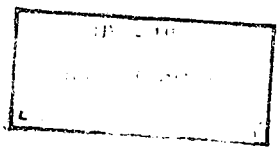

THE SYMBIOTIC INTEGRATION OF THEORY AND PRACTICE: A *SUI GENERIS* APPROACH

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DECLARATION

I, the undersigned, herewith declare that the work submitted herein is original in nature and has not previously been submitted to any other Faculty, University or Institution. I further declare that I have cited all sources consulted herein and given recognition to all authorities quoted. I have not allowed any other person to copy this work, in totality or partially.

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SUMMARY

The teaching of a substantive law subject and the teaching of a practical skills course have the potential for integration. Students should leave institutions of higher learning with theoretical knowledge, practical skills and the ability to integrate both in pursuit of a career. In order to produce well qualified graduates, more attention ought to be paid to practical legal training in the initial years of study. This study intends to recommend possible solutions towards the integration of legal theory and skills. This study advocates the full integration of theory and practice in the law curriculum and will further argue that clinical legal education is the best vehicle to achieve this. The study will conclude that clinical legal education should be viewed as the culmination point of other skills training options. The South African solution to legal education may lie in an approach which combines different methodologies in all four years of the LL. B degree.

OPSOMMING

Onderrig van 'n substantiewe regsvak en onderrig van 'n praktiese vaardigheidskursus het die potensiaal om geïntegreer te word. Studente moet hoër onderwysinstellings verlaat met die nodige teoretiese kennis, praktiese vaardighede en die vermoë om gemelde te integreer in navolging van 'n loopbaan. Hierdie studie beoog om moontlike oplossings te bied vir die integrasie van regsteorie en -vaardighede. Die studie beklemtoon volle integrasie van teorie en praktiese vaardighede in die LL. B kurrikulum. Daar word verder geargumenteer dat kliniese regsonderrig die beste metode is om die beoogde doelstelling te bereik. Die gevolgtrekking word bereik dat kliniese regsonderrig die kulminasiepunt is van ander opsies in die ontwikkeling van vaardighede. Die Suid-Afrikaanse oplossing tot regsopleiding mag in 'n benadering geleë wees wat die verskillende metodologieë in al vier studiejare van die LL. B graad kombineer.

CHAPTER ONE
INTRODUCTION AND RESEARCH FOCUS

1. INTRODUCTION

In 2007 I accepted employment at the University of the Free State Law Clinic and immediately felt an interest in the field of clinical legal education. I became involved in the training of students, using both the clinical legal education method and practical legal training, together with the presentation of lectures in the traditional sense as part of the LL. B programme. It struck me that the manner and aim of teaching a substantive law subject (such as the law of evidence) and that of teaching of a practical skills course differ greatly and yet have the potential for integration. The matter of the integration of legal theory and skills is usually further complicated by the differences between practical training and clinical legal education. Although I concede that practical legal training is different from clinical legal education, from the outset I felt strongly that these teaching methodologies have much in common and that practical legal training can be utilised to prepare students for eventual clinical legal education in the fourth and final year of the LL. B study.

My views regarding the integration of legal theory and skills are motivated by the fact that there can be little doubt that law students must leave institutions of higher learning with theoretical knowledge, practical skills and the ability to integrate both in the pursuit of a career. Further, and especially in a South African context, students ought to have been inculcated with the importance of access to justice as part of nurturing their civic responsibility as responsible practitioners and citizens. Based on this submission I will argue that in order to achieve the aim of producing well qualified graduates, more attention ought to be paid to practical legal training in the initial years of study and that practical legal training may be the best introduction to clinical legal education in the later years of study towards the degree.

Credit is due to South African universities and in particular the University of the Free State for their commitment to enhancing the marketability of their students by including practical skills in recent years, particularly since 1998 when Legal Practice was introduced in all four years of study as a compulsory subject towards the LL. B. The University of the Free State now has, apart from the compulsory courses in Legal Practice as mentioned, a clinical programme in the final year of study. It is immaterial whether this development came about as a result of pressure from the organised legal profession or at the insistence of the students. Its benefits are tangible. I am constantly amazed by the skills demonstrated by some of my students which I, when in the same year of study, did not possess.

1.1 PROBLEM STATEMENT

From a wealth of literature, as well as professional critique from the legal profession, it is abundantly clear that law graduates leave institutions of higher learning, particularly in law, with an enviable amount of theoretical knowledge, but that they often lack the practical skills required for the successful practice of law (hence the resultant lack of community confidence in the integrity of the profession).

1.2 RESEARCH FOCUS

It is this *lacuna* in legal education at tertiary level that I wish to research. I hope not only to contribute towards scholarly engagement on the topic but also to recommend possible solutions towards the integration of legal theory and skills.

I will introduce the topic of clinical legal education and argue for its use and potential as a possible solution to the problem posed above. The positive contribution made by clinical legal education and the potential for growth of this methodology will be examined. I will argue that although there is a difference

between practical training and clinical legal education as teaching methodology the teaching outcome remains the same; that is the development of legal and general life skills of law students. I will further argue that although the two methodologies are unique in their own right they may be adapted and assimilated into one workable methodology which can assist the South African challenge of large student numbers and wide diversity among students. I will further argue that theoretical education should not be supplemented by practical training and/or clinical legal education but must rather exist as an equal co-worker to clinical legal education and that this solution may present the most plausible solution to the challenges which currently exist.

I will advocate for the full integration of theory and practice in the law curriculum and will further argue that clinical legal education is the best vehicle to achieve this. I intend to bolster my submission by providing a workable definition of clinical legal education and to examine its place, functioning and aims within the current milieu of tertiary legal education. I further intend to differentiate and in some instances find commonalities between clinical legal education, practical training, community service and service learning in an attempt to find a 'best-fit' solution to the problem posed above. I intend ultimately to conclude that clinical legal education should be viewed as the culmination point of other skills training options and that a South African solution to legal education may very well lie in an approach which combines different forms of methodologies used in skills training. I will ultimately advocate for a 'clinical-practice' methodology.

My research focus is thus twofold:

1. to argue that theory and practice should be fully integrated in the LL. B curriculum; and
2. to show that clinical legal education in combination with practical legal training may be the best method for the integration of theoretical legal knowledge and practice in the South African LL. B curriculum.

2. RESEARCH DESIGN AND CHAPTER OUTLAY

I intend to combine a historical, comparative and literary overview method in my research study. Historically I will examine the origin of clinical legal education in the United States of America and the subsequent growth of university law clinics in South Africa. Comparatively I will contrast the various university law clinics in South Africa in terms of their programmes and aims. I will then briefly examine the American system of clinical legal education. I will proceed to undertake a literature review regarding legal education, highlighting the gaps in the current system and the use of clinical legal education as methodology. I further intend to make a recommendation, based on the above, for a programme which culminates in a clinical legal education approach, for all four years of LL. B study.

2.1 CHAPTER TWO – THE INTERNATIONAL ORIGINS OF CLINICAL LEGAL EDUCATION AND ITS SUBSEQUENT DEVELOPMENT IN SOUTH AFRICA

In Chapter Two of the study I intend to provide an overview of the origin and subsequent development of clinical legal education in United States of America.

I then intend to focus on the analogous development of clinical legal education in South Africa and the influence of the American systems and programmes on the subsequent development of South African clinical legal education. I will, after the outlined origin of clinical legal education provided, shift my focus to the calls for development in legal education in South Africa and the subsequent policies and directives which called for further practical skills development amongst graduates. I will demonstrate how this call may best be met through a combined clinical/practical training approach. I will furthermore examine the formation and the advocacy role of the South African Association of University Legal Aid Institutions and its involvement in the promotion of clinical legal education.

I intend to conduct a literature overview of some university law clinics in South Africa at present. I intend to concentrate, for the sake of brevity, on the university law clinics established at the University of the Witwatersrand, the University of Pretoria, the University of Cape Town, North-West University (both the Potchefstroom and Mafikeng Campuses) and the University of the Free State. In conclusion I will present an overview of the clinical programmes offered by the above clinics and argue that not all programmes represent 'pure' clinical legal education programmes but rather represent an amalgamation of clinical legal education and practical legal training which nonetheless serve the purpose for which they were developed.

2.2 CHAPTER THREE – DEFINING AND COMPARING CLINICAL LEGAL EDUCATION WITH OTHER FORMS OF PRACTICAL STUDENT ENGAGEMENT

Chapter Three will serve as platform for the main arguments in Chapters Four and Five. The aim of Chapter Three is to provide the reader with a few fundamental definitions relating to: clinical legal education, the method of clinical legal education, the goals of clinical legal education and the clinical method, the models employed in clinical legal education; the commonalities and differences between clinical legal education and practical training; the definition of service learning contrasted with community service learning, the goals of community service and service learning; and the juxtaposition between community service, service learning, practical legal training and clinical legal education.

In this chapter I will lay a foundation for my further submissions regarding a combination of methodologies which may justifiable in the South African context, to be styled 'clinical legal education'. I will later argue that there are many similarities between the various methods and models, that each one has the peculiar aim (primary or secondary) to inculcate practical skills and that clinical legal education and exposure to 'live clients' in the final year of the LL. B should

be supported by other methods such as practical legal training in the first three years of LL. B study.

2.3 CHAPTER FOUR – THEORY VERSUS PRACTICE: NOT AN 'EITHER'/'OR' APPROACH

Chapter Four, as a sister argument to Chapter Five, is the first primary thrust of this thesis and contains my submissions for the integration of theory and practice in tertiary legal education. I will argue that clinical legal education (inclusive of practical training, community service and community service learning), is ideally primed as a vehicle for the full integration between substantial law and practical skills. I will refer to the current state of legal education, identify the main challenges, argue for the inclusion of practical skills training and then attempt to address each issue under the auspices of clinical legal education. I will further argue that the training provided by university law clinics will hold up to the demands and scrutiny of the South African Qualifications Authority.

2.4 CHAPTER FIVE – A PRACTICAL EXAMPLE OF A CLINICAL LEGAL EDUCATION PROGRAMME IN SOUTH AFRICA

In Chapter Five I will propose, and demonstrate in a practical way, that it is feasible to integrate theory and practice through clinical legal education in South Africa. The argument here will focus on the programme itself and the fact that, although it may be viewed as an assimilation of various methodologies, the programme I suggest is as unique as the South African education paradigm for which it is designed. The proposed programme will identify the use of practical legal training and how it can be incorporated into clinical legal education for the betterment of students. I will argue that clinical legal education and practical legal training are complementary.

2.5 CHAPTER SIX – CONCLUSION

Chapter Six will contain my conclusion and present an answer to the problem posed in Chapter One. It will include possible recommendations for future legal education. I will make my final submissions, the main thrust of which, and based on the preceding chapters, is the idea of a combination of practical skills training, community service learning and clinical legal education as an ideal mode for integration with substantive law teaching.

CHAPTER TWO

THE INTERNATIONAL ORIGINS OF CLINICAL LEGAL EDUCATION AND ITS SUBSEQUENT DEVELOPMENT IN SOUTH AFRICA

1. INTRODUCTION

In this chapter I intend to provide a brief overview of the origin and subsequent development of clinical legal education in the United States of America – its country of origin. My research reveals that although the United States of America determined the standard, it by no means perfected the system and that each country which adopted the clinical method added and detracted from the original idea.

I then intend to focus on the development of clinical legal education in South Africa and I will further discuss the various stakeholders, providing an experiential overview of selected South African university law clinics which currently exist.

2. A HISTORICAL OVERVIEW OF THE DEVELOPMENT OF CLINICAL LEGAL EDUCATION IN THE UNITED STATES OF AMERICA

2.1 INTRODUCTION

The concept of clinical legal education finds its origins in the United States of America.[1] 1893 saw the inclusion of the concept at Harvard Law School and the University of Pennsylvania.[2] Sherman states that contemporary clinical legal

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1 Franklin: 1990: 59. See also De Klerk *et al*: 2006: 263.

2 www.abanet.org/lealed/prelaw/prep.html - 20/03/2008 - "According to the American Bar Association students are admitted to a law school after completion of basically any undergraduate programme and there are no required majors for admission to a law school." By contrast South African legal education takes place at an undergraduate level and no pre-admission degree requirement must be satisfied. However at Rhodes University students are only admitted to the programme after completion of a year's study in the BA programme. The position in the United States of America is vastly different in

education originated in the late 1960's due to domestic demands for legal education institutions which at the time were viewed as biased towards the commercial interests of high society, and were pedagogically self-expedient.[3] Legal education had, prior to this development, been static since the 1870s, when the concept of a 'law school' was created by Christopher Langdell.[4]

2.2 THE EFFECT OF THE JACKSON ELECTION

Before the unification of America's northern colonies, legal education, and subsequent admission to the legal profession, was effected through clerkship. Students were placed in law firms to learn the profession as apprentices (the students did not attend a university to obtain a qualification). Due to the apparent lack of 'equal' training, intensity and quality offered by the various law firms, law schools were established in an attempt to remedy the situation.[5] These schools focused on the provision of training in 'legal practice' and became known as 'proprietary' law schools. Once the apparent need for organised legal education became perceptible in the 1820's, a natural progression occurred in terms of the combination of theoretical training, provided exclusively by universities, and practical training, provided by proprietary law schools. One may view this progression as a meeting of intentions, so to speak, even though each method of education focused attention on a different area. It must be borne in mind that, during this period, the study of law was a selective pursuit and did not take kindly to the attentions of the downtrodden or disenfranchised. This situation changed

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that placement in law schools, and more specifically in Ivy League institutions, is limited and highly competitive. The admission requirements for the South African LL. B will be discussed in later chapters. See also the work of De Klerk *et al*: 2006: 263 in this regard, as well as De Klerk: 2006 (b): 932 in which he explains that practical internships as admission requirement were abolished and hence the development of clinics [in America] in a rather favourable environment.

3 1999:76.

4 Langdell is referred to by various names throughout legal literature: some authors refer to him as 'Christopher' and others as 'William'. I have been unable to establish which first name, if indeed either, is correct. It is however known that the surname is correct and that Langdell was the Dean of Harvard Law School and the creator of the case method of legal education.

5 Franklin: 1990: 56, where it is stated that 20 such schools were established in America by 1800.

dramatically upon the election of President Jackson in 1828, whose primary focus was on anti-elitism and the social upliftment of man.[6]

Jackson's policies called for the enrolment of students who were traditionally considered unsuitable for legal studies, in law schools in order to remedy social inequality, with the concentration on the provision of legal services and not the training of legal practitioners.[7] Jackson's policies caused a decline in legal education which was only remedied in 1870 when William Langdell was elected dean of the Harvard Law School.[8]

2.3 THE LANGDELL MODEL AS APPROACH TO LEGAL EDUCATION

Langdell's greatest accomplishment was to separate legal education from the profession.[9] Langdell was responsible for the introduction of admission requirements and a scientific [10] approach to the study of law.[11] Langdell's model

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6 De Klerk *et al*: 2006: 263. See also Gordon: 2002: 6 who states "In 1965 President Lyndon Johnson created a federally funded legal services program (sic) to serve poor clients and bring law suites on behalf of poor clientele. This program (sic) and other foundation-funded 'poverty law' programs (sic) inspired law schools to create clinics - law offices within the school, staffed by new cadres of clinical law teachers where students could learn not just to think like lawyers, but to represent real clients while in law school under the supervision of practising lawyers and clinical teachers." See also Franklin: 1990: 56.

7 According to Franklin: 1990: 57 "Educational and apprenticeship requirements were struck down and the practice of law was opened to those with little or no formal preparation."

8 Gordon:2002: 4 states "Harvard Law School was the pioneer. From 1870-1900 Harvard's Dean C.C. Langdell and his colleagues built a new model of legal education. It hired full-time law teachers as its faculty. Its teachers published the first casebook, and taught students by the case method, making them grapple with primary material of legal cases, and to learn actively and interactively through dialogue with the teacher, rather than passively listening to lectures....The Harvard model of legal education spread to one school after another, and eventually was adopted by all."

9 Franklin: 1990: 57.

10 Weiler: 1982: 10 writes that Langdell remarked "If law be a science, a university will best consult its dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices."

11 This scientific model later became known as the Langdell Model. This model was also known by various other names such as the Harvard Case Method, the Appellate Case Method and the Socratic Method. According to Franklin: 1990: 58 the Socratic Method was where the teacher and students "analysed the doctrinal logic of the cases through a question and answer process."

entailed the continual study of appeal court cases.[12] This method can be viewed as a metaphorical 'unpacking' of a case as the students used the case to deduce and analyse (and thereby acquire knowledge in) substantial and procedural fields.[13] Law was studied from an investigative perspective with a professor posing questions and expecting direct answers from his students.[14]

Clinical legal education by distinction from Langdell's case-method is about learning law, legal skills, and lawyering while providing legal services to impoverished people under the direction of a law educator who helps students reflect on this experience.[15] Sherman reiterates the concept that clinical legal education is not to be considered as an attempt to replace traditional methods of legal education but should be seen and allowed to perform as an equal co-worker in legal education.[16]

In the above situation there exists a correlation between American history and the current state of legal education at South African universities where the latter

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12 Barnhizer: 1979: 68 remarks of Langdell "Christopher Langdell launched the last major reform of legal education when he brought the education of lawyers into the university, established standards for curriculum content, insisted upon undergraduate education as preparation for law school, introduced the use of appellate decisions in aid of analysis, and initiated the use of the 'Socratic technique' in instructing law students. In 1870 these reforms were necessary responses to deficiencies in the apprentice-lecture approach to legal education. These reforms were also better suited to produce lawyers able to cope with a shift in the nature and needs of the society served by the profession. Langdell's genius identified and developed the means to meet the needs of a changing society. Unfortunately, ensuing generations of law teachers failed to continue the dynamic process initiated by Langdell. This resulted ultimately in the stagnation of legal education for a lengthy period and the slow but steady growth of pressures for change."

13 According to Sherman: 1999: 76 "The Langdellian approach 'brought legal education into the university, established standards for curriculum content, insisted upon undergraduate education as preparation for law school, introduced the use of collected appellate decisions in aid of analysis, and initiated the use of the 'Socratic technique' in instructing law students."

14 De Klerk *et al*: 2006: 264. Notably this method is still employed at many, if not all, South African law faculties.

15 Sherman: 1999: 76. The definition and characteristics of clinical legal education will be explored in Chapter Three of this study.

16 1999: 76. Condlin:1983: 318 explains that the clinical method is comparable to the Socratic method in that clinic requires the student to become an intellectual apprentice who solves challenges within a pre-set and guided problem. The roles assumed in clinical courses differ from those assumed in traditional teaching but in attempting to seek differences in conceptualisation one is hard pressed to find such.

have become wedged in a similar analytical preoccupation with the teaching of 'black-letter' law.[17] It would seem as though legal educators are once again dallying in the grey area between purely theoretical training and practical application which situation is of no benefit to academia or the requirements of the profession (not to mention the student who becomes the ultimate sufferer in the dispute between the schools of thought).

2.4 CRITICISM(S) OF THE LANGDELL MODEL

A criticism of the Langdell model of case analysis is that the most interesting cases, and therefore those suitable for in-depth analyses, are often atypical in nature which leads to the student having a distorted picture of the world in which the pathological and foreign obscure the healthy and routine. By way of example this may be demonstrated in the South African context if one considers the recent cases against Jacob Zuma and Jackie Selebi. One can appreciate that these cases are not run-of-the-mill and that they present unique challenges to the law as foundation of society, in their own right. These types of cases, although contextual and of value in student training, firstly provide a skewed view of the law and secondly are interesting purely due to their contextual nature. Students are knowledgeable about these kinds of cases purely because they are *in vogue* and I doubt that they gain any deeper insight into the actual law involved. However from a legal education value perspective, so as to produce, amongst other things, civic awareness amongst students, these cases may be gainfully studied in theoretical courses such as legal philosophy.

2.5 THE REALIST MOVEMENT

The realist movement brought about a shift in perception with regard to the Langdell model which had long been criticised for its conservative and

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[17] Weiler: 1982:11 remarked that "there is a conflict of interest, let us face it, between training people for a career and the creation of scholarly knowledge."

exhausting methodology.[18] The 1960's were a time of social upheaval and dramatic shifts in interests and ideologies and as with all periods of transformation, regardless of cause or origin, this era saw an increase in demand for realistic and practical teaching methods. Once again a direct correlation can be drawn between America in 1960 and the post-1994 South African situation.

Clinical education at university law clinics in the United States became firmly entrenched in the 1960's mainly as a result of a reaction against the method of education at faculties of law which were established in the 19th century. During the same period many American universities were profoundly criticised by civil rights and consumer activists and student organisations as stubborn keepers of archaic conventional ideals.[19]

The demand for a more purposeful, problem-solving and service-orientated approach to legal education caused law faculties to re-evaluate their *curriculae*. There was a call that they turn their attention to imparting skills, values and knowledge in a social context.[20] This shift in focus contributed greatly to the growth and development of university law clinics and clinical legal education.[21]

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18 De Klerk *et al*: 2006: 264. See also Gordon: 2002: 4 who states "After 1920 a group of critics called 'legal realists' attacked the Harvard model for teaching only formal rules and principles of law, legal doctrine or legal dogma. The reasons that judges gave for deciding cases, the realists said, were rarely the real factors behind the decisions. Law, they argued, had to be studied and taught as a social product, which arose in social conflicts and served social interests and policies. The realists urged scholars to integrate law with social sciences, to conduct empirical studies of courts and legal agencies and processes, and to teach students to argue for results on social policy grounds."

19 http://web.up.ac.za – 17/03/08.

20 According to Weiler: 1982:6 "In recent years law schools have acceded to the pressure to develop some form of clinical training. Such programmes serve a number of objectives within a law school: they help satisfy a student appetite for contact with interesting human problems, permit experimentation with new sources of legal services to communities not well served by the usual mechanisms, and provide the type of practical experience which brings to life the abstract debate in the books or the classroom. If the resources are available without sacrificing their intellectual care, law schools may well find these clinical experiments to be worthwhile investments."

21 http//web.up.ac.za – 17/03/08. See also Iya: 2002:16-17.

In 1968 the clinical legal education movement was significantly enhanced by the formation of the Council on Legal Education for Professional Responsibility (CLEPR) as a response to the political and societal commotion of the period. CLEPR was a breakaway group from the Ford Foundation and constituted themselves around the notion of social assistance to the indigent – through the training of students in practical aspects of law. At this time there was a clear call for the educators involved in clinical education to be both academics and practicing legal practitioners, which understandably created a resistance to clinical education by those who saw legal education as the elite domain of the intellectual philosopher of law. Despite the backlash by traditional academia the clinical movement was much supported by the public interest litigation community who were constituted mainly by young, liberal lawyers interested in civil rights and social change.[22]

The American situation today is that each state now requires the completion of a four-year undergraduate degree and then three years of law school followed by a state bar examination.[23]

3. CLINICAL LEGAL EDUCATION IN SOUTH AFRICA: FROM LANGDELL TO LIMPOPO

University law clinics and the notion of clinical legal education emerged principally within the South African milieu in reaction to a growing and, at that

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22 Sherman: 1999: 76. Condlin: 2005: 604 states "The 1970s was the decade of the clinic. In the early years clinical courses were few in number and marginal to the law school curriculum. Traditional faculty opinion was suspicious or negative, resources were patched together from 'soft' sources, and people who directed these programs (sic) work in obscurity and alone. Ten years later almost every law school has a clinical program (sic) and many schools have several. Funding comes from general law school revenues, traditional faculty opinion is accepting, and sometimes enthusiastic, and clinical teachers are treated as full members of the faculty...While all is far from rosy - there are exceptions to each of the above statements - at the organizational (sic) level the clinical legal education movement has been immensely successful." See also Barnhizer: 1979: 79 and Franklin: 1990: 60.

23 www.usinfo.state.gov – 19/ 03/ 08. See also Condlin: 1983: 319 who remarked that "In legal education, the 1970s were the decade of the clinic."

stage, unmet need for legal services in the community.[24] Clinics, through development, fulfill various roles, with their most prominent roles to be found in legal education, access to justice (including community service and engagement) and serving the interest of the legal profession. To understand the historical development of South African university law clinics is to understand the functioning of clinics in the current milieu. Bearing this in mind, recent transformational developments in South Africa have certainly had an influence on the clinical movement.[25] Before the history of South African university law clinics is explored it is important to note that reference in this study will only be made to university law clinics as defined by section 1 of the Attorneys Act 53 of 1979.[26]

The Universities of the Witwatersrand and Cape Town were the forerunners in the implementation of clinical legal education in South Africa and both had established viable law clinics by 1973.[27] Initially the University of the Witwatersrand took the lead in establishing a university law clinic and set the example for other institutions to follow.[28] McQuoid-Mason describes the structure and activities of the initial Wits Law Clinic as follows:

> "At the University of Witwatersrand in Johannesburg an "off-campus" legal aid clinic was set up in the beginning of 1973. July 1973, however proved to be a turning point in the development of law clinics in South Africa when the Ford Foundation sponsored an International Legal Aid Conference at the University of Natal in Durban. The Conference focused on both the delivery of legal aid services and the potential role of the law clinics in the provision of these services". [29]

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24 Haupt: 2006: 229. De Klerk: 2006(b): 929 states that over the past 30 years university law clinics have evolved from ad hoc student initiatives to mature institutions with a definite presence on the South African legal landscape.

25 De Klerk: 2006(b): 929.

26 According to the Attorneys Act 'law clinic' means a centre for the practical legal education of students in the faculty of law at a university in the Republic, and includes a law centre controlled by a non-profit making organization which provides legal services to the public free of charge.

27 De Klerk *et al*: 2006: 264.

28 See however McQuoid-Mason: 2004: 33 where he asserts that "the first South African University Law Clinic was set up in 1972 by law students at the University of Cape Town."

29 1982: 139. McQuoid-Mason: 2004: 34 further states that participants in the 1983 conference made many suggestions on the role of law schools in South Africa and their duty to provide legal aid. The following suggestions were first tabled at the first conference and from further chapters it is evident that they have been implemented at most South African university law clinics. The author summarises the suggestions as follows: "(a) legal aid should be a compulsory course in the law curriculum or at least an

The Ford Foundation, which played a fundamental role with regard to financial contributions leading to the establishment of university law clinics at national and international levels, sponsored an International Legal Aid Conference in 1973 and as a result thereof many other South African universities followed suit and established clinics between the late 1970's and early 1980's.[30]

The model for the early university law clinics was built mainly on student initiatives supported in some instances by academics and private practitioners.[31] University law clinics were generally known as legal aid clinics and gradually evolved in status and thinking from a *pro bono* perspective to statutorily recognised legal service providers.[32] The main drive of university law clinics was the provision of legal services to poor and marginalised communities. Reciprocity of learning occurred almost as a by-product of these initiatives in that the student obviously gained insight into the practice of law through assisting actual clients as opposed to text book analysis. This approach paved the way towards a philosophy of social awareness and responsibility and a keen consciousness of the gaps in access to justice by the members of the disenfranchised. According to De Klerk the need to provide legal assistance to the indigent was the core purpose of the clinics. The clinical programmes were not the root cause for the

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elective course; (b) academic credit should be given for legal aid work; (c) universities should encourage research into the administration of justice and the effectiveness of legal aid; (d) law students should be used to reduce the manpower shortage in respect of legal aid work; (e) the feasibility of student practice rules should be investigated; (f) properly supervised legal aid clinics should be set up at all universities; (g) academic lawyers should be represented on the legal aid board; (h) university legal aid clinics should assist in labour law matters; and (i) a coordinating committee on legal aid consisting of the universities and the legal profession should be set up."

30 The following universities established law clinics during this period: University of Natal (1973), University of Port Elizabeth (1974), University of Stellenbosch (1975), University of the Western Cape (1975), Universities of Durban Westville and Zululand (1978), Rhodes University (1979), University of Pretoria (1980), University of South Africa and Rand Afrikaans University (1981), University of the Orange Free State and University of Potchefstroom (1980). See also McQuoid-Mason: 2004: 40 in this regard.

31 De Klerk *et al*: 2006: 264. This situation remains to a certain degree unchanged in that from what follows in Chapter Four it is clear that all of these interested parties fulfill a pivotal role in the success of an otherwise clinical programme.

32 Haupt: 2006: 229. The Attorneys Act 53 of 1979 makes specific provision for law clinics.

establishment of clinics. In general the programmes were not credit-bearing and the students participated on a voluntary basis.[33]

During the 1980's clinics underwent an expansion in function, value and growth. By 1986 sixteen (of the then 21 South African universities) had incorporated a clinical programme into their undergraduate degree.[34]

The Association of University Legal Aid Institutions (AULAI) was formed in 1987 and the purpose of this organisation was to represent and promote South African university law clinics.[35] Since 1988 the Attorney's Fidelity Fund (AFF) has become one of the main financial supporters of university law clinics in South Africa.[36]

In response to the growth of the clinical movement, the Attorney's Act [37] was amended to allow for candidate attorneys to complete their articles of clerkship at a university law clinic as community service.[38]

By 2003, every law faculty within South Africa had established a law clinic and resultantly provided access to justice to those in need and thereby provided practical training to its own students within the mind-set of social upliftment.[39] By the end of 2003, the completion of a clinical course was compulsory at

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33 De Klerk: 2006(b): 930.

34 De Klerk: 2006(b): 930. See also Iya: 2000: 16.

35 De Klerk *et al*: 2006: 264. See also De Klerk: 2006(b): 930. AULAI has since become the principle representative body for South African Law Clinics and is comparable to CLERP in America and CLEO in the United Kingdom.

36 De Klerk *et al*: 2006: 264. See also De Klerk: 2006(b): 931 and 941. It is evident that still today many law clinics are dependent on the AFF for support.

37 53 / 79.

38 Refer to section 1-3 of Act 53/79 for a complete description of articles served at a law clinic. See also in this regard De Klerk: 2006(b): 931.

