

Experiencing the South African undergraduate law curriculum

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OPSOMMING

Ervaring van die voorgraadse regscurriculum in Suid-Afrika

In 1998 is die vierjarige LLB-graad as deel van 'n post-apartheid transformasie-agenda bekendgestel. In 'n studie om die gepastheid van die vierjarige LLB-graad vas te stel, is 'n onderhoud met vier regsgegraduateerde, nou praktiserende prokureurs, gevoer. Hierdie vier gegraduateerdes was almal in dieselfde jaargroep aan dieselfde, historiese wit, universiteit. Die doel van hierdie deel van die empiriese studie was om insigte in die ondervinding van die voorgraadse leerplan van 'n verteenwoordigende groep gegraduateerdes, wat almal die graad in die minimum voorgeskrewe tyd verwerf het, te kry.

Deur 'n fenomenografiese metodologie aan te neem, wat poog om die verskillende persepsies van respondente in verband met 'n sekere ondervinding te ondersoek, in hierdie geval die ondervinding van die voorgraadse leerplan vir regte, het die studie 'n ontleding van sommige wyses waarop die studente op die LLB leerplan gereageer het, ontwikkel. Die kategorieë omskrywings wat uit die gegraduateerdes se onderhoude afgelei is, het 'n interessante "oorsig van die kollektiewe denke" van die gegraduateerdes tot gevolg gehad: die instrumentele strategies (buitestander); die pragmatiese generalis (in gemaksone) en die omvormde beroepsgeörienteerde (betrokke binnestander). Hierdie drie posisies blyk drie hiërargies-geordende vlakke van ingeskakeldheid met die leerplan te weerspieël.

Die sleutelbeginsels wat die ontwerp van die voorgraadse leerplan sou inlig, naamlik die integrering van vaardighede, uitdruklike onderrig van etiek en die sensitisering van studente vir die praktisering van die reg in 'n diverse, pluralistiese samelewing, is nie effektief geïmplimenteer nie en dit speel 'n rol in die manier wat regstudente die leerplan ervaar. 'n "Kringloop van nadeel" het uit die data te voorskyn gekom as 'n voorstelling van die herhaling van historiese nadeel deur die leerplan. Vir baie "nie-tradisionele" studente, neig hulle status as "buitestanders" – beide in die universiteit en verder wanneer hulle die sfeer van die professionele inkweking binnegaan – tesame met hulle persoonlike geskiedenis en verwagtinge, om hulle sosiale stand na te boots. Die leerplan vir regte neig om bestaande ongelykhede weer op te lewer eerder as om as 'n omvormende middel te dien.

Ten slotte ontwikkel die outeur 'n paar voorstelle vir maniere waarop die ondervinding van die voorgraadse leerplan vir regte in Suid-Afrika 'n omvormende opvoedkundige proses kan word, in plaas daarvan dat dit 'n belemmering bly vir baie studente wat poog om toegang tot die regsberoep te kry.

1 Introduction

In this paper, the experiences and perceptions of law graduates in relation to the experience of the law curriculum at one South African law faculty were analysed as part of a larger study to determine the fitness for purpose of the four year undergraduate LLB degree in South Africa.¹ The term “curriculum” is used in the broadest sense as including the official (written) curriculum, the curriculum as it is implemented in lecture rooms (enacted), the hidden curriculum (or “unstated norms and values communicated to students”) and the null curriculum (what is not taught).²

A discussion of the three positions that were identified from the data gathered in interviews with six law graduates who are now practising attorneys, will be followed by my analysis of how the experience of the undergraduate law curriculum at one historically white university (HWU) in South Africa replicates the educational and socio-economic backgrounds of the graduates and prevents the experience of the law curriculum from being a transformative education, and thus indirectly operates as an obstacle to many students seeking to gain entry to the legal professions.

2 Background

The undergraduate degree was introduced in 1997, as part of the post-apartheid government’s transformation agenda.³ The objectives of a four year bachelor’s degree as the single entry qualification to both branches of the legal profession, attorneys and advocates, was to increase access into the profession for aspiring black lawyers who were underrepresented, by reducing the length of time, and thus the cost incurred in academic studies. It was also intended to diminish the perceived differential status which the previous system of a postgraduate degree for advocates (and many white attorneys) and a shorter undergraduate degree, as the entry requirement for attorneys, perpetuated.

Data elicited from six graduates who experienced the undergraduate LLB are analysed to develop an interpretation of the experiential aspects of the LLB degree. Using a phenomenographic orientation as analytical framework, an “outcome space” was developed. A phenomenographic methodology attempts to explore the differing perceptions of respondents in relation to a particular experience, in this case, the experience of the law curriculum.⁴ The research method provided

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- 1 Greenbaum *The Undergraduate Law Curriculum: Fitness for Purpose?* (PhD thesis (2009) UKZN).
 - 2 Barnett & Coate *Engaging the Curriculum in Higher Education* (2005) 33-37.
 - 3 Qualification of Legal Practitioners Amendment Act 78 of 1997.
 - 4 Marton “Phenomenography: Describing Conceptions of the World Around Us” 1981 *Instructional Science* 294.

insights into a range of possible responses to the curriculum, which might be used to inform future curriculum development. Variations in ways of understanding, conceptualising or experiencing the phenomenon emerges from key or critically distinct patterns that arise across transcripts during the data analysis.⁵ However, the analysis does not aim to explain “inner psychic processes” but aims, rather, at describing manifestations of forms of thought or ways of functioning which reflect the participants’ experienced world.⁶

The graduates were representative of the demographics within the year cohort in which they had studied; thus the respondents were: one white female (Maria), two Indian females (Rani and Fazila), one African female (Busi), one white male (David) and one Indian male (Sandesh).⁷ Within the parameters of the selected sample criteria which were: graduates who had completed the degree in the minimum prescribed time, had completed their articles of clerkship and who were now practising attorneys within a prescribed geographical area of the university, no African males were available for participation in the study.⁸ This aspect in itself is notable.

