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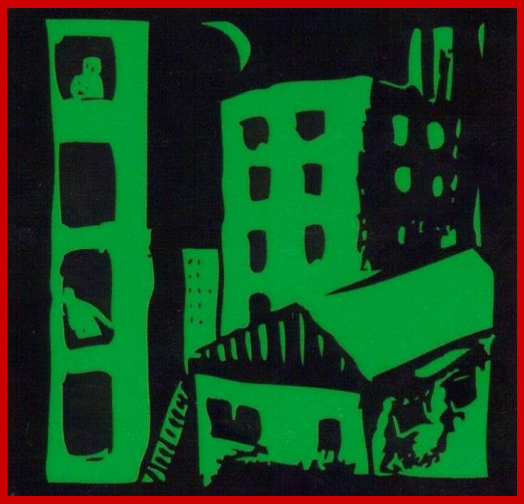

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# Incorporating Afrocentric alternative dispute resolution in South Africa's clinical legal education

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**ABSTRACT**

*Since its inception, South African clinical legal education has remained steeped in the promotion of the Western adversarial model of resolving legal disputes with minimal consideration for*

*Alternative Dispute Resolution (ADR). This dearth in legal development has ignited the argument that South African legal education is faulty, focusing on producing theory orientated graduates devoid of practical critical thinking skills and client empathy. Decolonising the manner in which law students are taught for practice to assuage these concerns through clinical legal education is overdue. This article explores the utility of ADR systems in the legal clinic as an instrument for skills transfer to students in order to prepare a competent and skilled law graduate. It argues that the introduction of ADR undergirded by African epistemic norms and the philosophy of ubuntu has the potential to re-make South African clinical education into an Afrocentric centred phenomenon, which is in harmony with societal boni mores.*

**Keywords:** Alternative Dispute Resolution; decolonisation; ubuntu; therapeutic; Afrocentric.

## 1 INTRODUCTION

The need to provide law students with the knowledge of Alternative Dispute Resolution (ADR) which is largely Afrocentric in nature is gaining prominence in South African legal academia.[1] The term ADR refers to mechanisms, practices and systems that focus on resolving legal disputes outside the traditional formal courts. Therefore, ADR is a broad term, which includes a variety of processes, such as, facilitation, conciliation, evaluation, mediation, and to some extent dialogues.[2] Arguments in favour of orienting law students with the mechanism of ADR are, inter alia, situated within the broader project of Africanising and decolonising South African clinical legal education (CLE).[3]

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[1] The idea of adequately accommodating ADR in legal education was pitched at an LLB Summit convened by the South African Law Deans Association (SALDA) in October 2016. It was agreed that law faculties in South Africa would generate ways of Africanising and Decolonising the entire legal education and culture. Imiera P "Integrating alternative dispute resolution into South African criminal jurisprudence: an urgent need for law reforms" (2019) 38 *Notizie di Politeia* 2 at 4; Boniface A "African-style mediation and Western-style divorce and family mediation: reflections for the South African context" (2012) 15 *Potchefstroom Electronic Law* 378.

[2] See Campbell J "Ideas for Decolonisation of the Law Clinic Curriculum" available at https://www.https://www.saulca.co.za/conferences.co.za (accessed 21 October 2020).

[3] See Campbell J "Ideas for Decolonisation of the Law Clinic Curriculum" available at https://www.saulca.co.za/conferences.co.za (accessed 21 October 2020). See also Himonga C & Diallo F "Decolonisation and teaching law in Africa with special reference to living customary law" (2017) 20 *Potchefstroom Electronic Law Journal* 2 at 3; Zitzke E "A decolonial critique of private law and human rights" (2018) 34 *South African Journal on Human Rights* 492 at 495; Fagbayibo B "Some thoughts on centring Pan-African epistemic in the teaching of public international law in African universities" (2019) 21 *International Community Law Review* 170 at 171; Barkaskas P "Beyond reconciliation: decolonizing clinical legal education" (2017) 26 *Journal of Law and Social Policy* 2 at 3; Tshivhase AE, Mpedi LG & Reddi M (eds) *Decolonisation and Africanisation of legal education in South Africa* Cape Town : Juta & Company (2015) at 9; Iya P "Fighting Africa's poverty and ignorance through clinical legal education: shared experiences with new initiatives for the 21st Century" (2000) 16 *Journal of Clinical Legal Education* 13 at 16-17; Open Justice Initiative "Combining Learning and Legal Aid: Clinical Legal

Decolonisation can be understood as the process of transformation which takes place when a country achieves its colonial independence from erstwhile colonial powers.[4] It is the opposite of the process of colonisation or westernisation which began in the 15th century as a result of the imposition of colonial systems on indigenous people.[5] In the context of South African clinical education, decolonisation objects to the westernisation project which promotes a Western-centric approach to the resolution of disputes.[6] The epitome to this anti-colonial project is the re-orientation and re-humanisation of South African clinical education so that it is reflective of the culture, history and norms of the people that it is meant to serve.[7]

## 2 CONTEXTUAL BACKGROUND

The quest for transforming CLE is inseparable from the Africanisation and decolonisation of legal education debate as one of the core demands inflaming the Fees Must Fall (FMF) movement, which brought learning to a standstill in many South African institutions of higher learning in 2017.[8]

### 2.1 The FMF movement

The FMF movement consisted of students drawn from South African universities who occupied the streets, calling for decolonisation of education and the adoption of a Pan-African episteme as the core of knowledge production. The FMF movement was epitomised by the removal of the statues of colonial figures such as Cecil John Rhodes.

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Education in Africa" *Report on the First All-Africa Colloquium on Clinical Legal Education*, at 6-7, 23-28 June 2003 available at https://www.justiceinitiative.org/uploads/c443e78db0cb470fb1de65ad726002ee/southafrica_20030628.pdf (accessed 13 May 2020).

4 Comaroff J "Colonialism, culture and the law" (2006) 26 *Law and Social Policy* 309.

5 See Tshivhase, Mpedi & Reddi (2015) at 9.

6 Boniface (2012) 378.

7 Seaman R *Explorative mediation: the importance of dialogue for mediation practice* London : Palgrave Macmillan (2016) at 223.

8 Mutekwe E "Unmasking the ramifications of the fees-must-fall-conundrum in higher education institutions in South Africa: a critical perspective" (2017) 35 *Perspectives in Education* 142 at 143; Bergin D "Writing, Righting, and Rioting: Fees Must Fall and Student Protests in Post-Apartheid South Africa" available at https://repository.upenn.edu/cgi/viewcontent.cgi?article=1000&context=uhf_2019 (accessed 14 May 2020) at 1-4 (This paper was part of the 2018-2019 Penn Humanities Forum on Stuff); Phan PN "Legal education in China: in pursuit of a culture of law and a mission of social justice" (2005) 8 *Yale Human Rights and Development Journal* 119 at 123; Polish Legal Clinics Found "The Legal Clinic: The Idea, Organization, Methodology" available at http://www.fupp.org.pl/down/legal_clinic.pdf (accessed 16 May 2020) at 34-55; Qafisheh M "The role of legal clinics in leading legal education: the model from the Middle East" (2012) 22 *Legal Education Review* 176 at 179.

