.[117] In the context of legal procedure, the trial of Paralympic athlete Oscar Pistorius,[118] as well as that of Christopher Panayiotou,[119] enjoyed the undivided attention of the public. While such coverage can direct the public's attention to the many commendable legal actions taken by legal practitioners, it can equally cast a dark cloud of doubt over the profession, as legal practitioners sometimes also engage in unprofessional and unethical conduct. Such conduct is unfortunately also sometimes published and generates comments from the public in relation to the profession in a way that can cause damage to the profession's reputation. There is a great opportunity for transformation, reorganisation and reorientation of the legal profession in this apparent negative cloud:[120] as social media, and increased transparency of the profession to the public, have already brought about their own changes, the profession should also transform as far as professional conduct and ethics are concerned.[121] It is submitted that the change should start with the training of law students to act ethically and professionally in the execution of civil procedure, criminal procedure and when engaging with evidence. Law schools should therefore make law students aware of the consequences that the negative perceptions of the public can have on the noble legal profession. Law students should accordingly be trained to act professionally and ethically in all instances when executing legal proceedings and handling evidence. This accords with Goosen's statement that important considerations, in bringing about transformation of the profession, are

115 Goosen 2019 *South African Judicial Education Journal* 65.
116 *Ibid.*
117 *Ibid.*
118 *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793.
119 *S v Panayiotou and Others* (CC26/2016) [2017] ZAECPEHC 53; [2018] 1 All SA 224 (ECP).
120 Goosen 2019 *South African Judicial Education Journal* 66.
121 *Ibid.*

"…how we deal with training in ethics and how we promote transformation in our ethical practice in order to foster the transformation of the legal profession."[122] Adequate training in this regard may result in future legal practitioners, and consequently a legal profession that can truly be accountable to the public.

As stated in the Preamble of the LPA, the legal profession should undergo some transformation. The profession is currently in a transitional period[123] in which debates relating to the weight and value of the LLB curriculum, as well as its efficiency to produce competent graduates who are worthy of practising law, are reaching intense levels.[124] It has also been indicated that influential law firms have continually uttered their dismay about law graduates who, even with good university grades, lack the required substantive knowledge to practise law.[125] It is submitted that this lack of substantive knowledge also includes knowledge about legal procedure and evidence, which explains why graduates struggle with practical work upon entering legal practice. There are legal practitioners who have blamed university law schools for not producing law graduates who can "hit the ground running" when they commence with their practical vocational training.[126] It has been suggested that the higher education system should be developed in order to produce knowledgeable, skilled and value driven law students and, eventually, professionals.[127] The gap between theory and practice must however be made smaller.[128] When entering legal practice, law graduates become candidate legal practitioners before being admitted and enrolled as *de facto* legal practitioners. Candidate legal practitioners must first complete a term of compulsory practical vocational training, as mentioned earlier, in order to be admitted and enrolled as such. This training has been described as extensive, involving work experiential learning in order to equip candidate legal practitioners with the necessary skills required to function as legal practitioners.[129] Training includes proper consultations with clients, advanced legal research techniques, file

122 *Ibid.*

123 Also see 2 1 in this regard.

124 Marumoagae "The role of candidate attorneys in the legal profession" 2014 (July) De Rebus 54 54.

125 *Ibid.*

126 *Ibid.*

127 *Ibid.*

128 *Ibid.*

129 SASSETA Research Department https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf 17-18.

arrangement and management, briefing counsel, properly conducting a trial, court etiquette, properly corresponding with opponents, legal practice ethics, properly running a legal practice, billing of clients, as well as preparation towards the admissions examinations.[130] This is quite a long list of competences that must be accomplished by a candidate legal practitioner during the two years[131] of practical vocational training. Furthermore, labouring under the assumption that law graduates have not been adequately trained in at least the competences mentioned in the above list, the gap between theory and practice, and consequently between university training and that received in legal practice, becomes even more evident. This may even create more doubt relating to the efficacy of the current law curriculum as far as the legal education of law students is concerned, especially as far as legal practice is concerned.

However, Marumoagae points out that both academics and legal practitioners have taken a paternalistic approach with regards to the debate surrounding the efficiency of the LLB degree, as they have not actively engaged with law students and law graduates upon their entry into the legal profession.[132] It therefore appears that neither academia nor the legal profession wants to accept any blame for the crisis around the LLB degree.[133] This crisis refers to the efficiency of the LLB degree to produce candidates worthy of practising law.[134] He also convincingly states that, in addressing the problems with the LLB degree, the main stakeholders, namely the law students, should not be left out of any engagement.[135] The input from students, and also candidate legal practitioners, can equip law firms with a better understanding of what their roles are as far as bridging the gap between theory and practice is concerned.[136]

A study relating to the training of candidate attorneys has also revealed that some law firms do not comply with the necessary training requirements as far as the practical

130 *Ibid.*

131 See Legal Practice Council – Requirements for the registration of a practical vocational training contract (candidate attorney) with regards to the two years requirement. This applies only as far as candidate legal practitioners, wanting to become attorneys, are concerned.

132 Marumoagae 2014 *De Rebus* 54.

133 *Ibid.*

134 *Ibid.*

135 *Ibid.*

136 *Ibid.*

vocational training of candidate legal practitioners is concerned.[137] This means that not all law firms provide candidate legal practitioners with experience of the workplace.[138] The study further revealed that the duties of some candidate attorneys were limited to performing tasks that amount to neither workplace experience nor the work of legal practitioners, more specifically attorneys.[139] This state of events raises some concerns. It can be questioned whether such candidate legal practitioners, when admitted and enrolled as legal practitioners, will be in a position to make any meaningful contribution to the legal profession as envisaged by the LPA. In this regard, it is doubtful as to whether or not the candidate has appeared in court, knows the rules of court procedure as well as other aspects of trial advocacy and the profession as a whole. It should further be asked whether a university training programme, different from the conventional one, might have instilled better skills for practice in a candidate. This would mean that university law schools must provide more practical training in order to enable candidate legal practitioners to contribute towards the legal profession, as well as the transformation thereof, in a meaningful and accountable way. It is submitted that this particular aspect is an important motivator for law schools to ensure that law graduates are adequately prepared for legal practice as far as trial advocacy is concerned. In legal practice, clients do not only want to talk to legal representatives about legal problems. Instead, clients want to see results, sometimes in a very short period of time. This means that legal practitioners must be skilled in executing legal tasks. A sound university training in this regard can thus assist a candidate legal practitioner, who has not received the required and expected practical legal training during a period of practical vocational training, in a significant manner. This emphasises the argued constitutional imperative that rests on law schools. In light of the aforementioned discussion, CLE can excel as a methodology thats provide the required traning, as future lawyers will be trained to not only be knowledgeable in theory, but also in application of such theory to practical problems by way of legal procedure and the principles of evidence. As such, results of appropriate quality, that clients would want to see, will be generated.

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137 SASSETA Research Department https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf 27.

138 *Ibid.*

139 *Ibid.*

5 2 2 2 ACCESS TO JUSTICE

A discussion, closely related to the previous one, is about access to justice. It has already been stated that one of the meanings of this concept is the provision of inexpensive ways for the public to have their cases adjudicated by legal practitioners, whether in or outside of a courtroom.[140] The enforceability of the Bill of Rights burdens the judicial system with a higher responsibility to ensure that access to justice is available to everyone.[141] Without access to justice, all other rights in the Bill of Rights would be meaningless.[142] Therefore, there is a responsibility on the legal profession to ensure that legal services are available to all members of the public, as well as to ensure the adequacy and consistency of such services.[143] This responsibility is another manifestation of professional responsibility.[144] If this responsibility is not adhered to, and furthermore not inclusive of competent practitioners delivering such services, it will be the indigent members of society who will suffer the most as a result thereof.[145] More privileged individuals can easily afford alternative and more competent legal practitioners, as well as advocates, something that is not readily available to the indigent members of society.[146] In such a case, indigent members may be restricted to incompetent legal practitioners – something which is undoubtedly not envisaged by the LPA in desiring a legal profession that is accountable to the public. However, the judiciary and the legal profession are at the epicentre of the State's quest for the provision of an accessible and affordable judicial system to the public.[147]

On the point of the affordability of legal practitioners, the transformative nature of the LPA really materialises in that the act provides for the capping of legal fees, as well as for the rendering of community service by legal practitioners and candidate legal practitioners. Both these aspects can greatly improve access to justice and therefore require some discussion. As a point of departure, section 34 of the Constitution

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140 See 3 4 5.

141 Thebe "Legal Practice Act and human rights at the core of issues discussed at LSSA AGM" (2015) http://www.saflii.org/za/journals/DEREBUS/2015/89.pdf (accessed 2020-07-24).

142 *Ibid.*

143 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 7.

144 *Ibid.*

145 *Ibid.*

146 *Ibid.*

147 Thebe http://www.saflii.org/za/journals/DEREBUS/2015/89.pdf.

entrenches the fundamental right to have access to the courts.[148] Section 34 applies to both civil and criminal cases.[149]

As far as the capping of legal fees is concerned, section 35 of the LPA must be examined. It must however be noted that the provisions of this section are not yet operational. Section 35(4) provides that the South African Law Reform Commission (hereafter referred to as the "SALRC") must, within two years after commencement of Chapter 2 of the LPA, investigate and report to the Minister of Justice and Constitutional Development on the following aspects:

(a) how to address circumstances that give rise to legal fees that are not affordable to most people;[150]
(b) legislative and other interventions that are necessary for the improvement of access to justice by the public.[151] In this regard, it should be examined as to whether law students should be allowed to appear in court in certain instances, as well as whether self-help stations at law clinics and selected other venues are viable options. These topics are discussed elsewhere in more detail;[152]
(c) the establishing of a mechanism that will be responsible for determining legal fees and tariffs;[153]
(d) how the mechanism should be assembled, as well as which steps it must follow in order to determine the fees and tariffs;[154]
(e) providing the users of legal services with the option of voluntarily agreeing to pay fees for legal services less or in excess of an amount that may be set by the mechanism;[155] and
(f) the obligation by legal practitioners to conclude mandatory fee arrangements with clients when the clients secure the services of the legal practitioners.[156]

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148 See 5 2 2 1.

149 Bellengere, Palmer, Theophilopoulos, Whitcher, Roberts, Melville, Picarra, Illsley, Nkutha, Naude, Van der Merwe and Reddy *The Law of Evidence in South Africa – Basic principles* (2016) 19, 20.

150 S 35(4)(a).

151 S 35(4)(b).

152 Self-help stations had already been discussed at 4 7 4 2, while students appearing in court is discussed in the next section.

153 S 35(4)(c).

154 S 35(4)(d).

155 S 35(4)(e).

156 S 35(4)(f).

The LPA stipulates that, in order to determine fees and tariffs, the SALRC must give thought to the following considerations:[157]

(a) *best international practices:* mention has already been made of law students appearing in courts. This is not currently allowed in South Africa.[158] The LPA also contains not provisions that allow and regulate the appearance of law students in courts. However, it must be noted that there are countries where students do appear in courts under close supervision. The United States of America serves as an example.[159] Students, who have sufficiently advanced in their legal studies, may represent clients in lower courts under the supervision of experienced legal practitioners.[160] Students are thus practising in courts in all 50 states in the USA, which moves CLE forward to a major extent.[161] In this way, students get much needed exposure to real life experiential learning under the close supervision of admitted attorneys.[162] This may have a profound influence on the strengthening of students' professional responsibility.[163] In South Africa though, a major concern is how intervention by supervisors can take place once court proceedings commence.[164] It is not like an office environment where a clinician can intervene at any time during a consultation.[165] In the courtroom it will require a proverbial leap of faith from both the supervisor and the client if a student is to be allowed to appear on the client's behalf.[166] This may be one of the main reasons why clinicians have mixed reactions to this suggestion.[167] Another reason may be that law clinics, and clinicians, are already overloaded with work and that there may consequently be no time to supervise students

157 S 35(5).

158 Vawda "Learning from experience: the art and science of clinical law" 2004 29(1) *Journal for Juridical Science* 125.

159 Bliss *Clinical Legal Education: International perspectives* presented at webinar (July 2020); Vawda 2004 *Journal for Juridical Science* 125.

160 Vawda 2004 *Journal for Juridical Science* 125.

161 Bliss *Clinical Legal Education: International perspectives*.

162 *Ibid*.

163 Evans and Hyams "Independent valuations of clinical legal education programs" 2008 17(1) *Griffith Law Review* 64.

164 *Ibid.*

165 *Ibid.*

166 *Ibid.*

167 Vawda 2004 *Journal for Juridical Science* 125.

appearing in courts.[168] It is nevertheless submitted that this is definitely an international practice that should be investigated and evaluated for the purposes of transforming access to justice in South Africa. There is a strong pedagogical basis as far as students are concerned, as well as the mentioned cost benefits for clients.[169] It may also help to alleviate the issues of congested court rolls, but should only be considered for basic types of appearances, including postponements, selected motion court proceedings in civil cases, selected pleas of guilty in criminal cases, selected bail applications and selected sentencing cases. Already cost-effective courts, such as the Small Claims Court, where legal representation is not allowed for any of the litigants,[170] may present opportunities for student training, provided that no payment for such services is required for the student representation. The importance of the Small Claims Court for the purpose of access to justice has been pointed out[171] and it is submitted that student participation can facilitate such access to justice. For the purposes of this research, it will mean that the knowledge and training of students must be appropriate in order for them to be able to act in the best interests of their clients when conducting such appearances and representation in court. This is especially important as far as court procedures are concerned. To alleviate any risk factor that court appearances by students might bring about, skills based training in legal procedure and court etiquette could be presented during classroom sessions or tutorial sessions as part of CLE programmes, whether as part of a clinical law programme or procedural law modules presented by way of CLE.[172] Simulated activities and trial advocacy sessions, also as part of CLE programmes or procedural modules presented by way of CLE, could also be beneficial in training students adequately for such appearances, as it can equip the students with a certain level of procifiency that is required for appearing

168 *Ibid.*

169 Evans *et al* 2008 *Griffith Law Review* 64.

170 S 7(2) of the Small Claims Court Act 61 of 1984 provides that parties shall appear in person before the court and shall not be represented by any person during such proceedings. This provision is subject to subsection (4), providing that juristic persons may be represented by its duly nominated director or other officer. Subsection (1) however provides that juristic persons may only become parties to an action as a defendant, subject to s 14(2) providing that the State cannot be such a defendant. Also see Pete, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Civil Procedure – A practical guide* 3ed (2017) 62 in this regard.

171 Thebe http://www.saflii.org/za/journals/DEREBUS/2015/89.pdf.

172 Evans *et al* 2008 *Griffith Law Review* 65.

in courts and handling the best interests of clients while so appearing.[173] Court appearances, as an extension of CLE, will foster a greater sense of professional responsibility[174] and accountability among students that will make them more aware of how important it is to promote the best interests of clients in order to bring relief to their legal problems and consequently improve their lives.[175] It is submitted that court appearances by students promotes constructive learning by students in that they will be able to reflect on their experiences and significantly learn from that about what is expected of them when performing litigious services in the courtroom. However, as already stated earlier, legislative intervention will need to take place in order to bring about the concept of student representation in courts;

(b) *public interest*: In considering the already mentioned self-help stations[176] and representation by students, initiatives which could drastically bring about a decrease in legal fees in some instances, the public interest will play an important role. A survey could give an indication as to how the public would react to the proposition of such services, although such a survey falls outside the scope of this research;

(c) *interests of the legal profession*: It is submitted that the legal profession could benefit from an initiative like self-help stations. Greater access to justice could mean greater public satisfaction, while lower fees, or even no fees in the case of representation by students in courts, could have the same effect. It may be that some legal practitioners will feel that business opportunities are taken away from their practices.[177] As true as that may be, the accessibility of legal services by the public must also be considered. In this regard, the focal point is the transformative nature of the LPA, as well as the reasons why the legal profession

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173 *Ibid*.

174 Evans *et al* 2008 *Griffith Law Review* 64.

175 See Vawda 2004 *Journal for Juridical Science* 125 in this regard. Vawda merely indicates that there are "obvious advantages" to court appearances by students, but does not specifically state what these advantages are. It is however submitted that the acquisition of a sense of professional responsibility and accountability on the side ot the students will be a reality, as students will experience what it is like to handle the lives of people in a somewhat stressful forum like a court of law.

176 See 4 7 4 2.

177 Also see Goosen 2019 *South African Judicial Education Journal* 61, where the learned judge states that some of the changes, as provided for in the LPA, may possibly not be much appreciated by all practitioners. However, such changes present new challenges that needs to be handled.

should be transformed. Expensive legal fees and tariffs are an important motivator in this regard; and

(d) *contingency fee agreements as provided for by the Contingency Fees Act*.[178]

While appropriate fees and tariffs are still being investigated, legal costs will continue as per the current dispensation.[179] When the complete effect of this section comes into operation, the use of contingency fee agreements, as mentioned, will not be excluded.[180] As the remainder of the LPA came into operation on 1 November 2018, the Minister must be advised, by the SALRC, about more affordable options for the public. It is hoped that by the end of October 2020, more clarity will surface regarding the way forward in this regard. It is submitted that it is of the utmost importance, as well as in the spirit of the LPA, that the SALRC finalises its investigation as soon as possible. It is further submitted that the aforementioned suggestions with regards to more cost-effective legal services for the public should be brought to the attention of the SALRC.

CLE can play an important role in training law students to be of assistance to members of the public at the mentioned self-help stations, should they (members of the public) feel overwhelmed by the technological nature of such stations. In this way, students can become more familiar with digital processes in legal practice and how it can facilitate more affordable legal services to the public, as well as with the transformative impact that AI can have on the lives of members of the public. CLE will furthermore be the decisive teaching and learning methodology to prepare students for court appearances, should such an initiative realise in South Africa. An integrated teaching and learning approach with procedural law modules will further facilitate the students' training in legal procedure and evidence. In this regard, mock trials, moots and verbal communication exercises will play crucial roles in equipping students with the relevant

178 66 of 1997.

179 S 35(1). This section provides that "[u]ntil the investigation…has been completed and the recommendations contained therein have been implemented by the Minister, fees in respect of litigious and non-litigious legal services rendered by legal practitioners, juristic entities, law clinics or Legal Aid South Africa…must be in accordance with the tariffs made by the Rules Board for Courts of Law…"

180 S 35(12).

and applicable skills necessary to execute such appearances with confidence and in a professional manner.[181]

Further, on the point of accessibility of legal services, it has been stated that the delivery of legal services in towns and cities is disproportional to that in rural areas in that there are not many legal practitioners delivering legal services in rural areas.[182] This might be an indicator that many law graduates are pursuing lucrative causes in mainly commercial law and not considering the importance of using their knowledge and skills to also serve the rights and interests of members of society living in rural areas. Many of these members may be indigent and marginalised with no access to justice. In an attempt to produce more law graduates who will be willing to render legal services to rural communities, it must be a priority of CLE programmes to foster an awareness among students about the importance of promoting and protecting the fundamental rights and interests of all members in society, including members in rural communities. Students must appreciate the fact that social justice is available for everyone in society, not only for people residing in towns or cities, or for people who can afford legal representation. As stated elsewhere, students must therefore not be trained to become cold-blooded commercial legal practitioners, but also to serve other causes.[183] They must rather be trained to keep the Constitution and its spirit in mind when rendering legal services. If students are trained in this manner, it may inspire them to fully appreciate how they can play a groundbreaking role in strengthening the dignity, equality and freedom of indigent and marginalised members of society.[184] Moreover, students will develop a better appreciation for the notion of *ubuntu* and how they, as future legal practitioners, can and should become involved in improving the lives of members of society and bring reality to the provisions of the Constitution in order to enhance transformative constititonalism. As part of CLE programmes, students will develop familiarity with the rendering of *pro bono* legal services to indigent members of society, especially when working at law clinics as part of a live-client model. It is especially during these sessions when students should be reminded of the valuable and deeply desired services that they are rendering to people who

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181 See 3 4 4 with regards to the importance of, inter alia, verbal skills in training law students for entry into legal practice.

182 See 5 1.

183 See 2 3.

184 See 2 3 in this regard.

might otherwise not have any other recourse to access to justice. If all of the abovementioned aspects can be achieved by way of CLE, future legal practitioners might become more willing to render legal services to rural communities.

Community service is a valuable way of providing access to justice. It is explicitly provided for by the LPA,[185] but has not come into operation yet. The reason for this is that there are no directives as to how community service should operate. Furthermore, the LPA is completely silent as far as *pro bono* work is concerned. This is in contrast to the Code of Conduct of the Attorneys Act, in which clear and extensive *pro bono* guidelines have been stipulated. The LPA does however mention "community service", a concept which, it will be argued, can include *pro bono* work.[186] One argument in this regard lies in a description of community service in section 29(1)(b) of the LPA, *ie* "…a minimum period of recurring community service by practising legal practitioners upon which continued enrolment as a legal practitioner is dependent." In terms of the Attorneys Act, attorneys have to perform at least 24 hours *pro bono* work per year. Although the Attorneys Act did not state that continued enrolment of the legal practitioner was dependant on the delivery of *pro bono* services, the Code of Conduct, applicable to the former Law Societies in the Northern Provinces, KwaZulu-Natal and the Free State, stipulated that a legal practitioner, who still has to perform *pro bono* services in a year and refuse to do so without any good cause shown, will be seen as acting unprofessionally.[187] The said Code of Conduct, once again with regards to the former Law Societies in the Northern Provinces, KwaZulu-Natal and the Free State, further provided that *pro bono* services shall include, but not be limited to, the delivery of legal advice and opinion or assistance by legal practitioners on matters that fall within their professional competence.[188] The purpose of such service delivery is the facilitation of access to justice for persons who cannot ordinarily afford to pay for such legal services.[189] The Code of Conduct contained a similar definition of *pro bono* work as far as the former Cape Law Society is concerned.[190] The Code of Conduct also provided that the society may, at its discretion, issue guidelines in

185 S 29.
186 See 4 7 2 1 in this regard.
187 Rule 25.15.
188 Rule 25.1.
189 *Ibid.*
190 Rule 25.1.

respect of any aspect relating to *pro bono* services generally, as well as in respect of any sub rules.[191] In this regard, it is submitted that, in terms of the Code of Conduct, the Cape Law Society could have extended the nature of *pro bono* services to include legal practitioners providing legal education to law students. The Cape Law Society's definition of "*pro bono* services" even provides that *pro bono* services shall include certain actions, but not be limited thereto.[192] A discretion, to extend the nature of *pro bono* services, was also clear from the Code of Conduct.

The Admission of Advocates Act did not provide for *pro bono* work, but the Uniform Rules of Professional Conduct, applicable to advocates, did.[193] The Uniform Rules were however not as extensive as the Code of Conduct for attorneys and did not include a provision that, if advocates do not render *pro bono* services, such omission would constitute unprofessional and unethical conduct.[194]

Although the various Law Societies and the Bar Council no longer exist, due to them being replaced by a single Legal Practice Council with Provincial Councils,[195] it is submitted that the attorneys' Code of Conduct, as well as the advocates' Uniform Rules should still have persuasive force with regards to the interpretation of the LPA where clarity and/or certainty is required. This is important, because the LPA states that community services are not only limited to the actions stipulated, namely:[196]

(a) service in the State;

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191 Rule 25.2.

