THE CONTOURS OF A PEDAGOGY OF LAW IN SOUTH AFRICA

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1 Introduction

There is currently much debate in the legal fraternity about legal education. As is the case for the entire legal profession, reform of legal education seems to be in the air again. The drivers for reform flow among others from the current reforms of legal services in South Africa, most pertinently by means of the Legal Practice Act 28 of 2014, concerns about law graduates' knowledge and skills upon graduation,[1] and developments in higher education relating inter alia to extremely poor throughput rates in the system.

There are already positive steps underway towards reform of legal education. The LLB Summit of May 2013, which brought together all major stakeholders in legal education,[2] adopted a resolution with key points for this reform.[3] These include the setting of a national standard for the LLB degree and the creation of an LLB National Task Team with the function of overseeing the reform process, including attending to the structure of the LLB and funding for legal education. Both of these initiatives are underway.

Reform in higher education can, however, be dangerous and counter-productive if it is driven purely by policy agendas and in the absence of sound pedagogical considerations. Legal education in South Africa is no stranger to this danger. The fact that the four-year structure of the LLB is currently at the centre of the debate about the quality of legal education underscores the view that the lack of a pedagogical foundation is at least partly to blame for the implementation failure of the 1997 reforms that led to the introduction of the four-year programme.[4]

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[1] See J Campbell "The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice?" (2014) 25 *Stell LR* 15 17
[2] L Dicker "The 2013 LLB Summit" (2013) 26 *Advocate* 15 15-20; A Pantazis "The LLB" (2013) 26 *Advocate* 22 22-23; M Sedutla "LLB Summit: Legal Education in Crisis?" (2013) 532 *De Rebus* 8 8-10; C van Niekerk "The Four Year Undergraduate LLB: Where to from Here?" (2013) 34 *Obiter* 533 533-544
[3] See LLB Summit "The Road Ahead: Proposal Adopted" (29-05-2013) *LSSA* <http://www lssa org za/ upload/RESOLUTION_Road%20Ahead_LLB_29%20MAY%202013 pdf> (accessed 21-07-2014)
[4] Cf L Greenbaum "The Four-Year Undergraduate LLB: Progress and Pitfalls" (2010) 35 *JJS* 1 1 2

This contribution aims to add a pedagogical perspective to the debates about reform of legal education in South Africa. Drawing on our earlier work in this field, we sketch the broad contours of a legal pedagogy for South Africa. In our view, discussions of legal education reform should also take place within these contours. That is, such discussions should not proceed purely on policy and political grounds, but at the same time within a suitable pedagogical framework. Although there has traditionally been reluctance by law teachers locally and in other countries to embark on engagement with educational theory, we would advocate that this is essential and inevitable if reforms are to be based on sound theoretical underpinnings and empirical evidence, instead of anecdotal views.[5]

At the outset, it should be stated that it is neither possible nor desirable to formulate one single teaching methodology for all legal education. We shall argue that by employing a variety of teaching methodologies in a context-sensitive manner is in itself an important way to model the nature of training that we propose for law students. The aim of inculcating in law students the importance of context in law is supported by varying teaching methodology in a contextualised manner. While one can thus certainly explore particular pedagogical principles and strategies it is not possible to identify one single set of tools that can be said to constitute the ideal or perfect teaching methodology for any particular field, including law. For this reason we can do no more than simply sketch the contours of a pedagogy of law in South Africa. In our view, one cannot get any closer to specifying the ideal teaching methodology for law than by setting the contours or parameters within which specific teaching-learning activities can be designed. Shulman describes a "signature pedagogy" of Law as having a surface structure of "dialogues that are under the control of an authoritative teacher … a deep structure that rests on the assertion that what is really being taught is the theory of the law and how to think like a lawyer … and an implicit structure that there is a distinction between legal reasoning and moral judgment."[6] What is apparent is that this characteristic pedagogy can no longer be appropriate in South Africa.

While our focus is on teaching methodology it should also be kept in mind that other dimensions of curriculum design, such as subject matter and its organisation within a programme, cannot be completely separated from methodology.[7] There is thus an inevitable overlap between methodology (the *how* of the learning experience) and content (the *what* of the learning experience).[8] We shall thus also comment on aspects of content, although only as a secondary focus. Our focus is furthermore on those aspects of teaching methodology that hold particular implications for legal education as opposed

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[5] N James "The Good Law Teacher: The Propagation of Pedagogicalism in Australian Legal Education" (2004) *AustLII* <http://www austlii edu au/au/journals/UNSWLJ/2004/7 html> (accessed 4-08-2014)

[6] L Shulman "Signature Pedagogies in the Professions" (2005) 134 *Daedalus, American Academy of the Arts and Sciences* 52 52-59

[7] Cf N Botha "Some Current Curriculum Issues in South African Higher Education" in E Bitzer (ed) *Higher Education in South Africa* (2009) 157 159.

[8] FM Connelly & DJ Clandinin "Curriculum Content" in A Lewy (ed) *The International Encyclopaedia of Curriculum* (1991) 330 330; MJ Eash "Curriculum Components" in A Lewy (ed) *The International Encyclopaedia of Curriculum* (1991) 67 68

to pedagogy generally. There are of course a vast range of general principles of good teaching that can be gleaned from higher education studies that apply across all disciplines and from international literature on legal education. It is not our intention to focus on such matters in this paper, although that is not to say that such principles are not equally important for legal education.

In 2012 Quinot proposed "Transformative Legal Education" (TLE) as a theoretical framework within which law in South Africa should be taught.[9] We use this framework as our point of departure in exploring aspects of teaching methodology that are of particular importance in the legal education reform debate.

In the next section we briefly describe the nature of the research behind this contribution and, importantly, the limits thereof. We then continue to discuss the students who typically enter higher education (in law) today, because before one can sensibly engage with issues of teaching methodology it is important to have a clear grasp of the basic characteristics of the students who can be found in a typical law programme today. Subsequently, we briefly set out the foci of TLE before proceeding to discuss various pedagogical elements that in our view can operationalise TLE and consequently serve as the practical contours of a pedagogy of law, based on TLE. We conclude by exploring the challenges that legal education in South Africa faces in implementing these elements.

2   The research design

2 1   The SALDA commission

In April 2014, the South African Law Deans' Association (SALDA) commissioned a research report on appropriate teaching methodologies to "ensure that Law Schools/Faculties produce well-rounded law graduates who will make meaningful contributions to the legal profession and the broader society". The terms of reference for the research stated that the following specific items were to be considered:

> "The researcher/s should examine the most appropriate and pedagogically sound teaching methods while taking into account the following:
> (a)   the need for students to obtain a law degree which equips them to meet the challenges of the legal profession;
> (b)   the need to inculcate an understanding of the Constitution and to develop greater awareness of the role law graduates should play in building South Africa's constitutional democracy; how transformative constitutionalism permeates the teaching of law;
> (c)   the underlying legal teaching philosophy;
> (d)   the interface between technological development and legal education;
> (e)   the desideratum of outcomes based legal education;
> (f)   the need to incorporate more clinical legal training and experiential learning."

A timeframe of approximately five months was allowed for completion of the report.

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[9]   G Quinot "Transformative Legal Education" (2012) 129 *SALJ* 411 411-412

2 2   Research methodology

The methodology agreed upon between the researchers and SALDA, in light of the limited timeframe for the report, was a desk top literature-based study. No empirical work was done in conducting this study.

It is envisaged that the outcome of this study will only form the first phase of a larger research project into teaching methodology in law in South Africa. The larger project should involve an empirical dimension to establish current approaches to teaching methodology and best practices in university legal education.

2 3   Limitations of the report/study

The absence of any empirical research places significant limitations on the findings of this study. While we make a number of recommendations on how university legal education can be approached in South Africa, there is no empirical evidence of the current state of affairs in this regard. Consequently, no recommendations can be made at this stage about what reforms should be implemented. It is only once an evidenced-based view can be taken of current teaching practices that one can sensibly apply the recommendations of this contribution to practice, in order to engage in an analysis of the need for and nature of reforms.

There are furthermore a number of limitations to a desktop methodology to research on pedagogy in legal education in South Africa. The literature on legal education in South Africa is extremely limited.[10] That literature has also paid scant attention to theory in legal education, including theoretical insights from education. Very few of these articles and book chapters are based on empirical research.[11] As a result, research in this area must inevitably rely on foreign literature. Comparative education research of this nature has particular risks. The most obvious risk flows from the differences in the structure of legal education in different jurisdictions. Another significant danger is that the social context of a particular educational practice may not be adequately taken into account when reliance is placed on literature reporting on or flowing from such practice.[12]

Finally, the limited timeframe in terms of which the study was completed placed limitations on the scope of the research that could be undertaken.

3   The university (law) student of today

There has been a constant stream of criticism in both academic and popular writing of students' under-preparedness for university studies in South Africa

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10   L Greenbaum "Current Issues in Legal Education: A Comparative Review" (2012) 23 *Stell LR* 16 17, 32; Quinot (2012) *SALJ* 411 411-412

11   Greenbaum (2012) *Stell LR* 37; L Greenbaum *The Four Year Undergraduate LLB Degree: Fitness for Purpose?* PhD thesis KwaZulu-Natal (2009) 65

12   M Bray, B Adamson & M Mason (eds) *Comparative Education Research: Approaches and Methods* (2007) 1 4-7

in recent years, which has also included law students.[13] Although there has also been a tendency to simply equate perceptions of increased under-preparedness of university entrants to current poor schooling, the recent report of the CHE Task Team on Undergraduate Curriculum Structure has argued that under-preparedness is in fact a much more complex issue.[14] The Task Team also argues that as a concept under-preparedness has fairly limited value in current debates in South African higher education. The Task Team shows that already in the 1970s in South Africa "there was disquiet about the school-university transition even when the intake was very small, racially exclusive, largely homogeneous and advantaged".[15]

What is, however, clear is that there is a significant articulation gap between school and university studies in South Africa at present. That is a "mismatch or discontinuity between the exit level of secondary education and the entry level of higher education".[16] The CHE Task Team notes that the "articulation gap" is a more useful concept to work with when engaging with issues of students' performance in higher education. They further note that "in the South African case the secondary-tertiary articulation gap seriously affects the majority of the higher education intake, and hence needs to be recognised as a key systemic fault, requiring systemic change".[17]

What makes the South African situation more complex is that the significant increase in student numbers in recent years means that the student body is more diverse. In South Africa, this means in particular that the student body will include larger percentages of students coming from educationally disadvantaged circumstances, that is students coming from poorly performing schools and socio-economic backgrounds that did not create optimal opportunities for educational development.[18]

A further dimension that is highly relevant for legal education in South Africa is the (home) language diversity of students compared to the language of instruction, which is predominantly English, and to a limited extent Afrikaans. For education in law, which has been described as "surely one of the most literate of all professions",[19] this holds significant implications. A number of scholars have pointed to the difficulties created by learning law in

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[13] See for example S Scott "Knowledge Production and Transmission in a Changing Society: Challenges Facing Law Lecturers in a Distance Education Environment in South Africa" (2006) 20 *SAJHE* 731 737; L Greenbaum "Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives" (2004) 15 *Stell LR* 3 4; S Woolman, P Watson & N Smith "'Toto, I've a Feeling We're Not in Kansas Any More': A Reply to Professor Motala and Others on the Transformation of Legal Education in South Africa" (1997) 114 *SALJ* 30 42-43

[14] CHE Task Team on Undergraduate Curriculum Structure *A Proposal for Undergraduate Curriculum Reform in South Africa: The Case for a Flexible Curriculum Structure* (2013) 57-59

[15] 59

[16] 60

[17] 60

[18] L Greenbaum "Experiencing the South African Undergraduate Law Curriculum" (2012) *De Jure* 7 27 An empirical study of a sample of six students' experiences of an untransformed LLB curriculum suggested that their educational background and socio-economic backgrounds played a determinative role in their experience of the curriculum and in their further career trajectories, suggesting that a "cycle of disadvantage" could be perpetuated through legal education Greenbaum *The Four Year Undergraduate LLB Degree: Fitness for Purpose?* 373

[19] PM Tiersma *Parchment Paper Pixels* (2010) 1

a second (or third etcetera) language.[20] In an increasingly language-diverse student body and an increasingly unilingual law curriculum, these challenges are set to increase.