39 Haupt: 2006: 231.

approximately 55% of faculties, and the remainder offered clinical courses as an elective module.[40]

4. THE FURTHER DEVELOPMENT OF CLINICAL LEGAL EDUCATION IN SOUTH AFRICA

4.1 INTRODUCTION

The creation of university law clinics has by no means been an easy feat and the current position of clinics throughout South Africa has been hard won and is yet uncertain.[41] When clinics were initially proposed, surprisingly or perhaps not, most resistance seemed to come from the organised profession who viewed clinics and clinical practitioners as 'charity' organisations which would ultimately compete for clients either through touting or simple economic necessity. The mixture of social upliftment and law practised at most clinics was a foreign concept to most private sector legal practitioners who saw neither the value nor the necessity of law clinics. This attitude has changed somewhat over the ensuing decades and perceptions shifted to the notion of un-capitalised talent and training potential that lay within the walls of most clinics albeit unsupported and in some cases untapped.[42]

4.2 GOVERNING STRUCTURES OF VARIOUS LAW CLINICS

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40 Haupt: 2006: 231. In this context the term 'clinical' refers to an attempt to study and teach law through the use of legal skills directed to solve client problems and the attempt to draw useful generalisations from such experience.

41 De Klerk *et al*: 2006: 18 "University Law Clinics are centers for the practical legal education of students in the faculty of law at a university in the Republic and a law centre controlled by, or which is, a non-profit organisation, which provides legal services to the public free of charge."

42 De Klerk *et al*: 2006: 18 "A more detailed definition of a law clinic [as provided by McQuoid-Mason: 2000: 90] describes law clinics as offices staffed by law students under the supervision of qualified lawyers which provide free legal services to indigent members of the community and deal with live clients with real life problems." See further in this regard the work of Haupt: 2006: 237.

According to McQuoid-Mason, by 1982 the scuffle for the recognition of clinics at South African universities had been won especially in consideration of the joint effort of the Transvaal Law Society and academics to create order and form in and for clinics.[43] Consequently a set of guidelines was established to guide clinics and invariably protect them from possible mishaps which can befall private and public sector practices. A further aim of the guidelines was to create a foundation for the establishment of clinics and for their exemption from certain rules of the various law societies. [44]

The subsequent guidelines according to Steenhuisen can be summarised as follows:

1. *"'n Regskliniek moet oor 'n voltydse prokureur beskik wat 'n voltydse kantoor beheer;*
2. *die kliniek moet behoorlik gekonstitueer, georganiseer en beheer wees;*
3. *die kliniek mag nie op winsbejag gerig wees nie en moet gratis regsdienste aan behoeftige lede van die samelewing ingevolge die middeletoets wat van tyd tot tyd vasgestel, lewer;*
4. *die kliniek mag regsdienste met regsonderrig integreer; en*
5. *die kliniek moet by die beperking van aanname van sekere soort sake hou, byvoorbeeld die aanname van derdeparty eise."*[45]

The above guidelines can be supplemented by the following plans which were extrapolated in the Law of the Transvaal Memorandum:

1. *The clinic shall be properly constituted, organized [sic] and controlled to the satisfaction of the Council* [46] *either as part of the faculty of law at a university in the Republic or as a law centre controlled by a non-profit making organization;*[47] *[sic]*

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43 1982: 166.

44 Haupt: 2006: 237. According to De Klerk *et al*: 2006: 13 "The Law Society of South Africa (LSSA) is the umbrella body of the Attorneys' profession in South Africa. The LSSA aims to promote the common interests of its members having regard at all times to the broader interests of the public whom the profession serves. There are currently four provincial law societies. These are the: Cape Law Society, which covers the areas of the Northern, Eastern and Western Cape as well as the former Transkei and Ciskei; Free State Law Society, which covers the Province of the Free State; the Law Society of the Northern Provinces, which covers Gauteng, Mpumalanga and the North West Province; and KwaZulu-Natal Law Society, which covers the area of KwaZulu Natal."

45 1998: 155.

46 At that stage the Council was referring to the Council of the Law Society of the Transvaal.

47 Law Society of the Transvaal Memorandum filed under 8218A/tws0066A/881213 as quoted by Haupt: 2006: 238. This rule is now contained in Cape Rule 19.1, Free State Rule 20.A.1.1, Northern Provinces' Rule 115A.1, KwaZulu Natal Rule 25(1)(a).

2. *The clinic must provide legal services to the public;* [48]
3. *The legal services provided by the clinic must be rendered free of charge, direct or indirect, to the recipient of those services;*[49]
4. *Provided that – the clinic may recover from the recipient of its services any amounts actually disbursed by it on behalf of the recipient;*[50]
5. *The services may be rendered only to persons who, in the opinion of the council, would not otherwise be able to afford them;*[51]
6. *The council may from time to time issue guidelines for the assistance of clinics in determining to whom services may be rendered;* [52]
7. *The clinic may not undertake work in connection with the drawing up of a will or other testamentary writing, the administration or liquidation or distribution of the estate of any deceased or insolvent person, mentally ill person or any person under any other legal disability, or the judicial management or the liquidation of a company, nor in relation to the transfer or mortgaging of immovable property, nor in relation to the lodging or processing of claims under the Motor Vehicle Accident Act, 1986, or any amendment thereof or such other work as the council may from time to time determine;*[53]
8. *The name under which the clinic is to carry on its activities, and the letterheads and other stationary of the clinic, shall require the prior approval of the council;*[54]
9. *Attorneys in the employ of the clinic may be remunerated only by way of salary payable by the clinic or by the organization [sic] to which it is attached.* [55]

The most striking conclusion which can be drawn from the above guidelines, despite their apparent practical use and intention, is that there was an obvious lack of input from South African academics regarding their perspectives of the mission and vision of university law clinics. The guidelines appear self-serving from a practitioner's point of view, especially a private practitioner. The guidelines which were created in order to structure and define university law clinics, definitely lean, like a 'Tower of Pisa', to one extreme side: that of private legal practitioners. While the access to justice angle of a university law clinic cannot be

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48 Similar provisions are found in Cape Rule 19.2, Free State Rule 20A.1.2, Northern Provinces' Rule 115A.2 and KwaZulu Natal Rule 25b.

49 This can be found in Cape Rule 19.3, Free State Rule 20A.1.3, Northern Provinces' Rule 115A.3 and KwaZulu Natal Rule 25(c).

50 This can now be found in Cape Rule 19.3.1, Free State Rule 20A.1.3.1, Northern Provinces' Rule 115A.3.1 and KwaZulu Natal Rule 25(c)(i).

51 A similar provision can be found in Cape Rule 19.4, Free State Rule 20A.1.2, Northern Provinces' Rule 115A.3.2 and KwaZulu Natal Rule 25(d).

52 A similar provision can now be found in Northern Provinces Rule 115A.4.

53 A similar provision is made in Cape Rule 19.5, Free State Rule 20A.2, Northern Provinces' Rule 115A.5 and KwaZulu Natal Rule 25(1)(e)-(f).

54 A similar provision is contained in Cape Rule 19.6, Free State Rule 20A.3, Northern Provinces' Rule 115A.6 and KwaZulu Natal Rule 25(1)(h).

55 Law Society of the Transvaal memorandum filed under 8218A/tws0066A/881213 as quoted by Haupt: 2006: 238. Similar provisions are found in Cape Rule 19.7, Free State Rule 20A.4, Northern Provinces' Rule 115A.6 and KwaZulu Natal Rule 25(1)(h).

denied, practical training and skills transfer appear to be the forgotten partner in the guidelines. Steenhuisen noted that the original drive for the establishment of university law clinics was the criticism leveled against most faculties that their students did not receive sufficient practical training and were therefore ill equipped to enter practice.[56] Despite the criticism it would appear that traditional academics were not duly involved or perhaps were under-represented when the guidelines for university law clinics were drafted. This is evident from the lack of focus on practical training in the guidelines. University law clinics currently enjoy full recognition by the organised profession and are permitted to offer a virtually unlimited range of legal services to clients.[57] University law clinics are governed individually, through various means, by their individual university structures and policies. The majority of university law clinics are under the leadership of a director who is, in most cases, also appointed within the framework of the individual law faculty concerned. Currently each law faculty within the Republic has a university law clinic and many clinics have moved into specialised fields of law such as refugee law.

University law clinics are not beholden to a central governing body that controls the actions of law clinics but are nonetheless under the management of their university management structure, the relevant law society and, where it employs advocates, the National Forum of Advocates.

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56 Steenhuisen: 1998: 154.

57 De Klerk: 2006(a): 244. See also McQuoid-Mason: 2004: 35 who states "During the 1970's (sic) most of the work of the clinics consisted of civil matters such as divorce, maintenance, other family matters, credit agreements, housing, personal injury, unemployment insurance, wrongful dismissals, workmen's compensation and deceased estates. Criminal law work consisted less than 10% of the work.....[S]tudents could provide a useful service by assisting with: (a) Writing statements reflecting the defendant's financial position for debtor's court hearings; (b) winding up small estates; (c) drafting letters of demand in respect of claims for sentimental damages; (d) assisting women to prepare their complaints before approaching the maintenance courts; and (e) assisting with negotiations where the legal aid board was party to a suit. In criminal cases law students could assist by: (a) Helping counsel in *pro deo* cases prepares defences; (b) preparing statements in mitigation of sentence for pleas and admissions of guilt; and (c) providing advice on whether or not to plead guilty to traffic or motor vehicle offences."

The Attorneys Act [58] has incorporated a definition of a university law clinic and has refined the functioning of a university law clinic. [59]

The Association of University Legal Aid Institutions (later referred to as AULAI) is a voluntary association of all South African university law clinics which was established in 1982 to promote and protect the interests, values and goals of its members.[60] The Association was, according to Iya, established to achieve some level of integration and benchmarking standards and procedures through promoting high quality clinical legal education programmes at universities in South Africa.[61] Over the past few years AULAI has produced a standard curriculum, a teaching manual and a student text book. [62]

The AULAI's vision is stated as:

> "...to be a professional and efficient organisation[sic] committed to democratic values and human rights, and dedicated to promoting excellence in clinical legal education and access to justice." In pursuit of the above vision AULAI's mission is "....to provide financial and programme support to its members, to promote high quality clinical legal education programmes at universities in South Africa, to encourage and assist member law clinics to promote social justice, to promote access to justice and to foster and encourage values of integrity, professionalism and dedication to human rights within the legal profession." [63]

The primary objectives of AULAI are as follows:[64]

1. *The provision of free legal services to indigent communities.*
2. *The practical legal education of senior law students and candidate attorneys.*
3. *To ensure the sustainability of AULAI and its members.*
4. *To assist member law clinics to attain their goals.*
5. *To network with relevant stakeholders.*
6. *To lobby relevant organisations when appropriate.*
7. *To foster public confidence in the law and the administration of justice.*[65]

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58 Act 53 of 1979.

59 Refer to section 1 of Act 53/1979.

60 http://www.aulai.org.za – 17/3/08. See also in this regard paragraph 6 of the Constitution of AULAI – on file with author, as well as De Klerk: 2006(b): 930.

61 2008: 46. See also in this regard paragraph 4 of the Constitution of AULAI.

62 See in this regard De Klerk: 2006(b): 931.

63 See in this regard paragraphs 2 and 3 of the Constitution of AULAI.

64 http://www.aulai.org.za – 17/3/08. See also paragraph 4 of the Constitution of AULAI.

65 According to the AULAI website the following universities are members: University of Cape Town Legal Aid Clinic, University of KwaZulu Natal Howard College Legal Aid

It is clear from the above that although the association promotes the different interests and values of its members it is a voluntary association and many law clinics choose to be members ultimately striving to achieve the same goal.

5. SOUTH AFRICAN LAW CLINICS: A GEOGRAPHICALLY SELECTIVE OVERVIEW

5.1 THE UNIVERSITY OF THE WITWATERSRAND LEGAL AID CLINIC

As previously mentioned the University of the Witwatersrand Legal Aid Clinic was established in 1973 and was the clear forerunner of clinical legal education in South Africa. The Wits clinical programme was the first to be incorporated into the mainstream law curriculum.[66] At the beginning of 1973 an off-campus legal aid clinic was established by law students at Wits.[67]

The University of the Witwatersrand Law Clinic (also referred to as the Wits Law Clinic) began as a simple 'poverty law' or general litigation clinic which provided free legal services to indigent members of the community. Towards the end of 1999 however, the clinic restructured itself in an attempt to create specialised units which dealt with particular areas of law. It was felt at the time that a general litigation clinic had many disadvantages such as: client dissatisfaction, high

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Clinic, University of KwaZulu Natal Westville Clinic, University of the Free State Law Clinic, University of the North Legal Aid Clinic, University of the North-West Mafikeng Campus Legal Aid Clinic, University of Port Elizabeth Legal Aid Clinic, University of Pretoria Legal Aid Clinic, Pietermaritzburg Legal Aid Clinic, Potchefstroom Legal Aid Clinic, Rand Afrikaans University Legal Aid Clinic, Rhodes University Legal Aid Clinic, Stellenbosch University Legal Aid Clinic, University of Venda Legal Aid Clinic, University of the Witwatersrand Legal Aid Clinic, University of the Western Cape Law Clinic, University of Fort Hare Legal Aid Clinic, University of the Transkei Legal Aid Clinic, University of South Africa Legal Aid Clinic, University of Zululand Centre for Legal Services, and North-West University Community Law Centre.

66 De Klerk *et al*: 2006: 307. See also Mahomed: 2008: 54.

67 McQuoid-Mason: 2004: 33.

turnover and rotation of cases, poor continuity, lack of professional responsibility and poor use of the individual skills and preferences of each supervisor.[68]

The move towards a more specialised clinic, it was suggested, would assist in dealing with the abovementioned challenges. Doubt was however expressed in the ability of a specialised clinic to afford students the experience of a range of legal scenarios whilst still maintaining the integrity of an already well-established skills training module where students would only be exposed to a specialised aspect of law. Concern was further expressed at the curriculum amendment required to institute a specialised training programme.[69] The challenges were overcome towards the end of 1999 through the idea of 'generic legal skills' training and the retention of a small generalised legal practice alongside the specialised units which ensured thorough training for students as well as assistance for those clients who did not fall within the scope of a specialised unit.[70]

The result of the restructuring process was the establishment of four specialised units in family law, labour law, criminal and delict and the retention of a small general practice unit. With the exception of the criminal unit each remaining unit is a full time training unit. Each unit is run by one or two attorneys who are assisted by candidate attorneys.[71] The restructured programme was first presented in 2000.[72] The key characteristics of the restructured programme were summarised by Mahomed:

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68 A general litigation clinic tends to have an overflow of work, usually in divorce and family law, and this situation fails to take into account the individual lawyers' skills and preferences geared towards specialisation in a particular field. See also Du Plessis: 2008(b): 14 where the author posits that specialised units eases the management of case loads but that educational goals should still be kept in mind.

69 De Klerk *et al*: 2006: 311.

70 The notion that legal skills such as drafting do not have to be taught within the framework of a specific field such as family law but can be taught as a fundamental skill which underlies all if not most areas of legal work.

71 http//www.aulai.org.za – 17/3/08. See also McQuoid-Mason: 2008: 6 where the author reiterates that specialised units entail that the students is trained in a specific field.

72 De Klerk *et al*: 2006: 312.

1. *Students are divided into teams comprised of two students.*
2. *The pair is then allocated to one of 7 supervisors with whom the pair will work closely.*
3. *The pairs participate in a specialist unit for the duration of the academic year.*
4. *Clients are seen on a first-come-first-served basis.*
5. *Individual supervisors are responsible for their weekly intake of cases and screening for suitable cases.*
6. *Case loads are allocated to each student pair and all professional activities undertaken by the students are monitored by the supervisor weekly in a tutorial session.*
7. *Students attend plenary lectures in which they are instructed in various legal practice topics.*
8. *A simulation method is used to teach trial advocacy.*
9. *Student assessment comprises of written tests on law and procedure, drafting test, oral exam, written assignments and file assessment.*
10. *Clinicians are further responsible for the training and mentoring of candidate attorneys employed at the clinic.*[73]

5.2 UNIVERSITY OF PRETORIA LAW CLINIC

The University of Pretoria Law Clinic began as a student initiative which aimed at rendering legal services to the community of *Eersterus* in Pretoria. [74] In response to student pressure the Faculty of Law requested Professor HP Viljoen in 1980 to investigate the viability and desirability of a Law Clinic. [75] He (Viljoen) found that some months previously a group of 13 perhaps over-eager law students had already established a type of clinical practice in *Eersterus*. The students had established offices in buildings provided by the Child and Family Welfare Organisation.

A constitution for the clinic was drafted and accepted in 1981. A student management committee was elected from the student body by the students themselves to manage the clinic. In terms of the constitution of the clinic any student who had successfully completed Roman-Dutch Law (II) and Commercial Law (I) and any full time lecturer could become a member of the clinic.[76]

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73 2008: 59-60.

74 De Facto Law Students Publication 1981.

75 Haupt: 2006: 232. See also Commemorative Journal UP Law Clinic 1980 – 2005 (2005) 11.

76 Haupt: 2006: 233.

By 1984 however many original student members had graduated and the anticipated faculty involvement had not materialised. The lecturers who had become involved expressed concern as to the quality of legal advice dispensed and the lack of supervision over the students giving such advice.

It was decided to integrate the clinic into the then Department of Procedural Law and Evidence. The existing constitution by default then ceased to exist. Towards the end of 1986 it was decided that a new elective module entitled Practical Law would be introduced thereby shifting the focus of the clinic from pure community service to practical training through the mechanism of community service. The management of the clinic was taken away from the students and placed in the hands of a director. Through the inception of an elective course in Practical Law the clinic became part of the law faculty and clinical work part of the mainstream curriculum, albeit as an elective module which it currently still is.[77]

5.3 UNIVERSITY OF CAPE TOWN LEGAL AID CLINIC

The main focus of the Cape Town Legal Aid Clinic is the provision of legal services, intensive practical training, paralegal support and access to justice. The clinic started in the early 1970's when students began operating from offices situated on campus. The clinic was managed and staffed on a voluntary basis by law students with some supervision by private practitioners.[78] Early funding

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77 Haupt: 2006: 234. During a recent interview with the director I established that their clinical module is now presented as two semester modules. During the second semester of 2009 24 students were registered for this course compared to 49 in the first semester. The students are divided into firms which have on average 5 students per firm and it is required of each firm to attend to clinical work for approximately 2 hours per week and a plenary session once a week. Pretoria Law Clinic offers, at the inception of the course (which is elective), a weekend orientation camp in which students are, through simulation activities, exposed to consultation, negotiation and interviewing skills. They currently have 1 supervisor (besides the director) that is specifically assigned to deal with students.

78 McQuoid-Mason: 2004: 33.

support was received from University of Cape Town Student Affairs and all consultations were held at the SHAWCO Community Centers.[79]

The first formalised law clinic was established in Kensington and serviced by students. The original clinic served merely as an advisory office and was upgraded in 1989 when the Attorney's Fidelity Fund began financially supporting all South African university law clinics. [80] According McQuoid-Mason:

> "the Attorneys Fidelity Fund is a fund that has accumulated out of the interest paid on monies held in attorney's trust accounts. It is used to compensate members of the public who have suffered loss as a result of fraud by practising attorneys, but also makes money available for legal education. The Attorneys Fidelity Fund subsidizes accredited legal aid clinics by providing funds to enable them to employ a practitioner (attorney or advocate) to manage the clinic." [81]

Presently the clinic operates as a law practice and is accredited by the Law Society of the Cape of Good Hope. The clinic's services are supplemented by a Refugee Rights Projects, a back-up service support to various community advice offices. [82]

5.4 NORTH-WEST UNIVERSITY (POTCHEFSTROOM CAMPUS) CENTRE FOR COMMUNITY LAW AND DEVELOPMENT

The University of the North-West is a conglomeration of a previously historically white (University of Potchefstroom) and a historically black (University of the North West) institution of higher education. The university has law clinics at both the Mafikeng [83] and Potchefstroom [84] Campuses. Each clinic is incorporated into

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79 http://www.aulai.org.za/clinics.uct.html -17 / 03 / 2008.

80 According to De Klerk *et al*: 2006: 14 "The Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund was established under section 8 of the Attorney's Admission Amendment and Legal Practitioner's Fidelity Fund Act 19 of 1941, and its continued existence – as the Attorneys' Fidelity Fund – is provided for by section 25 of the Attorneys' Act 53 of 1979. The Attorneys' Fidelity Fund is a statutory body established and regulated by the provision of the Attorneys' Act. Its principle objective is to protect the public against loss as a result of the theft of trust funds by practitioners."

81 2008: 9.

82 http://www.aulai.org.za/clinics.uct/html - 17 / 03 / 2008.

83 Called the Community Law Centre.

84 Called the Centre for Community Law and Development.

the respective law faculties and shoulders the responsibility for the provision of practical legal training to students.

The Centre for Community Law and Development (hereinafter referred to as the CCLD) operates as a clinic at the Potchefstroom Campus. The CCLD was established around 1982. The centre started, as was the trend, with a few student volunteers who visited an impoverished community and provided legal advice. In 1986 the centre opened an office from which they pursued the same objective. Up to 1994 the core objective of the centre revolved primarily around the provision of legal services and only thereafter incorporated practical training as a further objective of the centre.

The Community Law Centre at the Mafikeng Campus was established by the Faculty of Law during 1988 primarily to service the rural communities in the immediate area and to train students from disadvantaged backgrounds. In 1989 the Street Law Unit was established which provided community education in democracy and the law. [85]

5.5 THE UNIVERSITY OF THE FREE STATE LAW CLINIC

The University of the Free State Law Clinic was established by members of the law faculty and senior law students in the late 1980's.[86] The original clinic operated purely as an advisory office from an informal office in the Mangaung informal settlement. In the 1990's funding from the Attorneys Fidelity Fund and a cooperation agreement with the Legal Aid Board facilitated an expansion of the clinic. During this period a full time director was appointed who had the additional duty of developing a student practical training programme for senior law students. In 1998 the University of the Free State introduced a compulsory subject named Legal Practice in all four years of the LL B degree. The fourth

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85 Feldhaus: 2007: 6.

86 http://www.aulai.org.za/clinics.uofs.html - 17 / 03 / 2008.

year of study is divided into a formal class component taught by an experienced legal practitioner and the second part consists of purely practical training at the law clinic. The clinical programme is two semester courses and only those who are serving articles (which are minimal in number) are exempt from attending training. Initially the Free State programme consisted of students attending the clinic in groups of ten and then consulting with pre-booked clients. After the termination of cooperation with the Legal Aid Board and because of its temporarily unsuitable location, the clinic taught through simulation to students attending sessions in groups of ten.[87]

In 2010 the clinic is restructuring into units (6 in total) and appointing a supervisory attorney as the head of each unit. The students will attend the clinic in their unit divisions (16 students per unit) each week and serve clients on a first-come-first-serve basis. The supervisory attorney for that unit will then guide the student through each and every file. Unique to the Free State Clinic is the establishment of a specialised appeal unit which will be served by 15 students who qualify within the top 5 percent of their third year class. These students will assist a qualified advocate to prepare the necessary documents for appeal case representation.[88]

Another unique feature of the Free State programme is its attention to service learning projects in which students (in groups of ten) deliver two service leaning projects (a total of 20 per year) to a community partner. These partners sign a cooperation agreement with the clinic and the students then assist them through education, training and legal assistance. The aim of this approach is however not in-service but rather in reciprocity of learning as it is required that each student in a project reflect on what they have learned from the community they have assisted. Soft skills such as time management, budgeting, people skills,

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87 Free State Law Clinic, Director's reports for 2007, 2008 and 2009 on file with the author.

88 Free State Law Clinic, Director's Report for 2009, on file with author.

negotiation, crisis management and event planning are taught in this manner. This is in line with declared University of the Free State policy.[89]

The University of the Free State Law Clinic is further engaged in the National Youth Strengthening Programme with the Department of Justice and Constitutional Development and has recently received approval to appoint 15 candidate attorneys who are also divided into units with the students and assist in basic mentoring and supervision. The candidates also man two criminal courts at the Bloemfontein Magistrate's office and perform a variety of civil legal services under the guidance of their principal.

The main objective of the law clinic is the provision of practical training for senior law students through the mechanism of legal services.

6. PRELIMINARY CONCLUSION

It is clear that one can compare the American situation with regard to legal education in the United States of America to that of pre-democratic South Africa. The difference is of course that America underwent social change earlier than South Africa in terms of enlightened thinking towards legal education. In America and South Africa the pursuit of legal studies was seen as an elitist pursuit which disallowed any of the downtrodden to enter its hallowed halls.

Clinical legal education in South Africa saw the gap created by training students purely in theoretical science, as advocated by Langdell, to combine practical and theoretical skills whilst at the same time providing a platform for access to justice and the instilling of a sense of social responsibility in students.

It is clear from both the South African and American perspective that the central themes from inception of the clinical legal education (movement) was social up-

[89] Access this policy on www.ufs.ac.za/community service/documents 17/03/2008.

liftment, access to justice, civil rights and the practical instilling of knowledge geared towards preparing a graduate that can function in a society. These themes are evident from the history of the origins of university law clinics in South Africa. The initiatives to form university law clinics were mainly those of students interested in assisting the disenfranchised. The themes which can be viewed as values, so to speak, can also be found when one examines the legislative framework and subsequent guidelines under which law clinics currently function. Fundamental to these, however, the introduction of what may be described as pure pro bono initiatives was a change that occurred in the educational pedagogy at South African universities in that clinical legal education was well established and now is a core part of all LL.B *curriculae*.

CHAPTER 3

DEFINING AND COMPARING CLINICAL LEGAL EDUCATION WITH OTHER FORMS OF PRACTICAL STUDENT ENGAGEMENT

1. INTRODUCTION

This chapter will serve as the platform for the main arguments in Chapters 4 and 5. The aim of Chapter 3 is to provide the reader with a few fundamental concepts relating to: clinical legal education, the method of clinical legal education, the goals of clinical legal education and the clinical method. This chapter will further explain the models employed in clinical legal education. Commonalities and differences between clinical legal education and practical training will be examined. A brief exposition of service learning will be provided and the latter will be contrasted with community service learning. The goals of both community service and service learning will be incorporated in my study and the juxtaposition of community service, service learning, practical legal training and clinical legal education highlighted.

In this chapter I intend to lay a basis for my further submissions regarding a combination of methodologies under the umbrella term clinical legal education. I will argue at a later point that there are enough similarities between various methods and models. Each however has an aim, whether it is a primary or secondary outcome, which strives towards the inculcation of practical legal skills. Clinical legal education and exposure of students to 'live-clients' in the final year of LL B should be supported by other methods such as practical legal training in the first three years of the LL B degree.

In order to draw a clear distinction between the differing ideas and terminology frequently encountered in a practice-orientated training situation, one should draw a clear distinction between the varying terminologies under which the practical element of student engagement can fall. In this chapter the difference

between pure practical legal training and clinical legal education will be examined. Specific reference will be made to the different models of clinical legal education and the goals of clinical legal education compared to practical training. The recent addition of community service learning will also be distinguished from community service and the similarities between clinical legal education and community service learning will be highlighted.

From the onset, it is opined that the need to understand the various descriptive terms for practical engagement is of the utmost importance for purposes of successfully integrating the theoretical instilling of knowledge and practical application of the theoretical knowledge. It will further be illustrated that although clinical legal education is a mode of combining and integrating the two, practical application is but one of the goals of clinical legal education. It will also be illustrated that clinical legal education can be interpreted in a wide perspective and can thereby incorporate practical legal training with no form of 'live-client' situation yet still be successful. It will further be argued that clinical legal education provides the ideal method of achieving student engagement in accordance with the demands of the profession, the goals of higher education institutions and national policy directives for legal education.

2. CLINICAL LEGAL EDUCATION

2.1 DEFINITION THROUGH METHOD AND USE

It is clear from the previous chapter that different university law clinics have different programmes which incorporate clinical legal education. It is further clear from the exposition provided in the previous chapter that practical legal training is oftentimes disguised as clinical legal education. It is further clear from the extracts that follow that within the clinical legal education movement the discourse still exists as to whether clinical legal education should have a 'live-client' component in order to be viewed as clinical legal education. I submit that

the exposure of students to 'live-clients' is not essential and indeed to define clinical legal education by this sole aim or method is to severely understate its use.[90]

It is my perception that fellow clinicians are of the opinion that clinical legal education in its pure form must involve 'live-client' exposure. Those who hold this view posit that 'live-client' interaction is an integral part of the clinical legal education programme which affords the students the opportunity to practise law whereas other forms of practical training simply allow the student to apply theoretical knowledge to a hypothesised situation. This view will be explored and the conclusion will be reached that the 'live-client' interaction is simply one of the methodologies employed in clinical legal education but does not define it. I submit that although 'live-client' exposure is the overriding methodology in clinical legal education it is not the only one which allows students to develop their practical skills in a situation which is not simply the application of theory to a set of predetermined facts.

According to Steenhuisen a generally accepted, workable and finite definition of clinical legal education simply does not exist.[91] It is suggested that this may be due to the fact that it is often confused with the clinical method of teaching. Steenhuisen further explains that the clinical method of teaching as opposed to clinical legal education makes use of actual experiences of the legal process as the educational core.[92] I submit however that from the various authors in the field of clinical legal education a stable definition of the terminology clinical legal

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90 My emphasis which will be explained through the exposition that follows.

91 Campbell: 1991: 121 states in this regard "The literature reveals some confusion over the precise nature of a clinical program (sic); the term is sometimes used to refer without differentiation to skills training in simulated settings as well as to programs (sic) involving real clients with real problems. However the distinction between the objectives of the two forms of education is fundamental and the term 'clinical legal education' should properly be used only to refer to programs (sic) where students act for real clients in the handling of their real legal problems."

92 See in this regard De Klerk *et al*: 2006: 265 where Steenhuisen explains the clinical method as opposed to clinical legal education.

education can be construed which will be extrapolated hereunder after examining the various definitions which already exist in the literature.

Firstly if one examines the concept clinical legal education, the following aspects may be highlighted: the use of the word 'clinic' stems from the practice of medicine and hence the clinical method of teaching will be directly linked to the function of a traditional medical clinic.[93] Secondly clinical legal education, much like a medical clinic, implies a trade situation in which a member of the community is assisted by a student's knowledge and the student in return obtains further experience and insight into his own learning and knowledge.