The graduates’ descriptions of their “experience of curriculum” must be regarded as being influenced by their expressed recollections of personal interactions with individual lecturers on innumerable occasions. Each graduate brought a multiplicity of factors to the learning experience, including a personal history, many background affective influences, previous educational experiences, conceptions of law and of being a professional, and a plethora of socio-economic and motivational pressures that emanate from sources external to their university lives.⁹ Inherent personality traits and influences attributable to class, race and gender cannot be excluded from the equation.

In this particular institutional context in which I was a deep “insider-researcher”, it is notable that students come from a range of backgrounds, many of which could be seen to be less than ideal in terms of preparedness for and supportiveness of tertiary study.¹⁰ The discipline of Law employs an epistemology that emphasises the acquisition of facts and principles, which students are expected to recall and apply. Subjects are typically taught as discrete units of knowledge, with infrequent attempts made to create links across modules. The contending demands of a curriculum which is heavily committed to covering a significant amount of content, and which at the same time assumes a level of

5 Akerlind “Growing and developing as a university researcher” 2008 *Higher Ed* 242.

6 Uljens *Reflections on Phenomenography: Towards a Methodology?* (eds Dall’Alba & Hasselgren) (1996) 103.

7 Names were changed to conceal the identity of the participants.

8 Data obtained from Faculty cohort records of the university.

9 Vermunt “Relations between student learning patterns and personal and contextual factors and academic performance 2005 *Higher Ed* 205.

10 McLean “Can we relate student conceptions of learning to student academic achievement?” 2001 *Teaching in Higher Ed* 399.

proficiency in English, accompanied by adequate academic reading and writing skills, some framework of knowledge related to commercial concepts, and an ultimate outcome of meeting professional standards, together constitute a matrix of interactions in which there is a complex alignment between the curriculum and those who experience it.

Reflecting back now as legal professionals, the graduates' experiences focussed on varying aspects of curriculum, including their personal motivation for studying law; the way in which they approached the study of law, and their perceptions about the link between theory and skills in the curriculum. The open-ended questions that were used as the basis for the semi-structured interviews had a determining effect on the themes that emerged, since part of the interview schedule was an initial question about each theme: the integration of skills; ethics; and sensitivity to diversity.¹¹

3 The Categories of Description

The three categories that emerged from the pool of data are each characterised by a descriptive term:

- (a) instrumental strategist
- (b) pragmatic generalist
- (c) transformed vocationalist.

These characterisations are juxtaposed in phenomenography to determine if any relationship exists among them, and a logical relation is observed that reflects a hierarchical ordering. Each category reflects a progressively deeper level of identification with, and engagement in, the law curriculum. In a comparable Australian study of law students becoming legal professionals, three categories of student engagement were identified in relation to how students study law, based on their conceptions of being a legal professional.¹²

3.1 Outcome Space A (Strategic Instrumentalist): “Learning about other people’s lives”

A distinct sense of alienation and being an “outsider” was expressed by the students whose experience of law curriculum could be described as “strategic instrumentalist.”

Sandesh explained:

11 The selection of these three themes was based on the identification of these aspects as key features that were to be integrated into the design of the new LLB degree: McQuoid Mason “Developing the law curriculum to meet the needs of the 21st century legal practitioner: A South African perspective” 2004 *Obiter* 102.

12 Reid, Nagarajan & Dortins “The experience of becoming a legal professional” *Higher Ed R & D* 85.

During my youth, and growing up, a lot of people were being taken advantage of because of lack of knowledge ... not being able to assert themselves in a way that insiders do.

It is as if his background situated him differently from those who are in possession of this “knowledge.” He explained that he regarded the degree as providing the student with the necessary discipline “to get somewhere in life.” The underlying assumption of a degree as facilitating upward social mobility is clear.

Sandesh also explained:

... the degree ... says to you: you have a powerful degree in your hands; do something with it.

It is as if the degree takes on a life of its own, extraneous or foreign to, outside of the graduate. There is a sense of obligation, a duty to your community and to yourself that demands that you use the knowledge gained. He mentions that law is about “righting wrongs.” Sandesh’s description conjured up an image of the qualification as an extrinsic object in one’s life, exerting control and providing direction, rather than internalised learning that changes the learner’s perspective.

In Rani’s account of her experience of the law curriculum she often mentioned the disjuncture between her own life world and the world of the law curriculum:

The cases were not about ... did no connect with us ... We were learning about other peoples’ lives – you need to have a passion, an interest in other people (Rani).

She used the analogy of it being like “two worlds,” in reference to lecturers who focused on high court procedures, making students:

... grapple to read judgments by learned judges and constitutional memoranda ... things we were never going to see (in practice) (Rani).