Criticisms in the media and within the legal fraternity[21] about the literacy levels of law graduates necessitates an appraisal by law teachers of the way in which the "rules and conventions of the discipline are made overt" in their teaching.[22]

4   Transformative Legal Education (TLE): the point of departure[23]

In his proposal of TLE as a theoretical framework within which law should be taught in South Africa, Quinot posits a three-pronged framework for TLE. Firstly, it draws on transformative constitutionalism[24] as a guiding theory in South African law. That is as an overarching theory of the discipline being taught. Secondly, it relies on constructivism as the underlying teaching-learning philosophy. Thirdly, it focuses on the impact of the digital revolution on our conception of knowledge and consequently the implications of ICT for teaching and learning. The developments within each of these three dimensions of TLE can be viewed together to support specific approaches to teaching law.

4 1   The three legs of TLE

The radical shift that constitutionalism brought to South African law also impacts legal education. As captured in the notion of transformative constitutionalism, the Constitution of the Republic of South Africa, 1996 (the "Constitution") not only calls for the drastic re-evaluation of all legal rules, but (perhaps most importantly) calls for a different legal methodology, all in support of a distinct political, policy or social agenda. The Constitution envisages a "substantive vision of law"[25] in which open engagement with values outside of legal doctrine play an important role in justifying particular authoritative positions in law. Klare points out that this calls for a shift in legal culture in South Africa.[26] That is, a shift in "professional sensibilities, habits of mind, and intellectual reflexes", of lawyers' "repertoire of recurring

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[20]   See T Ngwenya "Integrating Language Awareness with Critical Language Skills: A Legal English Experience" (2006) 24 *SA Linguistics & Applied Language Studies* 23; V Bronstein & J Hersch "Teaching Law as a Second Language in a Second Language" (1991) 107 *SALJ* 159; C van der Walt "Teaching a Foreign Language: The Language of the Law" (1992) 55 *THRHR* 94; C van der Walt & AG Nienaber "The Language Needs of Undergraduate Law Students: A Report on an Empirical Investigation" (1996) 29 *De Jure* 71; C Mbali & L Greenbaum "Errors in First Year Law Students' Writing" (2002) 20 *South African Linguistics and Language Studies* 233

[21]   B Bangeni & L Greenbaum "The Acquisition of Legal Writing Skills by First Year Law Students" (2013) 29 *Per Linguam* 72 72

[22]   C Boughey "Epistemological Access to the University: An Alternative Perspective" (2005) 19 *SAJHE* 230 241

[23]   This section draws heavily on Quinot (2012) *SALJ* 411-412

[24]   KE Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150-151; P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 354

[25]   A Cockrell "Rainbow Jurisprudence" (1996) 12 *SAJHR* 1 9

[26]   Klare (1998) *SAJHR* 168-172

argumentative moves" and what "counts as persuasive legal argument".[27] As Klare and others[28] have indicated, the prevailing legal culture in a system can constrain or facilitate a particular role for law in the system, including law's ability to support transformation. The largely conservative legal culture in South Africa that places a high value on formal authority such as "the say-so of parliament or technical readings of legislation",[29] on "precision, determinacy and self-revealingness of words and texts",[30] on "a core of stable, a-contextual and a-political meaning inherent in the common-law tradition"[31] must give way to a legal culture that overtly embraces the project of constitutional transformation.

While legal reasoning has thus become much more overtly, substantively open-ended, the new position is not infinitely relativistic in the sense that any substantive considerations can be held up as justification for particular legal rules. The Constitution commits us to a particular social agenda, broadly captured by the notion of transformation,[32] which dictates both the method and outcomes to be pursued. This constitutional commitment also confirms that law has an active role to play in the transformation process, another key aspect of transformative constitutionalism.[33] The view of law in context has accordingly become a primary perspective in law as a discipline in South Africa.

The second leg of TLE is a constructivist teaching-learning philosophy. Constructivism tells us that we learn by assimilating new experiences into our existing knowledge framework.[34] The statement perhaps best captures the core of constructivism: "knowledge is not found, but made". This implies that one cannot transmit discrete bits of information to another person, which that person can simply absorb, amounting to ostensible "learning".[35]

An individual's knowledge emerges from the activity of connecting new experience to one's existing experiential framework or schemata, which are derived from past learning and life experience, resulting in that new

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[27]   166
[28]   DM Davis & K Klare "Transformative Constitutionalism and the Common and Customary Law" (2010) 26 *SAJHR* 403 406; Langa (2006) *Stell LR* 351 353-354; D Moseneke "The Fourth Bram Fischer Memorial Lecture – Transformative Adjudication" (2002) 18 *SAJHR* 309 315-316; M Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" (2005) 20 *SAPL* 155 164–165; AJ van der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" (2006) 12 *Fundamina* 1 7
[29]   Langa (2006) *Stell LR* 353
[30]   Klare (1998) *SAJHR* 168
[31]   Van der Walt (2006) *Fundamina* 7
[32]   This is of course a very broad description of the Constitution's core substantive agenda Liebenberg usefully captures transformation under the South African Constitution as "committed to redressing past injustices and guiding the creation of a transformed society" which includes the "construction of a new political, social and economic order … [which] envisages improving the quality of life and freeing the potential of each person", S Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 25 27
[33]   Klare in Klare (1998) *SAJHR* 150 defines transformative constitutionalism with reference to this role of law as "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law"
[34]   CT Fosnot (ed) *Constructivism: Theory, Perspectives, and Practice* 2 ed (2005) ix
[35]   J Pelech & G Pieper *The Comprehensive Handbook of Constructivist Teaching: from Theory to Practice* (2010) 8; E von Glasersfeld "Why Constructivism must be Radical" in M Larochelle, N Bednarz & J Garrison (eds) *Constructivism and Education* (1998) 23 23–27

experience being added to the framework, but also restructuring the existing knowledge base.[36] This continual construction of knowledge by an individual occurs within a "knowledge constructing community"[37] and hence "against a socially constructed plane".[38] The individual's active participation in the community does not only contribute to the restructuring of her own knowledge base, but also that of the entire community.[39] Knowledge thus constructed is accordingly always "emergent, developmental, non-objective"[40] as well as contingent and socially situated.[41]

This view of learning has obvious implications for teaching. It means that learners must be actively engaged in the learning process. Teaching cannot be viewed as transmission, but rather as facilitation of construction.[42] The teaching-learning process is non-linear, that is knowledge does not flow from the teacher to the student in one direction. There is a complex interaction between what the teacher brings to and does in class and what the student brings to and does in class that defines learning. Constructivism also implies that knowledge cannot be constructed in an a-contextual manner. Distinct skills and concepts cannot be separated from each other and from their context to be taught in isolation.[43] Knowledge can only be constructed within a contextual and relational framework.

The final part of TLE focuses on the impact of the digital revolution on our knowledge world and the implications thereof for teaching and learning. While one can engage in never-ending normative debates about the influence of the ubiquitous screens on our daily lives and consequently our knowledge world, one can hardly doubt the existence of such an influence. There also seems to be a widely emerging consensus across a broad range of commentators and scholars that the impact of the digital revolution on our knowledge world is not simply of a quantitative nature, but of a qualitative nature. The very essence of how we conceive of knowledge and consequently how we go about using and constructing knowledge seem to be in flux. In one of the most strongly formulated descriptions of this development, the leading African scholar and policy-maker Ismail Serageldin states:

> "We are on the cusp of a profound transformation of how knowledge is structured, accessed, manipulated and understood, how it is added to, and how it is displayed and communicated, that is the most profound transformation in the history of humanity since the invention of writing."[44]

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[36] Pelech & Pieper *The Comprehensive Handbook of Constructivist Teaching* 8
[37] E Venter "A Constructivist Approach to Learning and Teaching" (2001) 15 *SAJHE* 86 87
[38] P Cobb "Where is the Mind? A Coordination of Sociocultural and Cognitive Constructivist Perspectives" in CT Fosnot (ed) *Constructivism: Theory, Perspectives, and Practice* (2013) 39 39–45
[39] E Bitzer "Understanding Co-operative Learning: A Case Study in tracing Relationships to Social Constructivism and South African Socio-Educational Thought" (2001) 15 *SAJHE* 98 100
[40] Fosnot *Constructivism: Theory, Perspectives, and Practice* ix
[41] Venter (2001) 15 *SAJH* 86-87; DC Phillips "The Good, the Bad, and the Ugly: The Many Faces of Constructivism" (1995) 24 *Educational Researcher* 5 5
[42] Von Glasersfeld "Why Constructivism" in *Constructivism and Education* 27
[43] Fosnot *Constructivism: Theory, Perspectives, and Practice* ix
[44] I Serageldin "The Shape of Tomorrow – Part One: The Seven Pillars of the New Knowledge Revolution" (2010) *Serageldin* <http://www serageldin com/SpeechDetail aspx? SID=2Y6A%2fTjniOIL22nT39rblQ %3d%3d> (accessed 21-07-2014)

What is emerging is a move away from a more "literary and linear" paradigm of knowledge[45] to a more fluid notion with emphasis on the dynamic and relational qualities of knowledge. Of course, the tools of participation in the knowledge community have greatly changed as well. Working with information in a digital format has become commonplace, be it on a computer, tablet or smartphone. In the last three years alone mobile subscriptions have increased by a billion worldwide.[46]

From a teaching-learning perspective, one must consequently ask what the implications of these changes in mode and form of knowledge engagement may be. It seems evident that different (or at least varied) skills are required to navigate this new knowledge world. Given the mode and ease of access to information, there is arguably less need for memorising large portions of detailed information and more need for skills in finding and filtering information. The more fluid nature of the knowledge paradigm calls for a move away from a linear step-by-step approach to learning, to a more relational or networked approach.

4 2   The pedagogical implications of TLE

When one brings all three elements of TLE together, challenging opportunities emerge for exploring synergies between these hugely varying developments in designing a pedagogy of law in South Africa.

As a general point Dennis Davis has recently put his finger on the main implication of TLE for legal education in South Africa when he asked "[w]hether the South African legal academy teaches students more than a blind acceptance of legal principles derived from existing authority or whether the teaching of law places the constitutional vision at the heart of legal education".[47]

Some of the broad implications of TLE are that law lecturers are responsible for justifying their choices in designing teaching-learning activities towards their students as a reflection of a "culture of justification" at the heart of South African law[48] and a co-operative style of knowledge construction within the learning community. Students should likewise be required to actively participate in and be responsible for forming a view of the law being taught and its alignment to transformative ideals. The student's responsibility is not restricted to her own learning, but to the entire learning community as well.