From the above two premises, firstly of exposing the student to the practice of law by serving the community through a client and secondly the medically-defined concept of a clinic, it is suggested that viewed as such, clinical legal education should be seen purely as 'live-client' interaction. [94] It will however be further explained in the following paragraphs that the 'live-client' situation is

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93 Swanepoel *et al*: 2008: 105 refer to the Cambridge Online dictionary where 'clinic' means "a building, often part of a hospital, to which people can go for medical care or advice." The authors further explain that the word 'clinic' incorporates the core of clinical legal education and asserts that a 'clinic' viewed from the latter contention is defined as: "A place under the auspices of a university, or an institution of higher education, where members of the public may go to receive legal services, and where law students, through assisting to and or rendering these services under supervision of qualified legal practitioners, may learn the profession of law by either doing it or observing it being practised." Compare however Condlin 1983: 318 "[A] wide range of other types of practice-related instructional programs (sic) are called 'clinical'. These programs (sic): practice court simulation of litigation (particularly trial) problems that students are asked to act out; ad hoc faculty-student research into litigation and law practice skills; extracurricular volunteer work for legal aid offices, 'public interest' organizations (sic), and government agencies, often called 'internships'; equivalent uncompensated (except through course credit) work for private law firms, sometimes described as 'downtown seminars'; practice-skill exercises grafted onto substantive law courses and usually referred to as 'clinical components'; and classroom cognitive instruction (sometimes interdisciplinary and with or without parallel simulation exercises) in the interpersonal processes of law practice." See also in this regard CLEA handbook for new clinical teachers April 2007: 10 which refers to a clinic as "In law schools, program (sic) that teaches through direct experience of lawyering, under the supervision of practicing attorneys / or teachers, characteristically in work that advances social justice or the public interest."

94 Steenhuisen: 1998: 156-158 "...if clinical legal education is viewed from a community awareness perspective then it requires actual clients in order to create an ideal learning environment in which clinical education can best be practised."

merely one of the models of clinical legal education through which the clinical method is employed.[95]

The concept of clinical legal education may be understood as having a very broad meaning. Clinical legal education aims at the restructuring of legal education within the academic sphere and the inculcation of the philosophical role of legal practitioners within the broader context of society.[96] Viewed in this context clinical legal education is a method of improving the student experience and offers various advantages if integrated by law faculties.[97] Should one view clinical legal education in broader terms, it may be defined as:

> "...[T]he method of instruction in which students engage in varying degrees in the actual practice of law. This is where students get the opportunity to apply the theoretical aspects of their training to real-life or simulated situations."[98]

According to De Klerk clinical legal education can be viewed as an educational exercise which incorporates the integration of substantive knowledge, practical skills and values.[99] This explanation of clinical legal education incorporates the educational goal of community awareness through the instilling of values.

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95 See in this regard: Mahomed: 2008: 54: where the author states as follows: "Clinical legal education at University Law Clinics in South Africa is generally premised on the idea of providing access to justice to the poor and marginalised. It was with this thought in mind that most, if not all clinical programmes in South Africa were initiated. In time, a teaching model was developed around what is essentially a client-centred approach, adopted by many South African law clinics. I will refer to this model as the 'real-client' model."

96 De Klerk *et al*: 2006: 265. This viewpoint distinctly removes the student from the pure theoretical instilling of knowledge and regards the student as a learner who has to be prepared not only for practical application of substantive knowledge, but also for the societal challenges that the student will face when he enters the profession.

97 Marson *et al*: 2005: 29.

98 Iya: 2008: 35. This viewpoint is shared in the Report of the Committee on the Future of the In-House Clinics as summarised by Mahomed: 2008: 56: "Clinical education is first and foremost a method of teaching. Among the principal aspects of that method are these features: students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problems in role; the students are required to interact with others in attempts to identify and solve the problems; and, perhaps most critically, the student's performance is subjected to intensive critical review."

99 De Klerk: 2006(b): 937. This already distinguishes clinical legal education from practical skills transfer in that the students are confronted with substantive knowledge, albeit practically applied, and also that the students are confronted with certain values which they would not necessarily have to deal with in mere practical training.

John Stone asserts that clinical legal education is:

> "[a] law school sponsored programme for law student work on legal aid cases. Legal aid cases are those in which legal advice and assistance, at little or no cost to the client, are given to indigent persons and persons with low incomes."

Stone's definition presupposes a law faculty's involvement, student assistance and financial back-up for the university law clinic in which such activity takes place. This definition also incorporates the notion of 'live-client' interaction as central to clinical legal education.

In 1992 the committee which reported to the Association of American Law Schools provided the following definition of in-house, live-client clinical education [which is synonymous with the South African clinical legal education]:

> "Clinical education is first and foremost a method of teaching.[100] Among the principle aspects of that method are these features: students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problems in role; the students are required to interact with others in attempts to identify and solve the problem; and, perhaps most critically, the student performance is subjected to intensive critical review. [T]he 'live-client' clinic adds to the definition the requirement that at least some of the interaction in role be in real situations...[T]he supervision and review of the student's actual case...should be undertaken by clinical teachers rather than by practitioners outside the law school."

The interesting aspect of the above definition is that it distinguishes between a 'live-client' clinic and one in which simulations are used but still labels both methodologies under the label 'clinical legal education'. If clinical legal education is viewed from a pragmatic-professional perspective then the definition is wider and includes an absence of clients as possible method.[101]

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100 According to Sylvester: 2003: 39 who quotes Boon's definition of clinical legal education as "a curriculum-based learning experience, requiring students in role, interacting with others in role, to take responsibility for the resolution of a potentially dynamic problem."

101 Steenhuisen: 1998: 160. See also Haupt: 2006: 231 who states "clinical legal education can be viewed either as a methodology, or as an area of scholarly enquiry that is a subject, or from a broader, philosophical perspective. As a methodology, it uses the practice of law (simulated or actual) as a context to teach doctrine, ethics, professional skills, effective interpersonal relations and the ability to integrate law, facts and procedure. As a subject, it is the study of what lawyers actually do in practice. The

Further definitions gleaned from the literature on the topic of clinical legal education include that of Sherman who states that clinical legal education is about learning law, legal skills and lawyering while providing legal services to indigent people under the supervision of a law teacher who helps students reflect on this experience.[102] This definition once again presupposes the use of 'live-client' interaction as methodology in clinical legal education.

Meltsner and Schrag state that clinical legal education differs from traditional legal education in the sense that it places the student in a role through most of the process. This role is not superficial and requires the student to phrase his legal argument as if he were in court and further asks him to respond simultaneously to all conflicts and ethical dilemmas therein and thereafter to analyse, interpret and criticise his response. The clinical environment opens the floodgate of independent thought and asks the student to learn about facts, observe his own behaviour, deal with issues of professional responsibility, engage in strategic decision making, make choices under time pressure, make choices without adequate information, learn about judgment and intuition, learn about process and learn technical skills; all of which are vastly different from what is required of a student in the typical classroom situation.[103]

Duncan states that clinical methods of learning are those which require students to learn by undertaking the tasks that lawyers undertake in such a way that they have an opportunity to reflect on the law with which they work, the circumstances and relationships they encounter in that work and the development of their own

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practices of lawyers are examined and analysed in order to discern their theoretical structure." According to Condlin: 1983: 317 clinical legal education is defined as "Instruction in interpersonal skills (e.g. interviewing, counseling, negotiation) and professional ethics (the moral principles that regulate the behavior of lawyers in role), in the context of student field work (representation of actual clients with live cases in law offices created by law schools for this purpose) under the supervision (systematic, critical analysis of student work), of a lawyer-law teacher." The latter author also emphasises that if one of these elements is absent from a clinical programme it weakens the claim that instruction is clinical.

102 1999: 76.

103 As referred to by Sherman: 1999: 77.

skills and understanding. This may be done through simulated exercises, through taking on responsibility for real clients or through working with lawyers, judges or others providing advice or representation.[104]

From the above definition(s) of clinical legal education it becomes clear that the clinical method, which is applied in clinical legal education, makes use of actual experiences of the legal process as the educational foundation. [105] What is not clear however is whether 'live-client' interaction is essential to the methodology.[106]

I submit, after reviewing the various definitions of clinical legal education that the definition in South Africa is twofold – which is necessitated by the socio-economic, political and historical perspective. It is twofold in that firstly one has to define clinical legal education from the perspective of social responsibility towards a community that must be instilled in legal practitioners whilst realising that the student is a member of that community, and secondly one must attempt to educate that student whilst redressing the imbalances that existed in the past. In conclusion my definition of clinical legal education is as follows: *A methodology of social responsibility which seeks to extrapolate constitutional values in student and the community alike by providing an agenda for reciprocity in legal education, between access to justice and education which is grounded in academic knowledge and strengthened by practical skill.*

I submit in the alternative that the function of clinical legal education can be described as: *Extrapolating professional values and fundamental lawyering skills*

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104 2005: 7.

105 De Klerk *et al*: 2006: 265.

106 In this regard see Condlin: 1983: 317 who states " Clinical legal education is defined typically as instruction in interpersonal skills (e.g. interviewing, counseling, negotiation) and professional ethics (the moral principles that regulate the behavior of lawyers in role) in the context of student field-work (representation of actual clients with live cases in law offices created by law schools for this purpose) under the supervision (systematic, critical analysis of student work) of a lawyer / law teacher. Each of the emphasized (sic) elements is important, and the absence of any one weakens the claim that instruction is clinical."

through an access-to-justice perspective in a curriculum-based learning experience.

2.2 THE GOALS OF THE CLINICAL METHOD OF TEACHING COMPARED TO THE GOALS OF CLINICAL LEGAL EDUCATION

Before one can examine the goals of the above two mentioned concepts the distinction between the two needs to be highlighted. According to Barnhizer clinical education is a:

> "[c]onsiderably broader process than clinical methodology...clinical education refers to the broad process of bringing about institutional change and reform within legal education. It is appropriate to view this as an all-inclusive macro-process that is working externally on the curriculum and is representative, not of a specific educational process but a philosophy directed toward fundamental reform. If we accept clinical education as representing such a generalized movement, it is possible to consider the clinical methodology as a separate process that operates within the curriculum and involves the processes of teaching and learning. Viewed in this context, clinical methodology can be varyingly related to the generalized reform purposes of clinical education but the intensity of the linking depends upon the specific goals selected by the law teacher." [107]

The five goals for the clinical method of teaching were developed in 1933 in the United States of America. The clinical method was established to bridge the gap between the theory of law school and the practice of the profession, to synthesise the various bodies of substantive law and the procedural law learned by the student, to introduce the student into the human element of the study and practice of law, to introduce the student into the unwritten lessons of advocacy in the practice of law, to teach the student to think of legal matters and issues from the beginning of their development, rather than the end as 'appellate opinions'.[108]

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107 1979: 69.

108 As summarised by Swanepoel *et al*: 2008: 105. Duncan: 2005: 8 defines clinical methods of learning as "those which require students to learn by undertaking the tasks that lawyers undertake in such a way that they have an opportunity to reflect on the law with which they work, the circumstances and relationships they encounter in that work and the development of their own skills and understanding." He further explains that this can be done through simulation, assisting clients and working with legal professionals.

These goals were incorporated by Steenhuisen into the seven main goals of clinical legal education which are:

1. *To teach professional responsibility. Professional responsibility involves the client, the community and legal institutions.*[109] *It was a long held misconception that a law faculty cannot teach professional responsibility due to the obvious lack of client or case interaction.*[110] *Clinical legal education has however proven that professional responsibility can be taught in the clinical environment if such skill in underpinned with the theoretical basis of a sound knowledge of legal ethics and the sanctions attached to their abuse.*[111] *This is a prime example of the integration of theory and practice in which the substantive knowledge imparted by traditional academics is reiterated by practical experience provided by a university law clinic. In the clinical environment students are confronted by the reality of emotion, bias, dislike and frustration which is often experienced by a legal practitioner.*[112]
2. *To impart skills in judgment and analytical ability. This goal involves logical and legal thinking and is therefore distinguishable from skills training which places emphasis on technical expertise.*[113]
3. *The reiteration of substantive legal knowledge. Existing legal knowledge is often reiterated in the clinical situation and on occasion novel theory must*

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109 De Klerk *et al*: 2006: 266. The author states that: "...[L]aw clinics [are] the best learning opportunity for teaching professional responsibility because of the direct consequences for both clients and students alike." See also in this regard Schrag: 1996: 180-183.

110 According to Marson *et al*: 2005: 30 "In the UK, whilst such skills have been addressed to varying degrees through mock courts and mooting sessions, and the research skills necessary to acquire information through library exercises, the skills of communication with clients, ethical considerations in practice and the ability to put legal education into practical situations have been ignored. This has occurred (amongst other reasons) because of a lack of available expertise, funding, resources, time and accessibility. Despite these limitations universities have began a process of incorporating clinics into their academic framework notwithstanding the higher costs involved, since they see these costs as counter-balanced by a unique learning experience which offers a competitive advantage against similarly placed institutions."

111 According to Marson *et al*: 2005: 30 "Clinical legal education has been seen as providing students with an understanding of the legal environment which awaits them upon graduation and as a means to instill professional values and a sensitivity to the concept of justice."

112 De Klerk *et al*: 2006: 267. The author in this regard proposes that clinical legal education has to accentuate the values enshrined in our constitution. See also in this regard Campbell: 1991:122 where this goal forms part of the objectives of the Australian Monash Program (sic). See also the work of Leleiko: 1980:653 in this regard. See also Schrag: 1996: 182.

113 De Klerk *et al*: 2006: 269. This goal is linked to the concept of insight and requires that the student develop his common sense aside from legal rules in order to determine the most beneficial option available to a client. This cognitive skill can be taught in a clinical environment through client interaction and case management. This is one of the objectives of a clinical programme in Australia according to Campbell: 1991: 122. See also Schrag: 1996: 180 who refers to this goal as 'problem solving'. See also De Klerk: 2006(b):937.

be imparted before practical skill transfer can succeed. Substantive law is central to clinical legal education as it provides a foundation on which to impart practical skills.[114]

4. *To guide a student to apply practical skills. Clinical legal education places emphasis on consultation skills, client counselling, negotiation, trial advocacy, appellate advocacy, drafting of legal documents, legal research, factual investigation and office management.* [115]
5. *The provision of legal services to the community.*[116] *A by-product of clinical legal education is the increase in access to justice through the reciprocity of skills training which is one of the central aims of a clinical legal education programme. The provision of free legal service is simply a means to a justifiable end and excludes the necessity to teach practical implementation through simulation. Essentially this is distilled to a 'best of both worlds' ideology in that the student is provided with an arena to learn and practice practical implementation and the client is afforded legal services which he may not have otherwise been able to access.*[117]
6. *To teach a student to manage diversity and team work. Theoretical study is often confined to individual ability, determination and skill; however legal practice often requires that the practitioner interact and seek advice from colleagues. The clinical environment forces students to interact and share*

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114 According to Marson *et al*: 2005: 30 "[A] clinic is...generally considered to be of value to the student and the institution if undertaken seriously and rationally with a focus on the adoption of a real (albeit not-for-profit) law firm, and with the academic ability to extract a theoretical base from the practical experience. It is the very nature of this type of education – propelling the students as actors in the legal process rather than mere observers, which enables the full benefit of clinical legal education to be extracted, reflected upon, and re-invested into the student cohort." See also in this regard Campbell: 1991: 122.

115 De Klerk *et al*: 2006: 273 and 274. Refer also in this regard to the empirical study conducted of South African law clinics between April and June 2007 of which the findings are discussed by Vawda: 2008: 91. According to the author, 79% of 14 participating clinics teach drafting, 71% are teaching interviewing and counselling and 57% include an ethical component. The research further suggests that 50% of the clinics teach trial advocacy and 57% teach aspects of file and practice management. Vawda concludes that 36% teach numeracy, a mere 14% research and only 7% teach literacy. See also Campbell: 1991: 122.

116 De Klerk *et al*: 2006: 277. The term community in a university law clinic context is oftentimes associated with the client that approaches the law clinic for legal advice or assistance. This client is further confined to be associated with an indigent member of society. See also Campbell: 1991: 122.

117 See in this regard Du Plessis: 2008(a): 25 where the author explains that in the context of providing legal services to indigent members of society, the students are "...sensitised to both the theory and practice of social justice." She further explains that: "Students should be trained to see themselves as 'trustees of justice with a fiduciary responsibility to ensure that the legal system provides justice for all citizens, not only for the rich and powerful." Borrowed from an article of Church: 1988: 153 "...[L]aw and education are aspects and thus reflections of the culture or total way of life of a people, both should express an underlying philosophy of service to the community."

knowledge, often in a group situation which increases and cements the ability to function as part of a unit.[118]

7. *The integration of the abovementioned goals. The goals above are all parts of a whole and cannot be achieved in isolation. Clinical legal education and 'live-client' interaction provide the ideal platform to integrate these goals to the advantage of the student, the client and the clinic.* [119]

According to the literature of various authors a further two aims of clinical legal education may be summarised as the promotion of professional skills training which results in an improvement in legal practice; and the support of law school involvement in public service which heightens a sense of professionalism and public responsibility.[120]

Barnhizer summarises these goals by stating that the overall goal is to teach professional responsibility and that in order to do so one must assist the student to develop a coherent and personalised framework of professional responsibility; integrate and synthesise the diverse components of legal education; develop the ability to make judgments and assist in inculcating technical skills.[121]

Franklin posits that a good clinical programme (although with reference to the United States of America) has six things in common:

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118 De Klerk *et al*: 2006: 279. See also in this regard Vawda: 2008: 88 where the latter author deals with the racial, cultural, linguistic and ethnic diversity that is unique to the South African context. He explains that the responsibility to address diversity and 'multicultural education' are often addressed in the clinical context due to the services provided by the students. According to Iya 2008:38 diversity can be conceived as: "referring to human qualities that are different from our own and those of groups to which we belong, but are manifested in other individuals and groups." The same goal of addressing diversity issues and more specifically team work is a commonality with community service learning. Schrag: 1996: 181 refers to this goal as "collaboration" and explains that "...joint effort usually produces better results...than individual work." He further identifies "cross-cultural awareness" as a goal which falls within this ambit.

119 De Klerk *et al*: 2006: 279. It is opined that although the 'live-client' interaction is seen as an ideal situation to combine these goals, many of these goals can be reached by applying different learning pedagogies such as community service learning which does not have a one on one interaction in the student client ratio.

120 Bloch: 2004: 8. Public responsibility resounds in different educational aims as well and is often termed as civic responsibility. See also in this regard Rosseel: 2005: 229 where he focuses on the integrated [role] of a university within the society.

121 1979: 73.

1. *Students should be intensely supervised which requires low students to supervisor ratios.*
2. *Effective use of cases as a teaching tool.*
3. *Integrated curriculum that provides training in all basic legal skills.*
4. *A classroom component which provides structured reflection opportunities.*
5. *Enough academic credit to merit the students' effort.*
6. *Sufficient time for clinical staff to pursue scholarly interests.*[122]

2.3 THE MODELS OF A CLINICAL LEGAL EDUCATION PROGRAMME

The major models used in a clinical legal education programme can be identified and described as:

(a) The externship model[123]

Franklin defined this programme as:

> " .... [P]lacing law students in public or private law offices outside the law school where they work under the supervision of attorneys who are not employed by the university."[124]

By examining the above definition, it is evident that the legal skills are learned by observation whilst gaining vocational training.[125] Tarr explains that the advantages of these programmes are that students receive a variety in opportunities and work-related experience. These programmes are more flexible and a less expensive solution for a clinical programme than for example placing

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122 1990: 66-67.

123 The word 'programme' is often used as a synonym for a 'model'. McQuoid-Mason: 2008: 5 describes a 'farm-out law clinic' in the same sense. Please note that this model is also referred to as "a field placement clinic".

124 As quoted by Mahomed: 2008: 56. The author further explains that the 'law office' could be construed as any court, prison or organisation. According to Ankersen *et al*: 2005: 66 "In some instances, law schools supply office space while the non profit organization (sic) provides the attorney, who is appointed to the law faculty as an adjunct or courtesy appointment."

125 McQuoid-Mason: 2008: 5 explains that students spend a "certain number of sessions with the institution concerned under the supervision by the personnel of the host organisation and usually have to produce a written report on their work and experiences regarding the administration of justice or correctional services."

students in university law clinics. The author however warns against the lack of control over the learning experience which is a disadvantage of this model.[126]

Given the advantages associated with this model, it is suggested that supervision could be monitored and that one could possibly employ the mechanisms provided for in-service learning programmes with reference to strategic partnerships in an attempt to overcome the disadvantages associated with this model. The guidelines for service learning partnerships will be explained in later paragraphs.[127]

(b) Simulation

In the Report of the Association of American Law Schools 'simulation' is defined as:

> "....[A]n exercise in which the student assumes the role of a lawyer confronted with a problem which resembles as closely as possible a real situation."[128]

Many clinical programmes utilise simulation. These types of programmes usually engage the student in a mock case file consisting of the type of material one would find in an attorney's file. While such files are usually based on actual cases the advantage lies in the fact that the material can be manipulated to balance the case and to raise topical issues.[129] It is proposed that the advantages of the simulation model are embedded in its definition. The first advantage is that the student uses knowledge gained to solve a hypothesised legal problem, as opposed to merely learning the knowledge without engaging in practical

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126 Tarr: 1993:38. See also Mahomed: 2008:56 who states that flowing from the benefit of outsourcing students, the clinician will be in a position to allocate more time to research and writing.

127 This suggestion stems from the possible solutions provided by Tarr: 1993:39. Some of the solutions are regular site visits, well planned evaluation processes and the use of grading criteria. According to McQuoid-Mason: 2008: 5 these 'farm-out law clinics' are based on "cooperation or partnership agreements between law schools and outside bodies such as NGOs, other private bodies or government departments."

128 As quoted in Mahomed: 2008: 57. The practical exercise has a definite goal, albeit not a specific outcome as in the case of mere practical application. See also in this regard Amsterdam: 1984: 616.

129 Franklin: 1990: 64.

application. This model has the further advantage that practical legal training, as a lead-up to clinical legal education, can be introduced from the first year of LL. B study. In the South African context, many law faculties engage their first-year law students in moot court which, it is submitted, is a form of simulation.[130]

The second advantage is that simulation exercises are considered the safe option compared to 'live-client' interaction and the associated risk of exposing the law clinic to professional liability and negligence claims should the case not be handled with the required care and diligence.[131] Duncan states that the simulation module allows considerable control over the learning experience and therefore allows progressive development which is advantageous to the student. However Duncan further warns that simulations may become stagnant in that students become comfortable with exploring and learning skills with a known peer.[132] Another disadvantage of this model is that it cannot provide the same scope of experience as a live-client clinic. It does not create a knowledge bank on which to draw in future, unlike real cases which have challenges and differences.[133]

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130 At the University of the Free State Faculty of Law the first-year LL. B students participate, as part of their RPK 122 course, in an intervarsity moot court competition. In this competition the students are required to research the legal problem posed, draft heads of arguments that support both the applicant as well as the respondent's case and to argue both sides to members of the judiciary in the Supreme Court of Appeal. The set of facts used is based on a family law related opposed motion in order to accommodate all the participating universities' first year *curriculae*. Williams: 1984: 307 opines that: "Simulation is well suited for moot court and trial practice because the models are so well defined and highly structured that replicating them for the students and supervising implementation are relatively easy."

131 Mahomed: 2008: 57. See also Du Plessis: 2008(b): 13.

132 2005: 11.

133 Du Plessis: 2008(b):13.

(c) The in-house real-client model[134]

This model provides the student with the opportunity to gain experience through the provision of legal assistance to a client.[135] As Franklin suggests, the fact that the student actually represents a person intensifies his experience and objectifies his learning experience. This method does not ask 'how' a problem should be approached but rather 'what are you going to do about it?' Franklin further posits that the immediacy of the clients' problems and the associated challenges enhances the learning experience.[136]

The objective of this model as defined by Campbell can be summarised as providing students the chance to incorporate theoretical law with the practice of law, where an outcome which is available in theory may be unfeasible to a client due to financial restraints, time limitations, unavailability of supporting evidence or unenforceability.[137]

This model is traditionally incorporated in a clinical legal education programme in the following manner: students are divided into groups that visit the university law clinic on a rotational basis, dependant on the number of students and the availability of clients. The student group will then consult a particular client, who is generally pre-booked by the secretary of the university law clinic, who then proceeds to open a file in the name of the university law clinic. The members of the group are then guided by a clinician as to the availability of remedies and the

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134 Although this model is utilised in most law clinics in South Africa, it should not be confused with the different types of law clinics commonly regarded as uniquely South African as previously defined in Chapter Two of this study. See in this regard Du Plessis: 2008(b):12.

135 Mahomed: 2008: 57.

136 1990: 65.

137 1991:122. Ankersen *et al:* 2005: 68 "Universities run on semesters; the real world does not. This poses a fundamental methodological dilemma for all live client clinics, particularly in environmental litigation, which often is complex and driven by events and dockets that are out of the clinician's control. While courts and even opposing parties are frequently willing to work within the parameters of clinics, cases can lie dormant, explode in the middle of final exams, and otherwise frustrate the efforts of clinicians to assure quality experience."

appropriate course of action in any given situation. The student group will then advise the client and begin the legal process. The students will often arrange a follow-up appointment for the client.

The advantage here lies in the fact that the students will streamline the process for the practitioner who eventually handles the matter. However the disadvantages are numerous. For example, it has been my experience that clients will often ask for a 'lawyer' instead of a student when scheduling the initial appointment. Upon querying this with the client, the response usually ranges from: "I don't want to be assisted by someone who does not have a degree" to "I cannot contact the student if I have an enquiry about my matter". Further, it has been my experience that the practitioner who is ultimately responsible for the student file will schedule another appointment with the client and begin the matter *de novo* because the initial student did not have the skill or competency to take the initial instruction properly. Another problem with this model is that it requires a one-to-one basis and teacher student ratios should therefore be dramatically lower than is the case with traditional teaching. It is proposed that when dealing with large student numbers and few supervisors this can be problematic.[138] The main disadvantage, and the reason why this method is often not employed, is that it requires major financial commitment.

3. THE DIFFERENCES AND COMMONALITIES BETWEEN CLINICAL LEGAL EDUCATION AND PRACTICAL LEGAL TRAINING

It is submitted that the difference is not always as evident as one would expect. Should one for example look at some of the explanations of clinical legal education some authors explain the two concepts in the same breath. Naser, for

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138 Franklin: 1990: 65.

instance, explains that clinical legal education is basically practical legal training, and goes on to summate that it is learning through doing or acting as a lawyer.[139]

According to Steenhuisen, the concept of practical (or professional) training is used to prepare and instruct a student for the profession. This makes it distinct from theoretical training which aims to lay an academic foundation to enter the profession.[140] Du Plessis posits that the end justifies the means in that both seek the same goal – the production of a well-rounded and competent law graduate.[141]

According to Marson *et al* skills' training focuses predominantly on '*DRAIN*' skills: the skills of drafting, research, advocacy, interviewing and negotiation.[142] Practical legal training attempts to instill these skills and encourages the students to draw upon experiences in order to identify that they do actually already possess most of these skills albeit underdeveloped in most cases.[143] It cannot be denied that many other traditional law courses also make inroads in instilling these skills but they are almost a by-product of the course content and are not focused on or assessed.[144] Marson posits that in a traditional law course these skills are *"ancillary as opposed to fundamental"*.[145]

A further distinction is the social justice perspective which distinguishes clinical legal education from practical legal training. [146]

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139 http://refugeewatchonline.blogspot.com/2007/05/role-of-clinical-legal-education-in.html - 3/12/2008.

140 1998: 1. See in this regard Swanepoel *et al*: 2008: 106 where the authors suggest that practical training can be an alternative to clinical legal education.

141 2008(b): 10. See also in this regard O'Regan: 2002: 243.

142 2005: 36. Compare however Swanepoel *et al*: 2008: 103 where the authors argue that although many of the skills necessary to a proficient lawyer are taught in skills courses, this does not, by implication, exclude the acquisition of these skills in theoretical subjects.

143 Marson *et al*: 2005: 37. Refer to Swanepoel *et al*: 2008: 106 for an example on how practical training can be utilised to reach the desired outcome.

144 Condlin: 1983: 322 states that "...clinical work requires choice and judgment to a degree absent in other law-school instruction. Students are responsible for the choices that are the subject of clinical teaching and must live with the consequences in a way that makes the problem of responsibility a meaningful concern."

145 2005: 37. See also in this regard De Klerk: 2006(b): 937.

146 McQuoid-Mason: 2008: 2.

Here lies the advantage of clinical legal education as the development of these skills are central to the module and are assessed and developed as a core outcome of the educational experience.

Some of the goals of clinical legal education (as previously discussed in this chapter), much like practical legal training, may be seen as skills in the sense that they seek to address, develop and inculcate certain lawyering skills. However, we should keep in mind that the development of these skills is not the sole goal of clinical legal education. Clinical legal education cannot be equated totally with practical legal skills training although skills development is one of the outcomes of a clinical module.

Clinical legal education may be viewed as the overriding concept into which practical legal training can fit. By way of a practical example: teaching a student the contents of section 174 of the Criminal Procedure Act [147] and then expecting him to apply for discharge in a simulated case is practical legal training, while assigning a student a criminal case for which he takes sole responsibility (whatever is expected) is an example of clinical legal education. It cannot be denied however that in both situations presented above, the following advantages are evident: the theoretical knowledge of the substantive law is reiterated, the student gains the knowledge of the application procedure in a criminal trial, the student gains the confidence to recognise when to apply for discharge and the student has actual experience in applying for discharge. It must be borne in mind however that these mentioned skills in a practical legal education scenario are learned in a protected environment in which the client's freedom is not at stake whereas in a clinical legal education methodology the student will have to anticipate a discharge application, weigh up the pros and cons of applying for discharge, make a decision, apply or decline to do so and

147 51/1977.

ultimately have the client's freedom in his hands.[148] The last mentioned scenario seems disturbing for most legal educators and members of the public but it must be kept in mind that in most cases the student cannot go wrong because he is supervised by a legal practitioner who has the ethical responsibility to ensure that the student does not affect the client's case negatively. I therefore submit that the distinction in outcome, in terms of practical legal education and clinical legal education, remains the same: the client is assisted by a qualified legal practitioner and the student is simply a side show to the matter. This position could result in a situation where the student may doubt his abilities and the client may ultimately lose confidence in the capacity of a university law clinic.

4. COMMUNITY ENGAGEMENT AND COMMUNITY SERVICE LEARNING

4.1 DEFINITIONS

4.1.1 COMMUNITY SERVICE DEFINED

Furco defines community service as:

> "... [T]he engagement of students in activities that primarily focus on the service provided as well as the benefits the service activities have on the recipients."[149]

The above definition does not make any allowance for reciprocity of learning and focuses primarily (in a legal context) on the access to justice angle in which the client is assisted with his legal dilemma.

