

A HISTORICAL REVIEW OF THE DEVELOPMENT OF THE POST-APARTHEID SOUTH AFRICAN LLB DEGREE – WITH PARTICULAR REFERENCE TO LEGAL ETHICS

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1 Introduction

The purpose of this article is to consider the historical, political and social context of the Bachelor of Laws (LLB) degree – especially insofar as it pertains to teaching legal ethics. It reviews the role of the law, the legal profession and the system higher education not only during the apartheid era, but also during the transition to democracy and in contemporary South Africa. In addition, this article also provides a detailed explication of the efforts to transform legal education since 1994. Aspects which are especially relevant to the question of legal ethics in the LLB degree are highlighted.

In the context of this article, the term “legal ethics” is used to refer to the principles and values which, along with professional rules of conduct and statutory and common law, regulate lawyers’ behaviour. Legal ethics thus references both extrinsic and intrinsic controls on lawyers’ conduct. Extrinsic controls include the

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provisions of the Attorneys Act 53 of 1979, and the codes, rules and regulations of the professional societies. Intrinsic controls include personal values and principles, such as honesty, which are generally regarded by society and the profession itself as representing the best standards of ethical and professional practice.¹

In the last part of this article, the current state of legal education in South Africa is discussed.

2 Historical and political context

2 1 The legal profession

Lawyers have played a paradoxical role in South Africa's history. As the Truth and Reconciliation Commission (TRC) noted, most lawyers played a central role in legitimising the apartheid system.² However, as the TRC also recognised, a small, but significant, number of lawyers chose to pursue justice within the bounds of the law. Insofar as these lawyers were concerned, the TRC accepted that not only did their participation benefit the clients they served, but that these benefits outweighed any harm their participation in the apartheid system might have caused.³ Of course, many lawyers actively fought against the apartheid regime at great personal and professional cost. Nelson Mandela himself was a lawyer, as were many of South Africa's other struggle heroes,⁴ and the TRC found that such lawyers played a significant role in promoting the vision of South Africa as being a constitutional democracy throughout the struggle against apartheid.⁵

Ultimately, it was lawyers who were instrumental in negotiating South Africa's peaceful transition to the new constitutional democracy.⁶ This is not a new or unusual role for lawyers; it is widely recognised that the responsibilities of a lawyer in a state emerging from repression are especially important. These include guiding the nation towards a peaceful transition to democracy and the rule of law.⁷

- 1 The precise content of the appropriate controls may be contested. See, eg, F Mnyongani "Whose morality? Towards a legal profession with an ethical content that is African" (2009) 24 *SA Public Law* 121-134 at 121.
- 2 Truth and Reconciliation Commission of South Africa *Final Report* (1998 vol 4) at pars 33 and 38, available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> (accessed 5 Mar 2011).
- 3 *Idem* at par 3. See, also, A Craiger *Cause Lawyering in South Africa: Lawyers and the Law in the Struggle Against Apartheid* (Austin USA, 1999).
- 4 N Mandela *A Long Walk to Freedom: The Autobiography of Nelson Mandela* (Boston, Mass, 1994).
- 5 Truth and Reconciliation Commission of South Africa (n 2) at par 37.
- 6 W Esterhuyse *Secret Talks and the End of Apartheid* (Cape Town, 2012).
- 7 O Oko "Consolidating democracy on a troubled continent: A challenge for lawyers in Africa" (2000) 33 *Vanderbijl J of Transnational Law* 573-645 (hereafter Oko "Consolidating") at 573; O Oko "The problems and challenges of lawyering in developing societies" (2004) 35(2) *Rutgers LJ* 569-573 (hereafter Oko "Problems") at 569.

The fact that South Africa chose a constitutional democracy over any other form of government clearly signified that the law (and thus lawyers, and thus legal education) would play a key role in ensuring justice – and would be responsible for ensuring that the constitutional rights enshrined in the Bill of Rights⁸ were implemented.⁹ As Oko has pointed out, lawyers are responsible for ensuring that democracy works. They hold the power to curb governmental abuse, to promote beneficial societal and economic change, and to maintain political stability.¹⁰ The Constitution requires the use of law to promote social justice and democracy and it is the responsibility of lawyers to see that the Constitution does not become “dead letter” law.¹¹

The “special” responsibility of lawyers in society has been formally recognised by the legal profession itself in the Legal Services Sector Charter.¹² This Charter acknowledges that the legal profession’s special responsibility includes addressing the inequalities which plague South African society.¹³ In addition, the Charter expresses the need to ensure that legal education includes social-context training to achieve this.¹⁴ The legal profession has, however, been criticised for failing to live up to its expectations in this regard.¹⁵