192 Rule 25.1.

193 General Council of the Bar of South Africa "Uniform Rules of Professional Conduct" (undated) http://www.nfa-advocates.co.za/files/GCB_Uniform_Rules_of_Professional_Conduct.pdf (accessed 2020-01-31).

194 *Pro bono* work is provided for in Rule 5.12.4 of the Uniform Rules, which stipulates as follows:

"5.12.4 Pro Bono work

A local Bar Council shall require its members to undertake pro bono work on the basis that:

5.12.4.1 it allocates such work amongst its members on a basis that is fair, reasonable, equitable and transparent;

5.12.4.2 where a member is required to take instructions from a person who is not a practising attorney, the provisions of rule 5.12.3 shall apply;

5.12.4.3 a member may recover fees in terms of a written contingency fee arrangement lodged with and approved by the Bar Council prior to the commencement of the work.

5.12.4.4 Each of the constituent Bars shall make provision in their domestic rules for the provision of pro bono services to be rendered by their members at levels and at intervals as each constituent Bar may approve from time to time."

195 Summary to the LPA.

196 S 29(2).

(b) service at the South African Human Rights Commission;
(c) service as, *inter alia*, a Commissioner in Small Claims Court cases;
(d) the provision of legal education and training on behalf of the Legal Practice Council, or on behalf of an academic institution or non-governmental organisation; or
(e) any other service that a candidate legal practitioner or legal practitioner wants to perform, provided that it is approved by the Minister.

It is submitted that community service can therefore include *pro bono* work, especially if read together with section 29(1)(b), mentioned before, of the LPA. Items (d) and (e), as mentioned above, are also of particular interest to this research. The "legal education and training on behalf of an academic institution" can be interpreted to mean that community service may include the provision of legal education to law students by legal practitioners. Furthermore, in terms of item (e), legal practitioners, and even candidate legal practitioners, may apply to the Minister to be permitted to perform community service by way of providing legal education to law students, should the law school of a university allow them to provide such education to their students as part of a module. In this regard, attorneys, who are experienced in litigation, as well as in the consideration and utilisation of various pieces of evidence, will be able to provide valuable training to law students, as part of CLE programmes or programmes integrating CLE with procedural law modules, in furthering their theoretical knowledge and practical application of legal procedure and principles of evidence. This training can include interactions with clients in order to facilitate access to justice, but there is no reason as to why simulations can also not be used. Should candidate legal practitioners venture into this territory, but lack the necessary practical knowledge to effectively do so, their contribution may be highly questionable and not conducive to providing a quality legal education to students. Should this training involve interactions with clients, the quality of such access to justice may also be questionable. This will be the case especially if these candidate legal practitioners have not been sufficiently exposed to litigation and the application of evidence. In this regard, adequate training at tertiary level could solve this problem to a certain extent, as such a candidate legal practitioner would have been provided with a substantial theoretical basis and basic practical application of legal procedure and principles of evidence. Furthermore, the candidate legal practitioner would have consolidated those skills by executing the

same while undergoing additional practical training at the university's law clinic, or even externally, if external training programmes are in place. The graduate, commencing articles of clerkship, should therefore not have too much difficulty in providing training in legal procedure and principles of evidence to law students, whether providing education on an introductory or basic level, or on a more advanced level involving interactions with clients, thus promoting access to justice. The position of former law students, rendering community service in this regard, can be compared to that of medical students rendering postgraduate community service. This community service spans over a period of one year and is mandatory.[197] Medical students are often not placed at their first choice of placement, resulting in them performing work that is of no interest to them.[198] This may be a deterrent to them wanting to render community service in future.[199] From the wording of the LPA, it appears that community service for prospective legal practitioners is not as restrictive. It is therefore submitted that prospective legal practitioners will be more amenable to delivering community service, should they be allowed to choose the type of services that they want to deliver. It is further submitted that the same can be said about *pro bono* services: should legal practitioners be in a position to decide the type of *pro bono* services that they want to deliver, it might be an incentive to them to become more readily involved in the rendering of academic and practical skills training to law students.[200]

In concluding this discussion, the following statement by Goosen is relevant:

> "The adversarial system is key to the manner in which courts fulfil their constitutional role and function. The key players in the system are, understandably, legal practitioners."[201]

That legal practitioners are the key players as far as the adversarial litigation system is concerned, is correct.[202] The presiding officer adjudicates the matter based on the

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197 Van Niekerk "Internship and community service require revision" 2012 102 (8) *South African Medical Journal* 638 638.

198 *Ibid.*

199 *Ibid.*

200 See again 4 7 2 1 in this regard.

201 Goosen 2019 *South African Judicial Education Journal* 67.

202 See Erasmus and Hornigold "Court supervised institutional transformation in South Africa" 2015 18(7) *Potchefstroom Electronic Law Journal* 2457 2457 in this regard.

evidence that is adduced to court by the legal practitioners involved in the particular matter.[203] The presiding officer may however intervene judicially if it appears that one of the litigants is not performing the required litigious duties in a competent manner.[204] Due to them being the key players, legal practitioners must be skilled in what they are doing, especially since they provide access to justice to the public. The training of future legal practitioners to act skilfully in the courts, should already start at university. Furthermore, legal practitioners have a duty of fidelity to the adjudication process in that the court must be placed in a position to determine the matter in line with what the law provides on the basis of facts that were properly brought before it.[205] Legal practitioners have the duty to facilitate the adjudication of the court in accordance with what the law provides.[206] In doing so, practitioners ensure that the case is properly prosecuted before the court.[207] Goosen has also stated that the courts need legal practitioners not only as litigants, but also for the future of the bench.[208] This furthermore emphasises the importance of the fact, as was stated before, that legal practitioners need to be skilled and experienced in legal procedure. If so, it can be said that quality access to justice is provided to members of the public.

5 2 2 3 ENTRY INTO THE LEGAL PROFESSION

Closely associated with the previous discussion is the promotion of entry of prospective legal practitioners into the profession. In this regard, the Preamble of the LPA provides that, in the context of the LPA, section 22 of the Constitution, as already mentioned, states that freedom of trade, occupation or profession would mean that unnecessary and artificial barriers for entry into the legal profession should be removed. It has been stated that one of the problems in the legal profession is a lack of equality within the legal profession, specifically relating to qualification requirements for admission to the legal profession.[209] It has further been stated that inequality,

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203 Snyman "The accusatorial and inquisitorial approaches to criminal procedure: some points of comparison between the South African and continental systems" 1975 VIII *Comparative and International Law Journal of Southern Africa* 100 103.

204 Erasmus 2015 *Stellenbosch Law Review* 674.

205 Goosen 2019 *South African Judicial Education Journal* 68.

206 *Ibid.*

207 Goosen 2019 *South African Judicial Education Journal* 69.

208 Goosen *Covid-19 and the courts* presented at webinar, Microsoft Teams (May 2020).

209 See 5 1.

within the legal profession, is determined by, *inter alia*, gender, age, ethnic background and social class.[210] An extensive discussion of the nature of the mentioned barriers, as well as other possible barriers, falls outside the scope of this research. As entry into the profession is the central factor in this discussion, the employability of graduates deserves some attention. The orientation of the labour market policy has been modified from job security and structural workforce interventions to a position of employability security.[211] There is currently much debate about the concept of employability.[212] It has been stated that employability consists of three components: a good degree, generic skills and a set of personal attributes.[213] Education and its accompanying skills training is thus but one such component that requires attention. Education is often advanced as a solution to unemployment,[214] or, as can be said in this context, a barrier to entry into the working world. Employability skills can create an attractive candidate for a job that is being applied for.[215] For that reason, a candidate can gain an advantage in the job market if the candidate's employability skills were improved by way of education, training and the practical application of knowledge.[216] There is also an increasing emphasis on the need for undergraduate degree modules to be reflective of the working world.[217] In Canada, the United Kingdom and Australia, it has been shown that the aforementioned policy shift has affected higher education in significant ways.[218] Governments of these countries have made funding contingent upon graduates displaying certain attributes.[219] In this regard, the focus is on graduates who are ready for entry into the working world,

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210 Sullivan "Barriers to the legal profession" (July 2010) https://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/literature_reviewon_diversity1.pdf 17 (accessed 2020-02-25).

211 Bridgstock "The graduate attributes we've overlooked: enhancing graduate employability through career management skills" 2009 28(1) *Higher Education Research and Development* 31 31.

212 Creasy "Improving students' employability" 2013 8(1) *Engineering Education* 16 16. Although this article mainly focuses on the field of civil engineering, it is submitted that the general principles about education and skills are equally applicable to law students and law schools.

213 *Ibid.*

214 University of Johannesburg "Barriers to employment for poor youth" (20 January 2017) https://www.uj.ac.za/newandevents/Pages/BARRIERS-TO-EMPLOYMENT-FOR-POOR-YOUTH.aspx (accessed 2020-02-12).

215 McQuerrey "How to improve employability skills" (revised 24 July 2020) https://work.chron.com/improve-employability-skills-9852.html (accessed 2020-02-17); Cantatore "The impact of pro bono law clinics on employability and work readiness in law students" 2018 25(1) *International Journal of Clinical Legal Education* 147 149.

216 *Ibid.*

217 Creasy 2013 *Engineering Education* 16-17.

218 Bridgstock 2009 *Higher Education Research and Development* 31.

219 *Ibid.*

meaning that they are competent within the field of their respective disciplines and possess the abilities required by the working world.[220] However, it has been shown that, in many other instances, skills training is not preparing students adequately for a smooth transition into the working world.[221] This is due to access, content and the quality of such education and training.[222] It is therefore submitted that inadequately trained graduates may constitute one such barrier into the legal profession. This could be brought about by legal practitioners not wanting to appoint graduates as candidate legal practitioners, as they have no confidence in their abilities to make viable contributions through their knowledge and abilities, to their (legal practitioners') law firms.

The basis of this discussion is simple: skills are critical assets for individuals, businesses and societies.[223] In a dynamic world, like the current one, the importance of skills enjoys even more emphasis.[224] Skills that are relevant for the working world must be taught at school.[225] Such training should be maintained and be improved further during working life in order for them to be recognised and utilised by employers once the "trainees" enter the working world.[226] It is submitted that "school", in this context, should also refer to a law school and therefore that skills training at tertiary level should prepare graduates for professional life in legal practice. While at law school, CLE is the ideal teaching methodology for such skills training in that it encompasses both theoretical[227] and practical training[228] that may be necessary to learn about and to practice such skills. Additional skills training can take place and be

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220 *Ibid.*

221 AP Youthnet "Education and skills training to improve employability of young people – background statement" (2012) http://apyouthnet.ilo.org/discussions/forum/education-and-skills-training-to-improve-employability-of-young-people/education-and-skills-training-to-improve-employability-of-young-people-background-statement (accessed 2020-02-17).

222 *Ibid.*

223 World Economic Forum "Matching skills and labour market needs – building social partnerships for better skills and better jobs" (January 2014) http://www3.weforum.org/docs/GAC/2014/WEF_GAC_Employment_MatchingSkillsLabourMarket_Report_2014.pdf (accessed 2020-02-12).

224 *Ibid.*

225 *Ibid.*

226 *Ibid.*

227 See 4 3 3 with regards to the classroom component of CLE. During classroom sessions, important information concerning necessary and applicable skills could be imparted on students.

228 See 4 3 2 with regards to the practical component of CLE. Students will get the opportunity to practice the skills, that they have been taught during classroom sessions, while rendering legal services at a law clinic, mobile law clinic or during an externship programme.

refined during tutorial sessions.[229] These skills can be further improved upon during the vocational training stage in legal practice. Therefore, continuous access to education and training is an investment in the future of societies.[230] It is a pre-condition for economic advancement, democracy, personal growth, as well as social cohesion.[231] Education of good quality can fundamentally change the challenges of poverty and unemployment.[232] In order to fully understand this situation, it is necessary to make brief reference to the situation in South African schools and historically disadvantaged institutions. Research has shown that by grade nine, learners from the poorest 60% of schools in the country are behind by up to five years of learning experience in comparison to learners in wealthier schools.[233] There is furthermore research to show that higher education graduates, who have completed their studies at TVET colleges,[234] as well as graduates from historically black universities, are more likely to be unemployed than graduates who studied at historically white universities.[235] The quality of education, at historically disadvantaged learning institutions, is regarded as sub-standard by some employers.[236] The result of this perception is a reluctance on the part of the potential employer to appoint graduates who have completed their studies at these institutions.[237] It may furthermore lead to potential employers increasing the requirements for entry level employment positions.[238] This situation gives rise to the submission that it is important for law schools to train law students adequately in order to avoid similar reactions from potential employers.

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229 See 4 3 4 with regards to the tutorial component of CLE.

230 AP Youthnet http://apyouthnet.ilo.org/discussions/forum/education-and-skills-training-to-im prove-employability-of-young-people/education-and-skills-training-to-improve-employability-of-young-people-background-statement.

231 *Ibid.*

232 University of Johannesburg https://www.uj.ac.za/newandevents/Pages/BARRIERS-TO-EMPLOYMENT-FOR-POOR-YOUTH.aspx.

233 University of Johannesburg https://www.uj.ac.za/newandevents/Pages/BARRIERS-TO-EMPLOYMENT-FOR-POOR-YOUTH.aspx. Also see 1 1, where problems surrounding the South African school system have been mentioned.

234 See TVET Colleges South Africa (undated) http://www.tvetcolleges.co.za/ (accessed 2020-02-23) in this regard. "TVET" is an acronym for "Technical and Vocational Education and Training."

235 *Ibid.*

236 *Ibid.*

237 *Ibid.*

238 *Ibid.*

It is said that initial education forms an essential part of the career of an aspiring lawyer, affecting both the university that will be attended as well as the prospect of such a person to secure a position as a candidate legal practitioner.[239] The problematic schooling system, where the said initial education commences, however increases the duty of law schools to ensure that their training brings about skilled professionals. Many universities do present legal skills modules to students in order to address basic skills like reading, drafting and numeracy; however, if such skills training does not permeate throughout the curriculum, it is doubtful whether such modules truly serve their purpose.[240] In modern times, with the prevailing shortages of work and accompanying unemployment, professional education cannot afford to be regarded as poor or inadequate. The perception, especially from the side of the legal profession, should therefore not be that law schools are preparing graduates who lack critical knowledge and skills. This is exceptionally important if keeping in mind that, according to the Carnegie Foundation, law schools are showcases for the values and exemplars of the legal profession.[241] The following statement by Sullivan strengthens this point by implication:[242]

> "Without attending a top university and having had work experience at a law firm an individual will struggle to get a training contract at a top law firm… Once they arrive at a top law firm…if they cannot fit the culture they will not progress to partner. *Each stage is dependent on success at the previous stage*. A successful career is not made by a single decision but a serious of events that are affected by factors out of the control of the individual who wishes to have a legal career" (my own emphasis).

This statement by Sullivan is supported in the context of this research. Education is a continuous process, from primary level via secondary level and tertiary level into the working world. As stated by the learned author, each stage depends on the success of the preceding one. It is submitted that this requires law schools to ensure that the training, as far as legal procedure and evidence is concerned, creates a firm foundation for graduates to be successful in legal practice. In this regard, it must be kept in mind that one of the main purposes of legal education, of which CLE

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239 Sullivan https://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/literature_review_on_diversity1.pdf 3.

240 See 5 2 2 in this regard with regards to the Legal Skills-module presented at NMU.

241 Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the profession of law: Summary* (2007) 3. Also see 1 1.

242 Sullivan https://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/literature_review_on_diversity1.pdf 2.

undoubtedly forms an integral part, is the preparation of law students for lifelong practice, as well as to honour a duty to the legal profession to equip students with the necessary flexibility to adapt to uncertainties in the future that cannot be predicted.[243] A clinical programme, whether conducted by way of the live-client model or simulations, is aimed at providing the student with experience.[244] A plausible argument is therefore that CLE *per se* is a factor that attempts to remove any potential barriers into legal practice for law gradudates by ensuring that all law graduates receive quality and equal legal training for entry into legal practice. Such training must be sufficient in equipping students for the challenges that await them when entering practice. Such challenges include the practical application of legal theory and skills based training, as well as using technology and AI in the legal profession, as will be discussed later in this section. This approach aligns with the purpose of the LPA in that a legal profession is developed that needs to be accountable to the public.

The problem however is that matching skills has become a major concern.[245] A skills mismatch occurs when an employee possesses either fewer or even more skills than those required by a particular career opportunity.[246] This is caused by a gap between the skills of a person and the demands of a position in the job market.[247] It has been shown that higher unemployment is related to the quality of education, as well as to a mismatch of skills.[248] Such a mismatch can affect all layers in society, stretching from the productivity and efficiency of businesses to the current and prospective welfare of the youth.[249] Eventually, society at large can be affected by such mismatches.[250] The implication of such a skills mismatch for the legal profession is that the professional rendering of legal services, as well as the prosecution of civil and criminal cases in a

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243 Hall and Kerrigan "Clinic and the wider law curriculum" 2011 *International Journal of Clinical Legal Education* 25 29.

244 Du Plessis "Clinical legal education: planning a curriculum that can be assessed" 2011 36(2) *Journal for Juridical Science* 25 31.

245 World Economic Forum http://www3.weforum.org/docs/GAC/2014/WEF_GAC_Employment_MatchingSkillsLabourMarket_Report_2014.pdf.

246 *Ibid.*

247 Skills Mismatch "Right skills for right jobs (undated) https://www.skillsmismatch.thinkyoung.eu/ (accessed 2020-02-22).

248 AP Youthnet http://apyouthnet.ilo.org/discussions/forum/education-and-skills-training-to-im prove-employability-of-young-people/education-and-skills-training-to-improve-employability-of-young-people-background-statement.

249 Skills Mismatch https://www.skillsmismatch.thinkyoung.eu/.

250 World Economic Forum http://www3.weforum.org/docs/GAC/2014/WEF_GAC_Employment_MatchingSkillsLabourMarket_Report_2014.pdf.

court of law, accompanied by an improper appreciation of the rules of evidence, will decrease in quality. This quality decrease will severely impact upon social and procedural justice for the public, resulting in an infringement of the fundamental right to have matters adjudicated in a court of law in terms of section 34[251] of the Constitution.

A skills mismatch can be brought about by modules, in a particular educational curriculum, not matching the requirements of the employment sector.[252] It may therefore appear that the curriculum is not relevant to the specific requirements of the working world.[253] What is of concern, is that research has shown that, in some countries, graduates were either underemployed or even unemployed while the need existed in the working world for people with technical skills.[254] A skills mismatch can also result from effective partnerships lacking between training organisations and the profession.[255] In this regard, it is submitted that the needs of the students must be carefully balanced against those of the profession, especially when legal practitioners are involved in the training of students.[256] Linked to this is the shortage of training instructors, particularly instructors lacking experience of the profession, as well as inappropriate instructional techniques.[257] Furthermore, it should be kept in mind that law schools and legal practice frequently collaborate in various respects[258] and that there should be a harmonious relationship and understanding between them in order to facilitate appropriate skills training.

The world, including the legal profession, is currently in an age of job evolution.[259] This does not mean that the knowledge acquisition, traditionally associated with a university

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251 See 5 2 2 2.

252 AP Youthnet http://apyouthnet.ilo.org/discussions/forum/education-and-skills-training-to-im prove-employability-of-young-people/education-and-skills-training-to-improve-employability-of-young-people-background-statement.

253 *Ibid.*

254 *Ibid.*

255 *Ibid.*

256 See 4 7 2 1 in this regard.

257 AP Youthnet http://apyouthnet.ilo.org/discussions/forum/education-and-skills-training-to-im prove-employability-of-young-people/education-and-skills-training-to-improve-employability-of-young-people-background-statement.

258 See 1 1 in this regard.

259 Chamorro-Premuzic and Frankiewicz "Does higher education still prepare people for jobs?" (7 January 2019, revised 14 January 2019) https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs (accessed 2020-02-13).

degree, is not relevant any longer.[260] University qualifications have become commonplace and for that reason, employers will demand such qualifications in order for new graduates to be appointed.[261] Research has however indicated that the correlation between the level of education and work performance is weak and that intelligence secures better employment potential.[262] Therefore, a candidate with a degree is expected to be outperformed by a candidate with a higher intelligence score than the former candidate, especially as far as jobs requiring constant thinking and learning are concerned.[263] Academic grades provide an indication of how much a student has studied; however, intelligent performance reflects a student's ability to learn, reason and think in a logical manner.[264] This does not mean that employers must ignore candidates with degrees and instead appoint candidates with higher intelligence levels. In the legal profession, such appointments will not be possible as the LLB degree is a statutory requirement for entry into the legal profession. In this regard, section 26(1)(a) of the LPA provides as follows:

> "A person qualifies to be admitted and enrolled as a legal practitioner if that person has satisfied all the requirements for the LLB degree obtained at any university registered in the Republic…"

In light of this requirement, universities should strive to substantially improve the quality of their degrees by teaching critical soft skills to students.[265] This statement should not be interpreted to mean that the aforementioned practical training should be abandoned. The teaching of critical soft skills should be complementary to such practical training. As these soft skills include, *inter alia*, critical thinking, communication skills, work ethics, creativity and attention to detail,[266] it is submitted that all law graduates require them for entry into legal practice. These skills will greatly facilitate a graduate's engagement with legal procedure and evidence, as all of the mentioned skills play a pivotal role in litigation, as discussed throughout this research. Cohen appears to be in agreement with this argument and states that, for a long time,

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260 *Ibid.*

261 *Ibid.*

262 *Ibid.*

263 *Ibid.*

264 *Ibid.*

265 *Ibid.*

266 Kendall "9 critical soft skills to look for in candidates" (28 March 2019) https://blog.criteriacorp.com/9-critical-soft-skills-to-look-for-in-candidates/ (accessed 2020-02-25). Also see 4 1 in this regard.

simply knowing the law was the sole requirement for legal practitioners in order to render legal services.[267] However, future legal practitioners need to supplement such knowledge with other skills, including the following:[268]

(a) understanding the application and impact of technology to the rendering of legal services;
(b) project and process management;
(c) fluency in basic business;
(d) client management;
(e) collaboration;
(f) sales and marketing;
(g) understanding global legal marketing developments;
(h) cultural awareness of what has become a global profession; and
(i) emotional intelligence and people skills.

Although the aforementioned job evolution includes the impact of AI and technology, and machines are becoming increasingly relevant in the legal profession,[269] it does not mean that human engagement is becoming obsolete. On the contrary: it is valuable for the profession to have candidates who are skilled in tasks that computers cannot perform.[270] The legal profession requires interaction between a legal representative and a client, because emotions and social circumstances are essential features of any case. Although machines may become very advanced, they will never be a substitute for real human engagement. It speaks for itself that a client will be more comfortable in consulting with a real person instead of having a problematic scenario analysed, and possible answers provided, by a computer.

