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**TOPIC: CRITICAL EVALUATION OF THE PRACTICAL LEGAL
STUDIES PROGRAMME AT THE UNIVERSITY OF THE
WITWATERSRAND**

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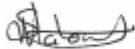
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DECLARATION

I, Shaheda Hassim Matomeel

declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



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This thesis is dedicated to:

My loving grandparents whose thirst for knowledge continues to inspire many,
my parents without whom this project would not have been possible
and of course to my loving husband Yousuf and absolutely inspiring daughter Yumna.
Thank you from the bottom of my heart for all your love, patience and unconditional
support throughout this amazing journey.

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CRITICAL EVALUATION OF THE PRACTICAL LEGAL STUDIES PROGRAMME AT THE UNIVERSITY OF THE WITWATERSRAND

ABSTRACT

Practical Legal Studies (PLS) — generically referred to as Clinical Legal Education (CLE) — is a compulsory final year course offered as part of the LLB degree, at the University of the Witwatersrand (Wits). PLS was informally introduced at the University in 1969 initiated by law students as a means to gain practical experience as well as in an attempt to address the social imbalances in South African society through legal intervention. Today, PLS is one of only two courses at the University of the Witwatersrand that accommodates learning through the integration of theory and practice. The literature on CLE/ PLS rejects the practice that PLS be accommodated as an ‘isolated’ course within the law school curriculum but rather promotes that it be considered as a teaching methodology contemporarily referred to as experiential learning. Experiential learning promotes a teaching formula that comprises the integration of theory, practice and reflection. Furthermore, the CLE literature encourages and promotes that this formula be integrated into the entire legal curriculum.

This thesis reviews the theory of learning, explores contemporary literature on CLE, provides a critical reflection on the goals, curriculum and teaching methodology attached to PLS at Wits and considers the potential integration of PLS methodology into mainstream LLB and LLM courses at Wits.

The thesis thus uses the case study of PLS at Wits to argue that CLE as a teaching methodology is not capitalised to its maximum potential in South Africa. If, and when, PLS is seen as an instance of a broader teaching methodology to be adopted by the Wits Law School, PLS as an ‘isolated’ course will no longer continue, as the clinical methodology will be incorporated into all mainstream LLB and LLM courses.

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CHAPTER 1

INTRODUCTION

“There is a new generation of students, and we need to continue to expose them to the profession and make an effort to help them be more well-rounded to help them think, to learn to be lawyers, to understand ethics, to work through the realities of having a professional role and having their own personal appreciation about what is important to them.”¹

1.1 MOTIVATION AND SIGNIFICANCE OF THE DISSERTATION

On a global scale, the present century continues to witness changes in teaching practices within law schools.² As a response to the global economic crisis, to pressures from the legal profession, and to demands from students of an evolving generation³, traditional methods of teaching within law schools are being challenged.⁴ In South Africa the situation is no different, in fact even more so since the transition from an apartheid led

¹ Jill Schachner Chanen ‘Re-engineering Schools across the country are teaching less about the law and more about lawyering’ (2007) *ABA Journal* July 42.

² John O. Sonsteng ‘A Legal Education Renaissance: A Practical Approach for the Twenty-First Century’ (2007) Legal Studies Research Paper Series 6-13 (<http://ssrn.com/abstract=1084098>) accessed on 10 November 2009. Also see: Lord Chancellor’s Advisory Committee on Legal Education and Conduct 1-157 at www.ukcle.ac.uk/files/downloads/407/165.c7e69e8a.aclec.pdf; accessed on 10 November 2009.

Recommendations proposed by the Council for Higher Education (CHE) 2010 in a power point entitled The LLB Curriculum Project Colloquium (unpublished copy with author); Stanford Law School ‘A “3D” JD: Stanford Law School Announces New Model for Legal Education’ 28 November 2006 available at <http://www.law.stanford.edu/news/pr/47> accessed on 31 May 2012. Also see The National Jurists ‘Chicago-Kent, Gonzaga and the University of Detroit Mercy are just sampling of schools reinventing the law school model’ available at <http://www.nationaljurist.com/content/most-innovative-law-schools> accessed on 5 August 2012. Also see document written by the Task force on Professional Skills Education ‘Curricular Innovations in other Law Schools’ 29 March 2010 (unpublished copy with author)

³ See discussion led by Mrs Ingrid Hoffman at National Legal Education Liaison Committee (NLELC) meeting 4 November 2010 at page 7 (copy with author).

⁴ David McQuoid-Mason ‘Clinical Legal Education: its future in SA’ (1977) 40 *THRHR* 343 – 358. In 1977 McQuoid-Mason highlighted the conflict between what law schools teach versus the needs of students and the legal profession alike. At pg 344 the author stated that, “The universities have been accused by academics of “dull uniformity” in their curricula and promoting the “worship of antiquity and rich man’s law”. Similar accusations have been made by law students, although the latter also join the practitioners in their complaint that the universities ignore many courses which are relevant to legal practice, and neglect practical training altogether.”

government to democracy- required traditional teaching methods within law schools to be reconsidered in order to address the inequalities of the past.

Traditional law school teaching concentrates on teaching students through either the theory of case law, dictation or the Socratic teaching practices⁵. Many propose that this is not enough.⁶ In their view, as in many other disciplines⁷, law students' learning cannot take place in isolation but rather learning should comprise theory, practice and reflection.⁸

In response to these challenges a number of law schools are attempting to offer a more balanced curriculum that embraces both doctrinal law as well as practical skills.⁹ Practical skills at law schools are generally taught through limited courses for example in Clinical Legal Education (CLE).¹⁰ Therefore, as a response to the need to develop a balanced curriculum several universities have shifted their focus on the skills offered through CLE.¹¹ In light of this, the literature on CLE has developed significantly over the last century.¹²

Motivated by this, the idea to research and write this thesis was inception. In South Africa (in fact in Africa) little is written and published on CLE, unlike the developments

⁵ Sonsteng op cit note 2 at 16 where Sonsteng defines the Socratic method as "The Socratic method of instruction engaged students in continual conversation and required them to distill the applicable rule of law from superfluous facts of a case. The method motivated students to reason rather than recite."

⁶ Ibid at 1-157. Also see Kate O' Regan 'Producing competent graduates: The primary social responsibility of law schools' (2002) 119 *SALJ* 242. Also see Willem De Klerk 'Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model' (2005) 39(2) *De Jure* 244- 251. See C.F. Swanepoel, M. Karels and I. Bezuidenhout 'Integrating theory and practice in the LLB curriculum: Some Reflections' (2008) *JJS* (special edition) 100- 111. See Stuckey R *Best Practices for Legal Education — A Vision and A Road Map* (2007) 1-287.

⁷ Chanen op cit note 1 at 42.

⁸ Jonny Hall & Kevin Kerrigan (2006) 'Clinic for all' 1-2 (unpublished copy with author). Published version Jonny Hall & Kevin Kerrigan 'Clinic and the wider law curriculum' (2011) *International Journal of Clinical Legal Education* 25 – 37.

⁹ For specific examples see chapter eight. Also see Peggy Maisel & Lesley Geenbaum Introduction to Law and Legal Skills(2002) Butterworths 1- 238.

¹⁰ Other examples of practical courses offered are Moot Courts and Alternative Dispute Resolution where students engage in simulation exercises and role play exercises.

¹¹ Willem De Klerk 'University Law Clinics in South Africa' (2005) 122(4) *SALJ* 929 at 947 where the author notes "There is an increasing demand for the law degree to be made more practical, yet clinical legal education remains on the fringes of legal education."

¹² See Neil Gold & Philip Plowden 'Clinical Scholarship and the development of the global clinical movement' in Frank Bloch (ed) *The Global Clinical movement — educating lawyers for social justice* (2011) 311- 321. Literature on CLE has developed in larger quantities internationally particularly in United States of America, United Kingdom and Australia. In South Africa literature on CLE remains limited.

internationally.¹³ This is partly due to the fact that in South Africa there has always been little expectation for clinicians to produce scholarship, as at most South African universities clinicians are not considered as academics, but rather as administrative staff.¹⁴ Thus, there is less of a responsibility placed on them to produce scholarship; unlike the responsibilities cast on their academic counterparts.¹⁵ Partly as a result thereof, the thinking around the potential of South African clinical programmes remain relatively underdeveloped.¹⁶ It is hoped that this dissertation will provide support for the advancement of clinical jurisprudence in South Africa as well as to assist with the advancement of other clinical programmes on our continent. In order to do so, the thesis will first address two fundamental matters which include identifying the theoretical justification which underpins the study of law through the clinical methodology and tracing the contemporary understanding of CLE.

As a consequence of the limited local jurisprudence, the University of the Witwatersrand Practical Legal Studies (PLS) course has developed in relative isolation.

¹³ Ibid at 311, the authors note “Clinical scholarship has grown exponentially in the last four decades. A search using HeinOnline, a US-oriented online law journal library, for keyword “clinical” for the decade 1960-1970 returns 41 articles with “clinical” in the title; by contrast, for the ten years between 1995 and 2005, the figure is 330. Similarly, a search for the word “clinic” for the same two decades produces an increase from 17 title references to 148 — but possibly more tellingly, whereas the majority of uses of the word “clinic” in the 1960s referred to medical or psychiatric projects, in the more recent period the term referred almost exclusively to clinical legal education projects.” For a discussion on the importance of clinical scholarship see Frank Bloch ‘The case for clinical scholarship’ (2004) 6 *International Journal on clinical legal education* 7 where the author rejects the notion that scholarship for clinicians is less important “by making the case that clinical scholarship strengthens clinical legal education by helping advance its goals of improving the quality of law practice and enhancing the public role of the profession.”

¹⁴ David McQuoid-Mason, Ernest Ojukwu & George Mukundi Wachira in Bloch (ed) op cit note 12 at 25 where the authors note “South African university law clinics employ directors who are practising attorneys or advocates, who may or may not be employed in the faculty as law teachers with tenure. In some universities, law clinic staff and the directors are employed on a contractual basis without tenure because the law clinics depend upon donor, rather than university, funding.”

¹⁵ For further reasons as to why there is this lack of publication see Shaheda Hassim Mahomed ‘United in our challenges — should the model used in clinical legal education be reviewed’ (2008) (special edition) *JJS* 54, where the author explains that as a result of the demands associated with the real-client model of teaching South African clinics tend to be service driven and as a result their educational goals are often neglected.. Also see Jeffery Giddings *Influential Factors in the sustainability of clinical legal education* (PHD) 2010 at 13 (copy with author). Also see Roy Stuckey ‘Ensuring basic quality in clinical courses’ (2000) 1 *International Journal for Clinical Legal Education* 20. Also see chapter eight for further discussion on the role of clinicians in Law Schools.

¹⁶ On the issue of underdevelopment see De Klerk op cit note 11 at 947 where the author notes, “While clinical education over the past thirty years has certainly expanded and improved, these programmes essentially remain within a certain mould — they are isolated from other law courses, usually condensed into a single course, and mostly presented only at final-year level. Even the best clinical education programmes have reached what seems to be a ceiling with little prospect of further development.”

So, the author dares to question, what are our goals, do our goals align with our curriculum and are our teaching methods appropriate? Is there room for improvement and if so in what context? In the authors view, there are a number of challenges that PLS clinicians encounter on a daily basis that are not always appropriately addressed. The author is, therefore, of the view that this research will aid in improving PLS teaching and advance it to new levels.

The thesis progresses to a set of recommendations as its concluding chapter. As the legal education sector in South Africa attempts to embrace the need to incorporate more practical teaching, it is hoped that this thesis will not only assist in advancing a better understanding of CLE programmes but also contribute towards the development of practical skills learning within the LLB and LLM degrees.

The remainder of this chapter reviews the CLE literature in South Africa and provides an outline of the thesis.

1.2 RESEARCH METHODOLOGY

The study has been undertaken primarily through desk top research with supplemental archival research and, to a limited degree, the author's personal experience. In part one literature on learning theory and critical based theory relevant to CLE has been sourced. Further comparative literature examining the development of CLE as a methodology in the United States and in South Africa is explored. This material concentrates on understanding the status of CLE as a methodology.

In part two, in chapter four, the author undertakes a historical study of PLS. Historical archival material was sourced and a discussion on the literature reviewed is explored below. Chapters five, six and seven are sourced through literature available on PLS as well as information gained through the author's own experience (as a student, candidate attorney, academic and Director of PLS/WLC). Where possible this information presented have been justified through multiple sources. In these chapters the author raises a number of questions on the goals, curriculum and teaching methods adopted in PLS. Through these questions the author aims to raise awareness of multiple

challenges that the course presents. Through analysis recommendations on how these challenges can be dealt with are discussed.¹⁷

In part three, the research method included a reflection on the literature on integration and teaching and other curricular material sourced from the University of Witwatersrand Law School on the processes followed prior to the implementation of the new (2012) curriculum.

1.3 LITERATURE REVIEW

As noted above, there is limited scholarship on CLE in South Africa. There is, however, an abundance of international literature on CLE. It is not possible for the purposes of this thesis to note all the articles that are relevant but most will be referenced through the course of this thesis.

The most relevant South African articles have been written by David McQuoid-Mason.¹⁸ His first article on CLE entitled *Clinical legal education: its future in SA*¹⁹ offers great insight into the topic. In this article McQuoid-Mason addresses the question: What is clinical legal education? He reflects on CLE development in the United States and England. Relevant to this thesis is the conclusions that McQuoid-Mason explores when he reflects on how clinical law could be integrated into legal training at South African universities. He proposed a partial clinical programme and a full clinical programme, arguing more in favour of the full time programme.²⁰

Other influential South African writers on CLE include, Willem De Klerk. In his article entitled *University Law Clinics in South Africa*,²¹ De Klerk discusses the role of CLE within the law degree. He begins by reflecting on the state of law clinics in South Africa and internationally. He then proceeds to discuss the present status of legal

¹⁷ Brandenburg R. *Powerful Pedagogy – Self Study of a Teacher Educator’s Practice* (2008) 3- 205. Also see Lyons N. *Handbook of Reflection and Reflective Inquiry – Mapping a way of knowing for Professional Reflective Inquiry* (2010) 85- 99.

¹⁸ Other articles by the author include McQuoid-Mason D. ‘The Organisation, administration and funding of legal aid clinics in South Africa’ (1986) 1(2) *Natal University Law and Society Review* 189-198. Also see David McQuoid-Mason, Ernest Ojukwu & George Mukundi Wachira ‘Clinical Legal Education in Africa: Legal Education and Community Service’ in Bloch (ed) op cit note 14 at 23-36.

¹⁹ McQuoid-Mason op cit note 4 at 343 – 359.

²⁰ Interesting in this discussion on full clinical programmes, is that the present Legal Practice Bill proposes a similar type of “community service” engagement for all graduate law students.

²¹ De Klerk op cit note 11 at 929.

education in South Africa and argues strongly that the role of CLE within universities is underestimated and not exploited to its maximum capacity.²²

For a historical overview on CLE in South Africa, reference can be made to an article written by the late Professor E. Khan entitled *A Review of South African Legal Education*.²³ In the article Professor Khan explored the need to introduce a practical teaching component into the law degree. He did this with reference to foreign literature and in conclusion argued against the incorporation of practice into the law degree — as he stated, “And if a great deal of attention is devoted in the academic stage to the practical crafts masteries, such as interviewing clients, the art of pleading and conducting actions and drafting legal documents, not only may this prejudice the teaching of legal principles, but it will drive away many students who want to study law but not in order to take it up as a profession.”²⁴ Professor Khan further provided an overview of the ‘Practical Legal Training’ course offered on a voluntary basis at the University of the Witwatersrand since 1969.

In 1983, P. Pretorius wrote the article *Legal Aid Clinics as Teaching Institutions*.²⁵ This article discussed the CLE programme at the University of the Witwatersrand during the early 1980s and has proved useful in the understanding of the status of the clinic at that time.

The recent South African CLE literature on goal setting, curriculum analysis, and teaching methods is limited to a number of articles and books, including articles written by the author,²⁶ Willem De Klerk²⁷, David McQuoid-Mason and Riette Du Plessis²⁸ and the leading textbook for CLE entitled *Clinical Law in South Africa*.²⁹

²² Ibid at 938. De Klerk states, “If one concludes, as I believe inevitably one must, that (1) clinical education is an effective teaching methodology; that (2) it could go a long way towards addressing the concerns expressed about legal education in South Africa; and that (3) the clinical movement in South Africa has reached a state of development where it is sustainable, the following question arises: To what extent is this resource being exploited to its full capacity?”

²³ Ellison Kahn ‘A review of South African legal education’ in David McQuoid-Mason *Legal Aid in South Africa* (1974) 139–159.

²⁴ Ibid at 149.

²⁵ David McQuoid-Mason *Legal Aid and Law Clinics in South Africa* (1983) 85- 93.

²⁶ Mahomed op cit 15 at 53-70. Also see Shaheda Mahomed & Philippa Kruger ‘Teaching Legal Writing at the University of the Witwatersrand Law Clinic’ (2009) 3 *John Marshall Law Journal* 106–134. Also see Fransciscus Haupt & Shaheda Mahomed ‘Some Thoughts on Assessment methods used in Clinical Legal Education Programmes at the University of Pretoria Law Clinic and the University of Witwatersrand Law Clinic’ (2008) 41(2) *De Jure* 7.

Part of the recent South African CLE literature addresses the question of CLE and mainstream legal education. This includes an article written by Willem De Klerk entitled *Integrating clinical education into the law degree: Thoughts on an alternative model*³⁰, and an article written by Swanepoel C.F. et al titled *Integrating theory and practice in the LLB curriculum: Some reflections*³¹. The central theme across these articles promotes the incorporation of the clinical methodology into the broader LLB degree.

International articles and books that should be mentioned include *Best Practices for Legal Education – A vision and a road map*,³² written by Roy Stuckey and others. The core message in *Best Practices* includes the broadening of the range of lessons taught at law schools; reducing doctrinal instruction that adopts the Socratic dialogue and case method of teaching; integrating the teaching of knowledge, skills and values into main stream courses; and finally, that greater attention to instruction in professionalism must be observed.³³ The arguments in the book are best captured by the following statement, “Law schools have a tradition of emphasizing instruction in theory and doctrine over practice and of treating theory and doctrine as distinct, separate subjects from practice. The separation of theory and doctrine from practice in the law curriculum was an unfortunate fluke of history that hinders the ability of law schools to prepare students for practice.”³⁴ Another article written by Roy Stuckey that features prominently in this thesis includes, *Ensuring Basic Quality in Clinical Courses*.³⁵ In this article Stuckey described the basic components attached to CLE. The purpose of the article is to direct those that plan on establishing clinical programmes, as well as, to remind those that have established CLE programmes what its fundamental purpose is. In *Teaching with Purpose*:

²⁷ Willem De Klerk & Shaheda Mahomed ‘Specialisation at a university law clinic: The Wits experience’ (2006) 39(2) *De Jure* 306- 318.

²⁸ M.A.du Plessis ‘Divorce: Achieving social justice through clinical legal education’ (2008) (special edition) *Journal for Juridical Science* 24- 33. Also see M.du Plessis ‘A consumer clinic as a specialised unit’ (2006) 39(2) *De Jure* 284.

²⁹ De Klerk et al *Clinical Law in South Africa* 2ed (2006) 1-298.

³⁰ De Klerk op cit note 6 at 244- 251. Also see article written by Geo Quinot Transformative Legal Education (2012) 129 *South African Law Journal* 411-433.

³¹ Swanepoel et al op cit note 6 at 100- 111.

³² Stuckey op cit note 6 at 1-287.

³³ Ibid at viii.

³⁴ Stuckey op cit note 6 at 97

³⁵ Stuckey op cit note 15 at 47 – 53.

*Defining and achieving desired outcomes in clinical law courses*³⁶ Stuckey questioned whether clinical teachers have failed to note the importance of learning that can be derived from clinical law programmes.³⁷

A comprehensive research paper written by John O. Sonsteng entitled *A legal education Renaissance: A practical approach for the twenty — first century*,³⁸ premises itself on the fact that contemporary law schools² fail to teach practical legal skills. The author argued that, “For more then a century, law schools’ teaching has relied on an education model that focuses on theory, providing minimal opportunity for students to learn and apply the practical problem-solving skills critical to becoming a competent lawyer in real world settings. Modern learning theory provides direction, and the tools are available for improving the legal education system to prepare students for practice of law.”³⁹ Sonsteng’s article is considered as significant as he provides a very valuable account of developments in the United States, CLE and skills incorporation within the legal curriculum. Further reference to this article was significantly made during the transition to a skills based curriculum at the University of the Witwatersrand. The textbook edited by Madhava Menon, entitled *Clinical Legal Education*,⁴⁰ provides a comprehensive study on CLE with particular reflection on developments in India. The most recent textbook on the subject is titled *The Global Clinical Movement*, edited by Frank Bloch and provides one with the most insightful contemporary understanding of CLE. The literature in the book confirms that CLE as a movement has gained global recognition as it noted that “ ...there is no doubt that clinical legal education has gone global. There are clinical programs at law schools all over the world, clinical law teachers have been meeting together regularly at international conferences for many years.”⁴¹

Finally, an article written by Jonny Hall and Kevin Kerrigan entitled *Clinic for All*⁴², although initially unpublished, must be noted since the authors explore the

³⁶ Also see other articles written by Roy Stuckey ‘Teaching with Purpose: Defining and achieving desired outcomes in clinical law courses’ (2006-2007) 13 *Clinical L Rev* 807–838.

³⁷ Ibid at 807.

³⁸ Sonsteng op cit note 2 at 1-118.

³⁹ Ibid at 5.

⁴⁰ Menon N.R. *Clinical Legal Education* (1998) 1- 311.

⁴¹ At Frank S. Bloch (ed) *The Global Clinical Movement* (2011) at xxv.

⁴² Jonny Hall & Kevin Kerrigan ‘Clinic for All’ (2006) 1- 16 (unpublished copy with author). Published version Jonny Hall & Kevin Kerrigan ‘Clinic and the wider law curriculum’ (2011) *International Journal of Clinical Legal Education* 25 – 37.

possibility of integration of CLE into substantive courses.⁴³ This article, in conjunction with De Klerk and Swanepoel et al (noted above), on integration provide strong motivation for the arguments cited in this thesis.

1.4 STRUCTURE OF THE THESIS

The thesis consists of three parts. The first part addresses the theoretical justification and definitional aspects of CLE. The current chapter (chapter one) aims to express the motivation of this dissertation, present the central argument and findings, provide a literature review and present the structure of the thesis. The present chapter also aims to outline the reason for choosing the topic of discussion.

In chapter two and chapter three the foundation that underlies the study of CLE will be discussed. In chapter two the theoretical justification supporting CLE as a relevant teaching methodology will be provided. Questions such as: How do students learn? and more particular to our own dispensation in South Africa, questions such as: How do we as law teachers advance effective learning methods upon our students while considering all their diverse backgrounds? will be explored. Chapter three provides an overview of CLE. In this chapter discussions are led on the definition of CLE in the twenty first century whilst reflecting on the debate between access to justice promoters and authors that promote CLE within the pedagogical sphere. Following this debate, the contemporary role of access to justice within CLE programmes will be evaluated. It will be argued that in most countries these service-setting programmes emerged within particular circumstances, however, with particular reference to South Africa, our transition to democracy, the reformation of the Legal Aid Board Act and the emergence

⁴³ Ibid at 1 where the authors struggle with similar issues as myself as they admit “We have become uncomfortable with the isolation of the substantive aspects of the programme from the clinical aspects and are currently grappling with how we can integrate doctrinal knowledge with a fuller clinical experience throughout the students’ journey.” Other articles that were referenced include Menon op cite note 39 at 264, Stuckey *et al* op cit note 6 at 166-178, Willem Shepard McAninch Experiential Learning in a Traditional Classroom (1986) 36 *Journal of Legal Education* 420, C.J.R.Dugard A Review of South African Legal Education Legal Aid in South Africa (1973) 164 and P.F.Iya ‘Diversity in provision of clinical legal education (CLE): a strength or weakness in an integrated programme of curriculum development’ (2008) (special issue) *Journal for Juridical Science* 35, Report of the Association of American Law Schools – American Bar Association Committee on Guidelines for Clinical Legal Education (1980) 63-64 and Jeff Giddings & Jennifer Lyman Bridging Different Interests The Contributions of Clinics to Legal Education in Frank Bloch (ed) *The Global Clinical movement — educating lawyers for social justice* (2011) 297-309.

of several successful pro bono organisations, university clinical courses should no longer continue to play an aggressive role in providing access to justice. It will be argued that whilst the author is not opposed to law schools' engaging in programmes which promote access to justice across the curriculum (for example in Street-law, Bill of Right or Human Rights courses) confining the primary value of PLS to access to justice is short sighted. As further argued in chapter six not only is PLS overloaded but by continuing to emphasis teaching through access to justice the true value of PLS as a teaching methodology is overlooked. Therefore in line with the argument on integration the author recommends that each course that adopts the CLE methodology design as part of its curriculum the opportunity for students to engage with live-clients either at pro bono centers or in consultation with other role players within the profession. Following on this debate, a comparative study of developments and understanding of CLE programmes in the United States of America (USA) and in South Africa (SA) will be presented. The comparative study will provide an illustration of the gap in understanding of CLE as a teaching methodology between the two countries — with SA unfortunately falling behind. Further in this part it will be argued that the USA has adopted a far more liberal understanding of CLE as a teaching methodology, as opposed to the conservative approach adopted in SA. In summary, the first three chapters provide the foundation upon which the author premises the rest of the thesis.

The fourth chapter consists of four parts. In this chapter the case study, the Practical Legal Studies (PLS) course at the University of the Witwatersrand (Wits), is first introduced and critiqued from different angles. In addition, this chapter outlines the early history of the Wits Law Clinic (WLC) not available elsewhere in the literature. In this chapter the author introduces the concepts of academic design and professional design as attached to CLE programmes. This chapter continues to trace the development of PLS and WLC from 1969 to date. The development will be traced through four stages with the period 1969-1973 marking the first stage. The second stage includes the period 1973-1989, the third stage includes 1990-1999 and the fourth stage is depicted from 2000 to 2012. Throughout the historical overview, PLS/WLC will be evaluated from an educational perspective and access to justice perspective. From an educational perspective, the question that the author aims to address by means of this historical

overview is: To what extent has the PLS programme advanced its educational objective since 1969? From an access to justice perspective the author will address the extent to which the WLC continues its access to justice commitments that inspired its inception. During this discussion, particular emphasis is placed on tracing the goals identified, curriculum design and the teaching methods that were adopted over the years.

The following three chapters on goals, curriculum and teaching methods each begin with a discussion from a global as well as South African perspective. Following on this a critical evaluation is provided on the goals, curriculum and teaching methods adopted in PLS.

Chapter five evaluates the goals attached to PLS. Questions such as — What are some of the defined goals attached to CLE programmes and can goals defined by foreign authors be aligned to clinical programmes in South Africa? — are explored. In this chapter it will be proposed that goals attached to PLS be divided into primary goals and secondary goals. Goals attached to each of these components will be critically discussed and their place in ‘contemporary’ PLS explored.

Chapter six evaluates the curriculum design attached to PLS. This chapter provides a discussion of the features of a CLE curriculum – both from a global as well as South African perspective. Included in this part, is a discussion on the different types of curriculum designs that can be implemented. Following on this, each component of the PLS curriculum is discussed and critically analysed. In this chapter it will be argued that one should be wary of ‘overloading’ the PLS curriculum and recommendations will be made on how this can be avoided. As part of the recommendation the author has drafted a proposed curriculum that the author considers appropriate for PLS in a full-year, compulsory CLE course such as the one at the WLC. (See annexure M). In annexure M the author attempts to narrow the curriculum to two specific areas of specialisation including interviewing skills and trial advocacy. It will be argued that by streamlining the curriculum within these areas the principal aims of the goals of PLS will be better advanced. Further recommendations addressing overloading includes the incorporation of certain teaching areas into other courses within the LLB degree.

Chapter seven is composed of a discussion on teaching methods that can be adopted within CLE programmes. In this part the different teaching methods attached to

CLE programmes will be discussed. Following on this, the teaching methods adopted in PLS will be critically evaluated.