These figures are largely understood as symbols of an oppressive colonial past.[9] A reading of the protestations of the FMF movement and other Afro-centred protests reveals the need to decolonise teaching in institutions of higher education including re-centering African epistemic values such as ubuntu as a stimulus to re-engineer the curriculum of CLE in South Africa.[10] The term ubuntu can be summarised with the Nguni proverb "a person is a person through other persons".[11] Mokgoro J further describes ubuntu as "a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity".[12] She maintains that the concept has a definite meaning and an important social value.[13]

This article argues that the introduction of an ADR curriculum underpinned by the Afrocentric principle of ubuntu has the potential to re-shape South African CLE into an Afrocentric-centred phenomenon in line with societal boni mores.[14] African customary law-centred mediation practices are based upon the principle of ubuntu. The concept of ubuntu is not unique to South Africa but is visible in many tribes on the African continent. Historically, local communities in Africa utilised the philosophy of ubuntu to resolve disputes among tribes and individuals.[15] This resolution consisted of informal hearings led by the chief or an elder in which a discussion ensued whereby an amicable decision was reached. The chief or elder served as a mediator rather than a judge. The principle of ubuntu was applied without the mediator being aware that he should enforce such a principle.[16] This was ADR in the real sense of the concept with

[9] Costandius E, Blackie M, Nell I, Malgas R, Alexander N, Setati E & McKay M "Fees Must Fall and decolonising the curriculum: Stellenbosch University students' and lecturers' reactions" (2018) 32 (2) *South African Journal of Higher Education* 65 at 68.

[10] Heleta S "Decolonisation of higher education: dismantling epistemic violence and eurocentrism in South Africa" (2016) 1 *Transformation in Higher Education* 74; Kamga SD "Cultural values as a source of law: emerging trends of ubuntu jurisprudence in South Africa" 2018 *African Human Rights Law Journal* 626.

[11] Gade C "What is ubuntu? Different interpretations among South Africans of African descent" (2012) 31 *South African Journal of Philosophy* 487 at 490.

[12] Mbigi L & Maree J *Ubuntu: the spirit of African transformation management* Ransburg : Emerald Group Publishing (1995) at 1-7.

[13] Mokgoro Y "Ubuntu and the law in South Africa" (1998) 1 *Potchefstroom Electronic Law Journal* 7.

[14] Du Plessis M "Clinical legal education models: recommended assessment regimes" (2015) 18 *Potchefstroom Electronic Law Journal* 2778 at 2782; Fourie E "Constitutional values, therapeutic jurisprudence and legal education in South Africa: shaping our legal order" (2016) 19 *Potchefstroom Electronic Law Journal* 3; Letseka M "Ubuntu and justice as fairness" (2014) 5 *Mediterranean Journal of Social Sciences* 544.

[15] Murithi T "Practical peacemaking wisdom from Africa: reflections on ubuntu" (2006) 1 *The Journal of Pan African Studies* 25 at 30.

[16] See Murithi (2006) at 33.

humanness at the centre of the decision-making process. Litigation, which is adversarial in nature, was not a default method for resolution of legal disputes.[17]

The FMF movement identified the shortcomings beleaguering higher education in South Africa.[18] Of particular concern was the failure to decolonise and transform the substantive content and curriculum.[19] For the purpose of this article, the authors will focus on the current curriculum for the *Baccalaureus Legum* (LLB) degree. The concern that the current South African LLB degree training has become archaic and ill-suited to law students is not novel.[20] It has been at the forefront of discussions conducted by university faculties, legal practitioners and law societies.[21] However, with the demand from students to change the curriculum in a de-colonial manner through ensuring that universities become ideologically pan-African there has been a lingering probe as to what this Africanisation means in a South African context.[22] Whilst it is vital to ensure that the Africanisation process is not turned into a crude essentialist anti-imperial project whose endeavour it is to reduce the university space to a mono-ideological outlook characterised by ethnic identities and exclusive indigenous knowledge contestations, there is a need to move towards a more African approach.[23]

This article commences by identifying the need to equip law graduates with skills for ADR within the prism of curriculum transformation.[24] It then traces the history of ADR in an attempt to demonstrate its origin and significance as a viable method of resolving legal disputes.[25] The article then provides recommendations on how to transform legal education by integrating ADR into CLE, a development necessary to

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[17] Tokarz K & Appell A "Introduction: new directions in ADR and clinical legal education" 2010 (34) *Washington University Journal of Law and Policy* 1 at 6.

[18] Chukwuere J "From decolonisation to digitalisation of education in South Africa" (2017) 9 *International Journal of Sciences and Research* 233.

[19] Mamdani M "Between the public intellectual and the scholar: decolonization and some post-independence initiatives in African higher education" (2016) 17 *Inter-Asia Cultural Studies* 68; Mudau P & Mtonga S "Extrapolating the role of transformative constitutionalism in the decolonisation and Africanisation of legal education" (2020) 14 *Pretoria Student Law Review* 46.

[20] Motshabi K "Decolonising the university: a law perspective" (2018) 40 *Strategic Review for Southern Africa* 108.

[21] Dzedze L "Time on their side? A review of the four year LLB as a tool for the transformation of the legal profession" (2017) 31 *Speculum Juris* 108.

[22] Ramphele M *Laying ghosts to rest: dilemmas of the transformation in South Africa* Cape Town : NB Publishers (2008) 13.

[23] Keevy I "Ubuntu versus the core values of the South African Constitution" (2009) 34 *Journal for Juridical Science* 19.

[24] Pounds N & Tyner A "The principles of ubuntu: using the legal clinical model to train agents of social change" (2008) 13 *Journal of Clinical Legal Education* 8; Greenbaum L "Experiencing the South African undergraduate law curriculum" (2012) 7 *De Jure* 106 at 107.

[25] Henrico R "Educating South African legal practitioners: combining transformative legal education with ubuntu" (2016) 13 *United States-China Law Review* 817.

produce well-rounded law graduates. The article ends with a few concluding remarks.[26]

## 3 DECOLONISING AND AFRICANISING THE LLB DEGREE

In pursuit of the agenda for the transformation and Africanisation of legal education, the South African Law Deans Association (SALDA) met in 2016 and discussed the importance of Decolonising and Africanising the LLB degree.[27]

### 3.1. The SALDA discussion

Central to the SALDA deliberations was the question of the modalities of Africanisation and avenues of transforming legal education in South Africa. The SALDA also reflected on concerns raised by the legal profession and the Council on Higher Education on the alleged low quality of the law graduates produced by some universities in South Africa.[28] Concerns raised by the law profession and other stakeholders include that legal education in its current form is focused on producing theoretical graduates who lack critical skills and client empathy.[29] In addition to the graduate readiness challenge, the legal profession faces transformation challenges with the commencement of the Legal Practice Act 28 of 2014. According to the SALDA, it is therefore evident that change and development in the manner in which law students are groomed for legal practice is overdue.[30]

In relation to the delivery of CLE, the SALDA observed that a decolonised Law Clinic curriculum should: (a) enable students to confront social realities, such as, limited access to justice, dysfunctional court systems, corruption in the public administration system, and leveraging the potential contribution of the law in achieving social justice, debates on diversity and the social context to which law responds; (b) make use of simulations which reflect students' lived experiences in the curriculum; (c) re-define the role of authentic learning in the development of professional legal identity through role-play exercises, court visits, and law clinic inductions; (d) develop writing skills and the value of plain language in the clinic context; and finally (e) promote indigenous language in community engagement and teaching of law.[31] This means that in communities where there is a dominant indigenous language, such as, *isiXhosa* in the Eastern Cape or *isiZulu* in KwaZulu - Natal, that language should be used in legal

[26] Van der Merwe S "Contemporary challenges facing law clinics" 2016 *De Rebus* 1.