Therefore, universities and especially law schools, should invest in the opportunity to accentuate their relevance by training students to possess the mentioned critical soft

267 Cohen "The future lawyer" (30 May 2017) https://www.forbes.com/sites/markcohen1/2017/05/30/the-future-lawyer/#34f1aca41d18 (accessed 2020-02-25).

268 *Ibid.*

269 See 4 7 4 for a detailed discussion on the impact of the Fourth Industrial Revolution and AI on the legal profession.

270 Chamorro-Premuzic *et al* https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs.

skills.[271] Soft skills in graduates will greatly facilitate both social and procedural justice, as already discussed.[272] A client can speak to an actual person and express particular wishes for justice clearly. A human legal representative can interpret such wishes in a social context and do what is most appropriate for the client in accordance with the client's wishes.

However, it must be kept in mind that the Fourth Industrial Revolution and technological advancement will not only impact on human interaction with one another, as mentioned, but also on the general daily operations of the legal profession. This includes new ways of doing research, drafting legal documents and conducting litigation.[273] Since graduates are trained in procedure, especially in making use of computers and technology as demanded by the Fourth Industrial Revolution, it is submitted that legal practitioners would be much more inclined to appoint them. It has already been stated that the legal profession is very slow to adapt to technological changes.[274] Despite this, it is foreseen that the legal profession, especially civil court litigation, will undergo radical changes before the end of 2020 through the introduction of a paperless digital courtroom system, namely Caselines.[275] If the legal profession is slow in its adoption of such changes, it can be questioned as to how many of the more established and long serving legal practitioners will be willing to adopt these changes in their practices. In case of any reluctance on their part, it could benefit their practices to appoint a graduate who has undergone training in using such a system and who can consequently advance the interests of the practice in the digital age, as a candidate attorney. This implies that, if graduates do not possess such skills, legal practitioners may not see the need to appoint them. It further implies the important role that legal education relating to procedure plays in furthering the abilities of graduates to facilitate their entry into legal practice. The following statement by Cohen supports this argument:

> "The future lawyer will play an integral role in this transformation. Millennials are already impacting the legal buy/sell dynamic by introducing new, technology and process enabled, agile legal delivery models. They are converting many legal

271 *Ibid.*
272 See 3 4 5.
273 See 4 7 4.
274 See 4 7 4 2.
275 *Ibid.*

> 'services' into 'products'… Delivery of legal services is no longer a staid, hierarchical, monolithic model whose economics are misaligned with clients. It is a global marketplace where the future lawyer can collaborate, design, and deliver new products and services across nations and continents. It's a time of great opportunity for future lawyers to bring millions of new customers into the marketplace – for the benefit of all."[276]

It must further be kept in mind that students are spending large amounts of money on higher education with the primary pragmatic goal of increasing their employability and in that way provide a valuable contribution to the economy.[277] The content of such degrees should therefore conform to the students' expectations in this regard. It is submitted that the end product of Higher Education, as a measure of intellectual competence, should not be an artificial or unnecessary barrier for entry into the profession, especially in the case of historically disadvantaged graduates. All graduates need an LLB degree for entry into the profession,[278] but greater emphasis should be placed on the practical performance of graduates at law clinics, mobile law clinics, externships and similar experiential learning opportunities. This may cause the legal profession to approach prospective candidates with a sense of open mindedness[279] and may also result in law schools focusing more on skills training, specifically relating to legal procedure and the principles of evidence.

A very interesting artificial barrier is mentioned by Leef, who argues that the bar examination keeps many people from entering the legal profession.[280] His reason for stating this is that the bar examination, as well as its prelude, *ie* the training at law school, does not ensure that legal practitioners are competent.[281] Mendenhall, a legal practitioner, agrees with Leef, arguing that the bar examination merely tests a person's ability to memorise a vast amount of information.[282] Mendenhall states that the bar

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276 Cohen https://www.forbes.com/sites/markcohen1/2017/05/30/the-future-lawyer/#34f1aca41d18.

277 Chamorro-Premuzic *et al* https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs.

278 S 26(1)(a), read with s 24(2)(a) of the LPA. S 24(2)(a) provides that "[t]he High Court must admist to practise and authorise to be enrolled as a legal practitioner…[a] person who, upon application, satisfies the court that he or she is duly qualified as set out in section 26;…"

279 See Chamorro-Premuzic *et al* https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs where an open minded approach to appointment of candidates is also discussed.

280 Leef "True or False: we need the bar exam to ensure lawyer competence" (22 April 2015) https://www.forbes.com/sites/georgeleef/2015/04/22/true-or-false-we-need-the-bar-exam-to-ensure-lawyer-competence/#6b98fd85631f (accessed 2020-02-25).

281 *Ibid.*

282 *Ibid.*

examination is "…more a 'hazing ritual' than a useful means of separating those who could become capable lawyers from those who couldn't."[283] He therefore believes that the bar examination does not test the ability of a person to practice law, but merely to take tests.[284] He convincingly states that experience and practical training are the best ways in which to get to know the legal profession; however, these aspects are delayed because of the years spent at university in order to graduate, as well as by the bar examination.[285] It should also be noted that, prior to formal legal education in South Africa, a Law Certificate was the required qualification, which was informally presented by legal practitioners.[286] This qualification was introduced in 1858 and remained in force until 1979.[287] It provided access to the legal profession for people who have not obtained a university degree.[288] No formal bar examination was required. This practice would appear to be in support of the views of Leef and Mendenhall, as legal practitioners could be produced without the need for a formal bar examination allowing entry into the profession.

Whether both Leef and Mendenhall are correct in their assertions, is debatable. The bar examination has been part and parcel of the qualification as a legal practitioner for many years now. Such an examination is also part of the requirements for admission and enrolment as a legal practitioner in South Africa. In this regard, the LPA, *inter alia*, states the following:

> "A person qualifies to be admitted and enrolled as a legal practitioner, if that person has…passed a competency-based examination or assessment for candidate legal practitioners as may be determined by the rules."[289]

What is however significant from the opinions of both Leef and Mendenhall, in the context of this research, is that conventional university training is not sufficient to prepare graduates to practice law. Something more is required: experiential learning. This is exactly what prospective legal practitioners experienced while undergoing training in terms of the mentioned Law Certificate. If the bar examination is viewed

283 *Ibid.*
284 *Ibid.*
285 *Ibid.*
286 Greenbaum 2010 *Journal for Juridical Science* 6.
287 Greenbaum 2010 *Journal for Juridical Science* 7.
288 *Ibid.*
289 S 26(1)(d).

from this perspective, it may well be that it is merely another test that does not contribute in a major way to experience and practice, which is something that prospective employers require.[290] Should candidate legal practitioners then struggle to pass the bar examination, it indeed becomes an artificial barrier for entry into the profession, which is ironic, since the LPA seeks to remove all unnecessary and artificial barriers to the profession. This would be most unfortunate, especially where a candidate legal practitioner excels in performing practical work and litigation. Leef argues that the practice of law, which includes the bar examination, must be deregulated. Such deregulation is not supported in this research, because it is believed that the bar examination is a good summative assessment by way of which knowledge of the law is tested. This argument also coincides with the argument that theoretical knowledge and training are also important for entry into legal practice.[291] A suggestion would be to transform the bar examination into a more practical written examination, if it is not yet conducted as such, by including more drafting, interpretation and analysis of various forms of evidence, as well as writing legal opinions, to name but a few items. Furthermore, it is suggested that the bar examination should also consist of a practical section. In this regard, impartial and experienced legal practitioners can be assigned to asses a candidate legal practitioner's performance in a court of law, peruse the candidate's client file in order to see whether or not it has been properly maintained and, on that basis submit a report to the Legal Practice Council[292] in which the candidate's practical skills are evaluated and assessed. In this way, a balance is struck between the ability of the candidate to memorise information, as well as to actually practice law. It is submitted that law schools will play an important role in this regard, in that graduates should be trained to perform practically as well. The teaching of the procedural law modules through CLE will greatly assist in this regard as far as legal procedure is concerned. Moreover, after the completion of such modules, a practical clinical law module, involving, *inter alia*, practical work at the university law clinic, will further enhance the theoretical and practical training of the students. Assessments will have to consist of theory based questions, as well as sufficient practical tasks. This will prepare

290 See 1 1 in this regard.

291 See 4 1 in this regard.

292 In terms of s 3(c) of the LPA, the Legal Practice Council can be described as a "…single unified statutory body to regulate the affairs of all legal practitioners and all candidate legal practitioners in pursuit of the goal of an accountable, efficient and independent legal profession."

graduates for entry into legal practice in three respects. Firstly, the graduate will possess sufficient theoretical and practical knowledge required to practice law, as advocated by both Leef and Mendenhall and as supported in this research. Secondly, the bar examination will not constitute a barrier for entry into the profession for a candidate legal practitioner who is not academically strong, but who excels in practical work. Thirdly, this approach by law schools will be complementing one of the purposes of the LPA, which is the creation of a "…framework for the development and maintenance of appropriate professional and ethical norms and standards for the rendering of legal services by legal practitioners and candidate legal practitioners;…"[293] It is submitted that this framework should include adequate university training, as training is a lifelong experience[294] that should be without any divide between theory and practice.[295] It is therefore submitted that, should the Legal Practice Council consider supplementing the conventional bar examination with a practical segment, such a change will further contribute towards producing better graduates for legal practice.

It is also worthwhile to consider work experience as a motivating factor for entry into the legal profession.[296] If work experience can facilitate entry into the legal profession – which it can – it means that a lack of work experience may constitute a barrier to entering the profession. The reason for this is that working knowledge and practical experience make graduates more attractive to prospective employers.[297] In the South African context, such experience can refer to students participating in vacation work at law firms while still studying. The NMU Faculty of Law's Legal Integration Project[298] also features a vacation work programme in terms of which efforts are made to secure vacation work for students who are members of the project. The problem is however that not all students, who may want to go into legal practice, get to participate in vacation work opportunities and as such gain practical experience. It may even be

293 S 3(g)(i) of the LPA.

294 See 5 2 2 1 in this regard.

295 See 1 2, as well as the exit level outcomes for the LLB degree by the South African Qualifications Authority (SAQA) in this regard, where it is, *inter alia*, mentioned that a learner must sufficient skills and knowledge to participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law – see 5 3 3 4 and 5 3 3 5.

296 Sullivan https://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/literature_review_on_diversity1.pdf 7. Work experience can facilitate entry into the legal profession.

297 *Ibid.*

298 See 4 7 2 4 for a detailed discussion about the Legal Integration Project.

that, depending on where the students find themselves during student recesses, it is not possible for such students to participate in such programmes. This may especially be the case with students who reside in rural communities that are situated far from cities or towns, with concomitant traveling complications to and from the venue where the vacation work is presented. The following extract from Sullivan, although not specifically about students in rural areas, explains this situation:[299]

> "Work experience can take place at an early stage with 18% of students having undertaken it… Such experience may not be accessible to all students, as students with connections to the professions are twice as likely to have secured early work experience as those without such connections."

A suggestion in this regard would be to ensure that all students obtain adequate work experience. However, this is, for obvious reasons, not possible. It will be a daunting task for any law school to secure part time or vacation work opportunities for all students at law firms, state departments, law clinics or other legal aid institutions. Moreover, such opportunities may not even exist at a particular stage. For that reason, it is submitted that adequate training in legal procedure and the handling and analysis of evidence, based on CLE, will equip students with work-like experience. In this sense, CLE becomes transformative in nature, as it enhances the ability of law students to fulfil their goals of entering the legal profession and pursue their vocation in line with the provisions of the Constitution, despite the abovementioned challenges. The transformative nature of CLE is further promoted by the fact that students are not singled out based on race, gender or cultural background, to mention but a few factors. All students are treated equally as far as CLE training is concerned, with the result that the educational benefits befall all of them. This has the potential to decrease and eventually remove the lack of equality within the legal profession as far as any admission requirements for law graduates are concerned. The significant factor in this instance is the quality of training that will be presented to the students: it will have to conform to the expectations of the legal profession. In this way, education, more specifically CLE, is set to become a motivator, and not a barrier of any nature, into the legal profession.

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[299] Sullivan https://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/literature_review_on_diversity1.pdf 7.

5 2 3 CONCLUSION

From the aforementioned discussion, it is clear that an activist approach has been employed in order to interpret the provisions of the LPA in light of transformative constitutionalism.[300] It is submitted that, in terms of this approach, arguments should be constructed by way of a liberal thinking process, *ie* the so called "thinking outside of the box." If a rigid and conservative process of interpretation and argument is engaged, there is little chance that transformation will take place. In this regard it is important to keep in mind that the enactment of the LPA aims to steer the legal profession in a new direction, with the primary focus being a profession accountable to the public. Legal practitioners and candidate legal practitioners therefore need to ensure that their professional conduct, as well as the quality of their work, conform to this framework. However, these practitioners do not appear from nowhere – they evolve into professionals by way of primary, secondary and higher education, with practical vocational training and the accompanying board examinations following. It is submitted that, during the higher education stage, law schools should play an important role in shaping students into young professionals by way of teaching methodologies that will make them aware of the accountability that the legal profession has towards members of the public. In this regard, Goosen states that the task of transforming the legal profession requires that legal practitioners foster a commitment to abide by the standards of conduct that give expression to constitutional values.[301] These standards of conduct do not merely emanate from professional regulatory bodies like the Legal Practice Council, but are found in individually rooted commitments to such values.[302] Therefore, Goosen states that these values should be placed at the core of legal education of law students as well as the practical vocational training of candidate legal practitioners.[303] This is required by the Constitution and deserved by the public.[304]

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300 See Kibet *et al* 2017 *African Human Rights Law Journal* 361 with regards to a discussion of an activist approach to the adjudication of rights.

301 Goosen 2019 *South African Judicial Education Journal* 71.

302 *Ibid.*

303 *Ibid.*

304 *Ibid.*

The aforementioned statements by Goosen further strengthen the argument that there is a constitutional imperative on law schools to produce law graduates who are sufficiently skilled to enter legal practice. Training persons for the purpose of producing legal practitioners, who are expected to act professionally and ethically as far as legal analysis and legal procedure is concerned, cannot wait until the vocational training stage. This training needs to start at tertiary level already. In this regard, it must be kept in mind that learning is a lifelong experience. The building of basic skills early on in a person's career is essential, especially by broadening and improving the quality of early childhood[305] and, therefore, the early stages of a person's career choice. Therefore, what a student will learn at tertiary level, will be built upon during the vocational training stages and developed even further when the person is eventually admitted as a legal practitioner.[306] From a transformative constitutional point of view, this is pivotal in not only transforming the legal profession, but also transforming societies, especially societies with deep divisions and political repression in their past.[307] The Constitution and the law need to address the injustices of the past, as well as inspire hope for a better future for such societies.[308] As was stated elsewhere, this can be achieved by way of, *inter alia*, procedural justice, as well as interpreting legal principles and procedures in light of constitutional values.[309] This will also improve access to justice. The result of this activist adjudication of rights interpretation will be that legal procedure, as well as the proper utilisation thereof by legal practitioners, become the forefront of change. Legal procedure is the engine that puts substantive rights and duties in motion. For this reason, improved skills education, as far as procedural law modules are concerned, is mandatory.

The result of the improvement of access to justice will be that more members of the public, especially members who cannot otherwise afford legal services, will have access to legal practitioners. Furthermore, if students are permitted to appear in courts and represent clients with specific procedures in specific types of cases, under

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305 World Economic Forum http://www3.weforum.org/docs/GAC/2014/WEF_GAC_Employment_MatchingSkillsLabourMarket_Report_2014.pdf.

306 See 4 2 2 3 and Sullivan https://www.legalservicesboard.org.uk/what_we_do/Research/Publications/pdf/literature_review_on_diversity1.pdf in this regard.

307 See Kibet *et al* 2017 *African Human Rights Law Journal* 350 in this regard.

308 See Kibet *et al* 2017 *African Human Rights Law Journal* 350 in this regard, as well as 2 1.

309 See 3 4 5 and 4 3 2 in this regard.

the close supervision of law teachers or other legal practitioners, access to justice will further be expanded in inexpensive ways. Community service, as well as *pro bono* work will be important in this regard, in that private legal practitioners may be willing to be more involved in the teaching of students, or even supervising them when they (the students) are appearing in court. It is consequently highly recommended that the LPA be progressively interpreted so as to include *pro bono* services as part of community service for both legal practitioners and candidate legal practitioners, as well as to recognise the training of law students, by legal practitioners and candidate legal practitioners, as *pro bono* work.

As far as entry into the profession is concerned, it is submitted that education can play a vital role in drawing an employer's attention to a particular prospective employee. Training and education can be an indication to a prospective employer that a candidate is viewing professional life in a serious manner.[310] In the context of this research, when this notion is considered in tandem with Schultz's point of view that law schools should make it their primary mission to turn out beginning practitioners,[311] it is submitted that law schools should assist students in showing the legal profession that their employability skills should be taken seriously.

In light of the abovementioned discussion, it was made clear that CLE is the preferred teaching methodology that can accomplish not only a foundational theoretical training of law students, but also skills based and practical training so as to cater for the needs of indigent members of society who has little to no access to justice. In the process, the student develops valuable knowledge, skills and practical experience that will be required by the legal profession when the student enters legal practice as a future lawyer. It is submitted that the focus should be on change. In this regard, change should not only be interpreted to mean that an improved education will change the lives of members of society, but also that the lives of law graduates, as future legal practitioners, will be changed. The equality, dignity and freedom of students, to enter the legal profession after graduation, will be significantly promoted. In this regard, the

310 McQuerrey https://work.chron.com/improve-employability-skills-9852.html.

311 See 1 1 and Schultz "Teaching 'Lawyering' to First-Year Law students: An experiment in constructing legal competence" 1996 52(5) *Washington and Lee Law Review* 1643 1647 in this regard.

integration of CLE in the teaching and learning of procedural law modules will result in law graduates who are suitably equipped to become professional and accountable legal practitioners in that they know how to interpret and apply the law in order to improve the lives of their clients by fully keeping the spirit and purport of the Constitution in mind. Where changes are required for the law to be applied in line with the provisions and spirit of the Constitution, legal practitioners should advocate for such changes to be affected. Legal practitioners owe such a professional duty to their clients. In case of both students and clients, no distinction is made as far as race, gender, cultural background, social class and other variables are concerned. It is submitted that such a result is transformative in light of the fact that the previous political regime cannot be said to have had this goal in sight when designing legal education and providing access to justice.[312]

5 3 THE IMPORTANCE OF GRADUATE ATTRIBUTES IN PREPARING LAW STUDENTS FOR LEGAL PRACTICE

5 3 1 GENERAL

The gap between university legal education and legal practice significantly contributes to the view that most law graduates are substantially underprepared for entry into legal practice.[313] Consequently, this research suggests that an improvement in the training of law students, as far as preparing them for entry into legal practice is concerned, is necessary. The focus of such preparation is on the procedural law modules, supported by transformative constitutionalism. This means that, after graduation, graduates will be expected to possess certain attributes that will ensure that they are ready for entry into legal practice. It is therefore necessary to investigate and evaluate such graduate attributes, as well as to ascertain where the need for such attributes is emanating from. The Qualification Standard for the LLB degree will also be discussed

312 See 3 1 in this regard. It is submitted that, because the roles of the courts had been severely constrained in order to promote apartheid during the previous political regime, no serious attempts have been made to use legal education as a tool in order to bring about change. A gross generalisation in this regard should however not be made, as it had already been pointed out how progressive CLE, as part of legal education, had been during the apartheid regime in changing the delivery of legal services to indigent and marginalised persons, as well as protecting people's human rights – see 2 3 in this regard.

313 Uphoff, Clark and Monahan "Preparing the new law graduate to practice law: a view from the trenches" 1997 65 *University of Cincinnati Law Review* 381 381.

as the source stipulating the standard of proficiency that the LLB degree should prepare graduates for. Thereafter, a baseline study into graduate attributes from the perspective of employers will be discussed. Holistically seen, the qualification standard, as well as the graduate attributes study, should provide an indication as to whether or not the LLB degree is preparing law graduates for entry into legal practice. The qualification standard will be set out, where after it will be evaluated to what extent it aligns with the arguments put forth in this research.

5 3 2 WHAT ARE "GRADUATE ATTRIBUTES"?

Higher education is seen as an important contributor to the economy by way of producing skilled graduates.[314] It was not until relatively recently, *ie* approximately the middle of the 1990s, that a suggestion came to light that there must be a measurable link between what is taught at higher education level and the development of skills necessary for the working world.[315] The reason for this was that it had always been assumed that graduates acquired sufficient skills during their academic years that would be useful when they commence employment after leaving university.[316] It therefore does not come as a surprise that a baseline study was conducted in South Africa in order to determine whether or not higher education institutions deliver the appropriate quality graduates that the working world expects them to deliver.[317] For this purpose, the following question can be asked: do higher education graduates possess the necessary and applicable attributes in order to successfully enter the professional world? Before discussing and evaluating the mentioned baseline study, it is important to define "graduate attributes" in order to understand the focal points of the study. It is however not always a simple task to delineate precisely what the term "graduate attributes" means, as well as at what stage of a person's career they must

314 Winberg, Staak, Bester, Sabata, Scholtz, Monnapula-Mapeseta, Sebolao, Ronal, Makua, Snyman and Machika "In search of graduate attributes: a survey of six flagship programmes" 2018 32(1) *South African Journal of Higher Education* 233 234, 236; Bridgstock 2009 *Higher Education Research and Development* 31, 40.

315 Greenbaum and Rycroft "The development of graduate attributes: the book of the year project" 2014 28(1) *South African Journal of Higher Education* 91 91; Bridgstock 2009 *Higher Education Research and Development* 31.

316 Greenbaum *et al* 2014 *South African Journal of Higher Education* 91.

317 See 5 3 6 1.

be developed.[318] It has been described as the skills, qualities and understanding that a university community agrees that their students should develop during their academic years at the institution.[319] The University of the Western Cape (hereafter referred to as "UWC") defines graduate attributes as "…qualities, attitudes and dispositions that graduates should possess, in full or part, when they have completed their course of study."[320] Graduate attributes are strongly linked to the missions, visions and values of universities, as well as to their accountability for the quality of the graduates that they produce.[321] One view is that the emphasis should be on development, as the student progresses through the academic years, from the first year, up to and including the final year.[322] Another view is that the emphasis should be on employability, focusing on generic skills, *ie* skills, values and attitudes that employers might regard as attractive.[323] Graduate attributes include disciplinary expertise and technical knowledge, but are not limited to those.[324] Instead, it also refer to qualities that should prepare graduates to perform social good in an uncertain future.[325] It is submitted that, in the South African context, this refers to the constitutional vision of accomplishing social justice in order to improve the lives of people from where they were, during the previous political dispensation, to where they can possibly go in the future. Barrie states that graduate attributes include more than skills and attitudes.[326] They can also include new concepts of wisdom and knowledge and should be seen as the product of higher education itself.[327] In this regard, graduate attributes should not be viewed as something completely separate or different from what higher education conventionally delivers, but rather as outcomes

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318 Van Schalkwyk, Herman and Muller "Graduate attributes for the public good: a case of a research-led university" in Leibowitz (ed) *Higher education for the public good – views from the South* (2012) 88.