The third part of this dissertation is chapter eight. This chapter is divided into four parts. In part one, the benefits and challenges for advancing the integration of the CLE methodology into the broader LLB and LLM degrees are discussed. Examples on several university programmes (both locally and internationally) that are affecting changes to their curricula to include a more practically skills orientated curriculum are then provided. In response to demands from the profession and various other bodies some universities have actively begun revising their curricula to include skills teaching. In light of this — and of course the premise that CLE promotes skills teaching — the question arises whether universities are unconsciously incorporating the clinical methodology into their curricula. In part two of this chapter, the author reflects on the curriculum changes at the University of the Witwatersrand Law School as adopted in 2012. In this part the author will explore the effectiveness of the new curriculum and it will be argued that although an integrated skills curriculum has been incorporated, the process gives rise to a number of challenges. In part three, a discussion will follow on how CLE can be integrated into primary courses, for example, Civil Procedure. The current curriculum for this course will be described and recommendations for the incorporation of the clinical methodology will be presented. In part four, the author raises and addresses the question: With the increase in skills teaching into the curriculum, what would be the purpose of a course like PLS in the future? In conclusion, the author will argue that in the future PLS should be discontinued as a standalone course, as the skills it aims to transfer could be incorporated into mainstream courses.

CHAPTER 2

THE THEORY OF LEARNING – JUSTIFYING CLINICAL LEGAL EDUCATION – A SOUTH AFRICAN PERSPECTIVE

“Education is not limited to training the mind and filling it with information, but involves all aspects — intellectual, religious, moral and physical — of the personality of the learner. It is not enough to impart theoretical learning; that learning must be put into practice. True learning is that which affects behaviour and whereby the learner makes practical use of his knowledge.”¹

2.1 INTRODUCTION

Clinical Legal Education (CLE) premises itself on the teaching of students’ legal skills through a process of doing.² Traditional law school teachers concentrate on teaching students’ through the theory of case law or through disguised dictation or undisguised dictation or even lecture notes.³ These methods extend globally across universities, however, with particular reference to South Africa, John Dugard in 1973, aptly described the teaching in three ways, first as disguised dictation, where “the law lecturer prepares notes which he then reads out or talks to at so slow a pace that students are able to take

¹ Al-Ghazali (A.D. 1058–1111; A.H. 450–505). The text was originally published in *Prospects: the quarterly review of comparative education* (Paris, UNESCO: International Bureau of Education), vol XXIII, no.3/4, 1993, p 519- 542. (copy with author)

² Victor M. Goode ‘There is a method(ology) to this madness: a review and analysis of feedback in the clinical process’ (2000) 53 *Oklahoma Law Review* 223, the author observes, “From its earliest days, the clinical legal education movement distinguished itself from its pedagogical cousin in the traditional law school classroom in not relying, unlike the latter, on the use of the Langdellian reworking of the Socratic method. While the latter approach to teaching law has remained dominant in the last half century, it proved poorly suited to the teaching of legal skills, which clinical education emphasizes.” Also see Frank Bloch ‘The case for clinical scholarship’ (2004) 6 *International Journal on clinical legal education* 7 at 8 where the author states that clinical legal education in its most basic form has two complementary aims: “promoting professional skills training, thereby improving the quality of law practice; and supporting law school involvement in public service, thereby raising standards of lawyers’ professional and public responsibility.”

³ C. J. R. Dugard ‘A Review of South African Legal Education, Legal Aid in South Africa’ in David McQuoid-Mason *Legal Aid in South Africa* (1974) 160–161.

down his pearls of wisdom”⁴; secondly, undisguised dictation where “the lecturer unashamedly dictates notes complete with punctuation”⁵; and thirdly, lecture notes where “roneod notes are handed out at the beginning of the year which are then read through together...”⁶

Clinical legal educators⁷ claim that this is not enough.⁸ In their view, the learning of law cannot take place in isolation but rather law students’ learning should be based in theory, practice and reflection.⁹ Of course clinical teachers are often called to provide evidence that supports this proposition.¹⁰ In South Africa this argument is supported by the likes of De Klerk and Swanepoel, both authors conceptualising the argument as a process of integration between traditional teaching methodology and CLE within the LLB degree.¹¹ With particular emphasis on the South African dynamic, this chapter discusses the responses of clinical legal educators to such calls against the background of the development of legal education.

⁴ Ibid at 160.

⁵ Ibid at 160.

⁶ Ibid at 160.

⁷ For the purpose of this thesis clinical legal educators are defined as academics that engage in the study of clinical legal scholarship. See Neil Gold & Philip Plowden ‘Clinical Scholarship and the development of the global clinical movement’ in Frank Bloch (ed) *The Global Clinical movement – educating lawyers for social justice* (2011) 311–321. Gold & Plowden use the term clinical legal scholarship — “Clinical legal scholarship, by contrast, is scholarship undertaken by students, supervising lawyers, and law professors that is observational, empirical, or theoretical and focused on professional skills training, experiential learning, and the teaching of professional responsibility and social justice.”

⁸ Willem De Klerk ‘University Law Clinics in South Africa’ (2005) 122(4) *SALJ* 929 at 947. Stuckey R *Best Practices for Legal Education — A Vision and A Road Map* (2007) 1–287; Jonny Hall & Kevin Kerrigan (2006) ‘Clinic for all’ 1-2 unpublished (copy with author); John O Sonsteng *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century* (2007) Legal Studies Research Paper Series 6-13 (<http://ssrn.com/abstract=1084098>) accessed on 10 November 2009. Also see Willem De Klerk ‘Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model’ (2005) 39(2) *De Jure* 244–251. See C.F. Swanepoel, M. Karels & I. Bezuidenhout ‘Integrating theory and practice in the LLB curriculum: Some Reflections’ (2008) *JJS* (special edition) 100–111.

⁹ David F. Chavkin *Clinical Legal Education* (2002) 1–169. Also see Willem De Klerk ‘Unity in Adversity: Reflections on the clinical movement in South Africa’ (2007) *International Journal of Clinical Legal Education* 100–101. Also see Keith A. Findley ‘Rediscovering the Lawyer School: Curriculum Reform in Wisconsin’ (2006-2007) 24 *Wisconsin International Law Journal* 295. In this article Findley briefly traces the arguments from 1930, as noted by several learned authors in the United States in favour of clinical teaching.

¹⁰ Roy T. Stuckey ‘Ensuring Basic Quality in Clinical Courses’ (2000) 1 *International Journal of Clinical Legal Education* 48. Also see Sonsteng op cit note 8 at 5.

¹¹ De Klerk op cit note 8 at 947. Also see Swanepoel et al op cit note 8 at 100.

In the nineteenth century, law students' in the United States assumed the role of apprentices under the watchful eye of prominent lawyers within society.¹² This method of teaching proved to be riddled with challenges.¹³ As a response to these challenges, the late nineteenth century witnessed the establishment of the first "modern"¹⁴ structures that resembled contemporary law schools.¹⁵

In the latter half of the nineteenth in the United States, Christopher Columbus Langdell, inspired by the scientific revolution¹⁶ introduced the pedagogy that defined the study of law as a science. He introduced the Case Method of study as he believed that to "... have such a mastery of these as to be able to apply them with constant facility and certainty to the over-tangled skein of human affairs is what constitutes a true lawyer; and hence, to acquire that mastery, should be the business of every earnest student of the law."¹⁷ His teaching methodology was premised on the ideal that law students' should be taught to 'think like lawyers' rather than act like one. This premise has drawn many into the debate of the study of law as a science as opposed to it being an art.¹⁸

¹² Jacob Henry Landman *The case method of studying law* (1930) 3–108. The author states that, "It had been customary for the novitiates in the Law to acquire their training by apprenticeship in imitation of the practice of the English, to whom we are indebted for much of our Law." Also see James E. Moliterno 'Legal Education, Experiential Education, and Professional Responsibility' (1996- 1997) 38 *William and Mary Law Review* 71. Also see Findley op cit note 9 at 296- 297.

¹³ See Landman op cit note 12 at 15 where the author notes that, "The law offices soon proved inadequate to provide satisfactory training for the Bar because of the increasing complexity of the Law, because of the methodless procedure of reading for the Bar in the law office and because of the conflict between the master lawyer's demands of the apprenticed clerk and the latter's needs." Also see Sonsteng op cit note 8 at 12 where he states that, "the apprentice system was criticized for its lack of legal theory and inherent inconsistencies."

¹⁴ Findley op cit note 9 at 297 where he notes that, "The modern American law school began to emerge in the 1870s when Christopher Columbus Langdell became Dean of the Harvard Law School."

¹⁵ Findley op cit note 9 at 297. In the United States the idea of law schools started taking shape in the late eighteenth century however these schools simply took the form of apprenticeship training in groups. These schools were not very successful as by the late 1800 few of these schools remained. Also see Jon C.Dubin 'Clinical Design for Social Justice Imperatives' (1997-1998) 51 *SMUL Review* 1461. Also see Kathleen Burch & Chara Fisher Jackson 'Creating the perfect storm: How partnering with the ACLU integrates the Carnegie Report's three apprenticeships' (2009) 3 *John Marshall Law Journal* at 57 where the authors discuss professional schools as noted in the Carnegie Report.

¹⁶ Landman op cit note 12 at 14, "The nineteenth century is distinguished by the rise of the Industrial Revolution, Liberalism and Ultra-nationalism, along with the far-reaching progress of Experimental Science."

¹⁷ Ibid at 14.

¹⁸ William Pincus 'Legal Education in a Service Setting, Clinical Education for the Student' The Council on Legal Education for Professional Responsibility (1973) 27–39. Pincus argues that without acting out the part, law students will remain graduates and not lawyers. Also see Mark Spiegel 'Theory and Practice in Legal Education: An Essay on Clinical Education' (1986-1987) 34 *UCLA Law Review* 577 at 581. Also see Findley op cit note 9 at 298.

Langdells' method has received much criticism over the years particularly as it fails to teach students' the application of the law that is the law in practice.¹⁹ Landman best describes this method as "the orthodox method of instruction in the law schools was the lecture method, accompanied by the text book. The student would familiarise himself with the principles of law included in the assignment. The teacher would quiz the student on its content for a part of the succeeding period and then explain, illustrate, and present problems to the class. This method of instruction imparts the law to the student dogmatically as a system of unified, logically arranged principles of unalterable law."²⁰ Many also question whether this method effectively promotes professional education.²¹

In South Africa the first form of legal qualification was introduced in 1858 as a Law Certificate.²² The first formal University based Law School was opened in 1859.²³ Students' attending these schools were taught through lectures and text books, as the

¹⁹ Gary Bellow & Earl Johnson 'Reflections on the University of Southern California Clinical Semester' (1971) 44 *S. Cal. L. Rev.* 644. Also see Findley op cit note 9 at 300–305; Peggy Maisel 'Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa' (2009) FIU Legal Studies Research Paper Series, Research paper No. 08-15, 375; Maisel notes that South African universities, "utilized either a lecture and/or seminar discussion format to teach substantive law." Also see Cathleen A. Roach 'A River Runs Through it: Tapping into the informational stream to move students from isolation to autonomy' (1994) 36 *Ariz.L.Rev* 667 at 673, she mentions an interesting comment from a student, who observed that "using the Case Method is like studying a forest one tree at a time." In her discussion on student isolation in law school she maintains that the underlying reason for such isolation is prompted by the Case Method. "In short, standard Case Method instruction isolates students on at least two levels: first, they are isolated personally from each other and their professors, resulting in the psychological distress discussed above; and second, they are isolated "instructionally" as they are taught by the Case Method without any significant understanding about what exactly it is that they are learning, nor how it all relates to their final examinations." Also see Anthony G. Amsterdam 'Clinical Legal Education – A 21st- Century Perspective' (1984) 34 *J. Legal Education* 612 at 616; Burch & Jackson op cit note 15 at 717 where in conclusion of their article the authors note that "Langdell and Harvard almost got it right" – the authors note that students do benefit from data analysis, however, the method falls short in that students should be given a chance to engage in the analysis and furthermore that other methods of teaching aside from the case method should have been adopted.

²⁰ Landman op cit 12 at 18.

²¹ Burch & Jackson op cit note 15 at 51–103. According to Burch and Jackson professional education aims to educate and train the novice to be an expert.

²² Lesley Greenbaum 'A History of Racial Disparities in Legal Education' (2009) 3 *John Marshall Law Journal* 1-19.

²³ Ibid 1-19. Also see Bruce K. Murray *Wits the early year* (1982) at 3 and 93. In the Cape in 1858 the first legal qualification was offered in the form of a Law Certificate. The first formal University Law School began in 1859 in Cape Town. In the Transvaal law classes were held in Johannesburg at the Transvaal Technical Institute in 1905. At this Institute students were prepared for the Law Certificate and the Civil Service Lower Law Examination. "In 1909 the Transvaal University College added courses for the LLB examination of the University of the Cape of Good Hope, and also the Civil Service Higher Law Examination, and in 1916 the School of Mines introduced courses in commercial law for commerce students. By the time university status was achieved, the courses given by the Department of Law were all well established." In 1921 the University of Stellenbosch established an Afrikaans based Law Faculty. In 1922 The University of Witwatersrand Law Faculty was formally established.

primary concerns for the courts at the time was the principles of law rather than the interpretation thereof.²⁴

Through time law schools' in South Africa promoted the lecture method, accompanied by the Socratic dialogue,²⁵ as the primary method of teaching.²⁶ In 1973, at a Conference on Legal Aid in South Africa,²⁷ two honourable authors, the late Professor Ellison Khan and Professor John Dugard engaged in a debate on the status of legal education in South Africa.²⁸ Professor Khan emphasised that law schools' should continue to promote "academic training".²⁹ According to Khan "[but] law is one of the several professions that in the nature of things requires a professional or vocational training in addition to an academic training, however realistic the latter be. And if a great deal of attention is devoted in the academic stage to the practical crafts and mysteries, such as interviewing clients, the art of pleading and conducting actions and drafting legal documents, not only may this prejudice the teaching of legal principles, but it will drive away many students who want to study law but not in order to take it up as a profession."³⁰

Opposed to this argument Dugard noted that the system of legal education at the time was in much need for reform and that reform could be achieved by using clinical law or legal-aid schemes as educational tools. Dugard further argued that reform in legal education could be done by introducing new teaching methods, new courses and a sense of relevancy into existing courses amongst other things. He goes on to submit that, "Law is a process of argument and reasoning and this can only be achieved by an enquiring approach to education. Education is a two-way process. At present, however, it is largely

²⁴ Peggy Maisel op cit 19 at 375. Also see Dugard op cit note 3 at 160–161; Martin Chanock *The Making of South African Legal Culture 1902-1936* (2001) 1- 571.

²⁵ For a comprehensive discussion on the Socratic dialogue see Stuckey et al op cit note 8 at 207-234.

²⁶ Joanne Fedler 'Legal Education in South Africa' (1993) 72 *Oregon Law Review* 1003.

²⁷ This conference was held in Durban at the University of Natal from 2nd – 6th July 1973.

²⁸ Ellison Kahn 'A review of South African legal education' in David McQuoid-Mason *Legal Aid in South Africa* (1974) 139–159 at 149.

²⁹ Ibid.

³⁰ Ibid.

unidirectional. The unidirectional method of dictation and reading of notes belongs to the High School and has no place in a real university.”³¹

In 1983, the late Authur Chaskalson at a Legal Education Conference held at the University of the Witwatersrand shared similar sentiments that were also noted by Dugard, “Law students can leave a university with an LLB degree without ever having seen a client, without ever having been in court, without knowing how to interview a witness or draft a contract, or prepare an argument or address a court. The result is that law graduates emerge from the university with a theoretical training, but without any basic knowledge of, or practical training directed specifically to, the practice of law. I do not believe that there is any profession other than the law in which students leave university as ill-equipped as this to pursue their chosen career.”³²

In line with Dugard’s argument, most contemporary law teachers advocate that in light of globalisation and economic pressure law students’ must be taught to apply the law just as they must receive doctrinal instruction.³³ Students’ must be taught “what lawyers need to be able to do”³⁴ rather than “what lawyers need to know”.³⁵ In addition to

³¹ Dugard op cit note 3 at 163. Dugard in his article argued further that reform in legal education could be done by introducing new teaching methods, new courses and a sense of relevancy into existing courses amongst other things.

³² A. Chaskalon ‘Responsibility for practical legal training’ 1985 (March) De Rebus 116. Also see De Klerk op cite note 8 at 935–939.

³³ This phenomenon is universal and is best described by an Australian writer Sally Kift ‘Developing the Law Curriculum to meet the needs of the 21st century legal practitioner — A tale of two sectors: Dynamic curriculum change for a dynamically changing profession’ (2003) at 1-13 (unpublished copy with author). In this article Kift notes that “Twenty-first century Australian legal graduates enter a complex and quite structurally different, professional environment from that of their predecessors, even those of a decade ago. The content, methods and foci of legal knowledge are now also changing so rapidly that, in many areas of practice, the doctrinal law learnt at Law School is no longer current, even on graduation. At a broader level, legal practice has been transformed by external drivers such as globalization, competitiveness and competition reform, information and communication technology and by a determined move away from the adversarial system as the primary dispute resolution method.” Also see P.F. Iya ‘Diversity in provision of Clinical Legal Education (CLE): A strength or weakness in an integrated programme of curriculum development?’ (2008) *JJS* 36 (special issue); Dugard op cit note 3 at 165 where Dugard questions, “But how can a student walk out of Law School without ever having seen law in operation?” He then writes on his own experience and reports that “At the University of Stellenbosch I was given a very thorough academic training. But I was never required to enter a court of law or an attorney’s office. I did in fact do so out of curiosity; but I was admitted to legal practice without ever having undergone any practical training.”

³⁴ Kift op cit note 33 at 3 refers specifically to the recommendations of the Australian Law Reforms Commission (ALRC) report in 2000. In the United States similar sentiments were expressed in 1992 when the Mac-Crate report published a list of fundamental lawyering skills and professional values that all law schools should consider adopting.

³⁵ Ibid at 4.

learning theory, law students must engage in practice in order to conceive of their studies as valuable and worthwhile.³⁶

For centuries philosophers and educational theorists have submitted that the best form of learning incorporates not a single method but rather a series of methods.³⁷ To date very little research has been done to understand the cognitive development of a law student.³⁸ Therefore, in an attempt to try and understand such development, several authors have resorted to reflecting on literature from other disciplines that promote professional education.³⁹

This chapter will elaborate on a South African perspective on the theory of clinical legal education in three parts. In part one the author will explore the literature on the theory of learning in order to justify the proposition of clinical legal educators. In this part particular emphasis will be placed on addressing the question of *how do law students' learn best?* Part two of the chapter, explores the above question within the South African context. It will be argued that the above question cannot be adequately

³⁶ Vernellia. R. Randall 'Increasing retention and improving performance: Practical advice on using cooperative learning in Law Schools' (2000) 16 *Thomas. M. Cooley Law Review* 201–273 at 214 where the author asserts that, "Law schools should be "adding value" to students' skills and ability. That "'added value' should be based on cultivating and developing all students." Also see Erwin Chemerinsky, 'Rethinking Legal Education' (2008) 43 *Harv. C.R.-C.L.L.Rev* 595–598 at 595, "Certainly, law students need to be prepared to deal with the globalization of the twenty-first century and the highly-regulated environment in which many lawyers practice." Also see Stuckey et al op cit note 8 at 1–287.

³⁷ Also see Sonsteng op cit 8 at 62, where the author observes that, "Theorists and educators agree that no single method exists by which students learn best. A variety of teaching methods will yield the best result for students." Also see Cathleen A. Roach 'A River Runs Through it: Tapping into the informational stream to move students from isolation to autonomy' (1994) 36 *Ariz.L.Rev* 667 at 682, who says "First, each student learns differently. Some learn best by visual methods (writing, charts, etc); some learn best by auditory methods (lecture or student verbalization). Some students are abstract thinkers; others are concrete thinkers. Therefore, when teaching to a classroom of students, it is optimal to combine some form of all of these techniques in order to reach the largest number of students." Also see Jonathan Klaaren & Pam Watson 'An exploratory investigation into the impact of learning in moot court in the legal education curriculum' (2002) 119 *SALJ* 548.

³⁸ Paula Lustbader 'Construction sites, building types, and bridging gaps: A cognitive theory of the learning progression of law students' (1997) 33 *Willamette L. Rev.* 315 at 324, "Cognition is the way in which we think about, and process information."

³⁹ Professional education has been discussed at length by Robert MacCrate 'Yesterday, Today and Tomorrow: building the continuum of legal education and professional development' (2003-2004) 10 *Clinical Law Review* 805 at 808. In this article MacCrate states that to him professional means "that an area of special knowledge has been identified; such knowledge is being systematically formulated; and those who profess that knowledge and the skill to apply it to useful ends are joined in a single calling which they so identify.... If the legal profession is to continue, each generation of professionals must earn that trust by training, by acquisition of skill and by acknowledging their responsibilities to those whom the profession serves." Also see Gary Bellow 'On Teaching the teachers: some preliminary reflections on clinical education as a methodology, *Clinical Education for the Law Student*' (1973) 374–413.

answered without consideration of the influence that extrinsic factors have on students' learning, as may be particular to the political and socio-economic dispensation in South Africa. In part three, the chapter concludes by identifying some measures that can be put in place to facilitate constructive learning.

2.2 HOW DO STUDENTS' LEARN?

Learning is classically defined as the acquisition of knowledge.⁴⁰ The purpose of knowledge is to gain wisdom about the world around us. Individuals could either seek knowledge within a general context or within a particular field of study. Knowledge is acquired continuously from birth, as children grow and develop into adolescence and transcend into adulthood. As such, knowledge is acquired in different ways during the different stages of human development.⁴¹

For a period of over two thousand years, many have asserted the importance of practice to learning. Avicenna⁴² (in the fourth century of the Islamic era) submitted that the soul be considered as the path to knowledge. He proposed that primary acquisition of knowledge began at the age of six. "And when he has reached the age of 6 years, he should be brought to the tutor and the teacher"⁴³ Once the child has received the stage of adolescence⁴⁴ he is ready to advance his study.⁴⁵ At this stage he observes that, "Instruction and learning include the practical, like carpentry and dyeing, for it is only acquired by practice of that craft."⁴⁶ Further evidence that promotes learning through the integration of theory and practice include statements from Confucius between c551-479 BC when he said "I hear and I forget. I see and I remember. I do and I understand".⁴⁷

⁴⁰ According to the Oxford Thesaurus (1991) 2nd edition at 237, knowledge can be defined as "knowing, awareness, apprehension and cognition." Also see Al Ghazali op cit 1 at 4 (copy with author).

⁴¹ Lustbader op cit 38 at 328 where the author reports that, "Many learning theorists and psychologists argue that learning and cognitive development occurs in stages. Although they break down and define such stages differently, they all recognize that students learn and develop cognitive skills progressively."

⁴² Avicenna (370–428 AH 980–1037 AD). The text was originally published in *Prospects: the quarterly review of comparative education* vol. XXIII, no.1/2, 1993 (copy with author).

⁴³ Ibid at 8.

⁴⁴ Ibid at 8.

⁴⁵ Steven D. Schwinn 'Developmental Learning theory and the American Law School Curriculum' (2009) 3 *John Marshall Law Journal* 33–49. In this article Schwinn indicates that both Jean Piaget and Lawrence Kohlberg advocate the "stages of growth" model to describe intellectual and moral development of individuals.

⁴⁶ Avicenna op cit note 42 at 7.

⁴⁷ Confucius (551-479) — The text was originally published in *Prospects: the quarterly review of comparative education* vol. XXIII, no.1/2, 1993, p211–219. (copy with author).

Landman observed that, “History informs us that Socrates and Aristotle in the fourth century B.C. and Roger Bacon in the thirteenth century A.D. regarded induction or experimentation as the *sine qua non* of all knowledge — a process which has been in lethargy until well nigh the nineteenth century.”⁴⁸ John Dewey in the 19th century believed that “mere memorization of facts was not education; instead genuine education would be derived from life experience that was accompanied by opportunities for discussion and reflection. In the absence of reflection, experience by itself has the potential for ‘mis-education’ or a faculty interpretation of experience.”⁴⁹

Classically, attention to learning has focused on child learning, to the extent that assertions were based on studies that were predominantly conducted on children and very little evidence was advanced on how it is that adults learn.⁵⁰ So, how do adult students’ learn, particularly law students’? Most South African law students’ begin university between the ages of 17-20, as they enter the realm of adulthood. As noted by Kaburise, “The law students are typically senior high school graduates who performed sufficiently well to be granted what is called full or conditional exemption from the matriculation examination.”⁵¹ This begs the question: Can the learning philosophy proposed by the authors above apply to these students? This chapter adopts the perspective that South African university law students’ are indeed young adults.

Contemporary learning theory developed from the middle twentieth century and has drawn on studies of adult learning. In 1946 Edgar Dale developed a learning theory which is commonly referred to as the “Cone of Experience”⁵². His theory emphasises that

⁴⁸ Landman op cit note 12 at 27. Also see Stuckey et al op cit note 8 at 146–149 where the authors refer to Aristotle’s description of knowledge. In its basic form Aristotle described knowledge in three forms 1) theory 2) productive action 3) practice.

⁴⁹ Linda Smith ‘Why clinical programs should embrace civic engagement, service learning and community based research’ (2004)10 *Clinical Law Review* 723 at 727.

⁵⁰ Roy Stuckey ‘Can we assess what we purport to teach in clinical law courses’ (2006) *International Journal of Clinical Legal Education* 9 at 14, where Stuckey engages on a discussion on learning and its link to education: “Learning is not education and experiential learning differs from experiential education. Learning happens with or without teachers and institutions. For example, eavesdroppers learn about the things they hear, yet they are not educated simply by the fact of eavesdropping because the activity is not accompanied by a teacher’s or institution’s participation in the learning process. Education, in contrast to a learning opportunity, consists of a designed, managed, and guided experience.”

⁵¹ John B. Kaburise ‘The structure of legal education in South Africa’ (2001) 51 *J. Legal Edu* 363–371; Frank S. Bloch ‘The Andragogical Basis of Clinical Legal Education’ (1982) 35 *Vand. L. Rev.* 321.

⁵² Also see Sonsteng op cit note 5 at 68 where it is explained that, “ In the Cone of Experience, the base of the cone represents the learner as a participant in actual or simulated experience and the top of the cone

people learn best by doing and that the least effective methods of learning include reading text and listening to lectures.⁵³ In the 1970s David Kold and Roger Fry developed a four phase learning circle and expanded further on the proposition of learning by doing. The four phases include experience, reflection, theory and application.⁵⁴ They advocated that learning by doing is only effective if one reflects on what one has learnt, arrives at a conclusion and then applies this conclusion or experience in an active experiment.⁵⁵

In 1970, Willem Perry identified nine stages of development.⁵⁶ His study concentrated on the learning ability of college students.⁵⁷ In 1988, Wangerin⁵⁸ condensed Perry's stages into three stages, dualism, relativism and reflective thinking or commitment. Dualism reflects the first stages of students' learning wherein students learn concrete principles from authority. Schwinn noted "that in short, the dualist aims to get his or her arms around a subject so as to rest comfortably in the belief that he or she 'knows' it."⁵⁹ Relativism allows students to develop the ability to question and not to just accept that which they are taught. During this phase, students question dispositions. Finally, reflective thinking "is characterized by an understanding that views are diverse and often diverge, but it is also characterized by a considered commitment to a particular view."⁶⁰

Malcolm Knowles, founder of the concept andragogy⁶¹, argued that adults learn best as self directed individuals who need to be allowed significant involvement in the

represents the learner as a mere observer of symbols that represents an event (e.g., reading words on a page)."

⁵³ Sonsteng op cit note 5 at 68.

⁵⁴ Ibid at 72.

⁵⁵ This view is emphasised by Roy Stuckey 'Teaching with Purpose: Defining and achieving desired outcomes in clinical law courses' (2006-2007) 13 *Clinical L.Rev* 807-838. He further quotes from Steve Hartwell 'Six easy pieces: Teaching Experientially' (2004) 41 *San Diego L.Rev* 1011 at 1013 where it is noted, "Experience is the immersing of one's self in a task or similar event – the doing. Reflection involves stepping back and reflecting on both the cognitive and affective aspects of what happened or was done. Theory entails interpreting the task or event, making generalization, or seeing the experience in a larger context. Application enables one to plan for or make predictions about encountering the event or task a second time."

⁵⁶ Schwinn op cit note 45 at 37.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid at 38.