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148 Condlin: 1983: 321 further explains this situation as "[E]xperience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information or the discussion of cases...in a classroom. The way in which ideas are understood after they have been used feels different in a sense that it is not fully explained by the fact that they are more readily remembered. This is particularly true of ideas about values; much of whose content is lost when understood in a purely intellectual way...[C]linical work requires choice and judgment to a degree absent in other law-school instruction. Students are responsible for the choices that are the subject of clinical teaching and must live with the consequences in a way that makes the problem of responsibility a meaningful concern."

149 www.FloridaCompact.org – 12/3/2008. The definition does not pertain only to law but includes a generic definition which can be applied to all academic courses.

Bender, who also excludes reciprocity of learning in favour of service, defines community service as: [150]

> "Community outreach is also an engagement of students in activities where the primary beneficiary is the recipient community and the primary goal is to provide a service."

The above definition is essentially the same as Furco's in its pursuit of access to justice for members of the community, viewed from a law perspective.

According to the University of the Free State Community Service Policy Document [151] community service is defined as:

> "Employing the scholarly expertise and resources of the UFS to render mutually beneficial services [[152]] to communities [[153]] within a context of reciprocal engagement [[154]] and collaborative partnerships."

Here we see the first mention of reciprocity of learning and the establishment of partnerships with the aim of improving access to justice and student learning. In my opinion, this notion resulted in the recent separation of community service and community service learning at the institutional level at the University of Free State.

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150 Bender *et al*: 2006: 22.

151 06.1: 7. On file with author.

152 In terms of the same policy 'service' is defined as "in the context of social transformation 'service' at a higher education institution can be defined as social accountability and responsiveness to development challenges through the key functions of teaching and research in close co-operation with local communities and the service sector in a spirit of mutuality and reciprocity. On the one hand this encompasses making available the institution's intellectual competence and infrastructure to improve service delivery. On the other hand, it is a focused modification and contextualization of what is taught, learnt and researched."

153 According to the same policy document, on page 7, 'community' is defined as "refer to specific, collective interest groups, conjoined in their search for sustainable solutions to development challenges, that participate or could potentially participate as partners in the similarly inclined community service activities of the UFS, contributing substantially to the mutual search for sustainable solutions to jointly identified challenges and service needs through the utilization of the full range of resources at their disposal."

154 In terms of the same policy document, on page 9, 'engagement' is defined as "continuously negotiated collaborations and partnerships between the UFS and the interest groups that it interacts with, aimed at building and exchanging the knowledge, skills, expertise and resources required to develop and sustain society."

4.1.2 COMMUNITY SERVICE LEARNING DEFINED

Community service learning may be defined as a form of:

> "experiential education where learning occurs through a cycle of action and reflection as students work with others through a process of applying what they are learning to community problems and, at the same time, reflecting upon their experience as they seek to achieve real objectives for the community and deeper understanding and skills for themselves." [155]

Service learning has further been defined as a curriculum approach that integrates learning with community service.[156] According to Lategan the general characteristic of service learning is that service learning enables a student to gain experience of meeting the needs of the community; it incorporates reflection and academic learning and it contributes to students' interest in and understanding of community life.[157]

According to the University of the Free State Community Service Policy Document [158] service learning is:

> "an educational approach involving curriculum-based, credit-bearing learning experiences in which students (a) participate in contextualised, well-structured and organised service activities aimed at addressing identified service needs in a community, and (b) reflect on the service experiences in order to gain a deeper understanding of the linkage between curriculum content and community dynamics, as well as achieve personal growth and a sense of social responsibility. It requires a collaborative partnership context that enhances mutual, reciprocal teaching and learning among all members of the partnership (lecturers and students, members of the communities and representatives of the service sector)."

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155 Mouton *et al*: 2005: 118.

156 Lategan: 2005: 100.

157 According to Sherman: 1999: 82 " If a lawyer's problem solving is merely an instance of human problem solving, then we must not think about the collaborative teaching/lawyering method of clinical legal education merely as a good way to educate "law student" problem-solvers, or even "pre-law student" problem-solvers. Rather, we must think of it [as] a good way to educate citizen problem-solvers, using a method that ultimately empowers both the helper and the helped." See also Lategan: 2005: 100 in this regard.

158 06.1: 9. See also Swanepoel *et al*: 2008: 107.

From this definition the following elements of service learning as methodology are apparent:

1. The students are to identify the needs of the community as opposed to simply enforcing their skills and knowledge upon a community which may have no use for them (in terms of access to justice this qualification is however doubtful).[159]
2. After providing a service to the community (which incidentally is not always legally related) the student should be guided through a process of internal evaluation regarding the service he has offered, what he learned from providing said service and the gaps in his current skill level. The student should then be able to link the service he offered to the theoretical content of his training and gain a deeper appreciation for the society in which he will ultimately practise.
3. This approach requires the establishment of a partnership between the university, the student and the community representative which allows for need analysis and outcome analysis.

According Swick [160] service learning is defined as:

> "A pedagogical strategy that combines authentic community service with integrated academic learning. Service learning offers students opportunities to gain new skills, apply knowledge in challenging situations, and contribute to the life of others in meaningful ways."

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159 There is a clear comparison that can be drawn between community service learning in this regard and street law programmes that developed in South Africa in 1985 in that according to McQuoid-Mason: 2004: 41 a street law programme is: "a programme designed to train law students and others to make lay people, usually school children, aware of their legal rights and where to obtain legal assistance. It helps people to understand how the law works, how it can protect them, what kind of legal problems they should be aware of, and how they can resolve these problems...the programme encourages tolerance by making participants argue and experience opposing viewpoints...[law students] have an opportunity to assist in community development and capacity building." See also McQuoid-Mason *et al*: 2005: 47 and further on this topic. See also Church: 1988: 154 and Swanepoel *et al*: 2008: 108.

160 2003: 31.

4.1.3 THE DISTINCTION BETWEEN COMMUNITY SERVICE AND COMMUNITY SERVICE LEARNING

The distinction between service learning and community service lies in the fact that community service tends to be a distinct activity and initiative of the higher education institution, whereas service learning is fully integrated into the curriculum.[161] Service learning is not an outreach activity but rather an integral part of the higher education curriculum. Practically speaking, service learning concentrates on the reciprocity of learning between student and community whereas community service tends towards pure service delivery.[162]

5. COMMUNITY SERVICE AND COMMUNITY SERVICE LEARNING AND THE JUXTAPOSITION WITH CLINICAL LEGAL EDUCATION

When one considers the definition of community service and the contents of this study it becomes apparent that community service can be viewed as a goal of clinical legal education although it can also be viewed as a vehicle to develop those skills identified as cardinal by clinical legal education.[163] Community service is a convenient means to an end in achieving the skills goals of clinical legal education. Community service learning by distinction clearly adds a different perspective to the experiential cycle in that it requires interaction with a 'live client' as opposed to a simulation-based course.[164] It is clear from the above that service learning, per definition, requires structured service learning through collaborative partnerships, which is not a characteristic of clinical legal education.[165] A further distinction between clinical legal education and service learning is reciprocal teaching and learning among all the members of the

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161 Bender *et al*: 2006: 22.

162 Ankersen *et al*: 2005:79 contend that "Service education is a term used to describe the broader commitment of universities to bring pedagogy and practice together to provide community service. Clinical legal education represents just one manifestation of this larger commitment which extends to all disciplines."

163 De Klerk *et al*: 2006: 277. See also Du Plessis: 2008(a): 25 and Church: 1988: 153.

164 This concept will be further explored in Chapter Five.

165 Refer to the discussion under paragraph 4.1.2.

partnership. This reciprocity is not an essential element of a clinical programme and neither is the formation of partnerships with a community organisation as is required by community service learning.

Clinical education aims to develop in students a social perspective and insight by experiencing the study of law in context. Clinicians must expose students in a structured way to the ideas and the complexity of social justice and role of the law in this regard. A clinical legal education approach aims to expose students to the plight of the indigent and the complexities of legal problems experienced by the poor, the illiterate and the vulnerable. This approach aims to result in a change in mind-set amongst legal practitioners and eventually in the transformation of the legal profession. Clinics tend to concentrate on specific areas of law usually determined by the typical legal and social problems experienced by the community in which they operate. In doing so, specific law areas will be identified and should be studied in accordance with traditional law subjects.[166]

There is a definite link between the aims of practical legal training, community service, service learning and clinical legal education, but it is a hard task to combine all of these methodologies in a single course which further encourages a socially conscious perspective.[167]

Clinical legal education worldwide is however confronted with a dilemma: should the clinical legal education of students have preference over rendering legal services to the community?[168] Clients are inseparable from the clinical

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166 De Klerk: *et al*: 2006: 273. Notably from the definitions in the Attorneys Act 53/1979 this "goal" is uniquely attributable to law clinics and in a lesser degree to the Legal Aid Board. This seems to be an international tendency. See in this regard Azam: 2005: 562.

167 It is submitted that the difficulty lies in a number of contributing factors such as the difference in aim of each programme, institutional recognition awarded to each course and the fact that each of these programmes can be presented in different years of academic study which will be explained in Chapter Five of this study. See also Swanepoel *et al*: 2008: 107 for further challenges.

168 On this topic Copeland: 2003: 2 remarks "Criticism concerning the use of unpaid students to provide legal services had particular resonance in a time when concerns were raised

methodology especially when one follows the socially conscious perspective. It is a responsibility of the clinician to strike a balance between education to the students and service to the community. Clinicians should respect the interest of the community, the partnership between the community and the law clinic, and adhere to the rules of professional responsibility to assist in dealing with any situation where there is a conflict of interest. Students gain insight into the role of practitioners as agents for social change and become sensitive to the impact of legal rules on the lives of the indigent.[169] The notion of combining legal education with community learning and service learning may furthermore go a long way in dispelling the popular notion of lawyers created by the media and society at large. As Sherman so pithily states:

> "Many of my students misperceive lawyers' work. This misunderstanding stems, in large part, from a popular culture – particularly influenced by the mass media (and, ironically lawyers' participation in it) – that conveys certain messages about lawyers and lawyering, generally, that are inaccurate, and are damaging to a society that takes pride in its commitment to the values of liberty, community, democracy, tolerance and equality. A few of these major misconceptions include (in no particular order): a) lawyers make a lot of money; b) lawyers have power and call the shots; c) lawyers are either heroes or anti-heroes and, in either case, are more important than their clients; d) lawyers are engaged in fascinating and important work every minute of every day; e) lawyers are smarter and wiser than non-lawyers; f) all lawyers are trial lawyers; and g) good lawyering requires cunning, a predatory competitive attitude, a nice office, a good wardrobe, and an expensive briefcase." [170]

The idea of the integration of legal study with community service puts service learning in context, which supports a critical understanding of the law and legal processes. It makes students aware of service orientation and social consciousness as part of a free and open democracy.[171] Sherman states:

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that the federal government was looking to clinics as a means of providing legal services for less cost. While student involvement can bolster and support the services being offered to clients, educative value for students relies on time and space to reflect and build upon skills and understanding."

169 See in this regard Du Plessis: 2006(a): 27, where she quotes Wizner, that students should be trained to see themselves as "trustees of justice with a fiduciary responsibility to ensure that the legal system provides justice for all citizens, not only for the rich and powerful".

170 1999: 82.

171 De Klerk *et al*: 2006: 278.

> "...community service learning, informed by the collaborative teaching/lawyering method, can be successfully incorporated into traditional undergraduate courses in a variety of programmes to introduce professional demands, further develop skills, foster progressive conceptions of citizenship, and facilitate critical examination of political systems." [172]

The concept of citizenship and professionalism which emphasise collaboration is the perfect vehicle for better understanding oneself and the person being served and further requires the student to reflect on the reciprocal nature of teaching and learning.[173]

The collaboration between clinical legal education and service learning as methods of education in their own right promote the consciousness of group dynamics, the development of problem solving, creative thinking and organisational goals and the expansion of a client-centered approach in the mind of the student.[174]

6. PRELIMINARY CONCLUSION

In summation of the above chapter it is clear that there are many commonalities between the various forms of what may conveniently be styled 'interactive learning'. From an educational perspective however the goals of each of the different methodologies are distinct and focus is often placed on the practical component of each of the methodologies that were mentioned instead of on the educational core and value on which they are founded.

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172 1999: 74. It is submitted that in order to achieve this integration, faculty support is required and in order to further facilitate a successful community service learning programme academic credit should be awarded to the subject. I intend to explore an alternative method of integrating community service learning as part of the law curriculum as part of Chapter Five of this study.

173 Sherman: 1999: 74. See also in this regard De Klerk *et al*: 2006: 266. See also Marson *et al*: 2005: 30, Campbell: 1991:122 and Leleiko: 1980: 653 for a discussion on professional responsibility as a goal of clinical legal education.

174 Sherman: 1999: 75.

It is also clear from the above that an ideal clinical legal education programme incorporates practical training, community service and ideally community service learning, but that it is not a fundamental requirement of a successful clinical legal education programme to be purely focused on 'live-client' interaction. From the above the live-client model is but one of the ways in which clinical legal education can be incorporated into a curriculum, but as is apparent from the experience of many clinics, this ideal model presents its own unique challenges and is largely dependent on funding.

Community service learning presents an opportunity for some South African universities that are challenged by a lack of funding, to expose students to society albeit in a different way, in a manner which instills values and skills required to produce a well-rounded legal graduate. This may even be the only way in which to instill the goals of clinical legal education in students at some universities.

It is also clear that practical training can more easily be incorporated into pure theoretical subjects, but that mere practical training does not lend itself to instilling values and ethical responsibility in a student. This I submit is the mistake that is made in most programmes of clinical instruction: the presupposition that including a practical element in a subject qualifies the professional experience gained as clinical legal education. I do not disagree that practical training is essential in every law subject for the benefit of the student and eventually the economic functioning of legal commerce. I however submit that practical legal training is but one of the components of clinical legal education. I further submit that all practical training should culminate in a pure clinical legal education experience within the confines of a law clinic, where students are exposed to societal and professional values, morals, skills and challenges. This, it will later be argued, is possible within the South African context if practical legal training is incorporated in the early years of study into

each law module and the student is thereby allowed the opportunity to prepare for the clinical education experience of serving a client in his final year.

CHAPTER FOUR

THEORY VERSUS PRACTICE: NOT AN 'EITHER'/'OR' APPROACH

1. INTRODUCTION

> "Theory without practice is academic indulgence and practice without theory is uninformed and undirected activity"[175]

Chapter Four, as a sister argument to Chapter Five, is the first primary thrust of this thesis and contains my submissions for the integration of theory and practice in legal education. I will argue that clinical legal education (inclusive of practical training, community service and community service learning) is ideally primed as a vehicle for the full integration of substantial law and practical skills. I will refer to the current state of legal education, identify the main challenges, argue for the inclusion of practical skills training within theoretical training and then attempt to address each issue under the auspices of clinical legal education. I will further argue that the training provided by university law clinics will hold up to the demands and scrutiny of the South African Qualifications Authority.

Having previously explored the definitions and aims of clinical legal education such as the distinction between clinical legal education and practical legal training, it becomes an obvious aim, for the purposes of this study, to persuade the reader as to 'why' the integration of theory and practice through the clinical method should be fully accepted and utilised in legal education. The 'how' of integration will be explored in the following chapter but for now the 'why' is of importance. There are obvious logistical problems associated with the integration of theory and practice. However in order to achieve the aim set out above I will discuss the 'why' and reserve the 'how' for the next chapter.

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[175] Jim Ward – Commemorative Journal UP Law Clinic 1980 – 2005: 2.

2. LEGAL EDUCATION: CAN WE EVER DO ENOUGH – THE BOTES REPORT AND OTHER REALITIES

2.1 INTRODUCTION

Michael Cassidy once remarked that very few legal educators will ever have the opportunity to view the skills they so laboriously teach in action.[176] We send our graduates out into the world and very few of us think further of their level of development and success or otherwise in the legal world. That being said, however, many of us will continue to wonder whether we have indeed given our best to equip the student for the challenging world of legal commerce. We are often criticised by our graduates and the profession alike for instilling an overly academic and theoretical knowledge base in our students whilst failing to realise the shortcomings in our pedagogy.[177] In this regard Justice Chaskalson once remarked:

> "Law students can leave a university with an LL. B degree without ever having seen a client, without ever having been in court, without knowing how to interview a witness or draft a contract, or prepare an argument or address a court. The result is that law graduates emerge from the university with a theoretical training, but without any basic knowledge of, or practical training directed specifically to, the practice of law. I do not believe that there is any profession other than the law in which students leave university as ill-equipped as this to pursue their chosen career."[178]

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176 2005: 383.

177 According to Du Plessis: 2008(b): 4 the following needs and expectations were identified by a survey conducted amongst final year clinical students at the University of the Witwatersrand: 79% indicated that their most valuable ability was the ability to assist clients and learn attorney's practice in the process. The same % indicated a need for training in trial advocacy, drafting of pleadings, interviewing, refining research skills and visiting courts to observe court process. 92% found the clinical course to be successful in providing a bridge between legal theory and practice. During 2007 at a provincial workshop on the Legal Services Charter, concerns were raised regarding the poor quality of law graduates and their inability to draw affidavits and pleadings.

178 As quoted in De Klerk: 2006(b): 935. For a further exposition of this responsibility see also: O'Regan: 2002: 244.

2.2 KEY FINDINGS OF THE BOTES REPORT

At the Law Faculty of the University of the Free State, a recent report, entitled the Botes Report, was issued following research conducted on postgraduate LL. B students regarding their impressions of the law faculty and the merits of its LL. B curriculum. The report indicated that 80% of respondents suggested that the practical and theoretical aspects of the LL. B should be integrated.[179] For the purposes of this study the following indicators are of particular importance:

a) *Some 4 out of 10 alumni indicated that the LL. B programme did not equip them sufficiently for their profession in that they wanted more exposure to practical work especially with regard to deeds and conveying of property.*[180]
b) *Only 50% of the LL. B alumni responded that the LL. B programme equipped them to deal with the demands of the profession. When asked why they held this opinion 3 out of 4 indicated that they lacked practical experience, while 10.8% expressed a lack of training in deeds law as a training inadequacy. 60% of these respondents further suggested that the coursework in the LL. B should be more practical.*[181]
c) *Asked about their current profession 62.2% of respondents indicated that they were advocates, lawyers or candidate attorneys. Almost 9 out of 10 alumni indicated that they were working in a legal profession. It is worth noting that only 6 of the respondents were lecturers.*[182]
d) *Almost 21% of respondents indicated that they would not have considered the LL. B programme again if given the choice. 3 out of 10 of the 21% indicated that they would rather have combined a B.Com degree with an LL. B to improve their employability.*[183]

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179 A report was compiled by the Centre for Development Support and the principle compilers André Pelser, Lucius Botes and Deidré Van Rooyen. On the methodology used a telephone survey was conducted during June 2008 and all LL. B alumni who completed their studies [at the University of the Free State] during 2000 to 2007 were taken as population sampling frame. The list contained a population of 413 individuals which constituted the sampling frame. Due to inactive phone numbers and refusal by respondents to participate, the final number of completed interviews totaled 156. At the end of every interview the respondent was asked to provide details of their line manager or supervisor. A total of 44 interviews were subsequently conducted with line managers and supervisors. I will refer to this document as "the Botes report".

180 2008: 1.

181 2008: 9. See in this regard also Du Plessis: 2008(b): 8 in which the author summarises the key findings of the SALDA meeting held in 2008. One of the areas of concern identified during this meeting was the "changing nature in which law is both studied and practised'.

182 2008: 8.

183 2008: 13. See in this regard: Tarrant: 2006: 68 where the author equates tuition fees of a university with an investment in "human capital" and that students should be allowed to have views regarding the quality of the product they are 'purchasing' and how delivery of

e) *In answer to the question of what changes enhance the relevance of the LL. B degree in practice, 71.1% of the respondents indicated that the practical component should be enhanced.*[184]

f) *Only 6 out of the 156 respondents indicated that the Law Clinic was a strong point of the programme. It needs to be mentioned that criminal law, law practice, family law, public law, capita selecta from the law of enrichment, constitutional law and law of contracts were rated lower than the law clinic in terms of their effectiveness in the LL. B programme.*[185]

g) *In answer to the question: where there any aspects of the LL. B programme that struck you as particularly weak, the lack of practical experience was once again identified by 30% of the respondents.*[186]

h) *28.1% of respondents indicated that more practical exposure was necessary and 3.5% indicated that drafting skills should be included as a module in the LL. B programme.*[187]

i) *79% percent of respondents indicated that theory and practice should be integrated while 17.2% indicated that the current system is adequate and 3.8% were unsure on this aspect.*[188]

j) *Of the line heads interviewed, 29.5% indicated that graduates from the University of the Free Sate were better equipped than graduates from other universities for legal practice, while 54.5% indicated that they were similarly equipped and 4.5% indicated that they were underequipped by comparison. 11.4% were unsure if the Free State graduates were better equipped or not when compared to law graduates from other universities.*[189]

k) *When asked to isolate a single aspect which the respondents felt was lacking in the LL. B programme of the University of the Free State, 75.8% indicated that a lack of practical experience, unfamiliarity with court documents and procedures, gaps between theoretical knowledge and practical application were apparent and 6.1% indicated that lecturers without any practical experience were a major drawback of the programme.*[190]

l) *86.4% of the supervisors interviewed and 79% of the alumni indicated that the current system in which a theoretical basis is provided by universities*

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the product should take place. He explains further that: "If students are buying education and see themselves as consumers, they are more likely to make demands about how, what and why they are taught."

184 2008: 14. See also in this regard Du Plessis: 2008(b): 9 where the author refers to the situation in Australia where the sentiment seemed to be shared amongst their graduates.

185 2008: 17. Please note that clinical programmes in South Africa are mainly only taught in the final year of LL. B studies.

186 2008: 17.

187 2008: 17.

188 2008: 20.

189 2008: 30. See also in this regard Du Plessis: 2008(b): 9.

190 2008: 31.

and practical training by the profession, was inadequate and that theoretical and practical training should rather run concurrently.[191]

2.3 THE FUNCTION AND AIM OF THE UNDERGRADUATE LAW DEGREE: THE BOTES REPORT IN CONTEXT

It is apparent from the above statistics (albeit from a student perspective) that theory and practice ought to be integrated. In order to create graduates who are ultimately employable legal educators need to reconsider the theoretical approach which is currently in use and which aims, with respect, to create jurists and not legal practitioners.[192] The argument here lies in the fact that legal educators are trying to create a profession which has 'too many chiefs and not enough Indians'.[193]

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191 2008: 33. It is suggested that this concern is in no way a new dilemma. Refer in this regard to Church: 1988:160.

192 According to Marson *et al*: 2005: 31 "[The] focus on the necessity for 'commercially focused' graduates has been highlighted by leading law firms which have observed 'we firmly believe that the closer to real practice and the more realistic training is the more effective it will be'. This commercial focus has been reiterated at a governmental level through the Law Chancellor's advisory committee on legal education and conduct in its consultation paper, review of legal education – the initial stage. The report makes explicit reference to both the relevance of intellectual and personal skills, and the importance of seeing law in its operational context. This can best be gauged and assessed in the university setting where the students' learning is paramount. The students do often gain experience in the vacations through work experience at law firms but this is often intermittent and unstructured. Whilst the larger firms do seek to educate and lead the students in their learning, many students identify that they often feel 'used and even a source of cheap labour.' The university can offer the structure that would satisfy the need for education along with the ability for live client work that also provides an invaluable insight into legal practice beyond academic debate." See also in this regard De Klerk: 2006(b): 935 where the author quotes Church who advocates the concurrent presentation of practical training with academic subjects.

193 According to Badat: 2002: 3 "...higher education has a particularly important role in providing society with individuals trained in such a way they can respond to the demands of knowledge-based occupations. ... globally, higher education is now expected to focus on the employability of its graduates and to contribute, at least in part, to national economic development." See also Rosseel: 2005:214 where the author explains how this could affect the student's choice of a university.

Law faculties are not graduating judges and legal philosophers (although some do pass through our doors): we are graduating alumni who practice in the field and should be sufficiently equipped to do so.[194]

As expressed by Church, if legal faculties are indeed training legal practitioners then legal education should seek to instill the following qualities:

> "Ours is a noble profession: it is the pursuit of justice and of truth, and these are surely well worth pursuing for their own sake, regardless of reward. And they should be pursued, too, regardless of consequences. He is but a poor member of that fine profession who dares not undertake a case in which he believes because he knows it to be unpopular, or, if he be a judge, hesitates to give a judgment, because he thinks it would not be applauded by the newspapers or might offend powerful interests."[195]

Twining, on this issue, remarked succinctly:

> "Some years ago I suggested that legal education has been strongly influenced by two sharply contrasting images of the lawyer: on the one hand, the lofty image of Pericles, the lawgiver, the enlightened policy maker, the wise judge; on the other hand, the image of the lawyer as a plumber, a no-nonsense, down-to-earth technician. My argument was that neither image was suitable as a model for the end products of a sane system of legal education and training and that the influence of these two images...has contributed to unnecessary controversy within legal education. In a nutshell: the academics have often been too lofty, but practitioners have tended to be too mundane. Understanding and practising law are both more difficult, more varied and more interesting than the plumbing image implies; but legal education has no special claim to be suited to the mass production of statesmen." [196]

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194 Sherr: 2005: 1 comments on the situation in America with regard to preparation for practice versus preparation for scholarship as "Whilst it was clear that legal education was really about preparing people for the legal profession, the mission of the undergraduate legal education was more certain. Until a few years ago, just over 60% of law graduates went on to qualify for the profession. But of the 8756 law graduates produced in 1995 only some 3700 will find places to qualify as practising lawyers, other such places will be filled by non-lawyers. This represents about 42% of all law graduates. Overall therefore, training for the legal profession has become the minority interest for undergraduate teaching. It therefore becomes less obvious what needs to be taught in legal education and how it should be taught." Being a legal practitioner can be exciting, frustrating and at times immensely satisfying and for those students who ultimately decide not to practise law the experience of a clinical programme can provide insight into career opportunities.

195 Church: 1988: 157 who quotes Mr Justice RPB Davis.

196 1982: 60.

The above-reflected statistics from the Botes report are however by no means a unique or ultimately new reflection of the shortcomings in legal education. Allen remarked as long ago in 1982 that:

> "[T]he law school, although part of the university, is a professional school. As such it must be concerned with the competency of its students to deal with the needs of their future clients, some of which needs may be of wide social significance but many of which are of importance largely to the client themselves. Law schools also owe obligations to the courts and to the other agencies of justice. Graduates lacking in basic competence are not only a menace to their clients but also constitute a burden on the institutions of justice and an impediment to the performance of their proper social functions...They are, on the contrary, soon to be plunged into the practice of law, and will be swept up in what is often a bruising, competitive, and demanding regimen. It would be nice (students tell me) if the law schools could do something more to sustain them in the hard pull ahead and even contribute to their making a living! ...In the United States and, I gather, also in Canada, voices both within and outside the profession are being raised to urge that more effective means be devised to enhance the competency of young lawyers and that new attention be given to what is sometimes called skills training. It would be folly for law schools to ignore these demands, for they express felt needs. Perceptions of this sort can be disregarded by legal education only at its peril... It is possible, too, that certain kinds of skills training will enhance the intellectual content of the law school experiences rather that detracting from it. Such training can contribute a basis for understanding and evaluating the other parts of the curriculum, of strengthening the command of reality which is a leading attribute of sound professional training." [197]

It would appear that very little has changed in legal education since these remarks were first made.[198]

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197 1982: 18–19.

198 See also Birks: 1996: xviii who remarked "Already in the eighteenth century Blackstone, the first ever professor of the common law, had prophetically foreseen that the educational tradition which left the law to be picked up on the hoof could not survive. The practising lawyer who could merely do his job would be no more that a mechanic, useless in comparison with one endowed with the power of reasoning about the law and about its grounds and principles." Church: 1988: 157 explains that in 1829 the system was introduced whereby "would-be attorneys" were only trained or educated by way of clerkship. In 1877 the requirement of a practical examination was added and in 1883 the requirement of a certificate in law and jurisprudence in 1883.

3. THE ROLE OF A LAW FACULTY IN LEGAL TRAINING

3.1 INTRODUCTION

The palpable question that many academics raise at this point is one of function and objective. What is the function and objective of a law school/faculty? Does the aim necessarily lie in training students to enter practice, even though many of them will not? Or is the function of a law faculty/school simply to establish a theoretical foundation which is necessary to pursue any aspect of a legal career? Are we teaching jurists or lending support to the recent notion that an LL. B is a worthwhile first, foundational degree as the BA or B.Com formerly was?

3.2 A HOLISTIC APPROACH IN PREPARING THE STUDENT FOR PRACTICE

According to Church, education directed at preparing students for the legal profession is threefold in nature. The first of the three components is an academic component consisting of theoretical instruction. The second part is a practical/professional component which focuses on the instilling of practical skills and the third component is "continuing legal education for post-admission training." Although all three of these components are part of the whole, so to speak, the second component is removed from the first because it is viewed as the responsibility of the practicing profession as opposed to that of a university.[199]

It appears as if this perception has shifted over the last few years in that law faculties have become more involved in the instilling of practical skills. One such example of the joint effort to combine practical training and theoretical training can be found in the fact that during 1997 law deans in South Africa agreed that the LL. B degree should be presented as a undergraduate degree over four

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[199] 1988: 157.

years, as opposed to the postgraduate LL. B degree over three years. They also agreed to the incorporation of skills courses in the then new LL. B degree.[200]

Steenhuisen supports the view that the LL. B degree should aim to prepare a student to enter a profession and therefore, logically, the function of a law faculty/school is to impart knowledge in a manner which best prepares the student to practice law.[201] Amsterdam supports the view that the skills instilled in law students by law faculties/schools are best reflected in the practice of law and that a law school does indeed have an obligation to instill practical skills, albeit at a foundational level.[202]

The following questions can be asked if we accept that law faculties play an integral role in preparing graduates for practice: does the current undergraduate curriculum allow sufficient time and resources for meaningful integration of theory and practice? To what extent should a law faculty prepare students for the legal profession? Is it the function of the law faculty to deliver a legal professional upon graduation?