[27] SALDA workshop on *Decolonisation and Africanisation of legal education* held on 3 October 2016; minutes summarised by Campbell J "Ideas for Decolonisation of the Law Clinic Curriculum" available at https://www. https://www.saulca.co.za/conferences.co.za (accessed 21 October 2020).

[28] Ramotsho K "Outcomes of the national review of the LLB programme released" 2018 (1) *De Rebus* 1.

[29] Sedutla M "LLB summit: legal education in crisis?" 2013 (8) *De Rebus* 6.

[30] See Sedutla (2013) at 6.

[31] See Campbell J "Ideas for Decolonisation of the Law Clinic Curriculum" available at https://www.saulca.co.za/conferences.co.za (accessed 21 October 2020).

education and law clinic practice.[32] This idea of introducing multilingual indigenous CLE is mainly informed by the view that "legal education is not just a mode of communication, but a carrier of history, culture and world views".[33]

From the submissions made by the SALDA, a deduction is made that there are shifts reminiscent of the jurisprudential Eurocentric plain language movement, which dominated legal discourse in America and Europe in the 1980s.[34] However, unlike the Eurocentric plain language movement which was based on making the law accessible to laymen by challenging language sophistication used in legislative enactments, municipal government regulations, municipal by-laws and the pronouncement of the courts, the push to decolonise legal education, and specifically CLE, is based on a broader idea incorporating African heritage in teaching the law.[35] This means that law schools have a responsibility to ensure that the psyches of their law students are deterred from just practising law for financial gain but directed towards becoming conduits which induce and participate in creating an egalitarian society.[36] South African CLE should be able to instill in students an ethos identical to the values and philosophies of a legal order which supports transformative constitutionalism, critical thinking, egalitarianism, ubuntu and therapeutic based jurisprudence.[37]

### 3.2. Therapeutic jurisprudence

The infusion of therapeutic jurisprudence into South African CLE underpinned by constitutional principles and values, such as, diversity, human dignity, the achievement of equality and the advancement of human rights and freedoms and non-racialism, will ensure that law schools produce graduates that display a commitment to African epistemic values and an ability to engage critically with those values.[38] It is essential to

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[32] Carnelley M & Bothma P "Decolonisation of South African family law in light of transformative constitutionalism: a practical approach for generation Z" available at https://www.litnet.co.za/dekolonialisering-van-die-suid-afrikaanse-familiereg-in-die-lig-van-transformasiegerigte-konstitusionalisme-n-praktiese-benadering-vir-generasie-z/ (accessed 19 May 2020).

[33] See Tshivhase, Mpedi & Reddi (2015) at 17.

[34] Kahn E "The plain English movement and accessibility to the law" (1992) 9 *English Academy Review* 83 at 89.

[35] Hudson H "Decolonising gender and peacebuilding: feminist frontiers and border thinking in Africa" (2016) 4 *Peacebuilding* 197 at 209.

[36] Kline M "The colour of law: ideological representations of first nations in legal discourse" (1994) 11 *Social and Legal Studies* 452.

[37] Mamdani M "Is African studies to be turned into a new home for Bantu education at UCT?" (1998) 28 *Social Dynamics* 64.

[38] Malan K "The suitability and unsuitability of ubuntu in constitutional law-intercommunal relations versus public office-bearing" (2014) 47 *De Jure* 231. The preamble to the Constitution of South Africa, 1996 explicitly recognises the diversity of South Africa which is supportive of therapeutic jurisprudence.

establish such a value-based professional legal identity amongst law students from the commencement of their studies as this will assist in the development of a well-rounded graduate that can contribute to the legal order of the future.[39] ADR, legal writing, drafting, multilingual languages, and moot court activities in CLE provide opportunities to integrate valuable therapeutic jurisprudential principles into the curriculum and allow students to engage critically with constitutional values.[40] By embodying these values, students can improve the legal system, shape our legal order and promote progress toward an equal and free decolonised democratic society envisaged by The Constitution of the Republic of South Africa, 1996 (Constitution).[41]

## 4 THE HISTORY OF ADR

There is scarcity of academic consensus on the origin of ADR. Whilst traditional views in the mainstream textbooks dealing with CLE point to a Eurocentric origin of ADR primarily from the Westminster legal culture, contemporary perspectives dismiss this view.[42] Legal theorists, who settle on the Western origin of ADR, marginalise or even ignore the role played by African customary law in shaping indigenous systems of ADR.[43] African traditions, norms, legal and dispute resolution methods commonly referred to as customary law were in effect before the arrival of Europeans on the continent.[44] While different peoples or tribes had unique and complex legal systems, the similarity between the traditions and practices of each region of the African continent formed a substantially similar system of laws governing the whole of African society before colonisation.[45] Although African customary law was barely recognised, it has contributed to the emergence of other methodologies of resolving disputes mainly in African indigenous communities and spaces.[46]

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[39] See Greenbaum (2012) at 8.

[40] Madlingozi T "Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-Black economy of recognition, incorporation and distribution" (2017) 28 S*tellenbosch Law Review* 129.

[41] Lenta P "Just gaming? The case for postmodernism in South African legal theory" (2010) 17 *South African Journal on Human Rights* 177; See also Ramphele (2008) at 13.

[42] Seaman (2016) at 223.

[43] Ghebretekle T & Rammala M "Traditional African conflict resolution: the case of South Africa and Ethiopia" (2019) 12 *Mizan Law Review* 325.

[44] By definition, African customary law consists of rules in the form of customs accepted as binding or with the authority of the law by the tribes or people of African origin. These rules are either codified or incorporated in various legal systems in Africa or uncodified practices. See Ndulo M "African customary law, customs, and women's rights" (2011) 18 *Indiana Journal of Global Legal Studies* 87 at 89; *Bhe v Khayelitsha Magistrate* (2004) ZACC 17; Silving H *Sources of law* New York : WS Hein (1968) at 37.

[45] Jessup G "Symbiotic relations: clinical methodology-fostering new paradigms in African legal education" (2002) 8 *Clinical Law Review* 377 at 379.

[46] See Seaman (2016) at 224.