⁶¹ Bloch op cit note 51 at 325 where the author notes, "Androgogical theory originally was designed to provide a framework for analyzing teaching programs for adults." The word androgogical was derived "

course of study. Furthermore, adults acquire knowledge more easily if they are able to apply such knowledge. He premised his theory on four assumptions, which in summary include the thought that adults see themselves as self directing individuals, reference to the role of experience in learning, plus the readiness to learn and the observation that learning orientation changes from childhood to adulthood.⁶²

According to Knowles, self directing adults learn best in an environment that allows for mutual respect between teacher and student. The climate “should be one which causes adults to feel accepted, respected, and supported; in which there exists a spirit of mutuality between teachers and students as joint inquirers.”⁶³ He stated further that adults learn best when they learn that which they think they need to learn and when they are active in the course design and evaluation process. Knowles claimed that learning techniques must include a means whereby the adults can relate to the learning activity in terms of their experience. “Andragogical methodology favors participatory, experiential learning techniques – for example, exercises, role playing, field work, seminars, and counselling – to reinforce the important role of experience in the lives and learning of adults.”⁶⁴ With regard to his theory on the readiness to learn he advocated two proponents: one, “adult students should be taught matters that relate to existing or changing social roles appropriate to their personal development”⁶⁵ and secondly, he argued that students with similar social roles should be grouped and taught together. On the theory of orientation to learning he argued that “andragogical methodology calls for a shift in emphasis from teaching the traditional subject areas to teaching material likely to assist students in dealing with problems they will encounter.”⁶⁶

Bloch discussed whether it would be appropriate to apply this theory to teaching legal education, while including traditional methods, such as the case analysis method and the Socratic dialogue. He observes that both these methods are not completely non-

by substituting the Greek stem *andr*, meaning adult, for the stem *paid*, meaning child, as the latter is used in the term pedagogy”

⁶² Also see Sonsteng op cit note 8 at 63 where the author identified five characteristics as the fifth according to Sonsteng was added later. The fifth element relates to the motivation to learn – “As a person matures the motivation to learn is internal.”

⁶³ Bloch op cit note 51 at 330.

⁶⁴ Ibid at 331.

⁶⁵ Ibid at 332.

⁶⁶ Ibid.

andragogical. For example, “the act of really listening to what the student says — is a technique of the case method of instruction which is necessitated by its reliance on Socratic dialogue. This technique requires mutual respect between teacher and student and is central to the andragogical notion of deferring to the self-concept of adults.”⁶⁷

Andragogical theory however moves beyond traditional methods and directly promotes the teaching of clinical legal education. Clinical legal education is premised on the idea of experiential learning⁶⁸ which, if taught correctly promotes self-learning⁶⁹, encourages that students be taught in an environment that includes role plays, field work and allows students to apply their experiences to particular situations. As observed by Menon, “It is said that unlike children, young adults tend to seek applying learning immediately and a clinical setting provides them the opportunity to do so under proper guidance.”⁷⁰

Bloch believes that the limitations of andragogical theory include, that andragogy may not be an appropriate theory when discussing professional education and that the studies undertaken may not be appropriate to the age group associated with law students.

A summary of all of the literature on learning theory is usefully provided by Cathaleen A. Roach⁷¹, who divides the literature on students learning into two categories that is, learning theory and methods teaching. “Essentially all of the learning theory and methods research (law-related as well as non-law-related) deals with one or more of the following processes:

- (1) How students learn (particularly adult students learners);
- (2) Which learning skills are essential to survive and succeed;
- (3) What mechanisms or specific “tools” can be used to teach those necessary learning skills.”⁷² More importantly Roach points out that not all students learn in the same way. Law schools in their teaching design must consider a number of factors relating to the

⁶⁷ Ibid at 335.

⁶⁸ Ibid at 341 where it is noted that “Clinical legal education is experiential learning both in terms of what the students bring to the learning setting and in terms of the experiences that the students work through in the clinical program itself.”

⁶⁹ If the author reflects on her own experiences she often asks students: “So, what do you think the answer is or should be?” This is aimed at promoting self-learning as students are allowed to present the answers as they understand it to be.

⁷⁰ Menon N.R. *Clinical Legal Education* (1998) at 11.

⁷¹ Roach op cit note 37 at 680.

⁷² Ibid at 680.

‘make-up’ of the student. Some of these factors include the race, religion, gender and financial status of the students — as students’ learning cannot take place in isolation.

Similarly, Lustbader in her article *Construction Sites, Building Types, and Bridging gaps*⁷³ identifies three barriers to learning. First, she identifies ‘non-academic’ factors that include finances, motivational problems, medical and psychological problems. Secondly, she identifies that law schools being primarily white institutes create barriers for those non-traditional and diverse students that “[e]xperience cultural and value conflicts leading to feeling of isolation and disenfranchisement. This occurs because voices and values reflected by differences of gender, sexual orientation, race, class, and learning abilities are not represented.”⁷⁴ Thirdly, she identifies that the law schools’ traditional teaching pedagogy itself creates barriers as it fails to allocate context and application to its method.⁷⁵

It is clear that both classical as well as contemporary learning theorists promote a learning methodology that would enhance traditional law school teaching. Following on Knowles’ theory on andragogy, the need to integrate theory and practice within the domain of learning remains critical. Therefore, in response to the question raised above, that is: How do adult students learn, particularly law students?, the author believes that one of the most effective methods of teaching promotes the integration of theory and practice, while CLE as a methodology effectively promotes this method. Further support for this argument is provided below.

Situated squarely within a professional education paradigm the Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law*⁷⁶ (hereinafter referred to as the Carnegie report)⁷⁷, advances

⁷³ Lustbader op cit note 38 at 315–357.

⁷⁴ Ibid at 318–319.

⁷⁵ Ibid 319–320. Also see E. Tammy Kim ‘Who’s learning What? Toward a participatory legal pedagogy’ (2008) 43 *Harv C.R.-C.L.L. Rev* 633–637.

⁷⁶ William M. Sullivan et al The Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law* (2007) (hereinafter Carnegie Report).

⁷⁷ Sonsteng op cit note 8 at 61 where the author reports that “The Carnegie Foundation for the Advancement of Teaching examined the way law schools develop legal understanding and professional identity, in its February 2007 report entitled, *Educating Lawyers*. The report made five key observations of legal education in the United States and Canada.” The observations include, that law schools “provide rapid socialization in the standards of thinking”; that law schools rely on one way of teaching particularly the case-dialogue method; that although this method has valuable strengths it also displays unintended

contemporary learning theory and does so in the clinical legal education context. This report promotes that the study of law be considered as a form of professional education: “Drawing upon contemporary learning theory, one can consider law, medical, divinity, or engineering schools as sites to which students come to be induced into all three of the dimensions of professional work: its way of thinking, performing, and behaving. For the sake of their future practice, students must gain a basic mastery of specialized knowledge, begin acquiring competences at manipulating this knowledge under the constrained and uncertain conditions of practice, and identify themselves with the best standards and in a manner consistent with the purposes of the profession”⁷⁸

The Carnegie Report identified six tasks that students would need to engage in if they were to reap the benefit of effective professional education. These tasks include:

1. “Developing in students the fundamental knowledge and skills, especially an academic knowledge base and research
2. Providing students with the capacity to engage in complex practice
3. Enabling students to learn to make judgments under conditions of uncertainty
4. Teach students how to learn from experience
5. Introducing students to the disciplines of creating and participating in a responsible and effective professional community
6. Forming students able and willing to join an enterprise of public service.”⁷⁹

According to Burch and Jackson, the Carnegie Report tasks must be mastered sequentially. Each task must be learned competently before the student can move on to applying him/herself to the next. Upon reflection, it is clear that once the first task is completed the student will benefit best from practice. “Education research suggests that people learn best “when an expert is able to model performance in such a way that the

consequences; that the assessment of students’ learning remains underdeveloped and finally, that legal education approaches reform incrementally not comprehensively.

⁷⁸ See Stuckey op cit note 55 at 809.

⁷⁹ Burch & Jackson op cit note 15 at 57-58.

learner can imitate the performance while the expert provides feedback to guide the learner in making the activity his or her own.”⁸⁰

The Report also recommended that professional education be taught within a Three Apprenticeship model. This model has three elements, the Cognitive, Practice and Ethical-Social elements. The Cognitive element represents the knowledge base, the mastery of legal rules taught within doctrinal courses. The Practice element presents the argument that students act out or perform in a practice setting. The Ethical-Social Apprenticeship requires that students be exposed to purpose and attitude that define the values of professional community. This requires exposure to ethical standards and social roles that one’s profession will demand. Burch and Jackson states that “Legal education is criticized because, to the extent that students are introduced to each of the Apprenticeships, the Apprenticeships are taught in isolation. If professional education is to attain its goal to produce competent and professional experts, professional education must “introduce students to the full range of professional demands’ and ‘initiate (students) into all three apprenticeships.”⁸¹

The Report concludes that experiential learning can to the highest degree develop professional competence:

“When seen as parts of a connected whole, the practical courses in lawyering and clinical-legal education make an essential contribution to responsible professional training. These courses are built around simulations of practice or law clinics involving actual clients. But they can do more than expand the apprentice’s repertoire of knowledge and skill. Critically, they are the law school’s primary means of teaching students how to connect the abstract thinking formed by legal categories and procedures with fuller human contexts”⁸²

⁸⁰ Ibid at 60.

⁸¹ Ibid at 63.

⁸² Stuckey op cit note 55 at 812–813. See Jill Schachner Chanen ‘Re-engineering schools across the country are teaching less about the law and more about lawyers’ *ABA Journal July 2007* at 42–46. This article provides an overview of how universities in the United States have responded to the Carnegie Report (2007) and is titled Educating Lawyers: Preparation for the Profession of Law.

In *Best Practices*, Stuckey et al argues that law school curriculums should be designed to include knowledge, skills and values.⁸³ “Before a novice lawyer can embark on solving any legal problem, she has to have a knowledge base to organize her experience, to communicate her ideas to others, to rely on for handling difficult situations, and to develop creative solutions.”⁸⁴ This point was further emphasised in Stuckey’s article on *Teaching with a Purpose*, where he identifies three domains of learning which are: cognitive domain (understanding and analytical processes), the psychomotor or performance domain (related to physical or motor activity) and affective or feeling domain (related to values, attitudes and beliefs) and concludes that experiential education is involved in all three.⁸⁵

Oates discusses an interesting dimension to education that is specifically related to the transfer of knowledge.⁸⁶ “Transfer has been defined as the degree to which a behavior will be repeated in a new situation.”⁸⁷ She discusses four steps involved in transfer as identified by researchers.⁸⁸ These steps include: problem representation, search and retrieval, mapping, and application. The following aspects are considered, to effect transfer, mastery of the material, learning from understanding, use of concrete examples, meta-cognition and deliberate practice. Oates then reflects on four different models of teaching law students. She discusses the effectiveness of teaching via lectures, case method, case method plus lectures and an alternative method designed to help students develop adaptive expertise.

Although teaching via lectures is not considered effective, the positive influence could be in providing the students with a foundation, however, one must be innovative in delivering these lectures, for example “a professor could describe the process of reading, analyzing, and briefing cases and then provide students with examples of how others have read, analyzed”⁸⁹ In her analysis of the case method Oates submits that the

⁸³ Stuckey et al op cit note 8 at 74.

⁸⁴ Ibid at 74.

⁸⁵ Stuckey op cit note 55 at 813–814.

⁸⁶ Laurel Currie Oates ‘Did Harvard get it right’ (2006-2008) 59 *Mercer L.Rev* 675.

⁸⁷ Ibid at 678.

⁸⁸ Ibid.

⁸⁹ Ibid at 703. On this point Oates continues to argue that there is still a problem with the lecture method as she argues that research clearly indicates that students remember very little after just hearing and reading. Similar sentiments were noted by Edgar Dale — see Sonteng op cit note 8 at 68 where the author mentions

Landellian method was a product of its time and that it does not adequately prepare students for practice.⁹⁰ Regarding the effectiveness of using the integration of the case book and lecture model, she states that this ‘depends’ on the type of analysis and lectures presented. As no published research in this area has been done, she is unable to conclude on its effectiveness of transfer. On the ‘alternative’ method, she suggests the use of exercises or simulations. “These exercises should be designed not only to help students transfer what they have learned to other problems they will encounter in law (for example, on their exams) but also to transfer what they have learned to problems that they will encounter in practice.”⁹¹

In summary, the Carnegie Report, Stuckey and Oates explore teaching processes in a professional context and conclude that for law students the lecture method in itself is not enough — this method must be accompanied by a number of other methods more specifically practical application. Therefore, it is clear that there is much support for the incorporation of clinical legal education methodology into law school curricula, particularly as its teaching style facilitates for the needs of all students — particularly those from disadvantaged backgrounds. Further discussion on this is provided below. This leads us into a discussion on the second part of this chapter and that is whether the theories proposed above will be suited for the needs of South African students.

2.3 EXTRINSIC INFLUENCES

Both Roach and Lustbader argue that not all students learn in the same way. Cognisance must be taken of the general make of the student.⁹² In line with this argument the author submits that the learning theories proposed above can only be accepted if students experience the same or similar political, social and economic upbringing. The above

that the least effective method of instruction, according to Dales’ Cone of Experience, is reading text and listening to lectures.

⁹⁰ Ibid at 711 Oates infers that, “As a consequence, students are taught to view legal questions from an academic rather than a practical perspective and are left on their own to figure out how to transfer what they have learned in law school to their practice.”

⁹¹ Ibid at 716.

⁹² For a further discussion on students’ learning style see Osman M. ‘Meeting quality requirements: A Qualitative review of clinical law module at the Howard College Campus’ (2006) 39(2) *De Jure* 252–283.

assertion is not unique to the South African landscape, however, the following discussion will centre on the needs of South African students.

In South Africa⁹³ as we struggle to recover from our racist political past, most law students — particularly black students —⁹⁴ from disadvantaged backgrounds struggle to succeed at university, if at all.⁹⁵ Greenbaum in her article *A History of the Racial Disparities in Legal Education in South Africa* emphasises that, “Although significant changes to legal education have been implemented in South Africa since the country’s transition to constitutional democracy in 1994, the remnants of previous inequalities continue to linger, replicating a cycle of disadvantage that is reflected in poor students’ graduation rates,⁹⁶ high student attrition rates and the continuing domination of white males in the legal profession.”⁹⁷ Similarly Swanepoel observes “that due to the lack of appropriate school education towards studying law in South Africa, law schools are faced with an unfortunate but extremely pressing challenge to bridge the divide between school and university education.”⁹⁸ Despite attempts made by the South African government to level the playing field by merging previously disadvantaged universities with universities that benefitted through apartheid system, many previously disadvantaged students continue to struggle. As a result student learning continues to be compromised.

⁹³ Kim op cit note 75 at 675. This may however be of international concern for as reported by Roach op cit note 37 at 675, the teaching philosophy in the US also fails to take pre-existing conditions of students into account. “If the problem now seems undeniable within the general student population, it is doubly more difficult for many of the black, Hispanic, older, and other non-traditional law students, for whom isolation in all facets of life is a much more pervasive problem.In fact, there are indications that psychological and academic ramifications may fall disproportionately on students of color. For example, there is an added psychological strain experienced by black law students who enter an environment dominated by whites with resulting high degrees of alienation and estrangement.”

⁹⁴ Black includes Coloured and Indian. See Lisa R Pruitt ‘No Black names on the letterhead? Efficient discrimination and the South African Legal Profession’ (2002) 23 *Michigan Journal of International Law* at 548.

⁹⁵ Fedler op cit note 26 at 999–1008. Also see William Perry Teaching Guide for GSIs — Theory of Learning at gsi.berkeley.edu/teachingguide/theories/perry.html accessed on 10 February 2010 - where Perry states that learners approach knowledge from a variety of standpoints. Thus, according to him “gender, race, culture, and socioeconomic class influence our approach to learning just as much as our stage of cognitive development.”

⁹⁶ See Moeketsi Letseka & Mignonne Breier *Student poverty in higher education: The impact of higher education dropout on poverty* 83–101, see http://www.ceia.org.za/downloads/2012/CEIA%20AGM%202012%20Presentation%20by%20Letseka%20and%20Breier,%20Student%20Poverty%20in%20Higher%20Education_1.pdf accessed on 10 April 2010.

⁹⁷ Greenbaum op cit note 22 at 1-16.

⁹⁸ Swanepoel et al op cit note 8 at 100.

Further evidence on the negative impact on higher education was provided in 2008 when both Letseka and Breier researched the reason for the low graduation rates at seven Higher Education Institutions in South Africa, including at the University of the Witwatersrand. Their primary concern reflected that, "... 13 years after the dawn of democracy and promise of equitable delivery of social justice to all, blacks and coloureds (population groups who were previously disadvantaged and bore the brunt of exclusion by apartheid education policies and legislation) continue to lag behind in education success rates, which are the building blocks of human capital. The performance of these population categories (that of black students, in particular) is way below the national average. This is contrary to the performance of whites and Indians, who are way above the national average."⁹⁹ Although their study did not directly include law schools, as by inference law schools experience the same or similar problems they conclude that the primary reason for such drop out is as a result of lack of financial resources.

The author believes that the problem extends much further, in that not only do law students from disadvantaged backgrounds struggle to raise the funds to attend law school, but once in law school, students fail to understand and conceptualise the 'new' lecturing methods and assessment process. Students from disadvantaged backgrounds have no prior experience in being self-reliant. At school level teachers would under reasonable circumstance 'spoon feed' these students, that is, learning material will be provided and students will be helped to prepare for assessments. And yet, these students struggle to make good grades.¹⁰⁰ Now at university level, students for the first time are required to listen to lectures (mostly delivered at an abstract level), take notes by themselves, be responsible for extra reading and need to determine for themselves how best to respond to assessment tasks. For most first year students entering university is like entering this "whole new world".¹⁰¹ As indicated by Du Plessis "The 'black schools' were lesser-

⁹⁹ Letseka and Breier op cit note 96 at 86. Also see Okechukwu Oko, 'Laboring in the vineyards of equality: promoting diversity in legal education through affirmative action' (1995-1996) 23 *S.U.L.Rev* 189 – 212.

¹⁰⁰ See Fedler op cit note 26 at 1001 where the author reports that "The Department of Education and Training which is responsible for the 'education' of millions of school-going black children has dismally failed in preparing black youth for university education."

¹⁰¹ C. R. M. Dlamini, 'The law teacher, the law student and legal education in South Africa' (1992) 109 *SALJ* at 604 where the author states that, "The study of law on its own is difficult, even if one studies it through one's mother tongue. The problem is exacerbated by the use of a second language that is hardly mastered.... If one considers the poor educational system from which many of these students have emerged

equipped, lesser-resourced and followed a less advanced curriculum than that of the 'white school', resulting in them not being equipped by their secondary education for a 'rigorous university experience'.¹⁰²

In addition to the above, law students are introduced to entirely new teaching methods, that is, either the lecture method or Socratic dialogue or even the case method of study. Furthermore, students are taught by lecturers or professors that are not professionally trained in teaching pedagogy. This is emphasised by Dlamini when he states, "There is no doubt that the law teacher must know his or her subject and know how to transmit the knowledge. The problem with us as law teachers, however, is that we are not professionally trained to teach. We use trial - and error method or use some methods we saw being used by one of our favourite lecturers during our student days. The results are sometimes disastrous."¹⁰³

Gary Bellow in his article, *On Teaching the Teachers*, clearly articulates that law schools have no clear idea as to what defines good teaching. He declares, "[w]e still do

and a host of other social, economic and political considerations, how infinitely greater is the gap between school and university." Also see Maisel op cit note 19 at 400 where at footnote 112 she argues "Since many of these students were educated under the inferior system of Bantu education that carried over from the apartheid period, they were less prepared for law school than those coming from predominantly white schools. For example some students come to university with English as a second or possibly third language (after their African tongue and Afrikaans) and limited secondary school training in courses such as mathematics, the teaching of which was banned under apartheid" Also see Brook K. Baker 'Teaching Legal Skills in South Africa: A Transition From Cross-Cultural Collaboration to International HIV/AIDS Solidarity' (2003) 9 *Legal Writing Journal* Legal Writing Institute 145; Eleanor M. Fox 'The good Law School, The Good Curriculum, and the Mind and the Heart' (1989) 39 *Journal of Legal Education* 473-484 at 482, "The tendency to marginalize students and their personal educational needs and choices is responsible for some of the greatest failures of the law school today. Many students, especially after their first one or two semesters, are disengaged, unexcited, and alienated. Even from the start of law school, they see courses as unconnected, grading as random, and much of their course of study as irrelevant."

¹⁰² M.A. Du Plessis 'University Law Clinics meeting particular student and community needs: A South African perspective' (2008) 17 no 1 *Griffith Law Review* 124.

¹⁰³ Dlamini op cit note 101 at 596. See Sonsteng op cit note 8 at 66 where he proclaims that, "filling lecture halls with people of different ethnicities, socio-economic backgrounds and life experiences, without doing more to explore those differences, does little to impact the learning process. Professors must actively engage students so that differences beyond appearances can be discovered and shared. Also see Randall op cit note 36 at 202 where he states: "We struggle to be better teachers. But like parenting, we haven't been trained and we often repeat the teaching patterns of our teacher. We look at our own accomplishments and we assume that the system can't be that bad. We did well, didn't we? So with small modifications, if any, we merely repeat the teaching pedagogy of our teachers." Lustbader op cit note 38 at 321, where the author asserts that, "problems created by an inadequate context or process are compounded because those who teach law are also those who excel in law schools. Even when law teachers want to be more explicit, they often cannot break down the reasoning process to the degree necessary to communicate it effectively to some students. As experts, law teachers have internalized so much of the information and process that they are not consciously aware of all that goes into their analysis." Also see Kim op cit note 75 at 635.

not have any explicit criteria of good teaching (although we purportedly know it when we see it or know when we don't), any adequate measure of teacher effectiveness, or any agreement on the purposes of legal education which can be expressed in terms of explicit contents or observable learning outcomes.”¹⁰⁴ While Bellow was writing for an American legal education context, his comments are equally as apt for the South African context.

How is it then, that as responsible South Africans we simply assume that the methods of learning can be adapted as a “one size fits all type of model”?¹⁰⁵ This is aside from the fact that we experience a number of other diversity issues including language disparities.¹⁰⁶ So, the question that we must ask, as somewhat altered, is the following: How do we as law teachers advance effective learning methods upon our students considering all their diverse backgrounds?¹⁰⁷ In response to this question a number of suggestions are proposed including the formation of academic support programmes, cooperative learning methods, introduction of outcomes based education and the incorporation of clinical methodology into law school curricula.

Roach suggests that, “[o]ne of the goals of an effective educational institution should be to provide learning on a level playing field”¹⁰⁸ as failure to take into account the students’ cognitive abilities and non-cognitive factors, such as students’ vulnerabilities, will result in not teaching the student as a “whole human being.”¹⁰⁹ Roach continues and suggests that one of the ways to create a level playing field would be to

¹⁰⁴ Bellow op cit note 39 at 374.

¹⁰⁵ Sonsteng op cit note 8 at 64. Randall op cit note 36 at 210 where it is noted that “[t]he problem with traditional legal pedagogy is that it is a “one- size-fits-all” approach.”

¹⁰⁶ Also see Shaheda Mahomed & Philippa Kruger “Teaching legal writing at the University of the Witwatersrand Law Clinic” (2009) 3 *John Marshall Law Journal* 105–134 at 125. See Randall op cit note 36 at 202. See Baker op cit note 102 at 150 where she discusses the crippling effect that ‘Bantu’ education has had on our students. She argues that “[t]he absences of a writing pedagogy was incapacitating for Black African students, most of whom spoke English as a second or third language and had had little opportunity under Bantu education to learn basic English, let alone to have any real experience in critical reading, textual analysis, and composition. As a consequence, some students tried to compose their exams mentally in Zulu and then simultaneously translated back into English with predictable, disastrous results given the enormous incongruities of grammar, diction, and syntax. Even worse, students were not exposed to the rigors of sustained legal analysis that comes from the discipline of writing.” Also see Fedler op cit note 26 at 1002 where the author states that Black students have been entering university linguistically disadvantaged.

¹⁰⁷ Note Dr Backhouse’s observation at the National Legal Education Liaison Committee (NLELC) meeting on 4 November 2010 “Doctor Backhouse said the key factor was to identify the extent to which the education system would inhibit law students being optimally prepared for professional life, and the possible measures that can be put in place to address any limitations that are identified.”

¹⁰⁸ Roach op cit note 19 at 679.

¹⁰⁹ Ibid at 674.

create new ‘laboratories’ which would take the form of academic support programmes (ASP’s). She promotes that these programmes provide an enhanced learning environment, particularly for minority and other non-traditional students.¹¹⁰

Randall promotes the idea of Cooperative learning as a means to address the challenges of diversity within law schools. Cooperative learning can be defined as teaching students in small heterogeneous groups. Within this environment “group members strive for each other’s success.”¹¹¹ He believes that learning within this environment helps increase “critical thinking, better attitudes toward subject matters, increases social support, improves social adjustment, and increases appreciation for diversity.”¹¹² He promotes that Academic Excellence Programmes (AEP) using as its foundation the cooperative learning ideology, should be designed for students in need.¹¹³

Another way to level the playing field could be for law teachers and students to identify their own goals. As proposed by Dlamini, law teachers should consider “[w]hat is the goal of this legal education? What do I want to achieve? What do I want my students to achieve?”¹¹⁴ Similarly, students should consider their purpose at law school.

In the US the National Research Council in a publication titled *How People Learn: Brain, Mind, Experience, and School* in 2000 recommended that an educational environment that addresses issues of diversity, should be designed. This could be done by

¹¹⁰ Ibid.

¹¹¹ Randall op cit note 36 at 217.

¹¹² Ibid at 204. From previous research Randall reports that cooperative learning:

1. produces higher achievements
2. reduces student attrition
3. increases critical thinking competencies
4. facilitates increased social support
5. improves attitude toward the subject matter
6. leads to healthier psychosocial adjustments
7. increases respect for diversity

¹¹³ Ibid at 226-227. At the University of Dayton cooperative learning formed the foundation of an Academic Excellence Program (AEP). The AEP was designed to assist minority students or other students that were considered to “be at risk”. At this University the AEP has 6 major themes namely:

1. “AEP is based on *psychological and cultural adaptations* NOT compensatory education
2. AEP stresses *encouragement and empowerment*, never sending a message of incompetence
3. AEP is *highly structured*
4. AEP promotes *confidence*
5. AEP encourages *risk-taking* in the classroom
6. AEP encourages students to articulate their analysis in writing.”

Also see Swanepoel et al op cit note 8 at 108-109.

¹¹⁴ Dlamini op cit note 101 at 596.

creating an environment that is learner-centred, knowledge - centred and assessment-centred.

In post apartheid South Africa one of our primary concerns was to address the challenges of diversity within our education sector. Since South Africa's first national democratic election in 1994, several curricula-related reforms that intended to democratise education and eliminate inequalities in the post-apartheid education system were introduced. The most comprehensive of these reforms has been labelled outcomes based education (OBE). The introduction of outcomes based education emerged as a response to the demands for access to life-long learning, accountability and transparency from educators and the advancement and increase of human resources.¹¹⁵

The outcomes based formula was enacted through the South African Qualifications Authority Act of 1995 (herein referred to as SAQA) which promoted the establishment of the National Qualification Forum (herein referred to as NQF).¹¹⁶ SAQA with NQF has resulted in a change in focus from content based teaching to that of outcomes based teaching where emphasis is placed on skills training as opposed to content based learning.¹¹⁷ The NQF has identified a list of ten exit level outcomes which promote the incorporation of skills teaching at law school,¹¹⁸ and as indicated by De Klerk, "[e]ven a cursory inspection of the SAQA document will confirm that it breaks through the barrier of the cognitive arena."¹¹⁹

¹¹⁵ Chrissie Boughey A Brief Guide to Outcomes Based Education and the National Qualifications Framework. at 1 (copy with author).

¹¹⁶ South African Qualifications Authority Act No 58 of 1995.

¹¹⁷ See www.saga.org.za accessed on 15 April 2010 for details of Mission of SAQA.