Context becomes crucial in teaching law, calling for deep engagement with the world beyond legal doctrine and including consideration of insights from disciplines other than law. As Davis has aptly formulated it: "[l]aw students

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[45]   N Carr *The Shallows* (2010) 10, 78

[46]   mobiThinking *Global Mobile Statistics 2014 Part A* (2014) <www mobithinking com/mobile-marketing-tools/latest-mobile-stats/a> (accessed 21-07-2014)

[47]   DM Davis *Legal Transformation and Legal Education: Congruence or Conflict?* (2014) unpublished paper presented at the *UCT Acta Juridica Conference in Honour of Former Chief Justice Pius Langa* 16-17-01-2014, Cape Town (footnotes omitted, paper on file with authors)

[48]   E Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 32

should be educated to view law through this broader prism".[49] At the same time the student's own context and how that differs from that of other members of the knowledge community hold important implications for designing the learning experiences. A relational, networked perspective on the curriculum content as well as the learning experience must be adopted.

The type of skills required to function effectively, meaning to achieve the particular role of law in South African society, must be developed and modelled in teaching-learning activities. This requires first and foremost "an engagement with a legal method by which to meet the transformative legal challenge".[50] Critical thinking of a particular nature and creativity are some of the higher order skills that must be fostered.

In the next section, we explore a number of aspects of teaching methodology that are linked to these pedagogical implications of TLE. These aspects define the contours of a pedagogy of law in South Africa. Under each, we discuss ways in which the particular strategy finds application in the context of legal education in South Africa.

5   Aspects of a TLE pedagogy

Based on these broad implications of TLE one can identify a number of design elements that can guide the formulation of particular teaching-learning activities and approaches within particular courses. We focus on three broad areas that impact on the terms of reference of this project. These are the need for integrated, coherent approaches; authentic learning; and the relevance of information and communications technology (ICT) in legal education. However, these guiding design elements are not distinct, watertight facets of the teaching methodology. There certainly is overlap between them as they find application in particular pedagogical tools and approaches. It should be kept in mind that these elements constitute the contours of one methodological approach and it is thus to be expected that more than one element will impact on specific practical aspects of the methodology.

5 1   Integrated, coherent approaches

The first element to consider in the design of a teaching methodology for law in South Africa is that of integration. This is a broad attribute that finds application across a wide terrain within legal education.[51] It supports TLE's insistence on presenting law as a whole, rather than an aggregate of distinct branches, fields and skills that can be mastered one after the other and in isolated bite-size chunks. Integration in the teaching methodology serves to acknowledge the complex nature of the discipline of law as well as the teaching-learning process itself. It thus facilitates a stronger relational, rather than an atomistic perspective in legal education.

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[49]   Davis "Legal Transformation and Legal Education"
[50]   Davis "Legal Transformation and Legal Education"
[51]   See BD Cooper "The Integration of Theory, Doctrine, and Practice in Legal Education" (2002) 1 *J Ass'n Legal Writing Directors* 50 50

Integration also aligns with the emphasis on context in teaching law. Activities that are designed to facilitate engagement with context should thus also adhere to the feature of integration.

The *Carnegie Report*[52] has advocated a particular model of integration in the context of legal education in the United States of America. The report relies on the metaphor of apprenticeships[53] and posits a model of professional education in law with reference to "the three apprenticeships of professional education" as follows:[54]

- the "intellectual or cognitive" apprenticeship, which focuses on the "knowledge and ways of thinking" in law;
- the "practice" apprenticeship in which students learn "the forms of expert practice shared by competent practitioners"; and
- the "apprenticeship of identity and purpose" or "ethical-social" apprenticeship, which focuses on the "purposes and attitudes that are guided by the values for which the professional community is responsible".

The report calls for the alignment of these three apprenticeships.[55] Similar approaches have been advocated in other foreign jurisdictions.[56] Greenbaum thus notes "a need to integrate the various domains of learning" as one of the major themes characterising the literature on legal education internationally.[57]

5 1 1   Integrated skills development

One application of integration is that of embedding the critical cross-field outcomes or graduate attributes of the degree/qualification within the substantive law modules that constitute the programme. These include key attributes in the SAQA exit level outcomes for the LLB qualification, such as creative and critical thinking, effective communication and language skills, information technology skills, research skills, ethical behaviour and a commitment to social justice.[58] These attributes should not be categorised as either exclusively academic or exclusively vocational. They range from academic skills (like theoretical conceptualisation) to generic skills (like basic writing and numeracy skills).[59] Where the focus should fall within a particular programme is best left to individual higher education institutions, but as Campbell has recently argued it is not realistic to attempt to pursue

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[52] WM Sullivan, A Colby, JW Wegner, L Bond & LS Shulman *Educating Lawyers: Preparation for the Profession of Law* (2007) – (the "Carnegie Report")
[53] Sullivan et al describe an apprenticeship in the context of professional education as the relationship in which "an expert is able to model performance in such a way that the learner can imitate the performance while the expert provides the feedback to guide the learner in making the activity his or her own" *Carnegie Report* 26
[54] 27-29
[55] 29 191
[56] See S Kift "21st Century Climate for Change: Curriculum Design for Quality Learning Engagement in Law" (2008) 18 *Legal Educ Rev* 1 8, 12-15, who lists about 20 reports echoing similar proposals for integration
[57] Greenbaum (2012) *Stell LR* 17
[58] SAQA *Bachelor of Laws Generic LLB Qualification* <http://allqs saqa org za/showQualification php?id=22993> (accessed 01-09-2014)
[59] Cf Campbell (2014) *Stell LR* 19

either a pure academic or pure vocational approach to university legal education in South Africa.[60] He also makes the important point that "an academically enhanced legal education will provide better preparation for practice, promote epistemological access, and answer many of the current concerns about legal education",[61] thereby largely undermining emasculating the familiar academic-vocational debate in respect of the attributes that law graduates must possess.

The integration aspect implies that these attributes must be developed while engaging with substantive law, rather than through freestanding, independent teaching-learning activities.

In terms of skills development, particularly writing skills, there is strong support in the literature for the view that an integrated or embedded approach holds the most potential.[62] A strong argument in favour of this approach, which also links with TLE, is that the development of writing skills is not simply an instrumental process. Legal writing and reasoning skills cannot be treated as discrete skills. "The act of writing is intimately involved with the act of construing the law…".[63] Writing development plays an important role in students' knowledge construction within the discipline. This is a process approach to writing skills development that recognises that "the act of writing serves not only to communicate the writer's knowledge but also to generate that knowledge".[64] Similar arguments have been advanced in respect of the development of other important skills in legal education[65] such as ethics[66] and critical thinking.[67]

One danger of such an integrated approach to skills development is that the particular skills that are meant to be developed and that span across all

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[60]   21-22, 29-30

[61]   30

[62]   B Bangeni & L Greenbaum "An Analysis of the Textual Practices of Undergraduate and Postgraduate Novice Writers in Law" (2013) 29 *Per Linguam* 72 80-81; L Greenbaum & A Rycroft "The Development of Graduate Attributes: The Book of the Year Project" (2014) 28 *SAJHE* 91 92-93; CM Parker "Writing throughout the Curriculum: Why Law Schools Need it and How to Achieve it" (1997) 76 *Neb L Rev* 561 561; AM Noble-Allgire "Desegregating the Law School Curriculum: How to Integrate More of the Skills and Values Identified by the MacCrate Report into a Doctrinal Course" (2002-2003) 3 *Nev L J* 32 32; P Lysaght & CD Lockwood "Writing-across-the-Law-School Curriculum: Theoretical Justifications, Curricular Implications" (2004) 2 *J Ass'n Legal Writing Directors* 73 73; N Witzleb & N Skead, "Mapping and Embedding Graduate Attributes across the Curriculum" in S Kift, M Sanson, J Cowley & P Watson (eds) *Excellence and Innovation in Legal Education* (2011) 31 31; B Wolski "Why, How and What to Practice: Integrating Skills Teaching and Learning in the Undergraduate Law Curriculum" (2002) 52 *J of Legal Educ* 287 287; S Christensen & S Kift "Graduate Attributes and Legal Skills: Integration or Disintegration?" (2000) 11 *Legal Educ Rev* 207 207

[63]   JC Rideout & JJ Ramsfield "Legal writing: A Revised View" (1994) 69 *Wash L Rev* 1 109

[64]   Parker (1997) *Nebraska Law Review* 566; CM Parker "Writing Is Everybody's Business: Theoretical and Practical Justifications for Teaching Writing across the Law School Curriculum" (2006) 12 *The Journal of the Legal Writing Institute* 175 176 Also see MR Smith "Rhetoric Theory and Legal Writing: An Annotated Bibliography" (2006) 3 *J Ass'n Legal Writing Directors* 129 141-142 for an annotated bibliography of works focusing on this process approach to legal writing development

[65]   See Noble-Allgire (2002-2003) *Nev L J* 33

[66]   DL Rhode "Teaching Legal Ethics" (2006-2007) 51 *St Louis ULJ* 1043 1051-1052; DL Rhode "Into the Valley of Ethics: Professional Responsibility and Educational Reform" (1995) 58 *Law & Contemp Probs* 139 139; M Robertson "Embedding 'ethics' in Law Degrees" in S Kift, M Sanson, J Cowley & P Watson (eds) *Excellence and Innovation in Legal Education* (2011) 99

[67]   Cooper (2002) *J Ass'n Legal Writing Directors* 50; N James "Embedding Graduate Attributes within Subjects: Critical thinking" S Kift, M Sanson, J Cowley & P Watson (eds) *Excellence and Innovation in Legal Education* (2011) 69

fields of the discipline may be perceived by students as "disciplinary content knowledge".[68] Such a perception may greatly undermine the transfer of the skills between different areas of content. Particular attention thus needs to be given to the vertical integration of skills across the curriculum within the programme, so that the emphasis on the cross-field nature and the importance[69] of these outcomes is clearly communicated. One way to achieve this is to pursue greater integration in the substantive content being taught, so that there is a reduction of the overall atomistic view within the programme, be that in relation to skills or substantive content.

5 1 2   Integrated teaching of substantive law

Integration also finds particular application in how substantive law is taught. Within the discipline it is important to provide students with the "big picture" of how individual branches of law interact and in particular how the overarching normative framework of the Constitution serves as a binding force across all fields. From a curriculum-content perspective, this raises questions about structuring the entire law programme around sequenced modules, each one dealing with a distinct area of law, with little or no cohesion between them.

This aspect of integration touches mostly on the structure of the curriculum, rather than on teaching methodology. Some of the most promising mechanisms to achieve this form of integration are accordingly of a curriculum-structure nature, such as capstone courses, which are designed and incorporated into the curriculum for the particular purpose of achieving such integration.[70]

Integration at the substantive level can, however, also be pursued through teaching methodology. It is thus desirable that law teachers incorporate perspectives from other branches of the substantive law in teaching-learning activities. This may, for example, take the form of setting complex problems for students to engage with, based on scenarios including more than one branch of law. This does not only facilitate the students' exposure to integrated perspectives on substantive law, but also helps them develop the skill to make informed choices between viable options from distinct branches of law.