From a historical overview of the foundation of law faculties in South Africa, this debate can be traced back for decades. However, for the purposes of this study, reference will only be made to the professional training needed to be admitted as an attorney or advocate.[203]

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200 Refer in this regard to Du Plessis: 2008(b): 7. The courses were: "...analytical skills to understand the relationship between law and society, language skills, communication and writing skills, legal ethics, cultural, race and gender sensitivity, practice management skills, accounting skills, research skills, trial advocacy skills, and computer skills."

201 1998: 26. Taylor as quoted by Westcott *et al*: 2006: 89 remarked "[Legal education is] a mixed model that adopts an approach of intellectual training in the context of university with the expectation that most students will practise [sic] law."

202 1984: 616. See also in this regard: O'Regan: 2002: 247 as well as De Klerk: 2006(b): 937.

203 According to Iya: 2008: 36 "Developments in legal education have tended to compartmentalize the study of law into stages; academic, vocational and continuing education and have created dichotomies which have placed a wedge between scholars and practitioners. However, what is generally recognized is that, such division of legal education into stages or compartments is arbitrary, unnecessary and confusing. More importantly, it confuses the objectives of legal education and encourages division within

By 1935 the South African LL. B degree was a professional degree which once completed allowed the graduate to practise as an advocate without any further training. The degree was essentially a compromise between academic training and practice, which was supported by the practical nature of many of the theoretical subjects which were based on situations which occurred in practice. Turpin opined in 1958 that the LL. B degree provided complete training for a career in law and that the degree should maintain its practical nature and practical skills should be transferred to students by way of a vast array of educational material.[204]

By the 1970's Turpin's view was no longer the acceptable view. Up to this point in time a graduate from the LL. B programme could practise as an advocate without further training; however it was becoming more and more apparent that the requirements of practice required a higher degree of practical training than was provided in the LL. B programme. By the 1970's the educational focus of law faculties began to fall on theoretical subjects and the curriculum of the LL. B degree was no longer negotiated with the Bar Council. It appeared that the Bar Council had accepted that a gap existed between the knowledge imparted at law faculties and the training necessary to qualify students for practice. In 1973 the Bar Council had already begun to bridge this gap through the introduction of the pupilage programme. Pupilage and the associated National Bar Examination were however not compulsory and graduates could choose to be admitted as an advocate purely on the strength of their LL. B degree. Pupilage also presented its unique challenges and shortcomings.[205] The main concern in the attempted

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the legal profession instead of abolishing it. In the eyes of those who view legal education as a continuum such divisions are more distractive than constructive."

204 Steenhuisen: 1998: 1-29.

205 Although, according to Marnewick: 2002: 41 "While there is a vast improvement on what we had in earlier decades, it [the pupilage training] still has a number of shortcomings. Critics argue that: (i) the syllabus is incomplete in both the subjects which have to be studied and their content; (ii) the Bar exam is too academic and has become the focus of training; (iii) the work experience is not supervised adequately and pupils receive little or no feedback; (iv) the lectures are unstructured and improvised; (v) there is too little advocacy skills training; (vi) the programme as a whole lacks cohesion; (vii) training of the same quality and intensity is not available to pupils from all parts of South Africa; (viii)

correction was and still is the fact that pupilage is not compulsory and many graduates simply have themselves admitted without any further training.[206] Currently the Act on the Admission of Advocates[207] does not require an applicant for admission to undergo practical training outside of the LL. B degree. Section 3(2)(a) of the Act simply requires that the applicant be in possession of an LL. B degree from a South African university or a certified degree from a designated foreign country.[208]

By contrast the attorney's profession requires that a graduate be in possession of an LL. B or B. Proc and then undergo practical training.[209] Part of the practical training required of an attorney is the attendance of a compulsory 5 week practical training course facilitated by the South African Attorneys Professions' Legal Education and Development programme or the attendance of a 4-month course facilitated by the School for Legal Practice. The attendance of this

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pupilage is not compulsory; one can set up practice outside the Bar; (ix) the marking of scripts is neither transparent nor to objective standards set out in a detailed marking guide." Church: 1988: 157 reiterates the fact pupilage is not compulsory and very selective.

206 According to Weiler: 1982: 7 "My conviction, then, is that the primary thrust of legal education must be the nurturing of this critical, theoretical perspective on the law, this aptitude for creative problem solving. I do not mean to claim that this is all there is to it. Surely, it would be foolish to ignore the need for good practical training. I would not want to have my appendix operated on by a new doctor who had a fine philosophical and scientific appreciation of medicine as it is evolving, but who had not yet honed his practical skills. The citizen facing criminal charges or buying a house also needs to be sure that whatever fully-certified member of the bar he happens to consult has developed the equivalent legal skills. A total system of legal education must meet this standard as well."

207 74 of 1964.

208 See also Vawda: 2004: 118 when dealing with attorneys "traditionally the practical training of lawyers was regarded as the preserve of the profession, so for example persons wishing to qualify as attorneys were required to serve articles of clerkship of two, three or five years. All that the law school (sic) was required to do was to provide the student with a sound legal education meaning in effect, an extensive coverage of substantive law courses. The practical aspect was to be handled by the principle ...[O]ver time the period of articles was shortened and with the increase of skills training within the law school (sic) curriculum, the lines between school and profession, in this regard, became blurred."

209 The Attorneys' Act 53 of 1979. See also Church: 1988: 157. The quality of the training received by many candidate attorneys is also criticised. See in this regard: Du Plessis: 2008(a): 29.

programme qualifies the graduate to a year's reduction in his required period of articles or community service.[210]

From the above brief, historical overview it is apparent that legal training came from a situation of extreme practical application and instruction, in that no tertiary qualification was required. It then moved towards a more theoretically-grounded mode of teaching in that and then again reverted to a situation where practical application is finding its proverbial roots in the theoretical domain.

3.3 IDENTIFIED CHALLENGES AND SHORTCOMINGS IN THE PRESENT SYSTEM OF LEGAL EDUCATION

In light of the above discussion it is abundantly clear that law graduates are often regarded as ill-prepared for practice. The question arises whether the problem lies with the legal education provided at university level or whether the professional training provided afterwards should remedy practical deficiencies. Before one can understand the value of integrating a more 'practice-orientated' methodology into the law degree curriculum, the current deficiencies in legal education should be examined and although many profess a more practical approach to legal education, one should ask what core competencies are 'lacking' in current legal education.

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210 The School for Legal Practice which conducts practical training for candidate attorneys states its main educational aims as: (a) that a person on completion of the course be able to perform the majority of tasks in an attorney's office with the minimum of supervision; (b) that a person on completion of the course must possess a minimum level of knowledge of a specified subject area; (c) that a person on completion of the course must possess the necessary skills to solve a legal issue with the minimum supervision; (d) that a person on completion of the course be able to integrate skills and where necessary use a specific skill in multiple tasks; (e) that a person on completion of the course should be able to develop basic skills in practice; and (f) that a person on completion of the course must know, understand and practise correct ethical conduct and professional attitude.

Du Plessis postulates that the main areas of concern are the lack of numeracy and literacy skills. The author further identifies as a concern the students' inability to draft legal documents which relates to writing skills.[211]

It would seem as though those involved in legal education and indeed practice play 'hot potato' with the issue of responsibility to prepare graduates for practice and tend to shift blame and responsibility for the correct training of graduates from law faculties to the School for Legal Practice and then to the Bar Council and back again. Those involved are often unable to find a solution and resultantly the placing of the blame in the current system of legal education is a fruitless exercise which only results in the procrastination of solution finding.

The questions can be posed: what is the reason for students not acquiring practical skills in the law degree? Who is to be blamed? Henderson suggests that the typical analytical response to the current state of legal education is to place the blame on the shoulders firstly of the student, then of the educator and then of the administrative system utilised in most major law schools.[212]

To place the blame on the students' shoulders in the South African context is an appealing justification to most law teachers. Law educators are often faced with a large student body of disinterested, under-equipped, under-motivated, ill-witted students who seem to take joy in criticising any thought which does not come from the pages of a text book. Students seem to be motivated by two goals – passing the exam and graduating.[213] As honest and agreeable as this picture may appear to most legal educators, the argument which places the blame on the student for the woes of the legal profession, both academic and otherwise, is faulty and fails to explain the current situation. While it is true that law educators

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211 2008(b): 9.

212 2003: 15.

213 Montjane: 2005: 95 remarks on this issue "Ultimately what is important is passing the exam, not developing transferable skills. This backwash effect of the exam is generally considered to be negative: teachers 'teach to the test' and students learn not for understanding but to give the correct answers in the exam."

face students who should not be studying law for one reason or another, the argument fails to take into account that today's students are heterogeneous in composition and have different needs and views than the relatively homogeneous student body who read law in the 1870's. Legal education methods have not kept up with the times and the academic concentration and methods have failed to take into account the changing nature and development of students.

This is not the fault of the student but rather of outdated educational methods and aims.[214] Is it not time that legal educators re-examined the use of the Socratic and case study methods which so many law teachers still employ?[215] The reality of the situation is that law is not static and the practice of law evolves according to the shifting tides of law. Today's students come to us with diverse backgrounds, expectations and needs and this, along with the shifting shape of law, requires of us to re-evaluate our teaching methods and curriculum content.[216]

The argument that lays the blame for the current state of legal education at the feet of the law teacher may contain a certain element of truth in that often academics fail to confront students with the cold, hard realities of the profession and attempt rather to concentrate solely on the noble traditions and legal

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214 Stuckey: 2008: 1 quotes a conversation between Professor Gary Bellow and Al Sacks in this regard "Al Sacks once said to me: 'Well, it seems to me that what you're saying is that law school is empirically irrelevant, theoretically flawed, pedagogically dysfunctional, and expensive. And I am, of course, saying just that. When you add to these deficiencies, the incoherence of the second- and third-year course offerings, the amount of repetition in the curriculum, the degree to which unacknowledged ideology pervades the entire law school experience and the fact that no graduate of an American law school is able to practice when graduated, you have a system of education which, I believe, is simply indefensible."

215 According to Weiler: 1982: 6 "The usual image of teaching – the verbal exchange between teacher and student inside the classroom – is only one, and not the most important, mode of legal education. Law students are not children."

216 Cassidy: 2005: 384. One simple example of a typical South African diversity challenge is different language proficiencies. This could lead to an inability to communicate effectively. See in this regard Vawda: 2008: 91.

philosophies of the legal system.[217] Further, law teachers tend to teach law in an emotionless vacuum which fails to take into account the students' ideologies, philosophies and feelings. There is a tendency to approach legal studies from a dispassionate perspective and then feign ignorance when the student graduates and cannot frame his argument in context because he cannot see past the blinkers of 'black letter' law. By way of example, in family law the lecturer will convey the legal position regarding a certain aspect and bolster the concept by explaining the fundamental allegations which must be contained in divorce pleadings. Often, and due to the duration of the lecture and the quantity of work which must be covered in a subject, the lecturer is not permitted to explore with the student the practical applicability of the course content. Furthermore, the lecturer is not allowed the opportunity to train the students in the ways that one can first of all ascertain from a client the grounds for the divorce or explain how it would be set out practically in a particulars of claim.

A further concern is that in the South African context an undergraduate degree is not a requirement for the law programme, unlike the situation in the United States of America. Consequently, South African students are young, passionate and idealistic.[218] In their formative years of legal education legal educators tend to stifle their individual concerns and emotions for the sake of *'teaching them to think like lawyers'*.

Lastly it is obvious that law teachers are not traditional educators and do not possess the necessary knowledge on how to teach effectively. This leads to a situation where the educator is legally equipped to educate students but lacks the

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217 Henderson: 2003: 50.

218 Bezdek: 2005: 59 on this issue however remarks "The typical student [in America] receives a JD degree at 25 and after a few weeks of study in a commercial bar review course, the law graduate undertakes a bar examination in one of the 50 States. After successfully completing this bar admission process, the student is legally entitled to undertake any legal matter for a client. The requirement of seven years of higher education filters out those who lack intellectual ability and academic staying power, and those unwilling or unable to invest or borrow the large amounts of money required to finance this extended period of study."

skills to impart such knowledge.[219] The lack of educational skill of law teachers was mentioned as far back as 1981 in an inaugural lecture delivered by Professor CF Eckard where he remarked that:

> "[D]osente soveel praktiese ervaring moontlik behoort op te doen alvorens hulle hulle voltyds wy aan die onderrigtaak. Hoe meer praktiese ervaring 'n dosent opgedoen het, hoe makliker sal dit vir hom wees om die reg so aan die studente mee te deel dat dit duidelik is hoe die teorie toepassing in die praktyk vind." [220]

Eckard further remarked:

> "[d]it sal goed wees as sekere dosente van tyd tot tyd uit hulle ivoortorings sal klim om kennis te maak met die bloed en die stof in die arena". [221]

This situation is further complicated by the role that educators assign to themselves. With the continuous pressure to publish, many educators frame themselves as researchers and see the actual teaching of law as a side-show affair.[222]

While it cannot be denied that research output is necessary and valuable, many would concur that research should not be at the sake of teaching.

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219 The position in the Canadian educational system is not that much different to the South African perspective and Weiler: 1982: 5 indicates that "...the practice of requiring a demonstrated capacity for innovative legal scholarship [should be] the sine qua non for a tenured appointment. Such a practice would involve the explicit requirement that a newly appointed faculty member produce a major piece of published work within a time frame of three to five years, that there be designated a senior colleague to encourage and prod this effort, and that there be a tough-minded outside review by recognized scholars in the field as well as by the internal tenure committee". To put it bluntly, Canadian law schools have not moved nearly far enough in this direction, certainly by comparison with their fellow university faculties. The fact is that a full-time law school position is now a relatively scarce resource. There is a growing pool of initially qualified people to fill these places. Before one of these tenured slots is awarded, potentially for a lifetime, the law faculty has an obligation to the legal community and to the public at large to insure [sic] that the person in question is going to be able to fulfill this mission of the law as a university discipline."

220 1981: 10.

221 1981: 11.

222 See also in this regard Tarrant: 2006: 79 where the author explains that law teachers could gain from obtaining a formal qualification in education.

3.4 ADMISSION REQUIREMENTS TO SOUTH AFRICAN UNIVERSITIES

In light of the above paragraph the question may be asked whether or not stricter admission requirements could improve the current deficiencies in legal education.

A criticism against the current system may be leveled at the LL. B degree and the shortcomings it possesses in comparison to its predecessors (B. Proc, B. Iuris). Presently the Universities of Cape Town, Western Cape, Stellenbosch, KwaZulu Natal, North West, Free State, Pretoria, South Africa, Johannesburg, Witwatersrand, Venda, Nelson Mandela Metropolitan, Rhodes, Fort Hare, Zululand, Limpopo and Transkei all offer the *Baccalaureus Legum* degree in one form or another, although each with differing time periods. Notably it is only the University of the Free State that offers the *B. Iuris*, albeit with an endorsement in financial planning law. Although each of the mentioned universities offers essentially the same LL. B degree, though with emphasis on different aspects, the admission requirements for each faculty differ considerably in terms of the four year LL. B curriculum. [223]

Perhaps an initial solution may lie in standardising the admission requirements for law studies in South Africa. This would prevent the situation where a student who cannot obtain entry to one law faculty because of his marks simply applies at another with a lower entrance requirement and then eventually graduates into a field where he cannot compete. A further analysis should be made of the very low bar set by the entrance requirements to study law. It is pointless to allow students who are ill-equipped to enter law faculties where they have no hope of succeeding and indeed simply frustrate the system and lead to an overall lowering of standards. In the Botes report (referred to above) 91% of respondents indicated that a 'good' general matriculation is not sufficient for entry

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223 Unpublished conference paper presented at the AFF Numeracy Conference – Bloem Spa Lodge – 21and 22 July 2008. On file with author.

to the LL. B programme and that entry requirements should be set and aligned with a separate admission test.[224]

It is my opinion that the LL. B degree and admission requirements should be examined and redefined and that clinical legal education may be the most appropriate method to assist in correcting some of the existing problems of ill equipped students within the LL. B degree programme (based on the assumption that the current admission requirements remain unchanged).

3.5 THE NECESSITY AND USE OF PRACTICAL TRAINING IN A LAW DEGREE

> "Law schools have a tradition of emphasizing (sic) instruction in theory and doctrine over practice and of treating theory and doctrine as distinct, separate subjects from practice. The separation of theory and doctrine from practice in the law curriculum was an unfortunate fluke of history and hinders the ability of law schools to prepare students for practice."[225]

It has become undeniably clear that practical training or 'practice-orientated legal education' should be incorporated into the law degree.[226] In order to determine why practical training is important in a law degree one must first examine the various roles or functions played by legal practitioners in society.

3.5.1 THE CHARACTERISTICS OR SKILLS OF AN IDEAL LEGAL PRACTITIONER

Henderson suggests that the functions of a legal practitioner can be categorised into four broad groups.[227] This is of importance because when we speak of "skills transfer" in legal education, these identified skills may indicate some of the skills which are essential in legal education:

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224 O'Regan: 2002:245 suggests that admitting students who are incapable of graduating is a disloyalty to the profession.

225 Sullivan *et al* as quoted by Swanepoel *et al*: 2008:99.

226 Swanepoel *et al*: 2008: 100.

227 2003:58.

a) *Legal practitioners are advocates and advisors.*[228] *Legal practitioners work to secure the best possible outcome for the client which they represent which often involves addressing a social issue on a macro or micro level. In order to achieve this aim a legal practitioner must be able to suggest various courses of action to a client and then to advise on the best possible path to follow. This can involve advising on legal, personal, financial and moral issues.*[229] *Research, interpretation, analytical thinking and persuasion are necessary to achieve an outcome. Legal practitioners are then further tasked to litigate on behalf of the client or to brief counsel to present the client's case to the court.*[230]

b) *Legal practitioners are makers and implementers of policies and rules - legal practitioners often draft documents and contracts for clients and interpret, design and critique the rules and policies of government. Legal practitioners are in some cases directly involved in drafting and successfully implementing statutes. Legal practitioners often hold senior management positions in private, public, governmental and non-profit organisations. They further act as directors on boards of companies and in some cases serve as elected government officials.*

c) *Legal practitioners are adjudicators, negotiators and mediators - legal practitioners assist clients with negotiations and settlements as opposed to litigation and on occasion serve a judicial function as assessors.*

d) *Legal practitioners are educators - legal practitioners play the role of traditional academic, senior specialist in a field concerning which they instruct others or as principles or mentors for candidate attorneys and advocates. Legal practitioners educate the public about issues concerning public rights and often play a role as community educators to schoolchildren, friends and family.*[231]

Bobbert defines a profession as:

> "having an intellectual basis; embodying a tradition of service to the community; organized; exercised independently, objectively and for private account; and governed by a professional code."[232]

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228 Term used by the author to described advocating on behalf of a client and does not refer to the advocates' profession as understood in the South African context.

229 2003: 59.

230 According to Sylvester: 2003: 32 "...William Twining identified a number of intellectual qualities required by the good lawyer: a) an ability to express oneself clearly both orally and in writing b) an ability to distinguish the relevant from the irrelevant c) an ability to construct and present a valid, cogent and appropriate argument d) an ability to identify issues and to ask questions in a sequence appropriate to a particular context e) general problem solving skills f) library research skills g) an ability to spot ethical dilemmas and issues."

231 Henderson: 2003: 60.

232 As quoted by Church: 1988: 156. See also in this regard O'Regan: 2002: 247.

The Attorneys Fidelity Fund also provides a framework of professional personal skills required of an attorney (some of which also apply to the advocate's profession). [233] This framework proposes the following skills and values which must be developed and ingrained in a legal practitioner. Again this may be a valuable indicator of the skills which we may want to transfer through the LL. B programme:

a) *The legal practitioner must be a protector of the constitution and uphold and promote the values and rights it enshrines by promoting justice and democracy.*
b) *The legal practitioner must possess 'people skills' and be sensitive to the needs of others; manage a client's affairs effectively; understand his or her mandate; explain the client's rights effectively; report to a client on a regular basis; and respect and strengthen relationships with other practitioners, experts, state officials and respect their importance to the legal system.*
c) *The legal practitioner must be a life-long learner who strives to select fields of speciality; stays cognisant of all developments through reading, studying, research and involvement in continuing legal education programmes; and seeks to improve his or her skills in respect of oral and written communication, creative problem solving, interpersonal relationships, analysis, technology, research, negotiation and drafting.* [234]

In order for a legal practitioner to fulfill the roles as set out above certain skills or capacities must be inculcated in the student before he attempts to fulfill the multifaceted aims of his profession. Henderson posits that these skills can be divided into three clusters of capacities which are essential to any law graduate.[235] It is submitted that any 'capacity' or 'capability' lays the foundation for development of a skill through training and practice. The capacities identified are:

a) *Judgment capacity – this entails the ability to exercise sound and reasoned judgment in the face of an integrated understanding of all sources which may or may not be applicable to the matter at hand. This capacity requires that the legal practitioner be able to recognise and pre-*

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233 Unpublished conference paper presented at the AFF Numeracy Conference – Bloem Spa Lodge – 21 and 22 July 2008. On file with author.

234 Gold: 1982: 23 suggests that continuing legal education is essential to graduates of a law school and further that law practice is likely to become more and more competitive as the recent graduates begin to outnumber the seasoned veterans.

235 2003: 61.

empt existing or potential problem issues. In order to exercise sound judgment a legal practitioner must know how to organise knowledge and to correspond such understanding to the problem at hand.

b) *Legal reasoning capacity – entails the ability to identify legal concerns, assess legal risks and propose legal solutions based on a comprehensive understanding of relevant legal theory or doctrine.*

c) *The capacity to communicate - this capacity involves the ability to communicate orally and in writing in the formal and informal sphere. This capacity also requires basic people-orientated skills such as empathy, active listening and concern for the needs and interests of others.*[236]

From a practical South African viewpoint Marnewick suggests that in order to identify the skills required of a South African legal practitioner one must first identify all the steps involved in the litigation process.[237] He provides for the following identification of the steps involved: interviewing, advising and counselling, alternative dispute resolution, initial fact analysis and preservation of evidence, drafting statements of claim, drafting pleas and special pleas, drafting replications, drafting exceptions and applications to strike-out, drafting application papers, preparing a case for trial, opening statements, examination in chief, cross-examination, re-examination, special procedures, closing arguments, motion court proceedings, reviews, appeals and general advocacy skills. He further states that the most important subjects at any university level will have to be revisited (these are identified as criminal procedure, law of evidence and civil procedure) and will have to be re-taught in a practical manner, which at present universities are unable to do.[238]

Twining, when asked what skills are required of a law graduate, responded by stating:

> "...since legal controversy is conducted by means of words, you need some knowledge about the use of words as symbols, that is, some grammatical knowledge. Since issues of fact are constituted of contradictory prepositions, are formed by the assertion and denial of propositions, and are tried by the proof and

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236 Henderson: 2003: 61. These skills are by no means unfamiliar in the legal fraternity. Justice O'Regan summarised the skills one should acquire in order to be a proficient lawyer. See in this regard O'Regan: 2002: 247. See also Swanepoel *et al*: 2008: 102.

237 2002: 42.

238 Marnewick: 2002: 43. See also the Principal's Guide provided by the Law Society of South Africa 2009 – on file with author.

> disproof of propositions, you need some knowledge of the nature of propositions and of the relationships which can obtain among them, and of the character of issues of fact and of proof and disproof, that is, some logical knowledge. Since the propositions which are material to legal controversy can never be proved to be true or false but only to be probable to some degree and since issues of fact are resolved by the calculation of the relative probabilities of the contradictory propositions of which they are composed, you need some knowledge of the distinction between truth or falsity and probability and of the logic of probability. Since propositions are actual or potential knowledge, since proof or disproof is an affair of knowledge, since, if they are truthful, the parties to the legal controversy assert, and witnesses report, their knowledge, and since knowledge is of various sorts, you need some knowledge about knowledge, such, for instance, as knowledge of the distinction between direct or perceptual and indirect or inferential knowledge. Since there are intrinsic and essential differences between law and fact, between propositions about matters of fact and statements about matters of law, and between issues of fact and issues of law and the ways in which they are respectively tried and resolved, you need some knowledge about these matters. Since litigants and all those who participate in the conduct and resolution of their controversies are men and since many of the procedural laws are based upon presuppositions about human nature and behavior, you need some psychological knowledge. Finally, of course, you need such knowledge as is necessary to enable you to understand the tangential ends which are served by procedural law and to criticize the rules which are designed to serve them." [239]

Although this list sounds impressive and contains the required skills of logic, grammar, rhetoric, psychology, the exploration of probabilities and the interconnection between law and fact, the question still remains: what is the best method to instill these skills? I intend to show that the answer may lie in clinical legal education although I concede that there are also other methods.

Besides the abovementioned capacities there is a certain normative component which a legal practitioner is required to fulfill. The component requires professional conduct, ethics and a sense of community.[240] Legal practitioners need to recognise that being a legal practitioner brings with it a duty of social responsibility.[241]

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239 1982: 54.

240 According to Vawda: 2004: 118 "the socialization [sic] of lawyers and the formation of a professional identity have been extensively researched [.] Simply put, 'a fully socialized individual is one who is, does and believes pretty much what society asks him or her to be, do and believe.'"

241 Henderson: 2003: 62. Justice Navsa remarked as quoted in De Klerk *et al*: 2006: 1 "It is important to appreciate that skills cannot be applied in a value-vacuum. As a legal practitioner, you will inevitably develop certain values that will, to some extent, determine

3.5.2 GENERIC OUTCOMES FOR ALL LAW DEGREES

There is another reason that necessitates attention to be paid to the legal skills which legal education must impart. In the South African context all qualifications must fulfill, as a further objective, the critical cross-field education and training outcomes, commonly known as the critical outcomes, as a mechanism through which coherence is achieved in the National Qualifications Framework.[242] The critical cross-field outcomes [243] are:

a) *Identify and solve problems in which the responses display that responsible decisions using critical and creative thinking have been made;*
b) *Work effectively with others as a member of a team, group, organisation, community;*
c) *Organize [sic] and manage oneself and one's activities responsibly and effectively;*
d) *Collect, analyse, organise and critically evaluate information;*
e) *Communicate effectively using visual, mathematical and/or language skills in the modes of oral and/or written presentation;*
f) *Use science and technology effectively and critically, showing responsibility towards the environment and health of others;*
g) *Demonstrate and understanding of the world as a set of related systems by recognising that problem-solving contexts do not exist in isolation.*[244]

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how you apply your skills. The purpose of this introduction is to stimulate some thought on your values, as a legal practitioner and a citizen, and your obligations to contribute in a practical and meaningful way towards building a society that reflects a commitment to justice and democracy"

242 The objectives of the NQF according section 2 of the South African Qualification Authority At 58 of 1995 are 1) creating an integrated national framework for learning achievements; 2) facilitating access to, and mobility and progression within education, training and career paths; 3) enhancing the quality of education and training; 4) accelerate the redress of past unfair discrimination in education, training and employment opportunities; and 5) contributing to the full personal development of each learner and the social and economic development of the nation at large. Section 5 of the National Qualifications Framework Act 67 of 2008 contains the same provisions mentioned in section 2 of Act 58 of 1995. According to section 37 of Act 67 of 2007 Act 58 of 1995 has been repealed in its entirety. Section 4 of Act 67 of 2007 defines the NQF as a comprehensive system approved by the minister for the classification, registration, publication and articulation of quality-assured national qualifications.

243 The outcomes describe the qualities which the NQF identifies for development in students within the education and training system, regardless of the specific area or content of learning, for life-long learning according to www.nqf.co.za - 5/3/09.

244 www.nqf.co.za – 5/03/09.

The South African National Standards body regulations indicate that a qualification must: [245]

> "1) [R]epresent a planned combination of learning outcomes which has the defined purpose and which is intended to provide qualifying learners with applied competence and a basis for further learning; [246] 2) add value to the qualifying learner by providing status, recognition, enhancing marketability and employability; 3) provide benefits to society and the economy; 4) comply with the objectives of the NQF; 5) include both specific and critical cross-field outcomes that promote life-long learning; 6) where applicable, be internationally comparable; 7) incorporate integrated assessment to ensure that the purpose of the qualification is achieved while the assessments should include a range of formative and summative assessment methods such as portfolios, simulations, workplace assessments and also written and oral examinations; and 8) indicate in the rules governing the award of the qualification that the qualification may be achieved in whole or in part through the recognition of prior learning, which concept includes but is not limited to learning outcomes achieved through formal, informal and non-formal learning and work experience." [247]

The South African Qualifications Authority provides the following requirements, in terms of necessary outcomes for law students in particular:

a) *The successful candidate will be able to be a lifelong student with the ability to be well informed of the most recent legal developments.*
b) *The successful candidate will be able to take part as a responsible citizen in local, national and international communities.*
c) *The successful candidate will be able to be sensitive as a lawyer to the cultural and ethnic diversity in the community.*
d) *The successful candidate will be able to explore educational and career possibilities and develop entrepreneurial skills.*[248]

More specifically the student must be able to:

a) *identify and solve legal problems through critical and creative thought;*[249]

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245 Section 1 of Act 67 of 2008 defines 'qualification' as a national qualification.

246 Section 1 of Act 67 of 2008 defines 'learning' as the acquisition of knowledge, understanding, values, skill, competence or experience.

247 www.nqf.co.za – page 4 – 5/03/09. This is understandable especially viewed from the financial implications to the student. See also in this regard Westcott *et al*: 2006: 82.

248 These skills are referred to as 'exit level' outcomes. See in this regard: http://www.saqa.org.za – 15/02/07

249 According to Sherman: 1999: 77 "Lawyering means problem solving. Problem solving involves perceiving that the world we would like varies from the world as it is and trying to move the world in the described direction. Solving human problems sometimes requires changing the physical world or overcoming ourselves, but it also can involve trying to persuade others to act in ways that will change the world into something closer to what

b) *approach and study personal and professional activities in a responsible, ethical and effective manner;*
c) *do effective legal research by gathering, analysing and critically evaluating information;*[250]
d) *communicate effectively in writing and verbally;*
e) *cooperate effectively with others in society;*
f) *use technology effectively and responsibly to the advantage of the community as a whole; and*
g) *see the law as a component of a system of interdependent systems within the community where problem solving cannot occur in isolation.*[251]

According to Badat:

> "in terms of the curriculum, many higher education institutions [252] in developed countries have responded to the globalization agenda and to the need to educate for an uncertain or unknown employment future, by emphasizing life-long learning and the teaching and learning of generic skills, competence or 'generic capacity', - all defined, more or less as the ability of the learner to put generic knowledge and skills into action. In South Africa, SAQA has responded to global trends by insisting that critical cross-field outcomes are infused into all qualifications at all levels on the NQF, and that these are demonstrated by learners in integrated assessment tasks." [253]

It is suggested that in order to fulfill the desired SAQA outcomes in the LL. B curriculum more integration of a practical component must be effected in traditional law courses. It is further suggested that without a more practical approach, law courses will not meet the outcomes as stated above. It will be explained in Chapter

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we desire. All of us so act when we solve problems; lawyers do no more. We can see lawyers' problem-solving simply as an instance of human problem-solving."