Sandesh also mentioned that the curriculum prepared students more for the high courts, when in fact most graduates were likely to become attorneys, who rarely practise in the high courts. He knew of only one student from his year cohort who had become an advocate. Recent data from another South African Law faculty suggests that out of a year cohort of 138 graduates in 2008, approximately 70% entered the law professions: 81 as attorneys, and 12 as advocates.¹³ Data from the Law Society of South Africa, Legal Education Division (LSSA-LEAD) statistical report¹⁴ relating to 2006 law graduates identifies that of the 2735 graduates, 1871 registered their articles as candidate attorneys in 2007, i.e. 68% aspired to become attorneys.

13 Communicated in a questionnaire completed by a Law Dean, May, 2009, which the author collated for the CHE-SALDA curriculum project, 2009.

14 National Legal Education Liaison Committee Meeting, Johannesburg (2008-11-07).

Rani mentioned a lecturer who told students that they would never survive in private practice; they should become prosecutors in the public service domain:

You know, [he] put us into those stereotype boxes and I think because we had the backgrounds ... [that we had] come from, we knew that those people place us in those boxes, that was something we were used to our entire life and the fact that we had made it to varsity meant that that box was not for us. So we understood; it annoyed us – that when someone presumes to say who you are – it would annoy us and frustrate us (Rani).

It is clear that the curriculum that is being enacted here by the (white, male) lecturer aims to reproduce existing social stereotypes. Rani also felt aggrieved that certain skills in the law curriculum which students were assumed to have learned at school, such as debating, were dependent on the type of school and the background of each student. Students coming into higher education from schools in disadvantaged communities would have had no experience of computers, mathematical numeracy and formal debating or public speaking (also often in a language other than their mother tongue).

Sandesh was critical of the “*distance*” between staff and students, saying that the only social or personal contact he had enjoyed with his lecturers was at the Law Students’ Ball at the end of his final year. He mentioned how intimidated he and his friends had been to approach staff members. Although faculty equity plans and policies are aimed at increasing the demographic representivity of law academics, in professional faculties, where academics’ salaries cannot compete with those outside of higher education, the problem of attracting qualified black professionals is exacerbated, resulting in an unrepresentative staff profile in many law faculties. The transformation of the teaching staff profile has in most faculties at HWUs not advanced much.¹⁵

The difficulties of experiencing a curriculum in a language that is not one’s mother tongue is another perspective on the theme of feeling like an “outsider.” This is captured in Busi’s vivid description of her sense of alienation as an isiZulu speaker, confronting the challenge of every reading task:

You know also coming from Zulu schools, every paragraph that I read, I had to go to a dictionary to look up the words. It would take me forever just to complete one particular task, and by the time I have looked at the dictionary for the fourth time, I have forgotten what it said in the first paragraph ... The thing that pulled me back was the language – it pulled me back badly.

15 Information disclosed by Deputy Dean at an HWU Faculty Staff Meeting, June 2009.

3 2 Understandings of the Curriculum: LLB Degree a Qualification that Equips One to Earn a Living and Therefore Should be Practice-Oriented

Rani made the following comments:

Most of the students that come through these doors are not wealthy students who can afford tuition (paid for) by parents ... they afford tuition by student loans, by the bank, or via many family ... they want to come and be taught ... so that when they leave they can earn money, get a job ...

From the outset, Busi too made the point that becoming a lawyer was a means of earning a living: "I thought of law, to be honest as more about making money than justice".

Sandesh mentioned at three different points, how he was hoping "to go somewhere in life" with his law degree. He emphasised that his LLB experience was of an overtly academic focus in the curriculum that failed to prepare graduates adequately for professional practice:

It was a very theoretical degree; the curriculum was too theoretical, unrelated to the demands of practice; a lot of courses I did have no relevance to practising. I think the problem is ... it is still too academically based.

These comments all reflect an approach to studying law that has at its core an instrumental functionality. It is viewed as a professional qualification that ensures the employability of a graduate as its ultimate purpose and goal. This critique of the failure of the curriculum to provide adequate exposure to practical legal skills was expressed in varying degrees by most of the participants, including those whose motivation for studying law and whose approach to learning law were different from the views of these three participants. These comments resonate powerfully with the discourse of globalisation and the high-skills agenda, mentioned in government policy relating to higher education.¹⁶ For those who had been disadvantaged by a poor apartheid education and socio-economic barriers, widening access to higher education had a particular meaning: obtaining a degree as a guarantee of employability and upward social mobility.¹⁷

3 3 Approaches to Learning Law: "Doing the swotting thing" and Not Knowing How to Learn

In the approaches to learning, a steady increase in the learners' levels of self-confidence was discerned across the three categories that were identified from the data. Unfamiliarity, or lack of self-confidence in the

16 Ntshoe "National plan for higher education in South Africa: A programme for equity and redress or global competition and managerialism?" 2002 *SAJHE* 1 1-5.

17 Scott, Yeld & Hendry *Higher Education Monitor: A Case for Improving Teaching and Learning in South African Higher Education* (2007) 10.

strategic instrumentalist category resulted in the need to adopt surface learning strategies, involving memorisation and repetition.

Rani recounted how she memorised material:

... learning questions from past papers, “swotting”, learning by heart to regurgitate law, because I am a swotting person.