5 1 3   Whole-of-curriculum approaches

A useful way to operationalise the element of integration is through a "whole-of curriculum" approach to a particular law programme.[71] This means that doctrine, theory, skills and values are taught in a coherent and coordinated manner and that there is congruence in the relationship between

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[68]   Greenabum & Rycroft (2014) *SAJHE* 92

[69]   Johnstone makes the important point that if particular skills, for example legal ethics or professional responsibility, are only given attention in the final year of study it may signal to students that those skills are of relatively lesser importance being "tacked on at the end", R Johnstone "Whole-of-Curriculum Design in Law" in S Kift, M Sanson, J Cowley & P Watson (eds) *Excellence and Innovation in Legal Education* (2011) 1 21

[70]   G Quinot & SP van Tonder "The Potential of Capstone Learning Experiences in Addressing Perceived Shortcomings in LLB Training in South Africa" (2014) *PELJ* 1355 1360-1363, 1366-1368

[71]   Johnstone "Whole of Curriculum Design" in *Excellence and Innovation in Legal Education* 14

distinct modules in the programme. The teaching-learning activities (including assessment) in a particular module should be aligned to the intended outcomes of that module, resulting in what Biggs has coined as "constructive alignment".[72]

At the next level, the outcomes of different modules within the programme should be aligned so that a module builds on the one preceding it and in turn provides the foundation for the next module etcetera. Eventually this sequenced progression should result in development of the programme outcomes and graduate attributes. A whole-of-curriculum approach entails a deliberate and express exercise in setting up these linkages.

The approach is furthermore not limited to the modules constituting the programme, but also involves alignment with both the entry level and the exit routes of the programme. In other words, the first-year modules should be aligned to students' prior learning. In South Africa, this means in particular that outcomes within first-year modules must take careful note of the exit level outcomes of secondary schooling, which is the basis upon which most of our students enter legal education. Bridging this "articulation gap" between school and higher education has become an urgent imperative in all facets of tertiary education. At the exit level of the programme, there should also be a deliberate attempt to align outcomes (both those of final-year modules and programme outcomes) to the next stage in legal education, be that entry into practical vocational training or postgraduate study.

Apart from this vertical alignment, a whole-of-curriculum approach should also generate horizontal alignment. This means that a programme should not only be vertically aligned from its point of entry to its exit and everything in-between, but that a law programme should also take cognisance of other disciplines taught in other programmes parallel to law and to which law students are typically exposed. This type of alignment (again, deliberately and expressly) recognises that law is not taught in isolation from other disciplines, but as a course of study in higher education within a particular social context. In South Africa, this perspective is supported by the basic organisation of (higher) education in terms of section 4 of the National Qualifications Framework Act 67 of 2008 (the NQF Act), which postulates a "comprehensive system" of education for South Africa, creating "a single integrated national framework for learning achievements"[73] aimed at a single set of national development priorities. This is echoed in the sub-framework of the NQF focusing on higher education, the Higher-Education Qualifications Sub-Framework, which is aimed at "the establishment [of] a single qualifications framework for higher education to facilitate the development of a single co-ordinated higher education system".[74]

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[72] J Biggs & C Tang *Teaching for Quality Learning at University* 4 ed (2011) 95-110
[73] S 5(1)(a) of the NQF Act, also see s 7: "The NQF is a single integrated system …"
[74] Higher Education Qualifications Sub-Framework GN 648 in *GG* 36797 of 30-08-2013 43

5 1 4   Co-ordination and co-operation

An integrated approach to teaching law self-evidently requires a break with atomistic approaches, which is arguably the paradigm in university legal education in South Africa.[75] The "Lone Ranger" theory of legal education was a term coined in 1981 in the United States, referring to a common understanding among law lecturers that "you do your thing in your course as long as I am permitted to do my thing in mine", an unwritten policy which leads to ignorance and a total lack of coherence between faculty members regarding the contents of the curriculum.[76] This paradigm influences both student and lecturer behaviour in legal education. From a learning (student) perspective, legal education is very much an individual activity. Paradigmatic assessment methods are individual assignments, tests and examinations. From a teaching (lecturer) perspective, law is largely taught by discipline experts within distinct and fairly isolated modules with each lecturer largely operating as master of his or her own module and with very little substantive engagement regarding teaching methodology and curriculum content between lecturers. Both these dimensions must be addressed in order to promote a more integrated approach.

5 1 4 1   Collaborative /Cooperative Learning

A broad definition of collaborative learning is: "a situation in which two or more people learn or attempt to learn something together."[77] The scale may vary from a pair, to a small group (three-five students) a class of 20 to 30, or an even larger group[78] but it is notable that a significant body of literature confirms that students "learn effectively, if not best, in small groups".[79]

Rockwood distinguishes cooperative learning from collaborative learning methodologies, in asserting that the former implies a focus on acquiring foundational knowledge, while the latter is based on the social constructivist theory. This theory posits the view that "knowledge is a social construct developed through the internalisation of social interaction".[80] In cooperative learning, the instructor typically is in a position of authority and answers are close-ended, often with a specific answer to be reached. In a collaborative learning situation, the instructor abdicates authority in favour of empowering

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[75] This view is based on our own experiences at various South African law faculties and on engagement with colleagues at a number of universities However, there is no empirical data to support such a view and as suggested in part 1 2 above, it is desirable to conduct a proper empirical study into teaching methodology in South Africa to establish exactly what current practices entail J Modiri "Transformation, Tensions and Transgression: Reflections on the Culture and Ideology of South African Legal Education" (2013) 24 *Stell LR* 455 458, 462

[76] R Cramton "Change and Continuity in Legal Education" (1981) 79 *Michigan LR* 400 469

[77] P Dillenbourg "What Do You Mean by Collaborative Learning?" in P Dillenbourg (ed) *Collaborative-learning: Cognitive and Computational approaches* (1999) 1-19

[78] 2

[79] B Dick, L Godden, K Healy, MJ LeBrun, G Airo-Farulla & D Lamb "A Case Study of the 'Offices' Project (Teacher-less, Cooperative Learning Groups) at Griffith University: Implementing Educational Theory" (1993) 4 *Legal Educ Rev* 273 283 (cf also D Jacques *Learning in Groups* 2 ed (1991))

[80] Bitzer (2001) *SAJHE* 99

the group to address more open-ended, complex tasks.[81] Developing an understanding of the dynamics of group processes and negotiating skills can be integrated as supplementary learning objectives. Reflecting on the group process, negotiating a group constitution, or drafting rules of conduct, offer further life-skill learning opportunities.[82]

Examples of cooperative learning exercises used successfully in law schools around the world are: group-led seminars, in which groups prepare materials to teach interactively to the rest of the class; research syndicates to prepare written research reports (Monash University); "teacher-less" cooperative learning "offices" (Griffith University);[83] syndicates that prepare material for presentation at seminars and tutorials[84] (Adelaide University); "houses" comprising students and one teacher, organised as a law firm in an experiential learning approach (CUNY); peer tutoring groups; and seminar-style teaching (University of Sydney).[85]

The beneficial opportunities offered by collaborative learning include: enhancing students' problem-solving skills and their high-level thinking skills such as analysis, synthesis and evaluation; learning to articulate and justify their own opinions; and developing critical skills to challenge opposing views, especially where the task is "complex and conceptual".[86] On an affective level, the exposure of students to diverse perspectives and styles of learning, and the reduction of levels of competitive individualism often prevalent in a law school environment are desirable possibilities.[87] It is asserted that group learning may be more responsive to students who have learning styles that disadvantage or marginalise them in a competitive environment, such as women and students whose cultures value collective and cooperative activity.[88]

Enhancing students' self-confidence, developing their inter-personal, communicative, listening and negotiating skills, as well as promoting their relationship-building skills are becoming increasingly important demands made on educational programmes. These attributes, if achievable, improve graduates' chances of employability in the legal profession and in other working environments.[89] Professional skills, including reflective judgement and self-and peer monitoring particularly are valued outside of the university. In addition, the development of the skills of evaluation and judgement of self and peers and metacognitive awareness are likely to encourage students to

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[81]   HS Rockwood III "Cooperative and Collaborative Learning" (1995) 4 *The National Teaching and Learning Forum* 8 8-9
[82]   Dick et al (1993) *Legal Educ Rev* 283
[83]   279
[84]   274
[85]   K Anker, C Dauvergne, M Findlay & J Millbank "Evaluating a Change to Seminar-Style Teaching" (2000) 11 *Legal Educ Rev* 97 97
[86]   GF Hess "Heads and Hearts: The Teaching and Learning Environment in Law School" (2002) 52 *J Legal Educ* 75 94
[87]   94
[88]   S Bryant "Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession" (1993) 17 *Vt L Rev* 459 476-478
[89]   S Kift "Lawyering Skills: Finding Their Place in Legal Education" (1997) 8 *Legal Educ Rev* 43 49

adopt "deep" learning strategies. Such strategies facilitate independent and self-motivated learning, as opposed to "surface" approaches.[90]

Le Brun and Johnstone highlight the fact that variations of small group learning can be effectively used during the large class lecture. Strategies such as "buzz groups", "pyramiding", "brainstorming" and mini-debates, three minute discussions, one minute essays, and pair participation in large classes are also effective means of breaking up a large class into smaller learning groups during a lecture.[91]

Assessment of group work is not uncomplicated, as the marks tend to be higher and reflect a smaller spread over a range of marks than assessment of individual work would produce.[92] Teachers are often reluctant to abdicate their control over the learning and to devote the amount of time required to design innovative and effective group-work projects. The "free rider" effect of students who do not contribute to the learning in a group is an inevitable possibility in cooperative learning exercises.[93] Time and perseverance are necessary to inculcate in students a culture of sharing of responsibility in groups, equal participation in constructing knowledge and effective management of group processes.[94]

5 1 4 2   Co-ordination and co-operative teaching

An integrated approach to legal education requires a significant degree of co-ordination across the programme. It is essential to map the outcomes of the programme across all modules in order to achieve the measure of integration and scaffolding that is envisaged in such an approach. This type of co-ordination is not restricted to matters of curriculum content (for example, what learning outcomes must be achieved in what modules), but extends to teaching methodology as well.