250 According to Weiler: 1982: 2 "the simple premise of the oft-touted, oft-maligned case method is that the law student should not just be a passive recipient of someone else's view about the state of law. Rather, the only way the student can develop the kind of independent, self-sustaining grounding in a subject – "knowledge" in the true sense of the term – is through participation in an intellectual exchange with his teacher. Whether personally or vicariously, the student must wrestle with a sequence of cases, try to extract from them a principle which can be applied to a problem, and in this way develop the intellectual equipment he can rely on when he is out in the real world without his teacher to tell him what the answer is..."

251 See also in this regard Du Plessis: 2008(b): 7.

252 According to section 1 of Act 67 of 2008 'education institution' means an education institution that is established, declared or registered by law.

253 2002: 3. See also in this regard Tyler as quoted in Biggs: 2003:25 "Learning takes place through the active behavior of the student: it is what he does that he learns, not what the teacher does."

Five; that these outcomes could be achieved under the umbrella term of clinical legal education.[254]

4. TOWARDS INTEGRATION OF THEORY AND SKILLS: A NATIONAL AND INTERNATIONAL PERSPECTIVE OF THE IDEAL

4.1 INTRODUCTION

I submit that it is clear that not only do we have to ensure that our graduates are employable in a law-related field but we further need to ensure that such graduate is equipped with generic skills and values which may be applied in any future employment position. Some of these skills can be applied within a theoretical framework. The vast majority of skills however can only be fully developed and assessed in practical components which require the application of theoretical knowledge and interaction with members of society and the profession.

The main purpose of a law faculty is to impart the above skills along with substantive knowledge of law.[255] Many of these skills can only be imparted through actually experiencing a problem as opposed to a text book analysis of a predetermined (by the educator) challenge.

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254 By way of example: The outcome that the successful candidate should be sensitive as a lawyer to the cultural and ethnic diversity in the community can be achieved mainly through exposing a student to real live situational analysis. This, it is suggested, cannot be taught in a simulation or hypothetical situation. See in this regard Swanepoel *et al*: 2008: 101 where the authors opine that many of the exit level outcomes for the LL. B degree are remarkably similar to the goals of clinical legal education. See also De Klerk as quoted by Du Plessis: 2008(b): 8 "In referring to the SAQA outcomes ... clinical legal education and academic legal education [are] ... two sides of a coin – without the one, the other cannot profess to achieve the stated outcomes of the LL. B degree." De Klerk: 2006(b): 948 is of the opinion that the SAQA document serves as "institutional encouragement for change".

255 According to Weiler: 1982: 3 " ...a university law school may be a fine place in which to turn out the occasional legal Pericles – equipped for legislating and judging – but it cannot do a good enough job in turning out the legal plumber who daily serves the citizen-client with a legal problem."

4.2 LEGISLATIVE MEASURES TO ENSURE PRACTICALLY ORIENTATED TRAINING

Besides the apparent need for more practically-orientated training, and the required degree of full responsibility from law faculties for practical training, history indicates that universities have already bound themselves to this undertaking through their own policy decisions; many of which are requirements set by legislation pertaining to higher education.

Steenhuisen emphasises the three primary functions of a modern university as teaching, research and community service.[256] These functions must be viewed in light of the aim of any university namely, the development of the student at all possible levels, connected to his training in totality. In order to gain achievement in all three levels of function (teaching, research and community service) each function must be viewed individually but must function as part of a holistic concept of student development.[257]

With regard to the teaching function of a modern university, two facets must be emphasised according to Steenhuisen.[258] These, according to the author, are:

a) *Scientific instruction and the associated intellectual development: this indicates basic, fundamental education with an emphasis on the science, under instruction, in general and the academic discipline specifically. The Grevette report suggests that under this facet the following goals must receive attention during academic training: a) fundamental principles and concepts of the discipline must be brought to the attention of the student. Application of techniques and practice relevance should never receive*

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256 With regard to the provision of service to the community Weiler: 1982: 13 remarks that "law should be conceived of as a means to social ends and not as an end in itself. It follows that any part needs constantly to be examined for its purpose, and for its effect, and to be judged in light of both and of their relation to each other." See also the work of Steenhuisen: 1998: 33.

257 Weiler: 1982: 11 "And what are the general purposes of a university? I shall not rashly attempt a comprehensive statement, but at least we might agree that they include the discovery of new knowledge; the identification, analysis, and criticism of values; and the cultivation of aesthetic sensibility. The law schools, if they are to perform their missions as integral parts of universities, are required to give greater attention to the means for discovery of new knowledge."

258 Steenhuisen: 1998: 32 and further.

preference over the principles and concepts. The student must know and understand the principles and concepts relevant to his discipline; b) holistic view: the integration of the different sciences and diverse facets of the discipline must be instilled in the student in order to allow the student to think holistically; c) ability and skill: academic teaching must form and develop the student's abilities and skill for science in general and for the specific science in which he will operate professionally. Academic teaching must seek to achieve the following skills: knowledge acquisition, management of knowledge, communication of knowledge, knowledge development, intellectual individuality and creativity and skills of a general nature; d) attitudes: the development of a cognitive attitude which is specific to experts in the different disciplines and a sense of social responsibility as an aim of professional attitude.

b) *High level professional training: this indicates that the university is involved with general career development as well as career-specific training. This aspect indicates that the university must stay in touch with the needs of the community and the professional skill requirements of the professional community. The Gravette report suggests that a university should stay abreast of societal needs and should fulfill the professional requirements of the business sphere.*

5. THE MACCRATE REPORT

5.1 INTRODUCTION

The task force's aim was to investigate the gap between academics and practice and to make recommendations as to how such gap could possibly be narrowed. Initially the members of the task force agreed that ideally the profession and the academics should theoretically function as one unit, although with differing aims, in the education and preparation of students for practice. The task force also investigated the full extent of curriculum development in the area of skills development and the availability of programmes specialising in these skills, to students.[259] The MacCrate report was the culmination of an investigation into methods and processes which are utilised in preparing new members for the profession of law.[260] The task force was diverse in membership, including

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259 Steenhuisen: 1998: 69 - 70.

260 Steenhuisen: 1998: 69. Report of the task force on Law Schools and the Profession: Narrowing the Gap. The report was published in 1992 by the task force on law schools and the profession. The task force was formed in 1989 to investigate and improve the

members of the federal and state judiciary of the United States of America, deans and faculty members of American law schools and members of the practising bar.[261] Robert MacCrate, a retired partner of the firm Sullivan and Cromwell, and the chairman of the task force, published the task force's report in 1992. Although the task force concerned itself mainly with clinical legal education, the report addresses the question of why theory and practice should be integrated. If regard is had to the circumstances and background of this report, South African universities may take valuable pointers to re-develop their LL. B curriculae.

The findings of the MacCrate Report were:

a) *At that time it was already firmly established that the function of an American law faculty was not the production of a 'perfect' practitioner, despite the quality of the student. Flowing from this it was found that members of the practising bar and members of the academia criticised one another unnecessarily and failed to show understanding of each others' differing needs, cultures, ambitions, value systems and achievements.*[262]
b) *With regard to legal education the task force found that the focus of law schools still fell on teaching substantive legal knowledge in an attempt to train students to 'think like lawyers'. They further found that there is potential for law schools to develop skills and values without detracting from the traditional role of academics.*
c) *With regard to university law clinics the task force established that law clinics have made a substantial contribution to legal education and continue to do so. Clinics are the connecting factor for the development of professional skills and values and should be allowed a greater say in curriculum development because of this position. Much legal research regarding legal education methodologies is performed by clinicians who are often regarded as talented, multifunctional lecturers due to their interest in practical legal pursuits and viewpoints. The clinical environment allows the student to see and develop practical skills in an environment which lends itself to skills integration. Further it was established that a well*

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way in which practitioners are prepared for practice. The investigation into the role of the Law School to instill fundamental lawyering [sic] skills and professional values was the greatest contribution of the report. See also in this regard Connolly: 2007:20 and Morrissey: 2006: 258.

261 Connolly: 2007: 20.

262 1992: 4. Legal educators and the profession are according to the report: "...engaged in a common enterprise – the education and professional development of members of a great profession."

structured clinical programme instills the traditional skills of fact investigation, communication, advising, negotiation and litigation and also the skills needed for research and logical analyses which are often only taught by way of the Langdell Model. Clinical education is three-dimensional and focuses on concept development, task delivery and critical analyses which combined create the perfect educational perspective for the development of skills and values. It was further found that although a well-structured clinical programme cannot possibly duplicate all of the skills necessary for practice, it at least prepares the student for eventual practice and equips him with the ability to make the connection between practical experience and the concepts inculcated at law school.[263]

5.2. THE MACCRATE REPORT: IDENTIFICATION OF LEGAL SKILLS REQUIRED TO PRACTISE LAW

The task force enumerated the skills required by an aspirant legal practitioner (which logically should be taught at law school) as follows:[264]

1. *Problem solving;*[265] + [266]
2. *Legal analysis and reasoning;*[267] + [268] + [269]
3. *Legal research;*[270] + [271]
4. *Factual investigation;*[272] + [273] + [274]

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263 Steenhuisen: 1998: 72 and further.

264 Connolly: 2007: 21. See also MacCrate: 1994:90.

265 According to Steenhuisen: 1998: 74 – this skill shows correlation with Gravette's exposition of knowledge generation, knowledge management and career preparation. Sylvester: 2003: 32 identifies general problem solving as an intellectual skill which correlates with the skill identified by the task force and Gravette's exposition identified by Steenhuisen.

266 1992:16 under "skill 1". See also in this regard Connolly: 2007: 21.

267 According to Steenhuisen: 1998: 74 this skill correlates with Gravette's exposition of knowledge management. Sylvester: 2003: 32 identifies the ability to construct and present a valid, cogent and appropriate argument as an intellectual skill which correlates with the skills identified by the task force, Gravette and Steenhuisen.

268 According to Marson *et al*: 2005: 39 "Of fundamental significance is the fact that students also acquire an understanding of law in context."

269 1992:16 under "skill 2". See also Connolly: 2007: 21.

270 According to Steenhuisen: 1998: 75 this skill correlates with Gravette's exposition of knowledge management and knowledge generation. This skill was further identified by Sylvester: 2003: 32 as an intellectual skill and correlates with the skills identified by Steenhuisen and Gravette and the task force.

271 1992:17 under "skill 3". See also Connolly: 2007: 21.

5. *Communication;*[275] + [276]
6. *Counselling;*[277]+ [278]
7. *Negotiation;*[279] + [280]
8. *Litigation and alternative dispute-resolution procedures;*[281]+ [282]
9. *Organising and management of legal work;*[283] + [284]
10. *Recognising and resolving ethical dilemmas.*[285]+ [286]

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272 According to Steenhuisen: 1998: 75 this skill correlates with Gravette's exposition of knowledge management. See also Sylvester: 2003: 32 who identifies this skill as the intellectual ability to distinguish between relevance and irrelevance, the ability to identify an issue and the ability to ask questions in a sequence; this identification correlates with the skills identified by Steenhuisen, Gravette and the task force.

273 According to Marson: 2005: 39 "Clinical legal education may fundamentally offer tangible benefits for the students as it has the capacity to achieve deep learning – for numerous reasons. First, students must engage in fact analysis. In academic modules students are furnished with a question which requires the law to be applied to a series of distinct facts. In clinical education students are deprived even of a set of coherently presented facts. They must understand law in sufficient depth to determine for themselves which elements of the client's story are important to the case, and which should be disregarded."

274 1992: 17 under "skill 4". See also Connolly: 2007: 21.

275 According to Steenhuisen: 1998: 75 this correlates with Gravette's communication of knowledge and skills of a general nature. Sylvester: 2003: 32 identifies this skill as the intellectual ability to express oneself clearly in writing and orally and this identification correlates with those skills identified by the task force, Gravette and Steenhuisen.

276 1992: 17 under "skill 5". See also Connolly: 2007: 22.

277 According to Steenhuisen: 1998: 76 this skill correlates with Gravette's knowledge management and career preparation.

278 1992: 17 under "skill 6". See also Connolly: 2007: 22.

279 According to Steenhuisen: 1998: 76 this skill correlates with Gravette's exposition of career preparation.

280 1992: 17 under "skill 7". See also Connolly: 2007: 22.

281 According to Steenhuisen: 1998: 76 this skill correlates with Gravette's exposition of career preparation.

282 1992:18 under "skill 8". See also Connolly: 2007: 22.

283 According to Steenhuisen: 1998: 77 this skill correlates with Gravette's exposition of skills of a general nature.

284 1992: 18 under "skill 9". See also Connolly: 2007: 22 – 23.

285 According to Steenhuisen: 1998: 77 this skill correlates with Gravette's exposition of attitudes.

286 1992: 19 under "skill 10". Connolly: 2007: 23. O'Regan: 2002: 247 on this issue identifies the following skills "The ability to listen and absorb information, the ability to think clearly and in turn to express those thoughts orally and in good prose, the ability to conceive an argument and to be able to use verbal techniques of persuasion, the ability to read and understand a text and particularly the ability to condense it without losing accuracy, the ability to use a law library, the ability to use basic computer programmes, the ability to find and interpret statutes and regulations, the ability to understand the legal significance of a set of facts and the ability to see the big picture..."

5.3. THE MACCRATE REPORT: IDENTIFICATION OF VALUES REQUIRED TO PRACTICE LAW

Further to the skills identified by the task force the following fundamental values were identified:

1. *Provision of competent representation;*[287]
2. *Striving to promote justice, fairness and morality;*[288] + [289]
3. *Striving to improve the profession;*[290]
4. *Professional self-development.*[291] + [292]

5.4. THE MACCRATE REPORT: RECOMMENDATIONS BASED ON OBSERVATIONS

The above skills and values were synthesised from the Statement of Fundamental Lawyering Skills and Professional Values and became a central feature for the reports analysis, providing a foundation for its recommendations.[293] The recommendations made on the basis of the findings culminated in the following:

1) *The general distribution and discussion of the statement of skills and values.*[294] *This recommendation was to enable the use thereof by law students to prepare them for practice and to facilitate curricula choices and to encourage law faculties to take these skills and values into account*

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287 1992: 19 under "value 1". See also Connolly: 2007: 23.

288 According to Steenhuisen: 1998: 78 this value correlates with Gravette's exposition of attitudes.

289 1992: 20 under "value 2". See also Connolly: 2007: 23.

290 1992: 20 under "value 3". See also Connolly: 2007: 23.

291 According to Steenhuisen: 1998: 79 this value correlates with Gravette's exposition of intellectual individuality and creativity.

292 1992: 20 under "value 4". See also Connolly: 2007: 24. See also Duncan: 2005: 15–16 for the impact of legal education of student's values.

293 Connolly: 2007: 20.

294 Steenhuisen: 1998: 79.

during the process of curriculum development, in order to develop students and better prepare them for eventual practice.[295]

2) *Enhancement of professional development during academic learning must take place. The interaction between core modules and elective professional skill modules should be reviewed and revised. Each faculty should participate in a self-evaluation of how the required professional skills and values can be taught to students using available resources.*[296]
3) *Education in lawyering skills and values should have the following characteristics in order to be effective:*
   3.1) *developed theories and principles must underpin the skill and values;*
   3.2) *opportunity for the students to perform practical tasks must be created with appropriate feed-back and evaluation attached thereto*
   3.3) *reflective evaluation must be done by a qualified assessor.*[297]
4) *Each faculty should assess which skills and values described in the skills and values statement are currently being taught. A comprehensive agenda regarding legal skills training, which is not limited to legal analysis, legal research, written assignments and advocacy skills; should be developed in each faculty. The skills identified in the agenda should be supported and transferred by way of a well-structured, formal clinical law programme which should further be indicated in the yearbook of each faculty.*[298]
5) *Students should have access to documented reports concerning legal education in order to facilitate better course selection. Access to documents further allows the student to identify which skills and values are required of him as a legal practitioner.*[299]
6) *Faculties should be encouraged to teach skills previously only acquired in practice such as problem solving, factual investigation, communication, and negotiation and trial advocacy.*[300]
7) *Faculties should improve their writing skills programmes especially when seen in light of the fact that newly admitted legal practitioners rarely have the skill of correct legal drafting.*[301]
8) *Well-structured clinical programmes should be engaged to teach students the value of organisation and management of legal work.*[302]
9) *Faculties should present well-structured ethics training programmes and teach students how to identify and solve ethical issues.*[303]

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295 MacCrate: 1992: 21 under paragraph "B".
296 MacCrate: 1992:21 under paragraph "C".
297 MacCrate: 1992: 23 under paragraph "C6".
298 MacCrate: 1992: 23 under paragraph "C8".
299 MacCrate: 1992: 24 under paragraph "C11".
300 MacCrate: 1992: 24 under paragraph "C13". The report further emphasises that these skills were "previously considered learnable only through postgraduation experience in practice."
301 MacCrate: 1992: 24 under paragraph "C14".
302 MacCrate: 1992: 24 under "C15".
303 MacCrate: 1992: 24 under "C16".

10) *Faculties should, during the formal education phase, inform students that evaluation of fundamental values and skills is just as important as knowledge of substantive law.*[304]

11) *Law faculties should encourage and support students who become involved in practice during their studies whether by way of vacation work or temporary employment in the legal sector.*[305]

6. SOUTH AFRICAN UNIVERSITIES PREPARE FOR INTEGRATION OF SKILLS AND THEORY

In South Africa, where a pre-graduate degree is not a requirement for admission, the task of developing the above global skills and values often falls on the law teachers' already over-burdened shoulders. Many South African law students come from a particularly underdeveloped secondary education system and do not think on a global or even integrated scale. The nature of the law determines that a student must have some sense of political, economic, psychological, mathematical and philosophical knowledge in order to understand and ultimately assist in the problems experienced by humans. It is well known that most legal practitioners quickly realise that dealing with a client is very rarely limited to his legal problem and the practitioner often fulfills many needs within the client.[306]

In terms of South African legislation, albeit still proposed, the Legal Practice Bill puts a new slant on legal education and the requirement that practical skills and values should be extrapolated during the educational phase of a legal practitioner's career.[307] The assumptions that currently exist in terms of legal

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304 MacCrate: 1992: 24 under "C17".

305 MacCrate: 1992: 25 under "C21". See also Steenhuisen: 1998: 82 and further.

306 See in this regard Sherman: 1999: 77.

307 According to Section 8 of the Legal Practice Bill of 2002 "Subject to section 6 and item 13 of Schedule III, any person may be admitted and enrolled to render legal services as a legal practitioner, the person concerned has (a) satisfied all the requirements for the degree of (i) *baccalaureus legum* at any university in the Republic after completing a period of study of not less than four years for that degree; or (ii) a bachelor degree other than the degree of *baccalaureus legum* at any university in the Republic and after having been admitted to the status of any such degree has satisfied all the requirements for the degree of *baccalaureus legum* at any such university after completing a period of study for all such degrees of not less than five years in aggregate or four years in aggregate if the other degree was substantially a degree in law; and (b) satisfied all the vocational

education are challenging to say the least. According to Vawda the challenges to legal education can be summarised as follows:

> "Theoretical knowledge, in particular substantive law, is primarily what lawyers need to learn. Universities can do more to provide a sound grounding in theoretical knowledge. Graduates will somehow develop the skills relevant to the practice of law, and find their way in the profession and, in any event, the imparting of skills is the responsibility of the profession." [308]

In addition to the author's comments emphasised above it would appear that the trend in legal education is moving towards challenging the assumptions as stated by Vawda.[309] The phenomenon of re-curriculation (redesign) has seen a dramatic increase in the number of skills-based modules being developed and presented through the four-year LL. B programme. To add to this apparent shift in paradigm, the admission requirements for entry to the legal profession have come under close inquiry resulting in the matter coming before the legislature in the form of the Legal Practice Bill.[310]

7. PRELIMINARY CONCLUSION

It is clear from the exposition above that legal education should take into account educational objectives, sustainability and effective teaching methodologies. Not only do we, as legal educators, have a responsibility to deliver the best quality legal education but also to stay abreast of the diversity in student populace, the demands of the profession, the needs of students as well as national policy directives that should be adhered to. The reality that we are currently facing is that, despite the law curriculum's best efforts to provide quality education, the need of students, especially for career preparation, cannot be denied. It is also

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training requirements as may be prescribed by the Minister upon the advice received from the National Council [this could include remunerated compulsory community service regulations]; and (c) passed a competency based examination or assessment determined and conducted under the auspices of the Society."

308 2004: 117.

309 2004: 117. See for instance in this regard Barrow on higher education as quoted in Hyams: 2006: 81 "there has been a reduction in the value of 'knowing that something is the case' and an increase in the value of 'knowing how', placing greater emphasis on the development of skills, attitudes and values appropriate to the discipline being studied or the profession being prepared for."

310 2002.

clear from the above that the practical component, whether in the form of community service, practical training or clinical legal education, fulfills a pivotal role in the educational methodology that is geared to best prepare law graduates to enter into the profession. It is further clear that mere practical training would result in a situation where integrated knowledge cannot be achieved and that pure theoretical training does not make the grade.

CHAPTER FIVE
A PRACTICAL EXAMPLE OF A CLINICAL LEGAL EDUCATION PROGRAMME IN SOUTH AFRICA

> '[Clinical legal education at its best] is a kind of teaching which makes law school the beginning, not the end, of a lawyer's education' [311]

1. INTRODUCTION

In Chapter Five I will submit and demonstrate practically the feasibility of integration of theory and practice. The argument here will focus on the programme itself and the fact that, although it can be viewed as an assimilation of various methodologies, the programme I will propose is as unique as the South African educational paradigm for which it was designed.

The proposed programme will suggest that practical legal training be incorporated in the first three years of the LL. B in preparation for an all-encompassing clinical legal education module in the fourth year of the LL. B Further I will propose that practical legal training continues in the fourth year as a part of the 'live-client' clinical legal education module and is viewed as complementary thereto.

In this chapter I intend to focus on the creation of a viable working clinical programme, which addresses all the aims of clinical legal education, where theory and practice can be integrated effectively. The idea is not the suggestion of a viable clinical programme which will suit the needs of every law faculty in South Africa but rather aims at suggesting improvements to existing programmes through the use of other teaching methods such as practical legal training and community service learning which are complementary to clinical legal education.

311 Amsterdam: 1984: 617.

I further intend to examine the challenge of large student numbers, diversity, lack of resources, and inadequate recognition of clinical legal education. Supervision and methods of assessment for the proposed programme do not form part of this study and only brief reference will be made thereto. In Chapter Four I indicated 'why' legal practice and theory cannot be separated and in this chapter the focus lies on 'how' a clinical programme (including practical legal training) can best be effected in order to equip a student for his legal career.

2. THE CENTRAL COMPOSITION OF THE ARCHETYPAL SOUTH AFRICAN CLINICAL LEGAL EDUCATION PROGRAMME

According to Vawda a clinical[312] course in South Africa usually takes the following format:

1) *A two-hour weekly formal classroom component in which supervisors meet with the entire class and offer instruction in the theory of clinical law, skills, ethics and values.*[313] *By way of example, the typical fourth-year South African clinical programme may be described and having reference to that offered at the University of Pretoria as follows: it consists of an initial intensive two day workshop which is normally held off campus and aims to sensitise the students to client-centered consultation and counselling, issues of equality and diversity and to introduce negotiation tactics and skills. Simulation exercises are used at this orientation workshop. The course also encapsulates a classroom component which consists of one-hour weekly lectures, which usually consist of lecturers or guest lecturers drawn from the professional ranks on topics such as substantive and procedural law and skills and values.*[314]
2) *A practical component which offers access to 'live-clients' in a legal office environment. This entails exposing students to the legal skills of drafting, consultation and case management under the guidance of trained*

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312 According to Haupt: 2006: 231 "...clinical in this context refers to the attempt to study and teach law through the use of legal skills directed to solve client problems and the attempt to draw useful generalisations from such experience."

313 See also in this regard Mahomed: 2008: 59. The "plenary lectures" deal with matters regarding drafting, management, ethics, numeracy skills, interviewing skills, trial advocacy and social justice.

314 Haupt: 2006: 234 "this is typical of all clinical law courses in South Africa. Although the levels of development of clinical courses at different universities are uneven, the combination of classroom and practice components is a common feature."

lawyers. [315] *The third leg of the Pretoria clinical programme for example is practical in nature which entails students consulting and advising clients in groups, engaging in collaborative research aimed at problem solving, drafting of letters, notices and pleadings, negotiations and learning skills on both a theoretical and practical level.*[316] *This course takes place under the direct supervision of attorneys or candidate attorneys who are equipped to provide regular feedback and guidance to the students.*[317] *The group structure of the clinical programme is designed in a manner which combines different cultural, gender and language variations.*[318]

3) *Involvement of students in community outreach programmes.*[319]

De Klerk states that in 2003, 55% of universities offered a compulsory clinical programme and the remaining 45% offered it as an elective.[320] At the time of writing 47% of South African universities offered some form of clinical training as

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315 According to Haupt: 2006: 231 "...as a subject [clinical legal education] ....is the study of what lawyers actually do in practice. The practices of lawyers are examined and analysed in order to discern their theoretical structure. Clinical teaching strives to impart these theoretical structures to students in order for them to develop a conceptual framework for the practice of law."

316 Haupt: 2006: 234. It is suggested that the quality of learning in a live-client situation compared to a simulated situation is different. This former experience usually produces deeper learning. See in this regard: Duncan: 2005: 11.

317 According to Marson *et al*: 2005: 34 "...whilst the student's education is vital in this context, the advisory service must also be taken very seriously. The legal same obligations to the client exist for the law students and law firms alike, and part of the CLS partnership scheme requires that the client receives the best possible, and most appropriate advice...[T]he typical advice of [the] law clinic also highlights a skill which can be difficult to fully develop in a classroom situation...[The] skills enable the law clinic to utilise client cases to guide the students through their development as potential lawyers which further enables law clinic staff to focus the teaching and instruction of the students."

318 According Marson *et al*: 2005: 32 "Students advising clients are exposed to the emotion faced by clients, an awareness of their obtaining the relevant facts from the client and focusing their advice on areas of law where the client has a legal challenge; a sense of responsibility to be honest to the client – even where this may involve informing clients of outcomes which may be unpopular; and an appreciation of the pressure and dedication which is required of lawyers. All of these elements contribute to the professionalism which students are expected to demonstrate when they train and begin to practise, and as such they are required to be introduced as soon into the students' education as possible."

319 According to Haupt: 2006: 232 "Clinical legal education in the South African context refers to a process which strives to integrate theory and practice within the law school curriculum by using clinical methodology for teaching students substantive and procedural law and skills mainly through the delivery of legal services to the indigent, thereby promoting access to justice for them and fostering a commitment in the student to build a society based on democratic values, social justice and fundamental human rights." See also Vawda: 2004: 119.

320 Although in 2004 Vawda: 2004: 124 stated that the majority of law faculties offered it as an elective and not as a compulsory module as reflected by De Klerk. See in this regard De Klerk: 2006(b): 932.

a compulsory module and 53% as an elective module. Most South African universities offer clinical training at fourth-year level. The position internationally is not much different. Northumbria University in the United Kingdom, for example, also offers their clinical programme only in the fourth year of study.[321]

A criticism offered by De Klerk is that most clinical elements are crammed into one module which is usually only offered at a fourth-year level. This situation leads to a 'cram and pass' scenario in which the student is suddenly expected to learn, understand and implement the preceding three year's theoretical training into one year of practical training. [322]

In light of the above and the large student numbers facing legal educators in South Africa I will, hereunder, advocate for a practical component to be incorporated into years one to three of the LL. B which will lead to a clinical module in the fourth year. This suggested "unpacking" of clinical activities is by no means a new suggestion. The programme I will suggest is however directly correlated to the experience at the University of the Free State and will to a great extent be modelled on the American proposed "best practices".[323] Further I will make allowances for university law clinics which, for whatever reason, cannot expose students to 'live clients'. In these cases I will argue that clinical legal education still takes place in the fourth year even without the benefit of 'live-client' interaction and that such course still be considered under the broad definition of clinical legal education.

3. PROPOSED CLINICAL PROGRAMME

De Klerk's proposed ideas on an alternative model for clinical legal education concentrates on the following three principles, namely that all students need to

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321 Sylvester: 2003: 30.

322 2006(a): 244. See also in this regard De Klerk: 2006(b): 947 where the author states: "There is an increasing demand for the law degree to be made more practical, yet clinical legal education remains on the fringes of legal education."

323 De Klerk: 2006(b): 948 also proposed an integrated clinical legal education programme.

complete a clinical course, that the clinical experience should be spread over the four-year LL. B degree and that clinical courses and academic courses ought to be combined. [324]

As previously submitted I intend to propose a programme that is in line with the suggested model Best Practices curriculum of our fellow American clinical legal educators which was designed to be distributed over the three-year postgraduate legal qualification.[325] I intend to combine the Best Practices curriculum with the alternative model suggested by De Klerk in the hope of reaching a position with regard to legal education which is close to the ideal.[326]

In evaluating the proposed 'alternative model', legal educators must keep their aims, successes and potential for further success in mind. The situation in the South African milieu might differ regarding the objectives and values aspired to in a clinical context (for example the provision of better access to justice which has long dominated the clinical agenda).[327] However, one cannot isolate the South African context and think of ourselves as a peculiar species of legal educators

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324 De Klerk: 2006(a): 247. Du Plessis: 2008(b): 10 argues that intensive planning of clinical course curriculum should take place in order to meet the needs of both the client and the student, in accordance with the SAQA outcomes. Iya: 2008:50 posits that a revised curriculum should also be aligned with the "multi-cultural context of the changing world.