Fazila commented: “it was mostly memory work; 80% of it was.” Being passive learners, expecting lecturers “to feed it to you”, “to transfer knowledge” echoes the expectations of a transmission teaching style that is not uncommon in the discipline of law.¹⁸

Sandesh told how he was able to negotiate his way successfully through his degree by adopting a strategic (surface) approach, memorising answers to questions for the previous five years’ examination papers. The type of assessments experienced by law students often signals that this approach is what is required. The nature of assessments, and particularly the assessment of skills in law schools, clearly conveys to students which knowledge is most valued within a discipline.¹⁹ The data from this category reflect an instrumental approach to learning that is teacher-centred and premised upon an unbalanced relationship between learner and teacher. The expectation is that legal knowledge is transmitted by experts to waiting recipients.²⁰ This acquisitive notion of learning is often the norm in secondary schools where there is a lack of resources, unsatisfactory pupil-teacher ratios, dominant cultural views related to acceptance of authority, and teaching styles that rely on rote-learning as a substitute for knowledge-construction in the classroom.

Shulman, describing the “signature pedagogies” of various disciplines, explains that the importance of such a “signature pedagogy” for law students is that it signals “how knowledge is analysed, criticised, accepted, or discarded” within the discipline.²¹ Shulman argues that the pervasive and routine way in which legal education is presented (large lectures, controlled by an authoritative lecturer who poses questions which students are expected to answer by means of coherent claims that can be substantiated) provides a familiar context to which law students become accustomed. This “routine” avoids unfamiliarity, and in its very predictability it facilitates engaging with increasingly complex cognitive material in an incremental way. It also serves the purpose of inducting students into acceptable modes of legal thinking and argumentation.²² This pedagogical style is the type of teaching practice that is widely enacted in South African law faculties. It has a particularly deleterious

18 Shulman “Signature pedagogies in the professions” 2005 (Summer) *Daedalus* 51 52-59.

19 O’Brien & Littrich “Using assessment practice to evaluate the legal skills curriculum” 2008 *J of Univ Teaching and Learning Practice* 61 76.

20 Ramsden *Learning to Teach in Higher Education* 3 ed (2003) 14.

21 Shulman 2005 *Daedalus* 51 .

22 Shulman 2005 *Daedalus* 51 52.

impact on students who lack confidence and are not first-language English speakers. For students from disadvantaged schools where fluency in English is not common, responding to teachers in a critical or argumentative way, in English, is a challenge in itself, and for many students is also likely to be not a culturally acceptable mode of interaction.²³

Rani and Busi both mentioned how they did not know “how to learn, how to study” at university. Busi explained:

You are not prepared: it's difficult understanding and managing your time and yourself – it's easy to get lost.

Rani described how she and her friends had to teach themselves how to study at university because they fared so poorly at first, despite having been high achievers at their schools.

It was clear that some students arrive at university unprepared for independent learning and deficient in the metacognitive awareness necessary for successful post-school study. Underpreparedness of first-year students entering higher education is a national problem that has been regularly identified in the literature on higher education in South Africa.²⁴ In the diagnostic section on “indicators of the need for systemic change” in the *Higher Education Monitor* the authors identify as a structural obstacle the lack of effective articulation between consecutive phases of education such as transition from school to university, suggesting that appropriate support is essential to ensure continuity and tackle poor output and retention rates.²⁵

Boughey comments that reading in university disciplines and fields is qualitatively different to many other kinds of reading because it involves the reader in taking up positions in relation to the text – positions that derive from the values and attitudes within that discipline as to what counts as valued knowledge, and how that knowledge can be known.²⁶ She argues that only discipline experts can assist students to appreciate “the ways of reading and writing which underpin knowledge production in their own fields”, as a starting point for facilitating learning in a discipline.²⁷

23 Ngwenya “Integrating language awareness with critical language skills: A legal English experience” 2006 *SA Linguistics & Applied Language Studies* 24.

24 Scott, Yeld & Hendry 9.

25 Scott, Yeld & Hendry 21.

26 Boughey “South Africa: University students can't read?” *University World News* <http://www.universityworldnews.com/article.php?story=20090827173247724&mode> (accessed 2009-11-16).

27 Boughey 4.

3 4 Reason for Studying Law: Making Money

In the strategic instrumentalist category, the contradictory tensions or dual discourses in higher education of efficiency and equity were mirrored in the graduates' apparently conflicting reasons for studying law: making money or transforming society.

There was a sense of urgency about becoming qualified to earn a living, becoming sufficiently skilled to "make money," tempered by an awareness that lawyers may effect change in a transforming society. Sandesh commented that more often than not, "people" enter this business (of law) seeing it as a means to make money, based on what they perceive as glamorous and exciting representations of lawyers in the media. He admitted that he thought he would be driving an expensive sports model vehicle two years after his graduation; in reality, this was not the case. He described how he had imagined legal practice as "glamorous" with a large support staff, and had seen himself "playing golf every day" – expectations that bear no resemblance to his current lifestyle.

Busi's primary aspiration was "to make money." She frequently alluded to the perceived financial rewards, but concedes that "it is a long journey" to become a partner, requiring you to meet fee targets for several years before a promotion is considered. She commented that her first salary had been "half of my Mom's salary – and my Mom is a nurse." She now concedes: "there is no money in law!"

3 5 Conceptions of Theory/Skills Dichotomy: Practical and Appropriate Skills Lacking

In the strategic instrumentalist category, a clear dichotomy between academic (theoretical) learning at university and professional (practical) skills was perceived as the major shortcoming in the LLB curriculum. Strong views that theoretical subjects unrelated to practice should be removed from the curriculum, were expressed.

Sandesh explained:

The problem is we learn so much theory and you ask anybody: it is just a matter of swotting and regurgitating.