- 8 Chapter 2 of the Constitution of the Republic of South Africa, 1996.
- 9 P Langa “Transformative constitutionalism” (2006) 17 *Stellenbosch LR* 351-360 at 351; K Klare “Legal culture and transformative constitutionalism” (1998) 14 *SAJHR* 146-188 at 147; J Cameron “Our legal system – Precious and precarious” (2000) 117(2) *SALJ* 371-376 at 371. See, also, L Greenbaum “The four-year undergraduate LLB: Progress and pitfalls” (2010) 35(1) *J of Juridical Science* 1-27 at 9; F Mnyongani “Duties of a lawyer in a multicultural society” (2012) 32(2) *Stellenbosch LR* 352-369 at 356; M Mutua “Hope and despair for a new South Africa: The limits of rights discourse” (1997) 10 *Harvard Human Rights J* 63-114.
- 10 Oko “Problems” (n 7) at 569.
- 11 A Sajo “The role of lawyers in social change: Hungary” (1993) 25(2) *Case Western Reserve J of International Law* 137-146 at 137; K Johnson “Lawyering for social change: What’s a lawyer to do?” (1999) 5 *Michigan J of Race and Law* 201-228 at 201; S Bachmann *Lawyers, Law and Social Change* (Bloomington USA, 2001); S Bachmann *Lawyers, Law and Social Change Update* (2010) available at http://www.law.nyu.edu/ecm_dlv3/groups/public/@nyu_law_website_journals_review_of_law_and_social_change/documents/documents/ecm_pro_068619.pdf (accessed 16 Oct 2012); WW Kilglin “Lawyers: Guardians of democracy” (1986) 38 *Baylor LR* 249-252 at 249; O Agbakoba “The role of lawyers and the observance of human rights” (1995) 5 *J of Human Rights Law and Practice* 115-150 at 120.
- 12 Law Society of South Africa and General Council of the Bar of South Africa “Legal services sector charter” (2008) available at <http://www.lssa.org.za/upload/LSC.pdf> (accessed 1 Mar 2011).
- 13 *Idem* “Foreword”.
- 14 *Idem* at par 2 5 1 iii. However, see H Kruuse “A South African response to legal ethics” in M Robertson, L Corbin, K Tranter & F Bartlett *The Ethics Project in Legal Education* (London, 2011) at 105-107.
- 15 D Mlambo “Carnegie 3: Conference Address” Oct 2012 *Noseweek* 156 available at <http://www.noseweek.co.za/article/2824/Bench-press> (accessed 16 Oct 2012); *Draft Report on LLB Summit: Legal Education in a Crisis?* (29 May 2013) at 2 (document on file with author); J Sarkin “Promoting access to justice in South Africa: Should the legal profession have a voluntary or mandatory role in providing legal services to the poor?” (2002) 18(4) *SAJHR* 630-644 at 630.

Scott cautions that law is an inherently conservative force, and that future lawyers must be properly equipped to play their proper role in the transformation of society.¹⁶ This is in fact the responsibility of legal education. The way lawyers conceive of themselves as legal practitioners, and their role in society, is profoundly affected by their experience of legal education.¹⁷ It is a truism that “the law is what lawyers are, and the law and lawyers are what the law schools are ...”¹⁸

The responsibility of legal education in this regard, and its potential to influence the legal profession and wider society, has been acknowledged by the South African legal academy. In 2009, the South African Law Deans Association (SALDA) and the Society of Law Teachers of Southern Africa (SLTSA) re-affirmed their “commitment to constitutional values and principles” and asserted the “importance of legal education for the proper functioning of the legal system”. In addition, they also re-affirmed “their responsibility to produce lawyers with the necessary analytical skills, critical disposition and independence of thought to play a meaningful role in the development of [South African] society” and called on “all legal educators and stakeholders to exert their energies to achieve this”¹⁹

The responsibility of lawyers in society was also one of the major themes at the LLB Summit held on 29 May 2013,²⁰ where it was stressed that if the legal profession is not fulfilling its proper role in society, the education of lawyers is a significant part of the problem.²¹ A repeated concern at the Summit was the fact that law faculties are not producing the type of graduates required to further a justice and rights culture.²² Greenbaum argues that a factor contributing to this deficit is the lack of attention given to the ethical dimension of lawyering in law faculties. This omission, she argues, “raises serious questions about the possibility of legal education becoming a transformative experience for law students or for exerting any positive influence on the future of the legal profession”²³

- 16 S Scott “Knowledge production and transmission in a changing society: Challenges facing law lecturers in a distance education environment in South Africa” (2006) 20(5) *South African J of Higher Education* 731-743 at 732; PM Mtshuaulana “In defence of the advocates’ profession” (2009) 22(3) *Advocate* 2-3 at 3.
- 17 F Cownie *Legal Academics: Culture and Identities* (Oxford, 2004); M Paxton “Legal academics: Culture and identities (Review)” (2005) 68(1) *The Modern LR* 156-174 at 166.
- 18 HT Edwards “The growing disjunction between legal education and the legal profession” (1992) 91 *Michigan LR* 34-78 at 34. Indeed, research shows a clear link between the style and content of legal education and the approach of law graduates to legal practice (see E Mertz *The Language of the Law School: Learning to Think Like a Lawyer* (Oxford, 2007)).
- 19 SALDA “SALDA statement” (2009) 22(2) *Advocate* 8-43 at 8.
- 20 *Draft Report on LLB Summit* (n 15) at 2.
- 21 *Ibid.*
- 22 *Idem* at 3.
- 23 L Greenbaum *The Undergraduate Law Curriculum: Fitness for Purpose* (PhD thesis, University of KwaZulu-Natal, 2009) at 274.