It is to be expected that such form of co-ordination will be met by resistance from law teachers on a number of grounds. Co-ordination inevitably involves extra work and stricter timelines to lecturers' teaching activities.[95] In a context where most university lecturers already feel overburdened by all the demands placed on them (of which producing research outputs is often considered the most pressing) it is only natural that lecturers will resist such further increases in workload.[96] However, lecturers may also feel out of their depth in taking responsibility for developing skills beyond their subject expertise.[97]

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[90] Dick et al (1993) *Legal Educ Rev* 286
[91] G Hess & S Friedland *Techniques for Teaching Law* (1999) 142-148
[92] A Greig "Student-Led Classes and Group Work: A Methodology for Developing Generic Skills" (2000) 11 *Legal Educ Rev* 81 83
[93] RE Slavin *Cooperative Learning: Theory, Research and Practice* 2 ed (1995) 19, quoted in A Sifris & E McNeil "Small Group Learning in Real Property Law" (2001) 13 *Legal Educ Rev* 189 190
[94] SL Rawson & AL Tyree "Self and Peer Assessment in Legal Education" (1989) 1 *Legal Educ Rev* 135 135
[95] Witzleb & Skead "Mapping and Embedding Graduate Attributes" in *Excellence and Innovation in Legal Education* 65
[96] See L Greenbaum "Teaching Legal Writing at South African Law Faculties" (2004) 15 *Stell LR* 1 4
[97] Robertson in *Excellence and Innovation in Legal Education* 111 (in respect of ethics); Greenbaum (2004) *Stell LR* 4, 7, 10-11 (in respect of writing skills)

It is significant, however, to note that very similar concerns emerge in a non-integrated approach to legal education where individual areas of law and skills are taught in isolation in distinct modules. For example, Simon notes that dedicated ethics teachers in freestanding professional responsibility modules in US law schools typically "worry about their credibility with their students. Their students aspire to be practitioners. The teachers do not … their knowledge of the circumstances of practice is limited".[98]

One way to counter these problems is to adopt more co-operative teaching strategies. Greenbaum thus notes that one of the key criticisms of the "legal skills movement" in the UK is the lack of co-operation between the legal profession and academics in developing graduates' skills.[99] It has accordingly been suggested that a more "imaginative integration" of skills in the curriculum is necessary "requiring unprecedented levels of co-operation and interaction between the profession and the academy".[100] One way in which practice[101] and the academy can be brought closer together in university legal education is through greater emphasis on authentic learning, to which we turn in the next section.

5 2   Authentic learning

Support for experiential forms of learning is one of the central themes in most recent literature on legal education.[102] The value of the methodology is that students are involved in tasks that reflect real-world ways of doing, in learning the way that knowledge and skills are used in practice.[103] This is in contrast to traditional forms of learning which emphasise the acquisition of decontextualised, abstract facts and procedures that are not easily transferred to real-life problem-solving contexts. Traditional approaches tend to ignore the interdependence of situation and cognition.[104]

One of the main threads running through the theory underpinning experiential learning is the notion of "authenticity", meaning the correspondence of learning to the world of practice that exists outside of the university.[105] Authentic learning is characterised by students participating in real-world, complex problem-solving activities, located in a learning environment that simulates as closely as possible the actual discipline context.

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[98] WH Simon "The Ethics Teacher's Bittersweet Revenge: Virtue and Risk Management" (2006) 94 *Geo L J* 1985 1985

[99] Greenbaum (2012) *Stell LR* 26

[100] A Boon "History is Past Politics: A Critique of the Legal Skills Movement in England and Wales" (1998) 25 *Journal of Law and Society* 151 151 Campbell argues along similar lines for "a mix of practice- and academic-orientated staff" in law faculties Campbell (2014) *Stell LR* 24

[101] Practice does not simply refer to the professions here, but more broadly to any form of legal service in a real-world context

[102] P Maharg *Transforming Legal Education: Learning and Teaching the Law in the Early Twenty-First Century* (2007); RT Stuckey *Best Practices for Legal Education: A Vision and a Road Map* (2007) 1; Sullivan et al *The Carnegie Report*

[103] S Bennett, B Harper & J Hedberg "Designing Real Life Cases to Support Authentic Design Activities" (2002) 18 *Aust J Educ Tech* 1

[104] J Herrington & R Oliver "An Instructional Design Framework for Authentic Learning Environments" (2000) 48 *ETR & D* 23 23

[105] K Barton, P McKellar & P Maharg "Authentic Fictions: Simulation, Professionalism and Legal Learning" (2007-2008) 14 *Clinical L Rev* 143 145

The essence of authentic learning is captured in the following design elements: relevance to real-world activities within the discipline (profession); problems that are complex and "ill-defined", or messy, requiring multiple approaches and interpretations; the use of multiple resources (which the students identify) and varied perspectives, including interdisciplinary approaches; sustained investigation demanding intellectual effort; an emphasis on collaboration and reflection; and integrated assessment that produces a "polished" end result and allows for a variety of possible solutions.[106]

Whilst clinical experiences, simulated mediation, negotiation or client counselling exercises, experiential learning scenarios, moots, mock trials and externships may serve to create authentic learning environments, it is becoming clear that online learning environments can provide the opportunity for many more students to participate in collaborative, authentic learning opportunities in virtual learning groups.

The types of technological support for authentic learning environments could include: high speed internet connectivity for providing multimedia information; social networking for supporting teamwork and collaborative knowledge construction; intelligent tutoring systems including feedback mechanisms to students and mobile devices for accessing data.[107]

Developing students' technological skills will no doubt enhance their career opportunities. Other benefits of authentic learning including teamwork, the ability to deal with ambiguity and develop solutions creatively, organising and evaluating multiple sources of information will equip them to deal effectively with solving real-life legal problems and develop professionalism.

5 2 1   Experiential Learning

Experiential learning theory (ELT) defines learning as "the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience".[108] Through the concrete experience, which learners observe and reflect upon, knowledge is conceptualised in the abstract and then actively applied. The ELT learning model suggests that students have different learning styles, determined by "hereditary equipment, (our) particular past life experiences, and the demands of (our) present environment", which manifest in preferred ways of choosing how to perceive new information. These may be by experiencing the concrete through abstract conceptualisation, reflective observation or active experimentation.[109]

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[106] TC Reeves, J Herrington & R Oliver "Authentic Activities and Online Learning" (2002) *Annual Conference Proceedings of Higher Education Research and Development Society of Australasia*, Perth, Australia *HERDSA* <http://www herdsa org au/wp-content/uploads/conference/2002/papers/Reeves pdf> (accessed 06-08-2014)

[107] MM Lombardi *Authentic Learning for the 21st Century: An Overview* Educause Learning Initiative Paper 1 (May 2007) 7

[108] DA Kolb *Experiential Learning: Experience as the Source of Learning and Development* (1984) 41

[109] DA Kolb, RE Boyatzis & C Mainemelis "Experiential Learning Theory: Previous Research and New Directions" in RJ Sternberg & LF Zhang (eds) *Perspectives on Cognitive Learning and Thinking Styles* (2000) 1 3

Aligned to his inventory of learning styles, David Kolb developed his theory of a four stage learning cycle that moves from (i) concrete experiences, which are the basis for (ii) observations and reflections, which are assimilated and distilled into (iii) abstract concepts, from which new implications for action can be drawn, and leads to (iv) abstractions which are actively tested, to serve as guides in creating new experiences.[110] This representation of authentic knowledge-construction accommodates the different styles of learning, and engages students in active and deep learning, provided the task is thoughtfully structured and feedback is given at each stage of the learning. As Kift explains, since experiential learning is a holistic integration of experience, perception, cognition and behaviour, the "links between the doing and the thinking" stages are important in maximising the benefits of the cycle to students.[111] As discussed above, activities such as role plays, moots, mock trials, simulation-based courses, law clinics and externships fall within the ambit of experiential learning, but all require the essential step of debriefing to ensure that real learning takes place.

Justifications for experiential learning include research that shows that the brain functions holistically, enabling people to make sense of the world by generating and calling forth patterns to deal with experience and is therefore preferable to traditional linear, step by step learning of fragments of subjects.[112] Donald Schön propounds the view that knowledge gained from experience is the most useful knowledge for professionals. "Reflection-in-action" enables professionals to deal with complexity, uncertainty and value conflict, which can be effectively simulated during the experiential learning process.[113]

The *Carnegie Report* noted that practical courses in lawyering and clinical-legal education, built around simulations of practice or actual client experiences in clinics contribute importantly to responsible professional training, as well as teaching students how to connect abstract theoretical doctrine with "fuller human contexts".[114] Stuckey in *Best practices for legal education: A vision and a roadmap* opines that experiential education "integrates theory and practice by combining academic enquiry with actual experience".[115] Examples of experiential learning exercises drawn from American law schools include: course-long simulations; simulations led by practising attorneys; case arguments, in which students play a lawyer role, presenting the arguments for one of the litigants; students acting as judges; negotiation exercises; negotiation and drafting of contracts; trial advocacy simulations; and interviewing and drafting for estate planning.[116]

In the context of South African legal education, Kruuse describes a pilot project implemented at a law faculty in the teaching of a legal ethics

[110] Kolb et al "Experiential Learning Theory" in *Perspectives on Cognitive Learning and Thinking Styles* 3
[111] Kift (1997) *Legal Educ Rev* 50-51 quoted in K Anker et al "Evaluating a Change to Seminar-Style Teaching" (2000) 11 *Legal Educ Rev* 97 100
[112] Hess & Friedland *Techniques for Teaching Law* 106-107
[113] DA Schön *The Reflective Professional: How Professionals Think in Action* (1983) 3-69
[114] Sullivan et al *The Carnegie Report* 178
[115] Stuckey *Best Practices for Legal Education* 165
[116] Hess & Friedland *Techniques for Teaching Law* 197-222

course.[117] She used a multi-stage role-play as a form of simulation to enable students to experience different perspectives (attorney, court, law student/ bystander) in the decision-making points that are experienced in a civil suit.[118] The simulation was based on materials used at Georgetown University, in Washington DC.[119]

The benefits of experiential learning include deepening students' understanding of concepts and principles, demanding active participation by the students in their learning, developing skills needed as professionals, supporting the integration of theory and practice, and increasing students' motivation through the experience of working in real-life roles.[120]

As desirable as experiential learning may be, difficulties such as resource constraints, the designing and implementation of such labour and time-intensive learning opportunities and the difficulty of assessment may act as deterrents. The introduction of a simulation into a substantive law course will most likely reduce the amount of doctrinal content that may be covered, while the giving of feedback, the developing of students' skills of reflection and judgement and the preparation of appropriate materials demand a high degree of expertise on the part of the lecturer.[121]

5 2 2   *Clinical legal education*

Although there is no single definition of clinical legal education in the literature, there is agreement that the term is wider than clinical method. A useful working definition is: "lawyer-client work by law students under law school supervision for credit towards the law degree," which emphasises three essential elements: actual client involvement; supervision of the students by the university; and academic credit for the work done.[122] Steenhuisen describes it as "a broad process aiming at change and restructuring of institutionalised legal education and a philosophy about the role of lawyers in society."[123] The factor, which distinguishes clinical education from other methods of skills training in legal education, is the use of "actual experience of the legal process as the educational core."[124] It aims to integrate substantive knowledge, skills training and the development of ethical judgement. Its contribution to transformative legal education is in the possibilities it holds for sharpening students' sensibilities to the context of South African society, enhancing access to justice for disadvantaged and vulnerable members of society and promoting the goals of social justice. At some law schools at certain times, law reform units have been established, to focus on important issues such as

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[117] H Kruuse "Substantive Second-Level Reasoning and Experiential Learning in Legal Ethics" (2012) 23 *Stell LR* 280 280
[118] Hess & Friedland *Techniques for Teaching Law* 290
[119] 289
[120] 108
[121] 194
[122] CLEPR definition, quoted in W de Klerk "University Law Clinics in South Africa" (2005) 122 *SALJ* 929 929 n 2
[123] E Steenhuisen "The Goals of Clinical Legal Education" in W De Klerk (ed) *Clinical Law in South Africa* 2 ed (2009) 265
[124] De Klerk (2005) *SALJ* 937

HIV-AIDS and land redistribution, and a vibrant Street Law programme has had success in serving an educational and social responsiveness function in communities beyond the confines of the law school. In response to a recent survey, several clinics reported that funding constraints prevented them from engaging in activities that promoted access to justice, but despite this, at some universities students have undertaken community education and advocacy work related to child law, debt counselling and class action litigation on behalf of communities.[125]

Clinical teaching methodology, characterised as an interactive approach, may be utilised in a variety of educational activities including in-house live client clinics, externships, community education projects, simulation courses and other skills training courses.[126] One of the key aims of clinical education is the development of students' analytical skills through the cultivation of critical judgement. Being able to identify relevant facts and applicable law, developing strategy and tactics for decision-making in situations of uncertainty and reflecting on the integration of them are desirable outcomes which align with several of the exit level outcomes of the LLB as required by SAQA.[127]

Clinical legal education has the potential to expose students to the challenges of identifying and addressing professional ethical dilemmas in real life situations involving clients, for example confidentiality, professional privilege and conflicts of interest. The Australian experience has been to experiment with a number of variations of clinical education, focussed mainly on developing students' ethical awareness and promoting an interest in public interest lawyering.[128] At the Murdoch Law School Clinical Programme, the clinical supervisors adopted a rights-based methodology in an attempt to foster a commitment to "fundamental human rights as an important principle of any legal practice."[129] However, ongoing tension between the interests of clients, the students' learning objectives and the nature and extent of supervision by clinic attorneys has been an issue of contention.[130] This tension between expectations relating to service to clients and educational outcomes can give rise to unsatisfactory results on both sides of the student-client advice transaction.