319 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 88.

320 University of the Western Cape "Graduate Attributes and the strategic plan for teaching and learning" (2013) https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx (accessed 2020-05-17).

321 Winberg *et al* 2018 *South African Journal of Higher Education* 234.

322 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 88.

323 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 88; see 5 2 2 3.

324 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 88.

325 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 88; Greenbaum *et al* 2014 *South African Journal of Higher Education* 92.

326 Barrie "A research-based approach to generic graduate attributes policy" 2004 23(3) *Higher Education Research & Development* 261 262; Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 88.

327 Barrie 2004 *Higher Education Research & Development* 263.

that can reasonably be expected from the higher education experience, [328] specifically including undergraduate students.[329] These attributes should not be viewed as merely entry level skills, but as an important outcome of the university based learning experience.[330] It is submitted that this view, together with the previous descriptions of graduate attributes, can be used to strengthen the argument in this research that university law schools should deliver graduates who are skilled in the law of procedure and evidence in order to serve the public upon their exit from university.

Further to the content and purpose of graduate attributes, Walker states that higher education can equip students with essential cultural values and knowledge that are important as far as active citizenship and democratic participation in ethical and political life shaping debates are concerned.[331] This means that higher education has a central role to play in the health of democracy in society, how such democracy contributes towards civic life, as well as in producing graduates who reflect such features.[332] This argument is closely connected to the nature of the attributes that graduates possess when leaving university, as well as how these attributes will equip students for the working world.[333] The concepts of social justice and civic life are also prominently stated in the Council for Higher Education (hereafter referred to as the "CHE") and the South African Qualifications Authority (hereafter referred to as the "SAQA") Qualification Standard, which will be discussed hereafter.[334] In this regard, it was already stated in 2001 that there is a need for graduates to actively participate

328 Barrie 2004 *Higher Education Research & Development* 263; Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 89.

329 Barrie 2004 *Higher Education Research & Development* 262.

330 Barrie 2004 *Higher Education Research & Development* 262; Greenbaum *et al* 2014 *South African Journal of Higher Education* 93.

331 Walker "Pedagogy and the politics and purposes of higher education" 2002 1 (1) *Arts and Humanities in Higher Education* 43 43; Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 87. Also see Fourie "Constitutional values, therapeutic jurisprudence and legal education in South Africa: shaping our legal order" 2016 19 *Potchefstroom Electronic Law Journal* 1 20 in this regard. It is important that law teachers prepare students for an active citizenship role in society so as to display constitutional values and to share the same in relation to their clients when they (the students) enter legal practice after graduation.

332 Walker 2002 *Arts and Humanities in Higher Education* 42-43; Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 87.

333 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 87.

334 See 5 3 3. Also see Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 87 in this regard as far as a former qualification standard is concerned.

in expanding the national economy.[335] The attributes that an institution bestows upon graduates are the responsibility of both the institution and the graduates themselves.[336] This means that graduates must see their development in the context of the working world and that they should strive towards preparation for entering the working world as knowledgeable and skilled individuals.[337]

Research shows that university staff struggle with the understanding of general graduate attributes, because such attributes have different meanings in the various disciplines.[338] Whatever the case may be, many higher education institutions have formulated lists of generic attributes that they want to see in their graduates.[339] These lists of attributes are called critical cross-field outcomes (hereafter referred to as "CCFOs") and apply to the development of all graduates as far as economic and social contributions to society are concerned.[340] They stem from the outcomes as formulated by SAQA, which are viewed as critical to the development of the capacity for life-long learning.[341] They include critical thinking, teamwork, effective use of science and technology, as well as viewing the world as a global village where problem solving contexts cannot exist in isolation.[342] An example is the list compiled by the Central University of Technology in the Free State. The list states that graduates should be skilled, innovative, socially responsible, technologically savvy, as well as astute, competent and focused.[343] The university lists ten graduate attributes that must be present in all graduates,[344] *ie* sustainable development,[345] community engagement,

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335 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 87. This was stated as part of the former Department of Education's National Plan in Higher Education.

336 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 89.

337 See Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 89 in this regard. A complete discussion of the perceptions of graduates in this regard however falls outside the scope of this research.

338 Winberg *et al* 2018 *South African Journal of Higher Education* 234.

339 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 89; Herok, Chuck and Millar "Teaching and evaluating graduate attributes in science based disciplines" 2013 4 (7A2) *Creative Education* 42 42.

340 *Ibid.*

341 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 89. Also see Herok *et al* 2013 *Creative Education* 42 with regards to the notion of life-long learning.

342 Van Schalkwyk *et al* in Leibowitz (ed) *Higher education for the public good* (2012) 89.

343 Central University of Technology, Free State "Developing CUT graduate attributes" (16 August 2018) https://www.cut.ac.za/graduate-attributes (accessed 2020-05-17).

344 *Ibid.*

345 This is explained to mean to "[b]e environmentally sensitive and recognize your role as a socially responsible citizen who care for the common good of others, the country and environment."

entrepreneurship, innovation and problem solving, technological literacy, numeracy, communication, technical and conceptual competence,[346] teamwork and citizenship and global leadership. The University of Stellenbosch's Faculty of Medicine and Health Sciences states that graduate attributes of students should be reflective of an enquiring mind, an engaged citizen, a dynamic professional, as well as a well-rounded person.[347] The university further states that the aim of the graduate competence framework is to provide a transformed learning experience to students and to equip them with the necessary competencies in order to address health inequalities by way of patient centred and community based care.[348] Although this framework is not related to law, it is submitted that the approach is equally applicable to law schools, as there are also inequalities in communities as far as access to justice, quality legal services and community legal services are concerned. More general approaches to graduate attributes are evident from NMU and UWC. NMU clearly supports the notion of the integration of graduate attributes with the academic experience, as their CCFOs mention that education must be life changing.[349] Other attributes, *inter alia*, include:[350]

(a) expanding and engagement with knowledge bases of various professions;
(b) excellence in art and science of various professions;
(c) awareness of the latest advances of technical competencies required by the various professions;
(d) production of new knowledge by way of understanding, inquiry, critiquing and synthesis;
(e) commitment to ethical conduct, social awareness and responsible citizenship;
(f) acknowledging and respecting constitutional principles, as well as values inclusive of equality, quality, equity, humanity, diversity and social justice;
(g) the ability to apply knowledge and skills in a variety of contextual and conceptual frameworks;

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346 This is explained to mean to "[d]emonstrate depth of specialised disciplinary knowledge and skills and be able to apply them in different contexts to solve problems."

347 Centre for Health Professions Education, University of Stellenbosch "Graduate Attributes" (undated) http://www.sun.ac.za/english/faculty/healthsciences/chpe/Pages/Graduate_attributes.aspx (accessed 2020-05-17).

348 *Ibid.*

349 Nelson Mandela University Graduate Attributes Profile (2015) https://nmmu10.mandela.ac.za/Looking-ahead/Our-Desired-Graduate-Attributes-Profile (accessed 2020-05-18).

350 Nelson Mandela University Graduate Attributes Profile https://nmmu10.mandela.ac.za/Looking-ahead/Our-Desired-Graduate-Attributes-Profile.

(h) the ability to think creatively and to generate a series of innovative ideas that are appropriate to a particular context;
(i) openness to new ideas;
(j) the ability to understand, interrogate and apply a variety of theoretical and philosophical positions, as well as the objective assessment of competing and alternative perspectives;
(k) critical reflection;
(l) relating and collaborating with others, exchanging views and achieving desired outcomes;
(m) the ability to function in a multilingual and multicultural context; and
(n) the ability to articulate ideas and information with confidence and coherently in visual, written, verbal and electronic formats.

It is submitted that, at law school level, almost all of these attributes relate to the outcomes that can be achieved by integrating CLE with procedural law modules, as pervasively discussed in this research.[351]

UWC has developed a Charter of Graduate Attributes,[352] which guides the university in developing the knowledge, skills and competencies of graduates.[353] The various faculties and departments at the university are currently in the process of analysing such graduate attributes in the context of their own missions and visions, embedding such attributes in the teaching and learning of the various modules in their degrees and courses.[354] It is submitted that all university law schools should follow this approach, should their universities have similar charters. Such attributes should be in alignment with the national qualification standard for each discipline, as set by the

351 See Cantatore 2018 *International Journal of Clinical Legal Education* 163 in this regard. The learned author states that students will be more practice ready if they are confident. Employability goes hand in hand with confidence and personality. Confidence in students is increased by their experiences with various clients at law clinics. For this reason, it is submitted that the integration of CLE with procedural law modules can assist to instill the same confidence in students as far as legal procedure and evidence are concerned, preparing the students to interact with real-life clients with confidence in their abilities.

352 A complete discussion of this charter falls outside the scope of this research. A link to the charter is available at https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx.

353 University of the Western Cape https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx.

354 University of the Western Cape https://www.uwc.ac.za/TandL/Pages/Graduate-Attributes.aspx. Also see Herok *et al* 2013 *Creative Education* 42 and Greenbaum *et al* 2014 *South African Journal of Higher Education* 94 in this regard.

CHE. For the purposes of this research, it is forthwith relevant and applicable to analyse and evaluate the qualification standard applicable to the legal profession.

5 3 3 QUALIFICATION STANDARD FOR THE LLB DEGREE

5 3 3 1 INTRODUCTION

The CHE is the quality control council for higher education in South Africa.[355] SAQA provides national qualification framework (hereafter referred to as "NQF") level descriptors that are applicable to each discipline.[356] The CHE must ensure that the NQF level descriptors remain current and appropriate.[357] The current NQF level of the LLB degree is set at eight.[358]

It is consequently necessary to identify some applicable sections of the qualification standard in order to evaluate to what extent they apply to and support the theoretical basis and arguments advanced in this research.

5 3 3 2 PREAMBLE

The Preamble to the qualification standard provides valuable information with regards to the content of the standard. It recognises the fact that the law is central to the creation of a cohesive and successful society, that it fulfils a significant role in facilitating economic development and that it plays a vital role in entrenching the ethos and values of South Africa's constitutional democracy.[359] It further recognises that the Constitution is transformative in nature, that the constitutional democracy aims to transform the legal system, its foundational values of human dignity, equality and freedom and that this ethos must be pervasive throughout the legal system.[360] For this reason, legal education cannot be separated from transformative

355 Council on Higher Education "Qualification Standard for Bachelor of Laws (LLB)" 2015 3.
356 *Ibid.*
357 *Ibid.*
358 Council on Higher Education 2015 8.
359 Council on Higher Education 2015 7.
360 *Ibid.*

constitutionalism.[361] It reiterates what was stated elsewhere as far as a conservative approach is concerned, *ie* that adherence to the literal meaning of words might become a dangerous exercise and totally inconsistent with transformative constitutionalism.[362] What is required is substantive reasoning, evaluation of the principles that informs the law, as well as judicial reaction to such laws.[363] These requirements cannot be achieved without the appropriate legal education relating to a foundation based on transformative constitutionalism.[364] The Preamble consequently states that legal education:[365]

(a) must be responsive to the needs of the economy, the legal profession and society as a whole;
(b) must produce skilled graduates who can think critically and have a substantial understanding of the impact of the Constitution on legal development;
(c) must promote social justice in South Africa;
(d) must enable law graduates to execute their professional and social duties in an ethical and efficient manner; and
(e) must be responsive to the ever evolving information technology.

5 3 3 3 PURPOSE

The qualification standard states that the LLB degree prepares students for entry into legal practice.[366] For that reason, the degree offers a broad education that should develop well-rounded graduates with the following attributes:[367]

(a) knowledge and appreciation of the values and principles in the Constitution;
(b) a critical understanding of theories, concepts, principles, ethics, perspectives, methodologies and procedures integral to the law;

361 *Ibid.*
362 Council on Higher Education 2015 7. Also see 2 1, 2 2 3 and 3 5 3 in this regard.
363 Council on Higher Education 2015 7.
364 *Ibid.*
365 *Ibid.*
366 Council on Higher Education 2015 8.
367 *Ibid.*

(c) the ability to apply the aforementioned knowledge, appreciation and critical understanding in an appropriate manner to academic, professional and career contexts; and
(d) the capacity to be accountable and to take responsibility in academic, professional and relevant societal contexts.

5 3 3 4 STANDARD FOR AWARDING THE LLB DEGREE

The qualification provides that the LLB degree may be awarded to students if and when the following attributes are evident:[368]

(a) *knowledge*: the graduate must have a comprehensive and sound knowledge and understanding of the Constitution and basic areas of law. These areas include, *inter alia*, formal law, perspectives on the law, the legal profession, as well as the dynamic nature of the law and its relationship with relevant and applicable contexts, including political, economic, commercial, social and cultural contexts.[369] CLE is also expressly stated as an alternative to any specialisation in particular fields of law that may be presented;[370]
(b) *critical thinking skills*: the graduate must, *inter alia*, be able to recognise and reflect on the role and place of the law in society and beyond;[371] and
(c) *research skills*: the graduate must be able to find, select, organise, use, analyse, synthesise and evaluate a variety of relevant sources of information in theoretical and applied research based contexts.[372]

5 3 3 5 APPLIED COMPETENCE

The qualification standard provides that the graduate must have the following competences:

368 *Ibid.*
369 Council on Higher Education 2015 8-9.
370 Council on Higher Education 2015 9.
371 *Ibid.*
372 *Ibid.*

(a) *ethics and integrity*: the graduate must have knowledge of relevant ethical considerations of law and must be able to act ethically and with integrity within the university, as well as with clients, courts, other legal practitioners and members of the public;[373]

(b) *communication skills and literacy*: the graduate must be proficient in reading, writing, comprehension and speaking to specialists and laypersons in a professional capacity.[374] In the guidelines to the qualification standard, "proficiency" is described as being able to show ability or skill in doing something.[375] Proficiency in writing can be developed by regularly exposing students to problem solving and research type problems and to expect of them to produce well written and coherent work.[376] Proficiency in language includes both substantive and formal components.[377] The substantive component includes relevance, clarity and precision as far as the topic is concerned, scope of the research being conducted, systematic and clearly structured treatment of the topic, logic and persuasiveness of arguments, as well as the correct application of authority.[378] The formal component includes consistency in style, subdivision for primary[379] and secondary[380] sources, language and appropriate diction.[381] Proficiency in speaking can be developed by way of moot courts, debating settings, as well as oral presentation or defence of research projects.[382] Graduates must be able to provide clear and concise descriptions during presentations, respond effectively to any questions posed to them, as well as demonstrate clear understanding of trial or debating procedures.[383] In doing this, graduates must be able to conduct presentations with spontaneity, not solely making use of a prepared text.[384] Such presentation must be organised and well-reasoned, clearly setting out the most important facts and legal principles, as well

373 Council on Higher Education 2015 10.
374 *Ibid.*
375 Council on Higher Education 2015 13.
376 *Ibid.*
377 *Ibid.*
378 *Ibid.*
379 "Primary sources" refer to legislation and case law.
380 "Secondary sources" refer to books, journal articles and similar sources.
381 Council on Higher Education 2015 13.
382 *Ibid.*
383 Council on Higher Education 2015 13-14.
384 Council on Higher Education 2015 14.

as applying such principles to the facts of the case.[385] As far as communication in general is concerned, the graduate must be able to demonstrate effective verbal, written, listening and non-verbal communication skills.[386] The graduate must also be able to apply communication skills to situations relevant to professional legal practice and must further be able to engage with diverse audiences as far as culture, language and gender are concerned;[387]

(c) *numeracy*: graduates must be able to perform basic numeracy tasks as far as the legal field is concerned;[388]

(d) *information technology*: the graduate must be able to access information in an effective manner.[389] The graduate must furthermore be able to use technology as a tool to conduct research, as well as to organise, evaluate and communicate information;[390]

(e) *problem solving*: graduates must be able to identify and define relevant issues in legal problems.[391] Graduates must further be able to identify and use the most relevant sources and research methods in solving legal problems and generating reasoned solutions to such problems;[392]

(f) *self-management and collaboration*: graduates must be able to act effectively in both individual and collaborative settings;[393]

(g) *transfer of acquired knowledge*: graduates must be able to apply knowledge to different, new and unfamiliar fields of law, deal with the development of the law on a continuous basis and transfer knowledge to others.[394] As far as a description of "continuous basis" is concerned, the guidelines to the qualification standard states that life-long learning is a pursuit that is essential for every law graduate throughout the career of such graduate.[395] With regards to "transfer of knowledge to others", the guidelines state that the graduate must have an understanding of the law and also be able to explain it to colleagues, clients, lay

385 *Ibid.*
386 Council on Higher Education 2015 10.
387 *Ibid.*
388 *Ibid.*
389 *Ibid.*
390 *Ibid.*
391 Council on Higher Education 2015 11.
392 *Ibid.*
393 *Ibid.*
394 *Ibid.*
395 Council on Higher Education 2015 14.

persons and members of society who do not have sufficient exposure to the law;[396] and

(h) *agency, accountability and service to the community*: graduates must be able to recognise, reflect on and apply social justice imperatives.[397] This entails that graduates must acknowledge the capacity, agency and accountability of a legal practitioner in the shaping and transformation of the legal system in order to promote social justice.[398] In this regard, fairness, legitimacy, efficacy and equity in the legal system play important roles.[399] It further entails that graduates must understand the professional responsibilities of a legal practitioner in rendering services to members of the community.[400]

5 3 3 6 ASSESSMENT

The qualification standard provides information about the type of assessments that are appropriate in order to test graduate attributes. The standard makes mention of a variety of assessment methods, including summative and formative assessments.[401] Assessments must occur regularly during the course of a particular module and must include authentic problem solving in real-life contexts or simulated teaching and learning activities.[402] The staff must be adequately qualified in order to conduct such assessments.[403] There must be opportunities for students to engage in independent research, which must also be assessed.[404] The guidelines to the qualification standard provide further insight into the nature of assessments, namely written or verbal assignments, tutorials, collaborative work, small group work, case studies, portfolios, moot courts, examinations and tests, role play, mock trials, client consultation exercises, reflective journals, observation of real work, as well as actual work in live-client clinics, which must be duly supervised, or any simulation of said work.[405] The

396 Council on Higher Education 2015 15.
397 Council on Higher Education 2015 11.
398 *Ibid.*
399 *Ibid.*
400 *Ibid.*
401 Council on Higher Education 2015 12.
402 *Ibid.*
403 *Ibid.*
404 *Ibid.*
405 Council on Higher Education 2015 15.

guidelines also provide that assessments may include any other compulsory and voluntary activities.[406] There must be regular and constructive feedback to students as far as problem solving, research, literacy and communication skills are concerned.[407]

5 3 4 RELEVANCE OF THE QUALIFICATION STANDARD FOR THIS RESEARCH

It is clear that the relevant provisions of the qualification standard, as analysed, support the arguments for better preparedness of law graduates, as far as procedural law modules are concerned, for legal practice. The following points are important as far as this conclusion is concerned:

(a) *the importance of transformative constitutionalism*:[408] this fully substantiates the theoretical basis of this research, in that students need to be pervasively taught about the supremacy of the Constitution and that all areas of law, whether substantive or adjectival, must be measured against its provisions in order to ensure that social justice takes place and that the values of dignity, equality and freedom are advanced. In this way, students will be made aware of their role in legal practice, as well as the important task of the legal profession to serve the needs of the members of society as far as their democratic rights are concerned. This will lead to the development of the legal profession in order to advance the spirit and purport of the Constitution instead of conservative and rigid interpretations of legal principles and procedures that are not underpinned by the mentioned constitutional values;

(b) *the importance of both substantive teaching and practical training*:[409] theory and practice should not be taught separately from each other. This substantiates the argument that a methodology like CLE, or any other practical training, should not be treated as mere add-ons to the curriculum, but that it should play an integrated

406 *Ibid.*

407 Council on Higher Education 2015 12.

408 See 5 3 3 2.

409 See 5 3 3 3.

role in the teaching and learning of the law.[410] In this regard, CLE is explicitly mentioned in the qualification standard as an alternative to any field of specialisation to which a student might be exposed to.[411] CLE can play a vital role in assisting with the development of students as far as the applied competences,[412] as prescribed by the qualification standard, are concerned. When integrated with procedural law modules, it can advance the students' appreciation of ethics and professionalism, communication, problem solving and collaboration in the handling of a client's case.[413] In this regard, students can be divided into groups when working on simulated cases, drafting documents, partaking in moots and mock trials, from which activities their ethical and professional behaviour can be ascertained. In executing these activities, students will learn how to transfer knowledge to others. In this regard, mock consultations can serve as a good platform where students can "consult" with one another and "provide legal advice" in such a manner. In doing so, they must foster an appreciation for social justice in accordance with the principles and values of the Constitution and critically evaluate the benefit of the existing legal principles and procedures in the context of their "client's" case and social setting. Students must be afforded the opportunity to reflect on the actions that they have taken in order to evaluate the effectiveness thereof. Constructive feedback from the presenter will play a paramount role in combining the substantive legal principles with practical steps taken in order to place students in a position to fully substantiate and justify the procedures that they have suggested for a client in a particular social setting;

(c) *the importance of training in the use of digital technology*:[414] being part of transformative legal education,[415] students must be skilled in using digital technology in performing practical legal work, *eg* making use of document generating software to draft process and pleadings.[416] This also includes the use of digital technology in order to conduct research for the purpose of finding

410 See, *inter alia*, 4 7 2 1 in this regard.
411 See 5 3 3 4.
412 See 5 3 3 5.
413 *Ibid.*
414 *Ibid.*
415 See 2 1.
416 See 4 7 4 2.

adequate and practical solutions to legal problems. Training law students to use digital technology, as far as procedural law modules are concerned, will promote a move by the legal profession to a more advanced and technologically developed level, especially taking into account that it was stated that the legal profession is slow to adapt to changes;[417]

(d) *appropriate assessment methods*:[418] various methods of assessment, as well as the efficacy or not thereof, have already been discussed elsewhere.[419] In this regard, the qualification standard reiterates the necessity for practical training in that problem solving in a real life context, simulations, moot courts, mock trials and work at law clinics are specifically mentioned.[420] The collaborative work directive also reinforces the constitutional notion of participatory parity.[421] In working together, the students will develop an appreciation for the needs of others and learn to listen closely to a colleague's input in a matter. This will facilitate their appreciation of the needs of their clients in legal practice and to listen closely to what their clients want in order to assist them accordingly. The reference to reflective journals emphasises the importance of affording the students opportunities to critically evaluate their own performance and, in collaboration with the law teacher, to learn from it.[422] The reference to other compulsory or voluntary activities finds manifestation in concepts like the NMU Faculty of Law's Mobile Law Clinic[423] and Legal Integration Project[424] – activities which can play a valuable role in enriching the knowledge and enhancing the practical skills of students. Assessment in this regard may be linked to the students' participation and performance in each of these activities;

(e) *the provision of constructive feedback to students about their performance in all teaching and learning activities*:[425] without feedback, students will not know whether or not they have satisfactorily completed particular activities and accordingly accomplished certain learning outcomes. The feedback is

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417 *Ibid.*

418 See 5 3 3 6.

419 See 3 4 9 and 4 5 6.

420 See 5 3 3 6.

421 See 2 3.

422 See 4 3 2 with regards to the importance of student reflection.

423 See 4 7 2 3.

424 See 4 7 2 4.

425 See 5 3 3 6.

paramount to the students' development as future legal practitioners, especially taking into account that they need to develop professional accountability towards members of the public.[426] In this regard, accountability and professional responsibility towards members of the public are specifically mentioned in the qualification standard, thereby emphasising the importance of the students' development as such;[427] and

(f) *linked to the previous item is the graduate's ability to transfer knowledge to others*: this is important in as far as the following is concerned, namely a graduate's interaction with members of the public, as well as a candidate legal practitioner in providing legal training to students as part of community service as discussed.[428]

5 3 5 CONCLUSION

From what was stated in Chapter 4, it is clear that CLE can accomplish all the mentioned teaching and learning outcomes as far as procedural law modules are concerned. Although some of the mentioned teaching and assessment aspects are not exclusive to CLE, it (CLE) is inclusive of all these aspects. It is therefore submitted that, as far as the qualification standard is concerned, CLE is the preferred teaching and learning methodology by which procedural law modules should be presented.