22 Higher education

Education, like law, has a dual identity in the South African context. Historically, apartheid education policies were instrumental in maintaining the ideology of apartheid and thus in excluding black citizens from meaningful participation in all sectors of society, including the system of government.²⁴ Legal education itself was strongly influenced by the government's policy of apartheid and both contributed to and reinforced it.²⁵ Greenbaum explains that legal education was dominated by "white" interests and that it contributed to and reinforced societal inequality and white hegemony.²⁶ Today, however, there is a strong belief that education, in general, and higher education, in particular, is the key to transforming South Africa and unlocking its potential.²⁷

Given the extent to which education, including higher education, contributed towards the maintenance of apartheid, it is not surprising that the system of higher education has undergone a process of transformation over the past twenty years.²⁸ This process may be traced back to 1996 when the National Commission on Higher Education (NCHE) issued a report which was used to develop policy which identified equity, redress of inequalities, reconstruction and development as its central concerns.²⁹

Following the publication of this report the Higher Education Act was promulgated.³⁰ It provided for the establishment of the Council for Higher Education

- 24 The University Education Act 45 of 1959 restricted entry to universities on the basis of race.
- 25 C Dlamini "The law teacher, the law student and legal education in South Africa" (1992) 19 *SALJ* 595-610 at 598; P Iya "The legal system and legal education in Southern Africa: Past influences and current challenges" (2001) 51 *J of Legal Education* 355-362; L Greenbaum "A history of racial disparities in legal education in South Africa" (2009) 3 *John Marshall LJ* 1-18 at 1.
- 26 Greenbaum (n 25) at 13.
- 27 DoHET *Education White Paper 3: A Programme for the Transformation of Higher Education* *Government Gazette* 18207 of 15 Aug 1997; Council for Higher Education (CHE) *Towards a New Higher Education Landscape: Meeting the Equity, Quality and Social Development Imperatives of South Africa in the 21st Century* (2000) at 25-26. See, also, DoHET *Report of the Ministerial Committee on Transformation and Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions* (30 Nov 2008) available at http://www.vut.ac.za/new/index.php/docman/doc_view/90-ministerialreportontransformationandsocialcohesion?tmpl=component&format=raw (accessed 28 Jan 2013) (hereafter DoHET Report) at 6; and *The Response from the Council of Higher Education to the Report of the Ministerial Committee on Transformation and Social Cohesion and the Elimination of Discrimination in Public Higher Education Institutions* available at http://www.che.ac.za/documents/d000202/CHE_response_to_Ministerial_Committee_Report_Dec2009.pdf (accessed 20 Jan 2013).
- 28 In the discussion that follows, some of the key developments in higher education from 1996 onwards are set out. It is important to note, however, that running parallel to these general developments were developments which pertained specifically to legal education. These will be discussed separately.
- 29 DoHET *Education White Paper 3* (n 27).
- 30 Act 101 of 1997.

(CHE). In 1999 the CHE undertook a general review of the institutional landscape of higher education and in response to this review the Department of Education issued the National Plan for Higher Education. This Plan, which prioritised increased efficiency and graduate outputs, argued that the number of higher education institutions in South Africa should be reduced, primarily through a process of institutional mergers.³¹

By 2003 the process of institutional mergers had reduced the total number of universities from twenty to eleven. Shortly thereafter the formula for funding higher education departments changed and law was placed in the lowest band of funding. In 2008, the Ministerial report on the transformation, social cohesion and the elimination of discrimination in public higher education institutions was published.³²

The next significant development took place in May 2009 when a separate Department of Higher Education and Training was formed.³³ According to its website, the mission of the Department is “to develop capable, well-educated and skilled citizens who are able to compete in a sustainable, diversified and knowledge-intensive international economy, which meets South Africa’s development goals.”³⁴

In 2010, the Department of Higher Education and Training (DoHET) invited stakeholders in education to participate in a summit to re-examine the role of higher education in societal development and transformation.³⁵ The participants agreed that the higher-education sector has a duty to produce socially responsible graduates who are conscious of their role in society, and as leaders of economic development and social transformation. They further acknowledged that market pressures in higher education had prioritised the corporate agenda over the transformative agenda, and agreed that university curricula should be oriented to social relevance and should enable and motivate students to become socially engaged citizens and leaders.³⁶

Whether the general efforts to transform higher education to make it more responsive to the needs of society have been successful is questionable.³⁷ There is

- 31 DoHET *National Plan for Higher Education* (2002) available at <http://www.dhet.gov.za/Reports%20Doc%20Library/New%20Institutional%20landscape%20for%20Higher%20Education%20in%20South%20Africa.pdf> (accessed 11 Feb 2015).
- 32 DoHET Report (n 27) at 6.
- 33 See <http://www.dhet.gov.za/SitePages/Home.aspx> (accessed 11 Feb 2015).
- 34 See <http://www.dhet.gov.za/SitePages/AboutUS.aspx> (accessed 11 Feb 2015).
- 35 Stakeholder Summit on Higher Education *Transformation Concept Document* (Oct 2009) available at <http://www.cepd.org.za/files/pictures/Stakeholder%20Summit%20on%20Higher%20Education%20Transformation.pdf> (accessed 13 Jan 2013) at 2.
- 36 Stakeholder Summit on Higher Education *Transformation Declaration* (Apr 2010) available at <http://www.cepd.org.za/files/pictures/Stakeholder%20Summit%20on%20Higher%20Education%20Transformation.pdf> (accessed 13 Jan 2013).
- 37 HR Hay “If walls could speak: Reflections from visiting a South African higher education classroom: Editorial SAJHE Heltasa Conference” (2008) 22(5) *South African J of Higher Education* 935-947 at 936; IM Ntshoe “National Plan for Higher Education in South Africa: A programme for equity and redress or global competition and managerialism?” (2002) 16(2) *South African J of Higher Education* at 7-10.

a real fear that higher education, as it is being managed, may be replicating and perpetuating the cycle of disadvantage for many students. As regards the LLB degree in particular, Greenbaum concludes that the promised “transformation” is superficial and illusory.³⁸