The obstacle presented by the need for fluency in English for a legal professional is a critical feature of the "hidden" curriculum that is only marginally addressed within the formal curriculum and in ways that do not develop essential language skills that are expected and required by employers. Even for first-language English speakers, the intimidating experience of appearing in court creates anxiety because it has to be learned quickly "on the job." Maria expressed a concern (echoed by David and Sandesh) that these rudimentary oral "lawyering" skills were not explicitly included in their university curriculum:

Trial skills are lacking: standing up before a magistrate and appearing; knowing how to address the magistrate; knowing how to put forward the argument in a logical manner. Your opponent will reply to your argument. You have to know to write it down and rebut it and you have to know to pick up and think quickly and you are not taught that.

Maria added that “it depends on your firm: how much guidance and support you get helping to teach you professional skills.” She explained that while some firms may teach you and take you to many trials before you have to “do it yourself”, other firms do not.

The traditional view of academics that these aspects of professional skills training are best taught by professionals does not take into account the uneven quality of professional training that occurs in different firms.

3 6 Conceptions About Ethics: A Personal Issue

Strategic instrumentalist participants stated that ethics had not been incorporated into the law curriculum in their undergraduate degree but had been learned during their period of articles of clerkship. They had studied the Law Society Code of Ethics at the Practical Legal Training School in order to pass the professional attorneys’ admission examinations. All agreed that ethics form an important component of being a professional, but they are a “personal issue.”

The need to introduce a pervasive thread of ethics education throughout the law curriculum has been persuasively argued by various academics in the United States, in England, and in Australia, but it seems that these arguments have not yet borne fruit in law curricula.²⁸ Robertson proposes that the focus in law curricula should be much wider than teaching students the codes of professional conduct: curricula should coherently incorporate a more pervasive emphasis on the requisite ethical and moral values for production of lawyers with integrity, honesty and the good of the society as a guiding interest in their professional behaviour.²⁹

3 7 Sensitivity to Diversity in the Curriculum: Stereotypes and Theoretical Learning

Rani conveyed an opinion that staff members were insensitive to diversity in their selection of materials and their stereotyping of students, as well as being “unapproachable.” She acknowledged that attempts to encourage students to engage with others from different cultures had been made at first-year level, but that the students themselves tended to thwart and undermine those intentions by preferring to mix with familiar

28 Rhode *In the Interests of Justice: Reforming the Legal Profession* (2000); Webb “Ethics for lawyers or ethics for citizens? New directions for legal education” 1998 *J of Law & Soc* 134 150; Robertson “Providing ethics learning opportunities throughout the legal curriculum” 2009 *Legal Ethics* 59 59-75.

29 Robertson 2009 *Legal Ethics* 59 65.

friends. She also mentioned how some students manipulated their membership of tutorial groups to avoid attending classes taught by tutors who were from a different race group.

Busi's experience of the module Legal Diversity mentioned how it had been interesting as theory, but:

... it wasn't so much about teaching you what happens if you get a client from a different ethnic group and how you deal with that. No. Everything was theory.

Sensitising students to living in a diverse or pluralistic society was identified by the Deans of Law in 1997 as one of the guiding principles that should inform the development of law curricula.³⁰ This emphasis reflected the national educational policy discourse of transformation and diversity in post-apartheid South Africa. According to *White Paper 5: A Programme for the Transformation of Higher Education*, transformation "requires that all existing practices, institutions and values are viewed anew and rethought in terms of their fitness for the new era."³¹ With this in mind, modules ought to have been developed to heighten students' awareness of the constitutional imperatives regarding equality and diversity. In many Law faculties, the fact that the new constitution and the effect of the Bill of Rights automatically filtered through into many substantive law modules, was thought to be an adequate response to addressing diversity issues. This allowed faculties to avoid addressing issues of diversity, racism and social justice explicitly with students. This disjuncture between the formal knowledge taught in the curriculum (constitutional jurisprudence) and the everyday interactions in classrooms has been noted in the *Report of the Ministerial Committee on Transformation, Social Cohesion and Elimination of Discrimination in Public Higher Education Institutions* (2008), as a disjuncture between official policies on transformation and lived practices in classrooms, staff rooms and residences.³²

It seems that there has been a shift towards interpreting diversity as embracing or accommodating, or engaging differences, which requires not only "diversity as curricular content" but also developing capacities for "engaging differences."³³ Initiatives tend to be fragmented and dependent on individual faculties as there is an absence of a holistic theoretical framework to guide initiatives, and no unified view on

30 Iya "The legal system and legal education in Southern Africa: Past influences and current challenges" 2001 *Journal of Legal Education* 356; McQuoid-Mason 2004 *Obiter* 101.

31 Department of Education 1997 par 1 1.

32 *Ministerial Report on Transformation in Public Higher Education Institutions* (2008).

33 Schneider "From Diversity to Engaging Difference: A Framework for the Higher Education Curriculum" in *Knowledge, Identity and Curriculum Transformation in Africa* (eds Cloete *et al*) (1997) 128.

whether evolutionary change or managed change is preferable.³⁴ The Ministerial Committee on Transformation reported that:

the transformation of what is taught and learnt in institutions constitutes one of the most difficult challenges this sector is facing. In light of this, it is recommended that institutions initiate an overall macro review of their undergraduate and postgraduate curricula, so as to assess their appropriateness and relevance in terms of the social, ethical, political and technical skills and competencies embedded in them. This should be done in the context of post-apartheid South Africa and its location in Africa and the world. In short, does the curriculum prepare young people for their role in South Africa and the world in the context of the challenges peculiar to the 21st century?