5 3 6 A BASELINE STUDY RELATING TO GRADUATE ATTRIBUTES ON SOUTH AFRICAN GRADUATES FROM THE PERSPECTIVE OF EMPLOYERS

5 3 6 1 REASONS FOR THE BASELINE STUDY

During 2009, the results of a baseline study, undertaken by Higher Education South Africa (hereafter referred to as "HESA"), was published. This study was a pilot survey and its purpose was to ascertain the views and expectations of employers, as well as their evaluation, of the quality of graduates who are produced by higher education

426 See 5 2 2 1.
427 See 5 2 3 5.
428 See 5 2 2 2.

institutions in South Africa.[429] The study was not specifically conducted with regards to law graduates, but it is submitted that the study, as well as its results, are equally applicable to the legal profession. It was envisaged that the outcomes of this study would:

(a) provide useful data to give rise to debate and engagement with the industry;[430] and
(b) establish an empirical threshold against which periodic future reviews can be measured.[431]

The economy has certain pressing needs and the need for a "skills revolution" was expressed by former Deputy President Phumzile Mlambo-Ngcuka.[432] This expression formed part of the Deputy President's vision to mobilise high level support for priority skills development.[433] As already discussed elsewhere,[434] the Deputy President stated that curriculum developers are not paying sufficient attention to the relevance of skills and competencies of graduates in the context of the world of employment.[435] The Deputy President's statement supports the argument in this research that something more is required from higher education in order to produce better graduates for practice. The expectation is for higher education to commence active engagement with the skills needs of the economy, while at the same time addressing the many pressing imperatives constraining South Africa as a developmental state and relatively young democracy.[436] The mentioned engagement should be conducted by way of research, knowledge motivation and innovation.[437]

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429 Griesel and Parker "Graduate attributes: a baseline study on South African graduates from the perspective of employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 2. Also see Greenbaum *et al* 2014 *South African Journal of Higher Education* 94-97 for a discussion of this baseline study.

430 *Ibid.*

431 *Ibid.*

432 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 2. Also see 1 1 in this regard.

433 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 2.

434 See 1 1.

435 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 2.

436 *Ibid.*

437 *Ibid.*

The baseline study was conducted within the following contextual layers as far as skills and employability are concerned:[438]

(a) the interface between higher education and the employment world, as well as the challenges in aligning these two areas;
(b) the current pressing skills needs of the economy and society;
(c) the reality of a 21st century world, driven by knowledge – a notion which should compel higher education to produce graduates who are able to compete and participate in the increasingly globalised world and economy in useful and productive ways; and
(d) the concern of employers about the gap between the outcomes of higher education and the needs of the economy. This gap refers specifically to the quality, type and quantity of graduates that are produced by higher education institutions.[439] In this regard, higher education has expressed, with some frustration, that universities are not human resources development factories and that employers must therefore appreciate the role that higher education plays in the education of students and the type of graduate that can be delivered.[440]

In conducting this baseline study, HESA assumed the following:[441]

(a) that knowledge, skills, competencies and values, developed by higher education, may not be aligned with the needs and expectations of employers and the demands of the rapidly changing working world; and
(b) that "skills" may require redefinition in order to bring the responsibilities of higher education in alignment with the possibilities of new and changing forms of work and how knowledge is being applied.[442]

438 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 3.

439 *Ibid.*

440 *Ibid.*

441 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 3, 19; Greenbaum *et al* 2014 *South African Journal of Higher Education* 95.

442 Skills, relevant to LLB graduates, have already been discussed in Chapter 1. See 1 1 in this regard.

In light of the aforementioned, the study was structured so as to produce the following information:[443]

(a) graduate attributes that are considered as important by employers when graduates enter the working world; and
(b) the extent to which graduates, graduating from South African higher education institutions, demonstrate these attributes.

5 3 6 2 THE STUDY AND THE RESULTS THEREOF

In conducting this study, it was noted that there is a shift away from the earlier notion of preparing graduates for "employment" to a notion of "employability."[444] "Employability" is influenced by four broad, but interrelated components, namely:[445]

(a) skilful practices: this refers to communication, time management, self-management, resource management, problem solving and lifelong learning;
(b) deep understandings that are grounded in a disciplinary base: this refers to specialised expertise in a field of knowledge;
(c) efficacious beliefs about personal identity and self-worth; and
(d) metacognition: this refers to self-awareness, as well as the ability to reflect on actions taken.

"Employability" appears to be a very deep notion.[446] It is inclusive of a lot of the soft skills that have already been mentioned elsewhere[447] and not only of attributes that will enable graduates to merely perform the work when entering the working world.

In conducting the study, a questionnaire was provided to employers.[448] In the questionnaire, various questions were asked and employers had to answer with

443 *Ibid.*
444 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 4.
445 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 5.
446 *Ibid.*
447 See 4 1, as well as 5 2 2 3.
448 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 23-27.

written comments or indicating values on two sets of rubrics.[449] Both sets of rubrics contained values from one to five, with one being indicative of "Very Dissatisfied" and five being indicative of "Very Satisfied." The one rubric was based on the type of graduate that the employer perceived higher education institutions to have delivered and was titled "what you get."[450] The other rubric was based on the type of graduate that employers expected to receive after the graduate's exit from higher education institutions, titled "what you expect."[451] Graduate attributes were categorised into four main groups for the purposes of this study, namely:[452]

(a) *basic skills and understanding*: this category investigated whether or not graduates display the necessary knowledge to meet the expectations of the workplace. In this regard, it should be asked: can graduates hit the ground running when entering the workplace? The assumption was that employers would expect graduates to possess basic communication skills and an understanding of the workplace in order to perform effectively.[453] The study revealed that there was a gap between what higher education institutions deliver and what employers expect.[454] The expectations of employers were also placed in different categories and, of these categories, the biggest gaps were found in that of "ability to find and access information", "written communications skills" and "ability to use information";[455]

(b) *knowledge and intellectual ability*: this category investigated whether or not graduates demonstrated the intellectual ability and adequate conceptual depth to perform well in the workplace. The assumption was that graduates need to have consolidated their intellectual ability and knowledge foundation, which

449 *Ibid.*

450 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 24, 25; Greenbaum *et al* 2014 *South African Journal of Higher Education* 95.

451 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 24, 25.

452 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 6.

453 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 9.

454 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 9-10.

455 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 10. The ratings were as follows: "ability to find and access information" – higher education delivered: 3.5, while employer expected: 5.0, bringing about a gap of 1.45; "written communication skills" – higher education delivered: 3.2, while employer expected: 4.5, bringing about a gap of 1.34; "ability to use information" – higher education delivered: 3.4, while employer expected 4.6, bringing about a gap of 1.23.

would enable them to engage with the demands of the workplace, as well as for them to benefit from workplace opportunities.[456] Once again, the delivery of higher education and the expectations of employers were placed in different categories and of these, the biggest gap was in that of "understanding of economic and business realities";[457]

(c) *workplace skills and applied knowledge*: this category investigated whether or not the performance of graduates was indicative of an appropriate and applied competence to tasks inherent to the workplace. The assumption was that graduates would be able to move from a theoretical approach to a more practical basis.[458] Of the various higher education delivery and employer expectation categories, two stood out for displaying the biggest gaps, *ie* "ability to choose appropriate information to address problems" and "ability to plan and execute tasks independently";[459] and

(d) *interactive and personal skills*: this category investigated how graduates see and conduct themselves in the context of the workplace and workplace practices. The assumption was that changes in workplace practices will demand flexibility and adaptability of graduates.[460] Of the various higher education delivery and employer expectation categories, the biggest gap was recorded in "openness and flexibility."[461] What is however significant, is that the smallest gap was recorded in "willingness to learn."[462] This clearly shows that graduates have a desire to learn skills that are applicable to the workplace. It is however not clear what the cause of this lack of openness and flexibility in graduates is.

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456 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 11.

457 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 12. The rating was as follows: higher education delivered: 2.9, while employer expected 4.2, bring about a gap of 1.34.

458 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 13.

459 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 13-14. The ratings were as follows: "ability to choose appropriate information to address problems" – higher education delivered: 3.1, while employer expected: 4.5, bringing about a gap of 1.42 and "ability to plan and execute tasks independently" – higher education delivered: 3.1, while employer expected: 4.5, bringing about a gap of 1.41.

460 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 15.

461 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 15-16. The rating was as follows: higher education delivered: 3.4, while employer expected 5.0, bring about a gap of 1.60.

462 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 15-16. The rating was as follows: higher education delivered: 4.0, while employer expected 4.7, bring about a gap of 0.75.

5 3 6 3 COMMENTS ON THE BASELINE STUDY BY HIGHER EDUCATION SOUTH AFRICA AND THE SOUTH AFRICAN QUALIFICATIONS AUTHORITY

HESA and SAQA considered the responses from the employers in the context of the two assumptions on which this study was based.[463] There appeared to be a need, as far as both instances are concerned, for engagement between employers and higher education institutions about how to narrow the gaps between what is expected and what is delivered.[464] In order to address this, a common understanding must be reached about the nature of the gaps, as well as ways in which such gaps can be narrowed.[465] This can be done by investigating higher education's work based and work placed teaching and learning programmes, in order to establish what is best and most appropriate.[466] It will further require an investigation into the particular curriculum and educational and assessment practices in order to conclude what will be most effective as far as both higher education and the workplace are concerned.[467]

The study revealed the importance of proficiency in English, communication and digital technology for the purpose of employability.[468] As indicated in the study, this is hardly surprising,[469] especially taking into account that communication and digital technology are concepts integral in almost all forms of employment, including the legal profession. A foundation for these skills is firmly established in the majority of countries, but not in South Africa.[470] This means that higher education will have to address the failure of the school system in order for such a foundation to be established in a more systematic and thorough manner.[471] It is submitted that this foundation is of paramount importance for the legal profession, as communication plays an important role in the everyday life of legal practitioners[472] and digital technology, being part of

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463 See 5 3 6 1.

464 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 19.

465 *Ibid.*

466 *Ibid.*

467 *Ibid.*

468 *Ibid.*

469 *Ibid.*

470 *Ibid.*

471 *Ibid.*

472 See 3 4 4.

the impact of the Fourth Industrial Revolution, now finds accelerated application in the legal profession.[473] Furthermore, transformative legal education also requires that students be trained as far as digital technology is concerned.[474]

Overall, the findings of HESA and SAQA are summarised as follows:

(a) employers have a much more complex perception of the role of higher education.[475] This means that employers and higher education may be misreading each other's positions;[476]
(b) there is a need to narrow the gaps between what employers expect and what higher education delivers.[477] This primarily concerns a proactive task directed at engagement and the application of knowledge by graduates;[478]
(c) it is however noted that employers do add value to the conceptual foundation, knowledge and intellectual approach to tasks that higher education is generating;[479]
(d) this study presents a real opportunity to promote engagement, understanding and more collaborative efforts between higher education and employers. In order to accomplish this, both higher education and employers must have clarity on how far higher education should go in order to narrow the gap as far as education is concerned, and to what extent employers should provide on-the-job-training and continuing development;[480]
(e) there is political sensitivity relating to the mentioned issues, which may lead to a simplification thereof.[481] Nevertheless, honest and constructive engagement between higher education and employers remains essential in order to bring about quality across higher education institutions.[482] The issues cannot merely be left out – they need to be problematised and contextualised.[483]

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473 See 4 7 4 2.
474 See 2 1.
475 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 19.
476 *Ibid.*
477 Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 20.
478 *Ibid.*
479 *Ibid.*
480 *Ibid.*
481 *Ibid.*
482 *Ibid.*
483 *Ibid.*

In achieving better synergy between higher education and employers, the study recommends, *inter alia*, that, before graduation, students should have a clear idea of the expectations of future employers.[484] In this regard, businesses and companies can conduct presentations about these expectations at universities, thereby facilitating the interaction between higher education and employers.[485] This is significant, because the study regards it as important to increase the student's career literacy while the student is still attending university.[486] In this regard, it is submitted that career literacy should already commence in the first academic year, permeate throughout all other academic years, culminating in a definitive summary during the final academic year. This will contribute towards the continuous education of students and contextualise their preparation for entry into the working world. A pleasing and unanticipated outcome of the study is that employers appear to understand the demands of a changing working world, as well as the demands that the future will place on graduates who enter the workplace.[487] This emphasises the role of higher education in producing thinking, responsive and intellectually well-grounded graduates who possess flexibility and the ability to readily adapt to demands and challenges.[488]

5 3 6 4 SIGNIFICANCE OF THE BASELINE STUDY FOR THIS RESEARCH

The baseline study by HESA and SAQA has revealed that there is merit in the dissatisfaction of various stakeholders in the legal profession as far as the preparedness of law graduates for legal practice is concerned.[489] A "skills revolution", as suggested by the former Deputy President,[490] is paramount, as graduates appear to lack the necessary skills that are required for entry into the legal profession. For this reason, the training provided by university law schools and the expectations of legal practice require alignment so as to ensure that graduates can adapt to the working world. As was stated earlier in this chapter, this alignment is beneficial to both

484 *Ibid.*
485 *Ibid.*
486 *Ibid.*
487 *Ibid.*
488 *Ibid.*
489 See 1 1 in this regard.
490 See 5 3 6 1, as well as 1 1.

the graduate, as far as self-development is concerned, and society at large, as graduates are required to serve members of the public in an accountable and professional manner when entering legal practice.[491] This alignment should therefore be seen as a constitutional imperative as far as the teaching and learning of procedural law modules by university law schools are concerned. Without a more practical approach to procedural law modules, fully underscored by the values of the Constitution, graduates will not develop a sense of how the law can promote social and procedural justice in order to improve the lives of people. It is therefore submitted that the various suggestions for improvement in the teaching and learning of the procedural law modules by way of CLE, including enhanced written and verbal skills,[492] emphasis on human and social elements,[493] the involvement of legal practitioners[494] and adequate recognition of the impact of the Fourth Industrial Revolution,[495] can significantly assist with the narrowing of the gap between higher education and the working world.

An important question that must be answered is whether or not the integration of graduate attributes with curricular content is actually yielding any success. It is not easy to determine whether or not students have absorbed such attributes during their academic years at university.[496] In order to answer this question, the views of academics, who are the primary teachers at university level, should be visited. However, in the United Kingdom, there has been very little sign of large scale impact in this regard.[497] In Australia, it has been reported that academics regard graduate attributes as relatively unimportant additive outcomes that are only taught in order to supplement the more important substantive content of the various modules.[498] These findings, together with the dissatisfaction of relevant stakeholders as already discussed,[499] therefore appear to provide a somewhat negative answer to the aforementioned question. It has consequently been stated that graduate attributes

491 See 5 2 2 1.
492 See 3 4 4.
493 See 3 4 5.
494 See 4 7 2 1.
495 See 4 7 4.
496 Greenbaum *et al* 2014 *South African Journal of Higher Education* 93.
497 *Ibid.*
498 *Ibid.*
499 See 1 1.

can only be successfully internalised by graduates if there is a willingness to integrate it with the module content, which will be reflective of a belief by the particular law teacher that such attributes are indeed important.[500] This reverts this discussion to two earlier points already discussed, *ie*:

(a) the earlier argument that CLE, and consequently more practical training, should not be treated as a separate part to the LLB degree, but as an integral methodology for training graduates for better preparedness in procedural law modules for the purpose of successful entry into legal practice;[501] and
(b) that some academics believe that the role of a university, including the law school, is not to train graduates for practice, but to equip them with substantive knowledge in order to be critical thinkers.[502]

The baseline study has already shown that graduates indicate a willingness to learn skills that are applicable to the workplace;[503] therefore, it is submitted that law schools do not have a choice other than to regard the integration of graduate attributes with curricular content as paramount to the professional education and training of law students.

It is consequently submitted that law schools at South African universities should take immediate and serious notice of the content of the baseline study, as well as the expectations of legal practice and adapt the teaching and learning of procedural law modules accordingly. It is further submitted that law schools should adopt CLE as the preferred teaching and learning methodology in enhancing the teaching of procedural law modules. As law schools in South Africa have recently undergone reaccreditation of their LLB degree curricula, and have in some instances adapted their curricula accordingly, it is submitted that this is the ideal opportunity for introducing the teaching of procedural law modules by way of CLE into their curricula.

500 Greenbaum *et al* 2014 *South African Journal of Higher Education* 93.
501 See 4 1 and 4.8.
502 See 1 1.
503 See 5 3 6 2.

5 4 CONCLUSION

Arendt stated the following:[504]

> "Education is the point at which we decide whether we love the world enough to assume responsibility for it and by the same token save it from that ruin which, except for renewal, except for the coming of the new and the young, would be inevitable. And education, too, is where we decide whether we love our children enough not to expel them from our world and leave them to their own devices, not to strike from their hands their chance of undertaking something new, something foreseen by no-one, but to prepare them in advance for the task of renewing the common world."

The LPA brings about new developments for the legal profession. As argued, it requires of legal practitioners and candidate legal practitioners to practice law in a professional and ethical manner, ever aware of the best interests of their clients. This duty, together with the constitutional imperative to improve the life of all members of society against the backdrop of the constitutional and democratic values, provides opportunities for legal practitioners and candidate legal practitioners to renew the common world, as stated by Arendt. Arendt's pedagogy requires universities to serve the public good by way of critical learning experiences and notions of democratic freedom, instead of a consumerist future.[505] Furthermore, the term "accountability" has been mentioned frequently in this chapter. In addition, it has been indicated that the legal profession is, and has always been regarded as, a noble profession. It therefore does not come as a surprise that the South African Minister of Justice and Correctional Service, Ronald Lamola, has called for judicial officers to be held to the highest standards of scrutiny.[506] As justification for this statement, the Minister stated that the conduct of judicial officers must at all times be beyond reproach and conduct that befits their office.[507] This follows the suspension of a magistrate based on misconduct for allegedly being linked to corruption.[508] The Minister indicated that such allegations are devastating to the image of judicial officers, the courts and the rule of

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504 Arendt "The crisis in education" (undated) file:///D:/LLD%20research/Arendt-Crisis_In_Education-1954.pdf (accessed 2020-05-21); Walker 2002 *Arts and Humanities in Higher Education* 48.

505 Walker 2002 *Arts and Humanities in Higher Education* 48. Also see 2 3 in this regard.

506 Sibanda "Why pay a lawyer when you can buy the judge? Corruption in our legal system is a threat to democracy" (1 March 2020) https://www.dailymaverick.co.za/opinionista/2020-03-01-why-pay-a-lawyer-when-you-can-buy-the-judge-corruption-in-our-legal-system-is-a-threat-to-democracy/ (accessed 2020-03-17).

507 *Ibid.*

508 *Ibid.*

law in general.[509] Perception definitely matters,[510] especially as far as a noble profession is concerned. It has already been discussed how social media has influenced public perception of what is going on in everyday life and that the legal profession is not exempted in any way form this. The judiciary and the rule of law are therefore no exceptions.[511] US Supreme Court Justice Kennedy has stated that, where there is a loss of confidence in the judicial system and a misunderstanding of the judicial system, steps must be undertaken to correct this.[512]

Therefore, whether it is a judicial officer, legal practitioner, legal administrative official, or the rule of law in general that is compromised by way of unprofessional and unethical conduct, the entire legal profession is tainted by the improper perceptions of the public, resulting in a profession that does not heed the call for accountability of the provisions of the LPA. As also stated, it may raise concerns about the legal education and training that legal professionals have undergone, not only during their years of experience and vocational training in practice, but also as far as university education and training is concerned. Sibanda indeed states that "…some of the faultlines in the judiciary and legal profession lie in our legal training."[513] Law schools offer legal practices modules as part of the LLB curriculum, but topics like professional conduct and ethics are not always sufficiently addressed.[514] As professional conduct and ethics are linked to legal procedure, it emphasises the inclusion of such aspects in the training of students. It will strengthen the attempts to produce graduates who can fulfil accountable roles in serving the public.

It can therefore be stated without any doubt that the advent of the LPA requires a new level of legal education, especially as far as procedural law modules are concerned. This point of view is undeniable when taking into account that it has been stated that the LPA must bring change not only to the legal profession, but also to the manner in which the legal profession provides legal services to the beneficiaries of such system,

509 *Ibid.*
510 *Ibid.*
511 *Ibid.*
512 *Ibid.*
513 *Ibid.*
514 *Ibid.*

ie members of the public.[515] During practical vocational training, candidate legal practitioners will utilise legal procedure and aspects of evidence every day. This will not cease after they have been admitted and enrolled as legal practitioners – it will intensify. In utilising legal procedure and aspects of evidence, legal practitioners and candidate legal practitioners are serving the world. In this regard, and to paraphrase Arendt's abovementioned words, if law teachers value the world that will be served by legal practitioners and candidate legal practitioners, law teachers must educate law students accordingly. This requires transformative legal education to take place. This will enable students to undertake "something new", as also stated by Arendt, when entering legal practice as adequately qualified graduates.

However, in order for graduates to successfully undertake "something new" upon entering legal practice, they need to possess the required graduate attributes. The LLB standard makes it clear that a substantial knowledge of legal theory, practical skills and an appreciation of constitutional values, legal ethics and professionalism are paramount for all law graduates. Therefore, when planning the curricula for procedural law modules presented by way of CLE, law teachers need to carefully and thoroughly peruse the LLB standard in order to ensure that the learning outcomes will lead to the achievement of a particular standard. This will ensure that module outcomes are aligned with the qualification standards, ultimately resulting in equipping graduates with the required attributes for entry into legal practice. It is further recommended that law schools should devise faculty specific graduate attributes in order to direct the focus to what the quality of graduates should be when leaving university. In devising such graduate attributes, law schools should ensure that the constitutional imperative, as argued for in this chapter, is strictly adhered to. If so, the foundation is firmly established for the training of law graduates who can promote the spirit and purport of the LPA and the Constitution from their first day in legal practice.