¹¹⁸ The 10 points include 1) A coherent understanding of and ability to analyse fundamental concepts. 2) An understanding of relevant methods, techniques and strategies involved in legal research and problem solving in theoretical and applied situations. 3) The ability to collect, organise, analyse and critically evaluate information and evidence from a legal perspective. 4) The ability to communicate effectively in a legal environment by means of written, oral, persuasive methods and sustained discourse. 5) The ability to solve complex and diverse legal problems, creatively, critically, ethically and innovatively. 6) The ability to work effectively with colleagues and other role players in the legal process as a team and contribute to group output. 7) Computer literacy to effectively communicate and retrieve data. 8) Ability to effectively manage and organise his/her life and professional activities. 9) Ability to participate as responsible citizens in the promotion of a just, democratic and constitutional society under the rule of law. 10) Ability to understand the different employment and income generating opportunities in the legal field... and outside. In the US similar requirements have been noted by the American Bar Association, Standards for Approval of Law Schools and Interpretations, Standard 302(a)(4) (1998).

¹¹⁹ De Klerk op cit note 8 at 929.

In the United States the outcomes based education is promoted by the authors in *Best Practices*. According to the authors of *Best Practices*, the best process to use to reform legal education in such a way that all Three Apprenticeships are integrated is to “articulate clear educational objectives for the program of instruction and ... to describe those objectives in terms of desired outcomes.”¹²⁰

While there are a number of directions in which a South African perspective might lead CLE, this dissertation argues that the incorporation of the methodology into other courses in the LLB and LLM degree may facilitate for the learning needs of students. CLE, as a methodology, emphasises diverse learning styles thus catering for the needs of most students, including those students from disadvantaged backgrounds. Therefore, the incorporation of clinical methodology into main stream academic courses is supported as a plausible solution to the question stated above — as the methodology allows law students to learn in a variety of ways, from the understanding of theory to the incorporation of simulations, plus live-client clinics or even externships. This theory forms the premise of this thesis and both chapters three and eight provide further explanation on this assertion.

2.4 CONCLUSION

In conclusion, the author responds to questions raised at the outset of this chapter before recommendations are proposed.

At the beginning of this chapter, the author raise the question: How do students learn? Literature leads us to understand that there is no one correct method of learning however, there should be a variety of methods used to teach in order to accommodate the needs of the learner. The theory of learning promotes the integration of theory, practice and reflection as a platform on which knowledge should be transferred. The introduction of practical exercises should be deemed compulsory and the introduction of clinical legal methodology into curricula or individual subjects may be one way to achieve this end. Furthermore, in seeking to respond to this question adequately, cognition must be taken of the diverse needs of any student, for example, the age, cultural background as well as

¹²⁰ Burch & Jackson op cit note 15 at 73. Also see Stuckey op cit note 8 at 8.

the economic and social circumstances influencing the make-up of the student should be considered.

In response to question two, how do law teachers advance effective learning methods upon students considering all their diverse backgrounds particularly in South Africa? The author proclaims that the time is ripe for South African law schools to critically reflect on the teaching methods they promote — long gone are the days of teaching through dictation or rote learning; students today, particularly those emerging from disadvantaged backgrounds, must be allowed the opportunity to learn through a variety of methods.

In order to achieve this end, the author recommends that various options be explored, for example, first educate the teachers on the needs of the students, explore various options of teaching that include objective consideration of incorporating the clinical methodology into the broader legal curriculum and thus also potentially to promote tutorial programmes. The author believes that developing the ideal teaching methodology cannot be the work of individual academics struggling on their own, but rather requires the support and motivation of all stakeholders in the legal fraternity. As questioned and appropriately answered by Kim, “[g]iven the limits of student activism and influence, who else must contribute to make diversity and cutting-edge pedagogy meaningful realities? The answer, of course, is everyone else: alumni, faculty, law school administrators, and the academy.”¹²¹

Exactly how do we explore these options further while we simultaneously consider our challenges? The author proposes the following: *Identify the goal of one’s law school.*¹²² Some law schools may opt to adopt a purely academic angle, others a more integrated model of theory and practice. This approach would at least assist students in making conscious decisions on which schools best suit their career paths. However, most state universities would generally have these goals determined for them by statute.

Whilst identifying with one’s goals, law teachers must evaluate all courses taught in the LLB degree and consider their relevance.¹²³ Law schools should consider forging

¹²¹ Kim op cit note 75 at 633–637.

¹²² Stuckey op cit note 8 at 8.

¹²³ For example, at the University of the Witwatersrand, during the last few years through the process of curriculum reform a number of difficult conversations took place between what it is that students should

ahead with a diverse range of courses that address the needs of most of its students. It is important that the evaluation of teaching methodology and assessment methods within courses should be done continuously.

Should law schools identify its primary goal as one that promotes both theory and practice, then practical methods must be integrated into theory based courses. The incorporation of the clinical legal methodology could be one example that could be utilised to promote practical education.¹²⁴ As mentioned by Menon, “[c]linical programmes and methods engage the student in a whole range of learning objectives necessary to think and act like a lawyer, particularly when the student deals with real-life situations in a legal aid clinic. Interests are cultivated, attitudes are developed, skills are imparted, value clarification is provided, ethical decisions are made, and confidence and responsibility experienced by the student in a clinic setting. The learning is internalized both at the “cognitive level” as well as in the “affective domain”.¹²⁵ Similar sentiments are shared by the members of the Council on Legal Education for Professional Responsibility (CLEPR)¹²⁶, as well as the Carnegie Report entitled *Educating Lawyers*.¹²⁷ This idea was further supported in 1993 by the University of the Witwatersrand Law Faculty when it declared that “[s]tudents from disadvantaged backgrounds need intimate,

learn as opposed to that of what traditional academics thought was necessary to teach. Examples of courses that were discussed included Customary Law and Roman Law.

¹²⁴ David McQuoid-Mason, Keynote Address at 8th Annual Learning in Law Initiative: Using Your Imagination to Light Up Knowledge, Skills and Values for LLB Students: Clinical Legal Education and Effective Lessons (pt.1) (Jan 5 2006), available at <http://law.gsu.edu/ccunningham/LegalEd/SouthAfrica-McQuoid-Mason-LILI-Pt1.pdf> accessed on 20 July 2013 — as noted by McQuoid-Mason, “The fact that studies have shown that traditional legal studies result in a ‘dulling of students’ (sic) motivation and altruistic values’ it clearly indicates a need to ‘illuminate legal education’. One method of doing this is to introduce clinical legal education methods and the interactive forms of learning associated with it when teaching substantive and procedural law to law students.” Also see Stuckey op cit note 8 at 14 where he states that, “[o]ptimal learning from experience involves a continuous, circular, four-stage sequence of experience, reflection, theory, and application.” Also see Dubin op cit note 15 at 1478; Plessis op cit note 103 at 125-126.

¹²⁵ Menon op cit note 70 at 9. Also see David McQuoid-Mason ‘Clinical legal education: its future in SA’ (1977) 40 *THRHR* 343 at 355, where the author describes a variety of advantages attached to clinical education.

¹²⁶ See Willem Pincus ‘Legal Clinics in the Law Schools’ in D.J. Mcquoid-Mason (ed) *Legal Aid in South Africa* (1974) at 130 where the author states, “[b]ecause human development also requires learning through doing, clinical education is a necessity at the professional school level in higher education. It gives the student a real life role in the world as an integral part of his education. Though not the whole answer to what is best for the human personality and soul in a prolonged educational process, the clinical element can serve to make educators aware that they should concern themselves with the whole being which is the student as well as about how to make a better technical or intellectual contribution in their speciality.”

¹²⁷ Sullivan op cit note 76.

small-group teaching and close supervision in order to overcome their disadvantage; something which it is not possible to achieve to a very considerable extent in conventional teaching.”¹²⁸

Academics should be educated on the different and the most effective types of teaching methods. There is no doubt that the time has come for universities to be more selective in their employment processes, particularly when it comes to academics. It is essential that prior to employment, academics engage in courses on teaching methodology, as this will allow them to have insight into the different options available to cater for students’ needs.

In conclusion, not all students learn the same, some succeed by being taught theory and through summative assessment,¹²⁹ while others succeed by learning through practice and prefer continuous formative assessment processes.¹³⁰ It is therefore not enough to impart theoretical learning, as learning must be put into practice. The idea is to get the balance right as is expressed by Brown, “[t]he teachers are the trees, and they can and should bend when that will benefit their students... to connect with students who would not be reached by professor’s natural style.”¹³¹

¹²⁸ Documented and cited as memos/mission.law at 5. (copy with author)

¹²⁹ See Franciscus Haupt & Shaheda Mahomed ‘Some thoughts on assessment methods used in Clinical Legal Education programmes at the University of Pretoria Law Clinic and the University of the Witwatersrand Law Clinic’ (2008) 41(2) De Jure 7.

¹³⁰ Ibid at 117.

¹³¹ Ronald Benton Brown *I am a tree, I can Bend: Adapting your Communication Style to better Suit Your Students’ Needs*, The LAW TEACHER (Gonz.Univ.Inst.for L Sch. sTeaching), Fall 2006 at 13(book review)

CHAPTER 3

AN OVERVIEW OF CLINICAL LEGAL EDUCATION — WITH PARTICULAR REFERENCE TO SOUTH AFRICA WITHIN THE WORLD OF CLINICAL LEGAL EDUCATION

“..the essence of clinical legal education is a teaching methodology used by competent, experienced educators who attempt through lectures, discussions, exercises and real experiences to help students learn about the interplay between theory and practice as well as gain the skills and values they need if they are to become competent lawyers. The clinical methodology is not limited to in-house live client clinics but can be employed in different formats.”¹

3.1 INTRODUCTION

In the previous chapter the author concluded that the most effective method of learning within any law school environment should consist of an integration of theory, application and reflection. Building upon that conclusion, the author maintains that one way to achieve this objective would be for law schools to consider adopting a Clinical Legal Education (CLE) teaching methodology that incorporates the above. While CLE as an independent programme exists at most universities, the idea of considering CLE as a methodology that can be incorporated into all courses taught within the LLB and LLM degrees, has not so readily been adopted. In light of this, the author proposes in this chapter that Law Schools in South Africa (and particularly at the University of the Witwatersrand) consider expanding on the CLE methodology, now more contemporarily referred to as experiential methodology.²

¹ Rodney J. Uphoff, ‘Why in-house live client clinics won’t work in Romania: Confessions of a clinical educator’ (2000) 6 *Clinical L Review* 315 at 328.

² Erwin Chemerinsky ‘Rethinking Legal Education’ (2008) 43 *Harv. C.R.C.L.L.Rev* 595- 598. Victor M. Goode ‘There is a method(ology) to this madness: A review and analysis of feedback in the clinical process’ (2000) 53 *Oklahoma Law Review* 223. Also see Roy Stuckey ‘Can we Assess what we purport to

On inception, CLE was modelled on providing access to justice to those in need — it is claimed that this was (and may continue to be) a response to the lack of state funded legal aid and pro bono facilities available at the time.³ However, since 1994, with the coming about of our democracy and the adoption of the Constitution, the responsibility for advancing access to justice to those in need has shifted. With more responsibility cast on the State, university law clinics are now squarely placed in the position to promote academic teaching that incorporate practical methods. As the author submitted in 2009, “the ideology of CLE programs at South African universities has shifted, with the responsibility now on government to provide efficient access to justice. Universities are emphasizing the need for clinicians to develop and impart more classical academic skills, thereby bring into focus the challenge between access to justice versus education.”⁴ Having expressed the above, the author argues that the change in focus from access to justice to education exists in theory only — in practice university law clinics in South Africa continue to promote access to justice as a responsibility, thus often compromising on the educational needs of the student.

In light of the above, university law clinics in South Africa continue to promote teaching through the live-client method⁵ as historically many were taught that this was the only way to advance the methodology. The author argues that adopting such a narrow approach strangles any attempt to think creatively about CLE as a teaching methodology. CLE as a teaching methodology promotes a variety of methods of teaching which include simulation exercises and externships. CLE further provides students with the opportunity to reflect on what they have learnt. In support of this argument Giddings defined CLE as involving “an intensive small group or solo learning experience in which each student takes responsibility for legal and related work for a client (whether real or simulated) in collaboration with a supervisor. Structures enable each student to receive feedback on

Teach in Clinical Law Courses’ (2006) *International Journal of Clinical Legal Education* 9–28. See Willem De Klerk ‘Unity in Adversity: Reflections on Clinical Movement in South Africa’ (2007) *International Journal of Clinical Legal Education* 95–104.

³ Prior to 1994 pro bono facilities in South Africa were limited particularly towards persons of colour. As a result students — reacting towards the political injustices — took it upon themselves to assist the disadvantaged.

⁴ Shaheda Hassim Mahomed ‘United in our challenges — should the model used in clinical legal education be reviewed’ (2008) special edition *JJS* 54 at 68.

⁵ For a further discussion on the live-client teaching method see chapter seven.

their contributions and to take the opportunity to learn from their experiences through reflecting on matters including their interactions with the client, their colleagues and their supervisors as well as the ethical dimensions of the issues raised and the impact of the law and legal process.”⁶ Similarly, Uphoff’s quotation above pronounces CLE as a teaching methodology that is not limited in its application to the demands of the in-house live-client⁷ teaching method, but rather as a methodology that embraces a wide variety of teaching methods. Giddings, as well as Uphoff’s, contemporary insight defines the primary ambitions for this chapter and is supported by several prominent authors that are mentioned below.

This chapter is divided into four parts. In part one the author discusses several definitions of CLE as proposed by various authors. This discussion illustrates that, while it is a contested concept, CLE should be considered as a teaching methodology rather than an isolated course or programme. The author argues that there are two schools of thought advocating CLE — the access to justice advocates and others that actively support a more pedagogical approach towards CLE. It is argued that CLE as a teaching methodology embraces different formats of teaching and should not be restricted to the in-house live- client clinic model. In light of this, many will question: What then is the role of access to justice in a pedagogical approach to CLE? In part two, the author will attempt to answer this question as well as address some of the challenges associated with trying to achieve a balance between access to justice programmes and the educational demands of CLE. In part three, a comparative study is presented between the developments and pedagogical understanding on CLE in the United States of America (USA) and South Africa (SA).⁸ The purpose of this study is to benchmark the understanding of CLE practice and jurisprudence between the two countries. In this part it is argued that the USA has adopted a far more liberal understanding of CLE as a teaching methodology, as opposed to the conservative approach adopted in South Africa. The author argues further that despite our unique political, social and economic dynamic, some nineteen years into democracy that surely the time has come for us to explore the

⁶ Jeffery Giddings ‘Influential Factors in the sustainability of clinical legal education’ (PHD) 2010 at 17-18 (copy with author).

⁷ For a discussion on the challenges related to in-house live-client clinics see Mahomed op cit note 4 at 54

⁸ For an earlier comparative study between the United States and South Africa see David McQuoid-Mason ‘Clinical Legal Education: its future in SA’ (1977) 40 *THRHR* 343–358.

unique potential that CLE as a teaching methodology offers. In part four conclusions are drawn on a number of matters including how CLE as a teaching methodology can continue to embrace an access to justice component without actually being defined by it and on how South African CLE programmes can progress into playing a more influential role in the law degree.

3.2 DEBATE BETWEEN ACCESS TO JUSTICE PROMOTERS AND THE PEDAGOGICAL APPROACH

Before a discussion on the definition of CLE is introduced, the semantics behind the words ‘clinical legal education’ must be reflected on. The word ‘clinic’ originates from the practice of medicine and is defined as a “building where outpatients receive medical treatment or advice”.⁹ Over time the word clinic was adopted within the legal fraternity.¹⁰ Within this environment the word ‘clinic’¹¹ is synonymous with that of a service delivery environment accompanied by the real client. According to Swanepoel et al the word ‘clinic’ within the legal context can be defined as, “[a] place under the auspices of a university, or an institution of higher education, where members of the public may go to receive legal services, and where law students, through assisting to and or rendering these services under supervision of qualified legal practitioners, may learn the profession of

⁹ ‘Collins English Dictionary and Thesaurus’, Harper Collins Publishers, Third Edition 134(2006). Also see C.F. Swanepoel, M. Karels & I. Bezuidenhout ‘Integrating theory and practice in the LLB curriculum: Some Reflections’ (2008) (special edition) *JJS* 100 at 105 where it is noted that according to the Oxford Online dictionary, the word clinic “originates from the Greek *klinike tekhnē*, meaning ‘bedside art’ from *kline*, ‘bed’. Also see Ellison Kahn ‘A review of South African legal education’ in David McQuoid-Mason *Legal Aid in South Africa* (1974) 139–159 at 147. Also see Giddings op cit note 6 at 16 (copy with author).

¹⁰ Jon C. Dubin ‘Clinical Design for Social Justice Imperatives’ (1997-1998) 51 *SMUL Review* 1461 at 1463 where the author notes that during the 1920s and 1930s legal realists lead by Professor Jerome Frank “called for ‘legal clinics or dispensaries’ at law school to supplement the predominant casebook method of legal instruction and to offer law students experiential learning opportunities similar to the medical school model while providing free legal services to indigent clients.”

¹¹ See Jerome Frank ‘Why Not a Clinical-Lawyer School?’ (1933) 81 *U. Pa Law Review* 907. Also see Peter Toll Hoffman ‘Clinical Scholarship and Skills Training’ (1994-1995) 1 *Clinical Law Review* 93. Also see Cemerinsky op cit note 2 at 595. Also see Philip G. Schrag & Michael Meltsner, *Reflection on Clinical Legal Education* (1998) 19; Linda F. Smith ‘Designing an extern clinical program: or as you sow, so shall you reap’ (1998) 5 *Clinical Legal Review* 527 where the author claims that “[t]he term ‘clinical’ has been used to refer to lawyering experiences in actual cases and for actual clients. ‘Clinical’ has also been used to refer to simulated lawyering experiences.” Also see Franciscus Haupt ‘Some aspects regarding the origin, development and present position of the University of Pretoria Law Clinic’ (2006) 2 *De Jure* 231.

law by either doing it or observing it being practiced.”¹² Thus, the practical angle of legal education is emphasised — that is, learning by doing.¹³ Within any law school curriculum ‘learning by doing’ is generally associated with CLE programmes.

Clinical legal education programmes at universities across the globe are generally premised on the idea of providing access to justice to the poor and marginalised.¹⁴ It is against this background that most, if not all, clinical programmes were inceptioned and against which CLE programmes were defined.¹⁵ However, a reflection on the definition of CLE over the last century¹⁶ illustrates a shift from a more access to justice driven perspective — which emphasises CLE as an isolated course — that teaches students lawyering skills within a live-client clinic, to a more pedagogical definition that advances CLE as a teaching methodology, that promotes a variety of legal skills¹⁷ and proposes the use of different methods (including the live-client clinic) that can be used to teach legal skills.¹⁸ As mentioned by Ellmann, Gunning and Hertz, “[m]ost of us probably would also agree that one goal of clinical teaching is to foster, and to carry on, legal practice in the public interest. But our understanding of this goal is changing, and so is our

¹² Swanepoel op cit note 9 at 105. Also see Haupt op cit note 11 at 231 where the author states that, “‘Clinical’ in this context refers to the attempt to study and teach law through the use of legal skills directed to solve client problems and the attempt to draw useful generalizations from such experience.”

¹³ William Pincus ‘Legal Education in a Service Setting’, Council on Legal Education for Professional Responsibility, Inc 27 (1973) at 31. Also see Menon N.R. *Clinical Legal Education* (1998) at 10–11 where he confirms that: “Clinical methodology is most often described as ‘learning through doing’. The concept is borrowed from medical education where medical students learn diagnosis and treatment around sick patients in a hospital under the direct supervision and guidance of hospital doctors. The unique aspect of the clinical method is active participation of the students under faculty guidance and supervision. In the context of legal education, it refers to any law school course or programme in which law students participate in doing what lawyers usually do, including representation of clients under the supervision of a lawyer/ teacher.”

¹⁴ Frank Bloch (ed) *The Global Clinical movement — educating lawyers for social justice* (2011) at 4–400.

¹⁵ McQuoid-Mason op cite note 8 at 343–358. Willem De Klerk ‘University Law Clinics in South Africa’ (2005) 122(4) *SALJ* 929. Also see Frank Bloch & Mary Anne Noone ‘Legal Aid Origins of Clinical Legal Education’ in Frank Bloch (ed) op cite note 14 at 153–166.

¹⁶ For the purpose of this chapter I will reflect on the development of CLE dominantly from the perspective of its development in the United States as in most other countries around the world including South Africa. CLE programmes only began in the 1970s or soon thereafter.

¹⁷ See Haupt op cit note 11 at 231.

¹⁸ Stephen Ellmann, Isabelle R. Gunning & Randy Hertz ‘Why Not a Clinical Lawyer-Journal?’ (1994) 1 *Clinical Law Review* at 6. Although the authors refer to the contemporary vision of CLE, it is important to note that such a vision was already proposed by the likes of William Rowe in 1917. Rowe promoted the integration of clinical programmes into mainstream doctrinal courses. Also see Margaret Martin Barry, Jon C. Dubin & Peter A. Joy ‘Clinical Education for the Millennium: The Third Wave’ (2000) 7 *Clinical Law Review* at 16-17 where the authors state that Rowe’s vision promoted what most closely resembles an externship programme or a hybrid clinic.

understanding of the means by which it might be achieved.”¹⁹ Further reference should be made to Steenhuisen who states that CLE is influenced by two perspectives, the socially conscious or pragmatic-professional perspective. The difference between the two perspectives “is that the socially conscious perspective, unlike the pragmatic-professional perspective, does not make use of simulation as the learning opportunity. Rather, it uses the tension of client representation by the law student as its central motivation.”²⁰

From an access to justice perspective CLE is defined by the existence of three components, that is: “a lawyer-client relationship, academic credit, and supervision by clinical professor who would have to be accorded some form of status on the law school faculty.”²¹ Emphasis is placed on the idea that CLE should promote access to justice and that through this process students will learn lawyering skills. Earlier writers gave little or no thought to the idea that CLE could be promoted as a ‘pedagogy’ or ‘teaching methodology’ that could be incorporated into traditional law school courses.²² The idea was simply to provide access to justice and allow students to learn lawyering skills through this process. As indicated by Pincus in 1973, “[f]or us these additional educational benefits are rooted in the service setting is what gives clinical education its identity — not the fact that the experience is outside the classroom but that the experience is in the service relationship of lawyer and client. The purpose of clinical education is to extract the educational benefits available only in the service setting. This requires real service to a client”.²³ Active engagement presented through direct client interaction was the primary mode of the instruction for CLE programmes — thus

¹⁹ Ibid at 6. Also see Goode op cit note 2 at 223 where the author notes the specific goal that clinical education targets that is, “the development of qualified practicing lawyers.”

²⁰ Elsabe Steenhuisen ‘Goals of Clinical legal education’ in De Klerk et al *Clinical Law in South Africa* (2006) at 265–265

²¹ Lester Brickman ‘CLEPR and Clinical Education: A review and analysis’ (1973) The Council on Legal Education for Professional Responsibility, Inc at 56 — these components were proposed by the Council on Legal Education for Professional Responsibility when it set out to introduce the experiment of clinical legal education into law school curricula.

²² De Klerk et al op cit note 20 at 265. Also see Bloch et al op cit note 14 at 4 where the authors observe early (in 1920s) experiences of students at Yale University “The academic faculty allowed the students to work in the legal aid offices but refused to award academic credit, considering the work to be outside the academic domain.”

²³ Pincus op cit note 13 at 28.

demonstrating the original intention for the inception of the course.²⁴ He further promoted law clinics as having a separate physical identity from other law school courses.²⁵

Other promoters of the access to justice perspective include McQuoid-Mason who defines CLE²⁶ to include: “teaching legal skills in a social justice context”²⁷. Mason, Wilson and Van Hoorebeek state that “CLE provides a learning experience that is difficult to replicate in any classroom setting. With the benefit of academic guidance and structure, an ability to instil values into the students’ practice of law, and exposure to real clients with problems which are beyond mere textbooks exercises, the students learn key skills and are encouraged to reflect on their experience and their role in the advice process.”²⁸

Pedagogical promoters of CLE argue that confining CLE only to the live –client clinics will be an injustice to the true value that the course can promote. In this era of critical evaluation of law degrees and the discussions of integration of skills required for professional education²⁹, the examples that CLE as a methodology can potentially deliver to legal education should not be underestimated.³⁰

²⁴ Many believe that CLE is defined by the real client engagement and that only through such engagement will students learn the art of true lawyering skills.

²⁵ Pincus op cit note 13 at 29.

²⁶ Smith op cit note 11 at 527 where the author notes, “The term “clinical” has been used to refer to lawyering experiences in actual cases and for actual clients. “Clinical” has also been used to refer to simulated lawyering experiences.”

²⁷ David McQuoid-Mason ‘Law clinics at African universities: An overview of the service delivery component with passing references to experiences in South and South- East Asia’ (2008) *JJS* (special edition) 2.

²⁸ Mason, Wilson & Van Hoorebeek ‘The necessity of clinical legal education in University Law Schools: A UK Perspective’ (2005) *International Journal of Clinical Legal Education* 29-43 at 31.

²⁹ See Recommendations proposed by the Council for Higher Education (CHE) 2010 in a power point titled ‘The LLB Curriculum Project Colloquium’ (unpublished copy with author). Also see Stanford Law School ‘A “3D” JD: Stanford Law School announces New Model for Legal Education’ 28 November 2006 available at <http://www.law.stanford.edu/news/pr/47> accessed on 31 May 2012. Also see The National Jurists ‘Chicago-Kent, Gonzaga and the University of Detroit Mercy are just sampling of schools reinventing the law school model’ available at <http://www.nationaljurist.com/content/most-innovative-law-schools> accessed on 5 August 2012. Also see Document written by the Task force on Professional Skills Education ‘Curricular Innovations in other Law Schools’ 29 March 2010 (unpublished copy with author)

³⁰ Dubin op cit note 10 at 1466, where the author notes that in the United States in the beginning of the 1980s there was a shift in emphasis on how clinics should be modelled – a shift away from “client and community service, structural reform, and social justice ideals,” towards a more skills oriented curriculum.

Ironically, in the very same year that Pincus promoted the access to justice perspective, Bellow in an extremely progressive article, extended the definition of CLE to that which encompasses a teaching methodology. He claimed that:

“characterizing clinical education in methodological terms reemphasizes its potential application throughout the curriculum....The radical potential of the clinical method, however lies in its capacity to deal with these problems in a more total way — in its basic intention to infuse law study with experience and knowledge of the legal system in operation, and in its capacity to erode or at least foster examination of the rigid distinction between theory and practice, fact and value, the subjective and the objective, which underlie the dysfunctions of modern social life.”³¹

Following on Bellows suggestion, Spiegel contends that one should consider CLE as a teaching methodology, as this method could be used to teach any substantive course in the law curriculum.³² “If these substantive courses are ‘theoretical’ the use of a different methodology should not change the theoretical status of the course.” In the revised edition of the Report of the Committee on the Future of the In-House Clinic, it is clearly noted that, clinical education is first and foremost a method of teaching. Among the principal aspects of the method are these features: “students are confronted with problem situations of the sort that lawyers confront in practice; the students deal with the problem in role; the students are required to interact with others in attempts to identify and solve the problem; and, perhaps most critically, the student performance is subjected to intensive critical review.”³³ These features promote more than just the reliance on live-client interaction but include simulation activity³⁴ as well.

In 1980, this pedagogical definition of CLE was proposed in the United States by the committee of the American Bar Association. The Committee proclaimed that, “Clinical Legal Studies includes law students’ performance on live cases or problems, or

³¹ Gary Bellow ‘On teaching the teachers: some preliminary reflections on clinical education as methodology’ (1973) *Clinical Education for the Law Students* 374 at 377–378.

³² Mark Spiegel ‘Theory and Practice in legal education: an essay on clinical education’ (1986-1987) 34 *UCLA Law Review* 577 at 591.

³³ Report of the Committee on the Future of the In-House Clinic (1992) 42 *Journal of Legal Education* 508 at 511.