2 3 National Consultative Forum and Justice Vision 2000

One of the urgent priorities South Africa faced following the transition to democracy in 1994 was the need to address issues relating to the legal profession and legal education.³⁹ This was in order to give effect to constitutional values (most notably equity and access to justice) by ensuring that the legal profession became more demographically representative and more transparently aligned to the constitutional ethos.⁴⁰

To this end, in 1994, the Department of Justice and Constitutional Development (DoJCD) convened a National Consultative Forum (NCF) to which the main stakeholders in the legal profession and in legal education were invited.⁴¹ This gave impetus to the national debate about the transformation of the legal profession and legal education,⁴² which had started in the early 1990s.⁴³

The NCF met in November 1994, and this meeting led to the establishment of a special planning unit of the DoJCD in 1995. The unit produced a strategic plan called “Justice Vision 2000”.⁴⁴ The document was a devastating critique of the legal profession. It argued that the legal profession was alienated from the concerns of citizens and lacked a commitment to justice for citizens. It laid out a plan to transform the justice sector. The document raised questions about the focus and purpose of legal education, but did not make any direct recommendations in this regard.⁴⁵

2 4 Task Group on Legal Education

Although Justice Vision 2000 did not make any direct recommendations about the focus and purpose of legal education, various fora were subsequently convened

38 Greenbaum (n 23) at 365; *Draft Report on LLB Summit* (n 15) at 4.

39 For a discussion of the historical development of legal education in South Africa, see Greenbaum (n 25) at 8-10; Iya (n 25) at 355.

40 Greenbaum (n 23) at 213; S Godfrey & R Midgley *Law Professionals: Report on Scarce and Critical Skills* (South Africa, 2008) at 98.

41 Greenbaum (n 23) at 210-211.

42 *Idem* at 210, 212, 214 and 230-231.

43 Godfrey & Midgley (n 40) at 98.

44 Ministry of Justice *Vision 2000: Five year National Strategy for Transforming the Administration of Justice and State Legal Affairs* (1995), available at <http://www.doj.gov.za/policy/misc/justice2000.htm> (accessed 3 Mar 2012).

45 Greenbaum (n 25) at 23; Godfrey & Midgley (n 40) at 21.

to review aspects of legal education and practice. In April 1995, for example, the Legal Forum of Legal Education met.⁴⁶ It emphasised the need for a greater focus on practical skills in the LLB degree.⁴⁷ Later that same year, the DoJCD requested the law deans to establish a task group on legal education to put forward proposals for a new legal education framework.⁴⁸ Underlying this request was the notion that these proposals would be used to draft new legislation aimed at effecting changes to the structure of legal education.⁴⁹ The task group included government representatives, law deans, and representatives from the legal profession itself.

Ironically – given the emphasis on transformation and the importance of the indigenous context – the task group relied extensively on the *First Report on Legal Education and Training* by the Lord Chancellor's Advisory Committee on Legal Education and Conduct in England (ACLEC), which had been published on 24 April 1996.⁵⁰ In fact, the impression created is that the task group relied almost exclusively on the ACLEC report. No other resources are referred to, and there is no indication of the process that was followed by the task group in dealing with the monumental task it had been entrusted with. The task group made far-reaching proposals regarding the LLB degree with little, if any, input from educational experts – for which it has been heavily criticised.⁵¹ Despite the far-reaching nature of the task group's proposal there was a lack of “interrogation of the ramifications of the [proposed] changes, even by law academic leaders”⁵²

The process followed by the South African task group stands in stark contrast to the process followed by ACLEC, which commenced in October 1992 and culminated with the publication of its report in April 1996.⁵³ ACLEC records that it convened consultative panels and commissioned research projects on matters of especial importance.⁵⁴ It also published consultation papers in respect of which it received written comment and took oral evidence. Its members visited relevant institutions both locally and abroad, paying particular attention to countries where

46 Greenbaum (n 23) at 204.

47 Godfrey & Midgley (n 40) at 99.

48 Greenbaum (n 25) at 25; D McQuoid-Mason “Developing the law curriculum to meet the needs of the 21st century practitioner: A South African perspective” (2004) 1 *Obiter* 101-108 at 101.

49 Greenbaum (n 23) at 202.

50 Available at www.ukcle.ac.uk/files/downloads/407/165.c7e69e8a.aclec.pdf (accessed 5 Mar 2012) (hereafter ACLEC Report).

51 Greenbaum (n 9) at 2; S Woolman, P Watson & N Smith “Toto, I've a feeling we're not in Kansas anymore. A reply to Professor Motala and others on the transformation of legal education in South Africa” (1997) 114(1) *SALJ* 30-64 at 55.

52 J Campbell “The role of law faculties and law academics: Academic education or qualification for practice” (2014) 1 *Stellenbosch LR* at 17.