A wide range of employability skills can have positive effects not only on graduate learning outcomes and employability, but also on the economy.[516] For this reason, higher education institutions should play a pivotal role in developing the career

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515 Thebe http://www.saflii.org/za/journals/DEREBUS/2015/89.pdf.

516 Bridgstock 2009 *Higher Education Research and Development* 39.

management skills of students.[517] A more practical approach to procedural law modules, fully underscored by the values of the Constitution, will undoubtedly develop students more adequately towards their careers in legal practice. University law schools must therefore actively engage with aspects of employability as far as procedural law modules are concerned.[518] The incentive of government funding, as mentioned elsewhere,[519] might prove useful in this instance: should law schools produce graduates who are evidently ready for entry into legal practice, it will mean that they are eligible for funding in order to maintain or even further improve their efforts in producing practice ready and employable law graduates. It is submitted that, in order to determine whether or not university law schools are compliant in this regard, more frequent baseline studies relating to graduate attributes may be required. This can be done every alternate year, with annual reports submitted to the particular government funding institution(s) by law schools, clearly setting out the training provided to law students. As much as this may bring about administrative burdens for both law schools and government, it may result in more practice ready law graduates. It is therefore important that universities remove the division between themselves and the demands of legal practice in order to assist graduates to prepare for their careers in legal practice.[520] In this way, university law schools become important conduits between skilled law graduates and members of the public being served in an accountable, professional and ethical manner.

It can therefore be concluded that the graduate attributes, as provided for in the LLB standard, are sufficient to prepare law students for legal practice as far as legal procedure and the principles of evidence are concerned. Law schools should further familiarise themselves with the mission and vision of the LPA, in order to be clear on how important it is to comply with the constitutional imperative, as argued for in this chapter. If not, such universities may be accused of producing legal practitioners who are not responsive to the needs of the public, especially in a developing country like

517 *Ibid.*

518 See Bridgstock 2009 *Higher Education Research and Development* 39 in this regard.

519 See 5 2 2 3.

520 See Bridgstock 2009 *Higher Education Research and Development* 40 in this regard.

South Africa, where there is a large disparity in the distribution of wealth.[521] The integration of CLE with the teaching and learning of procedural law modules will undoubtedly play an invaluable role in this regard, as clinicians will be aware of the latest developments as far as the LPA is concerned and therefore be in an ideal position to impart such knowledge and skills to students.

[521] McQuoid-Mason "Can't get no satisfaction: the law and its customers: are universities and law schools producing lawyers qualified to satisfy the needs of the public?" 2003 28(2) *Journal for Juridical Science* 199 207.

CHAPTER 6

CONCLUSION

6 1 THE IMPORTANCE OF INTEGRATING THEORY AND PRACTICAL TRAINING

This research has analysed the dissatisfaction with the current under preparedness for legal practice of law graduates by various stakeholders in the legal fraternity, including legal practitioners, law academics, court officials, umbrella organisations like the former Law Society of South Africa, as well as law students themselves.[1] Some of the reasons for this under preparedness were discussed in this research, including the following:

(a) *the teaching methodologies relating to procedural law modules, ie the Socratic and case dialogue methodologies*:[2] it was argued that these teaching methodologies, on their own, cannot adequately train graduates to acquire the necessary skills relating to civil procedure, criminal procedure and the principles of evidence that are required when such graduates enter legal practice;
(b) *the presence of little to no practical experience in procedural law that students undergo while at law school*:[3] the argument made was that practical or work integrated learning plays a big role in preparing graduates for what awaits them in legal practice as far as legal procedure is concerned; and
(c) *the non-alignment between university training and the required graduate attributes expected by the working world*:[4] in this regard, it was argued that there needs to be a better correlation between what, and how, law schools teach and what legal practice expects from graduates when they enter legal practice.

1 See Chapter 1.
2 See 3 3.
3 See, *inter alia*, 3 1 and 4 1.
4 See 5 3 6 3.

It has been stated that law schools are still "library-schools" or, phrased differently, "book-law schools."[5] Law schools should be more like "lawyer-schools."[6] South Africa is one of the countries in which students are taught to think like lawyers and also to write like lawyers.[7] Students should however also be taught to act like lawyers.[8] A principal of candidate attorneys has indicated that the insufficient knowledge of a candidate attorney could be ascribed to the lack of exposure to other fields of law while at university.[9] This comment was made specifically with regards to the insufficient knowledge of a candidate attorney working in the real estate department of a law firm, but it is submitted that the same can apply to a candidate attorney who works in the litigation department of a firm and who also has insufficient knowledge of legal procedure and evidence. The aforementioned principal also stated that the problem with the candidate attorney's knowledge "…lies in the type of training that candidate attorneys[10] receive at university."[11] According to him, "…there is a gap between the university training and workplace practical training."[12] This means that universities are not preparing law graduates adequately as far as the workplace is concerned[13] and confirms the mentioned non-alignment between university training and graduate attributes required for the workplace. Should such a state of events continue, it might constitute a situation as sketched by a law student interviewed by the Carnegie

5 Kaufman "Advocacy as craft: there is more to law school than a paper chase" 1974 28(2) *Southwestern Law Journal* 495 500; Gravett "Pericles should learn to fix a leaky pipe – why trial advocacy should become part of the LLB Curriculum (Part 2)" 2018 21 *Potchefstroom Electronic Law Journal* 1 23.

6 *Ibid.*

7 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 23.

8 *Ibid.*

9 SASSETA Research Department "SASSETA Research Report: assessment of learning conditions of candidate attorneys during a transformation attempt" (March 2019) https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf (accessed 2020-01-14) 31.

10 The term "candidate attorney" here obviously refers to the candidate attorney still as a student at university, and not a candidate attorney who is undergoing additional training at a university while enrolled for practical vocational training in practice.

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

Foundation, namely that "[l]aw schools create people who are smart without a purpose."[14]

Throughout this research, it has been shown that there are strong arguments in favour of university law schools leaning more towards the academic side of knowledge dissemination. It would appear that many academics believe that their primary duty is not to prepare law graduates for the purpose of entering into legal practice, but to provide them with an adequate and firm substantive knowledge of legal principles.[15] In this regard, a graduate indicated that a law professor stated that theory is taught at law school, and that the purpose of law school is not teaching students to become lawyers.[16] This statement raises concerns. One of the main arguments of this research is that legal education consisting only of the teaching and learning of substantive law, cannot be sufficient, especially keeping in mind that many graduates will want to enter legal practice. In this regard, it should be noted that there are currently 27,223 practising attorneys in South Africa, as well as 6,669 candidate attorneys on the roll of the Legal Practice Council.[17] This can be compared to the number of practising attorneys and registered candidate attorneys in 2015, which were 23,712 and 3.060, respectively.[18] There are currently 2,986 practising advocates and 804 candidates undergoing pupillage training in South Africa as part of the General Council of the Bar of South Africa.[19] There may also be graduates who want to enter legal practice, but who cannot acquire employment. It should furthermore be kept in mind that some graduates become public prosecutors and legal advisors which will further increase the number of graduates entering legal practice.

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14 Cunningham and Burge "Can legal education promote civic professionalism? Reflections on the 2007 Report on American Legal Education from the Carnegie Foundation for the Advancement of Teaching" (3 April 2007) http://clarkcunningham.org/LegalEd/Carnegie-Griffith-Handouts.pdf (accessed 2019-05-14).

15 See 1 1 and 4 1 in this regard.

16 Uphoff, Clark and Monahan "Preparing the new law graduate to practice law: a view from the trenches" 1997 65 *University of Cincinnati Law Review* 381 392.

17 Law Society of South Africa "Statistics for the attorneys' profession" (January 2019) https://www.lssa.org.za/about-us/about-the-attorneys-profession/statistics-for-the-attorneys-profession/ (accessed 2020-09-22).

18 Manyathi-Jele "Latest statistics on the legal profession" 2015 (August) *De Rebus* 13 13.

19 These statistics denote the position for 2020 and had been obtained from the General Council of the Bar of South Africa. It is on file with the author of this research and can be made available on request.

Campbell points out that there is tension regarding this apparent dual function of law schools:

> "Universities must…be cognisant of the needs of the profession, but not exclusively so – their prime loyalty should be to the discipline of law, and to equip students with universal skills, and not to any time-specific needs of a particular profession. At the same time, however, universities cannot ignore these needs entirely. To do so, would create a situation in which their educational offerings become irrelevant."[20]

This research calls for a much more practical orientated teaching and learning of procedural law modules, incorporating the notion of transformative constitutionalism. In studying adjectival law, of which the procedural law modules form part, students cannot only be taught doctrinal principles without an opportunity to practice these principles. A disregard of practical exercises will result in the study of procedural law lacking a vital section thereof. This however does not mean that university law schools should abandon the *status quo*, *ie* to provide the basic introduction to analytical and research skills that equip law graduates with new knowledge and insight into the law and society.[21] The development of intellectual skills and achievement of intellectual goals remain important.[22] Certain changes should however be made that could complement the *status quo*. What is required is an approach that integrates the intellectual skills of graduates with practical skills so as to enable them to serve the public as competent legal practitioners when entering legal practice. For example, the preparation of legal documents for purposes of litigation, is a skill that is acquired and improved upon when in legal practice, but it is never really executed to perfection.[23] However, there are certain fundamental principles and guidelines that can be taught to students.[24] Students also need to be able to interpret and analyse legal documents, as well as legislation, in order to discover the true meaning thereof in light of the values and principles of the Constitution.[25] This will constitute an ideal attempt to develop

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20 Campbell "The role of law faculties and law academics: academic education or qualification for practice?" 2014 1 *Stellenbosch Law Review* 15 16.

21 Gravett (Part 2) 2018 *Potchefstroom Electronic Law Journal* 23.

22 *Ibid.*

23 Van Blerk *Legal Drafting – Civil Proceedings* (1998) v.

24 *Ibid.*

25 See 3 5 in this regard.

and improve their written and cognitive skills from an early stage. Another example is the law of evidence, which has been described as cold in its purely theoretical and abstract form.[26] This can make it quite difficult to recognise situations where such rules need to be applied.[27] However, some hands-on experience could result in a much easier learning experience, would cause the principles of evidence to make much more sense, culminating in a better understanding of the law of evidence.[28] It has already been indicated that not only new graduates, but sometimes also several trial practitioners and even presiding officers are not skilled in applying the principles of evidence.[29] Some practitioners attempt to learn the application of evidentiary principles on the job by repeating what their co-practitioners are doing.[30] They mimic these activities of their co-practitioners without clearly understanding why and how these principles should actually be applied.[31] It can also happen that practitioners follow the misguided application of evidentiary principles of a presiding officer, which will also not help them in any way to properly understand the actual and proper application of such principles.[32] A good foundation at university, in which theory and practical application are integrated, could be a solution to this apparent problem.

Legal practitioners are problem solvers.[33] For this purpose, students require the skills of critical thinking and analysis.[34] They must however become creative problem solvers by being able to critique the existing law in light of transformative constitutionalism.[35] In this way, they will be able to see what the law really could be, or what it ought to be.[36] Justification, and not authoritarianism, should be the decisive

26 Uphoff *et al* 1997 65 *University of Cincinnati Law Review* 392.

27 *Ibid.*

28 *Ibid.*

29 Uphoff *et al* 1997 65 *University of Cincinnati Law Review* 392. Also see 3 1 in this regard.

30 Uphoff *et al* 1997 65 *University of Cincinnati Law Review* 392.

31 Uphoff *et al* 1997 65 *University of Cincinnati Law Review* 392. Also see 3 1 in this regard.

32 *Ibid.*

33 Bauling "Towards a sound pedagogy in law: a constitutionally informed dissertation as capstone course in the LLB degree programme" 2017 (20) *Potchefstroom Electronic Law Journal* 1 19.

34 *Ibid.*

35 *Ibid.*

36 *Ibid.*

factor as far as their reasoning is concerned.[37] As far as procedural law modules are concerned, the following scenarios may provide useful guidance in this regard:

(a) In terms of civil procedure, service of legal process and some pleadings may take place by the sheriff of the court serving a copy of such documentation on people other than the defendant or respondent, whatever the case may be.[38] Students may consider whether such methods of service go against the fundamental rights of privacy, as well as against legislation such as the relatively new Protection of Personal Information Act,[39] which is firmly based upon the right to privacy; and

(b) In terms of the law of evidence, the best evidence rule restricts some probative material from being admitted into legal proceedings as evidence.[40] Students may consider whether or not the best evidence rule should be removed, or whether the adversarial trial system, with its rigid rules of eliciting testimony from witnesses, is really conducive to ensuring justice in litigious matters.

In light of the abovementioned, the research question, as well as the shorter questions facilitating the main research question, should be reviewed shortly.[41] It is clear that the legal profession does indeed require a change in the manner in which law students are trained, especially keeping their future careers in legal practice in mind. This becomes increasingly important in context of procedural law modules, as procedural law is inherently practical in nature and therefore require a practical approach as far as teaching and learning is concerned. The current teaching and learning methods, relating to procedural law modules, *ie*, the Socratic and case dialogue teaching metholdogies, can and do indeed play valuable roles as far as the teaching of theory

37 Bauling 2017 *Potchefstroom Electronic Law Journal* 25.

38 See Pete, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Civil Procedure – A practical guide* 3ed (2017) 134-141, as well as Rule 4 of the Superior Courts Act 10 of 2013 and Rule 9 of the Magistrates' Court Act 32 of 1944 with regards to service by the sheriff of the court.

39 4 of 2013.

40 See Bellengere, Palmer, Theophilopoulos, Whitcher, Roberts, Melville, Picarra, Illsley, Nkutha, Naude, Van der Merwe and Reddy *The Law of Evidence in South Africa – Basic principles* (2016) 60-61 in this regard. In terms of this rule, only the best possible evidence would be admissible in a particular case, making it difficult for copies of documents, for example, to be admitted. The reason is obvious: to prevent forgery and fabrication.

41 See 1 2 1 for the main research question and shorter questions.

is concerned, but, as far as practical training is required, something more is required. It is submitted that CLE is the preferred teaching methodology by way of which procedural law modules should be taught. CLE does not only provide practical training to law students, but also regards the teaching of a foundational theoretical basis as a prerequisite for practical training. Furthermore, CLE regards tutorial sessions and feedback as important aspects of the teaching and learning experience, thus enhancing the educational opportunities available to students in order to ensure the maximum transfer of knowledge, skills and practical experience. In teaching procedural law modules by way of the CLE methodology, students will be able to develop graduate attributes, which attributes are required by future employers. This development of graduate attributes is in line with the provisions of the LLB qualification standard, especially keeping in mind that the standard regards the law to be central as far as economic development and the values of South Africa's constitutional democracy are concerned. It speaks for itself that enhanced practical training in procedural law at university level will significantly facilitate these aspects. Transformative constitutionalism should play a pervasive role throughout the entire training process, especially keeping in mind that the constitutional democracy aims to transform the legal system. This is explicitly stated in the preamble to the LLB qualification standard. It is submitted that such transformation cannot take place by teaching the law, more specifically procedural law, in a theoretical manner only, but also in a practical manner, actively involving law students in the practice of law, as well as other professional and ethical issues that the practice of law might bring about. In conclusion, an enhanced teaching methodology with regards to procedural law modules will bring about law graduates who are destined for having careers as professional and accountable legal practitioners as envisaged by the LPA.

6 2 THE WAY FORWARD

6 2 1 GENERAL

The way forward, in the context of this research, is undoubtedly to integrate CLE, as a teaching methodology, with procedural law modules in order to introduce a more

practical approach to the teaching and learning of procedural law modules. Apart from what has already been argued in this research with regard to support for such a practical approach, history also supports this recommendation. The Romans employed a vocational and pragmatic style in teaching law.[42] They based this approach on the notion of problem solving by using actual issues and real life problems as teaching scenarios.[43] Substantiation for this approach was the Roman view that the law is nothing else but "the art of what is good and fair", where "art" was meant to "make men good" by way of practical instruments, penalties and rewards.[44] The Romans thus believed that the law is real in nature, not a pretended and abstract philosophy.[45]

It is however not only history that supports a more practical approach. Schneider, an experienced CLE teacher, explains how she wanted to attempt the teaching of procedural law by virtue of her practical experience.[46] She states that, what moved her to do this, was a constant reminder of the critical importance of developing the sensitivity of students to procedural contexts and perspectives.[47] Her goals with teaching procedure were the following:[48]

(a) to reach out to students with a different picture about the legal system and legal practice;
(b) to help students to develop a great sensitivity to the normative side of procedure; and
(c) to help students to understand how legal procedure can affect human lives.

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42 Cappelletti "The future of legal education: a comparative perspective" 1992 (8) *South African Journal on Human Rights* 1 2.

43 *Ibid.*

44 *Ibid.*

45 *Ibid.*

46 Schneider "Rethinking the teaching of Civil Procedure" 1987 37(1) *Journal of Legal Education* 41 42.

47 *Ibid.*

48 *Ibid.*

Driven by these goals, Schneider decided on civil procedure.[49] She states that she was warned that the course could be difficult to teach, being technical and boring and, as stated by her, it "…exemplified the worst vocational education vices of law school."[50] However, Schneider realised the importance of this endeavour to teach civil procedure, because procedure introduces students to both formal and informal methods required to solve legal problems.[51] Procedure also plays an important role in familiarising students with the litigation process, dispute resolution, as well as general advocacy.[52] Civil procedure, specifically, consists of many interrelated elements that will be of paramount value to the development of law students, including human legal problems that lead to formal and informal adjudication, ethics, legal strategy, as well as the relationship between substantive legal principles and legal procedure.[53] All of these elements will not only direct the students' attention to the value of legal procedure itself, but also to the value of legal procedure in the context of social and human elements, *ie* procedural justice.[54]

Schneider states that the teaching of civil procedure can be strengthened by way of experiential learning derived from CLE.[55] This will equip the students with a lawyering perspective when studying civil procedure.[56] Students now have the opportunity to learn legal procedure in a more active manner and to accept greater responsibility for what they are learning.[57] For a module like civil procedure, this teaching methodology is of the utmost importance.[58] Schneider indicates that many law teachers in the United States of America are currently teaching civil procedure according to her suggested methodology, brought about by her experience in legal practice as well as with CLE.[59] She hopes that such a "reconstruction" of the teaching and learning of

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49 *Ibid.*
50 *Ibid.*
51 *Ibid.*
52 *Ibid.*
53 *Ibid.*
54 Schneider 1987 *Journal of Legal Education* 42. See 3 4 5 with regards to procedural justice.
55 Schneider 1987 *Journal of Legal Education* 43.
56 *Ibid.*
57 *Ibid.*
58 *Ibid.*
59 Schneider 1987 *Journal of Legal Education* 44.

civil procedure will let law students experience and evaluate the legal system, as well as the role of legal practitioners, in a more critical and reflective manner.[60]

It is submitted that Schneider's approach to the teaching and learning of civil procedure is commendable, as well as an appropriate basis for a way forward that will prepare graduates more adequately for legal practice. It substantiates the need, as expressed in this research, for more practical training as far as procedural law modules in modern times are concerned. However, it is further submitted that there is no reason why Schneider's sentiments cannot be applicable to the law of criminal procedure and the principles of evidence as well. Both these areas of law can be fairly abstract and difficult to understand without some practical examples or experiential learning. Furthermore, both criminal procedure and evidence also involve social and human elements, for example:

(a) respect for and protection of the rights of arrested, accused and detained persons in terms of the Constitution.[61] Legal practitioners need to know how to approach accused persons in a manner that will show respect for their dignity as human beings, especially keeping in mind that some accused persons may be innocent of the crime that they are accused of. Accused persons should not be judged in any way by their legal representatives in order for the "innocent until proven guilty" principle[62] to be maintained until the outcome of the criminal trial; and
(b) treating all evidence in a particular case with the greatest of circumspection and care in order to help a client to formulate a case that the client favours. Legal practitioners should appreciate the fact that, as part of the adversarial trial system in South Africa, evidence plays a central role in proving and disproving the cases of clients and opponents respectively. For this reason, a lack of knowledge about the principles of evidence, or disregarding some pieces of evidence, may have a severe emotional impact on a client, should the client eventually lose a case which would otherwise not have happened had all relevant pieces of evidence

60 Schneider 1987 *Journal of Legal Education* 45.
61 S 35 of the Constitution provides for the rights of accused, arrested and detained persons.
62 S 35(3)(h) of the Constitution.

been utilised in a proper and professional manner. Furthermore, there may be financial implications for the client in the context of civil proceedings, should the client be ordered to pay the legal costs and expenses of the opponent.

It is submitted that, should law schools reconstruct the teaching and learning of procedural law modules by way of CLE, they will indeed be displaying the exemplars of the legal profession. This proverbial display has already been mentioned in Chapter 1 and is advocated by the Carnegie Foundation for the Advancement of Teaching.[63] Before suggesting an adequate way forward in the context of this research, it should be examined whether or not the exemplars of the legal profession are indeed on display at law schools, as demanded by the Carnegie Foundation.[64] The conclusion, reached in this research, is that such exemplars are only partly on display. Some of the reasons for this conclusion are the following:

(a) legal practitioners are involved in the training of law graduates, but not to a large extent;
(b) externships and practical experiences are not prevalent and pervasive throughout the curriculum;
(c) there is not sufficient practical training, from an overall perspective, for law students; and
(d) CLE is not currently compulsory at all universities, thereby causing many students to not be exposed to practical legal training in any manner. It may also cause CLE to not be considered as a teaching methodology for modules like procedural law modules.

63 See 1 1, as well as Sullivan, Colby, Wegner, Bond and Shulman, *Educating Lawyers – Preparation for the profession of law: Summary* (2007) The Carnegie Foundation for the Advancement of Teaching 3.

64 *Ibid.*

6 2 2 SUGGESTIONS RELATING TO THE RESTRUCTURING OF PROCEDURAL LAW MODULES

The question of what should be included in a restructured programme as far as procedural law modules are concerned thus arises. The following suggestions, in the context of this research, are thus made:

(a) *the course outcomes for each module should be clear*: the purpose of each procedural law module should be to equip students with both theoretical knowledge and practical skills. This should include training on advocacy, as well as ethical and professional behaviour. Both the theoretical and practical instructions should be guided by transformative constitutionalism. In devising the module outcomes, it should be asked whether or not, after successful completion of the modules, the graduate will be equipped with the relevant graduate attributes that will promote the graduate's success in legal practice. It should furthermore be asked whether or not the graduate will be able to make a meaningful contribution to the lives of members of the public when practising law. In short, it should be determined whether the graduate conforms to the vision that the LPA expects of a legal practitioner in a professional and accountable profession. As CLE will be the teaching methodology by way of which the procedural law modules will be taught, the law teacher must remember that a clinical experience is the student's experience, and for that reason, students should be granted sufficient freedom in order to actively participate in achieving the outcomes for each module.[65] This approach is fully underpinned by the philosophy of constructivism.[66] Furthermore, CLE employs both theoretical and practical teaching methods; hence, CLE can be of significant value in training students to achieve the course outcomes as far as both theoretical knowledge and practical skills are concerned. Apart from knowledge of substantive law and

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65 See Du Plessis "Clinical legal education: planning a curriculum that can be assessed" 2011 36(2) *Journal for Juridical Science* 25 31 in this regard. Although Du Plessis primarily focuses on the live-client model of CLE in this instance, it is submitted that the same principle should also apply to simulations presented by way of CLE.