³⁴ For a discussion on simulation activities refer to chapter seven.

in simulation of the lawyer's role, for the mastery of basic lawyering skills and the better understanding of professional responsibility, substantive and procedural law, and the theory of legal practice. The performance or simulation of the lawyer's role may include one or more of the following:

1. Representing or assisting in representing a client in judicial, administrative, executive, or legislative proceedings;
2. Assisting a client as office or house counsel; or
3. Undertaking factual investigations, empirical research, policy analysis, and legal analysis on behalf of a client.”³⁵

Hoffman argues that skills training as opposed to the exclusive live-client model should be considered as the central goal of clinical education and therefore urges clinical teachers to see themselves as teaching lawyering skills.³⁶ He critically comments that promoting CLE as a teaching methodology does not dictate any particular educational goal. He declares that:

“[v]iewing clinical legal training as part of the larger subject matter of skills training recognizes both of clinical education's competing definitions, as a methodology and a subject matter. As a methodology, the education through role assumption that is characteristic of clinical courses should be seen as one of several available pedagogies for teaching skills. As a subject matter, 'skills training' more accurately describes what is being taught than does 'clinical legal education'. ...thinking of clinical legal education as a form of skills training requires clinical teachers to identify the skills being taught in their clinical courses, to identify and evaluate competing skills models, and to adopt the best methods of teaching such skills.”³⁷

Uphoff's quotation at the introduction of this chapter highlights specific words and sentences that illustrate the liberal thought process of CLE. These words include,

³⁵ Report of the Association of American Law Schools — American Bar Association Committee on Guidelines for Clinical Legal Education, *Clinical Legal Education* (1980) 12.

³⁶ Hoffman *op cit* note 11 at 93.

³⁷ *Ibid* at 111.

“teaching methodology”, “interplay between theory and practice”, “skills and values”, “clinical methodology is not limited to in-house live client clinics but can be employed in different formats.”³⁸

From an African perspective Ojienda and Oduor submit that CLE “is a method of instruction in which students engage in varying degrees in the actual practice of the law. Students get the opportunity to apply the theoretical aspects of their training to real life or simulated situations.”³⁹

Brayne et al describes CLE “as learning law through application, practice and reflection. But the way in which the concept is turned into a programme of educational experience varies.”⁴⁰ Menon defines CLE as a new methodology and further states that CLE is “directed towards developing the perceptions, attitudes, skills and sense of responsibilities which the lawyers are expected to assume when they complete their professional education. It can, therefore, be as broad and varied as the law school curriculum would accommodate; certainly it is not limited to the mere training in certain skills of advocacy.”⁴¹

Chavkin has defined CLE to reflect a marriage of theory and practice.⁴² Barry, Dubin and Joy in their article *Clinical Education for the Millennium: The Third Wave*, discuss CLE in the context of a teaching methodology. “By focusing on clinical education as a method, clinicians began to explore what clinical teachers were and should be doing, how clinical teaching methodology could be infused throughout the law school curriculum, and what the purposes and goals of clinical teaching should be.”⁴³

Bloch says that CLE “has two complementary aims: promoting professional skills training, thereby improving the quality of law practice; and supporting law school involvement in public service, thereby raising standards of lawyer professional and public

³⁸ Uphoff op cit note 1 at 328.

³⁹ T. O. Ojienda & M Odour ‘Reflections on the Implementation of Clinical Legal Education in Moi University Kenya’ (2002) 2 *International Journal of Clinical Legal Education* 49.

⁴⁰ Hugh Brayne, Nigel Duncan & Richard Grimes, *Clinical Legal Education- active learning in your law school* (1998) at 11.

⁴¹ Menon op cit note 13 at 1.

⁴² David F. Chavkin, *Clinical Legal Education* (2002) 1–164.

⁴³ Barry Dubin & Joy op cit note 18 at 16-17. Also see Roy Stuckey ‘Ensuring Basic Quality in Clinical Courses’ (2000) 1 *International Journal of Clinical Legal Education* 49.

responsibility.”⁴⁴ Bloch fundamentally discusses the ‘clinical methodology’ — and notes that although initially clinical scholarship focused on clinical teaching and educational value, this paved the way for discussions on methodology thus introducing concepts of professional skills and professional responsibility. Maisel states that “[c]linical legal education implies a method of teaching that, in most instances, has a social justice dimension. In its broadest definition, it includes in-house live client clinics, externships, community education projects, simulation courses, other skills training courses, and interactive teaching methodology.”⁴⁵

Stuckey et al has afforded clinical programmes a ‘new name’ — that is, *Experiential Education*. Experiential education promotes the integration of “theory and practice by combining academic inquiry with actual experience.”⁴⁶ While experiential education endorses the live-client teaching model as a method of teaching, it does not promote the exclusivity of the method. Rather this form of education encourages diverse methods of teaching students through experience. Stuckey emphasises that courses using, “Socratic dialogue or discussion as the principal pedagogical methodology also may employ simulation exercises or role-playing from time to time. For example, in an Evidence class, the instructor may create an on-the-spot role play to teach a concept by designating one student in the class as a prosecutor in a criminal case who is seeking to admit a piece of evidence, another student as defence counsel who is to resist admission, and a third student as the judge who is to rule on the proffer.”⁴⁷

⁴⁴ Frank S. Bloch ‘The case for clinical scholarship’ (2004) 6 *International Journal of Clinical Legal Education* at 8.

⁴⁵ Peggy Maisel ‘Expanding and Sustaining Clinical Legal Education in Developing Countries: What We Can Learn from South Africa’ FIU Legal Studies Research Paper Series, Research Paper No– 08–15, 374, October 2009 at 378–379.

⁴⁶ Roy Stuckey et al *Best Practices for legal education — A vision and a road map* (2007) 166–178. Stuckey et al submits the following as best practices for experiential courses: a) students must be provided with clear and explicit statements about learning objectives and assessment criteria, b) teachers must focus on educational objectives that can be achieved most effectively and efficiently through experiential education, c) the programme should meet the needs and interests of students, d) appropriate credit should be granted to students enrolled in experiential education courses e) student performance should be recorded in order to give students feedback, f) teachers who provide feedback should be trained on how to employ best practises, g) students should be trained to receive feedback, h) students should be helped to identify and plan on how to achieve individually important learning goals, i) students should be given repeated opportunity to perform tasks if achieving proficiency is an objective, j) the effectiveness of faculty in experiential courses should be enhanced.

⁴⁷Ibid at 165–166.

McAninch, demonstrates the effectiveness of introducing experiential simulations and events in his classroom and concludes that,

“[e]xperiential learning reflects the wisdom of the old saw, ‘experience is the best teacher’. By actually experiencing something, one learns it better than she would if simply told about itThe point is that experiential learning can be an effective method of learning substantive law. By drafting a document that will not violate the rule against perpetuities the student may learn more about the rule than she did by simply reading cases and commentary about it. Or, to put it another way, by preparing the will she may come to understand the rule more fully than she did when she had studied it only in a more traditional manner.”⁴⁸

This debate has been conducted within South Africa as well — with leading scholars on the pedagogical side. In South Africa, in 1973, Dugard suggested a number of recommendations for the integration of practical legal training into existing academic courses, for example into Civil Procedure and Criminal Procedure. “ ... integrate practical training into existing courses, such as civil procedure. At the University of the Witwatersrand a tutorial workshop has been introduced in civil procedure where certain actions are simulated and students are then expected to prepare pleadings on the action. Criminal procedure too is a subject which lends itself to this method: mock trials and regular visits to criminal courts might be made a part of the academic curriculum.”⁴⁹

In 2007, De Klerk submitted that “... clinical legal education is not a course or subject, as it is typically ‘packaged’ in the law degree, but is in fact a teaching methodology.”⁵⁰ Further in his articles *University Law Clinics in South Africa* and *Integrating clinical education into the law degree: Thoughts on an alternative model*, De Klerk maintains that CLE (in South Africa) should break from its traditional mould of being an isolated cause within the law curriculum to that of an integrated teaching

⁴⁸ William Shepard McAninch ‘Experiential Learning in a Traditional Classroom’ (1986) 36 *Journal of Legal Education* 420 at 420–421.

⁴⁹ C.J.R. Dugard ‘A Review of South African Legal Education’ in McQuoid-Mason op cit note 9 at 164.

⁵⁰ De Klerk op cit note 2 at 100. Also see how in this article De Klerk demonstrates the different goals of ‘academic methodology’ and ‘clinical methodology’.

method into mainstream law courses.⁵¹ De Klerk proposes an alternative model of CLE based on three principles. These principles include: “firstly, that clinic experiences must be spread over the four year degree as opposed to being limited to the final year; secondly, that clinical courses should be integrated and taught in conjunction with academic courses; and thirdly, that a clinical experience during the law degree must be compulsory for all students.”⁵²

Like Stuckey, De Klerk proposes that integration will “eradicate the artificial divide between academic teaching and practical training. Integration means linking the two learning experiences in a meaningful way, as opposed to the current model where clinical courses are generally completely divorced from academic teaching without any real attempt at coordinating the two.”⁵³ Interestingly, as does Stuckey and Uphoff, De Klerk does not confine the teaching methodology adopted within CLE programmes to the live-client clinic method’ but suggests the adoption of alternative models, for example externship programmes.⁵⁴

The author submits that integration will not only bridge the gap between theory and practice but also help address the challenge on the lack of skills taught within law degrees. This of course will facilitate for the needs of law students, particularly those from disadvantaged backgrounds in South Africa. In this country, the four year LLB degree leaves students ill prepared for practice — as noted in the previous chapter. The integration of experiential education into the mainstream curriculum should be considered as a solution to address this challenge. Having written on the different perspectives the author believes that understanding CLE as a methodology promotes

⁵¹ De Klerk op cite note 15 at 947, where he submits that “While clinical education over the past thirty years has certainly expanded and improved, these programmes essentially remain within a certain mould — they are isolated from other law courses, usually condensed into a single course, and mostly presented only at final-year level. Even the best clinical education programmes have reached what seems to be a ceiling with little prospect of further development.” Also see Willem De Klerk ‘Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model’ (2005) 39(2) *De Jure* 2 at 245 – 246.

⁵² De Klerk op cit note 51 at 249.

⁵³ De Klerk op cit note 51 at 947.

⁵⁴ Ibid at 249. Also see PF Iya ‘Diversity in provision of clinical legal education (CLE): A strength or weakness in an integrated programme of curriculum development’ (2008) *JJS* (special edition) at 35, where he states that “the term “clinical legal education” (CLE), as broadly understood and used, refers to the method of instruction in which students engage in varying degrees in the actual practice of the law. This is where students get the opportunity to apply the theoretical aspects of their training to real-life or simulated situations.”

positive benefits towards addressing students' needs as well as the needs of the profession.

Having stated the above, many may then ask: So, what is the contemporary role of access to justice within CLE? A discussion on this follows.

3.3 THE CONTEMPORARY ROLE OF ACCESS TO JUSTICE WITHIN CLINICAL LEGAL EDUCATION PROGRAMMES

Before the above question is explored, it is essential to set the foundation for the discussion. This part will be made up as follows. First a discussion on the semantics of access to justice and social justice will be explored. Secondly a discussion will be led on the teaching methodology that has emerged through student engagement in these service-setting programmes. Discussions from various authors that support this methodology will be noted. It will be argued that in most countries these service-setting programmes emerged within particular circumstances. Thirdly, a discussion will be provided on the challenges that this methodology provides. However, with particular reference to South Africa, our transition to democracy, the reformation of the Legal Aid Board Act and the emergence of several successful pro bono organisations the author argues that university law clinics should no longer be expected to play an aggressive role in providing access to justice. It will further be argued that in line with submissions made in part 3.2 of this chapter - that is that CLE be considered as a teaching methodology – the provision of access to justice should no longer be the exclusive preserve of clinical programmes but should instead be incorporated into the broader curriculum, where and how such services may compliment teaching. For the purpose of this thesis the engagement by students in the programme will often be referred to as within the 'service-setting model'.

The idea of access to justice dates back to at least the end of the fifteenth century, where the English King Henry VII ordered judges to assign counsel to the poor in need of

help.⁵⁵ It may be defined as providing individual legal services to those that are unable to afford the cost of hiring private attorneys to resolve their disputes.⁵⁶

‘Social justice’ on the other hand has been defined in many ways and is sometimes even referred to in the context of public interest lawyering⁵⁷. For example, McQuoid-Mason claims that social justice refers “to the fair distribution of health, housing, welfare, education and legal resources in society, including, where necessary, the distribution of such resources on an affirmative action basis to disadvantaged members of the community. Social justice in this sense is concerned with satisfying the ‘needs’ rather than the ‘wants’ of society.”⁵⁸ Furthermore, social justice is seen as impacting more on communities than on individuals. Clinical legal educators often use these terms interchangeably depending on the types of clinical programmes they operate. Generally social justice clinics are adopted by CLE programmes that engage in specialised curricula. For example, the programme will offer a clinic in education rights or on housing related matters. Therefore, for the purpose of this chapter, the author will discuss the role that CLE adopts, as providing services to the poor and unrepresented from a more general context — the need to provide legal assistance to members of the

⁵⁵ See Bloch & Noone op cit note 14 at 153 for a discussion on the history behind providing persons and community with free legal assistance.

⁵⁶ According to Bloch & Noone op cit note 14 at 153, during the 1960s and 1970s the awareness of injustices stem from progressive lawyers and academics realising that the justice system “was merely a formal right, with little substance and limited practical effect. The reality was that most people rarely engaged with the legal system and those that did were often denied access to representation and advice because of financial reasons.” Also see Greg Nott — Law Students Council President opening submission at Legal Aid Conference 11-13 July 1983 (copy with author) where Nott lends a description to legal aid as: “As it was once described legal aid is, the recognition that the poor man, the indigent person lacking the means to provide his own suit of armour is given one with which he can perhaps grapple and cope with the legal system which in all countries is complicated and in many respects menacing.”

⁵⁷ For a discussion on public interest lawyering see Jeremy Perelman ‘The way ahead? Access-to-Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The *Nkuzi* Case’ (2005) 41 *Stanford Journal of International Law* 357. Also see McQuoid-Mason op cit note 27 at 7; M.A. Du Plessis ‘Divorce: Achieving social justice through clinical legal education’ (2008) *JJS* (special issue) 24–33. An example in South Africa of a public interest law firm includes the Legal Recourse Centre (LRC). The LRC was founded in 1979.

⁵⁸ There are several definitions for social justice, for example as noted in the article by Spencer Rand ‘Teaching law students to practice social justice: an interdisciplinary search for help through social work’s empowerment approach’ (2006-2007) 13 *Clinical Law Review* at 460-461 — “practicing within a social justice framework means instilling in our students that they are not to mechanically practice law by merely applying law to the facts of the individual case presented. Instead, they are to consider the oppressed condition of our low income community and practice law in a way that alleviates that oppression.” Also see David McQuoid-Mason ‘Teaching social justice to law students through community service: The South African experience, Transforming South African Universities’ (ed Iya) (1999) at 89. Also see De Klerk op cit note 15 at 943.

public or communities that are indigent or that cannot afford to defend themselves on matters that relate to socio-economic rights.⁵⁹

Generally the inception of clinical programmes from a global context was premised on students taking it upon themselves to provide assistance to the poor.⁶⁰ Students often responded to the needs in society, as there was (and in some countries may continue to be) a gap between the needs of the people and the resources as provided by the state. During these early stages no serious thought was cast on the pedagogy attached to CLE. For example, in South Africa in the 1960s, with the country experiencing extreme political turmoil, inequality based on race made it extremely difficult for the poor person of colour to gain adequate access to legal services.⁶¹ As mentioned by Mahomed and Kruger, “[i]t was a dark time in the history of our country when the Apartheid Policy of the Nationalist led government was at its height. Black and white people led vastly segregated lives. By and large, black people were poor, minimally educated and unable, and in many instances forbidden, to break from this disadvantaged state. They were voiceless and too poor to engage legal representation to assist them with life’s challenges.”⁶² As a result students from the University of the Witwatersrand, in 1969, took it upon themselves to assist at the Johannesburg Legal Aid Bureau (this organisation no longer operates) and ran their own clinic in the coloured township

⁵⁹ See P. Pretorius ‘Legal Aid Clinics as teaching instruments’ in D.J. McQuoid-Mason (ed) *Legal Aid and Law Clinics in South Africa* (1983) at 86 which comments on the purpose of Legal Aid as noted by the Association of Law Societies of South Africa and the General Council of the Bar of South Africa as “The purpose of legal aid is to provide essential legal services to persons who are unable to pay for them. These services should not be seen as a luxury, nor should the provision of such services to those who cannot afford them be seen as an act of charity. They are essential services, the provision of which is necessary to ensure that the legal system functions properly.” Also see Antoinette Sedillo Lopez ‘Learning through service in a clinical setting: the effect of specialization on social justice and skills training’ (2000 – 2001) 7 *Clinical Law Review* (2000- 2001) 307 at 317 where the author notes that “[i]n a clinical setting, providing access to justice means designing a program to address needs for legal service in our communities.”

⁶⁰ De Klerk op cit note 15 at 940. Also see McQuoid-Mason op cit note 59 at 90. Also see Bloch et al op cit note 14 at pg xxiv. Also see McQuoid-Mason, Ojukwu and Wachira in Bloch et al op cit note 14 at 23 where the authors note that in South Africa the inception on the clinics depended on the ‘political status’ that the University assumed: “The first law clinics in South Africa were established during apartheid era for different reasons at different universities. At historically ‘White’ English-speaking liberal universities, law clinics were established primarily to help the victims of apartheid — and other poor persons whose human rights had been violated — to access legal advice and assistance, while at the same time allowing law students to gain practical experience. However, at historically ‘White’ Afrikaans-speaking universities, the emphasis was on exposing students to practical skills rather than assisting with human rights violations.”

⁶¹ See McQuoid- Mason op cit note 9.

⁶² Shaheda Mahomed & Philippa Kruger ‘Teaching Legal Writing at the University of the Witwatersrand Law Clinic’ (2009) 3 *John Marshall Law Journal* 108–109.

Riverlea.⁶³ During this period students received little support from the university, as these initiatives were noted as voluntary programmes with no formal university credit granted.⁶⁴

Through the engagement of student and client in a service-setting a teaching methodology emerged.⁶⁵ As reported by Lopez, “[t]he pursuit of social justice involves working to provide access to justice and understanding and addressing inequities in our justice system. In a clinical setting, providing access to justice means designing a program to address needs for legal service in our communities.”⁶⁶ The methodology centred on providing access to justice and as a result CLE programmes often resembled the workings of a legal-aid office.⁶⁷ This feature was further entrenched once several CLE programmes began to receive funding to support their course, for example, in South Africa funding was received from both Ford Foundation⁶⁸ and the Legal Aid Board.⁶⁹ This methodology continues to define CLE programmes in South Africa.⁷⁰

⁶³ Ibid at 109.

⁶⁴ Bloch (ed) op cit note 14 at 157 where the author discusses similar approaches adopted in other countries, for example “Prominent examples of early student-run ‘legal aid societies’ in the United States include Yale University, the University of Southern California, and the University of Chicago. Typically, they were administered as extracurricular student associations with little or no faculty supervision.” Also see Willem Pincus ‘Legal Clinics in Law Schools’ in McQuoid-Mason op cit note 9 at 124-125. Also see Bloch et al op cit note 14 at 24–25 where the authors discuss the clinic status at the University of Cape Town in 1972 — “The clinic was managed and staffed entirely by law students, with supervision being done by legal practitioners from outside the university. The clinics were held in poor neighborhoods during the evenings in churches and town halls. The program differed from subsequent law faculty programs in that nobody employed by the law school supervised the students and no office, equipment, or other facilities were provided by the university.”

⁶⁵ In designing these programmes several possibilities emerged, for example individual service clinics, specialised clinics and community engagement projects. Individual service clinics may be considered as general clinics as opposed to community or specialty clinics. Specialised models address specific cases. The areas of specialisation are dictated by the needs within communities. Community engagement projects are aimed at addressing community needs as well as empowering them.

⁶⁶ Lopez op cit note 59 at page 316.

⁶⁷ Bloch (ed) op cit note 14 at 157, where the author notes “.. these legal aid clinics incorporated the core mission of any legal aid office, that is, to serve the local community’s legal needs.”

⁶⁸ McQuoid-Mason op cit 63 at 123 where the author discusses the origination of funding received for clinical programmes. In the United States the creation of the Council on Legal Education for Professional Responsibility (CLEPR), in 1968, was inspired by a promise to receive funding for a period of ten years from the Ford Foundation. The purpose of such funding was to provide support for clinical legal education programmes. Also see Bloch(ed) op cit note at 14 at 25 where it is noted “The Ford Foundation funded a legal aid conference in South Africa in 1973, which was the catalyst for the law clinic movement in the region.”

⁶⁹ Ibid at 157 & 162 where the author rightfully mentions that often CLE programmes are seen by the state as a cheap and an easy way to facilitate access to justice to the poor. As a result several government bodies began to fund these programmes as it relieved the burden of the state. Similarly at the University of the Witwatersrand funding received by the Legal Aid Board in the 1990s was aimed at reducing the burden on

Having stated the above, the author proclaims that for most countries, particularly South Africa, it has been some forty years since clinical programmes were inceptioned. With the transition to democracy, the reformation of the Legal Aid Board Act⁷¹ and the emergence of several successful pro bono organisations⁷² and the acknowledgment by some that CLE extends itself to a teaching methodology, the question that the author asks is: So, what is the contemporary role of access to justice within CLE? What follows is a written debate between discussions from several authors that support teaching within the service setting versus the challenges that this model presents in light of contemporary legal education.

The need for law students to be exposed to access to justice cases has received strong support from many academics.⁷³ In 1973 Pincus raised the key question, ‘Why the service setting?’ The reply was that outside the actual service setting the law student cannot be asked to act the answers to legal questions which are troubling human beings. Consequently, without the service setting there is an incomplete job done in educating the professional. “Absent the service setting, the law school produces law graduates and not lawyers. No one can learn how to be a lawyer until he has tried to act the part.”⁷⁴ Boyer stated that, “[w]e conclude that today’s undergraduates urgently need to see the relationship between what they learn and how they live. Specifically we recommend that

the Legal Aid Board on providing access to justice on civil matters. See De Klerk op cit 15 at 940 where the author confirms that in the 1990s the Legal Aid Board relied heavily on university law clinics to provide access to justice, “By 1998 the LAB was on the brink of collapse. It had seen a 709 per cent increase in legal aid referrals from 1990 to 1998 and its administration was breaking apart. Legal aid in criminal matters dominated the LAB agenda and resulted in clinics being virtually the only service providers in respect of civil matters.” It is only over the last few years that the Legal Aid Board has introduced a civil litigation programme. See Perelman op cit note 57 at 361.

⁷⁰ Bloch (ed) op cit note at 57 at 162. Also see Pincus op cit note 9 at 124 where the author, while discussing CLE programmes in the US states that “[a]t the outset it should be clearly understood that it has been CLEPR’s insistence on bringing legal aid work into the law school curriculum which has made its program unique.”

⁷¹ See Perelman op cit 57 at 361 where the author writes, “[l]egal aid in South Africa has an extensive legal foundation. The Constitution’s Bill of Rights provides mandatory legal aid for criminal cases (Section 35) and for children less than seven years of age (Section 28). A right to access to legal services in civil matters (with restrictions as to the areas of the law covered) was recognized as a means-tested entitlement by the revised 1969 Legal Aid Act, which created the national Legal Aid Board (“LAB”). As a result, legal aid in civil matters is granted to citizens who pass a means test, proving that their income level is beneath a fixed ceiling.”

⁷² For example the Nkuzi Development Association, The Socio-Economic Rights Initiative (SERI), Legal Aid initiatives established at the Labour Court and Pro bono.org.

⁷³ Jon C. Dubin op cit note 10 at 1461. Also see Daniela Ikawa ‘The Impact of Public Interest Law on Legal Education’ in Bloch (ed) op cit note 14 at 198–199.

⁷⁴ Pincus op cit note 7 at 31.

every student complete a service project — involving volunteer work in the community or at the college — as an integral part of his or her undergraduate experience. The goal is to help students to see that, not only are they autonomous individuals, but also members of a larger community to which they are accountable.”⁷⁵

Dubin claims that CLE furthers social justice needs in three ways, one, by providing access to justice and pursuing social reform to those in need, secondly, by exposing law students to social and pro bono needs, and thirdly, by creating a sense of social consciousness amongst students.⁷⁶ McQuoid-Mason provides two important reasons for student engagement in ‘legal aid clinics’,⁷⁷ first, these clinics allow students the opportunity to help the disadvantaged members of society and secondly, the knowledge acquired by students through such engagement is “something that is not possible in a regular black letter law course.”⁷⁸ According to Milstein one of the important goals of in-house clinics is to allow the students the opportunity to critically analyse the justice system. He states that “ ... they typically represent the poor and disenfranchised, students see the legal system through the eyes of clients who are indigent, women, convicts, or members of racial or sexual minority groups. They witness, for example, the way in which states often disadvantage their clients, ... Clinical teachers work with students to help them understand the sources of injustice and to explore their ideas for reform.”⁷⁹ Steenhuisen declares that legal service has benefits to both students and law faculties. For law faculties the benefits include the client holding the educational institute in high regard and partnerships with professional bodies are improved. For students, the benefits include, “[s]tudents gain insight into the role of practitioners as agents for social change and become sensitive to the impact of legal rules on the lives of the indigent.”⁸⁰

Therefore, teaching within the service setting model could potentially allow students to master a number of fundamental lawyering skills that include interviewing skills, advocacy skills, drafting skills and professional management skills, community

⁷⁵ Ernest Boyer ‘College: The Undergraduate Experience in America’ (1987) 51.

⁷⁶ Dubin op cit note 4 1474–1477. Also see McQuoid-Mason op cit note 45 at 89.

⁷⁷ McQuoid-Mason op cit note 45 at 89.

⁷⁸ Ibid at 93-94.

⁷⁹ Elliott S. Milsten ‘Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations’ (2001) 51 *Journal of Legal Education* 375 at 379–380.

⁸⁰ De Klerk et al op cit note 20 at 278.

engagement and empathy skills.⁸¹ The reason the author proclaims that students could ‘potentially’ learn the above skills is simply because by allowing students to engage with clients in an unstructured clinical programme, may result in students not necessarily learning — or even being aware that they have learnt the above skills. Therefore, clinical courses using the service-setting model of teaching must include the element of structure and reflection. Structure will ensure that students derive the full educational value of the course. Reflection will allow the students the opportunity to reflect on what it is that they have learnt. As mentioned by Pretorius “[t]he clinic provides an almost perfect educational resource on which to base the training of most of these extra-legal aspects of being a lawyer. However, the clinic cannot do this automatically. It cannot be done purely by clinical participation in the clinic. It is only if a carefully designed teaching programme is developed that the educational potential of a clinic can be fully exploited. In other words, mere participation in the clinic from an educational point of view is not going to give any results, unless it is accomplished by a carefully designed teaching programme.”⁸²

Although such engagement is without saying a valuable teaching tool, the institutional limitations or challenges that this methodology imposes must be noted.⁸³ Johnson sums up these challenges by weighing up “a service-oriented program that undertakes a large caseload with minimal lawyer supervision of the student work, as contrasted with an “education-oriented” program that accepts fewer clients and maintains a low student-supervisor ratio.”⁸⁴ Further challenges that this model presents include, limited resources; addressing clients’ needs and students’ needs; difficulties around assessment; time constraints and the challenges to balance the learning amongst students. These are discussed below in the remainder of this part of this chapter.⁸⁵

⁸¹ Philip M. Genty ‘Clients don’t take sabbaticals: the indispensable in-house clinic and the teaching of empathy’ (2000-2001) 7 *Clinical Law Review* 273 at 275.

⁸² Pretorius op cit note 59 at 91.

⁸³ De Klerk op cit note 15 at 946.

⁸⁴ Earl Johnson Jr, ‘Education versus Service: Three variations on the theme, Clinical Education for the Law Student (1973) The Council on Legal Education for Professional Responsibility, Inc, 414.

⁸⁵ This part of the text has been extracted from a paper written by myself and published referenced Shaheda Hassim Mahomed ‘United in our challenges — should the model used in clinical legal education be reviewed’ (2008) *JJS* (special issue) 54.

3.3.1 Resources

In order to facilitate an effective service setting model, extensive resources are required.⁸⁶ These include financial security, human resources and appropriate infrastructure.⁸⁷ This model tends to strain resource budgets and most universities are reluctant to respond favourably to this.

From a financial perspective this model poses an extreme challenge. Operational costs such as telephone accounts, photocopying, faxing, stationery and transport are unavoidable. As most universities are reluctant to subsidise these costs, clinicians are forced to raise funds. Aside from the fact that it is not easy to secure outside funding, once such funding is secured, it is essential to comply with funders' requirements.⁸⁸

Real-client clinics require appropriate infrastructure that include private consultation areas,⁸⁹ receptionist facilities, filing space and cabinets. Thus, to establish the ideal clinical setting adds a further burden to already stretched financial resources. However, sustaining an effective real-client teaching model requires human capacity. Clinics that adopt this model should have secretaries, administrative clerks, financial managers, a receptionist and sufficient full time clinicians to provide adequate supervision for the students.⁹⁰ In 1983, Pretorius stated that the scarcity of professional supervision was a major problem. He considered supervision to be the 'crux' of an

⁸⁶ Pretorius op cit note 59 at 86.