In the US context the *Carnegie Report* also placed emphasis on educational programmes that utilise clinical methods to develop students' ethical consciousness.[131] Recent American experience relating to the type of clinical supervision that is required for effective clinical legal education has sparked a debate around the centrality of the role of a practitioner academic, trained

[125] Surveys from a study conducted by P Maisel, K Tokarz, S Mohamed, M Jain (2014) on file with the authors
[126] P Maisel "Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa" (2006) 30 *Fordham Int L J* 374 378
[127] Steenhuisen "Goals of Clinical Legal Education" in *Clinical Law in South Africa* 265
[128] J Giddings "Contemplating the Future of Clinical Legal Education" (2008) 17 *Griffith L Rev* 1 12
[129] M Kenny & A Copeland "Clinical Legal Education and Refugee Cases: Teaching Law Students about Human Rights" (2003) 25 *Alternative L J* 252 253
[130] Giddings (2008) *Griffith L Rev* 1
[131] Sullivan et al *The Carnegie Report* 121

specifically in supervisory skills, or a practitioner in the profession.[132] Programmes based on externships in a professional setting have proved to be as effective in developing students' practice skills, while having the advantage of making clinical experiences available to more students.[133]

In most jurisdictions, obstacles to the extension of clinical teaching are resource implications and institutional resistance. "Financial sustainability, large student numbers and limited training time in a student's curriculum" are cited as general challenges facing university law clinics.[134] Clinical law teachers are often not regarded as full members of the academic staff which impacts on the retention of skilled clinicians, and in many cases, a lack of capacity for teaching in clinics by academic staff members serves to discourage curriculum reform that would require all students to complete a clinical law course.

De Klerk points out that despite the unquestionable benefits of clinical legal education and its experiential teaching methodologies, it remains on the periphery of LLB teaching, being limited to stand alone courses, typically in the final year of the degree.[135] The integration of clinical teaching within substantive law courses in the mainstream curriculum, where appropriate, would effectively promote the teaching of skills in a context of knowledge acquisition.[136]

6   ICT and legal education

TLE brings home to the law teacher that the digital revolution of the last few decades holds profound implications for all bodies of knowledge and thus any teaching-learning context. It is, however, not only the teaching-learning context that is influenced by information and communication technology (ICT), but also legal services. ICT thus has a double impact on legal education. Law teachers must engage with ICT in order to design effective teaching-learning activities for their students, but also in order to prepare them for a professional life that is highly influenced by ICT.[137] A pedagogy of law must therefore engage with ICT.

As with most of the issues discussed above there is a vast and rich literature on the use of ICT in (higher) education under the broad topic of e-learning. E-learning can generally be described as "the use of computer network technology, primarily over an intranet or through the Internet, to deliver information and instruction to individuals".[138] Our intention is not to engage

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[132] DR Givelber, BK Baker, J McDevitt & R Miliano "Learning through Work: An Empirical Study of Legal Internships" (1995) 45 *J Legal Educ* 1 34

[133] S Maher "No Easy Walk to Freedom" (1992) 1 *DCL Rev* 243 246

[134] I Swanepoel & N Bezuidenhout "The Institutionalisation of Community Service and Community Service Learning at South African Tertiary Education Institutions: Specific Reference to the Role of the University Law Clinics" (2012) 45 *De Jure* 46 58

[135] De Klerk (2005) *SALJ* 948

[136] 948

[137] See C Dunham & SI Friedland "Portable Learning for the 21st Century Law School: Designing a New Pedagogy for the Modern Global Context" (2008-2009) 26 *J Marshall J Computer & Info L* 371 372

[138] ET Welsh, CR Wanberg, KG Brown & MJ Simmering "E-learning: Emerging Uses, Empirical Results and Future Directions" (2003) 7 *International Journal of Training and Development* 245 246

with e-learning generally here, but only to note the particular uses of ICT in legal education that are of direct relevance to formulating pedagogies of law in South Africa and to highlight the implications of ICT on legal services that necessitate an engagement with ICT in legal education.[139]

6 1   The use of ICT as a teaching-learning tool in law

There can be little doubt that simply adding technology to instruction does not result in any particular pedagogical benefits. In fact, there are now a number of studies that have shown that the use of technology by students in traditional lecture-type teaching, such as typing notes on a laptop, may be detrimental to learning.[140] The key to the use of ICT in teaching that will support learning is to align the functions of ICT to a specific purpose in the teaching methodology. A good way to achieve this is by means of blended learning.

Blended learning refers most commonly to the combination of traditional forms of teaching-learning, such as face-to-face classroom sessions, with e-learning.[141] Oliver & Trigwell point to one of the key potential benefits that blended learning can bring about, namely that "[b]lends of e-learning with other media may make it easier to help students experience the variation in the critical aspects of the topic being learnt".[142] As noted above, within a constructivist learning theory it is students' engagement with a variety of perspectives and their attempts to integrate these into their existing experiential schemata that support learning. For effective use of ICT in legal education it thus becomes imperative to consider what particular variation in experiences can be achieved by blending technology-mediated engagement and face-to-face engagement. In an important sense a blended-learning approach to the use of ICT in legal education echoes the objectives of integration raised in part 5 1 above. Here the focus is on the integration of various teaching-learning modes: face-to-face, virtual, synchronous and asynchronous.

There is evidence in the literature of various ways in which a blended-learning design can optimise the use of ICT's strengths to support legal education. One promising method is the use of podcasts as a replacement for traditional lecturing of content knowledge. It has often been noted, also in the context of legal education, that lecturing is not the most effective teaching method.[143] One of the primary problems with lecturing is that it forces students into a largely passive role, something that is exacerbated by ever-

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[139] For extensive bibliographies on the influence of ICT on legal education up to 2008 see P Goldman "Legal Education and Technology: An Annotated Bibliography" (2001) 93 *Law Library Journal* 423 and P Goldman "Legal Education and Technology II: An Annotated Bibliography" (2008) 100 *Law Library Journal* 415

[140] PA Mueller & DM Oppenheimer "The Pen is Mightier than the Keyboard: Advantages of Longhand over Laptop Note Taking" (2014) 25 P*sychological Science* 1159 1159-1168

[141] M Oliver & K Trigwell "Can 'Blended Learning' be redeemed?" (2005) 2 *E-Learning* 17 18; AD Crocker "Blended learning: A New Approach to Legal Teaching in South African Law Schools" (2006) 31 *JJS* 1 3

[142] Oliver & Trigwell (2005) *E-Learning* 23

[143] See Stuckey *Best Practices for Legal Education* 171; A Paliwala "Socrates and Confucius: A Long History of Information Technology in Legal Education" in A Paliwala (ed) *A History of Legal Informatics* (2010) 225 228

increasing student numbers.[144] However, even in a constructivist approach to teaching there is a need for some lecturing: that is, the explanation of material to students. There is very little use in students attempting to integrate new perspectives on a topic into their existing knowledge base if they do not adequately understand the new perspective, hence the need for explanation from the knowledgeable teacher. Podcasting creates the opportunity for such explanations to be delivered asynchronously in a format that can facilitate an active role by students.[145] A recording (either only audio or also with video) that effectively captures bite-size lectures can be combined with reading materials, inter-active online assessments (such as a quiz) and discussion forums to create a relatively active learning experience for students *and* allow for traditional lecture-type coverage of the materials. Such asynchronous tools can be combined with synchronous, face-to-face engagements in which higher order skills can consequently be developed on the basis of the materials already covered via ICT. This seems to be a good blend for legal education as it facilitates problem-based learning without unduly sacrificing engagement with the content of the law.[146]

The use of ICT in legal education thus creates the scope for more attention to the development of higher order thinking skills, such as critical analysis, creativity and argumentative skills, which are key attributes for law graduates. These skills are most effectively developed through synchronous and face-to-face engagements.[147]

Another key benefit that podcasting can bring to legal education is its potential to support second-language learners. As noted in part 3 above the fact that many contemporary South African law students study in a language other than their first language poses particular challenges for legal education given the strong literary basis of the discipline. The evidence that podcasts can meaningfully support such students is thus a further reason for their use in legal education.[148] Guertin for example reports on a number of studies that have analysed student use of lecture podcasts and found that the ability "to control the pace and frequency of listening to course content" was especially valuable to those studying in a non-first language who may have missed content in class because of language difficulty.[149]

The use of multimedia in teaching activities enables law teachers to situate learning in a contextual setting. At the most basic level, the use of multimedia makes the highly abstract notions of law more real for students.[150] This makes

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[144] Crocker (2006) *JJS* 4-5

[145] D Butler "Technology: New Horizons in Law Teaching" in S Kift, M Sanson, J Cowley & P Watson (eds) *Excellence and Innovation in Legal Education* (2011) 459 469; J Ireland "Blended Learning in Intellectual Property: The Best of Both Worlds" (2008) 18 *Legal Educ Rev* 139 143

[146] Ireland (2008) *Legal Educ Rev* 143

[147] K Parish "Flexible, Blended and Intensive Learning in Law" in S Kift, M Sanson, J Cowley & P Watson (eds) *Excellence and Innovation in Legal Education* (2011) 428 440

[148] LA Guertin "Creating and Using Podcasts Across the Disciplines" (2010) 2 *Currents in Teaching and Learning* 4 6; Butler "Technology: New Horizons" in *Excellence and Innovation in Legal Education* 466 and in respect of the benefits of ICT for second-language students more generally see Crocker (2006) 31 *JJS* 4, 6

[149] Guertin (2010) *Currents in Teaching and Learning* 6

[150] Butler "Technology: New Horizons" in *Excellence and Innovation* 472

the formation of connections with existing and real-world experiences more likely with consequent increased potential for learning. Beyond the simple connections to concrete objects, the use of multimedia can also bring the real-world context of a particular legal rule or case to the fore.[151] For example, by showing students a video of the implications of particular legal rules, especially in a social context, the message of the contextual nature of that rule and law in general is emphasised. Take for example an engagement with evictions law. The learning experience is very different when students study the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 in class, looking at the text of the Act and discussing its implications compared to watching a video of people's homes being demolished in the middle of the Cape winter, with all their belongings ending up in the rain. The likelihood that students will consequently engage with the rule in a purely abstract manner is considerably less. Likewise, confronting students with the real-world story behind a particular case in multimedia format can be a powerful instrument in facilitating engagement with the contextual nature of law and harness the "cognitive power of storytelling".[152] ICT thus makes it possible for law teachers to incorporate carefully designed real-world contexts into the learning process in a manner which is very difficult (if not impossible) to achieve in any other way. ICT can thus help the law teacher to bring the real-world context to the class without the logistical challenges of taking the class to the real-world context.