66 See 2 3.

applied practice skills, CLE can further bring about the following goals, which goals align appropriately with what should be expected after teaching modules relating to procedural law and evidence: professional responsibility, judgment and analytical abilities, the importance of legal services to the community, learning and working in group format, as well as an integration of some of these goals.[67] The importance of these goals have been discussed throughout this research;

(b) *careful consideration should be given to the module content*: the module content is pivotal to the successful presentation of the course and the development of the graduate as a prospective legal practitioner, because the graduate must have substantial knowledge of and be practically trained in legal procedure and the principles of evidence, given the central role that procedural law and evidence play in almost every legal matter. The goals of CLE, relating to knowledge of substantive law, applied practice skills, as well as judgment and analytical abilities, are especially important in this context and need to be closely monitored in order to ensure that students are trained as such. No shortcuts should be taken and essential sections of every procedural law module should not be left out or neglected in any way. In devising the module content, attention should also be given to the development of the soft skills that are important for legal practice. In this regard, legal practitioners may be invited to present particular sections of the modules. Students can also attend externships at law firms in order to acquire practical skills as far as some sections are concerned. The role of externships in this regard should be viewed as an extension of CLE beyond the university;[68]

(c) *the teaching methodologies should be clearly identified for each purpose*: as already stated, CLE is the preferred teaching methodology. It must be borne in mind that CLE consists of theoretical, practical and tutorial components. For relaying theoretical knowledge to students, even as part of CLE, there is no reason why the Socratic and case dialogue methodologies cannot be used. However, as far as the practical component is concerned, these methodologies

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67 Steenhuisen "The goals of clinical legal education" in De Klerk (ed) *Clinical Law in South Africa* 2ed (2006) 266; Du Plessis 2011 *Journal for Juridical Science* 39-40.

68 See 4 7 2 1 in this regard.

cannot be effective. Simulated activities are recommended instead. These will include drafting of various legal documents, moots, mock trials, composing simulated client files, indexing and pagination of simulated court files, analysing and interpreting various forms of simulated evidence, as well as drafting of bills of costs.[69] In extending CLE beyond the classroom, as mentioned earlier, students can also be required to attend a certain number of sessions relating to live-client events, *eg* at a university law clinic, at community outreach events like the NMU Mobile Law Clinic[70] or assisting members of the public at court.[71] Other practically orientated sessions, *eg* that of the NMU Legal Integration Project,[72] as well as the already mentioned externship programmes at particular law firms, are also valuable options in this regard;

(d) *there should be sufficient lecturing time during a week for dissemination of knowledge and skills to students*: it is suggested that there should be at least three contact sessions per module per week. One session should be dedicated to theory, while a second session is dedicated for practical work. During the practical session, the theory that was covered during a particular theoretical session, should be concretised by way of simulations and other practical exercises and assignments. The third session should be a tutorial session, during which both theoretical and practical issues, that are causing challenges to students, can be discussed and resolved as far as possible. The tutorial sessions can also be used for the purposes of general revision, as well as to discuss other topics of relevance relating to the module content. After each theoretical, practical and tutorial session, students should be afforded the opportunity to reflect on what they have learned and where they should improve their knowledge and practical skills. Every session should furthermore dedicate time for visualisation of the course content in light of the values and principles of the Constitution so as to give effect to transformative constitutionalism. The division of contact sessions into theoretical, practical and tutorial sessions are fully aligned with the teaching methodologies use in CLE programmes; and

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69 This list does not constitute a *numerus clausus*.

70 See 4 7 2 3.

71 See 4 7 2 5.

72 See 4 7 2 4.

(e) *assessment methods should be clearly identified*: assessments can consist of the compilation of portfolios of evidence, which can in turn consist of a simulated client file[73] and a variety of written assignments[74] and other practical exercises. Such assignments and exercises can be useful to test practical skills, especially related to drafting. The simulated case files should mimic real-life case files that are found at a university law clinic or in a law firm so as to provide a complete and authentic CLE-driven experience to the students. Tests and examinations can also be employed in order to assess theoretical knowledge.[75] Verbal skills can be tested by way of moots, mock trials and general practically orientated conversations between law teachers and students. What is however recommended as far as the assessment of procedural law modules is concerned, is a continuous assessment approachfor all the modules by way of portfolios of evidence, as explained.[76] Students should work together in small groups of approximately three members, which fulfils the CLE goal of working in group format. The reason for this suggestion is that it will mimic the position that law graduates will find themselves in when working at a university law clinic and when entering legal practice: there will be collaboration with other staff members in law practices, as well as the availability of law libraries where information and legislation can be obtained. In this way, students can learn to research the law and to construct meaningful legal opinions for and arguments in favour of their simulated clients, in the same way as legal practitioners will when working on matters in legal practice. Furthermore, legal practitioners often work under pressure and therefore strict time limits may be placed on when assignments and portfolios must be completed by students. However, it is submitted that continuous assessments should benefit students more than memorising information solely for the purpose of writing an examination.[77] Procedural law modules are inherently practical and the assessment methods should relate to

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73 See 3 4 9 2.

74 See 3 4 9 1.

75 See 3 4 9 1 and 3 4 9 5.

76 See 3 4 9 2.

77 See 3 4 9 in this regard.

the orientation of such modules; hence it is submitted that a practical assessment approach is undoubtedly the best option in this regard.

6 2 3 SUGGESTIONS ON HOW TO FACILITATE THE WAY FORWARD

The importance of practical training is therefore indicative that it must be integrated into the curriculum as far as the teaching and learning of procedural law modules are concerned. There may be various recommendations as to how an integrated teaching and learning approach to procedural law modules, involving CLE, can be promoted. In the context of this research, the following recommendations are made:

(a) *workshops should be held for law teachers of procedural law modules, as well as for clinicians*: law teachers should be instructed on how integrated teaching and learning can benefit the training of law students, while clinicians should be made aware of the important role that they can play in the teaching of procedural law modules. Both law teachers and clinicians should be addressed on the importance of transformative constitutionalism and how the rights in and values of the Constitution should feature prominently in every lesson presented, as well as in every case that is handled at a university law clinic. Legal practitioners, judges and legal academics, who are accomplished promoters of transformative constitutionalism, should be involved in the presentation of these workshops. Their contribution will be paramount in bridging the gap between academia and legal practice. They are in a position to shed light on problematic areas in practice where there is a shortfall in the recognition of transformative constitutionalism and can therefore share their expertise with other workshop attendees in as far as possible solutions to such problems are concerned. These workshops will be important for law teachers, clinicians, legal practitioners, presiding officers and legal academics to re-evaluate their assumptions about the role and methods of law schools and law clinics, and consequently to explore, construct and implement new ways of delivering legal education that is student

centered.[78] It is submitted that an entity like the AULAI Trust is in a good position to finance such workshops. The trust has played an important role during 1999 until 2006 in the development of clinical law programmes by way of significant external funding.[79] Since 2006, the trust is using such funding to finance workshops and conferences to the benefit of all clinicians[80] The importance of these workshops vests in the fact that many law clinics appoint admitted legal practitioners from legal practice to train students.[81] Although such legal practitioners are in a position to make a valuable contribution to the legal education of students, they still need to be trained as far as the CLE teaching methodology is concerned.[82] They may also be in need of ongoing pedagogical support as far as the training and supervision of students are concerned.[83] SAULCA has succeeded in hosting quite a number of skills based workshops for member law clinics with financial support by the AULAI Trust.[84] Based on these workshops, a CLE manual has been produced that could be of assistance to clinicians on aspects of CLE, as well as the administration and management of law clinics in South Africa.[85] It speaks for itself that workshops of this kind should continue in order to maintain the momentum in training law teachers and clinicians adequately, especially taking into account that new law teachers and clinicians are often appointed[86] and that changes in the law and legal procedure frequently occur. Furthermore, it must be kept in mind that law clinics have advanced through many developments and have been self-sustaining for the past 40 years.[87] Law clinics have succeeded – and still do – in using CLE to train law students for legal practice.[88] This places law schools in a powerful and

78 Stuckey, Barry, Dinerstein, Dubin, Engler, Elson, Hammer, Hertz, Joy, Kaas, Merton, Munro, Ogilvy, Scarnecchia and Schwartz *Best practices for legal education: a vision and a road map* (2007) 3.

79 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* (2018) 7.

80 *Ibid*.

81 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 22.

82 *Ibid*.

83 *Ibid*.

84 *Ibid*.

85 *Ibid*.

86 *Ibid*.

87 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 24.

88 *Ibid*.

tactical position to lobby for CLE to be used throughout the curriculum due to its immense benefits, as already discussed. If so, the discussion reverts to the initial statement in this section, *ie*, that law teachers and clinicians need to be sufficiently trained in presenting procedural law modules by way of CLE. The workshops will lay a firm pedagogical foundation for what will be required by law teachers and clinicians in presenting not only procedural law modules, but also clinical law programmes, with the ultimate goal in preparing better graduates for entry into legal practice. Law schools should also play an active role in hosting and financing such workshops in support of training of law teachers and clinicians, especially in light of research that has shown that law schools are currently not providing enough support towards CLE;[89]

(b) *workshops should be arranged for students relating to the role of digital technology in the legal profession, in light of the Fourth Industrial Revolution*: students can be trained as far as practice related systems, like the Caselines system,[90] are concerned, and must be made aware of the value that such technology holds for the progress of the legal profession into the digital era. It was already suggested elsewhere that a digital component should be incorporated into the CLE programme in order to achieve this.[91] Students should also be taught how to keep electronic data banks of important process, pleadings, other legal documents, as well as legal precedents that are applicable to the everyday life of legal practitioners. This will put them in a position to easily access templates and examples when serving the needs of clients both in practice, as well as when working at law clinics or at law firms, as part of externship programmes, that utilise digital technology to facilitate workflow, cases as well as the needs of clients. Students should also be taught how to sharpen their research skills by using digital technology in order to reach thorough and circumspective search results applicable to the legal problems at hand. This could be escpecially significant in a clinical environment where vulnerable and marginalised clients often need proper and speedy advice at the

89 Bodenstein (ed) *Law Clinics and the clinical law movement in South Africa* 21.

90 See 4 7 4 2.

91 *Ibid*.

earliest possible moment in time. As already indicated elsewhere,[92] clinical students can use such research, as well as technology, to draft letters and documents on behalf of clients, to conduct negotiations and settlements online with opponents and, in doing so, advance the rights of their clients in a professional manner. The experience and graduate attributes that students accumulate in this manner is fully underpinned by transformative legal education. It is submitted that, as far as procedural law modules are concerned, CLE can also be utilised to teach the aforementioned skills to students by way of simulations. Online simulated activities can be arranged during which students must fulfil the roles of legal practitioners in researching information and attending to the cases of their clients. Mimicking what is happening in real-life at the Cumbria VLC,[93] "clients" in simulated activities can upload makeshift documents and other pieces of "evidence", which students need to analyse for substantiating their "clients'" cases.[94] These simulations could be excellent practical exercises during workshops, as well as during *de facto* training as part of procedural law modules. Students should also be taught how to effectively network and collaborate with colleagues in order to collate such data banks and how to share their information with colleagues. This will instil the notion of healthy and collegial business and professional relationships in them, emphasising participatory parity;[95]

(c) *team spirit should be developed among students*:[96] in the CLE programme at the University of Ibadan, Nigeria, it has been found that students regard team spirit as very important.[97] Team spirit is a highly valued skill in any organisation[98] and, in this regard, the legal profession is no exception. The concept of participatory parity should once again be kept in mind in this regard;[99]

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92 *Ibid*.

93 See 4 7 4 2.

94 *Ibid*.

95 See 2 1 in this regard.

96 Adewumi and Bamgbose "Attitude of students to Clinical Legal Education: A case study of Faculty of Law, University of Ibadan" 2016 3(1) *Asian Journal of Legal Education* 106 114.

97 *Ibid.*

98 *Ibid.*

99 See 2 3 in this regard.

(d) *law teachers and clinicians should stay abreast of constitutional decisions and new developments as far as transformative constitutionalism, social justice, the needs of the public and the impact thereof on procedural law is concerned*: this may function as a safeguard against the omission of human and social elements in teaching the various components of procedural law modules. When working at law clinics as part of a CLE programme, especially live-client clinics, it will ensure that clinicians and students stay updated on the latest legal substantive and procedural law developments so as to ensure that clients are assisted in the quickest and most efficient manner as far as their cases and personal circumstances are concerned. When working with simulations, including simulations as teaching and learning method of procedural law modules by way of CLE, there are equally good opportunities to stay abreast of legal developments, as students can be given research assignments as to the latest developments in procedural law, as well as in social justice and constitutional litigation. In this regard, it is suggested that students be provided with a set of facts that involves issues of social justice and constitutional rights. Students will have to analyse a set of facts, identify the legal issues and conduct adequate and required research in order to address the relevant issues identified by utilising appropriate legal principles and procedure;

(e) *students should be prominently introduced to and encouraged to engage with the notions of social justice and public service*:[100] this may help to foster the development of a more socially responsible legal profession.[101] It is submitted that it will also foster an awareness of procedural justice among students. Students, working at live-client clinics, will become appreciative of rendering *pro bono* services to indigent members of society. In this way, they will be able to see the importance of providing access to justice to people who ordinarily cannot afford legal services. They may take this notion with them into legal practice and continue to, from time to time, to render occasional *pro bono* services.[102] Some clinical law students have indicated that, after rendering services at a law clinic,

100 Adewumi *et al* 2016 *Asian Journal of Legal Education* 114.

101 *Ibid.*

102 *Ibid*.

they cannot forsee a future in law without rendering *pro bono* services from time to time.[103] When CLE programmes, including CLE programmes used to teach procedural law moduels, are conducted by way of simulations, the same result could be achieved by ensuring that students are duly informed the importance of providing access to justice and *pro bono* services to people who cannot afford legal representation. In this instance, it is submitted that students should be provided with sets of facts about matters like evictions or child maintenance where legal assistance is usually required on an urgent basis. Students should then reflect on how they would feel if they were in the position of the client and could not afford legal representation. This may move students to appreciate the position of the "client" and develop a favourable attitude towards *pro bono* legal services and social justice when entering legal practice. It is therefore submitted that an awareness of social justice by way of *pro bono* services will promote procedural justice in that legal procedure is uitilised to give effect to all substantive legal rules, which rules are consulted when looking for ways in which people's rights can be advanced and protected; and

(f) *law teachers and clinicians should also stay abreast of the latest developments in legal practice in order to ensure ethical and professional behaviour at all times*: such developments must be relayed to students during legal education and practical training. This will promote the spirit and purport of the LPA, underpinned by the values of the Constitution, as discussed elsewhere.[104] It will further ensure that students are taught about the latest principles and trends applicable to legal practice, which may in turn lead to narrowing the gap between what higher education delivers and what prospective employers expect as far as graduate attributes are concerned. It will also ensure that the requirements for awarding the LLB degree, as stipulated in the SAQA Qualification Standard for the LLB degree, are properly complied with.[105]

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103 *Ibid*.

104 See Chapter 5 in this regard.

105 See 5 3 3 in this regard.

It should be kept in mind that not all graduates who have completed a well-rounded clinical law experience, will be able to make a competent start when entering legal practice.[106] There may be various reasons for this. Students may, for example, not take the training to heart as being an important factor towards their future in legal practice. It is furthermore unlikely that all clinical law modules require students to critically evaluate the professional demands that legal practice may pose to them.[107] Time and opportunities to reflect on the philosophical and ethical context of legal practice should not be readily forsaken at university level.[108] Students should be encouraged to immerse themselves in legal training in order to promote their own self-development with an eye towards their futures in legal practice. Universities, and more specifically law schools, have a big task in this regard. It is of crucial importance that universities keep in mind that students are their best ambassadors.[109] Therefore, students should be reflective of the qualities and attributes that higher education aims to instil in graduates before entering the working world. Law schools, an integral and important part of the legal profession, should therefore utilise all the resources at their disposal, including CLE and various stakeholders from the legal profession, in order to ensure that graduates obtain such qualities and attributes to the largest extent possible. The following statement by Silverthorn provides an appropriate remark in this regard:

> "The legal profession has long shaped…politics and justice. We are the protectors, enforcers, deliberators, and arbiters of justice. Our law students will next lead this profession… Yes, they need to think like a lawyer. At the same time, they also need to keep integrity, ethics, justice, and service at the core of what they do. In so doing, they can answer the life-long challenge to truly live like a lawyer."[110]

CLE is often compared to the training provided to medical students.[111] All medical students must undergo mandatory clinical training and engage with patients before

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106 Uphoff *et al* 1997 65 *University of Cincinnati Law Review* 402.

107 *Ibid.*

108 Uphoff *et al* 1997 65 *University of Cincinnati Law Review* 408.

109 Bleasedale, Rizzotto, Stalker, Yeatman, McFaul, Ryan, Johnson and Thomas "Law clinics: what, why and how?" in Thomas and Johnson (eds) *The Clinical Legal Education Handbook* (2020) 17.

110 Silverthorn "Carnegie Report 10 Years later: live like a lawyer" (26 August 2016) https://www.2civility.org/carnegie-report-live-like-a-lawyer/ (accessed 2019-01-23).

111 Van der Merwe "A case study in advocating for expanded clinical legal education: the university of Stellenbosch module" 2017 28(3) *Stellenbosch Law Review* 679 687.

they are allowed to graduate from medical school.[112] It does not appear to be desirable to put someone's life in the hands of a graduate from medical school who has not completed the required practical medical training; yet, law schools allow this as far as law students are concerned: the public must trust law graduates, who in many cases have not received any practical training, with their legal problems.[113] Law students must therefore not only be taught to "think like lawyers", but also to act and live like lawyers.[114]

In conclusion, Hutchins states that, as far as changes and reforms are concerned, every generation needs a restatement of the law in its principal departments.[115] The learned author believes that it is within the legitimate functions of the law teacher to contribute towards a large part of the scholarly work by which, *inter alia*, such restatement can be accomplished.[116] It is also hoped that such contributions will be useful to legal practitioners as well as to the science of jurisprudence.[117] Based on these statements by Hutchins, it is therefore submitted that the arguments, advanced in this research, will hopefully have an impact on the future of teaching and learning of the procedural law modules, ideally by way of CLE and fully underscored by the values and principles enshrined in the Constitution. South African law schools are engaging with a new generation of law students and their training for legal practice needs to be adapted according to their needs, as well as in light of the spirit and purport of the LPA. Students have indicated that CLE causes learning of the law to be a fun experience, because it allows for interaction in class, as well as eradicating boredom during lessons.[118] The teaching and learning of somewhat cold, boring and abstract law modules, *eg* procedural law modules, by way of CLE should therefore stimulate

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112 *Ibid.*

113 Van der Merwe 2017 *Stellenbosch Law Review* 687; Redding "The counterintuitive costs and benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 58.

114 Van der Merwe 2017 *Stellenbosch Law Review* 687; Redding 2016 *Wisconsin Law Review Forward* 58. In this context, Van der Merwe uses the expression "to think like doctors", while Redding uses "thinking like a student." The meaning of their expressions is however clear: students need to be taught to think and act like legal practitioners in a practical context.

115 Hutchins "The Law Teacher – his functions and responsibilities" 1908 8 *Columbia Law Review* 362 370.

116 *Ibid.*

117 *Ibid.*

118 Adewumi *et al* 2016 Asian Journal of Legal Education 114.

the interest of students in learning more about the law of procedure and principles of evidence, aspects which are crucially important for legal practice.[119] It is submitted that this will play an important role in transforming classrooms into law laboratories in a similar way to how law clinics are sometimes depicted.[120] CLE thus transforms teaching and learning of the law into an educational and relevant experience for students, promoting equal justice and the rule of law.[121] Because of the growth of CLE over the last two decades in South Africa, as well as the part it is playing in the broad based transformation away from the conditions of the apartheid regime,[122] it is submitted that all law schools should investigate the immense pedagogical advantages that the integration of CLE with the teaching and learning of procedural law modules can have for the development of law graduates into competent legal professionals.

In the words of Fourie:[123]

> "As law lecturers in South Africa we want to prepare students for an active citizenship role in society and have them display the constitutional values of human dignity, equality, freedom and *ubuntu* when they interact with their fellow students, lecturers, other citizens, and one day with their clients when they enter the profession."

119 See Adewumi *et al* 2016 Asian Journal of Legal Education 114 in this regard.

120 See 4 7 3.

121 Maisel "Expanding and sustaining clinical legal education in developing countries: what we can learn from South Africa" 2007 30 *Fordham International Law Journal* 374.

122 *Ibid.*

123 Fourie "Constitutional values, therapeutic jurisprudence and legal education in South Africa: shaping our legal order" 2016 19 *Potchefstroom Electronic Law Journal* 1 20.

Appendix 1: Extract from the Qualification of Legal Practitioners Act 78 of 1997

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of section 3 of Act 74 of 1964, as amended by section 1 of Act 73 of 1965, section 16 of Act 29 of 1974, section 1 of Act 39 of 1977, section 1 of Act 60 of 1984, section 1 of Act 17 of 1987, section 2 of Act 106 of 1991, section 2 of Act 55 of 1994 and section 1 of Act 33 of 1995.

1. Section 3 of the Admission of Advocates Act, 1964 (Act No. 74 of 1964), is hereby amended by the substitution for item *(aa)* of subparagraph (i) of paragraph *(a)* of subsection (2) of the following item:

> "*(aa)* has satisfied all the requirements for the degree of *baccalaureus legum* of any university in the Republic after completing a period of study of not less than [five] four years for that degree; or": …,

Amendment of section 2 of Act 53 of 1979, as amended by section 1 of Act 108 of 1984 and section 2 of Act 115 of 1993

2. Section 2 of the Attorneys Act, 1979 (Act No. 53 of 1979) (hereinafter referred to as the principal Act), is hereby amended- …

(a) by the substitution for paragraph *(a)* of subsection (I) of the following paragraph:

> *"(a)* two years after he or she has satisfied all the requirements for the degree of *baccalaureus [procurationis] legum* of any university in the Republic 20 after pursuing for that degree a course of study of not less than four years [which is recognized by the Board for the Recognition of Examinations in Law established by section 16 of the Universities Act, 1955 (Act No. 61 of 1955))."

Appendix 2: Extracts from the Legal Practice Act 28 of 2014

Minimum qualifications and practical vocational training

26(1)…

(c) undergone all the practical vocational training requirements as a candidate legal practitioner prescribed by the Minister, including —

(h) community service as contemplated in section 29, and

(ii) a legal practice management course for candidate legal practitioners who intend to practise as attorneys or as advocates referred to in section 34(2)*(b)*;…

Practical vocational training

27. (1) The Council must in the rules, determine the minimum conditions and procedures for the registration and administration of practical vocational training.