⁸⁷ See Stuckey et al op cit note 46 at 197 where it is noted that to ensure best practices for in-house clinics the Law school includes providing adequate facilities, equipment, and staffing for in-house clinics — "This means that clinical offices should include reception areas, confidential client interviewing space, appropriate work areas for students, adequate room for professional staff and faculty, supportive staff services, means for investigation, research resources, classrooms, and multimedia technology."

⁸⁸ Brayne *et al* op cit note 40 at 16 submits that: "Those advocating the development of clinics must be prepared to address the issue of funding head on. A starting point might be to try to identify sources of funding. 'Hard' money....There are, however, difficulties, notably the over-reliance on soft money and the vulnerability that this can produce (that is, the law school does not take financial responsibility for the clinic, which then rises or falls at the whim of the external funder)." The Wits Law Clinic is currently funded by several organisations, each with their own sets of requirements. While attempting to comply with these requirements, clinicians continuously find themselves responding to several demands at once. For example one of our primary funders requires that a minimum number of files be opened each year. In order to meet these requirements one could easily compromise on the quality of the files.

⁸⁹ Although some clinics, for example, the Wits Law Clinic and Natal Law Clinics, were facilitated under trees or in churches in the early 1970s, these environments do not always prove to be ideal, due to continual problems related to confidentiality and the safe keeping of the files.

⁹⁰ David McQuoid-Mason 'The organisation, administration and funding of legal aid clinics in South Africa' (1986) 1(2) *Natal University Law and Society Review* at 193 states that: "A full time supervisor has the advantage of devoting all his time to ensuring the smooth running of the clinic."

effective CLE programme.⁹¹ It has been said that the ideal student to supervisor ratio should be 1:7⁹² to 1:12⁹³. Most universities are however reluctant or unable to provide the necessary means to employ enough clinicians in order to achieve this ideal, which detracts from the effectiveness of the model as a teaching tool.⁹⁴

3.3.2 Clients

Real-client clinics operate within a live-client context; therefore, it comes as no surprise that one needs clients to sustain this model. Several clinics are not able to attract sufficient clients for various reasons, one of which is the fact that some clinics are inaccessible to the clients. University campuses are mostly situated in urban areas which might be inaccessible to clients in rural or peri-urban areas. In response, several satellite clinics have been set up by some clinics.⁹⁵

Dealing with such large number of cases often result in excessive strain being placed on both clinicians and students. It is within this context that one could easily forget about the educational elements of clinical legal education and become completely absorbed in providing access to justice.⁹⁶ It must however be noted that “students carrying excessive caseloads without adequate supervision are neither learning how to practice law, nor providing effective service to their clients.”⁹⁷

3.3.3 Student versus client needs

Clinicians are continually faced with having to balance clients’ needs against that of the students. This juggling act between the need to provide access to justice and education is

⁹¹ Pretorius op cit note 59 at 87.

⁹² P. G. Schrag ‘Constructing a clinic’ (1996) 3(1) *Clinical Law Review* 175-248.

⁹³ As proposed by the UK Clinical Legal Education Organisation (CLEO). See www.ukcle.ac.uk accessed on 20 July 2013

⁹⁴ McQuoid-Mason op cit note 90 at 194.

⁹⁵ For example, the University of Johannesburg Law Clinic has established several satellite law clinics at strategic positions around Johannesburg. The University of Pretoria Law Clinic has also established a satellite clinic at the Hatfield Community Court.

⁹⁶ Johnson J. R. op cit note 84 at 414-429.

⁹⁷ Justice Initiative Database on CLE 2001 at 3 (copy with author), where it is noted that, “We also find it necessary to limit the intake of files by the students. This is something that unfortunately is only really learnt by a student at the end of the year. There is a limit to the amount of work that can be done effectively in the clinics.”

not limited to South African clinics.⁹⁸ Clients' needs can easily cloud educational goals. "Once cases are taken on, it is the clients' best interests that are paramount.... The willingness of staff and students to serve the client or the insistence of funders that such a service be provided can compromise the educational purpose."⁹⁹

This challenge can best be addressed by clinicians asking themselves the following questions:

- What is the primary objective¹⁰⁰ of the clinical programme? Should the clinic identify education of its students through using the real-client model as its primary objective? The next question that must be asked is:
- How best will clinicians achieve this objective whilst addressing the challenges that this model presents?

By raising these questions, clinicians are forced to evaluate their programmes and develop appropriate objectives. When using the real-client model clinicians must be selective in the cases they accept. Matters dealt with must contribute to the educational goal of the course.¹⁰¹

3.3.4 Assessment

The dynamics on assessing students objectively, whilst using the real-client model, continues to be a challenge. Students consult with clients from different cultural backgrounds, who speak different languages and have different levels of literacy, each client presenting his or her own set of complex or simple legal problems. Assessing students in this context, with so many variables, whilst remaining consistent, proves to be most challenging. "It is sometimes difficult to ensure that all students, especially in real-

⁹⁸ Brayne et al op cit note 40 at 18 where it is stated: "A further tension again particularly prevalent in the USA, but also a notable feature in the UK real-client clinics, arises in the competing demands of the students and the clients."

⁹⁹ Ibid at 18.

¹⁰⁰ Words like vision and goal could also be used.

¹⁰¹ McQuoid-Mason op cit note 8 at 347 where he proclaims: "For this reason some American law teachers have favoured restricting community service to 'test case' litigation, on the basis that the yield from victory in a major test case is many times greater than that from winning several minor cases." Schrag op cit note 92 at 186 advocates the benefits of smaller cases, because: "if a student is able to see a winning case through to the end, the opportunity to celebrate the success with a client reinforces all of the educational lessons of the clinical experience." See also Nina Tarr 'Current issues in clinical legal education' (1993)37 (31) *How. L.J.* at 3. Also see Stuckey et al op cit note 46 at 197 where it is stated that "Education should be the first priority." Also see chapter five for a further discussion on goals.

client work, are exposed to the same quality of material on which they are to be assessed.”¹⁰²

One effective way to assess students within this model is to provide regular feedback to the students and to encourage reflection on the part of the students. With the large numbers of students, clients and cases, constructive feedback and reflection is not always possible though. This problem can be resolved by ensuring that the number of files opened is limited and that each file opened serves an educational purpose.

3.3.5 Time constraints and continuity of services

Real-client clinics are, by their very nature, time intensive and only operate effectively if an on-going service is provided. They present similar time management challenges as those in private practice. Once a client has been screened and a file opened, professional responsibilities set in for both the clinician and the student.¹⁰³ This requires clinical teachers to supervise students closely to ensure proper management of the files. As is mentioned by Vawda, “the proper implementation of the clinical methodology requires close and direct supervision of students. The ultimate goal of supervision is to ensure that the student is working effectively, efficiently and ethically for the client.”¹⁰⁴ Clinicians generally spend a substantial amount of time working with students, in assessing merits, drafting pleadings, attending court or briefing counsel. Little time remains for formal teaching and research.

Real-client clinics cannot simply close during student vacations. There always has to be professional staff in attendance to deal with the clients’ needs and attend to files. This places a further burden on clinicians as they are not only required to teach, research and publish, but also need to deal with clients’ matters professionally on an ongoing

¹⁰² Brayne et al op cit note 40 at 19.

¹⁰³ Stilwell et al *Clinical Law in South Africa* (2004) (1st ed) at 29. Professional responsibility is regulated in terms of several statutes including the Attorneys Act 53 of 1979 and the Admission of Advocates Act 74 of 1964.

¹⁰⁴ Yousuf Vawda ‘Best clinical teaching practices in South Africa’ (2003) at 6 (unpublished copy with author) In South Africa a number of articles written by the author of this thesis as well as other academics have quoted the unpublished articles by Vawda- as argued in the thesis aside from literature written by David McQuoid- Mason up until 2005 there was very little published on CLE in South Africa.

basis.¹⁰⁵ Time constraints are dependent on the complexity of a particular matter. For example, a simple dismissal matter could escalate into a complex review application or a simple divorce action could result in a complex custody battle. This raises the question, should clinics be selective in the types of matters they deal with, and if so, how will the selection criteria be determined?

3.3.6 Imbalances in learning

Real-client models allow students to have different learning experiences as they deal with different clients and different types of cases. The spin-off is simply that some students may deal with substantial matters with good educational value, while others may not.

In summary whilst it is clear that many argue that access to justice is a fundamental component of clinical legal education and that its value is indispensable, there are several challenges that access to justice programmes present. To the extent that this is accepted, how then do we adapt the access to justice model to better suit the needs of the students, the clinicians and the clients whilst at the same time being cognisant of the fact that CLE is a teaching methodology rather than an isolated course in the law degree?

For many this will involve a mind-shift from classifying access to justice as a priority to reflecting on the educational needs of the students and clinicians alike. McQuoid-Mason has stated that “the most successful programmes seem to combine community service work, with low case loads and close supervision backed up by carefully structured classroom instruction.”¹⁰⁶ Maisel proposes that universities allocate more resources towards clinical programmes, integration of clinical curriculum into mainstream law courses will allow students to be better prepared for their final year engagement with clients,¹⁰⁷ the adoption of student practice rules will help in promoting access to justice and that universities increase clinical faculty. Others continue to debate

¹⁰⁵ Stilwell et al op cit note 103 at 32 where specific reference is made to a book by C.H. Van Zyl, *The Theory of Judicial Practice of South Africa* (1921), wherein the author referring to attorneys’ conduct states: “He must serve his client faithfully and diligently and must not be guilty of unnecessary delay.”

¹⁰⁶ McQuoid-Mason op cit note 8 at 348.

¹⁰⁷ Maisel op cit note 45 at 417 where she proposes that, “[a] fairly simple and helpful first step would be to put more emphasis on skills and substantive law related to issues of poverty and development in the first three years of the curriculum, so that students are better prepared for their final year clinical course.”

whether the educational value lies in dealing with more complicated matters rather than less complicated matters.¹⁰⁸ Barry, Dubin and Joy propose that, “[e]ach law school course should raise issues of access to justice, with clinical courses exposing students to the reality of how these issues play out in the lives of indigent clients and the systems currently used to address their needs. If law schools are truly committed to professional values, then these values must be discussed in every class and not simply relegated to clinical courses.”¹⁰⁹

Therefore in response to the question raised above the author submits that the contemporary role of access to justice within CLE should be to integrate the method into the broader law degree rather than confining it to an isolated course. For example the author recommends that each course that adopts the CLE methodology design as part of its curriculum the opportunity for students to engage with live-clients either at pro bono centers or in consultation with other role players within the profession. This will assist in relieving the burden on law schools hosting a separate, client-intensive clinical programme. Further support for this argument is lead in chapter eight. The author submits that each law school reflect on its understanding of CLE and following this the role of access to justice within the particular institution should be assessed. This might result in clinical programmes exploring different options – each unique to the demands within its own institution. The author submits that there are two possible options namely, operating access to justice as the primary mode of instruction in an isolated CLE programme or integrating the access to justice method into other courses within the LLB and LLM degrees. In the event that Law Schools continue hosting an isolated CLE programme the author recommends that the clinical programme be designed to meet the pedagogical needs of the students.

¹⁰⁸ McQuoid-Mason op cit note 8 at 347.

¹⁰⁹ Barry, Dubin & Joy op cit note 18 at 16.

3.4 COMPARATIVE STUDY: DEVELOPMENT AND UNDERSTANDING OF CLINICAL LEGAL EDUCATION PROGRAMMES WITHIN THE UNITED STATES OF AMERICA

In an attempt to expand on the discussion in this chapter thus far, the comparative study focuses on CLE as teaching methodology in the United States of America (USA) from a South African perspective. Some may question the viability of this effort as they may argue that the ‘playing fields’ are not the same or that comparing these countries does not amount to comparing ‘apples with apples’.¹¹⁰ The present research proves otherwise as I proclaim that, while we may have begun and developed under different political, economic and social circumstances, the end goals specific to pedagogy of both programmes should be reflective of each other – that is the teaching of students practical skills.¹¹¹ This comparative study is presented in order to provide further insight on the institution of CLE as a teaching methodology in South Africa.

This comparative study engages in an account of the emergence of CLE programmes to date. Next, a pedagogical analysis (educational overview) on CLE from each country’s perspective will be provided. It will be argued that whilst the United States has seen significant progress in understanding the clinical methodology, clinical programmes in South Africa have progressed with little enthusiasm for change since their inception.

¹¹⁰ Some may argue that the reason why the USA cannot be compared to South Africa stems from the fact that the licensing systems for lawyers in the USA is different from that in South Africa. In the USA, students complete a four year college degree before attending University to complete a law degree. Following on this the student is required to sit for a bar exam in any of the respective states. Upon successful completion of the bar exams, students are allowed to engage in practice. In South Africa, students are able to study law at a university after completing high school. Students could choose to study law as an undergraduate degree or as a post graduate degree. Through either of the processes students are required to complete the LLB degree. Upon completion students are required to complete a period of internship under a practising attorney, called articles of clerkship. In order to be admitted as a practising member of the attorneys’ profession, students must write and pass a set of professional examinations. The argument is therefore that South African universities are not primarily responsible for practical training of graduates, since the profession takes care of this aspect. See McQuoid-Mason op cite note 8 at 350 where the authors refer to the lack of enthusiasm expressed by South African lawyers in a comparison between South Africa and the United States “Many South African lawyers, academics included, are sceptical about developments in the United States, and feel more comfortable when comparisons are made with the English legal profession, which like ours still retains a divided bar, and relies on the institutions of pupillage and articles for training its practitioners.”

¹¹¹ Also see Bloch op cite note 14 at 23 where the authors state: “The genesis of modern law clinics in the United States during the 1960s and the South African clinical movement in the 1970s were closely linked to access to justice.”

3.4.1 Clinical Legal Education Programmes in the United States of America¹¹²

3.4.1.1 Emergence of CLE programmes

Describing the emergence of CLE programmes in the USA is best done in three waves, as described by some researchers.¹¹³ Each wave represents a particular stage in development.

a) The First Wave

In the United States the first wave of CLE programmes was promoted in the late eighteen-nineties and early nineteen hundreds.¹¹⁴ Initially, they were developed as voluntary programmes for students interested in learning “lawyering skills” and wanting to promote access to justice for the poor.¹¹⁵ During this period legal realists promoted the teaching of lawyering skills and professional values.¹¹⁶ Between 1920 and the 1940s John Bradway and Jerome Frank pursued the cause for a clinical legal education methodology and emphasised the in-house clinic as an indispensable component of its teaching methodology.¹¹⁷ In 1921 the thoughts on CLE programmes grew out of a study by the Carnegie Foundation for the Advancement of Teaching, “which noted that legal education was lacking in ‘clinical facilities or shopwork’ as compared to engineering and medical education.”¹¹⁸ By the end of the 1950s a number of CLE programmes were

¹¹² James E. Moliterno ‘Legal Education, Experiential Education, and Professional Responsibility’ (1996-1997) *William and Mary Law Review* 72.

¹¹³ Barry, Dubin & Joy op cit note 18 at 4 endorse the use of the word waves as “they believe that waves-which generally have no clearly defined starting and ending points are a useful means for symbolizing and conceptualizing the development and future of clinical legal education.”

¹¹⁴ Bloch op cit note 14 at 5 where it is reported that the University of Pennsylvania had established a Legal Aid Dispensary in 1893.

¹¹⁵ Barry, Dubin & Joy at op cit note 18 at 6 note that “While the casebook method was gaining acceptance, law students at several law schools in the late 1890s and early 1900s established volunteer, non-credit ‘legal dispensaries’ or legal aid bureaus to provide hands-on opportunities to learn and practice lawyering skills and legal analysis, and also to serve a social justice mission by providing legal assistance to those unable to hire attorneys.” Also see Guidelines for Clinical Legal Education Report of the Association of American Law Schools — American Bar Association Committee on Guidelines for Clinical Legal Education, January 1980, at page 7. Also see Sonteng J. A. ‘Legal Education Renaissance : A Practical Approach for the Twenty-First Century’, Willem Mitchell College of Law (2008) at 19.

¹¹⁶ Ibid at 12

¹¹⁷ Anthony G. Amsterdam ‘Clinical Legal Education —21st-Century Perspective’ (1984) 34 *J. Legal Education* 612 at 616. Also see Sonsteng op cite note 115 at 20.

¹¹⁸ Bloch op cit note 14 at 5. Also see Sonsteng op cite note 115 at 42 which confirms: “On February 7, 1913, the Committee on Legal Education requested that the Carnegie Foundation for the Advancement of Teaching review legal education in the United States. In 1921, the foundation funded a study called the

established at a number of accredited law schools. However standards of these programmes varied and at many universities these programmes were considered voluntary programmes.¹¹⁹ CLE promoters during this period faced several challenges including, funding restrictions, the need for academics to disassociate themselves from the apprenticeship model and promote standards within law schools and the emphasis on teaching legal analysis as a skill as opposed to other skills.¹²⁰

b) The Second Wave

The second wave began in the 1960s and continued until the 1990s and it was during this time that CLE programmes were integrated into the mainstream legal curricula.¹²¹ Various factors influenced this transition including “demands for social relevance in law school, the development of clinical teaching methodology, the emergence of external funding to start and expand clinical programs, and an increase in the number of faculty capable of and interested in teaching clinical courses,”¹²² the increase in clinical scholarship¹²³ and a change in accreditation standards for law schools in favour of establishing clinical programmes.¹²⁴

The emergence of external funding received from the Ford Foundation to fund CLE programmes, through the Council on Legal Education and Professional Responsibility (CLEPR), is considered by many as the catalyst that encouraged a number

Reed Report, which identified three components necessary to prepare students for the practice of law: general education, theoretical knowledge of the law, and practical skills training.”

¹¹⁹ Bloch op cit note 14 at 5.

¹²⁰ Barry, Dubin & Joy op cit note 18 at 9.

¹²¹ Bloch op cit note 44 at 7. Also see Sonsteng op cit note 115 at 20.

¹²² Sonsteng op cit note 115 at 20. Also see Pincus, op cit note 13 at pg 27.

¹²³ See Barry, Dubin & Joy op cit note 18 at 16 where they state that, “[i]mportant early examples of clinical scholarship focused on clinical methodology, what it meant for students to assume and perform the lawyer’s role in the legal system, how to identify and teach the elements of various lawyering skills, how to develop and explain theories of lawyering, how to refine and improve the supervisory process, and how to incorporate experiential learning theory into clinical law teaching.”

¹²⁴ Pincus op cit note 9 at 123 where it is confirmed that “... the American Bar Association’s Section on Legal Education and Admissions to the Bar adopted a new set of standards for accreditation of law schools, which for the first time provides explicitly for clinical work and does so by authorizing up to 300 of a total of 1200 hours in law school to be devoted to clinical work.” Also see ABA Standards for approval of Law Schools 2013-2014 at www.americanbar.org/content/dam/aba/publications/misc/legal_education/standards/2013_2014_standards_chapter3.authcheckdam.pdf

of universities to develop CLE programmes.¹²⁵ The CLEPR was tasked to distribute the funding received from the Ford Foundation to various universities to ‘experiment’ with CLE programmes.¹²⁶ By 1973, a hundred and twenty five of a hundred and forty nine approved law schools had clinical programmes for credit purposes.¹²⁷

c) The Third Wave

From the 1990s, CLE programmes at various universities advanced at a rapid pace. The growth was further encouraged by the findings within the MacCrate Report in 1992.¹²⁸ The MacCrate report promoted the teaching of ten fundamental lawyering skills within law schools. These skills included: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling, negotiation, litigation and alternative dispute resolution procedures, organisation and management of legal work and recognising and resolving ethical dilemmas. “By the end of 1999, 183 United States law schools had clinical programs.”¹²⁹

In 2007, the Carnegie Foundation for the Advancement of teaching issued a report entitled *Educating Lawyers*.¹³⁰ In addition to observations reported, the report proposed several recommendations, including an integrated three year curriculum that incorporates theory and practice. At certain universities this report inspired law schools to integrate

¹²⁵ See Pincus op cit note 9 at 123 where it was reported that “CLEPR is a philanthropy created in 1968, backed by a promise of financial support from Ford Foundation for ten years. Its purpose is to make grants in support of experiments with clinical legal education. Although the climate turned out to be favorable to the growth of clinical education, this was not apparent until someone took the responsibility for promoting it.” Also see McQuoid-Mason op cit note 8 at 346. Also see Osman M. ‘Meeting quality requirements: A Qualitative review of clinical law module at the Howard College Campus’ (2006) 39(2) *De Jure* 258-259.

¹²⁶ Pincus op cit note 9 at 123. Funding received from the Ford Foundation was also distributed towards establishing clinical programmes in other countries, for example South Africa. Also see McQuoid-Mason op cit note 8 at 350 “CLEPR has been given \$11 million by the Ford Foundation to administer and encourage the growth of clinical legal education in the United States.”

¹²⁷ Ibid at 123.

¹²⁸ See Keith A. Findley ‘Rediscovering the Lawyer School: Curriculum Reform in Wisconsin’ (2006-2007) 24 *Wisconsin International Law Journal* 295 at 306 where the author states: “The MacCrate Report created a storm of discussion of legal education, and it particularly energized the growing community of clinical teachers and proponents of clinical legal education.” Although, prior to MacCrate, there were several other reports, including the Cramton Report in 1979. It however appears as if none of the prior reports had the same effect on Law schools as MacCrate did.

¹²⁹ Sonsteng op cit note 115 at footnote 130.

¹³⁰ Sullivan W. et al ‘The Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law’ (2007) (hereinafter Carnegie Report)

CLE into mainstream curriculum courses.¹³¹ For example, John Marshall Law School inspired by the reports, partnered with the American Civil Liberties Union of Georgia (ACLU) to develop the Civil Liberties Seminars.¹³² As indicated by Burch and Jackson , “[t]he Seminars were developed to respond to the noted criticisms and provide students with the foundation necessary to practice law competently.”¹³³

Therefore, a century later, all accredited universities in the US engaged in some form of CLE programme. As the CLE methodology continues to make its way into curriculum methods of teaching, law students may eventually align with methodologies proposed by learning theorists as noted in chapter two.

3.4.1.2 Educational overview

In 1921, with submissions made by the Carnegie Foundation, the seeds for discussion on CLE as a methodology similar to those imposed at medical school were sown. Already at this early stage authors began to explore that possibility of integration of theory and practice. Essential to this discussion is that CLE programmes were not always premised on the access to justice platform. In 1933, John Bradway set five goals for clinical instruction:

“First, bridge the gap between the theory of law school and the practice of profession; second, synthesize the various bodies of substantive law and procedural law learned by the student; third, an introduction into the human element of the study and practice of law; fourth, an introduction into

¹³¹ Findley op cit note 128 at 307. Also see Sonsteng op cit note 115 at 46 where the author offers a critique on the influences of the MacCrate Report. He says that “[a]lthough most law schools have acknowledged the validity of the MacCrate Report, and many have integrated skills courses into their curriculums to some degree, legal education still looks much the same as it did prior to 1992.” Further discussion on integration is undertaken in chapter eight.

¹³² Kathleen M. Burch & Chara Fisher Jackson ‘Creating the Perfect Storm: How partnering with the ACLU integrates the Carnegie Reports Three Apprenticeships’ (2009)3 *John Marshall Law Journal* 52–103. For further discussions on other universities’ integration programmes see chapter eight of the thesis. Also see Jill Schachner Chanen ‘Re-engineering Schools across the country are teaching less about the law and more about lawyering’ (July 2007) *ABA Journal* 42- 46. Also see Clark D Cunningham and Charlotte Alexander ‘Developing Professional Judgement: Law School innovations in response to the Carnegie Foundation’s Critique of American Legal Education — 15 February 2010 where the authors lead a discussion on innovation at three American universities including Stanford Law School, Indiana University Maurer School of Law and Washington & Lee School of Law.

¹³³ Burch & Jackson op cit note 132 at 53.

unwritten lessons of advocacy in the practice of law; and fifth, teaching the students to think of legal matters and issues from the beginning of their development, rather than the end as appellate opinions.”¹³⁴

Although the period between the 1960s to the 1970s was dominated by the need to provide access to justice¹³⁵ conversations on promoting CLE as a methodology continued.¹³⁶ Between the 1970s and 1980s academics began constructing a vocabulary on clinical legal education as a teaching methodology. As expressed by Barry, Dubin and Joy, “[b]y focusing on clinical education as a method, clinicians began to explore what clinical teachers were and should be doing, how clinical teaching methodology could be infused throughout the law school curriculum, and what the purposes and goals of clinical teaching should be.”¹³⁷ In 1977, McQuoid-Mason described the programmes in the United States as being divided into two — that is, the service programmes and the programmes without clients.¹³⁸ Service programmes included externship programmes and legal-aid clinics. Programmes without clients included participant-observation programmes and simulation programmes. By 1977, as indicated by McQuoid-Mason, “[t]he educational value of clinical programmes has become widely recognized and a number of texts on clinical teaching materials have been widely produced.”¹³⁹

Throughout the last century, the voice of integrating practical teaching into law school curricula have been echoed clearly — from ABA accreditation of clinical programmes, Bellows’ article in 1973, the promotion of the MacCrate Report, Best Practices and the ever so recent Carnegie Foundation report (in 2007) on Educating Lawyers. As clinical scholarship continues to be encouraged and the benchmarks continue to be stretched, new challenges have begun to emerge, for example, encouraging law schools to include CLE programmes as compulsory programmes for all students,

¹³⁴ Sonsteng op cit note 115 at 71.

¹³⁵ See Pincus op cit note 9 at 128. Also see Bloch op cit note 14 at 5 “The major social issues of the 1960s and 1970s — poverty and civil rights, the women’s movement, the Vietnam War — had a profound influence on the direction of clinical programs, leading to greater student demand and more specific focus on providing legal services in areas such as poverty law, civil rights, women’s rights, consumer rights, and environmental protection.”

¹³⁶ Barry, Dubin & Joy op cit note 18 at 16.

¹³⁷ Ibid at 16.

¹³⁸ McQuoid-Mason op cit note 8 at 346–348.

¹³⁹ McQuoid-Mason op cit note 8 at 348.

developing qualitative assessment tools for CLE programmes,¹⁴⁰ the use of technology, the effects of the global economic crisis,¹⁴¹ globalisation and interdisciplinary teaching. CLE authors in the United States have paved an ideal example of what law schools in the twenty first century should be striving to replicate.

3.4.2 Clinical Legal Education Programmes in South Africa

3.4.2.1 Emergence of CLE programmes ¹⁴²

Prior to the 1970s, legal education in South Africa swayed more towards advancing private law as opposed to public law.¹⁴³ A distinct impediment towards establishing CLE programmes (or legal aid programmes as they commonly became known in South Africa) was the fact that most law schools offered only part-time study programmes. This made it difficult for students who worked during the day to participate in other activities. As law schools began to introduce full time legal programmes and as some progressive academics began responding to social equality ¹⁴⁴ — in light of the inefficiency on the part of the Legal Aid Board — the seeds for the inception of legal aid clinics were planted.

Before discussing when clinical programmes in South Africa were established, it is important to note that these programmes were initially referred to as Legal-aid programmes — of course, the name confirmed the activities of the programme. This was unlike developments in the United States, already in the early part of the 1900s.

¹⁴⁰ Stuckey op cit note 2 at 9–28.

¹⁴¹ The global economic crisis has had a significant effect on the relationship between law schools, students, the legal profession and society at large. As a result of the global crisis law schools are forced to consider a number of matters, including student fees and curriculum content in line with ensuring that students are able to secure employment. See document titled The Value Proposition of Attending Law School – ABA commission on the impact of the economic crises on the profession and legal needs at <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEEQFjAD&url=http%3A%2F%2Fwww.americanbar.org%2Fcontent%2Fdam%2Faba%2Fmigrated%2Flegaled%2Fprelaw%2FThe%20Value%20Proposition%20of%20Attending%20Law%20School.doc&ei=O8-3UuPgIsSrhAeeh4G4CQ&usq=AFQjCNF1RFDgo0Z2KUaztRfWiHCA9o2z0A&bvm=bv.58187178,d.ZG4&cad=rja> accessed on 21 December 2013. Also see J E Moliterno The Future of Legal Education Reform (2013) 40 *Pepperdine Law Review* 423 for further discussion on the need for law schools to consider reformation.