Notwithstanding the above, legal scholars who subscribe to the Western basis of ADR, locate the first elementary evidence of its existence in the 20th century United Kingdom when mediation became institutionalised in the secular arena where it was considered as having a role in resolving social conflicts. This is evidenced by the enactment of the Conciliation Act of 1896.[47] Around the same time, the United States (US) was formalising the ADR processes as an alternative to litigation, and in 1947 the Federal Mediation and Conciliation Service came into existence with many of its early writings drawing inspiration from the English based ADR systems used in the resolution of labour disputes.[48]

The Dutch first heard of the Anglo-American term mediation in the early 1990s. However mediation was known as "*bemiddeling*, *verzoening*, *conciliatie*" which was translated as "to conciliate" or "*comparitie*" which had existed for several centuries.[49] The methods employed for dispute resolution were "practised as a side-activity by judges, mayors, or yet other functionaries, using their intuition, experience of life, or mere authority".[50] The Dutch system is an interesting model of a legal transplant. Historical evidence from the 16th century sheds light on the mediation practice of "*Leidse Vredemakers* (Leyden Peacemakers)", an idea which emanated from the French Revolution and consisting of peacemakers (*Bureaux de Paix* or *Juges de Paix)*, which then formed the basis of formalising mediators in The Netherlands's socio-political culture and system.[51] In the 1970s and 1980s the Dutch citizens became disappointed with the operation of law due to the "inaccessibility of the courts, overcrowded dockets, increased formalism, long delays and high costs", and these factors incentivised the government to look at alternative means of dispute resolution.[52] Another term for appropriate dispute resolution is "co-existential justice" which has been part of African and Asian traditions "where conciliatory solutions were seen to be to the advantage of all and often as a *sine qua non* for survival".[53]

From the Eurocentric histography of mediation, it is clear that African pre-colonial society's mediation pre-dates that of the Anglo-American and Dutch mediation

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[47] Davidson P "Social conflict and social administration: the Conciliation Act in British industrial relations" in Smout TC (ed) *The search for wealth and stability : essays in economic and social history – presented to MW Flinn* London : Macmillan (1979) at 175.

[48] See Seaman (2016) at 113.

[49] De Roo A & Jagtenberg R "Mediation in the Netherlands: past - present – future" (2002) 5 *Electronic Journal of Comparative Law* 127 at 131.

[50] De Roo & Jagtenberg (2002) at 132.

[51] De Roo & Jagtenberg (2002) at 133.

[52] Bruinsma F & Welbergen R *Hoge Raad van onderen* Berlin : Centre for Mediation (1999) at 4; Brenninkmeijer AFM *Burgerlijk procesrecht als publiekrecht* [The Law of civil procedure as public law] Inaugural lecture, University of Amsterdam. Zwolle : Tjeenk Willink (1993) at 1.

[53] Cappelletti M "Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement" (1993) 56 *The Modern Law Review* 256 at 287.

systems.[54] Long before the formalisation of mediation in the US and Europe, African indigenous communities already had an informal assembly called a "moot" whereby the senior and respected members of the community served as mediators to help resolve matters, and which reflected the kinship patterns of many African communities.[55] In post-colonial South Africa, the earliest identification of these unofficial people's courts were the civil dispute settlement associations, which existed in the township of Uitvlugt in the Cape Town area in 1901.[56] In the latter part of the 1970s the people's courts were known as *makgotla*.[57]

As time progressed, under the colonial era, European laws were imposed on African society, sidelining indigenous laws.[58] The African legal systems at the time of colonial conquest, described as having a holistic conception of law by Lawrence Friedman, were suppressed and supplanted by Eurocentric based systems. According to Friedman, the relegation of African legal systems denied the current legal order of a more holistic view of the law as encompassing expressions of culture and including social norms and values affecting behaviour.[59] McDougal likewise laments this development by arguing that the current legal system does not espouse a "legal realism" view, which emphasises that the role of law only has meaning when used in the context of the community process in which people are using legal doctrines to effect or justify distribution of values inherent in African legal systems.[60] This means the morality of the law should secure the fundamental values of the community by regulating social change, conveying values and operating as a vehicle of education.[61]

[54] See Cappelletti (1993) at 289.

[55] See Seaman (2016) at 223.

[56] Van Niekerk G "Peoples courts and peoples justice in South Africa – new developments in community dispute resolution" (1994) 1 *De Jure* 19 at 20.

[57] See Van Niekerk (1994) at 22.

[58] See Himonga & Diallo (2017) at 4.

[59] Friedman T "On legal development" (1969) 24 *Rutgers Law Review* 1 at 13.

[60] McDougal M "The law school of the future: from legal realism to policy science in the world community" (1947) 56 *Yale Law Review* 1345 at 1348. McDougal posits that the role of the law school suffers from confusion. The confusion was inherited from the time of colonisation when Western Europeans were expanding to the four corners of the globe, "annihilating all who resisted or subordinating them as dependents to its imperial power". Consequently, men pursued and secured wealth, and used private wealth as a mechanism to affect the distribution of other values in the community, without too much regard for their effects on the community or the community's response. See also Linde A "Judges, critics, and the realist tradition" (1972) 82 *Yale Law Review* 227 at 279.

[61] See McDougal (1947) at 1348-1349.

## 5 RECOMMENDATIONS TOWARDS A NEW PARADIGM FOR ACCOMMODATING ADR IN CLE

Knowledge of ADR is one of the critical aspects of successful legal practice.[62] An understanding of how to reach an amicable decision for one's client requires a thorough grasp of the nature of mediation as well as its purpose.[63] The end goal is the promotion of justice and ensuring the certainty of the law. In order to acclimatise students to mediation skills some universities in South Africa, such as, the University of the Witwatersrand and the University of Pretoria, offer a stand-alone mediation course as part of the undergraduate programme.[64] Perhaps other Universities which are not offering ADR as a stand-alone module should follow suit so that they can produces LLB students who can serve their clients' interest by providing flexible, cost efficient, and time effective methods of dispute resolution.

Many universities' law clinics offer an opportunity for final year law students, who are presumed to know a fair amount of legal theory, to assist in matters that have settlement on the horizon.[65] However, these limited clinic efforts are usually hampered by time constraints.[66] Law graduates also experience this problem when they enrol for mediation programmes offered by Legal Education and Development South Africa (LEAD SA) for practitioners, but which is only a one-week course. The ability to transfer effective practices to students in one week is not possible.[67] Therefore, it is submitted that the period allocated for teaching mediation to law students by CLE and LEAD SA programmes should be extended.[68] Given that clinic pedagogy should not be set in

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[62] Connerty A "The role of ADR in the resolution of international disputes" (1996) 12 *Arbitration Internal Law Journal* 50 at 63; Kariuki F "Conflict resolution by elders in Africa: successes, challenges and opportunities" (2017) 3 *Alternative Dispute Resolution* 30 at 53; Kift R "Victims and offenders: beyond the mediation paradigm?" (1996) 7 *Australian Dispute Resolution Journal* 236 at 237.

[63] Roebuck D *Mediation and arbitration in the middle ages: England 1154 to 1558* Oxford : Hart Publishing (2013) at 29; De Vos W & Broodryk T "Managerial Judging and alternative dispute resolution in Australia: an example for South Africa to emulate? (part 1)" (2017) 4 *Tydskrif vir die Suid-Afrikaanse Reg* 680.