4 Outcome Space B (Pragmatic Generalist): “Law is Just a Tool”

In contrast to the strategic instrumentalist perspective, the pragmatic generalist position reflected a comfortable ease, a sense of finding a comfort zone where the student’s sense of self prevailed over the surrounding milieu. The law degree was seen as “empowering”, giving the student control over his/her destiny. David, a white student, described how he became more and more confident about asking lecturers to explain if he was not following what was being discussed:

I would ask questions and say: “... go over it again please.” Everyone in the lecture was saying: “don’t ask him questions!” Ja, and I mean I actually stopped caring that everyone else said that. I mean I didn’t disrupt the lectures but if I didn’t understand something and I would need clarity on it, I would ask.

David recalled the way many students remained silent during lectures, yet at the tutorials it was clear that the entire class had not understood much about the topic.

In this pragmatic generalist category, the student saw the learning as an acquired body of knowledge to be utilised in different contexts as an adaptable, generalist tool. There is neither the sense of urgency to become skilled in order to earn a living, nor the passion for changing oneself to become a professional:

[Law] is just a tool ... we use the law as a tool to get certain results to assist people and use the tool, so to speak, in different ways ... whatever I do must be a general degree to have if I want to go into business or do anything and that’s where the whole empowerment thing comes from.

This approach echoes one of the strong arguments raised by the South African Law Deans’ Association (SALDA) in resisting the teaching of

34 Cross “Institutionalising campus diversity in Southern African higher education: Review of diversity scholarship and diversity education” 2004 *Higher Ed* 396.

vocational legal skills throughout the law degree. Their view is that the LLB degree provides a solid foundational education for many careers.³⁵ Students who wish to continue in the law professions will undergo further specific vocational education during their articles of clerkship or pupillage. In a statement SALDA explained:

- (i) SALDA believes that universities should remain true to their core function, which is to provide relevant legal education to students who can then use such an education in a variety of ways, the practice of law being a significant but not exclusive field of activity.³⁶

The sub-text in this viewpoint seems to be enhancing the marketability of the qualification.

4 1 The LLB Degree Provides a Generalist Education; It Fosters a Particular Approach to Thinking and Understanding

Within this category of description, the experience of curriculum was regarded as the acquisition of “ways of thinking.”

David commented:

We use the law as a tool to get certain results, to assist people and use the tool, in different ways. Varsity is not a practice place, it is an academic place. You are getting a knowledge base; you have a way of thinking, a way of learning.

Maria, too, referred to a “way of thinking” when she mentioned that “[y]ou have to find things, so it develops your mind to think in a certain way ... ways of thinking”.

The pragmatic generalist approach to learning law through the curriculum reflected a self-confidence that enabled a more active engagement in and control over learning:

Students blame lecturers for not preparing them for exams or marking in a particular way, instead of taking responsibility for their own learning, questioning ... you have all the resources at university; you need to make it work for you; it's no one else's fault, other than your own.

These comments from David reflect the confidence that emanates from a student who is familiar with independent learning styles. He admitted to “cramming before exams,” but explained that it was easier to understand and (then) memorise than to learn “parrot fashion.” His attitude reflects that as a white male he is in a comfort zone where his voice is heard and he feels able to question, to challenge and to successfully negotiate the hidden curriculum, or the tacit rules, because

35 SALDA Position paper on Legal Education (2008-08-25).

36 SALDA Position Paper on Legal Education (2008-08-25).

of his familiarity with the language of the lecturers, and the discourse of the institution, as well as his educational background.

4 2 Learning Skills in a Contextualised Setting

Conceptions about the dichotomy between theory and skills were viewed by the pragmatic generalist category as providing a “skeleton” or “framework” of principles and concepts, the theory that is “quite academic.” An adequate separation of academic skills, from university education, and practical lawyering skills, acquired once graduates are “working” in professional practice was regarded as acceptable:

[University] is not an institution for gaining practical experience; practical skills in the real world are completely different to what you learned at university; how you negotiate with people, what you say when you get to court – you pick these up very quickly (David).

This model works well provided the candidate attorney receives adequate exposure to working with an experienced practitioner, in an environment where there is time to learn by watching.

4 3 Ethics: “A very blurry thing”

Graduates in the pragmatic generalist group recalled learning a little about ethics towards the end of the degree: about attorneys being struck off the roll, but as David commented, “quite what the bounds of ethics are for an attorney, well...it’s a very blurry thing”.

4 4 “Understanding where others are coming from”

Engagement with students from different backgrounds who had different perspectives on most topics, is the overriding recollection of being aware of diversity in the pragmatic generalist position. A positive view of the “vigorous arguments” with students from other cultural groups, according to David, was that you began to understand “where others were coming from,” which has been helpful to him in dealing with clients from different race groups.

5 Outcome Space C (Transformed Vocationalist): “Giving it my all”

The third category of description was the transformed vocationalist perspective. The term “vocation” is adapted from Dewey (1916) and encompasses the “full range of wider social and political connotations of “vocation,” to avoid viewing a vocation as a trade or specific job.³⁷ Views expressed by participants in this category represented a serious

37 Johnstone “Liberal ideals and vocational aims in university legal education” 1999 *Web J of Current Legal Issues* <http://webjcli.ncl.ac.uk/1999/issue3/johnstone3.html> (accessed 2009-10-08).

commitment to, and a personal focus on becoming a law professional; there was a sense of changing as a person. Expressions like “making sacrifices,” “I really think I gave it my all,” “taking it so seriously,” “it was really, really hard work,” all suggest putting in effort and an acceptance of the rigorous academic endeavour required to achieve this goal.