¹⁴² For an overview on CLE development in South Africa see De Klerk op cit note 15 at 929–932.

¹⁴³ Dugard op cit note 49 at 147.

¹⁴⁴ F.N. Kentridge Lead — in Address in David McQuoid-Mason *Legal Aid in South Africa* (1974) 87–89.

Universities in the US then adopted the term clinical legal education (CLE). Therefore it came as no surprise that the initial purpose of these programmes were driven by the need to supplement the function of the Legal Aid Board.

In South Africa a number of universities established legal-aid clinical programmes¹⁴⁵ in the 1970's,¹⁴⁶ first at the University of Cape Town (UCT)¹⁴⁷ and soon thereafter faculty staff initiated programmes at the University of the Witwatersrand, University of Natal¹⁴⁸ and Rhodes University.¹⁴⁹ There appears to be some discrepancy on which clinics were the earliest, according to Van Wyk, Wits got off the ground in 1971 and UCT in 1972; one can only assume that he is referring to informal programmes. In line with the discussion in the above paragraph, the UCT programme was — and continues to be referred to — as the 'legal aid clinic'. The University of the Witwatersrand has over the years subsumed a few names — initially referred to as the Practical Legal Training Programme (1973), Practical Legal Studies (1983) and presently the programme promotes the educational component as Practical Legal Studies; the access to justice programme is subsumed under the name Wits Law Clinic.

¹⁴⁵ See Maisel op cit note 45 at 377.

¹⁴⁶ See De Klerk op cit note 15 at 932 as to why Common Wealth nations were slower than the United States in establishing CLE programmes. "It must be borne in mind that clinics in the United States developed in a particularly favourable environment as a result of the abolition of practical internship as a requirement for admission to the legal profession. In contrast, Commonwealth nations (which generally retained the internship period as a requirement for practice) were much slower to develop clinical programmes." McQuoid-Mason op cit note 58 at 89.

¹⁴⁷ Maisel op cit note 45 at 380. Also see McQuoid-Mason, Ojukwu & Wachira 'Clinical Legal Education in Africa Legal Education and Community Service' in Frank Bloch (ed) *The Global Clinical Movement 2011* at 24 where the authors note that "[t]he first legal aid clinic in South Africa was established by law students at the University of Cape Town in 1972. The clinic was managed and staffed entirely by law students, with supervision being done by legal practitioners from outside the university. The clinics were held in poor neighborhoods during the evenings in churches or town halls. The program differed from subsequent law faculty programs in that nobody employed by the law school supervised the students and no office, equipment, or other facilities were provided by the university." See A.H. Van Wyk — Lead in Address after Dugard's paper op cit note 49 at 170 where he describes the practice of the UCT clinic in 1973. Also see P.H. Gross 'Legal Aid in South Africa' in David McQuoid-Mason *Legal Aid in South Africa* (1974) at 44-45.

¹⁴⁸ McQuoid-Mason op cit note 146 at 25.

¹⁴⁹ De Klerk op cit note 15 at 930. Also see Danny Wimpey & Shaheda Mahomed, 'The practice of freedom — South African Experience' Paper delivered at the 4th International Journal of Clinical Legal Education Conference, London, at 2(unpublished copy with author). Also see A.H. Van Wyk op cit note 146 at 170 where the author notes that in 1973 there were only three student legal aid clinics in South Africa "at the University of the Witwatersrand and Cape Town and at Rhodes." Van Wyk proceeds to describe the developments at Stellenbosch. Also see Osman op cit note 125 at 261-262.

In 1973, after a conference sponsored by the Ford Foundation, a number of legal-aid programmes were established.¹⁵⁰ By 1981, fourteen universities had established law clinics, including “Cape Town (1972), the Witwatersrand (1973), Natal(Durban) (1973), Port Elizabeth (1974), Natal (Pietermaritzburg) (1974), Western Cape (1975), Stellenbosch (1975), Durban-Westville (1978), Zululand (1978), Rhodes (1979), the North (1980), Pretoria (1980), South Africa (1981), and Rand Afrikaans University (1981).”¹⁵¹

These clinical programmes were established primarily in order to increase the access to legal services for the poor and vulnerable, as limited state legal aid facilities were available at the time.¹⁵² As indicated by Kentridge this period was marked by very little commitment by the State towards providing legal aid for the disadvantaged persons — of course this was motivated by the political circumstances at the time.¹⁵³ Therefore, with a lack of government commitment for access to justice programmes, university students, particularly law students, took it upon themselves to bridge the gap.¹⁵⁴ Gross, in 1973, whilst confirming this statement, described the aims of the UCT legal aid clinic as, “The aims of the U.C.T. clinic are to provide a public service, to facilitate the operation of the National Scheme by freeing the legal aid officers from the need to undertake the preparatory work, and to enable law students to obtain practical experience during their period of academic training.”¹⁵⁵

Despite initial resistance by academics towards establishing legal aid programmes¹⁵⁶ in the late 1980s and early mid-1990s, most legal aid programmes began

¹⁵⁰ See McQuoid-Mason, Ojukwu & Wachira op cit note 147 at 25.

¹⁵¹ Ibid at 25.

¹⁵² Franklin N. ‘The clinical movement in American legal education’ (1986) *Natal University Law and Society Review* 1(2) 61. Clinical programmes in the United States of America began in a similar way. In the 1960s with an increase in anti war demonstration and an increase in poverty, students committed themselves to changing this system. Thus, the first grants received for Legal Education were for providing opportunities for service as opposed to teaching of professional skills. That lay the foundation for the development of clinical legal education programmes as we understand them today. Also see N. Bengtsson ‘Justice for all? Law Clinics in South Africa, and in Sweden?’ LLM thesis 2-98 at 15 (unpublished – copy on file). Tarr op cit 101 at 2. Also see McQuoid-Mason op cit note 8 at 352 where the author leads a discussion on the structure of the University of Natal law clinic in 1977. Also see Haupt op cit note 11 at 229.

¹⁵³ F.N. Kentridge op cit note 144 at 87–89.

¹⁵⁴ Wimpey & Mahomed op cit note 148 at 2. Also see F.N. Kentridge op cit note 144 at 87–89.

¹⁵⁵ Gross op cite note 147 at 44.

¹⁵⁶ See discussion below between Ellison Khan and A.H. Van Wyk op cit note 9 and 146.

to recognise and capitalise upon the academic value of their specific programme.¹⁵⁷ By 1986, at least sixteen universities had established university law clinics. The increase in legal aid programmes in the 1990s was motivated by a number of factors, including an increase in the development of state legal aid systems¹⁵⁸; the accreditation of law clinics by the South African Law Society¹⁵⁹; funding received by universities from the Attorneys Fidelity Fund (AFF) specifically for the educational development of clinical programmes¹⁶⁰, and the establishment of the Association of University Legal Aid Institutes (AULAI) whose primary objective remains to promote clinical programmes in South Africa.¹⁶¹ By 1997 every law school in South Africa had a clinic.¹⁶² On 30 June 1998 AULAI Trust¹⁶³ was formed specifically in response to funding received from the

¹⁵⁷ Pretorius op cit note 59 at 85. Pretorius said, “[a]t several universities clinics are now being used formally for teaching purposes. Wits is an example. RAU is a very good example, probably the most progressive so far in this field. Natal University also uses it. I am not certain what the position is at other universities but Unisa also uses the clinic as a teaching instrument.”

¹⁵⁸ The obligation on the State to provide adequate access to justice was enforced by the enactment of our Constitution Act 108 of 1996, section 35 and section 28(1) (h). Also see De Klerk op cit note 15 at 940–942. Also see Mahomed op cit note 4 at 55, where she noted that “Since 1994, the South African state legal aid system has undergone intensive transformation with greater commitment towards providing access to justice to the poor and marginalized. In addition, the law societies in various provinces have either implemented or are in the process of implementing policies prescribing *pro bono* commitments from practitioners.”

¹⁵⁹ The South African Law Society is considered as the governing body for all practising Attorneys. This Society prescribes rules and regulations about attorneys’ conduct and practices. Law Clinics are accredited in terms of the Accreditation and Certification of Legal Aid Clinics — section 1 and 3(1) (f) of the Attorneys Act 1979 and Rule 115A of the rules of the Law Society of the Northern Provinces. Also see De Klerk et al op cit note 20 at page 264 where Steenhuisen says that: “Important developments in the clinical movement took place in the 1990s. The Attorney’s Act 53 of 1979 was amended, giving formal recognition to law clinics and allowing candidate attorneys to complete their articles at accredited law clinics.”

¹⁶⁰ The Attorneys Fidelity Fund is a statutory body with the primary responsibility of protecting the public from theft by attorneys of their trust funds. It also funds some practical programmes at law schools. The Attorneys Fidelity Fund agreed in 1988 to provide funding to university law clinics affiliated with AULAI. Presently each university clinical programme receives R 210 000 per annum for the development of students skills.

¹⁶¹ De Klerk op cit note 15 at 930. AULAI was formed in the mid-1980s for the purpose of representing and promoting law clinics in South Africa. Also see Wimpey & Mahomed op cit note 18. Also see <http://www.aulai.co.za> accessed on 20 July 2013. The AULAI Vision statement reads: “... to be a professional and efficient organisation committed to democratic values and human rights, and dedicated to promoting excellence in clinical legal education and access to justice.” Also see Osman op cit note 125 at 262–263.

¹⁶² De Klerk op cit note 15 at 931. On 21 February 1997 a Conference was hosted for the clinical programmes in the Northern Provinces. (copy of report of the conference is with the author)

¹⁶³ See <http://www.aulai.co.za/aulai-trust-34> accessed on 20 July 2013 where the aims of AULAI Trust are noted as “The aim of the AULAI Trust shall be to create a fund for the benefit of all legal aid and clinical legal educational institutions ...” The objectives, just to mention a few include, the promotion of legal aid in South Africa, the encouragement and promotion of practical legal education, and capacity building for clinical programmes.

Ford Foundation (FF). Prior to 1998, the Ford Foundation funded a number of disadvantaged university clinical programmes. However, by 1994 they decided to expand the funding towards all South African Universities' clinical programmes.¹⁶⁴ The Ford Foundation donated a once off endowment grant of US \$1 million for the development of clinical legal education programmes in South Africa and required a legal entity to be established to administer and manage the funding received.¹⁶⁵ Subsequent funding was received from the International Commission of Jurists (Swedish Section) specifically to fund the access to justice programmes within clinical programmes.¹⁶⁶ Other donors towards clinical programmes include Atlantic Philanthropies, the Charles Steward Mott Foundation and the Candidate Attorney project funded by the Department of Justice and Constitutional Development (DOJ & CD).¹⁶⁷ In 2008, the DOJ & CD entered into service level agreement with AULAI in terms of which funding was made available for candidate attorneys and a mentor to be appointed within clinical programmes. The purpose of such funding was twofold, first, to increase the number of LLB graduates receiving articles and secondly, to expand on the access to justice project.¹⁶⁸

Although significant progress on inception of legal aid programmes had taken place, little has been done to move away from the obligation to provide access to justice as predicted by Van Wyk in 1973, predicting that this function will continue, "[t]o tell the truth, to a great extent the present clinics regard themselves simply as clearing houses for the legal aid offices, and for the foreseeable future it will probably remain like that."¹⁶⁹ Similarly, in 2005, De Klerk notes that "the strength of the clinical movement today is therefore attributable to its role in access to justice and has little to do with the appreciation of clinical legal education by law schools."¹⁷⁰ In 2009, Maisel identified five objectives upon which contemporary legal aid clinics premise themselves in South Africa. First, legal aid clinics introduced students to the challenges relating to poverty and developmental law, secondly students are exposed to values that promote equal justice for all, thirdly students are taught actual lawyering skills such as interviewing

¹⁶⁴ Ibid at 1. Also see Osman op cit note 125 at 263.

¹⁶⁵ Ibid at 1.

¹⁶⁶ Ibid at 1. Also see De Klerk op cite note 15 at 931.

¹⁶⁷ Ibid at 6.

¹⁶⁸ Ibid at 5.

¹⁶⁹ A. H. Van Wyk op cit note 147 at 170.

¹⁷⁰ De Klerk op cit note 15 at 941.

skills, fourthly legal aid programmes allow students from disadvantaged backgrounds to complete their articles of clerkship and finally, these programmes allow for the expansion of legal aid to the disadvantaged sector of the South African population.¹⁷¹ Essentially these objectives all speak towards promoting access to justice rather than pedagogy.

3.4.2.2 Educational overview

The development of CLE programmes in the 1970s clearly defined the traditional access to justice role for clinics in South Africa. “In a developing country such as South Africa where there are vast economic and social differences between rich and poor, and where the majority of the population do not have access to proper legal services, law clinics take the form of legal aid clinics and deal predominantly with poverty law matters.”¹⁷² Unfortunately this traditional role continues to prevail at all university law clinics in South Africa.

In line with this discussion, the initial resistance to CLE programmes in South Africa must be noted. At the Legal Aid conference in South Africa in 1973, several leading authors expressed their resistance to the establishment of CLE programmes. From the likes of the late Professor Ellison Khan and A.H. Van Wyk arguments were led on the lack of preparedness of our legal institutes to teach practical legal skills. Van Wyk, comparing South African universities with the likes of universities in the United States, stated the following:

“ ... for the foreseeable future in any case, legal aid clinics in this country are going to remain voluntary, purely student affairs — and I am not quite sure whether this is not a good thing. My impression is that clinics in the U.S.A. have been “academised” (if one can coin such a word) to a very large extent and that they are becoming part of the academic establishment. Mr Pincus himself has emphasized the fact that their function is there seen as being the provision of practical training for law students, and not the provision of legal aid...I also feel that there are certain dangers in making clinical work part of the ordinary curriculum — in South Africa students

¹⁷¹ Maisel op cit note 45 at 375 – 377.

¹⁷² McQuoid-Mason op cit note 58 at 90-91. Also see Franklin N. op cit note 152 at 61. Also see

are used to being spoon-fed from the day they enter primary school and as *Professor Dugard* quite correctly said, this also happens to a certain extent in law schools. I therefore do not know whether we are not merely going to transpose spoon-feeding from the classroom to the legal aid clinic.”¹⁷³

Despite the growth and advantages that CLE programmes potentially provide for a broader legal curriculum, all clinical programmes in South Africa continue to operate as standalone courses in law schools.¹⁷⁴ Legal aid programmes are still perceived as a course and not as a methodology. In fact — except for scholarship written by De Klerk and Swanepoel — the idea that CLE should be considered as a methodology and its methods incorporated into other law school subjects remains unspoken. It is almost as if there is a fear to explore the unknown.

However, setting aside the above, in chapter eight the author explores South African Universities’ response towards the integration of skills teaching into the LLB and LLM degree. As the CLE methodology embraces skills teaching I raise the question: Are law schools not subconsciously incorporating the clinical methodology into their programmes? Further discussion on this will follow in chapter eight.

3.5 CONCLUSION

As this chapter consists of a number of parts, conclusions will be drawn on each part, before recommendations on a way forward is proposed.

In part one, the author argues that there are two schools of thought advocating CLE — the access to justice advocates and those who promote a more pedagogical approach towards CLE. This discussion illustrated two points, one, that CLE programmes should not completely define themselves against access to justice programmes and secondly, that CLE should be considered as a teaching methodology rather than an isolated course or programme in the law degree. With reference to the first point and Uphoff’s quotation in the introduction to this chapter — allowing students to learn

¹⁷³ A.H. Van Wyk op cit note 147 at 173–174.

¹⁷⁴ De Klerk op cit note 15 at 947. As noted by De Klerk, over the past thirty years clinical programmes have expanded and improved, however, even the best models are represented by isolated single courses taught in the final year of study.

exclusively through access to justice programmes does not necessarily define experiential learning — it is only one method of teaching within the experiential learning model. Law schools should not be afraid to explore other options, for example, simulations and/or externships. Further discussion on these options are led in chapter seven. This leads to the discussion on point two — CLE should be employed as a teaching methodology catering for the learning needs of most students and – as discussed in chapter two - law schools should consider integrating this methodology into other courses in the LLB and LLM curriculum. In chapter two the author concludes that should law schools identify its primary goal as one that promotes the integration of theory and practice, than practical methods must be incorporated into theory based courses.

In part two, the author raises the following question: What then is the contemporary role of access to justice in a pedagogical approach to CLE? The author submits that, although she is not averse to the access to justice methodology, the author is averse to this methodology consuming the entire course. The author believes that because most universities in South Africa continue to emphasise the role of access to justice within CLE programmes, law schools overlook the true potential of CLE as a teaching methodology. This approach stunts the potential of integrating the access to justice methodology into other law school courses. Therefore the author submits that by educating academics on the true value on CLE as a teaching methodology law schools will be more receptive to the idea of integration between theory and practice. The access to justice method should be integrated into several courses within the law school curriculum. For example the author recommends that each course that adopts the CLE methodology design as part of its curriculum the opportunity for students to engage with live-clients either at pro bono centers or in consultation with other role players within the profession.

In part three, a comparative study is presented between the developments and pedagogical understanding (educational overview) on CLE in the United States of America and South Africa. It is argued that the USA has adopted a far more liberal understanding of CLE as a teaching methodology as opposed to the conservative approach adopted in South Africa. The author further argues that despite our unique political, social and economic dynamic, some nineteen years into democracy, the time

has surely come for us to explore the deeper potential that CLE as a teaching methodology offers. While it is clear that CLE programmes in South Africa began almost some fifty years after the movement began in the United States, the positive influence that the programme has (or could have) on teaching should. Although academics in both jurisdictions argue for integration, significant progress is observed at US universities as opposed to developments at South African universities.¹⁷⁵ The time has arrived for South African law schools to explore alternative teaching practices in order to meet the needs of the students, legal profession and community at large. As submitted by Albert Einstein “You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew.”¹⁷⁶

In conclusion, the author recommends educating academics particularly in South Africa on the benefits of clinical methodology.¹⁷⁷ For many years, since the inception of CLE, promoters in South Africa have attempted to convince law school faculty to understand and acknowledge CLE programmes. However, a number of universities have either chosen not to acknowledge the programme or its contribution towards students’ learning. Many staff members continue to be employed on fixed-term periods and many CLE programmes continue to sustain themselves primarily through outside funding.¹⁷⁸ The best way for CLE advocates to promote the methodology would be to host workshops, produce scholarship and encourage others to get actively involved in integrating the model across the curriculum. The establishment of a South African-based Clinical Law Journal must be considered. This will not only increase scholarship on the subject but create a platform to engage in debate on CLE as a methodology. Examples of what scholarship should address include, integration methods between academic - and clinical methods, identifying skills that CLE promotes and engaging in an analysis of

¹⁷⁵ See chapter eight for a further discussion on integration.

¹⁷⁶ See Molitero op cit note 141 at 422.

¹⁷⁷ For example see David Chavkin ‘Matchmaker, Matchmaker: Student Collaboration in Clinical Programs’ (1994-1995) 1 *Clinical Law Review* 199 which concludes that very little research has been done on collaborative learning particularly in law clinics — such research should be undertaken and written on. Also see Hoffman op cit note 11 at 93

¹⁷⁸ Maisel op cit note 45 at 377 where the author notes, “the clinical law movement still lacks sufficient support in most countries. Among other factors, law school clinical programs continue to have to scrounge for financial resources, often from soft money and overseas funders, and clinical faculty do not enjoy the same compensation, status, or job security as those who teach traditional courses.”

such skills,¹⁷⁹ and finally, how CLE as a methodology could be infused into the broader law curriculum.

¹⁷⁹ Hoffman op cit note 11 at 94 where he notes that “skills-focused scholarship, I believe, can help clinical educators to do what they are uniquely well-positioned to do in the academy — namely to remedy legal education’s notorious weakness in preparing students for the actual work they will do as lawyers.”

PART TWO

CHAPTER 4

CASE STUDY: OVERVIEW AND HISTORICAL CRITIQUE

ABSTRACT — HISTORICAL OVERVIEW

The purpose of the historical overview is to provide a platform whereby to enable the reader to contextualise the present position of Practical Legal Studies (PLS), which incorporates the Wits Law Clinic (WLC) as its teaching method at the University of the Witwatersrand (Wits). The chapter traces the development of PLS/WLC from 1969 to date. Emphasis will be placed on understanding the development of PLS/WLC from an educational as well as access to justice perspective.

Earlier information from 1969–1996 has been traced from various documented letters, articles or minutes of meetings. Information from 1996–2012 stems from the author's own experience (as a student, candidate attorney, academic and Director of PLS/WLC), articles published as well as minutes of meetings.

The period 1969–1973, marked the beginning of the PLS/WLC programme at Wits. During this period emphasis was placed on providing access to justice, as the course was a voluntary programme. From 1973–1989 PLS/WLC was confirmed as an elective course in the LLB degree. During this period, whilst a structure defining the educational components of the course was established, PLS/WLC continued as a paralegal advice office. From 1991–1999, PLS/WLC transformed itself from a paralegal advice office into a fully fledged law office. This was partly due to funding received from several organisations. The course, however, continued as an elective programme offering students the opportunity to engage in a general clinic. From 2000–2012 PLS/WLC witnessed two major changes: 1) it is now offered as a compulsory course in the LLB curriculum to final-year law students and 2) the concept of integrated teaching (as opposed to specialised teaching) is offered.

In this chapter it will be argued that whilst PLS has advanced in many respects since 1969, achieving the ultimate balance between the educational demands against the needs of the clients, continues to be a challenge.

“Law professors are, in fact, teachers, and must keep the elements of ‘good teaching’ in mind when planning their courses.”¹

4.1. INTRODUCTION

This chapter marks the beginning of part two in this dissertation. In chapter two of part one, the author concluded that, from a South African perspective, the best form of learning should include theory, practice and reflection and that the clinical legal education (CLE) methodology is a means to achieve this end. In chapter three, the author presented an institutional overview of CLE in South Africa, underlying a number of conclusions pertinent to this chapter. In particular, the author noted how South African universities have adopted a conservative approach towards the CLE methodology. The author argued that some thirty nine years since the inception of CLE, surely, the time has come for us to explore further the potential that CLE as a teaching methodology offers.

In the chapters that follow this one, the author will present a critical evaluation of three specific areas that make up the Practical Legal Studies (PLS) course offered at the University of the Witwatersrand (Wits). These are the goals, curriculum and teaching methods adopted in PLS. There are a number of challenges within these areas that PLS clinicians encounter on a daily basis. These challenges are not always appropriately addressed. One of the aims of this dissertation and of course of this research is to aid in improving the understanding and practice of PLS teaching and to elevate both to new levels.

An overview of the names governing the CLE programme at Wits may assist the reader’s understanding of developments in this field. As reflected in chapter three, Practical Legal Studies (PLS) and the Wits Law Clinic (WLC) have subsumed a few

¹Judith A. Frank ‘Lessons and ideas: skills instruction in large law school classes’ (1999-2000) 3 *Thomas M. Cooley Journal of Practical and Clinical Law* 316. Also see Philip G. Schrag ‘Constructing a Clinic’ (1996) 3 *Clinical Law Review* 175.

names over the years. They initially were referred to as the Practical Legal Training programme and the Legal Aid programme in 1973 and Practical Legal Studies and Campus Law Office in 1983. Today the programme promotes the educational component under the title Practical Legal Studies (PLS). In the LLB curriculum, this is cited as course LAWS 4003, which final year students in the two, three and four year LLB curricula must take and pass in order to graduate. The access to justice programme is subsumed under the name Wits Law Clinic (WLC). This is the unit of about six full-time teaching posts, ten candidate attorney posts, and various other temporary and flexible posts, headed by a Director, who reports to the Head of the School of Law. The access to justice programme describes the method used to teach in PLS and is more commonly referred to as the in-house live-client method of teaching. This method will be discussed in more detail in chapter six. While these two components can be analysed separately, in reality PLS and the WLC have never existed separately and have always been (basically) two sides of the same coin; this point is discussed further below in this chapter in terms of the academic and professional design of the Wits programme. For the remainder of this chapter, reference will be made to PLS/WLC when discussing both the educational component and access to justice programme.

This chapter will do two things. First, the author will explain the specific focus of this study and introduce the concept of CLE design. The author will argue that the design of CLE programmes that adopt the in-house live-client teaching method can be divided into academic design and professional design.

Second, a historical overview of PLS/WLC will be presented. The historical overview will be presented in four stages, beginning with the period 1969 to 1973. The second stage reflects the early years of formal inception, particularly 1973 to 1989, while the third stage identifies the period 1990 to 1999 and the fourth stage reflects the contemporary status of the course marking the period 2000 to 2012. Throughout the historical overview PLS/WLC will be evaluated from an educational perspective and access to justice perspective. From an educational perspective the question that the author aims to address by means of this historical overview is: To what extent has the PLS programme advanced its educational objective since 1969? From an access to justice perspective the author will address the extent to which the WLC continues its access to

justice commitments that inspired its inception. It will be argued that although PLS/WLC has progressed in certain respects over the years, there has been little shift in two particular areas. One area is the method of teaching — that is, the in-house live-client method — which still dominates and around which PLS/WLC still centres. A second area with little shift is that, academics in the Wits Law School do not appear to appreciate PLS as a methodology. As a result, PLS has not made significant inroads into other courses in the LLB or LLM degrees.

4.2. THE DESIGN OF CLINICAL LEGAL EDUCATION PROGRAMMES

As we have seen in chapter three, clinical legal education (CLE) programmes across the globe are designed and taught differently.² As Amsterdam has noted, they generally take the form of problem situations presented in various ways, for example, concrete situations textured by specific factual detail, complex situations “that is, they required the consideration of interacting factors in a number of dimensions — legal, practical, institutional, personal and/or unrefined or unstructured situations that is, they were not pre-digested for the student through the medium of appellate opinions or course books, but were unstructured, requiring the student to identify ‘the problem(s)’ or ‘the issue(s)’.”³ Although most clinicians agree on the primary goal of CLE programmes to expose students to the practical application of legal doctrine⁴ — law schools across the globe use a variety of different ways to achieve this goal.⁵ Over the last century, various

² See Roy T. Stuckey ‘Ensuring Basic Quality in Clinical Courses’ (2000) 1 *International Journal of Clinical Legal Education* 48 where Stuckey notes that: “Clinical courses can take many forms and still accomplish important educational functions if they are thoughtfully designed. Various factors will affect how a clinical course is structured, most notably the preferences of the faculty and the resources of the school. Designing a clinical course provides opportunities for creative and new approaches, and few clinical courses look exactly alike.”

³ Anthony Amsterdam ‘Clinical Legal Education — 21st-Century perspective’ (1984) 34 *Journal of Legal Education* 616.

⁴ Schrag op cit note 1 at 175. Elliott S. Milstein ‘Clinical Legal Education in the United States: In- House Clinics, Externships, and Simulations’ (2001) 51 *Journal of Legal Education* 375, where Milstein submits that, “The core idea of clinical legal education is that teaching students while they are in professional roles is an essential component of professional education.”

⁵ See Stuckey op cit note 2 at 48–49. Also see Frans Haupt & Shaheda Mahomed ‘Some thoughts on assessment methods used in clinical education programs at the University of Pretoria Law Clinic and the University of the Witwatersrand Law Clinic’ (2006) 41(2) *De Jure* 7. Also see Willem De Klerk ‘University Law Clinics in South Africa’ (2005) 122 (4) *SALJ* 929 – 950.

organisations have work shopped and promoted appropriate designs,⁶ however, each CLE programme — bearing in mind a university's vision and mission — adopts a design that suits the needs of its students, teachers and community.⁷ As the author shall elaborate, in her view the design of a CLE programme could either adopt some form of structure or be unstructured.