325 Stuckey *et al*: 2007: 275 – 281.

326 Church: 1988: 163 suggests that a "holistic approach" should be followed to achieve an integrated system of legal education.

327 De Klerk: 2006: 247. See also Haupt: 2006: 232 "[the goals of clinical legal education regarding access to justice] ...are reflected in the constitution or mission statements of various clinics, e.g. the University of Limpopo: to provide legal representation and advice to the indigent; to conduct outreach programmes [sic] for the benefit of the members of surrounding communities; to provide training opportunities for university law students and develop fundamental legal skills and values that are necessary in the practice of law; and to sensitise students to problems facing low income communities and develop strategies to meet these challenges. Likewise Rhodes University Law Clinic: To promote a culture of human rights as enshrined in our constitution's bill of rights; to provide professional and efficient legal services to indigent and/or vulnerable groups and individuals; and to provide legal education and training to law students at Rhodes University, to paralegals and to the communities." See in this regard also Mahomed: 2008: 63 for the mission statement of the Wits Law clinic.

especially when one considers the resistance of the legal academy to change – which our American counterparts are also facing.[328]

According to Stuckey *et al* the 'ideal' legal curriculum embodies three parts that interact with and influence each other, namely the teaching of legal doctrine and analysis, the introduction of several facets of practice and an emphasis on the values and dispositions of the legal profession.[329]

The model suggested by Stuckey is divided into a three-year programme of instruction.[330] The suggested philosophies are supported (albeit in revised format for the South African perspective), however I propose distributing the clinical experience over the duration of a student's academic endeavour, as opposed to the current fourth year format. I support the integrated model for a clinical programme curriculum compared to the classic capstone model. [331] In light of my previous submissions on the topic I suspect that my support for 'clinical legal education' in all four years of the LL. B will seem contradictory. However I submit that:

1) Practical legal training should be implemented in years one to three but should have a clinical flavour through the gradual exposure of students to 'live clients' using the community service learning methodology.
2) The fourth year of study should consist of clinical legal education and where it is impossible to expose students to 'live clients' the interaction

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328 Stuckey *et al*: 2007: 283.

329 2007: 275. See in this regard Stuckey: 2000: 49 -51 where the author opines that the educational goals of a clinical course are directly linked to the mission of the specific law school. He summarises the five most important educational objectives of a clinical course as follows: "(1) Developing problem-solving skills; (2) becoming more reflective about legal culture and lawyering roles; (3) learning how to behave as well as how to think like a lawyer; (4) understanding the meaning of justice and the responsibility of all lawyers to strive to do justice; (5) discovering the human effects of the law."

330 2007: 276 – 281.

331 According to Bender *et al*: 2006: 39: "[Capstone] modules are generally designed for fundamental and core models in a given discipline and are offered almost exclusively to students in their final year... Capstone modules ask students to draw upon the knowledge they have obtained throughout their learning programme and combine it with relevant service work in the community. The goal of capstone modules is usually either to explore a new topic or to synthesise students' understanding of their discipline. These modules offer an excellent way to help students make the transition from the world of theory to the world of practice by helping them establish professional contacts and gather personal experience." See also Mouton *et al*: 2005: 120.

can be compensated for by using service learning. This approach should still nevertheless be considered clinical legal education.

According to Vawda clinical methodologies (if integrated into the teaching of substantive law courses) might provide more dynamic, interactive and problem-based disciplines.[332] He posits the question of whether clinics have the capacity to effectively supervise large numbers of students considering the objectives of clinical teaching, and draws the conclusion that currently, this is not achievable.[333] I however submit that a *sui generis* approach to clinical legal education, as further extrapolated below, may address the challenges expressed by Vawda.

Before addressing the programme suggestions, I will address the pertinent issue of compulsory or elective practical training/clinical legal education. Should practical legal training and clinical legal education be compulsory? [334]

When one answers the above question from the presupposed idea that the practical/clinical programme should ideally extend over all years of LL. B study, one can begin to envisage the benefits and effectiveness of a well-structured methodology, with the obvious paradigm shift from 'practice and theory' to an experiential learning cycle. Kolb and Fry define experiential learning as a strategy which integrates education, personal development and work.[335] Kolb and Fry's model further explores the cyclical pattern of all learning from experience through reflection to conceptualisation and action and only thereafter

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332 2004: 123

333 2004: 124. He sets out the student to staff ratio which in many instances is in excess of 25:1. The effective clinical programme should have a student to staff ratio of 10:1. Compare to Du Plessis: 2008(b):11.

334 On this topic Schrag: 1996: 193 states "Extrinsic factors affecting this decision will again include otherwise unmet community needs. But they may also include any clinic funding source that requires the handling of certain types of cases, the rules of local tribunals, student interest, coordination with the school's non-clinical curriculum and many other local factors."

335 According to Badat: 2002: 9 "as higher education institutions respond to the white paper's social responsibility and citizenship development agenda, experiential learning is likely to become a more common feature of the higher education curriculum."

the return to further experience.[336] From this definition one can easily fall into the trap of viewing clinical courses as 'experiential education'. In the exposition of 'Best Practices for experiential courses' the authors draw a clear distinction between 'experiential learning' and 'experiential education'; the concept of experiential education is, according to Stuckey *et al*, a properly:

> "*designed, managed and guided experience*" ,

compared to learning which can take place without said clear guidance.[337] In order for a programme to be considered experiential education, the learning needs to be structured in such a way that it is accompanied by clear academic inquiry. Experiential education forms the basic instructional method of most clinical programmes. Similarities can be seen in Kolb's experiential learning cycle and that of learning from experience. The cycle of learning in the latter also includes a four-stage sequence of experience, reflection, theory and application.[338]

From the basic cyclic sequence in these two strategies, it is apparent that the well-rounded law graduate should be granted the opportunity to experience the cyclic development instead of being bombarded with a plethora of unknown practical issues after graduating.[339]

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336 According to Sylvester: 2003: 36 "Kolb's Learning Cycle 1984 identified four stages in a natural learning cycle; experiencing, reflection, conceptualisation and planning." See also in this regard Hyams: 2006: 79 who proposes that the clinical programme is ideally suited for this "learning theory".

337 Stuckey *et al*: 2007: 165.

338 Stuckey *et al*: 2007: 166.

339 Marson *et al*: 2005: 41 "The students are encouraged [in a clinical legal education programme] to participate actively in their own educational growth – both personally and professionally – and this is continually assessed to ensure the student understands how to measure his success."

3.1 THE INCORPORATION OF A CLINICAL/PRACTICAL COMPONENT IN THE FIRST YEAR OF THE LL. B CURRICULUM

It is suggested that the first year programme of any clinical course is designed to introduce students to basic legal skills such as research and writing.[340]

Stuckey *et al* suggest that the first year of instruction should focus on the progressive acquisition of knowledge, skills and values.[341] Analytical skills should be developed.[342] The student should further be assisted in developing problem-solving skills, self efficacy, self-reflection and lifelong learning skills as well as research, writing skills and basic legal knowledge.[343] Although instruction will predominantly occur in the classroom, the prevalent method of instruction should be that of context-based instruction, especially discussion of legal problems. This according to Barnhizer is a necessary preface to actual representation of clients in that there will be no other motivations that compete and interfere with the effectiveness of teaching at this phase.[344] When a student is asked for example

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340 Silecchia: 1996: 249. According to Barnhizer: 1979: 110 "research permits the learning of the substantive and procedural principles applicable to the particular area in which the student is involved, and his performance in this skill enables the teacher to recognise and remedy any problems the student has in researching. Writing can be useful to teach legal writing itself, and to gauge the student's ability to conceptualize [sic] and organize [sic] the legal and factual issues with which he is involved."

341 2007: 276

342 Presently the University of Cape Town offers quantitative literacy in their first year; the University of Stellenbosch offers information skills at first-year level; the University of the Free State offers legal practice in the first year; the University of North West offers studies and textual analysis in English as an elective module in the first year; the University of Pretoria offers computer literacy and legal skills in the first year; Nelson Mandela Metropolitan offers legal skills at a first-year level; the University of Zululand offers basic reading and writing and introduction to computers at first year level; the University of Venda offers legal research methodology and English communication at first year level; the University of Limpopo offers legal communication and computer studies at first-year level and the University of Fort Hare offers legal and numeracy skills and English for special purposes at first-year level. These courses seem at first glance designed to inculcate analytical skills and critical outcomes which do not necessarily have to be discipline specific.

343 Although Stuckey does not define 'basic legal knowledge' in his exposition of the Best Practices Curriculum it is safe to assume that he is referring to the fundamental theoretical legal grounding required of a first-year student. According to Colburn *et al*: 2007: 48 "Self-efficacy theory focuses on people's beliefs in their capabilities to accomplish desired goals."

344 1979: 82.

to analyse a legal problem, the student should be instilled with the knowledge of when and how the outcomes of a legal problem are controlled or influenced by societal values, and reasoning.[345]

By way of example the University of the Free State in its first year of legal studies makes a course in legal practice compulsory. The module is designed to instruct students in how to analyse case law through the FIRAC method (where F stands for facts, I for issue, R for rule of law, A for application and C for conclusion) which is then tested by requiring the students to draft heads of argument based on a fictitious problem presented by the lecturer. The top four students then compete in the first-year intervarsity moot court competition, using that written argument, in the Supreme Court of Appeal. Although they are provided with the outcomes expected and design of a legal argument they are not assisted with content and are expected to research the problem using skills acquired during class. The result of this exercise is that the students are taught to analyse case law, interpret legislation and authority and draft an argument in the correct format for presentation.

Apart from the above learning focus, the authors' (Stuckey *et al*) purport that students should be encouraged to develop autonomy, authenticity, social awareness, and self-esteem.[346] It is not a huge leap of the imagination to propose that by encouraging students to compete for a place in a team which will argue in the Supreme Court of Appeal fulfills the goals of autonomy, authenticity, social awareness and improvement of self-esteem.

One may argue that the above mentioned goals are already incorporated into the first year LL. B curriculum; can we honestly say, however, that we have appropriate methods of assessing whether we are achieving these outcomes? Whilst assessment will be dealt with later in this chapter, author deems it

345 See in this regard Swanepoel *et al*: 2008: 103.
346 2007: 276.

necessary to examine proposed methods of instilling the desired outcomes in the outline that follows.

Stuckey *et al* propose that simulations should be incorporated into every first-year course.[347] This, the authors suggest, will strengthen the students' understanding of legal concepts and will provide the student with the opportunity to fulfill a professional role (notwithstanding that this occurs in a role-play situation). Besides the moot court example provided above, it is plausible to divide first year classes into two teams (for example state and defence, plaintiff and defendant or applicant and respondent) in each subject and provide the class with a problem based on the subject content and then require each team to submit their case strategy, witness statements, consultation notes, evidence and conclusions for marks.[348]

The second suggested best practice for a first year of instruction is that students should participate in study groups and that projects should be assigned to each group. The latter suggestion will develop the student's collaborative skills which is reflection of the much-needed alliance necessary for a successful law practice.[349] If one examines the suggested practice (group assignments) purely from what the intended outcome is, one can also relate this to the critical cross-field education and training outcome of:

> "working effectively with others as a member of a team, group, organisation, and community". [350]

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347 Simulation-based courses according to Stuckey *et al*: 2007: 179 are defined as: "[C]ourses in which a significant part of the learning relies on students assuming the roles of lawyers and performing law-related tasks in hypothetical situations under supervision and with opportunities for feedback and reflection." Duncan: 2005: 10 argues that simulations guarantee better control over the learning experience and encourage students to reflect collectively since they share their experiences in a group.

348 See Williams: 1984: 307 – 314 for a practical exposition of how simulation can be effectively used in moot court practice.

349 Stuckey *et al*: 2007: 276.

350 Critical outcomes are defined in Regulation 1 of Government Notice R452 of 28 March 1998 as: "[T]hose generic outcomes which inform all teaching and learning." A further benefit of working in a group as stated by Hyams: 2006: 89 is that the ability to work with others effectively in a group is a requirement of a later professional life.

Although Kolb is of the view that "*learning is best conceived as a process, not in terms of outcomes*", I postulate that this critical cross-field outcome (and subsequent learning) in an LL. B degree could also be achieved through other means such as community service learning activities.[351] I submit however that in the first year of instruction, group activities might prevail as the most viable option to achieve the desired outcome, considering the generally large student cohort. Group activities could also assist in forming the basis for extended attempts in sensitising students in diversity challenges.[352] I submit that the further critical cross-field outcome, namely to *"[C]ommunicate effectively using visual, mathematical and/or language skills in the modes of oral and/or written presentation"* could also be assessed when the students have to deliberate and report on the group assignments. This presupposes that the deliberations are presented verbally.[353]

To illustrate this proposal the Faculty of Law at the University of the Free State has two programmes composed of group work. The first is styled 'Law Jaw' which is linked to first-year legal practice. Senior students are appointed as facilitators and the students are divided into groups which are assisted by the facilitators with work done in the formal class. Discussions and activities form the basis of the group work. The second programme is the Tutor Programme in which students in the entire second year are divided into smaller groups. Senior students are the facilitators. The subject matter for group work and activities consists of the content of second-year subjects which traditionally are considered more difficult and usually therefore have a higher failure rate.[354] Hyams states that the major benefit of requiring students to work in groups is that students have different skills and knowledge bases. In the process each student benefits

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351 1984: 26.

352 Refer to Iya: 2008: 42 for the benefits that a clinical legal education course will derive from diversity.

353 Regulation 7(3) of Government Notice R452.

354 See in this regard Swanepoel *et al*: 2008: 108 as well as Westcott *et al*: 2006: 101.

from the other and this may also serve to reduce a student's anxiety and self-doubt about the activity or task at hand.[355]

The critical cross-field outcome relating to effective communication can further be reiterated by introducing mooting sessions and/or mock courtroom sessions. In these situations the student must demonstrate an ability to communicate on a functional level with the court, fellow practitioners and clients. Currently, at the University of the Free State for example, in the legal practice curriculum during the first year, the substantial skills taught in family law are reiterated and reinforced through a compulsory moot court exercise in which all first-year students must participate, based on a family law-related case. If seeking a justification as to why such an exercise should ideally be incorporated into a legal education programme the following is apparent: it imparts skills in judgment and analytical ability, it reiterates substantial legal knowledge and it guides a student to apply practical skills. [356] Mooting sessions and mock court sessions fit neatly into the usual legal education pedagogy. I submit that they are best suited to a clinical environment and programme and that the staff usually tasked with overseeing and organising the moot sessions are mainly comprised of clinicians. These clinicians practise law and it would be more practical to include these sessions in their work to avoid duplicity of work and outcome.[357]

Stuckey *et al* are of the opinion that the intellectual skill that is especially important in this year is the ability to 'think like a lawyer'.[358] The ability to solve a

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355 2006: 89.

356 De Klerk *et al*: 2006: 269 - 273.

357 According to Marson *et al*: 2005: 31 "All students at the case study institution [are] provided with 'lawyering' skills through compulsory mooting sessions...these skills are vital to increase experience, raise confidence, and offer the students an insight into how the law is actually different in practice to that learnt through textbooks." Swanepoel *et al*: 2008: 106 provides an example of how a simulation session can form part of a purely academic course.

358 Stuckey *et al*: 2007: 278: "This includes the ability to understand the holdings of appellate cases, to distinguish among appellate cases, and to apply legal doctrine to a set of facts and predict what a court would decide." Barnhizer: 1979: 76 states that in teaching a student to think like a lawyer particular attention must be paid to: ethical proscriptions, ethical philosophy, personal morality, professional role, institutional

problem is of equal importance and this skill could be developed in the first year of instruction.[359] At the University of the Free State for example, and during the first year, the students undergo a course in legal practice and one in legal skills. These classes focus on the use of analysis, the process of criticising and logical reasoning. Further the moot court problem set in the first year as part of legal practice is deliberately emotional and flooded with irrelevant facts in an attempt to teach the students how to distinguish between a 'human' argument and a legal argument.

Emphasis, in the first year, is also placed on reflection activities.[360] Feedback/reflection is different from assessment and have been identified as an effective catalyst for student learning. Students benefit immensely from the feedback regarding their progress which is a unique benefit of a clinical programme.[361] I submit that although the educator in the LL. B curriculum is usually fully acquainted with assessment practices, little value is ever placed on reflection as part of an integral learning cycle although it ought to be a vital part of the clinical programme and indeed any legal education programme.[362]

In the context of this study, one naturally wonders how reflection can be incorporated into the above suggested approach in a first year LL. B curriculum and indeed what exactly the definition of 'structured reflection' is.

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analysis, social consciousness, systematic reform, issue recognition and analysis, understanding of strategy and decision making, understanding of process and procedure, synthesis, client interviewing, investigation, client counselling, negotiation, legal research, legal writing, trial advocacy and appellate advocacy.

359 Stuckey *et al*: 2007: 278. See also: De Klerk *et al*: 2006: 269 who provide an exposition of "Recognition of relevant facts and applicable law" which is one of the goals of clinical legal education. The goal aims to develop the problem-solving ability. See also: Vawda: 2004: 121 - 122 in this regard.

360 According to Stuckey *et al*: 2007: 277: Students 'reflect' on their learning process and in that the student continuously improves him or herself as learner.

361 Hyams: 2006: 80. See also in this regard Hinett: 2002: 1.

362 Sylvester: 2003: 39 "the concept of the reflective practitioner as described by Schon has been widely acknowledged. Jones describes the approach as one in which 'professionals learn to 'frame' problems, impose a kind of coherence on 'messy' situations and through which they discover the consequences and implications of their chosen frames. It encourages critical self assessment, contemplation and insight. Savage and Watts refer to an 'elite of reflective practitioners, who 'bridge the academic – practical divide'."

According to Bringle and Hatcher, 'reflection' is the "*intentional consideration of an experience in light of particular learning objectives.*" [363] It is a process designed to promote the examination and interpretation of experience and the promotion of cognitive learning.[364] According to Bender *et al* structured reflection refers to:

> "a thoughtfully constructed process that challenges and guides students in: examining the critical issues related to their service-learning projects; connecting the service experience to module content; enhancing the development of social responsibility and ethical skills and values; and assisting students in finding personal relevance in the work. The overall aim of structured reflection is to assist students to recognize (sic) and articulate their learning so that they can apply it critically towards continuous learning and personal growth; improved learning and improved social responsiveness." [365]

Although this aim was formulated to adapt specifically to the service learning module, one can easily relate the overall aim back to the objectives of clinical legal education. Students could possibly utilise a reflective journal to document their experiences and the observations. [366] These journals need to be reviewed by the facilitator.[367]

Stuckey *et al* further suggest that students should have contact with practising lawyers and judges throughout the first year of instruction.[368] Eckard supports the views of Newman in this regard who said:

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363 Bender *et al*: 2006: 58.

364 See also Eyler: 2002: 518 in this regard.

365 2006: 59.

366 Bender *et al*: 2006: 63 sets out the following guidelines for journals as effective modes of reflection: "The journals should not merely be simple inventories of events... [T]hey should address situations objectively, subjectively and analytically. Academic staff may provide questions to guide students in addressing issues and should periodically review and provide feedback on the journals. It is helpful to offer written comments, questions and feedback that will encourage, challenge and essentially provide a dialogue that deepens the students' thought processes." Bender *et al*: 2006: 63: further postulate that structured journals could be used to guide the student to address important issues or questions and to connect the experience to the module content.

367 Stuckey *et al* 2007: 277. Duncan: 2005: 8 describes the reflective journal as a professional development file in which there are pre-set sheets which encourage them to reflect after completion of a task. For a detailed analysis of reflective journals in a clinical setting refer to Hyams: 2006: 84.

368 2007: 277.

> "you may learn from books at home; but in the detail, the colour, the tone, the air, the life which makes it live in us, you must catch all these from those in whom it lives already." [369]

This could be achieved through various methods, such as inviting legal practitioners for a guest lecture, requiring of students to observe court proceedings, and even including a mentoring arrangement.[370] One advantage of a clinical programme is that you are not necessarily bound to a specific time limit. Many informal discussions at the end of a session or driving to and from court can provide for learning opportunities. Students tend to be more relaxed and engage in one-on-one discussions in this atmosphere that is not so formal.[371] I submit that although the various methods proposed do not require the student to 'perform' a specific practical task, and might even be viewed as a mere 'field trip', the value of the proposed contact sessions should not be underestimated. Should one consider that professional responsibility is one of the goals of clinical legal education, the different roles of legal practitioners could be viewed (albeit from the point of inception of the goal-directed activities in the years to come) as the best way to show the student what the profession entails.[372]

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369 1981: 10.

370 According to Marson *et al*: 2005: 36 "A further method of instruction [common to many clinical programmes within England and Wales] which offers a different perspective to the students method of learning is provided through the series of guest lectures available throughout the year. Students are encouraged to become involved in the series as the lecturers are drawn from local practitioners, from diverse backgrounds, involved in different areas of law, both from public and private law jurisdictions, and it enables the students to interact and gain insights into the world of legal practitioners. The lectures centre on the experience of practising law, but the lectures also move away from simply an academic exercise on points of law, and increasingly highlight the commercial pressures of legal practice, and the benefit/drawbacks from practice."

371 See in this regard Hyams: 2006: 80.

372 De Klerk *et al*: 2006(a): 268. According to Barnhizer: 1979: 79 the goals of legal education provide a framework when designing a specific course, clinical programme or curriculum and provide direction to learning.

3.2 THE INCORPORATION OF A CLINICAL/PRACTICAL COMPONENT IN THE SECOND YEAR OF THE LL. B CURRICULUM

The second year of study should continue building on the skills and values developed and implemented in the first year, with the additional aim of developing further skills or subsets of skills. Stuckey *et al* agree that as the first year of study focuses on legal analysis, the second year should be centered on fact analysis.[373] Bearing in mind that one strives to engage students in the full legal process in the final year of instruction, I submit that a progressive exposure to a 'live-client' situation should be incorporated.[374] Stuckey *et al* explains that in the second year of instruction the student should be sensitised regarding the client-centered practice.[375] He goes on to explain that basic introductory courses in professional skills (including interaction skills and pre-trial advocacy skills) should be offered in the second year.[376] Instruction in writing, drafting and research should continue throughout the second year of study.[377]

The route of student placement or externship might assist in training students in the second year of study.[378] De Klerk proposes that the latter option could benefit intermediate students.[379] The student will spend time at the selected organisation and might even assist in the services provided at said organisation.[380] Stuckey *et*

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373 2007: 279.

374 De Klerk: 2006: 247. It is submitted that during the second year of instruction the student should not be responsible for a 'case load' but exposed to the client indirectly.

375 2007: 279.

376 Stuckey *et al*: 2007: 279. It is common cause that most South African universities are using writing courses to bridge the gap between secondary education and tertiary education.

377 Stuckey *et al*: 2007: 279.

378 Weiler: 1982: 8 suggests that 'as a general matter, clinical training in legal practice is best offered by actual practising lawyers in real law offices." Watt: 1995: 56 states that in the United Kingdom students are placed in a legal practice setting through placement in a solicitor's office, the Crown Prosecution Service or in a barrister's office.

379 Even though he does not provide a precise definition of what is meant by the intermediate student, author opines that the second and third year LL. B student could fall into this category.

380 According to Badat: 2002: 9 higher education requires "to provide students with varied opportunities for the application of their knowledge and skills in target employment contexts linked to particular social practices and identities...This suggests that initiative[s] such as community-based and workplace learning should be encouraged." Refer in this

al agree that externship courses or observation programmes should be arranged to give students the opportunity to engage and reflect on the practice of law.[381] Stuckey *et al* posit that:

> "the primary educational goal of such experiences should be to develop students' understanding of professional values and commitment to those values, including seeking justice, fostering respect for the rule of law, and dealing sensitively and effectively with diverse clients and colleagues."[382]

The advantages of externship are that it lowers the cost of the clinical programme and provides a variety of learning opportunities, different work experience, service to the community and flexibility. The main disadvantage is however the lack of control over the quality of educational experience.[383]

In terms of the South African Qualifications Authority guidelines this educational goal as identified by Stuckey *et al* complements the critical cross-field outcomes relating to: a) working effectively with others as a member of a team, group, organisation, community; b) organising and managing oneself and one's activities responsibly and effectively; c) demonstrating an understanding of the world as a set of related systems by recognising that problem-solving contexts do not exist in isolation; d) participating as responsible citizens in the life of local, national and global communities; and e) being culturally and aesthetically aware across a variety of contexts.[384] Vawda, on the topic of diversity, states that "*we must embrace the diversity and multiculturalism in our society*", which appears to support or at the very least entertain the idea that externships may be the ideal catalyst for the acquisition of such skills.[385] Stuckey *et al* suggest that American law schools should consider placing students in *pro bono* organisations in order

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regard also to McQuoid-Mason: 2008: 5 where he speaks of farm-out law clinics. One example that could be fruitful is to require of students to assist the clerk of the domestic violence court to complete the necessary pleadings. See also Duncan: 2005: 11 which suggests that students could possibly be engaged with *pro bono* partner initiatives.

381 Stuckey *et al*: 2007: 279.

382 Stuckey *et al*: 2007: 279.

383 Tarr: 1993: 39.

384 www.nqf.co.za – 11/03/09.

385 2004: 131.

to provide role models who focus on the aspect of access to justice which suggestion I support in the South African context.[386]

De Klerk further suggests on the topic of external placement that 'clearing house' clinics could be established and serviced by senior law students who simply refer the matter to the appropriate institutions dependant on the client's needs and means.[387] This type of clinic will instill skills relating to problem identification, factual investigation, legal writing skills and exposure to the legal industry which is equivalent with the skills goals suggested by Stuckey *et al.*

By way of example the second-year students at the University of the Free State are required to attend court proceedings in terms of their criminal law module and are further required to attend proceedings at the local domestic violence centre after which they complete an assignment. Second-year legal practice concerns itself with the inculcation of writing skills. Although the externship route is not yet established I submit that it would be invaluable as part of student training.

3.3 THE INCORPORATION OF A CLINICAL/PRACTICAL COMPONENT IN THE THIRD YEAR OF THE LL. B CURRICULUM

> *"If a vast democratic republic as diverse – and at times divided – as late 20th-century America is to survive and flourish, it must cultivate some common spaces where citizens from every corner of society can come together to learn how others live, how others think, how others feel. If not in universities, where? If not young adulthood, when? If not in law schools, why not?"*[388]

Clinical legal education is to most people synonymous with community service and more specifically access to justice. One of the goals of clinical legal education as set out by Steenhuisen regards professional responsibility which

386 Stuckey *et al*: 2007: 279. These proposals in the South African context are analogous to placing students in internship programmes within a university law clinic, although it must be kept in mind that South African law students do not have right of appearance as enjoyed by their American counterparts.

387 2006(a): 248.

388 Parker *et al*: 2005: 9 as quoted by the American Bar Association Deputy Attorney General.

has 'social awareness' as a sub-goal. This sub-goal can be best described as the aim to "... *develop in students a social perspective and insight by experiencing the study of law in context.*" It entails a structured exposure of the student to social justice and the role of the law viewed from an impecunious client's perspective.[389]

I submit that the provision of community service is not the only way to achieve the above said goal, but that this goal could also be achieved in an educational context.[390] By employing the educational paradigm shift of community service learning, not only will the LL. B programme be in line with the various higher educational policy directives but will assist in achieving better access to justice.[391] Sylvester says from the British perspective that:

> "...the UK, although slow in adopting the clinical approach, has an excellent basis upon which to build. The established clinical programmes have not been demand-led by a need for free legal services nor were they established with the emphasis on provision of practical experience for students (as in countries where the training opportunities for law students are limited). The existing programmes have always had, at their forefront, educational priorities." [392]

Providing community service and engaging in service learning activities are not uncommon for clinical programmes. It is however suggested that the clinical programme in the third year should be presented as a service learning module.[393]

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389 De Klerk *et al*: 2006: 266-268. See also in this regard De Klerk: 2006(b): 943. See also Duncan: 2005: 17. See also in this regard Iya: 2000: 30.

390 According to Vawda: 2004: 131 educations need to be "socially-relevant and justice-orientated" which once again emphasises that neither a law clinic nor students operate in a system that is socially removed from the greater society.

391 According to O'Brien: 2005: 65 " Service learning (SL) is increasingly being seen not only as a way in which to fulfill State policy directives, but as one strategy by means of which higher education institutions can implement their own mission statements concerning service and development, and attempt to integrate these ideals with their teaching and research priorities."

392 2003: 36.

393 Swanepoel *et al*: 2008: 107.

The only challenging aspect to this proposal, both locally and internationally, is always the question of institutional recognition and credit allocation to such a component of clinical legal education.[394]

If one exposes students to service learning in their third year, the students are exposed to members of the society before having to take responsibility for individual cases. This will facilitate the development of social and ethical skills which students need to effectively serve clients in the fourth year of the clinical legal education programme. This is where the line between practical legal education and clinical legal education blurs, as essentially the student is receiving practical skills training but is also being exposed to 'live clients'. This method limits the potential professional negligence of a student (and the university law clinic) by exposing him from the third year to an indigent client's mindset, goals, challenges and perspectives. The student also feels more comfortable with clients from diverse backgrounds due to previous exposure and the student therefore presents as more confident and relaxed when dealing with a legal client in his fourth year. It is suggested that the proposed idea might not be to unfamiliar to some clinicians; albeit from a street-law perspective. As stated by McQuoid-Mason, students in this street-law programme are required to:

> "Teach a series of interactive lessons on areas of the law such as an introduction to law and the legal system, criminal law and juvenile justice, consumer law, family law, socio-economic rights, family law, human rights, democracy and HIV/AIDS and the law, at high schools and prisons. They also have to be able to answer questions on relevant areas of the law."[395]

It is however suggested that the main difference between a street-law programme and community service learning is reciprocity of learning which is unique to a service learning module. Many opponents of this idea see service

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394 This challenge is not a uniquely South African one especially when viewed in light of Sylvester's: 2003: 37 comment "...there is a funding crisis in Higher Education and much talk of alternative sources of funding and increasing student numbers. Increasingly universities are required to demonstrate that they contribute to their local communities and economies. In many African universities, this is of such importance that it has been incorporated into their mission statements, but in the UK the contribution clinics can make to their communities has rarely been acknowledged."