53 ACLEC was established in Apr 1991 under the auspices of the Courts and Legal Services Act, 1990 (c 41).

54 ACLEC Report (n 50) at 23.

legal education had been subject to scrutiny – notably Australia, Canada, Japan and the USA.⁵⁵

The most significant proposal made by the South African task group was that a four year undergraduate LLB degree should be introduced as the minimum qualification needed to practice as an attorney or an advocate.⁵⁶ The task group did not recommend that the content of the LLB degree be prescribed, despite strong calls for the standardisation of the curriculum.⁵⁷ This echoed the recommendations of ACLEC, and followed the approach adopted by the America Bar Association (ABA).⁵⁸

Although the task group emphasised the need for flexibility regarding the content of the curriculum, it did specify the general objectives to be achieved by the LLB. It also specified certain core recommended subjects to be included in the LLB curriculum. They are identical to those contained in the ACLEC report. The core subjects included “legal ethics”, and “legal skills”. There is no explanation of these terms – nor any discussion of what was envisaged by these subjects. This was consistent with the approach taken by ACLEC, which deliberately chose not to articulate a list of skills and values appropriate for legal practice – for fear of creating false dichotomies between the skills, knowledge and attitudinal dimensions of legal practice.⁵⁹ While it is true that an integrated, holistic strategy to integrate the various dimensions of legal education is required, the starting point must be a proper and common understanding of what it is that must be integrated.

The objectives to be achieved by legal education were listed as “intellectual, integrity and independence of mind; core knowledge; contextual knowledge; legal values and professional skills”.⁶⁰ These terms, and the paragraphs describing each of them, are identical to those in the ACLEC report.⁶¹ Legal values were described as including

a commitment to the rule of law, to justice, fairness and high ethical standards, to acquiring and improving professional skills, to representing clients without fear or favour, to promoting

55 *Ibid.*

56 Greenbaum (n 23) at 232-233.

57 *Idem* at 219.

58 The American Bar Association (which determines whether a law degree will be recognised for the purposes of entry into the profession) does not prescribe any courses other than one in ethics. Thus, effectively, ethics is mandatory for those who wish to become lawyers in the USA. See S Gillers “Eat your spinach?” (2007) 51 *St Louis LJ* 1215-1222 at 1219. This is also the case in Australia and New Zealand. See K Economides & J Webb “Teaching ethics and professionalism: A lesson from the Antipodes” (2001) 4 *Legal Ethics* 91-94 at 92.

59 ACLEC *Report* (n 50) at 43.

60 *Proposals by the Task Group on the Restructuring of Legal Education* (Jul 1996) in Greenbaum (n 23) App 10 at 485 (hereafter *Proposals by the Task Group*). The list is identical to the one contained in the ACLEC *Report* (n 50), which is said to have greatly influenced the task group. See D McQuoid-Mason (n 48) at 108; Iya (n 25) at 357; Greenbaum (n 25) at 11.

61 ACLEC *Report* (n 50).

equality of opportunity, and to ensuring that adequate legal services are provided to those who cannot afford to pay for them.⁶²

Greenbaum comments that by merely naming these attributes, the task group was simply paying lip service to the dominant view of the time, as reflected in the influential international reports on legal education, and that it merely strategically mimicked the ACLEC report.⁶³

The proposals were accepted at the conference of the Society of University Teachers of Law in January 1996.⁶⁴ The task group was mandated to continue with their investigations and to report back to the deans of all South African faculties of law as soon as possible.⁶⁵ In April 1997 the task group met and agreed that curriculum design for the LLB degree would be informed by three fundamental principles, and that an integrated approach to the curriculum should be taken.

The first principle adopted was that the historically dominant Eurocentric approach to law was not necessarily suited to South African society and that the *status quo* should be critically evaluated. The second principle was that vocational skills should be taught in the LLB degree; the skills of language, communication, writing and legal reasoning were specifically mentioned. The third principle was that the LLB degree should actively inculcate ethical values in students.⁶⁶

There is no public record of the process leading to the adoption of these three broadly stated principles, nor of the rationale behind their identification and acceptance. There is also no explanation of how they were intended to be interpreted or implemented. This is perhaps why Greenbaum found that the principles had been implemented with only limited success and in isolated pockets at a few law faculties some ten years later.⁶⁷

2 5 South African Qualifications Authority (SAQA)

There had been an expectation that uniform measurable outcomes leading to the LLB degree would be identified in terms of structures set up by the South African Qualifications Authority (SAQA). However, it was soon realised that learning at

62 *Idem* at 34.

63 Greenbaum (n 23) at 255.

64 Greenbaum (n 25) at 25; Greenbaum (n 23) at 25.

65 *Proposals by the Task Group* (n 60) at 481.

66 McQuoid-Mason (n 48) at 102; D McQuoid-Mason "The four year LLB programme and the expectations of law students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: Some preliminary results" (2006) 27(1) *Obiter* 166-172 at 166; and D McQuoid-Mason *Transforming Legal Education for a Transformed Society: The Case of South Africa* (paper presented at the international conference on the future of legal education, 2008) available at <http://law.gsu.edu/FutureOfLegalEducationConference/ppt/Friday%202020208/McQuoid-Mason2020208.ppt> (accessed 10 Jan 2013). See, also, Iya (n 25) at 355.

67 Greenbaum (n 23) at 208.

such a high level was too complex for this approach to be workable.⁶⁸ The higher-education sector thus secured for itself the right to generate its own qualification standards through the establishment of a Sectoral Standards Generating Body (SSGB). It was also given the right to submit the LLB qualification as a single unit – for registration on the National Qualifications Framework (NQF). The currently registered LLB qualification is SAQA Qualification 22993: Bachelor of Laws, registered at NQF level 8.⁶⁹

The LLB qualification is listed as generic – which means that “the essential minimum required outcomes and their assessment criteria have been identified in an abstract way, and are not linked to a preconceived curriculum (content)”.⁷⁰ This means that all LLB degrees are not required to be identical.