[64] Hoffman HC *The contribution mediation can make in addressing economic crime in corporate and commercial relationships in South Africa*" (unpublished LLD thesis, Stellenbosch University, 2019) 1. University of Witwatersrand " Mediation and Conciliation LDRP" available at https://www.wits.ac.za/mandelainstitute/short-courses/2nd-semester-courses/mediation-and-conciliation-ldrp/ (accessed 21 February 2021); University of Pretoria "Programme In Advanced Alternative Dispute Resolution 2019" available at https://www.pretoriabar.co.za/images/AFSA/Programme%20in%20Advanced%20Certificate%20in%20ADR%202019%20(ABF).pdf (accessed 21 February 2021).

[65] Ramotsho (2018) 1.

[66] See Dzedze (2007) 109.

[67] Van Deventer C & Swanepoel T "Teaching South African law students (legal) writing skills" (2013) 27 *Stellenbosch Law Review* 537 at 544.

[68] See Sedutla (2013) at 9.

stone, the incorporation of ADR into CLE could be possible by availing more time to practical law modules, such as ADR, and less time to theory-based law modules.[69]

Students could be introduced to ADR when they are required to read interdisciplinary therapeutic jurisprudence and preventative lawyering scholarship as compulsory reading materials.[70] Introducing these concepts and providing concrete examples of this approach through interactive lawyering, client role-plays, and during moot court preparation and mediation lectures[71], legitimise concepts, such as, counselling and prevention.[72] Introducing the abovementioned concepts to law students from their first year allows for a change in mindset that can result in social change and a transformed form of adjudication, as envisaged by our Constitution.[73] Wexler explains that from a therapeutic jurisprudence viewpoint the law itself can be a potential therapeutic agent in that legal rules, procedures and the behaviour of legal actors may produce therapeutic or anti-therapeutic results.[74] Therapeutic jurisprudence encourages the application of the law more therapeutically.[75] It is concerned with the improvement of the law and the operation thereof by searching for ways of minimising negative and promoting positive effects on the wellbeing of those affected by the law.[76] One of the ways this objective can be reached is by introducing mediation as an alternative to court based adjudication.[77] Students at the University of Johannesburg are made aware of this form of alternative dispute resolution during their first year when they study Law of Persons and the Family as a subject,[78] and a mediation module has been introduced into the first year Legal Skills course. Through this module, students are exposed to a variety of legal rules and instruction in ADR. Non-adversarial justice

[69] See Greenbaum (2012) at 18.

[70] Stolle DP, Wexler DB, Winick BJ & Dauer EA "Integrating preventive law and therapeutic jurisprudence: a law and psychology based approach to lawyering" (1997) 34 *California Western Law Review* 15.

[71] See Stolle et al (1997) at 8.

[72] See Stolle et al (1997) at 9.

[73] See Fourie E & Coetzee E "The use of a therapeutic jurisprudence approach to the teaching and learning of law to a new generation of law students in South Africa" (2012) 15 *Potchefstroom Electronic Law Journal* 428 at 382.

[74] Wexler B "Therapeutic Jurisprudence: An Overview" available at http://www.Law.Arizona.Edu/Depts/Upr-Intj/Intj-Welcome.Html (accessed 19 May 2020) at 29.

[75] See Fourie & Coetzee (2012) at 383.

[76] King M *Non-adversarial justice* Washington DC : Federation Press (2014) at 2.

[77] See King (2014) at 27.

[78] The Children's Act 38 of 2005 makes provision for compulsory mediation in certain instances. Section 21(3)(a) determines that when the parental responsibilities and rights of unmarried fathers are in dispute, it is compulsory that the matter be referred for mediation. However, if one of the parties feels that it is in the best interest of the child, they can approach the High Court without having to engage in mediation first. With regard to parenting plans, the Act states that if co-holders of parental rights and responsibilities are having difficulties in exercising these rights, they must seek mediation, in order to agree on a parenting plan. In order to achieve this, the parties must participate in mediation through a social worker or any other qualified person.

enhances a positive legal identity for those students who prefer collaboration to argument.[79]

Currently, Western-style divorce and family mediation are practised to give effect to the Children's Act.[80] According to Boniface, there is room for African group-style mediation in the context of the mediation provided for by the Children's Act.[81] This mediation is facilitated by elders and takes place in "an attitude of togetherness" and "in the spirit of *ubuntu*".[82] Section 71(1) of the Children's Act of 2005 states that if circumstances permit, the Children's Court may refer a matter brought before the Court to any appropriate lay forum. The lay forum may include a traditional authority. The purpose is to attempt to settle the matter out of court by way of mediation.[83] The South African Law Reform Commission has attempted to identify various protective mechanisms for children at risk and recognises that the extended family, friends and community form support systems for these children.[84] In these communities, the values of ubuntu are exercised.[85] If these values are exercised during the mediation, it is more likely that a therapeutic outcome will be achieved.

### 5.1 Infusing Afrocentric and therapeutic values in CLE: lessons from other jurisdictions

Law students are also introduced to African group-style mediation and its place in the context of the Children's Act,[86] as well as to the importance of ubuntu in this regard. Through role play the therapeutic jurisprudence outcomes and the constitutional values of ubuntu and human dignity will once again be emphasised. This approach will ensure that awareness of constitutional values is created from the first year of the student's legal studies. Such an approach will ensure that students are acclimatised on embracing diverse values and Afrocentric principles which should underpin our socio-legal order.[87]

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79 See King (2014) at 12.

80 Children's Act 38 of 2005.

81 See Boniface (2012) at 380.

82 See Boniface (2012) at 381.

83 See Boniface (2012) at 382.

84 See South African Law Commission "Review of the Child Care Act" available at https://www.justice.gov.za/salrc/reports/r_pr110_01_2002dec.pdf (accessed 12 May 2020) at 19.

85 According to Goldberg V "Practical and ethical concerns in alternative dispute resolution in general and family and divorce mediation in particular" (1998) *TSAR* 748 another mediation model is used in Canada and the US, apparently with partial success. It is called the sensitise-a-mediator model, in which existing conflict resolvers, such as mediators, are trained in cultural issues and considerations that are important to the communities served.

86 Children's Act 38 of 2005.

87 Modiri J "The Time and Space of Critical Legal Pedagogy" (2016) *Stellenbosch Law Review* 507 at 510.

The arguments for diversity among faculties in higher education are as compelling as those for student body diversity.[88] They are premised upon the creation of a holistic learning environment as part of the institution's educational mission, which promotes a sense of community of students and teachers who learn from their interactions and "robust exchange of ideas" with one another in and outside of the classroom.[89]

CLE is a core part of the LLB curriculum at most South African universities.[90] Since CLE is essential for LLB offerings, there is a need to review clinical models in an attempt to find suitable models.[91] It is submitted that such a review is in tune with the theory of developmental law, which maintains that legal principles giving rise to development law are in response to the pressure being exerted by the globalisation process.[92] Development Law has emerged as a new legal discipline in that it differs from past reform efforts instilled in the history of the European oriented legal canons, or the "received law" from the traditions of the Romans or even socialist Russia.[93] Development law plays two critical roles. First, it bridges the elusive gap between the laws of the developed and the developing world. Secondly, it links development with other legal disciplines, such as, contracts and company law, property, securities, commodities, banking, secured transactions, bankruptcy, intellectual property rights, antitrust, criminal law, and international law, to name but a few.[94]

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[88] Alger J "When color-blind is color bland: ensuring faculty diversity in higher education" (1990) 10 *Stanford Law and Policy Review* 191 at 192; see also *University and Community College System of Nevada v Farmer* 930 P 2d 730 (Nev 1997) holding that the university demonstrated a compelling interest in fostering a culturally and ethnically diverse faculty and that the rationales for seeking faculty diversity were analogous to those sanctioned by the Supreme Court in *Regents of the University of California v Bakke* 438 U S 265 (1978) for student body diversity.