5 1 A Law Degree Represents the Fulfilment of a Personal Vocation

Maria spoke with fondness of her experience of the curriculum:

I really love studying and I loved the law degree at university and all that work that I had put into it, I couldn't throw my files of notes away. Your personality changes a bit.

Similar comments from Fazila convey her “passion” for law that shaped her experience of the curriculum:

It is basically something that I wouldn't give up ... You have to have a passion as well. You must. It must be something that you actually want to do. I believe in that strongly because when you have a passion about something you tend to work harder and you tend to enjoy what you are doing. You put your heart and soul in it because you enjoy what you do, which is important.

The “passion” for their vocation and an expectation of what it entails are critical indicators of total engagement of the person, which combines more than knowledge and skills in practising their profession.

5 2 Learning Independently and Reflectively

In this category the approaches to learning law were expressed as an awareness of being reflective about learning. New ways of thinking about law as a discipline and taking pleasure in developing intellectual skills were a notable feature. Maria explained in the following terms:

I used to take notes and go home and work with the textbook to think about it, absorb it; I loved the law degree at university ... you learn a way to think; reading cases develops your mind, challenges you; you need to reflect on your understanding; you teach yourself. I would read work over and take time to absorb it.

This resonates with Boulton-Lewis's view that the more complex the students' conceptions of learning are, the more likely it is that they are “associated with more sophisticated reasons for study and study strategies.”³⁸

The curriculum can be seen as empowering students to develop their professional identity. Independent learning and taking personal responsibility for their construction of knowledge is a defining characteristic in this category.

38 Boulton-Lewis “Tertiary students' knowledge of their own learning and a SOLO taxonomy” 1994 *Higher Ed* 387 392.

5 3 Caring and Helping Others

In this transformed vocationalist category, the graduates expressed an anticipation that their work as lawyers would enable them to help others in a caring way, although their reflections now do not necessarily suggest that this is the case in practice:

I am type of person where I would like to sit down and listen to your problem and obviously then advise you ... I like the interaction (Fazila).

The aspect of helping and caring about people (clients) is a strong motivational factor in this category. Maria commented that she considered herself a “caring type of person who wants to help,” but she concedes that she has become somewhat cynical and has learned that she cannot be “an emotional lawyer.”

5 4 Theory to Underpin Practical Skills

The theory/practice dichotomy in this category of description was regarded as appreciating the “groundwork” of theoretical or foundational understanding, prior to entering professional practice. Fazila mentioned that the “communication and people skills” learned at university, were important in building self-confidence, as part of a maturation process in becoming a professional.

Although graduates were consistent in their view that more skills as preparation for practice ought to be included in the curriculum, they commented that the “research and thinking skills” for professional practice were acquired through the rigour of academic discipline. Many subjects were viewed as “purely academic” and practical courses were not taken seriously because of the absence of formal or rigorous assessments in those modules.

5 5 Learning the Standards of Professional Conduct Too Late

Graduates’ understandings of ethics in the law curriculum in this category reflected a well-defined understanding of ethics as a critical aspect of professionalism. A view was expressed that morals and values are inherent to a person, but the objective professional standards of integrity, knowing what is expected of attorneys by the Law Society of South Africa, ought to be made explicit throughout the degree. Participants recalled having learned what constituted a breach of the ethical codes – and the possible repercussions – after graduation, from the partners in their firms and for the attorneys’ admission examinations, but never as students. Graduates were critical of the fact that students were not made aware at an earlier stage in their academic careers of what standards of behaviour are expected of legal professionals.

5 6 Values and Learning Respect Through the “Hidden Curriculum”

In response to the question of how the curriculum prepares graduates in respect of sensitivity to diversity, the prevailing experience of the participants who expressed views in this category was that it had been valuable to mix with people from diverse cultures daily at university: this sustained interaction prepares lawyers for the working world. Maria’s view was that the daily interaction within a diverse student body, over a period of four years (the hidden curriculum) was more significant than formal learning.

In the discussion of the three positions identified as constituting the outcomes space of graduates’ experiences of the law curriculum, it thus became clear that a hierarchical relationship existed between the three positions, with each category reflecting a more engaged relationship between the graduate and the experience of the law curriculum.

6 Curriculum Replicates Historical Disadvantage

The motif of a circle: a “cycle of disadvantage,” emerged from the data as a representation of the replication of historical disadvantage through the curriculum. A pattern of graduates’ previous educational experience and socio-economic backgrounds that underscored their approach to learning, their motivation for becoming a lawyer and their conceptions about being a professional became clear from the data. In turn, these factors interacted within the milieu of the law school curriculum, the tacit practices, the hidden curriculum and other obstacles inherent in the institutional and departmental culture, to determine the graduates’ training experiences, the professional opportunities and career trajectories of the graduates in the second part of the study.