(2) The rules contemplated in subsection (1) must regulate the payment of remuneration, allowances or stipends to all candidate legal practitioners, including the minimum amount payable.

Assessment of practical vocational training

28. (1) The Council must, in the rules, determine a procedure and issue directions pertaining to the assessment of persons undergoing practical vocational training.

(2) The purpose of assessment in terms of subsection (1) is to establish whether, in the opinion of the Council, the person has attained an adequate level of competence as determined in the rules, for admission and enrolment as a legal practitioner.

(3) The assessment referred to in subsection (1) must be carried out by the Council or an appropriate institution or organisation engaged by the Council to conduct the assessment on its behalf.

(4) The Council must, in the rules, determine the criteria for a person, institution, organisation or association to qualify to conduct an assessment in terms of this section.

Appendix 3: Concept questions to students

Civil Procedure[124]

General set of facts[125]

Your client, James Selepe, bought a second-hand BMW convertible for R540 000-00 on 14 December 2009. After he had collected the car from the seller, Stewart Brown, he went to register it and found that the car was a 2006-model BMW. The seller had advertised the car as a 2007-model. Your client was attracted by the advertisement in a local daily newspaper on 10 December 2009 because he did not want a car that was more than two years old, and he felt that R540 000-00 was a good price for that particular model. Moreover, your client informs you that if he had known that the car was more than two years old, he would not have bought it. He wants to return the car for the return of the R540 000-00.

Stewart Brown is an elderly gentleman whose son emigrated a few months before the sale. The son had given the car to his father but the old man, who had decided to sell the car, had not transferred the registration into his own name.

After your client had read the advertisement, he contacted Brown. He asked whether the car was a 2007-model, and Brown replied that it was. Selepe then made arrangements to inspect the car, which he did that afternoon. Without further ado, Selepe agreed to buy the car. He handed Brown a bank guaranteed cheque in the amount of R540 000-00, and Brown handed him a sealed envelope which the son had left. It contained the car's registration papers.

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124 This exercise and these questions have been drafted by the law teacher for Civil Procedure at NMU.

125 The set of facts is taken from Searle *Pre-litigation drafting* 1ed (2011) 11-12.

When Selepe went to register the car, he was standing in the queue at the Licensing Office when he opened the envelope for the first time. He noticed that the car had been registered as a 2006-model. The registration was confirmed as being correct by one of the licensing officials on duty.

Selepe went back to his office where he phoned Brown immediately. Brown's explanation was that his son had informed him that the car was a 2007-model BMW. Selepe repeated that he specifically wanted a 2007-model and Brown retorted that he had sold the car at a very good price. Selepe had nothing to complain about. Selepe said that he was not prepared to accept the car as it was more than two years old. Brown argued that it as in mint condition. Selepe stood his ground. He demanded the return of his money against the return of the car. Brown refused. Selepe threatened with legal action; Brown slammed down the phone shouting, "It's your problem, you should have looked inside the envelope before you left. You can do what you damn well like. It's a done deal and I will *not* refund the money!"

(from *Pre-litigation Drafting: Opinions & Letters of Demand* by Glenda Searle)

The following questions are all based on the General Set of Facts provided. Where necessary and applicable, additional and/or alternative facts will be provided.

1. In what court will this matter be heard? Explain your answer.
2. In order for Mr Selepe to institute a legal action against Mr Brown, he should establish that there is a cause of action on which he can base his case. What is meant by "cause of action"?
3. Read carefully through the set of facts and identify the cause of action.
4. What are the *facta probanda* of this cause of action?
5. Mention an example of *facta probantia* that can be used in order to prove any of the *facta probanda* identified in (4) above.
6. Suppose that Mr Selepe's cheque was not bank guaranteed. After a few days, the bank notifies Mr Brown that there are not enough funds in Mr Selepe's bank

account in order to honour payment of the cheque. The cheque has consequently been sent back to Mr Selepe. Explain the various causes of action at Mr Brown's disposal, as well as what must be proven in order to succeed with it.

7. Do the respective parties have *locus standi* to be involved in this matter? Explain your answer.
8. It transpires that Mr Selepe is married in community of property. Does this have any impact on his *locus standi* in this matter? Explain fully.
9. Suppose that Mr Brown is a declared prodigal. Will it have any impact on his *locus standi* in this matter? Explain.
10. Suppose that Mr Selepe is suffering from a mental illness. Does he have the required *locus standi* to institute proceedings against Mr Brown? If not, what can be done to provide him with the applicable *locus standi*? Explain fully.
11. Mr Selepe is currently working overseas, but wants his brother, Thabo Selepe, to represent him in the civil action against Mr Brown.
    (a) Will Thabo have *locus standi* to represent Mr Selepe? Explain.
    (b) What can be done do give *locus standi* to Thabo? Explain.
    (c) Draft the applicable document in which *locus standi* is given to Thabo.
12. What are the two most important questions that must be answered when "jurisdiction" is concerned?
13. Must Mr Selepe institute his case in the Magistrates' Court or in the High Court? Explain.
14. What procedural step can Mr Brown take if it transpires that Mr Selepe has instituted his case in the wrong court?
15. For the next few questions, let us amend the set of facts slightly:
    - Mr Selepe lives in the magisterial district of Uitenhage;
    - Mr Brown lives and works in the magisterial district of Port Elizabeth;
    - The cost of the motor vehicle had been R410 000-00;
    - The newspaper, in which the advertisement appeared, circulated in Uitenhage. That is where Mr Selepe decided to buy the motor vehicle; and

- Mr Selepe telephonically contacted Mr Brown in order to inform him that he will buy the motor vehicle. At that time, Mr Brown was attending a meeting in Cape Town.

15.1 What court, generally speaking, will have jurisdiction in this matter? Explain your answer

15.2 Mr Selepe wants to keep legal costs in this matter at the minimum. Is there any way in which this matter can be heard by the Magistrates' Court? Explain.

15.3 If your answer, in 15.2, is in the affirmative, which Magistrates' Court, specifically speaking, will have jurisdiction to hear this matter? Explain.

15.4 You are the attorney for Mr Selepe. You cannot ascertain exactly where Mr Brown is residing. Is there any other way in which you can determine jurisdiction in this matter, based on Mr Brown's whereabouts? Explain.

15.5 You, as Mr Selepe's attorney, wants to base the jurisdiction of the course upon the cause of action. Is this advisable in the current situation? Explain.

16. What is the general rule, as far as High Court-jurisdiction, is concerned?

17. What are the most important foundations for High Court-jurisdiction that can be found in the common law?

18. Mr Selepe, your client, instructs you that he has found out that Mr Brown does not have sufficient money to pay back the R540 000-00, should the court grant judgment in Mr Selepe's favour; nor does he have sufficient property that can be sold in execution to satisfy a Warrant of Execution in Mr Selepe's favour. Will this have any impact on the jurisdiction of the court? Explain.

19. For the next few questions, suppose that both Messrs Selepe and Brown are residing within the High Court-division of Port Elizabeth:

19.1 Will the High Court in Port Elizabeth have jurisdiction to hear Mr Selepe's matter? Explain with regards to the applicable ground(s) of jurisdiction.

19.2 Will your answer, in 19.1, be different if Mr Brown had been residing in Cape Town? Explain.

20. Explain the concepts of *incola* and *peregrinus* and provide examples to illustrate your answers.

21. You advise your client that it is preferable to furnish Mr Brown with a letter of demand prior to the institution of any legal action. Why is this preferable?
22. Draft the applicable letter of demand to Mr Brown, paying close attention to what is required, by the theoretical rules of a demand, to be included therein.
23. As far as calculation of dies is concerned, distinguish between calculations within a certain time period and calculations after a certain time period. Provide examples of each instance.
24. Your client's letter of demand to Brown ends as follows:
    "If the said amount is not paid within 14 days of date of this letter, legal action will be taken against you. You will also be held liable for all legal costs in this matter."
    The letter of demand is dated 5 February 2018, which date falls on a Monday. By which date may you institute legal action against Mr Brown? Indicate clearly how you calculated the *dies* in order to arrive at this date. For purposes of this exercise, answer this question with reference to both court days and calendar days. Also assume that Wednesday 14 February is a public holiday.
25. How is the particular Sheriff, who must serve process on Mr Brown, determined?
26. Suppose that Mr Brown is arrested on a charge of robbery and is imprisoned in St Albans Prison, awaiting his trial. Mr Selepe consults with you about whether or not it will be possible to have the Summons herein served on Mr Brown. Advise him in this regard.
27. Mr Brown is enjoying a braai at his house with friends on a Saturday night. At about 21:45, the Sheriff arrives at his house and serves the applicable Summons on him. Mr Brown seeks legal advice about whether service had been done in the legally correct way, as well as what his rights in law are. Advise him in this regard.
28. Distinguish between "substituted service" and an edictal citation."
29. Draft an affidavit for an Applicant, seeking to serve a Summons on a Respondent by way of substituted service, in order to illustrate your understanding of the content of such an affidavit.
30. What are the main distinguishing characteristics of "action"- and "application"-proceedings?

31. Certain legal proceedings may only be brought by way of either action- or application proceedings. Provide an example in each case.
32. Distinguish between “on notice”- and “ex parte”-applications.
33. List the various stages in motion proceedings.
34. Draft an affidavit, based on the account of events from your client.
35. List the various stages in action proceedings.
36. List the various pleadings that are served and filed during the pleadings stage. Also indicate which of party is responsible for filing a particular pleading.
37. Distinguish between a “Simple Summons” and a “Combined Summons”.
38. In this matter, you decide to make use of a Combined Summons. Draft the applicable Particulars of Claim that must accompany the Summons.
39. Assume that you made use of a Simple Summons and Mr Brown defends this matter. What will the next pleading be? Explain briefly.
40. Assume that this matter is instituted in the High Court and that you, as attorney, does not have right of appearance in the High Court. Who must sign the pleadings in this matter?
41. Will your answer in 40 above differ if you, as attorney, have right of appearance in the High Court? Explain.
42. Will your answer in 40 above differ if this matter had been instituted in the Magistrates’ Court? Explain.
43. How are the following clauses worded in a Plea (in other words, how would you practically draft such clauses):
    - An admission of fact
    - A denial of fact
    - A confession and avoidance of fact
    - A fact of which the Defendant does not carry any knowledge
44. What is a Special Plea?
45. What is a dilatory Special Plea? Mention two examples.
46. What is a Special Plea in abatement? Mention two examples.
47. What is *litis contestatio*?
48. Discuss the future of *litis contestatio* in the South African law with reference to case law.

49. After Mr Brown has delivered his Notice of Intention to Defend, Mr Selepe wants to apply for Summary Judgment against him.
    (a) What is “Judgment Judgment”?
    (b) Would Mr Selepe be entitled to apply for Summary Judgment in this case? Explain.
    (c) Briefly explain the procedure that must be followed in order for Mr Selepe to obtain Summary Judgment against Mr Brown.
50. Provide a definition of the term “discovery”.
51. Suppose that Mr Selepe wants to use an extract from the applicable newspaper, in which the advertisement of the motor vehicle appeared, during the upcoming trial. Mr Brown wants to inspect such extract before commencement of the trial. May he do so? Explain.
52. The trial commences. Provide a layout of the trial proceedings and briefly explain each stage briefly.
53. Explain the term “absolution from the instance”.
54. When, during the trial proceedings, can Mr Brown apply for absolution from the instance? If successful, what will the implications be for Mr Selepe’s claim?
55. The court grants judgment in Mr Brown’s favour. Mr Selepe is satisfied with this, as he believes that the presiding officer has not interpreted the evidence appropriately and for that reason came to the wrong conclusion.
    (a) What will be the appropriate relief that Mr Selepe should seek for in this instance?
    (b) Explain the usual route that this procedure will follow.
56. The court grants judgment in Mr Selepe’s favour, but Mr Brown is dissatisfied with that. In his opinion, the presiding officer was clearly biased in his approach to the case and favoured Mr Selepe’s side of the story.
    (a) What will be the appropriate relief that Mr Brown should seek for tin this instance?
    (b) How does this relief differ from your answer in (55) above?
    (c) Explain the usual route that this procedure will follow.
57. The court grants judgment in Mr Selepe’s favour. Mr Brown however does not want to comply with the order of the court and pay the applicable judgment

amount to Mr Selepe. Mr Selepe consults with you with regards to possible ways of obtaining payment from Mr Brown. Advise him about the possible methods of obtaining payment from Mr Brown. Explain what each method entails, as well as the procedure that must be followed in each.

58. What is the difference between an “emoluments attachment order” and a “garnishee order”?
59. When can someone apply for an administration order in terms of the Magistrates’ Court Act? Briefly explain what the administration procedure entails.
60. Explain a Rule 43-application for interim relief.

Appendix 4: Concept questions to students

Law of Evidence[126]

QUESTIONS FOR STUDENTS (PART 1)

1. What is “evidence”?
2. What is the difference between “evidence” and “probative material”?
3. Complete the following sentence:
   The rules of evidence governs…… and……
4. Provide an explanation of the “residuary sections” of the Law of Evidence.
5. Does the Constitution of the Republic of South Africa have any impact on the residuary sections? Explain.
6. What is a “reverse onus clause”?
7. Write a note on any case in which a reverse onus clause had been found to be unconstitutional.
8. Complete the following sentence:
   Evidence will be admitted if it is……
9. When will evidence be “relevant”?
10. Will all relevant evidence be admissible? Explain your answer.
11. Which factors must a court take into account to determine the admissibility of evidence?
12. What must a court do in order to determine the weight of evidence?
13. Distinguish between “direct” and “circumstantial” evidence and provide examples to illustrate your answer.
14. What are the “two cardinal rules of logic” as far as circumstantial evidence is concerned?
15. Distinguish between the “burden of proof”, “standard of proof” and “evidentiary burden”.

[126] These questions have been drafted by the law teacher for the Law of Evidence at NMU.

16. Distinguish between “prima facie proof”, “sufficient proof” and “conclusive proof”.

QUESTIONS FOR STUDENTS (PART 2)

17. What is “oral”- or “viva voce”-evidence?
18. When is evidence given “under oath”?
19. When is evidence given “by affirmation”?
20. When is a witness “admonished” to speak the truth?
21. Explain the intermediary-process in South African law.
22. What arguments can be advanced, in favour of the accused, against the current intermediary-process?
23. What arguments, in favour of the best interest of children, can be advanced against the current intermediary-process?
24. With reference to your answer in item 23 above, what did the Constitutional Court find with regards to the current intermediary-process?
25. Explain the meaning of “precognition” in the context of the Law of Evidence.
26. Write a short essay on the evaluation of children’s evidence. Your answer should include reference to the cautionary rule, if applicable, as well as make reference to the Criminal Procedure Act 51 of 1977, as well as to the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
27. State whether the following witnesses are competent and compellable to testify in a court. You must substantiate your answers:
    (a) intoxicated persons in civil matters;
    (b) mentally handicapped persons in criminal matters;
    (c) the wife of an accused as witness for the co-accused;
    (d) the co-accused as witness for the accused;
    (e) a person who cannot speak;
    (f) a judge in a civil matter (not presiding in the particular matter); and
    (g) a member of Parliament, who is an accused.
28. Distinguish between “compellability” of a witness and “marital privilege”.

29. What is the legal position regarding information adduced to the court during an opening statement to a trial? Will it be regarded as evidence against a specific party to the matter?
30. What impact may leading questions, during examination-in-chief, have on the weight of evidence? Provide a reason/reasons for your answer.
31. Explain the importance of cross-examination as far as evidence is concerned.
32. What is the advantage of conducting a closing argument to a trial by way of heads of argument?

QUESTIONS FOR STUDENTS (PART 3) – FOCUS ON "ADMISSIONS"

33. Study the document, to be found on the Moodle-site, entitled "Admissions in terms of section 220 of Act 51 of 1977" and answer the following questions:
    a. What do we call the statements contained in this document?
    b. Are these statements made in or out of court?
    c. Are these statements conclusive proof of its content? Substantiate your answer by referring to case law.
34. Study the document, to be found on the Moodle-site, entitled "Statement in terms of section 115 of the Criminal Procedure Act 51 of 1977" and answer the following questions:
    a. It can be said that this statement contains informal admissions. Provide a definition of "informal admissions."
    b. Are informal admissions made in or out of court?
    c. From the document, identify 2 instances of "exculpatory" statements.
    d. What probative weight will the court attach to such exculpatory statements? Explain your answer.
    e. From the document, identify an instance of an "incriminatory" statement. Will the probative weight, which the court will attach to this kind of statement, differ from that in (d) above? Explain.
    f. Are the statements, contained in paragraphs 2.1, 2.2 and 2.3 of the document, "formal" or "informal" admissions? Explain your answer.
    g. Write a note on the requirements for admissibility of informal admissions.

QUESTIONS FOR STUDENTS (PART 4)

35. Define the concept of “analogue” evidence.
36. Name a few examples of analogue evidence.
37. Can analogue evidence easily be admitted into trial proceedings? Explain and refer to case law. Your answer should be indicative of the conventional stance of the courts, as well as the modern trend.
38. Define the concept of “electronic” or “digital” evidence.
39. Name a few examples of electronic evidence.
40. What legislation is primarily applicable to the regulation of electronic evidence in South Africa?
41. What are the admissibility requirements for electronic evidence?
42. How is the evidentiary weight of evidence determined?
43. How does electronic evidence differ from analogue evidence as far as the requirement of “originality” is concerned?
44. Define the concept of “judicial notice.”
45. Mary is involved in a motor vehicle accident in Marine Drive, Summerstrand, Port Elizabeth and sues the driver of the other vehicle for damages to her own vehicle. During the trial, the court hears viva voce-evidence about the area where the accident occurred. The presiding officer has lived in Port Elizabeth for her whole life and therefore knows the Port Elizabeth and surrounding areas very well. May the court take judicial notice of the area where the accident took place? Substantiate your answer.
46. What are “presumptions?”
47. What does presumptions and judicial notice have in common?
48. What are the various categories of presumptions present in South African law? Provide a definition, as well as examples, of each of these categories of presumptions.
49. Ntokozo goes to town in order to buy some groceries. He parks his motor vehicle at the top of a hill on an incline, a few meters from the grocery store, because that is the only parking spot he could get. He completes his shopping, but when he exits the shop, he cannot find his vehicle. He however sees a few bystanders,

pointing to something at the bottom of the hill. To his horror, he discovers that the bystanders are pointing to his vehicle, now at the bottom of the hill, where it has crash into another parked motor vehicle. The owner of the damaged vehicle sues Ntokozo for damages to her vehicle. Is there a presumption that may work in her favour during the trial? Briefly explain by referring to the facts provided.

QUESTIONS FOR STUDENTS (PART 5)

50. Define the concept of an admission.
51. Provide an example of a formal admission and ensure that your example clearly illustrate the definition of the concept.
52. Provide an example of an informal admission and ensure that your example clearly illustrate the definition of the concept.
53. Provide an example of a pointing-out and ensure that your example clearly illustrate the definition of the concept.
54. X is chased through town by the police, as he is suspected of robbery. He escapes the police and hides in an alley between two buildings. It is however not long before the police catches up with him. They arrest X and ask him if he has any knowledge of the robbery. X appears very nervous and keeps on looking in the direction of a nearby rubbish bin. One of the police officers approaches the rubbish bin and finds a handbag in the bin. It is later confirmed that the handbag belongs to the victim that had been robbed, allegedly by X. During X's trial, the prosecution wants to use X's glancing in the direction of the rubbish bin, as a positive pointing-out. Will such a pointing-out be admissible? Explain fully.
55. Assume the same facts as in 54. However, when the police arrests X and ask him about his knowledge of the robbery, he states that he was on the scene when Z robbed a lady, but that he had run away with Z, because he (X) was afraid he would also be implicated in the crime. He then points to the rubbish bin and states that Z had hidden the handbag in the rubbish bin with the intention of later retrieving it. Z then ran away. During X's trial, the prosecution wants to use X's statements AND pointing in the direction of the rubbish bin, as a positive pointing-out. Will such probative material be admissible as a pointing-out? Explain fully.

QUESTIONS FOR STUDENTS (PART 6)

56. Z is arrested on a charge of murder. During his examination-in-chief at the trial, he testifies that there is a huge mistake regarding his identity, as he was definitely not close to the scene of the crime at the time that it happened. Instead, he alleges, he has been at a shopping mall quite a distance from the crime scene. He further testifies that he has even told his best friend, C, about him being at the shopping mall and that he (Z) is therefore telling the truth to the court. The prosecution objects to Z's statement, that he has told his story to C, as being admissible in this instance. Is there any merit in the prosecution's objection? Explain.
57. D is assaulted by G. During the trial, D testifies about the injuries that she has sustained during the assault, which injuries are denied by G. In addition to her testimony, G also shows the scars from the alleged injuries, as well as photographs of the fresh injuries, to the court. G objects to this evidence on the basis that there is no independent witness testifying on D's behalf as far as the injuries are concerned. Is there any merit in G's objection? Explain.
58. A is being sued by B for damages to B's motor vehicle, resulting from a motor vehicle collision in which A and B were involved. One of the issues in the trial is that of fault in that A testifies that he is not liable for the occurrence of the motor vehicle collision, due to the fact that he is a very safe driver. He also testifies that he is an instructor at a driving school and therefore respects safe driving. Should the testimony, about A being an instructor at the driving school, be admissible or not? Explain.
59. Define the concept of *res gestae*. Also provide an example of evidence that may be regarded as *res gestae*, thereby substantiating your definition of the concept.
60. Consider the set of facts in 56 again. It turns out that Z has taken a polygraph test herein, which test he has failed. Furthermore, one or two elements in his testimony were not consistent in relation to some other aspects he testified about. In this regard, C testifies that has no idea what Z is talking about and that Z has never told him anything about being at a mall. During the closing arguments of the trial, the prosecution states that the State has undoubtedly proven their case

against Z, because he is clearly an untruthful witness because he lied to the court about his whereabouts on the night of the crime. Is the prosecution correct in this regard? Explain.

61. X is suspected of being involved in the smuggling of diamonds. The police do not have convincing evidence against him and, for that reason, they decide to use one of their very experienced officers, R, to befriend X in an attempt to find out more about the smuggling. R befriends X and repeatedly attempts to convince him (X) to sell him some "precious stones." X denies every request in this regard, saying that he knows nothing about any precious stones. However, after what can be described as constant nagging of R, X grows tired thereof and shows R a little box filled with diamonds. He tells R that he can buy it from him (X) for an amount of R500 000-00. Thereupon, R reveals his true identity as a police officer and arrests X. During the trial, the prosecution calls R as a witness in order to testify about how he has uncovered X's diamond smuggling business. X's legal representative objects against the admissibility of such evidence. Can he object to that? Explain fully. Also briefly explain the procedure in terms of which the admissibility, or not, of such evidence will be determined.

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