395 2008:7.

learning as mere 'fun welfare activities' and question the educational content of the activity. In response I submit that reciprocity of learning cannot be controlled from a discipline-specific perspective and although our students aim to assist the community in a legally relatable context, the learning which they undergo is often more value orientated in terms of social skills, diversity, humanistic approaches and empathy.[396] The purely academic opponents cannot deny that these values are also essential skills required by higher education and the profession and are listed as cross-field outcomes by the SAQA guidelines. [397] Community service learning and community involvement go a long way in assisting with the development of these so-called 'soft skills' and are relatively easy to implement and have the added advantage of introducing the students to a 'live-client' situation.

Stuckey *et al* have suggested numerous methods for the third year of instruction but we cannot lose sight of the fact that American law students are postgraduates and the third year is the final year of study. [398] Despite this we can adopt and utilise many of their principles by splitting the content over the South African law degree's third and fourth year. Stuckey suggests that the third year should focus on continual development of problem-solving skills and the cultivation of 'practical wisdom'. Whilst Stuckey's idea of social wisdom delves into exposing the student to 'live-client' interaction and practice, in the South African context we are hobbled by the fact that our students have no right of

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396 Sherman: 1999: 77 "[The] collaborative teaching/lawyering method of clinical legal education – not unlike service learning methodology – borrows much from humanistic psychology. It works, at the same time, in two symbiotic dimensions: student-centred and client-centred. This dual nature of the collaborative teaching/lawyering method is particularly important for service-learning projects where students are working with a community. In terms of student-centred teaching, advocates of this approach emphasise the establishment of a learning environment where the teacher becomes facilitator and resource, rather than authority, and which, therefore, fosters a sense of ownership and personal responsibility in the learner."

397 According to the Education White Paper 3 published in the Government Gazette 18207 – "high-level skills training: the training and provision of person-power to strengthen this country's enterprises, services and infrastructure. This requires the development of professionals and knowledge workers with globally equivalent skills, but who are socially responsible and conscious of their role in contributing to the national development effort and social transformation."

398 2007: 280.

appearance in court unlike their American counterparts. The third year in South Africa may however serve, through the implementation of community service learning initiatives, as a 'practice year' in which students are exposed to members of the community without the added pressure of solving any real legal dispute which may require court appearances. Problem-solving skills are nonetheless still cultivated through listening to and experiencing the unique characteristics of the community to which they will be exposed in the fourth year. In summation, service learning can be viewed as an educational approach which:

> "values scholarship that is, the interactive generation and transmission of knowledge by university students, staff and communities, through out-of-class learning experiences... [M]utually defined, socially responsible and responsive teaching, research and service activities." [399]

As an example of the above I propose that students, in groups, be taken to a rural community to explain the implication and recognition of customary marriages and the implications on matrimonial property.[400]

A further suggested best practice is to teach subjects in an integrated context as opposed to teaching subject-specific courses.[401] I submit that through service learning activities the curriculum content of various courses could be practically linked and therefore ultimately integrated with practice.[402] For example if one were to use the community outreach project described above, a certain amount of credit could be allocated to the project using key indicators specific to indigenous law and thereafter family law on the topic of maintenance or divorce. The method described above could be used in an attempt to integrate the theory of indigenous law, family law and practical divorce/maintenance law.

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399 O'Brien: 2005: 72.

400 The reciprocity in learning in the above example could be that the student familiarises himself with the reality that many South African citizens' marriages fall within the ambit of the customary marriage regime. The community on the other hand gain valuable insight into the legal consequences associated with this type of marriage.

401 Stuckey *et al*: 2007: 280.

402 According to the White Paper 3 published in the Government Gazette 18207 "to produce graduates with the skills and competencies that build the foundations for life-long learning, including, critical, analytical, problem-solving and communication skills, as well as the ability to deal with change and diversity, in particular, the tolerance of different views and ideas."

Stuckey *et al* further suggest that students should continue with reflective practices.[403] The students should ideally be compelled to keep a reflective journal in all the experiential educational courses. I submit that the reflection practices are firmly embodied in a service-learning programme and can be used with very little adaptation.[404]

It should be kept in mind that there is a clear distinction between pure clinical legal education and pure *pro bono* initiatives. The distinction lies not so much in aim but in what clinical legal education offers to the student and what is not, or cannot, be offered from a *pro bono* perspective. Sylvester posits that many *pro bono* initiatives established by universities do provide a measure of student training; but that the training provided is not the main aim of the initiative and cannot be described as clinical legal education.[405] Clinical legal education focuses on student training and views the *pro bono* aspect as a catalyst for such training. Clinical legal education is a methodology which requires a shift in the acceptance of responsibility for problem solving. The clinic environment is the cocoon which offers a safe environment in which to develop skills. The environment empowers and encourages the student to delve deeper into his learning approach which requires an understanding of the substance of the knowledge and not simply the acquisition thereof. The clinical environment encourages 'adult' acceptance and responsibility from a student whilst still providing a safety net. The clinical experience attempts to teach the easily quantified skills of drafting and legal practice but also the more elusive values of analyses, problem solving, synthesis and other such intellectual skills.[406] A clinical programme requires structured reflection and evaluation of a student whereas a *pro bono* initiative is usually voluntary and does not seek to evaluate

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403 2007: 280.

404 According to Eyler *et al*: 2005: 118 service learning is: "...a form of experiential education where learning occurs through a cycle of action and reflection as students work with others through a process of applying what they are learning to community problems and, at the same time, reflecting upon their experience as they seek to achieve real objectives for the community and deeper understanding and skills for themselves."

405 2003: 39.

406 Sylvester: 2003: 39.

or reflect on the learning experience of the student. The clinic, unlike a *pro bono* initiative, provides a broader scope for a student to view the law in context, and although the same can be said for *pro bono* initiatives, the scope is narrowed towards the specific area of law within the confines of the initiative. The clinic is a drive to a more holistic approach to the study of law in which the theoretical and practical components are not only equally valued but also equally inculcated through the use of student, client and practitioner interaction.[407] From the perspective of the academic legal practitioner (or clinician more specifically) the conflicting aims of *pro bono* initiatives and educational training cause conflict in the realm of time and resource allocation but it must be said that, in consideration of the function of a clinician, the ultimate goal must remain the transfer of knowledge and skill to the benefit of the student.

In light however of the priority towards student training we cannot lose sight of the fact that South African clinics do not have the luxury of simply abandoning the social and access to justice perspectives of their clinical programmes, unlike the position in many developed countries. Clinical legal education can be viewed in isolation as a sophisticated method of skills transfer or practical training which can survive without performing any form of community service or access to justice functions. However in South Africa, taking into account the fact that we are a developing nation with a troublesome history, our clinics have an academic obligation to ensure that these functions are performed and that students receive proper training. This obviously places a heavier burden on the South African clinician in terms of his skills, duties and personal attitude towards education and community outreach. The social purpose of clinical legal education cannot be excluded in South Africa and we are best poised to combine a social, activist position which provides access to justice whilst at the same time educating our students to their full potential. The community service learning perspective allows for the above integration of theory, practice and social responsibility.

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407 Sylvester: 2003: 39.

Watt *et al* further suggest that in the third year, as an add-on to the clinical programme, each group of students should be instructed to draft a workable moot court problem comprising of two grounds of appeal involving academically debatable questions of law.[408] This exercise tests a number of pervasive skills such as problem solving, project management and team work as well as legal research and drafting. I propose that in the South African four-year LL. B programme the moot problem developed in the third year could be exchanged between the groups so as to ensure that no group argues their own drafted problem. This experience will build on the skills acquired by the students in the first and second years of study.

3.4 THE INCORPORATION OF A CLINICAL/PRACTICAL COMPONENT IN THE FOURTH YEAR OF THE LL. B CURRICULUM

The fourth year of study, in the South African context at least, is effective in its aims and has been so for a number of years at many South African university law clinics.[409] There are no new proposed best practices for fourth-year clinical training in published research papers and each university appears to be continuing with the age-old practice of exposing students through 'live-client' consultation, problem solving, research, drafting and case management. This in itself, I submit, is the correct approach when viewed as a culmination of processes and learning which ought to begin in year one. I propose however that clinical teaching (as a culmination of the practical legal training undergone in years one to three) in the fourth year should be compulsory at all faculties and not be dismissed to the field of elective modules. This proposal is by no means new and is well proclaimed by members of the clinical movement. Vawda for example supports the idea but has asked whether clinics have the capacity to facilitate large numbers of students without a decrease in the quality and

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408 1996: 59.

409 The current clinical programme in the fourth year could however be viewed as "static". Refer to Du Plessis: 2008(b): 10 in this regard.

objectives of teaching. [410] I submit that, dependant on the structuring of the programme, staff availability and access to a client base, compulsory clinical legal education is possible and necessary in the fourth year of LL. B.[411]

In the American system it has been suggested that most courses could be organised as simulated law firms in which students work individually and in groups to resolve legal problems.[412] Stuckey *et al* suggest that, for example, one course may be structured as a general practice firm, while others may be structured as corporate firms, family law firms, criminal defence firms and prosecutor's office.[413] The 'firms' in this context should be structured to meet the demands of the profession and societal needs: there is, for example, no use in establishing a specialised animal welfare unit, if the profession and society have no use for a graduate trained as such.[414]

If we examine the clinical programmes and best practices employed by our American counterparts, albeit in the third and thus final year of their studies, students are encouraged to extend their 'practical wisdom' with emphasis being placed on problem solving and the cultivation of practical skills and values. Students are given guidance in terms of self reflection and life-long learning.[415]

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410 Vawda: 2004: 124 states that "the option of a voluntary clinical course is not desirable, especially if it will not garner academic credit points. It may not serve a sufficient motivation for students, and does not justify committing scarce resources to such an option. A voluntary clinical course may be useful where a clinic is being established for the first time, possibly as a pilot programme in order to understand what works best. In addition, it will expose students to practical training which they might otherwise not be able to access."

411 At the Wits Law Clinic the course is presented as a compulsory in-house specialised programme for all final year law students. In 2008, 308 students registered for the course. See in this regard: Mahomed: 2008: 58 – 59. The latter figures exclude the students that are completing externships. See in this regard: Du Plessis: 2006(b):11.

412 Stuckey *et al*: 2007: 280. It is suggested that there are without a doubt talented and experienced clinicians to facilitate the programme, but most South African law clinics are plagued by a high turnover of staff due to lack of security of tenure.

413 2007: 280. See also in this regard: Mahomed: 2008: 58 for the various units at Wits Law Clinic.

414 See in this regard: Du Plessis: 2008(b): 14.

415 Stuckey *et al*: 2007: 280.

There is a clear similarity between the aim of a final-year law degree in the United States of America and a fourth-year South African LL. B in the inculcation of practical skills and life-long learning. The difference however lies in the integration of clinical programmes. In America the clinical methodology is employed from the first year and culminates in the exposure of students to 'live clients'. In South Africa, by comparison, students have no practical basis before suddenly being exposed to clients, along with all their associated problems, in the fourth year.[416]

The challenge in establishing 'firms', in the South African context, is often that the student to supervisor ratio is rather extreme due to high student enrolment and the limited funding made available for the employment and training of clinical staff. According to Vawda the average student to supervisor ratio is 25:1. [417] The optimal ratio to ensure effectiveness should be 10:1.[418] A further challenge to Stuckey's suggested organisation of courses into firms is that many South African legal academics have little to no practical experience and would expose the students to a 'blind leading the blind' type of situation, whereas in America practising and retired legal practitioners are employed to assist with these types of courses.[419] Locally, these challenges could be met by sourcing local attorneys' firms and facilitating the placement of students in those firms with a view to specialisation which would benefit the student and the firm; or clinics could employ retired practitioners in specific areas to develop specialised courses and to facilitate training therein. A third option may be the employment of sufficient clinicians, in various areas of speciality, to facilitate the in-house training of students in different areas of law. The benefit herein lies in the fact that the student is given the choice to develop in the area in which he intends to practise and the clinician is spared from being considered as 'a jack of all trades and master of none' which is currently the situation for many clinical practitioners.

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416 It should not be overlooked that not all South African clinical legal education programmes incorporate the live-client model. Refer to De Klerk: 2006(b): 935 in this regard.

417 2004: 125.

418 Vawda: 2004: 124.

419 Stuckey *et al*: 2007: 280.

This type of arrangement would further enhance the probability of clinics handling impact litigation cases which is currently basically impossible due to lack of time, resources and refined legal speciality of the clinician.[420]

Another consideration from the South African perspective is the auspices of the Attorneys Act, which contains stipulations regarding the 'employment' or otherwise of persons who are not in possession of an LL. B degree or who are entered into a contract of articles with a specific firm.[421] These stipulations often serve to protect the profession from professional liability claims and the danger of a 'free agent' using the name of the firm to conduct business. Furthermore, South Africa does not allow a student to appear in any form of court or tribunal without a suitable legal qualification which further complicates the matter of student training and development. Teaching practical skills without access to the 'real deal' is akin to teaching a student to drive without access to a car. In America, this problem does not exist, as the student, who is advanced in his legal training, may appear in the lower courts.[422]

4. PRELIMINARY CONCLUSION

The proposed programme is by no means an all encompassing clinical legal education programme that will suit the unique challenges faced by each South African university law clinic. It is suggested however that clinical programmes should be aligned with the current composition of students, educational outcomes, and institutional recognition within the LL. B degree to ensure sustainability and quality learning experience. Through the proposed programme, as well as the various other proposed models investigated in this study, it is suggested that ultimately they all strive to ease students' transition into practice. In an environment where law clinics are often faced with financial constraints,

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420 Refer to Du Plessis: 2008(b): 11 where the author discusses the severe demands on clinicians. See also De Klerk: 2006(b): 935 where the latter author discusses the ability of clinics to retain and build expertise.

421 53/1979.

422 Vawda: 2004: 125.

high student to supervisor ratios and the aim of fulfilling educational objectives, clinical legal educators will be best suited to adapt to these circumstances and should be better prepared to revisit the way in which a practical component is included into the traditional law curriculum. Clinicians should realise that educational goals can only be achieved through cooperation with the traditional law teacher. Clinical legal education should be aligned with other academic courses to ensure full academic integration into the curriculum.

CHAPTER SIX
CONCLUSION

> "Once we recognize (*sic*) the wide variety of talents needed by competent lawyers and stop separating the learning of theory from its application, it becomes painfully obvious that 'skills' training is more than just an appropriate part of legal education – it is essential if we are to do the job we claim to be doing....Whether the result is a restructuring of the entire curriculum or something much more modest, the important task is to begin the process of reassessment and to seek a coherent, comprehensive view of the education available to the average student at each school. Ultimately the more variations students are exposed to – in teaching methodology, personal visions, interdisciplinary concepts, and the like – the more likely they are to emerge as well-rounded, thoughtful, mature professionals, capable of making their own decisions about how to conduct themselves efficiently in the world of law practice and human interaction into which we send them."[423]

Most of what I will conclude in this chapter will not be unfamiliar to those who have perused this study and the field of clinical legal education in general; however the slight indulgence of the reader will, in the end, result in an overall conclusion.

The title of this research is: The symbiotic integration of theory and practice: a *sui generis* approach. In unpacking this title it is obvious that my research focus lies primarily on the current relationship and potential future relationship of the practice of law and the study of law. The second focus was on how best, from a South African perspective, to integrate the two. I would like to believe that my research contribution to the field presents a unique perspective and hence, the *sui generis* approach. From the outset, however, I would like to point out two factors: (1) in suggesting integrated models my research has been influenced by international literature on the topic; and (2) my entire career both as a law teacher as well as a legal practitioner has been based in the Free State and more specifically at the University of the Free State which has inevitably had an influence on my perspectives.

[423] Schultz as quoted by MacCrate: 1994: 94.

At the risk of sounding like an introduction to law lecturer and semantics aside: what is law and what is a lawyer? The answers to these questions can be debated *ad nauseum*, but for the purpose of this study I support Frankfurter who stated:

> *"The law is what lawyers are. And the law and lawyers are what the law school makes them."*

At face value this statement may not be striking; however if we consider the institutional influence on an individual student level, a community level and the development of law, the question must be asked as to whether law faculties are currently living up to the burden placed (figuratively) upon their shoulders to the best benefit of these three parties. Having been fortunate enough to have been exposed to practice, to education and most importantly to the mentoring of candidate attorneys, my answer to this question is definitively no. From this statement the question now becomes: how can we better prepare graduates?

I indicated above the research focus of my study, but the operational definition from where I began was that law graduates leave institutions of higher learning with an enviable wealth of theoretical knowledge, but often lack practical skills required for the successful practice of law. This view is reflected not only in South Africa, but internationally and most importantly by our students.

Before I anger traditional law teachers, please note that I am not suggesting that we do away with theoretical knowledge, nor am I disagreeing with the fact that some of our students will one day be the great legal minds of our country. What I am suggesting is that somewhere we have to face the reality that there is a community to which we owe a service, a community that does not need the services of *Kemp J Kemp*, but one which is simply seeking assistance with, for example, a simple eviction matter. The second reality is that law is not an elitist pursuit and resultantly we are faced with a large student body, many of whom were exposed to a disastrous secondary education system. What I am

suggesting is that it is to those students and to the community they will eventually serve that we as legal educators owe the greatest service.

How do we take up that call? How do we accommodate minds the likes of Cameron, Mandela and Bizos, or the mind of a future one-man firm with a commitment to using the law to fight injustice no matter how complicated the fight?

My answer, and the reader may disagree, is that we need clinical legal education. For those who have read this dissertation in its entirety, you may have noted that at some point I refer to clinical legal education as a method of social revolution, and if one considers that clinical legal education originated in the United States of America around the same time as the civil liberties movement and its associated demands for equality, it does not require a long stretch of the imagination to understand that clinical legal education likewise became prominent in South Africa during the apartheid era – hence my definition of clinical legal education as a mechanism of social revolution. Today however, with South Africa what it has become, there appear to be no great social injustices which demand the unbending support of the legal fraternity. However this does not mean that clinical legal education has lost its usefulness or meaning in training graduates to have a civic outlook on the world. Nor does it preclude law educators from actively engaging in academic citizenship.

In conducting the research needed for this dissertation, it became obvious to me that there are many and various definitions of clinical legal education. I am not about to engage in cognitive definitions or semantic overlap of academic discourse in defining clinical legal education. What I will do is to sketch a picture: you are a fourth-year student or perhaps you recently graduated, as in my case. You are articling or serving pupilage. Ms X makes an appointment to discuss a divorce. You very excitedly recall your knowledge of the divorce act, the matrimonial property act and the high court rules. She arrives at your office and

within the first few minutes bursts into tears. She tells you that she has been severely beaten by her husband to whom she is married out of community of property. She has a Standard 8 education and is staunchly religious. She does not really wish to divorce as she has nowhere to live and wants to solve this problem some other way. This situation is usually answered in one of two ways: (1) the student or recent graduate has had similar experiences to Ms X and is so angered that he will do anything in his power to assist her: he does not actively hear the mandate given; or (2) the student has grown up in a similar way to the children of the *'Brady Bunch'*, cannot relate to Ms X and tells her that a divorce is her only option. Although the reactionary attitude differs, there is one commonality between the two reactions: the student or graduate does not know where to begin, cannot see the law as interrelated and ultimately becomes completely disillusioned. This is where clinical legal education finds its ultimate application. Through the process of training, sensitisation, supervision and assistance the same student is guided in the safe environment of a law clinic in assisting Ms X and is thereafter requested to reflect on his own learning, action, reaction and ability. He is 'engineered' by the clinician in reiterating his theoretical knowledge, assessing his lack in skill and most importantly, I submit, forming and evaluating his values. This is nothing more than the definition of clinical legal education through a demonstration of its use.

To put it succinctly my definition of clinical legal education is *extrapolating professional values and fundamental lawyering skills through an access to justice perspective in a curriculum-based learning experience*. When looking at the various components of clinical legal education, I submit that practical training is learning through doing. It does not necessarily involve access to justice or ethical reality which is one of the core goals of clinical legal education. Community service, which is intrinsically linked to clinical legal education, is the engagement of students in activities where the primary beneficiary is the recipient community and the primary goal is the provision of service. Community service learning by contrast, although not separated from its link to clinical legal education, is an

educational approach involving a curriculum-based, credit-bearing learning experience in which students participate in contextualised, well-structured and organised service activities aimed at addressing identified service needs in the community. Students reflect on the service experiences in order to gain a deeper understanding of the linkage between curriculum content and community dynamics, and experience personal growth and a sense of social responsibility. It requires a collaborative partnership context that enhances mutual, reciprocal teaching and learning among all members of the partnership. Compared to this, practical legal training would involve a lecturer who is biased in favour of his/her own cultural and economic circumstances drafting a fictitious Ms X and requiring of the student to draft and argue an opinion in a controlled exercise. Although this is still valuable it lacks the element of intrinsic evaluation.

The concept of clinical legal education is closely linked with the concepts of community, community awareness and community support. This leads to the next conclusion. Institutionally the University of the Free State distinguishes between community service and community service learning, as is evident from the two definitions provided above. My definition is somewhat more practical in nature: community service is giving a man a fish and presupposes inequality between the giver and receiver. The giver receives nothing except for a sense of doing well; community service learning on the other hand teaches the man to fish and presupposes equality between the two parties. Community service learning also presupposes that the 'receiver' will teach the 'giver' where the best fishing spot is, for example, as community service learning demands reciprocity of learning.

To return to the conclusion of my study: clinical legal education originated in the United States of America and each country that adopted it thereafter added and/or detracted from the original idea. Clinical legal education originated in the 1960s as a result of critical reaction to legal education methods and to provide for the unmet need for legal services in communities. In South Africa the first law

clinics were established in 1973 with the main focus on the provision of legal services to the poor. Gradually all university law faculties established law clinics in which clinical legal education was employed. Currently there are 21 law clinics that incorporate a clinical undergraduate programme in the LL. B.

There are seven goals of clinical legal education which have been established through practice and to which all of the clinical programmes indicated above ascribe:

1. To teach professional responsibility.
2. To impart skills in judgment and analytical ability.
3. To reiterate substantive legal knowledge.
4. To guide students in the application of practical skills.
5. To provide legal services to the community.
6. To teach students to manage diversity and teamwork.
7. To integrate of all the goals.

In terms of models used to ensure the achievement of the goals outlined above, the externship, simulation and in-house real client models seem to be the most prominent. The clinical programme is typically presented to fourth-year law students as an elective or compulsory model, depending on the institution, and usually includes a formal classroom component. In the clinic the method usually employs one of the models mentioned above to instill practical skills and professional values.

Whilst there is nothing fundamentally incorrect with the typical clinical legal education programme, universities are becoming hard pressed to extend their practical engagement of students. Can we ever do enough in this regard? We are criticised by our graduates and the profession alike for instilling an overly academic and theoretical knowledge base in students, whilst failing to realise the shortcomings in our methodology. Recent studies (conducted for example at the University of the Free State, the University of the Witwatersrand and the South

African Law Deans Association) indicate that focus on practical skills training is lacking in the LL. B curriculum.

My proposed programme to meet the abovementioned shortcoming suggests that practical training should be incorporated in all three years of undergraduate studies in preparation for a clinical legal education programme in the fourth year of study in the LL. B.

Clinical legal education should not be a capstone module which is simply inserted into the fourth year but should occur as an experiential, cyclic programme which goes through the steps of experience, reflection, theory and application.

My proposed programme works on the assumption that clinicians and their supporters stop arguing as to the exact nature of clinical legal education and accept that it can be incorporated in various forms of skill-building initiatives.

In terms of this suggested programme, the first year of LL. B study will entail a focus on the progressive acquisition of knowledge, skills and values. It is designed to introduce students to basic legal skills (such as research, writing, problem solving, analytical skills, self-efficacy, self-reflection and basic legal knowledge). Instruction will occur mainly in the classroom but should be context-based through the discussion of existing legal knowledge. This year will serve as a preface to client interviewing. At the University of the Free State, for example, the FIRAC method, mooting sessions, simulations, study groups, law jaw and tutor programmes are used to accomplish this. This first year should also expose students to practitioners and court officials. The University of the Free State has to this end signed a cooperation agreement with the local magistrate's court, which entails a relationship where such contact becomes possible and easy to facilitate using the agreement terms and obligations.

The first year of instruction lays the cement for the bridge, so to speak. The second year can be viewed as installing the hand rails. The second year should focus on the skills and values developed and implemented in the first year which should inevitably lead to a progressive exposure to live clients. This year should focus on the sensitisation of students to a client-centered practice and professional skill training should continue to this end. In this year the possibility of placing students in externship programmes should be considered. We cannot ignore the fact that in the old *B. Proc* and *B. Iuris* programmes the student was forced to take social/humanity modules such as political science which gave them a global prospective on the functioning of society. In the current LL. B the student does not have that world view exposure and while the second year should be used to build on the skills of the first year, it should also encourage a global perspective.

In the third year of study the focus should be on social awareness and the development of a civic perspective which is enhanced by the study of law in perspective with the community and their legal needs. Here I suggest an educational paradigm shift towards the employment of service learning as a method of education. This will bring the LL. B degree in line with various higher education policy directives and will assist in increasing access to justice. This year should be used to expose students to members of the public before taking on responsibility for individual cases and should assist in the development of social and ethical skills.

The proposal for the fourth year of study is that it should serve as the culmination of the process of learning which began in year one. It should be presented as a compulsory module and the group structure should meet the demands of the profession and society. This year should be used to expose students to live clients and case responsibility and should serve as a springboard into practice.

In summation I submit that although practical legal training is logically part of a law curriculum, the war has yet to be won for proponents of practical training for its rightful integration into the law curriculum. Previous chapters clearly reflect a need dictated by students and the profession alike regarding the need for practical training of law students in order to ensure employability and eventual success in the practice of law. Those currently involved in clinical legal education are faced daily with the challenge of convincing law faculties of the value of the programmes and their distinction from 'fun welfare activities' which simply reflect well on audit reports but further have no acceptable status as far as traditional legal educators are concerned. This discourse is furthered by explaining the difference and commonalities between clinical legal education and practical legal training and persuading faculties that the two can work together in aim, yet remain independent in method.

The above study posits that clinical legal education as methodology can stand alone as a method but that it can also be successfully combined with community service, service learning, traditional theoretical teaching, practical legal training and indeed research. It is clear from the historical overview provided that the obliteration of theoretical education is impossible and undesirable. In the economic and business sector of today's world the average legal practitioner cannot train an apprentice attorney unless he already has a basis of legal knowledge upon which to build. The theoretical training of students is fundamental to their eventual graduation however their success in practice will often be determined by their ability to apply their theoretical knowledge in context, in a practical manner. I am by no means suggesting that theory should be more important than practice or *vice versa* but am rather advocating for an integrated programme in which the two are equal co-workers in the system of legal education. This 'marriage' of sorts will ensure that the graduate receives the best training as a person involved in legal commerce whether as a legal practitioner or as a person employed in some other related activity.

The university law clinic is not the *alpha* and *omega* of practical training. Skeptics often say that it is not the job of a law faculty to graduate 'lawyers' and although I agree that the profession does have some sort of responsibility in practical training, a law faculty should see practical training as a complement to an often excellent theoretical basis. It is however apparent that most law faculties are simply ignoring what is staring them in the face in most cases, in the form of their clinical programmes.

Although we may not be as advanced as our American counterparts in the field of clinical legal education we all ultimately pursue the same goals in terms of outcomes for our students. In the South African context one aspect is abundantly clear – all South African universities have some sort of clinical programme and whether it is compulsory or elective, a general clinic or a specialised clinic, recognised and supported by its faculty or not – it is in all cases presented in the fourth year of study. All South African clinics are guided by and aspire to the seven goals of clinical legal education as set out in Chapter Three above, and the unanimous instruction provided by the South African Qualifications Authority.

A further factor of commonality amongst most South African clinics is the continuous battle for funding. The funding provided to clinics often forces them into providing access to justice, which in itself is an excellent basis for student training, but often becomes so burdensome that the focus shifts from clinical/practical training to the provision of legal services and all the associated time and resource demands created in this regard. It is often the case that, in an effort to please our financial benefactors, we lose sight of our educational goals.

One cannot lose sight of the fact that most South African university law clinics had their origin in initiatives created by law students who became involved in an advisory capacity in order to assist clients who could not otherwise afford legal services. These students however pursued these initiates with the further aim of educating themselves practically in their chosen field of study. Unfortunately the

'community service' aspect of clinics has remained the primary focus at most university law clinics. We, as clinicians, have a duty to refocus our attention on the reciprocity of learning between student and community member. Our aim should ultimately be the education and betterment of the student and if we manage to provide access to justice in the process then so much the better but it should not be our primary objective. Once this shift in focus occurs, from access to justice to education, the battle to win the favour and acceptance of our faculties may be so much easier.

If we want to provide quality legal education that manages to fulfill all the goals and outcomes set by the various authorities, we must accept that it is impossible to provide such in one year. This suggestion follows especially in light of the other academic obligations of the student body and the demands made on the lecturing staff in terms of research and teaching. The practical skills required of a well-rounded graduate cannot be instilled in one academic year. The foundational building blocks must be laid in year one and built upon continuously and progressively. Currently we are attempting to build a mansion from the roof level downwards and we are surprised when the structure collapses. In order to bridge the gap between theory and practice we need to expose the student gradually to the practice of law, and this is best achieved over a number of study years. This gradual development of the student then fulfills the requirements of the profession and ensures that the student receives value for his years of study and the economic input of his benefactor(s). The theoretical knowledge acquired by the student over four years cannot be tested and applied in a one-year clinical programme. The diversity of our population requires of us to expose students to communities before they are required to work effectively with the public. This task also cannot be achieved in a one-year period and is best achieved gradually. The student's confidence in his skills and ability can best be built through gradual exposure, through the use of simulations and observations. This teaches a student self efficacy and results in the ability, in the final year of study, to provide legal advice and assist members of the community with the minimum of

supervision. This will lead to a much improved system of community service and access to justice.

I submit that a four-year programme of clinical instruction will present its own unique challenges, one of which will definitely be an amplified work load on the shoulders of the staff of the clinic. However we must consider that our graduates have to meet the universal needs of a global society and not be regarded as underdeveloped cogs in a wheel of legal commerce. Consideration needs to be given to the adjustment of our methods in order to provide graduates that are employable and useful to society both nationally and internationally. This should be our ultimate aim as educators.

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