The SAQA exit-level outcomes for the LLB degree include four outcomes relevant to the question of ethics, attitudes and values in the LLB degree. Firstly, “the learner will have acquired a coherent understanding of and ability to analyse fundamental legal concepts, principles, theories and their relationships to values critically”. Secondly, “the learner can solve complex and diverse legal problems creatively, critically, ethically and innovatively”. Thirdly, “the learner is able to manage and organize her or his life and professional activities in the legal field responsibly and effectively”. And, finally, “the learner can participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law ...”⁷¹

The generic approach is supposedly designed to facilitate innovation in curricular design, and to encourage universities to be stakeholder-driven in their approach to legal education. This reflects typical neo-liberal ideology. Thornton explains that neo-liberalism is usually justified on the basis that it is economically rational, since it is assumed that competition fosters excellence. However, she explains further that the neo-liberal approach neglects considerations such as the social value of higher education, and its meaning for the individual’s development.⁷² Greenbaum notes that although this approach protects academic freedom and allows for flexibility and the development of specialist areas of expertise, it has, ironically, also made it easier for law schools to continue a “business as usual” approach – rather than transforming legal education as anticipated.⁷³ It has also resulted in a situation where there are

68 S Gravett & H Geyser (eds) *Teaching and Learning in Higher Education* (Pretoria, 2004) at 12.

69 Information available at <http://regqs.saqa.org.za/viewQualification.php?id=22993> (accessed 23 Oct 2013).

70 *Ibid.*

71 The SAQA Exit Level Outcomes are available at <http://regqs.saqa.org.za/viewQualification.php?id=22993> (accessed 23 Nov 2010).

72 M Thornton “Among the ruins: Law in the neo-liberal academy (2001) 20(3) *Windsor Yearbook of Access to Justice* 3-23 at 7.

73 Greenbaum (n 25) at 27-28; Greenbaum (n 23) at 2.

significant disparities in the manner in which even core courses are taught between universities.

There is thus a concern that without defined objectives regarding content, knowledge and skills, there can be no certainty about the levels of competence achieved by LLB graduates across the country.⁷⁴

2 6 The undergraduate LLB and growing concerns about it

The new four-year undergraduate LLB was introduced in 1998 – by way of the Qualification of Legal Practitioner's Amendment Act.⁷⁵ The main rationale behind the introduction of the undergraduate degree was to provide a more affordable route to qualification as a legal practitioner – thus ultimately transforming the demographics of the legal profession and enhancing access to justice for citizens. However, this objective has not been achieved. The increased diversity of LLB graduates has not translated into a significant change in the demographics of the private sector legal profession,⁷⁶ despite rising numbers of black South Africans being admitted as attorneys. The trend is even more apparent in respect of advocates.⁷⁷ The public sector is in fact representative but, as Godfrey and Midgely correctly note, this is not relevant to the lack of demographic representivity in the private sector.⁷⁸

Increasingly, concerns about the state of legal education have been expressed by the legal profession, the judiciary, the government, the public and the academy itself. In 2009, these concerns were identified by the South African Law Deans Association (SALDA), as relating to:

- a. the quality of graduates⁷⁹ – particularly their lack of skills and deficient writing;⁸⁰
- b. the appropriateness of the four-year undergraduate degree for the different legal careers available to graduates;⁸¹

74 G Pickett *The LLB Curriculum Research Report* (2009) at 134.

75 Act 78 of 1997.

76 I Scott *et al Higher Education Monitor No 6: A Case for Improving Teaching and Learning in South African Higher Education* (2007) available at http://www.che.ac.za/documents/d000155/HE_monitor_6_ITLS_Oct2007.pdf (accessed 25 Jan 2013); Law Society of South Africa *National Survey of the Attorneys Profession* (2008) available at http://www.lssa.org.za/upload/National_Survey_of_the_Attorneys_Profession_2008.pdf (accessed 20 Jan 2013).

77 Godfrey & Midgley (n 40) at 118-119.

78 *Idem* at 120.

79 Greenbaum (n 25) at 29; P van der Merwe “The trouble with LLB graduates ... (editorial)” (2007) 7 *De Rebus* 1-60 at 2; L Dicker “The future of the four year LLB” (2011) 24(1) *Advocate* 1-43 at 22; S Godfrey “The legal professions: Transformation and skills” (2009) 126(1) *SALJ* 91-123 at 121.

80 Van der Merwe (n 79) at 2.

81 Transcript of meeting between CHE and SALDA held on 22 Jul 2009 (document on file with author).

- c. the reduced and condensed curriculum in the four-year undergraduate degree and its impact of teaching;⁸²
- d. the immaturity of students and their apparent lack of a broader world view;⁸³ and
- e. the suitability of graduates for academic careers.⁸⁴

Similar concerns about legal education and law graduates are being expressed globally.⁸⁵ Lawrence explains that “globally, increased access to university education has resulted in an increasingly diverse student body, with inevitably different levels of preparedness for tertiary education ...”⁸⁶ In South Africa, the problem is especially serious – given the dysfunctional state of primary and secondary education. High levels of poverty, scarcity of resources and related issues exacerbate South Africa’s problems.

In addition, one must not underestimate the pressure placed on law faculties during this period. They had to contend with a shortened degree, a new emphasis on skills development in the light of the SAQA requirements and the need to infuse the entire curriculum with human rights considerations in light of the new constitutional dispensation in South Africa.⁸⁷ In addition, many universities were grappling with the complex and fraught process of merging with other institutions.