[89] Alger (1990) at 192 ("Recent court decisions have made it increasingly difficult for institutions to rely upon this discrimination based rationale for race-conscious affirmative action programs."); see for example *City of Richmond v Croson* 488 U S 469 (1989) (contractors set aside for minority construction companies are not narrowly tailored to remedy identifiable discrimination by the City of Richmond); *Hopwood v Texas* 78 F 3d 932 (5th Cir 1996) (University of Texas affirmative action admissions program was not narrowly tailored to remedy the identifiable present effects of its own past discrimination); *Podberesky v Kirwan* 38 F 3d 147 (4th Cir 1994) (voiding race-conscious university scholarships not narrowly tailored to remedy past discrimination). Dubin J "Faculty diversity as a clinical legal education imperative" (2000) *Hastings Law Journal* 454 at 455.

[90] See Du Plessis (2015) at 2779. It is noteworthy that there are some universities in South Africa, such as University of South Africa, that do not offer CLE.

[91] See Du Plessis (2015) at 2780.

[92] See Du Plessis (2015) at 2780.

[93] Sarkar R *Development law and international finance* Oxford : Oxford University Press (1999) at 19. The Janus Law Principle embedded in the theory of developmental law emphasises the "importance of looking both backwards into the past as well as ahead into the future, like the Roman god, Janus". In this context, the Janus Principle requires recognition of historical factors and cultural components, aspects of indigenous legal traditions that were not taken into account by the modernisation of the legal order.

[94] See Sarkar (1999) at 20.

Developmental law theory accepts that CLE should be infused with the values derived from the concept of therapeutic jurisprudence.[95] According to the International Network on Therapeutic Jurisprudence, therapeutic jurisprudence refers to:

> "Jurisprudence which concentrates on the law's impact on emotional life and psychological wellbeing. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognised and systematically studied."[96]

A therapeutic jurisprudence approach is an interdisciplinary approach to studying the law's impact on emotional life and focuses on the therapeutic and anti-therapeutic consequences that can flow from legal rules, legal procedure and the different roles of legal actors.[97] Initially, the focus of therapeutic jurisprudence was on mental health, but the focus now includes the wellbeing of all citizens.[98] This shift in focus supports humaneness, social justice and fairness, concepts that are embodied by the value of ubuntu.[99] This approach is predicated on the social responsibilities of the law and that the legal order should be seen as a core component of the social fabric of society.[100] The approach appears to be compatible with the descriptive submission by Mohamed J in *S v Makwanyane*[101] who sees ubuntu as an expression of the inherent capacity for, and enjoyment of, love towards fellow men and women and the fulfilment involved in recognising their innate humanity. Mokgoro J asserted :

> "While ubuntu envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation."[102]

The aforementioned description of ubuntu embodies fundamental values and skills, which are at the heart of CLE in many countries. For instance, the US has introduced

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[95] See Fourie (2016) at 9.

[96] According to Wexler this concept was first introduced in the 1990, and although its foundation is in mental health, its scope has widened to other branches of the law, such as, employment law, disability law and criminal law. See also Wexler B "Therapeutic Jurisprudence: An Overview" available at http://Www.Law.Arizona.Edu/Depts/Upr-Intj/Intj-Welcome.Html (accessed 19 May 2020) at 29.

[97] Stoll *et al* (1997) at 17.

[98] See Stolle *et al* (1997) at 35.

[99] See *S v Makwanyane* 1995 2 SACR 1 (CC) at paras 237 & 263.

[100] Williams GR "Negotiation as a healing process" (1996) *Journal of Dispute Resolution* 1 at 3.

[101] See *Makwanyane* (1995) at paras 237 & 263.

[102] See *Makwanyane* (1995) at para 307.

ADR into its CLE as a synthesis of preventive law and therapeutic jurisprudence. The US considers ADR as an umbrella term for

> "a range of dispute resolution processes outside the courts that includes negotiation, conciliation, mediation, dialogue facilitation, consensus-building, and arbitration—[and] has emerged as a principal mode of legal practice in virtually every legal field and in virtually every country in the world".[103]

Many law schools in the US require all students to take either clinical education or dispute resolution before graduation.[104] This model of clinical education has received wider support from scholars across the world, including an Australian academic, Osborne, who posits that

> "…clinical legal education needs to incorporate dispute resolution to introduce students to multiple lawyering skill sets and strategies, to counteract —the risks of acculturation to adversarial modes of thinking that might develop by offering only litigation-focused clinics, and to heighten the development of a social justice consciousness in our law students".[105]

Some academic commentators have maintained that legal education overly focuses on teaching students to become and think like a lawyer even though they are impelled by market forces to offer non-adversarial dispute resolution.[106] Other legal theorists have pointed out that incorporation of non-adversarial methods of dispute resolution may suffocate the LLB syllabus with multiple modules over a short term with a negative bearing on financial and human resources.[107] Apart from this critique, it is submitted that the South African clinical education pedagogy should be revised so that it adopts ADR.[108] ADR offers a flexible approach compared to the rigid and tedious legal processes, which most often require the services of a lawyer to present to the court.[109] Disputes are usually resolved in a reconciliatory manner and ADR in particular mediation, therefore, promotes restorative justice.

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[103] Tokarz K & Nagaraj Y "Advancing social justice through ADR and clinical legal education in India, South Africa, and the United States" in Bloth FS (ed) *The global clinical movement: educating lawyers for social justice* Oxford : Oxford University Press (2010) at 253.

[104] See Tokarz & Appell (2010) at 6.

[105] Osborne M "*Alternative dispute resolution and clinical legal education in Australian law schools: convergent, antagonistic, or running in parallel?*" (1996) 14 *Journal of Professional Legal Education* 97 at 109.

[106] Sullivan WM, Colby A, Wegner JW, Bond L & Shulman L *Educating lawyers: preparation for the profession of law* San Francisco : Jossey-Bass (2007) at 77; Bobbi M & Sharon P "Client problem-solving: where ADR and lawyering skills meet" (2015) 34 *Elon Law Review* 268.

[107] See Sullivan *et al* (2007) at 79.

[108] See Sullivan *et al* (2007) at 80.

[109] See Williams (2007) at 19.