The possibility to open legal education up to greater contextual influences by means of ICT also supports the pursuit of authentic learning in law. The challenges of providing all law students with truly authentic learning experiences and in particular clinical legal education can be eased through ICT. One of the leading scholars in this area is Paul Maharg,[153] who has experimented extensively with virtual training in law across a number of jurisdictions.[154]

Technological advances have made ever more authentic simulations possible in which students can act out real-world legal transactions. These range from highly open-ended simulations where students engage (asynchronously) in various legal services roles with a host of characters, managed by lecturers or tutors, to fairly structured simulations involving mostly forms and processes.[155] The structure of the simulation is closely connected to the subject matter at issue. Thus, in Maharg's experiments personal-injury law exercises called for

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[151] Paliwala "Socrates and Confucius" in *A History of Legal Informatics* 252

[152] Butler "Technology: New Horizons" in *Excellence and Innovation* 473

[153] A bibliography of Maharg's extensive writings on this topic is available at <http://paulmaharg com/publications> (accessed 01-09-2014)

[154] P Maharg *Transforming Legal Education* (2007) 176–203, 229–259; P Maharg & M Owen "Simulations, Learning and the Metaverse: Changing Cultures in Legal Education" (2007) 1 *Journal of Information, Law, and Technology* 1 7–17; M Rowe & M Murray "Teaching Professionalism Online – An Australian Professional Legal Education Experience" in F Westwood & K Barton (eds) *The Calling of Law* (2014) 181 183

[155] Maharg & Owen (2007) *Journal of Information, Law, and Technology* 7

open-ended simulations while conveyancing lends itself to a more bounded approach.[156] Maharg & Owen summarise their approach as follows:

"Our simulations site learners in a professional context, where there are aggregates of transactions, perhaps multiple solution paths, and where learners' work is, as it will be in the workplace, distributed between tools, colleagues, resources, anticipated and unanticipated problems and individual constructions of knowledge and experience."[157]

Similar experiments in designing virtual authentic learning experiences for law students have been done with success elsewhere.[158] These experiments are not restricted to typical law firm simulations, but have explored other contexts of legal services such as legislative drafting or political processes as well.[159]

The value of this approach within legal education in support of authentic, experiential and contextual learning should be apparent. ICT now offers a viable alternative to real-world clinical training without a loss of the important authentic quality of learning in the clinical environment.[160] As such ICT puts a clinical experience within the reach of all law students.[161] These simulations furthermore expand the scope of authentic learning in law beyond what is feasible in an actual clinical setting. As noted, contexts of legal services that cannot viably be taught in real clinical environments, such as legislative drafting for example, and fields of law firm practice that cannot be accommodated in the traditional university law clinic (such as mergers and acquisitions or maritime law for example) can be successfully simulated with use of ICT.

Maharg & Owen note a further potential of such an approach, which is also highly significant for our purposes. They note the possibility of integrating other disciplines within their virtual world so that law students can interact with a range of professions in effecting legal transactions.[162] This holds significant potential for training in different disciplines "to develop links and liaisons with each other, and to practise the collegiality, networking, values-building and community-building within and between professions that exists within actual workplaces".[163] ICT opens up the possibility of offering students

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[156] 7

[157] 14

[158] See S Kift, D Butler, R Field, J McNamara, C Brown & C Treloar *Curriculum Renewal in Legal Education* (2013) 75-76; S Kift, D Butler, R Field, J McNamara, C Brown & C Treloar *Capstone Experiences Toolkit* (2012) 73–75, 86–88; I van Haaren-Dresens "Students as Legislators: Simulating the Making of an Act of Parliament by Collaborative Electronic Learning" (2004) 38 *The Law Teacher* 202 202; L Quanjel-Schreurs, T Starren-Weijenberg, C Aretz & N van der Meer "A Digital Training Programme for Advocacy" (2002) 36 *The Law Teacher* 15 15; P Maharg "Sea-change" (2011) 18 *International Journal of the Legal Profession* 139 151; Rowe & Murray "Teaching Professionalism Online" in *The Calling of Law* 182; AJ Muntjewerff "ICT in Legal Education" (2009) 10 *German Law Journal* 669 669 See also the work of the Democracy Design Workshop at New York Law School *DoTank* <http://dotank nyls edu/> (accessed 02-09-2014), which includes several experiments in the use of virtual worlds in legal education

[159] Van Haaren-Dresens (2004) *The Law Teacher* 202; AW Heringa *Legal Education* (2013) 84-85

[160] Kift et al *Curriculum Renewal in Legal Education* 76; Rowe & Murray "Teaching Professionalism Online" in *The Calling of Law* 183

[161] This should not be seen as an argument for replacing actual law clinics and the clinical experience that they provide to law students with virtual experiences As noted in part 5 2 2 above, clinical training is a key part of TLE pedagogy in South Africa The argument is rather for an expansion of the clinical experience by adding more such training with the use of ICT

[162] See also J Priddle, P Maharg, P McKellar & D Lysaght *Simshare: Project Final Report* (2010) 26-27

[163] Maharg & Owen (2007) *Journal of Information, Law, and Technology* 14

an authentic *and* interdisciplinary learning experience, which can greatly
enhance the learning experience.

A final benefit that may be gained from the use of ICT simulations to deliver
authentic learning experiences in law is the efficiencies that it may generate.
If the design of these types of ICT tools is approached on an open-source
and sector-wide basis, the development costs will be significantly reduced
for individual institutions. Pilot projects such as the SIMPLE and Simshare
projects in the UK and Australia have shown how virtual tools can be created
and placed on a repository in a way that enables individual lecturer-users to
tailor the resource to their own needs.[164] In the South African context this can
be a significant advantage in delivering clinical learning experiences where
resources are not evenly spread across the sector.

All these ICT-enhanced teaching strategies hold the potential to move legal
education closer to an emerging paradigm of learning and knowledge that
is multidirectional and fluid and which facilitates emphasis on the relational
dimension of both the learning and the knowledge. This is a much richer
and more contextual learning experience with a promise to also effectively
engage the Google generation.[165] The above-mentioned examples of blended
learning in law can be viewed as the beginning of careful integration of ICT
in legal education that can move legal education away from what Dunham &
Friedland have described as "a stationary and linear endeavour, much like an
assembly line" in terms of which

> "[p]rofessors transferred information to students in classes, who in turn assembled the knowledge
> into an organised and useable form outside of class, often in a library or other 'study' place. This
> information was assimilated and utilized on the final exam and then warehoused for possible future
> use."[166]

In contrast e-learning, through podcasts and simulations for example,
facilitates much greater student control over their own learning, spreads
learning across a multitude of platforms and spaces and in multiple directions.
This can help to develop students into self-directed learners and support life-
long learning attitudes. It furthermore helps to break down power relationships
since it reduces the notion of control on the part of the teacher.[167]

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[164] Priddle et al *Simshare: Project Final Report* 7, 8, 11, 24, 25; Rowe & Murray "Teaching Professionalism
Online" in *The Calling of Law* 195-196

[165] Those born in the digital age and who have grown up with digital technologies are commonly referred
to as millennials, the digital-, Net- or Google generation or in Marc Prensky's evocative term "Digital
Natives", M Prensky "Digital Natives, Digital Immigrants" (2001) 9 *On the Horizon* 1 1 While there
are some that question the usefulness of attempting to group an entire generation into one class (see
generally M Thomas (ed) *Deconstructing Digital Natives* (2011)), there is now strong evidence that digital
immersion is much higher for a younger generation and that it is having a greater impact on them See
S Greenfield *Mind Change* (2014) 4-6, 26-28, 37-41 Greenfield (27) quotes fellow neuroscientist,
Michael Mezernich, who states: "There is thus a massive and unprecedented difference in how their
[Digital Natives'] brains are plastically engaged in life compared with those of average individuals from
earlier generations, and there is little question that the operational characteristics of the average modern
brain substantially differ"

[166] Dunham & Friedland (2008-2009) *J Marshall J Computer Info L* 373 (references omitted)

[167] 392

6 2   The implications of ICT in legal services for legal education

ICT has also had a far-reaching impact on how legal services are rendered. At the most simplistic level, the practice of law today is highly ICT based, like most other service sectors.[168] Sophisticated word-processing, electronic case management systems, email, video conferencing, all forms of databases, various electronic filing systems (such as regulatory filings, deeds processes and court filings) and the like are common features of most law practices. If law graduates are to be at least able to bring their graduate skills to bear in such an environment, if not yet proficient at doing so, they need to be exposed to ICT in legal education.[169]

Regardless of what type of legal service work law graduates pursue, they will have to possess a range of skills in ICT to function effectively. Developing these skills in legal education is also not merely a matter of getting students practice-ready through some form of vocational training. The impact of ICT on legal services is such that it touches the very notion of lawyers' role in society (in whatever position they find themselves). Du Plessis points out that lawyers are "knowledge workers", meaning that they stand in a particular expert relationship with information within a distinct body of knowledge.[170] Given the significant impact that ICT has had on dealing with knowledge generally, it follows that "[i]n the information era lawyers cannot claim to be knowledge workers without effectively using … ICT".[171] Hirsh & Miller bring home the generality of this point when they state:

> "No one technological innovation changes what it means to "think like a lawyer," but the information technology revolution is fundamentally changing how information moves in legal processes. Without a basic understanding of that fundamental shift, a new lawyer will be increasingly unable to understand how information flows in legal processes."[172]

The same reasoning applies to the impact of ICT on basic communication, so that anyone who claims to be proficient in rendering any form of legal service must have skills in ICT-mediated communication.[173]

A further important reality is that legal services are rendered in an increasing globalised world and South Africa is no exception. The tremendous expansion of legal services rendered from South African bases to the rest of the continent

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[168] See T du Plessis "Competitive Legal Professionals' Use of Technology in Legal Practice and Legal Research" (2008) 11 *PELJ* 32, 45-47; RM Bastress & JD Harbaugh "Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counselling, and Negotiating" (2003-2004) 10 *Clinical L Rev* 115 121-126; KJ Hirsh & W Miller "Law School Education in the 21st Century: Adding Information Technology Instruction to the Curriculum" (2004) 12 *Wm & Mary Bill Rts J* 873 874, 877-878; D Aganyo Owonga "LAWNET Initiative: A Case for the East African Legal Information Institute" (2003) 1 *The Journal of Information, Law and Technology* para 3 2

[169] This point returns to the question about the purpose of academic legal education raised above As we have noted, whatever the exact purpose, or combination of purposes, may be, it is unrealistic to think that such purpose can be entirely divorced from some preparation for legal practice (in whatever form) In the current context Hirsh & Miller put it well when they state (already ten years ago) that "the management of information through technology is one of the most important skills in the legal profession today, and legal education must begin to reflect that reality", Hirsh & Miller (2004) *Wm & Mary Bill Rts J* 880

[170] Du Plessis (2008) *PELJ* 40

[171] 40

[172] Hirsh & Miller (2004) *Wm & Mary Bill Rts J* 883

[173] Bastress & Harbaugh (2003-2004) *Clinical L Rev* 117

in recent years is one illustration of this trend. There can be no doubt that ICT plays a key role in this globalised legal services market. As Dunham & Friedland thus note

> "[i]ncreasingly, the legal profession is challenged to serve as a global force, providing structure and process for the complex world of the 21st century. Legal education should evolve to prepare lawyers to advance with the information era's intercontinental movement and operate effectively in the modern arena that spans the globe."[174]

The extension of the reach of legal services through ICT does not only offer opportunities beyond our borders, but also within. ICT offers novel ways to make legal services more broadly available within the country, especially to communities that would otherwise struggle to obtain legal assistance because of cost and geographical factors.[175] For legal professionals to maximise these opportunities they require ICT skills that go beyond the mere ability to do word processing or send an email. It requires a creative alignment of legal services and ICT.