Finally decreased funding for law (from 2004) also had to be managed and adjusted to in this period.

In 2013 SALDA noted that “the four year LLB degree was designed to serve an empowering purpose for a transitional period, but the evidence indicates instead that the degree does not enable students to achieve the requisite graduate attributes within the minimum period”.⁸⁸

2 7 National Legal Education Liaison Committee

The National Legal Education Liaison Committee (NLELC) responded to the perceived crisis in legal education by calling on its participants to engage in a review of all facets of the academic phase of legal education.⁸⁹ A summit was convened in

82 SALDA *Review of the LLB Degree* (13 Oct 2005) (document on file with author).

83 SALDA *Position Paper on Legal Education* (25 Aug 2008) (document on file with author).

84 Transcript of meeting between CHE and SALDA (n 81) at 4.

85 Pickett (n 74) at 145.

86 J Lawrence “Addressing diversity in higher education: Two models for facilitating student engagement and mastery, in higher education in a changing world” *Proceedings of the 28th HERDSA Annual Conference* (Sydney, 3-6 Jul 2005) available at <http://www.hersda.org.au/wp-content/uploads/conference/2005/papers/lawrence.pdf> (accessed 25 Jan 2012); S Mayson “The education and training of solicitors: Time for change” (2011) 45(3) *The Law Teacher* 278-293 at 280.

87 Campbell (n 52) at 17.

88 SALDA *Position paper on Legal Education* (2013) quoted by Campbell (n 52) at 18.

89 Dicker (n 79) at 23.

June 2008 and a task team consisting of representatives of the judiciary, the Law Society of South Africa (LSSA), the General Council of the Bar (GCB), the SLTSA, the universities and the DoJCD was constituted.

28 National LLB Curriculum Research Project

The task team – in consultation with the Council for Higher Education (CHE) – commissioned a National LLB Curriculum Research Project.⁹⁰ The project's main objectives were to assess the nature and extent of the perceived crisis in legal education and to make suggestions for improving the situation.⁹¹

The National LLB Curriculum Research Report was prepared by Georgina Pickett for the Advice and Monitoring Directorate of the Council for Higher Education, and was completed in November 2010. The research took the form of both empirical and desk-top research, and contains an excellent review of legal education in various countries.

Unfortunately, the research report was not widely distributed, nor formally published, because of concerns about the reliability and validity of the empirical research. Nevertheless, it did create the impetus for further engagement between the CHE and SALDA on the question of the LLB qualification.

29 The 2013 LLB Summit

The engagement between CHE and SALDA led to the convening of a summit in May 2013. The objective of the summit was to consider the LLB crisis, identify its causes, and develop recommendations and solutions to address the problems and to improve the LLB degree.⁹²

Various delegates gave presentations – each followed by a general discussion. The presentations included those made by SALDA, SLTSA, LSSA, an acting Constitutional Court judge, an education expert, the GCB and the CHE. Thereafter, breakaway groups considered the issues and reported back. Finally, the steering committee presented a draft proposal on the way forward, which was discussed and finalised in a plenary session.⁹³ A document entitled *The Road Ahead: Proposals* was duly adopted.

Concerns that were prominent at the summit included the need to develop knowledgeable, skilled, value-driven and ethical law graduates who would be able to contribute meaningfully to society, who would have a highly developed social conscience, and who would strive towards social justice. Modiri criticises the summit

90 Pickett (n 74).

91 *Idem* at 9.

92 *Draft Report on LLB Summit* (n 15) at 1.

93 *Idem* at 19.

for being overly concerned with indexing the value of legal education by how well it serves the needs of the legal profession and the judiciary, arguing that the question is rather how well legal education contributes to “a new jurisprudence suited to the legal, social and political transformation of South Africa”.⁹⁴

The CHE was requested by the summit to conduct a standard setting process for the LLB degree, in accordance with its general mandate to develop standards for higher education qualifications generally.⁹⁵ The CHE was specifically asked to consider a number of issues – including desirable graduate attributes (including an ethical disposition and commitment to social justice), workplace requirements, and resources.⁹⁶

The standard setting exercise will be followed by a national review of the LLB under the auspices of the CHE in its capacity as a quality council for higher education in terms of the National Qualifications Authority.

2 10 Standard setting for LLB

The development of standards for the LLB is intended to clarify the purpose of the qualification and thereafter to identify the appropriate outcomes to be demonstrated by an LLB graduate.⁹⁷ The standard-setting process will be peer-driven. This means that the applicable standards will be “developed by academics in the first instance and then subject to scrutiny in terms of the requirements of the profession”.⁹⁸

In August 2013, the CHE published *A Proposal for Undergraduate Curriculum Reform in South Africa: The Case for a Flexible Curriculum Structure* which recommended, *inter alia*, that four year professional degrees like the LLB be extended by one year”.⁹⁹ However, in May 2014 the National LLB Task Team indicated that

94 J Modiri “The crisis in legal education” (2014) 46(3) *Acta Academica* 1-24 at 1.

95 This is in accordance with its responsibility to implement the Higher Education Qualifications Sub-Framework (HEQSF) published in *Government Gazette* 36721 of 2 Aug 2013) in terms of the Higher Education Act 101 of 1997 and the Higher Education Amendment Act 39 of 2008. In Jan 2013, the CHE published the second draft of *A Framework for Qualification Standards in Higher Education* available at http://www.che.ac.za/sites/default/files/publications/second_draft_framework_for_qualification_standards_in_higher_education_january_2013.pdf (accessed 11 Feb 2015).