On a national level, South Africa should develop mediation establishing norms and standards for mediators and the accreditation of mediators.[110] The movement towards ADR is supported by the African Centre for the Constructive Resolution of Disputes (ACCRD).[111] The ACCRD maintains that Africa "will reach a turning point in the next ten years because of two factors: the population explosion and rapid urbanisation. Caseloads will grow exponentially as a result, and ADR will go mainstream".[112] This submission explains why South Africa should adopt a hybrid legal system which adequately accommodates mediation as an alternative mechanism for resolving disputes. Such a system is effective, less costly and non-prohibitive.[113] Mediation also enables expeditious access to justice for the vulnerable person, which is often lacking in South Africa due to an overloaded judicial system.[114] The inability to meet the access to justice needs of the ordinary citizens is not due merely to the content of the South African substantive law, but also to the structure and procedural requirements of the courts.[115]

Apart from the aforementioned proposals for synergies in the pedagogical approach, the CLE and ADR movements teach similar lessons about the basic tenets of client problem solving.[116] There is a significant commitment in each field to the ideas of client autonomy, self-determination and control, backed by the idea that clients will be best served if their self-defined goals and interests are met by their legal representation.[117] This commitment is evidenced in the insistence of the client centred approach that the non-legal dimensions of a situation often predominate in the client's thinking and determine the outcome that will best satisfy a client.[118] Moreover, it pervades the problem solving approaches to negotiation and mediation, which suggest that identifying and satisfying the parties' underlying interests are more critical than

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[110] Vettori S "Mandatory mediation: an obstacle to access to justice?" (2015) 15 *African Human Rights Law Journal* 358 at 377.

[111] African Centre for the Constructive Resolution of Disputes "Conflict Trends Issue" available at https://www.accord.org.za/ (accessed 16 May 2020).

[112] See Brand J "SA ripe for alternative dispute resolution to take root" available at https://www.businesslive.co.za/bd/opinion/2017-08-02-sa-ripe-for-alternative-dispute-resolution-to-take-root/ (accessed 16 May 2020).

[113] South African Law Commission "Alternative Dispute Resolution" available at https://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf (accessed 16 May 2020).

[114] South African Law Commission "Alternative Dispute Resolution" available at https://www.justice.gov.za/salrc/ipapers/ip08_prj94_1997.pdf (accessed 16 May 2020).

[115] Grant B & Schwikkard P "Peoples court?" (1991) 7 *South African Journal on Human Rights* 304 at 310.

[116] See Tokarz & Appel (2010) at 9.

[117] See Du Plessis (2015) at 2778.

[118] De Klerk W "Unity in adversity: reflections on the clinical movement in South Africa" (2007) 98 *International Journal of Clinical Legal Education* 324.

vindicating their legal positions.[119] There is a concern in each field about the importance of the client being heard and understood in the legal process and the vital role that lawyers play in ensuring that this happens both inside and outside the lawyer-client relationship.[120] Both fields share a concern that lawyers' law-centered focus can impede their ability to engage in active problem solving for and with their clients.[121]

Riskin's identification of the "lawyers' philosophical map" points to the danger that lawyers will overvalue litigation as a dispute resolution process, missing opportunities to find common ground among disputing parties.[122] The client-centred approach is based on a similar concern that lawyers will view their clients' problems in legal terms and overlook the importance of the social, psychological, economic, political, and moral dimensions of the client's situation.[123] Each field focuses instruction on a common set of techniques and capacities based on ensuring that legal representation stays true to the attainment of client goals and consistent with client values and priorities.[124] A typical set of techniques for interpersonal communication, designed to elicit a broader range of information from clients and parties, includes active listening, neutral and non-judgmental empathic responses, and appeals to deeper values or future interests. Each field also focuses on developing habits of mind that assist lawyers to break out of their preconceptions and to view a situation from multiple perspectives.[125]

Clinical pedagogy focuses on developing the habits of challenging assumptions and of reflective practice.[126] Dispute resolution emphasises identifying underlying interests as a way to reframe problems and generate multiple possible solutions.[127] The shared pedagogical techniques, the shared concern that lawyers will fall prey to law-centric analysis, and the shared commitment to client goals, values and perspectives, create a solid foundation for collaboration between ADR and CLE fields as they shape an

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[119] Smyth GE & Liddle M "Lulling ourselves into a false sense of competence: learning outcomes and clinical legal education in Canada, the United States and Australia" 2012 *Canadian Legal Education Annual Review* 21.

[120] Woodruff WA & Brucker A "The Bologna Process and German legal education: developing professional competence through clinical experiences" 2008 *German Law Journal* 579.

[121] CLEO "Model standards for live-client clinics" document available at http://www.ukcle.ac.uk/resources/teaching-and-learning-practices/clinical-legal-education/ (accessed 19 June 2019).

[122] Guthriet C "The lawyer's philosophical map and the disputant's perceptual map: impediments to facilitative mediation and lawyering" (2001) 6 *Harvard Negotiation Law Review* 146 at 149.

[123] Kruse KR, McAdoo B & Press S "Client problem-solving: where law and meet" (2015) 7 *Elon Law Review* 253.

[124] See Kruse et al (2015) at 254.

[125] See Kruse et al (2015) at 255.

[126] Casey T "Reflective practice in legal education: the stages of reflection" (2014) 20 *Clinical Legal Review* 324 at 328.

[127] Wizner S "Beyond skills training" (2002) 19 *Clinical Law Review* 491 at 499.

experiential program around client problem solving.[128] This means that endowing law students with knowledge of ADR when they are involved in legal clinical work will drive legal education toward an outcomes based learning model in which knowledge, skills and values are tangibly demonstrated.[129]

Cronin-Harris substantiates the above submission by maintaining that ADR and CLE go hand-in-hand with advocacy.[130] She notes :

> "[Law students] use negotiation, rather than adversarial advocacy, during most of their waking hours in every type of law practice. Transactional lawyers who craft deals use negotiation continually but so do public interest lawyers, government attorneys and litigators. The number of cases that go through trial in federal or state courts hovers around 5% [higher than the South African rate], give or take a few percentage points. The vast bulk of litigated matters wind-up in settlement conferences or a court mediation program; or, something happens during litigation to prompt one party to initiate serious settlement talks, such as losing an important motion ...."[131]

The above submission by Cronin-Harris is also in step with the Carnegie Model of Legal Education which supports courses and curricula that integrate three sets of values or "apprenticeships" : knowledge, practice and professionalism.[132] The experiential education movement is sweeping through law schools in Australia influenced by critiques that legal education is overly focused on teaching students to think like lawyers, and impelled by market forces to take those critiques seriously law schools are scrambling to offer more and better opportunities for interactive, hands-on learning.[133] As the interest in experiential education broadens, however, a broader spectrum of teaching methodologies comes under the experiential tent, creating opportunities to tap into new sources of guidance for reshaping legal education.[134] Therefore, integrating ADR into clinical education would support the emergence of a new pedagogical approach, which enhances student ability.

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[128] Fisher J "Putting students at the center of legal education: how an emphasis on outcome measures in the ABA standards for approval of law schools might transform the educational experience of law students" (2011) 35 *Southern Illinois University Law Journal* 225 at 228.

[129] Hyams R "On teaching students to 'act like a lawyer': what sort of a lawyer?" (2008) 21 *International Journal of Clinical Legal Education* 25.

[130] Cronin-Harris C "Why Take ADR Courses in Law School" available at https://www.americanbar.org/content/dam/aba/directories/dispute_resolution/0177_croninharris_why_take_adr_classes.authcheckdam.pdf (accessed 22 April 2019) at 15.

[131] See Cronin-Harris C "Why Take ADR Courses in Law School" available at https://www.americanbar.org/content/dam/aba/directories/dispute_resolution/0177_croninharris_why_take_adr_classes.authcheckdam.pdf (accessed 22 April 2019) at 4.