Criticisms of curricula in higher education often resonate with Heidegger’s views that curricula have become “instrumentalised, vocationalised, corporatised and technologised.”³⁹ These trends appear to be in response to increasing pressures on universities from external (government) agencies, couched in the neo-liberal globalisation discourse, aimed at improving quality, throughput, and the acquisition of de-contextualised graduate vocational skills. Ironically, it is this very emphasis in law curricula which seem to subvert the possibility of curriculum as transformative educational experience. The curriculum acts to reproduce existing inequalities rather than serving as a transformative vehicle for students. In order for curricula to have a transformative and lasting effect on graduates, changing learners from students into professionals, they should reflect a concentration not only on epistemological aspects, in the form of the acquisition of knowledge

39 Thomson “Heidegger on ontological education, or: how we become what we are” 2001 *Inquiry* 243 255.

and skills, but also on an ontological component, as imparting an awareness of a way of being or becoming a professional. The ontological focus serves to develop a sense of knowing that is not “exclusively cognitive, but is created, enacted and embodied.”⁴⁰

When an ontological component is integrated into professional education programmes, it extends and develops the “ways of being” of a profession, addressing not only the necessary knowledge and skills required – the cognitive, intellectual and practical aspects of professional education – but also the additional dimension of transforming the aspiring professional as a human being.⁴¹ Thomson highlighted the “ontologisation of education” in Heidegger’s work as a means of “transforming the self.”⁴² The motif of the circle is used by Thomson to explain the purpose of transforming the learner through education:

to bring us full circle back to ourselves, first by turning away from the world in which we are most immediately immersed, then by turning us back to this world in a more reflexive way.⁴³

These conceptions of curriculum and its ontologisation connect with the notion of unifying the “three apprenticeships of professional education” identified in the Carnegie Report.⁴⁴

7 Conclusions

The popularity of law as a pathway to social mobility was a notable motivational feature in the data, where several participants (Sandesh, Busi and Rani) referred to their intention to “do well” in life through becoming a professional. As Letseka and Breier note: “graduating has significant financial benefits for the individual concerned.”⁴⁵ The part that such motivation and market-related influence play in shaping students’ conceptions of curriculum are expressed in their expectations of learning “practical skills” that will equip them with the means to secure employment. The looming financial burden of re-paying student loans after graduation serves to bolster many disadvantaged students’ existing approaches to learning, which typically focus on surface rote-learning to which they were accustomed in disadvantaged schools where resources and teaching expertise are often less than optimal:

40 Dall’Alba “Improving teaching: enhancing ways of being university teachers” 2005 *Higher Ed & Development* 361 365.

41 Dall’Alba “Learning professional ways of being” 2009 *Ed Philosophy and Theory* 34.

42 Thomson 453.

43 Thomson 254.

44 Sullivan, Colby, Wegner, Bond & Shulman *Educating Lawyers: Preparation for the Profession of Law* (2007) 3.

45 Letseka & Breier “Student poverty in higher education: the impact of higher education dropout on poverty” in *Education and poverty reduction strategies: issues of policy coherence colloquium proceedings* (ed Maile)(2008) 92.

A notable theme is the complexity of factors that affect learning. Apart from personal circumstances, these include a range of cognitive factors, including 'learning style' and orientation, and different understandings of purpose and the requirements of the learning process. In South Africa key issues include the nature of prior educational experience as well as the level of achieved performance, and language background in relation to the medium of instruction.⁴⁶

The data thus suggest that students' engagement with curriculum is often founded on strategic ways of "getting through" and not seeking anything more than the qualification at the end. For many aspiring lawyers, their family background and educational history does not prepare them for the experience of becoming a professional: Fazila revealed that her ideas about what it meant to become a lawyer came from popular television images. Thus for many "non-traditional" students, their status as "outsiders" – both within the university and beyond it, once they enter the realm of professional enculturation – along with their personal history and expectations, tends to replicate their social positioning. Identity dissonance amongst "outsider" students in professional degree programmes has been identified as creating a distracting struggle which can lead to academic underperformance by such students.⁴⁷ The outsider students' personal identities are at odds with the dominant perception of professional identity in law schools, which privileges middle-class (often male, and in South Africa, white) viewpoints. In order to be successful, students may have to internalise appropriate professional identities that require a suppression of their personal identity and value system.⁴⁸ Diverse cultural, religious, language and socio-economic values jostle for acceptance within an historically middle class, white English-speaking, male cultural ethos.

The *Higher Education Monitor of 2007* specifically recommended that in order to address the disparities in the socio-economic and educational backgrounds of the diverse student intake "equity-related educational strategies" will become a key element in contributing to development.⁴⁹ Improving formal access to universities without enhancing epistemological access, which in this context implies "more than introducing students to a set of a-cultural, a-social skills and strategies to cope with academic learning and its products", will not be sufficient to improve the success and retention rate of students in higher education. Unless students are explicitly made aware of the conventions and rules

46 Scott, Yeld & Hendry 33.

47 Sommerlad "What are you doing here? You should be working in a hair salon or something: Outsider status and professional socialisation in the solicitors' profession" 2008 *Web J of Current Legal Issues* <http://webjcli.ncl.ac.uk/2008/issue2/sommerlad2.html> (accessed 2009-07-10); Costello *The Professional Identity Crisis: Race, Class, Gender and Success at Professional Schools* (2005) 8.

48 Sommerlad 8.

49 Scott, Yeld & Hendry 26.

of what counts as academic knowledge, including the use of appropriate academic language, the current inequities will no doubt persist.⁵⁰

In conclusion, a re-visioning of law curricula, incorporating notions of ethics, sensitivity to diversity, and deliberately including materials that are inclusive of all students is recommended. Pedagogical strategies that are facilitative of students' developing metacognitive awareness of their own learning, independent and interactive "deep" learning practices, as well as the teaching of skills to enhance theoretical understandings would all serve to improve legal education in South Africa.

50 Boughey 3.