96 *Draft Report on LLB Summit* (n 15) at 21.

97 *A Framework for Qualification Standards in Higher Education* available at http://www.che.ac.za/media_and_publications/frameworks-criteria/second-draft-framework-qualification-standards-higher (accessed 23 Oct 2013). See *Draft Report on LLB Summit* (n 15) at 9-10.

98 *A Framework for Qualification Standards* (n 97) at 4. See *Draft Report on LLB Summit* (n 15) at 9.

99 CHE *A Proposal for Undergraduate Curriculum Reform in South Africa: The Case for a Flexible Curriculum Structure* (2013) available at http://www.che.ac.za/media_and_publications/reports/research (accessed 10 Feb 2015) at 20.

until the standards for the LLB were published and finalised, entry to the legal profession degree would remain a four year undergraduate degree.¹⁰⁰

As at February 2015, the standards have not been published and finalised. It is however no secret that SALDA¹⁰¹ and the legal profession are lobbying for an extended LLB, namely a five year programme “that will better be able to produce well equipped graduates for the legal profession and broader society”.¹⁰²

Academics have stressed the importance of a greater focus on legal ethics in the proposed new LLB degree. Campbell explains in this respect that “a good lawyer, particularly in the current constitutional dispensation, is so much more than one who knows well the law and how to apply it ... our law is values-based, and a deep understanding and inculcation of the values of social justice and ethical practice are as important as knowledge of the law”.¹⁰³

This sentiment was also expressed by Justice Yacoob and representatives of the legal profession at a summit on professional ethics held in February 2014. The summit was organised by the LSSA and it was concluded that “a joint partnership between universities, the law society and the legal profession is required to raise the ethical standard and to make a meaningful contribution and difference in South Africa”.¹⁰⁴ Delegates at the summit appeared optimistic that this could be achieved.

2 11 National review

The national review of the LLB degree will follow the standard-setting exercise and will require the re-accreditation of the degree. The national review will also be peer-driven in the sense that academics teaching in the LLB programme will identify the minimum criteria in terms of which the quality of the programme should be assessed. Thereafter, law schools will be required to engage in a process of self-evaluation – followed by peer evaluation. Possible results of the review include: (i) full re-accreditation; (ii) accreditation with conditions where there are shortcomings

- 100 N Manyathi-Jele “National LLB task team on access and quality legal education” (2014) 7 *De Rebus* 1-60 at 8.
- 101 In 2013 SALDA specifically recommended a five year degree programme “with the caveat that this should not be regarded as an opportunity to add more law courses, but rather that non-law modules be introduced to broaden the understanding of law students of the context within which the law operates” (*SALDA Position Paper on Legal Education* (2013) quoted by Campbell (n 52) at 23).
- 102 *Ibid.* See, also, 2014 STLSA conference, the plenary session chaired by Prof V Jaichand, University of the Witwatersrand, 14 Jun 2014. (Document on file with authors.)
- 103 F Rabkin *Quality Law Graduates Preferred to Large Numbers of Ill Equipped Graduates* (16 Jan 2014) available at <http://www.ru.ac.za/law/facultynews/qualitylawgraduatespreferreddolargenumbersofillequippedgraduates.html> (accessed 10 Feb 2015) at 2.
- 104 *Report on Ethics Summit. Summit of Professional Legal Ethics* (Durban, 28 Feb 2014) at 5 (document on file with author).

which could be addressed; and (iii) de-accreditation where the qualification does not meet the minimum criteria, and where there is no possibility of improvement.¹⁰⁵

3 Conclusion

Throughout the process of the transformation of the academic phase of legal education, the importance of teaching legal ethics in the LLB degree has been acknowledged. Unfortunately, however, there has been little engagement with what this commitment actually means. Discussion has tended to be general and vague. There is no doubt that the legal ethics will form an important part of the future LLB curriculum. The CHE is specifically tasked with identifying the underlying purpose of the LLB and the associated values and attitudes that the graduate should demonstrate on completion of the degree.¹⁰⁶ The standards set for the LLB will thus include standards relating to ethics, values and attitudes.¹⁰⁷ It is of vital importance that the mistakes made by the task team on legal education in 1996 and 1997 are not repeated. The mistakes made are identified by Campbell as being the failure to “consider very carefully and to engage critically with the educational rationale” behind the changes made to the LLB degree.¹⁰⁸ Decisions around the teaching of legal ethics should be carefully considered and should have a firm pedagogical foundation which is suitably aligned with the fundamental purpose of the LLB degree. Of course, exactly what this is, is also contested terrain.¹⁰⁹

ABSTRACT

This article considers the historical, political and social context of the LLB degree – especially insofar as it pertains to teaching legal ethics. It reviews the role of the law, the legal profession and the system higher education not only during the apartheid era, but also during the transition to democracy and in contemporary South Africa. In addition, this article also provides a detailed explication of the efforts to transform legal education since 1994. Aspects which are especially relevant to the question of legal ethics in the LLB degree are highlighted. Finally, the current state of legal education in South Africa is discussed.

105 *Draft Report on LLB Summit* (n 15) at 9.

106 *Idem* at 19.

107 *Ibid.*

108 Campbell (n 52) at 18.

106 See the special edition of *Acta Academica* on “Law as a humanities discipline: Transformative potential and political limits” (2014) 46(3) *Acta Academica* 1-195 at 1.