[132] See Du Plessis (2015) at 316.

[133] Kruse et al (2015) 7 at 227.

[134] See Kruse et al (2015) at 229.

Although the above discussion has made a case for an integrated module approach for incorporating ADR in CLE and other law modules, questions can be raised regarding the feasibility of such an endeavour.[135] Given that law lecturers are overloaded with a heavy academic load requiring that they teach, supervise postgraduates, engage with the community , research, and write, it may not be practical to take an integrated module approach where ADR is incorporated into every law module.[136] This may also be excessive given that the LLB is a four-year degree programme loaded with many modules. However, in the context of the law clinics these concerns seem immaterial given that many clinics may limit their students' work to a few carefully chosen cases that are small and manageable enough to give the students full ownership and control over them.[137] This individual client case model subscribed to by many law clinics provides law students with the opportunity of providing full representation to a few clients, and to carefully dissect, analyse and reflect on the myriad of choices and issues that arise in the process of representing an individual client.[138]

Notwithstanding the above, it is recommended that the clinical course should not be taught in isolation.[139] First year courses, particularly Introduction to Law and Legal Skills, must contain an element of how ADR works and the essential elements of the process.[140] This should then be followed by the Professional Skills and Ethics course whereby skills, which are inherently built into the negotiation and mediation processes, are explored. This should include simulated relevant examples with fellow students.[141] Third year courses should include the aspects of procedure and, as such, will help students with a broader understanding of the process. The final year CLE students should be treated as though they are ready and willing to enter into the fray of negotiation.[142] The supervisory legal practitioners should provide either relevant examples through clients themselves or intensive mock cases, which provide law

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[135] Bloch FS *The global clinical movement: educating lawyers for social justice* New York : Oxford University Press (2010) at 4.

[136] See Bloch (2010) at 7.

[137] Bloch F "The andragogical basis of clinical legal education" (1982) 35 *Vanderbilt Law Review* 352. Chavkin D "Am I my client's lawyer? Role definition and the clinical supervisor" (1998) 51 *Southern Methodist University Law Review* 1509 at 1511. He concludes that students get the most educational benefit out of client representation where the student's autonomy is maximized. However, Critchlow favours minimal supervisor interference as a feature of a clinical model that seeks to maximize students' educational goals. See Critchlow C "Professional responsibility, student practice, and the clinical teacher's duty to intervene" (1990) 26 *Gonzaga Law Review* 415 at 421.

[138] Kemp V "Clinical Legal Education and Experiential Learning: Looking to the Future" available at https://core.ac.uk/download/pdf/78911073.pdf (accessed 17 June 2020) at 22.

[139] Barry M "Clinical supervision: walking that fine line" (1995) 37 *Clinical Law Review* 137 at 138.

[140] Peters D "It Takes Two to Tango, and to Mediate: Legal Cultural and Other Factors Influencing United States & Latin American Lawyers' Reluctance to Mediate Commercial Disputes" available at https://www.law.ufl.edu/_pdf/academics/centers/cgr/11th_conference/Don_Peters_Two_to_Tango.pdf (accessed 22 September 2020) at 3.

[141] See Tokarz & Appel (2010) at 9.

[142] See Tokarz & Appel (2010) at 10.

students with an opportunity to enhance their skills of facilitation, conciliation, evaluation, and mediation.[143]

## 6 CONCLUDING REMARKS

This article has demonstrated that South African law lecturers have a sacrosanct obligation to prepare law students for an active citizenship role in society by ensuring that they are oriented towards other forms of Afrocentric dispute resolution including mediation. These methods of dispute resolution are more effective, less costly and promote fundamental constitutional values, such as, human dignity, equality, freedom and ubuntu.[144] Given that the strength and vitality of any constitutional democracy depends on the quality and integrity of its lawyers, it is imperative that law students uphold these therapeutic guiding values.[145] Therefore, there is a need to incorporate mediation into the LLB curriculum. This can be achieved by dedicating more time to teaching it and the development of a stand-alone compulsory ADR module for LLB students.[146] Such incorporation of therapeutic jurisprudence principles into legal education pedagogy will enhance student awareness of constitutional values.[147] By embodying these values, students will be able to improve access to justice for the marginalised, shape the legal order and promote progress toward an equal and free democratic society as envisaged by the Constitution.[148]

It can be argued that as the experiential education movement continues to broaden, the common ground of client problem solving can prove fertile soil for integrating the lessons from ADR and lessons about client-centered lawyering.[149] This means that the time has come for law schools to avoid offering CLE and ADR in parallel.[150] Instead, law

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143 See Tokarz & Appel (2010) at 11.

144 See Henrico (2016) at 840.

145 See Fourie (2016) at 732.

146 Maphalala N & Mpofu M "Embedding values in the South African curriculum: by design or default?" (2018) 38 *South African Journal of Education* 2 at 6.

147 Walters B "The importance of teaching dispute resolution in a twenty-first-century law school" (2016) 5 *The Law Teacher* 228.

148 See Fourie (2016) at 734.

149 Notably, the principal goal of a CLE program is to provide students with the opportunity to obtain comprehensive legal experience, which encompasses the theoretical foundations of the law and practical legal skills training. One of the crucial tenets of clinical legal education is to afford the law student an opportunity to learn from practical experience. Invariably, no two students will require the same degree of instruction at any given point in time. It follows that the more sensible approach is that the professor or supervising attorney assesses the individual student's strengths and weaknesses, and has the flexibility to respond to that student's educational needs. The pedagogical considerations of a Development Law Clinic are consistent with other clinic designs. The philosophical distinction of a Development Law Clinic is that it is concerned with nation building or national development. Therefore, the clinic design and curricular offerings will take into account the conditions of the country and train law students as future leaders and lawyers to address those conditions.

150 Kruse KR *et al* "Client Problem-Solving: Where ADR and Lawyering Skills" available at Http://Open.Mitchellhamline.Edu/Facsch/268 (accessed 25 April 2020).

schools should move towards a new Afrocentric paradigm for accommodating ADR in CLE.[151] Such a legal development has the potential to re-make South African clinical legal education into an Afrocentric - centred phenomenon in accord with societal boni mores.[152]

[151] Cao L "Law and development: a new beginning?" (1997) 32 *Tennessee Law Review* 545 at 550; Zagaris J "Law and development or comparative law and social change--the application of old concepts" (1998) 37 *University of Miami Inter-American Law Review* 549 at 555.

[152] Anderson J & Catz R "Towards a comprehensive approach to clinical education: a response to the new reality" (1981) 59 *Washington University Law Quarterly* 727; Black J & Wirtz R "Training advocates for the future: the clinic as the capstone" (1997) 64 *Tennessee Law Review* 1011 at 1012; Condlin R "Learning from colleagues: a case study in relationship between academic and ecological clinical legal education" (1997) 3 *Clinical Law Review* 337 at 340; Frank J "Why not a clinical lawyer-school?" (1947) 3 *Yale Law Journal* 137 at 338.

**Contribution of each author and collaborator**

Batchelor, Chetty and Mota Makore equally attended to the writing of the manuscript; Batchelor approved the final version of the manuscript.

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