The impact of ICT on legal services raised above points to the need for legal education to integrate ICT in such a way that law students become members of the legal community. As with the other dimensions of TLE, the notion of deliberate and express integration is of critical importance here. The influence of ICT and the challenges and opportunities that it brings to the legal profession are such that a process of osmosis, in which students incidentally pick up ICT skills for example by working on computers while engaging in essentially non-digital teaching-learning activities such as writing an essay, will not adequately prepare graduates for the world of work.

7   Challenges in implementing a TLE pedagogy in South Africa

It is beyond the scope of this article to explore the challenges that law faculties may face in implementing a TLE pedagogy in South Africa fully. One reason is that in the absence of thorough empirical evidence regarding the current "state of play" in legal education nationally, it is very difficult to engage properly in a discussion about challenges.

However, we do not want to create the impression that we are making these proposals about contours for a pedagogy of law in South Africa completely in abstract terms and in ignorance of the significant challenges that may impact on implementing such a pedagogy. In this section we thus note some of the issues that we consider may pose particular challenges in pursuing the type of pedagogy that we propose. We do not explore these matters in any detail nor do we suggest that these are the only challenges. We consider these issues to be urgent topics for further research.

A first, and perhaps most obvious, challenge is that of funding. Many of the teaching-learning interventions that we have proposed will have funding implications. At the same time legal education is funded at the lowest subsidy

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[174] Dunham & Friedland (2008-2009) *J Marshall J Computer Info L* 377 Also see Aganyo Owonga (2003) *The Journal of Information, Law and Technology* para 3 1
[175] Cf Bastress & Harbaugh (2003-2004) *Clinical L Rev* 156

level by government.[176] The LLB Summit of 2013 already noted this as a major concern and an issue requiring collective action.[177] In the larger landscape of higher education, all universities are being subjected to increased financial stringency measures as budgetary cuts are made from central government. [178]

Closely linked to the funding issue is the student-staff ratio. It is common knowledge that student-staff ratios are generally high in South African higher education[179] and it seems that the situation is even worse in legal education. As we have argued above, small-group teaching is the ideal (sometimes the prerequisite) in following the teaching methodology we propose. Skills-development in particular is very difficult to achieve with any great effect in large groups.

However, funding issues also touch on the historical legacy that still characterises the South African higher education landscape, even 20 years after the dawn of democracy. Historically black universities still do not have access to the same resources as historically advantaged universities. Adequately equipped libraries, access to an extensive array of legal databases and the provision of computers and internet access for all students are essential requirements for operationalising a vision of legal education going forward. The pursuit of the pedagogy that we propose across all legal education in South Africa will thus raise significant challenges in dealing with this historical legacy.

Our proposals about the integration of ICT in legal education relate to a particularly resource-sensitive area. On the one hand it must be acknowledged that not all South African universities have adequate ICT resources available to staff and students in order to effectively pursue these approaches.[180] Even where the institution has ICT resources to which students have access, e-learning may still pose significant challenges to students living off campus with little or no access to ICT hardware or the internet at home. Not only would high levels of e-learning place such students at a disadvantage compared to students living on-campus or with ICT resources at home, but it would also greatly increase their time-pressure as they will be forced to complete all e-learning tasks while on campus and before going home. Czerniewicz & Brown's research has furthermore shown that there are still significant numbers of students in South Africa whom they term "digital strangers", that is students that have had very little, if any, prior experience or opportunities in ICT.[181] The same can be said for many law teachers.[182] It thus cannot be

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[176] Minister of Higher Education and Training *Ministerial Statement on University Funding: 2013/14 and 2014/15* (2012) 4

[177] LLB Summit "The Road Ahead: Proposal Adopted" (29-05-2013) *LSSA* <http://www lssa org za/upload/RESOLUTION_Road%20Ahead_LLB_29%20MAY%202013 pdf> (accessed 21-07-2014)

[178] Higher Education South Africa (HESA): Presentation to the Portfolio Committee on Higher Education and Training, Cape Town, March 2014

[179] See CHE Task Team *Undergraduate Curriculum Reform* 146

[180] See L Czerniewicz & C Brown "The Habitus of Digital 'Strangers' in Higher Education" (2012) 44 *British Journal of Educational Technology* 1 2; I Moll, F Adam, J Backhouse & E Mhlanga *Status Report on ICTs and Higher Education in South Africa* (2007) 11-18

[181] Czerniewicz & Brown (2012) *British Journal of Educational Technology* 3

[182] Crocker (2006) *JJS* 15

assumed that these students or staff will naturally be in a position to engage in e-learning activities.

A different challenge is a perception of resistance to pedagogicalism by law teachers, that is, of grappling seriously with educational questions pertaining to their teaching practices. There is currently no uniform requirement for law teachers to have some training in education and the opportunities that do exist are largely sporadic, *ad hoc* and generic. There is accordingly a significant need to professionalise teaching in legal education and to encourage and incentivise staff development in relation to their teaching-learning function.

Shifting the focus to the student, we noted at the outset that there is currently an alarming articulation gap between secondary and higher education in South Africa.[183] We noted that the significant increase in higher education enrolment (and government's expressed intention to increase higher education participation levels even more) is a strategy to increase access to higher education and to promote diversity within the student body. However, we are aware that many universities are faced with unacceptably large classes, pressure on lecturing venues in which to teach such classes and unrealistic throughput targets. In light of the literacy levels of the majority of first time entering students in South Africa, and the past educational disadvantage experienced by a significant number of "first generation" students, exceptional demands are being made upon staff to address the legacy of a poor schooling system that is unlikely to improve in the near future. For many students the financial burden of affording a university education, difficulties experienced with the National Students Financial Aid Scheme (NSFAS) and other affective issues impact on students' success and retention rates.[184]

We also noted that the digital revolution is leading to new paradigms of knowledge and that a younger generation seems to be much more immersed in this new approach.[185] All these developments raise the challenge of knowing who our students are in classrooms that do not reflect a homogenous composition. It is very difficult to design effective learning opportunities for our students if we have no idea of their level of skills, what they bring to the classroom and their general learning experiences.

8   Conclusion and recommendations

Within the limited scope of this article and the desktop literature review we have undertaken, several key elements have emerged quite clearly. The necessity of a re-conceptualisation of legal education in light of the imperatives of transformative constitutionalism has become inevitable. In order to produce law graduates who are equipped to develop and participate in the new legal culture and the constitutional project, a reappraisal of the content, the design, the methodologies and the outcomes of legal education must be embarked upon. Innovative and creative thinking, informed by educational theory and

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[183] See part 3 above
[184] M Letseka & M Breier "Student Poverty in Higher Education: The Impact of Higher Education Dropout on Poverty" (2008*) HSRC Press* <http://www hsrcpress co za> (accessed 26-09-2014)
[185] See part 4 1 above

empirical research, must be applied to advance a vision of an integrated and context-sensitive pedagogy in law.

It is our contention that a co-ordinated impetus from SALDA possibly in conjunction with the Society of Law Teachers of Southern Africa (SLTSA), to promote and support national and regional co-operation and engagement on these issues that are of relevance to all law faculties could initiate such a process. A national meeting, broadcast through live-streaming, to share the outline of such a project could serve to draw in a wider audience of law teachers. The sharing of best practices and innovative materials through websites, and the facilitation of frequent seminars and colloquia focussed on strategies to achieve holistic and integrated teaching, would serve to support and disseminate collective understandings. Roadshows, or virtual workshops designed specifically for legal educators could be arranged. Short-term teaching exchanges across faculties would further facilitate the enhancement of teaching at a national level. Currently, in the areas of embedding legal writing skills and ethics, there are already some tentative moves to share approaches to integration, using comparative literature to inform these initiatives.

The enhancement of the status of teaching and learning, against a background of a traditional emphasis on doctrinal research in law, would signal to lecturers the concern and focus in higher education on improving student success. The availability of funding from the Department of Higher Education and Training and other sources, to enhance teaching development and professionalise teaching skills should be considered. Encouraging reflective practice on teaching activities, recognition for creative materials development, assessment design and curricular innovations could be achieved through the establishment of a national resource hub on the web, similar to the UK Centre for Legal Education (UKCLE), previously hosted at Warwick University. Collaboration among representatives from all law faculties who have an interest in legal education could be co-ordinated through this type of virtual forum.

Overall, there is a dire need for all stakeholders to recognise and support teaching expertise in legal education as a core characteristic of legal academia.

SUMMARY

Reform of legal education is currently a topic of debate in South Africa again. Reform in higher education can, however, be dangerous and counter-productive if it is driven purely by policy agendas and in the absence of sound pedagogical considerations. This contribution aims to add a pedagogical perspective to the debates about reform of legal education in South Africa. Drawing on our earlier work in this field, we sketch the broad contours of a legal pedagogy for South Africa. Although there has traditionally been reluctance by law teachers locally and in other countries to embark on engagement with educational theory, we would advocate that this is essential and inevitable if reforms are to be based on sound theoretical underpinnings and empirical evidence, instead of anecdotal views. We propose nothing more than a pedagogical framework and do not intend to present anything as prescriptive. Our approach is premised on transformative legal education (TLE) as developed by Quinot. Within the framework of TLE we argue for an integrated, coherent approach, which aims to integrate skills development with substantive law, various areas of law with each other and with broader contextual influences flowing from the South African reality within which legal education is grounded. This calls for a whole-of-curriculum approach with high levels of co-ordination and

co-operation within a law programme. We emphasise the importance of authentic learning and focus especially on experiential learning and clinical legal education. Finally, we consider the major role for the use of information technologies in teaching law in South Africa. Our recommendations are not without challenges with the lack of resources and the articulation gap between secondary and higher education as major concerns. While being realistic about the limitations imposed by these challenges we argue that a re-conceptualisation of legal education in light of the imperatives of transformative constitutionalism has become inevitable in South Africa.