Some clinical programmes are more structured than others. Unstructured courses assume that students learn through their experiences while engaging with real world lawyers and clients. Many then ask: Why structure a course?⁸ The simple answer may be that for students to receive academic credit for the clinical courses, universities require a structured curriculum as mentioned by Stuckey, “academic credit should be awarded only if a law school is prepared to establish clear educational objectives and to structure clinical courses in a way that will facilitate the achievement of those objectives.”⁹ As noted above in chapter three, in South Africa it was only in the 1980s and early 1990s that universities began to recognise the academic value of clinical programmes and, in recognition of this value, began to impose academic requirements for the course.¹⁰

Structured CLE programmes are influenced by a number of variables. According to the Guideline for Clinical Legal Education, there are four possible variables that could influence the design. These include, “the teaching method, the existence and nature of classroom components, the methods of student supervision and the evaluation of

⁶ From 2003 the Association of University Legal Aid Institutions (AULAI) hosted a series of workshops on curriculum design, assessment methods and methods of teaching. The workshops have resulted in a production of a manual that can be used by old as well as new clinicians. In the United Kingdom, in 1995, the Clinical Legal Education Organisation (CLEO), devised a model standard for live-client clinics. This model was reviewed in 2006 and aims to provide guidelines for existing and new clinical programmes. In the United States, in 1980, a written text titled Guidelines for Clinical Legal Education was published. See Guidelines for Clinical Legal Education, Report of the Association of American Law Schools — American Bar Association Committee on Guidelines for Clinical Legal Education (1980) 1–268.

⁷ See Stuckey op cit note 2 at 49.

⁸ Ibid at 48–49.

⁹ Ibid at 48–49. Also see Guidelines for Clinical Legal Education, Report of the Association of American Law Schools — American Bar Association Committee on Guidelines for Clinical Legal Education (1980) at page 27 where factors that one should consider when awarding academic credit are noted. These factors include “1. number of regularly scheduled class hours; 2. number or regularly scheduled meeting hours between students and individuals teaching; 3. writing requirements which form part of each student's fieldwork responsibilities; and 4. investigation, negotiation, events, and proceedings required as part of each student's fieldwork and simulation responsibilities.”

¹⁰ See De Klerk op cit note 5 at 929. Also see Shaheda Hassim Mahomed ‘United in our challenges — should the model used in clinical legal education be reviewed’ (2008) *JJS* (special edition) 54.

students.”¹¹ The teaching methods include the in-house live-client model, simulation exercises or externship programmes.¹² The existence of the classroom component relates to the educational aspect of the programme, for example lectures, seminars and tutorial sessions. These sessions are generally defined by the curriculum. Student supervision could vary in extent depending on the design of the programme. Some programmes demand more instant supervision than others. Evaluation of students refers to the assessment method which could be summative or formative or include both. Each of the above variables contributes towards the design that CLE programmes adopt. According to Menon: “The basic elements involved in designing a clinical course are straightforward: goals and objectives; material to be covered; teaching methods to be used; students activities, evaluation of student work; development of detailed syllabus.”¹³

The PLS programme at Wits may be classified as a structured CLE programme, as it is a compulsory credit bearing course offered to final-year law students. Its design is first influenced by the teaching method, secondly the attachment of the classroom component and thirdly by the supervision that is provided. The evaluation or assessment attached to PLS does not significantly influence its design. The primary teaching method adopted includes the in-house live-client method and simulation exercises. According to the model standards for live-clients designed by the Clinical Legal Education Organisation (CLEO) in the United Kingdom, “[l]ive-client clinics can take a variety of forms, ranging from advice only, through assistance and partial representation to fully fledged solicitors’ practices — the latter would include those working under public funding, those undertaking litigation support and those providing immigration advice. The clinics may also be in-house or run through an external agency (such as a free representation unit or law centre). In each case there are implications and, in some instances, requirements in terms of standards and rules of professional practice.”¹⁴

¹¹ Also see Guideline for Clinical Legal Education, op cit note 6 at 9.

¹² Others may promote Street Law and Community Service programmes as well.

¹³ N. R. Madhava Menon *Clinical Legal Education* (1998) at 179.

¹⁴ Model standards for live-client clinics. A Clinical Legal Education Organisation document (CLEO) at 4 updated 25 June 2007 <http://www.ukcle.ac.uk/files/downloads/38/713.83471086.standards.rtf> (copy with author) accessed on 20 July 2013.

The author proclaims that the design of PLS can further be divided between the academic design and professional design.¹⁵ The academic design includes identifying goals, structuring a curriculum to match the goals, methods of teaching and assessment policies. As a whole this design relates to the educational outcomes of CLE programmes.

Professional design relates to the day to day management of the WLC. In South Africa, particularly for those clinics that adopt the live-client teaching method and employ candidate attorneys,¹⁶ the professional design of CLE programmes can be dictated by Law Society rules. These programmes must apply and receive accreditation from the relevant Law Societies in order to operate.¹⁷ In Gauteng, law clinics must comply with Rule 115 B.3 of the Law Society of the Northern Province which notes that clinics must have “[p]roper office systems with telephones, typing facilities, files and filing procedures, a diary system and at least elementary library facilities”.¹⁸ Rule 115 B.4 notes that “the clinic has a proper bookkeeping system and accounting procedures”.¹⁹ Another aspect of professional design that is prescribed by the Law Society relates to the management structure of the clinic. Rule 115A.1 prescribes that “[t]he clinic shall be properly constituted, organised and controlled to the satisfaction of the Council, either as part of the faculty of law at a university in the Republic or as a law centre controlled by a non-profit making organisation.”²⁰

In general, CLE programmes (like PLS/WLC) that adopt the in-house live-client clinic teaching method often find that there is a fine line between the demands promoted by the academic design and those required within the professional sphere. Further discussion on this matter from the viewpoint of the goals of a CLE programme will be

¹⁵ For best practices on in-house clinical courses see Roy Stuckey *Best Practices for Legal Education* (2007) 188- 198.

¹⁶ See De Klerk op cit note 5 at 931. Candidate attorneys are trainer attorneys. In South Africa, after students complete a Law Degree they are required to complete a period of articles before being admitted as attorneys. “During the early 1990s an important breakthrough was made when the Attorneys Act was amended giving formal recognition to law clinics and allowing candidate attorneys to complete their internship at accredited law clinics.” Also see Dan Bengtsson ‘Justice For All? Law Clinics in South Africa’ (2001) at 9 (an abstract from the author’s Master’s thesis, unpublished copy with author).

¹⁷ Accreditation is received on an annual basis. Every year the Law Society calls on clinics to “reapply” for accreditation. Accreditation and certification of Legal Aid Clinics — Section 1 and 3(1)(f) of the Attorneys Act, 1979 and Rule 115A of the Rules of the Law Society of the Northern Provinces. Similar provisions are noted in the other Provinces for example, Law Society of Cape Province Rule 19. Law Society of Kwazulu-Natal Rule 25.

¹⁸ Rule 115A of the Rules of the Law Society of the Northern Province.

¹⁹ Ibid.

²⁰ Ibid.

provided in chapter five. Therefore, although the author's aim is to provide an evaluation of components that make up the academic design of PLS, it may at times be difficult to disassociate the discussions without making reference to elements within the Professional Design.

4.3 HISTORICAL CRITIQUE OF THE PLS/WLC

*"If Santayana was correct in observing that those who forget history are doomed to repeat it, then any responsible prediction of clinical legal education's future must start with a perspective on its past."*²¹

A discussion on the history of PLS/WLC cannot be led without a reflection on our discriminatory past — as it is the past that influenced the design of PLS/WLC at Wits and it is what continues to influence its future.²² The turn of the twentieth century marked the beginning of discriminatory legislation in South Africa.²³ Discrimination transcended through every fibre in our society and has had a distinctly negative effect on the growth of Higher Education in South Africa.²⁴ Professor Bruce Murray, in his book, *Wits the early years* explains that initially both the University of Cape Town and the University of Witwatersrand (often referred to as the 'white' teaching universities) were considered as 'open universities'.²⁵ "Open universities' because they admitted non-white students as

²¹ Margaret Martin Barry, Jon C. Dubin & Peter A. Joy 'Clinical Education for this Millennium: the Third wave' (2000) 7 *Clinical Law Review* 3.

²² Lisa R. Pruitt 'No Black names on the letterhead? Efficient discrimination and the South African Legal Profession' (2002) 23 *Michigan Journal of International Law* 545 at 553. Also see Gabriel Cele and Charlton Koen 'Student Politics in South Africa. An overview of key developments' <http://cres.revues.org/1517?long=en> accessed on 20 July 2013.

²³ See for example the imposition of the Native (Urban Areas) Act 1923 which regulated the pass law requiring all black African men in cities and towns to carry permits called 'passes'.

²⁴ Bruce Murray *WITS — the early years* (1982) at 297–336. Also see Bruce Murray *Wits — the 'open' years* (1997) at 289–326 where the author provides a remark by Albert Luthuli in response to the 1959 Act "the Act's foundations were laid much earlier, when the Act applying to school education was passed. The Nationalists were not deterred. The reality was that the 'open universities' perceived themselves essentially powerless against government, equipped with a formidable parliamentary majority, determined to get its own way. Once the Nationalist Government had decided on its formula for apartheid university structures, it simply brushed aside the arguments and protests of the 'open universities'. Also see Pruitt op cit note at 22 at 563.

²⁵ Ibid at 297.

well as white students and aimed, in all academic matters, at treating non-white students on a footing of equality with white students, and without segregation”²⁶ However, this practice was stopped by Government with the enactment of the Extension of University Education Act in 1959 which deprived universities of the ability to apply their discretion when it came to admissions based on race. This Act therefore prohibited the white universities from admitting black students except under special circumstances and only with ministerial permission.²⁷ Apartheid ideologies encrypted on the development of legal education influenced its goals, curricula and teaching methods.²⁸ As stated by Kentridge in 1973, “[t]here is no positive dream of South African life. We are a very heterogeneous community; we have not yet found a single unifying goal; we are going through a period of greater and greater separation; we have no constitution to which we can refer with an almost religious excitement or commitment; our Supreme court is never going to hand down a judgment saying that all men are entitled to be represented because it is a constitutional right.”²⁹

Therefore, it is no surprise that the initial development of clinical programmes were hampered by legislative interference. For example, the National Welfare Act No 79 of 1965 specifically prohibited welfare organisations from receiving funding unless such organisations were registered with the Act.³⁰ Registration was dependent on Law Society approval and initially Law Societies were reluctant to grant such approval.³¹

²⁶ Ibid at 297. Also note Murray’s discussion on the fact that Wits was not always an “open university”. In fact at its inception Wits reflected the prejudices of South African society at the time.

²⁷ Ibid at 297.

²⁸ Vawda ‘Best Clinical Teaching Practices in South Africa’ (unpublished copy with author) at 3.

²⁹ F.N. Kentridge Lead-in Address in D.J. McQuoid-Mason *Legal Aid in South Africa* (1974) at 87.

³⁰ A.H. Van Wyk Lead-in Address in Dugard’s article A Review of South African Legal Education in D.J. McQuoid-Mason *Legal Aid in South Africa* (1974) 170 where Van Wyk discusses this specific piece of legislation that hampered the inceptions of clinics. He notes that the National Welfare Act defined a welfare organisation as “any association of persons, corporate or unincorporated, or institution, the objects of which include one or more of the following, namely ... (e) the rendering of legal assistance and advice as a form of social assistance.” Van Wyk further refers to section 16 “no welfare organization shall, after the commencement of the Act, ... (b) receive financial assistance from the State or from a local authority; or (c) collect contributions from the public, unless such organization is registered under this Act.” “The crucial provision is sec.19(5)(a), according to which the National Welfare Board shall not register an organization having the provision of legal aid as one of its objects unless the consent of the particular Law Society has been obtained.” Other examples of legislative interference included provisions in the Attorneys, Notaries and Conveyancers Admission Act, No.23 of 1934, section 30, 32 and 32b of the Attorneys Admission Act.

³¹ Ibid at 170.

4.3.1 Inception of Practical Legal Studies

The PLS/WLC programme at the University of the Witwatersrand was initiated informally in 1969.³² As stated in the introduction to this chapter, the programme was initially referred to as Practical Legal Training (PLT). Included in this programme was an access to justice component. As described in chapter three, like most other clinical programmes it started as a response to the political and social circumstances of the country at the time.³³ Initially, a small number of students from Wits offered legal aid assistance at the Johannesburg Legal Aid Bureau.³⁴ They also managed their own legal aid clinic in a ‘coloured’ township in Riverlea, which is south of Johannesburg. These offices were advice offices rather than law offices and operated two nights a week. Khan describes this period as when full time students assisted the Johannesburg Legal Aid Bureau and run their own legal aid clinic in the Coloured township of Riverlea.³⁵ The students were advised on their matters by practicing attorneys on two evenings per week. The students reported back to Mrs Kentridge at informal seminars held at regular intervals.³⁶

In addition to the access to justice programme other forms of practical experience were introduced including visits to courts and assistance to pro deo counsel.³⁷ Full time students visited the then Supreme Court, the Magistrates’ courts and the Bantu Affairs Commissioners’ court.³⁸ Students were debriefed on matters before the courts and discussion on the matters continued after the hearing. Final year law students were granted permission to attach themselves to pro deo counsel and assist in all stages of preparation of the case — except actual representation. “ ... the student may participate fully in the preparation of the case and observe the presentation of the case as a type of

³² Shaheda Mahomed & Philippa Kruger ‘Teaching Legal Writing at the University of the Witwatersrand Law Clinic’ (2009) 3 *John Marshall Law Journal* 106–134.

³³ See Willem De Klerk op cit note 5 at 930. Danny Wimpey & Shaheda Mahomed, ‘The practice of freedom — South African Experience, Paper delivered at the 4th International Journal of Clinical Legal Education Conference, London at 1 (unpublished copy with author).

³⁴ C.J.R. Dugard ‘A Review of South African Legal Education’ in D.J. McQuoid-Mason *Legal Aid in South Africa* (1974) at 162.

³⁵ Ellison Khan ‘A Review of South African Legal Education’, in D.J. McQuoid-Mason *Legal Aid in South Africa*, (1974) at 148. Students practiced in Riverlea and not Soweto because of restrictions imposed by the Group Areas Act and the Bantu (Urban Areas) Consolidation Act. See A.H. Van Wyk – Lead-in Address op cit note 30 at 173.

³⁶ Ibid at 148.

³⁷ Ibid.

³⁸ Ibid.

‘junior counsel’ ”.³⁹ Lectures on the practice of law were delivered by members of the profession including judges, magistrates and prosecutors.⁴⁰

Students’ assistance in cases during this period was voluntary and with limited professional supervision.⁴¹ The motivation for this experience was the promotion of access to justice rather than for any pedagogical purpose, as the students that participated in the PLT programme received no credit towards any courses in their law degree.⁴² However, during these initial stages the seeds for linking the legal aid objectives and educational outcomes were planted by Dugard when he wrote on whether Wits should consider assisting in a legal aid scheme and stated that, “[u]niversities, certainly my own university, would be prepared to initiate a scheme of this kind provided it had educative value.”⁴³ Khan by inference supported this perspective and suggested that the best way to derive educational value was to introduce a course in clinical legal education.⁴⁴

The access to justice programme at Wits operated under the Riverlea Coloured Social Service Institute which was referred to as WITSCO. The programme was subsequently welcomed by the Incorporated Law Society of the Transvaal,⁴⁵ as Wits overcame legislative barriers by operating the clinic under WITSCO.⁴⁶ WITSCO allegedly had a representative on the Incorporated Law Society of the Transvaal

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid 147–148.

⁴² Ibid at 148.

⁴³ Dugard op cit note 34 at 160–169. Dugard suggested recommendations for the integration of practical legal training into the academic syllabus. He recommended four possibilities,

- 1) An elective course in clinical law
- 2) Introduction of legal aid as a DP requirement (certificate of attendance)
- 3) Integration of practical training into existing courses.
- 4) To introduce an additional year for vocational training after the LLB or B. Proc degrees.

He further envisaged the future of the Practical Legal Training programme at Wits to include “...an off-campus legal aid office which would be staffed by at least two qualified attorneys. This would permit one attorney to go to court with students while the other attorney manned the office and received clients. Students would work with these qualified attorneys and then report back at seminars conducted both by the attorneys and by members of the academic staff.” Also see Van Wyk op cit note 30 at 171.

⁴⁴ Khan op cit note 35 at 148.

⁴⁵ Dugard op cit note 34 at 166 where the author confirms “Happily our campus legal aid has been welcomed by the Incorporated Law Society of the Transvaal and I do hope that this enthusiasm will continue because this was one of the main obstacles in the way of our initial schemes.”

⁴⁶ WITSCO represented the Riverlea Coloured Social Service Institute. See Wits Student the official student newspaper vol 37 No:2 14 March 1984 at pg7, <http://www.cs.wits.ac.za/~scott/issues/WS-1985-37-02.pdf> accessed on 20 July 2013. Also see Van Wyk op cit note 30 at 171.

committee, thus making it possible for Law Society accreditation.⁴⁷ As a result, a legal aid clinic was formally accredited by Wits Law Faculty in 1973 and an on campus legal aid clinic was established.⁴⁸

4.3.2 Development 1973–1989

This period witnessed the growth of legal aid programmes at several universities in South Africa.⁴⁹ This was particularly spearheaded after a Conference on Legal Aid in South Africa held at the University of Natal in July 1973.⁵⁰ Motivated by this, a distinct phase started in the latter half of 1973 when a law clinic was established on the Wits campus. The course continued to be managed by Mrs F.N. Kentridge. The clinic was opened at lunch every day of the week for staff and students. The course was an elective credit bearing module and operated mainly as an advice office. In a document dated May 1993 it was noted that the clinical programme was inceptioned during the period of statutory segregation. Black students could only participate in the course with ministerial permission. Therefore the course overwhelmingly accommodated white students⁵¹ (see annexure A).

Between August 1973 and July 1983 just one article was written on Clinical Legal Education in South Africa — that is, the article titled *Clinical legal education: its future in SA* written by Professor David McQuoid-Mason published in 1977. Although this article attempts to enlighten the reader on CLE in South Africa, the article falls short on a detailed discussion of the events at Wits.⁵² Indeed, for a period of ten years there appears to be no compilation of information about the developments of the Wits PLT/WLC programme.

In July 1983, Paul Pretorius presented a paper titled *Legal Aid Clinics as Teaching Institutions* at the Legal Aid and Law Clinics in South Africa conference held

⁴⁷ Ibid at 171.

⁴⁸ Khan op cit note 35 at 148.

⁴⁹ De Klerk op cit 5 at 930. Also see David McQuoid-Mason 'Clinical legal education: its future in SA' (1977) 41 *THRHR* 351.

⁵⁰ Papers presented at this conference were published in the text *Legal Aid in South Africa*. For a discussion on why the conference took place see chapter 3.

⁵¹ Documented cited as memos/mission.law (copy with author).

⁵² McQuoid-Mason op cit note 49 at 343–359.

that year and provided further insight on the status of the PLT programme at Wits.⁵³ In his paper Pretorius confirmed that by 1983, university legal aid clinics were used for teaching purposes particularly at Wits.⁵⁴ He implied the following as goals for students participating in the PLT course: administration of a law clinic and a lawyer's practice.⁵⁵ Lawyer's practice included teaching students interviewing skills, statement taking skills, drafting of documents, problem analysis, and diarising. Pretorius lists a number of challenges associated with law clinics in his article including, limited financial resources, students do not have right of appearance in court and lack of adequate professional supervision.

The course, as well as supervision during this period, was managed in the following manner:

- 1) Simulations were used to teach interviewing,⁵⁶ statement taking, drafting of documents, problem analysis, advice on evidence, the trial, including leading evidence, cross examination and re-examination, preparation for appeals and negotiation.
- 2) Seminars were held on various aspects of public interest law including individual labour problems, consumer exploitation, social benefits and administrative matters.
- 3) After the seminar students would interview real clients.⁵⁷
- 4) Statements would be taken and checked by the supervisor.

⁵³ P. Pretorius 'Legal Aid Clinics as Teaching Instruments' in D.J. McQuoid-Mason *Legal Aid and Law Clinics in South Africa*, (1983) at 85–97.

⁵⁴ Ibid at 85 where Pretorius notes other universities using the legal aid clinics as a teaching method. These universities include RAU, Natal University and UNISA.

⁵⁵ Ibid at 85 where the author states: "A viable clinical teaching programme must therefore cater for two problems. The first is the question of access to legal services by groups that would otherwise not have such access. The second is that universities have been criticised for concentrating too much on 'academic education' and pressure has been brought to bear in order to make the education of students in the broad sense more practical."

⁵⁶ See Pretorius op cit note 53 at 91 where he describes how interviewing skills were taught through simulation, "We do not lecture students on the important things that they have to do and must not do in the interview situation. What we do is conduct an interview and then discuss it amongst the class. The students themselves then discover what is important and what is not important. They also learn what their personality can bring to an interview and what their personality cannot contribute."

⁵⁷ Already, during the 1980s supervisors experienced problems with the number of files opened by students. Ibid at 88 where the author states that "Keen students want to take on many cases in the beginning but these have their own geometric momentum. By the end of the year we have a backlog of say 300 to 350 files which are then handed on to some poor unsuspecting vacation students. These are then passed on to succeeding students the next year."

- 5) All administrative matters were then attended to, for example appointment cards and photocopying of documents.
- 6) Students then worked on the files and researched the matter. Dummy files were created so as to allow students the opportunity to remove the files from the clinic.
- 7) The case and an action plan were then discussed with the supervisor.
- 8) Once the action was completed the file was diarised.⁵⁸

Fundamental to this article is the comments made by Pretorius on the educational objectives of the legal aid programme. Essentially he argued that students could not learn by mere participation in the clinic and that there needed to be a teaching programme developed so that the educational potential of the clinic could be exploited.⁵⁹

Statutory segregation for admission was lifted in 1984. Subsequently, a number of Black students were admitted to the course. These students had been poorly schooled and as a result experienced a number of challenges.⁶⁰

As compared to the period from 1973 to 1986, there is a more complete documentary history for the period 1986-2000 that the remainder of the chapter will now discuss and reflect upon.

Between 1986 and 1988 PLT adopted the name Practical Legal Studies (PLS). The teaching curriculum reflected a diverse range of lawyering skills that were taught including, interviewing and statement taking, drafting, labour law, ethics, dispute resolution and litigation skills. (see annexure B)⁶¹ These lectures were held on a Tuesday during the course of the academic year. In 1987 the Director of the programme was Zilla Graff.

In 1989, Arthur Chaskalson⁶² submitted a letter to Zilla Graff. The letter was written by Chaskalson after he acted as an external moderator for the written examination

⁵⁸ Ibid at 85–93.

⁵⁹ Ibid at 91 where the author notes: “In other words mere participation in the clinic from an educational point of view is not going to give any results unless it is accompanied by a carefully designed teaching programme.”

⁶⁰ Documented cited as memos/ mission.law. (copy with author)

⁶¹ Original copy with author.

⁶² Clinton Bamberger described Arthur Chaskalson’s involvement in the clinic as “It is well to remember that he was a founder and supervisor in the early days of clinical legal education at Wits. He is a teacher in the classroom now and a sterling supporter of the law school and PLS course.”

in PLS. (see annexure C) Chaskalson was most disappointed with the grades received by the students and therefore presented the following: Regarding the clinic he stated that,

“[t]he clinic is a valuable institution and you and other supervisors are doing important work. I think that it is essential that this work be kept within manageable limits. The bad results this year may prove to be a mixed blessing. They serve as a warning as to what can happen if numbers increase. If there is another increase in the student intake next year it may have to be balanced by a reduction in the student case load so that each case can be carefully supervised and discussed with the students — possibly more than once — until the end product meets the satisfaction of the supervisor. What is important is that the end product should be the student’s work and not the supervisor’s work. Without time for discussion and review of cases the students will flounder, the supervisors will despair and the clinic may go under.”⁶³

There are a number of other matters that arise from Chaskalson’s letter that are worth noting including, the increase in class sizes, language disparities, case load management, supervision and students’ ability to work in a clinical setting. Although the exact circumstances pertaining to the letter are unknown (and to a large extent may not be particularly relevant to the point I am about to make) the matters raised above continue to be challenges that PLS/WLC continues to struggle with today.

Further on in 1989 there appeared to be some thought on reworking the PLS/WLC curriculum. This is indicated from the contents of a letter received by Zilla Graff from Clinton Bamberger.⁶⁴ The letter was forwarded to Etienne Mureinik for discussion.⁶⁵(see annexure D) The letter discussed the possibility of a classroom

⁶³ Letter from Arthur Chaskalson addressed to Zilla Graff dated 6 December 1989 at page 2. (copy of letter on file with author) The clinic staff appears to include five supervisors including Zilla Graff, Philippa Kruger, Ingrid de Villiers, Eric Blumenson and Eva Nilsen. Resources were also drawn from the Centre from Applied Legal Studies as the need arose.

⁶⁴ From 1989-1990, Clinton Bamberger was a Visiting Professor of Law at the University of the Witwatersrand, Johannesburg, South Africa designing and conducting PLS. Also see http://www.historicalpapers.wits.ac.za/inventories/inv_pdf/AG3298/AG3298-1-008-text.pdf accessed on 20 July 2013.

⁶⁵ The note to Etienne Mureinik is dated 11 December 1989 — attached is the letter from Clinton Bamberger, undated, but received by Zilla Graff on 8 December 1989. Etienne Mureinik was the Head of the Law School during this period.

component for PLS. Bamberger proposed an integrated classroom component independent of and yet related to the practice.⁶⁶ He proposed that there be two Directors — one for the classroom component and the other for the clinical component. He further proposed that the classroom component be directed by a member of the academic staff so as to draw a connection between clinical education and legal education. “The director of the PLS course would be responsible to design the course, teach some of the classes, and recruit the other teachers from the clinicians, the faculty, the profession, and the bench — all in consultation with you as the director of the clinic.”⁶⁷ In terms of a curriculum for the classroom component, he proposed that it began with an orientation on the administration of the clinic, followed by brief lectures on skills for interviewing, counselling, legal research and writing, an overview on substantive law and procedure. He then proposed lectures on ethics, the role of the profession in society, the socialisation of lawyers, the power and responsibilities of lawyers, and the opportunities for lawyers in the current context of South Africa. Following on this he proposed a series of lectures on lawyering skills.⁶⁸

Ironically the Bamberger letter set the stage for the way in which PLS is taught today — except that we have one Director of the course. However, in 2012, for the first time a separate position for course co-ordinator was created. Willem De Klerk was appointed as course co-coordinator for PLS as distinct from the post of the Director of the Clinic (from 2012, Philippa Kruger).

Another document in the possession of the author relating to this period must be noted. The document is titled *Notes of the meeting concerning the Blumenson’s Report*.⁶⁹ (see annexure E) The original copy of the Blumenson report is not in the author’s possession but the notes are and will be discussed accordingly. The note was addressed to the then Dean of the Law Faculty and clinic members.⁷⁰ The theme of the report was expressed as follows: “The main theme which runs throughout the report is the lack of resources in the clinic and the suggestions in the report are aimed, mostly, at dealing with

⁶⁶ Ibid where the author notes “The PLS course should develop with a single theoretical base and room for a variety of practical components. The classroom is the unifying base. All students attend the class and do their practical component in the clinic or research track.”

⁶⁷ Ibid at 1 see attached annexure B. (original letter with author)

⁶⁸ Ibid at 2 see attached annexure B.

⁶⁹ The notes appear to be a product of 1989.

⁷⁰ Prof June Sinclair, Zilla Graff, Philippa Kruger, Ingrid de Villiers, Eric Blumenson and Eva Nilsen.

this problem.”⁷¹ Suggestions (challenges) made in terms of the report include, limiting the types of cases, specialisation, supervision in smaller groups, student numbers (in 1989 — 42 students, 74 students in 1990, anticipate 160 from 1991 and to thereafter increase),⁷² clinical pedagogy and library resources. An action plan for each of the above was recommended.

In 1989 Eva Nilsen and Eric Blumenson described the clinic as understaffed and overloaded with cases. Echoing the concerns of the Chaskalson letter of 1987, they noted that as a result the educational component took strain as well as the cases themselves, which may not have been handled adequately. They stated “In our judgment, the extraordinary efforts of the clinic staff do not suffice to provide adequate supervision of cases. This is the result of several factors, including the supervisory ratio; the lack of regularly scheduled meetings between student and supervisor; the irregular student schedule at the clinic, which results in students and cases bouncing between supervisors; ... Supervision seems too often to be a hit-or-miss affair, and an important issue may never reach the supervisor because the student is unaware of it. (Indeed, there have cases where actions have been prescribed) ... It is essential that the supervisory system be improved and tightened.”⁷³ Therefore, up until 1989 PLS/WLC was described as unstructured and irregular.⁷⁴

4.3.3 Development 1990–1999

In the early nineties, the Campus Law Clinic transformed itself from a paralegal advice office into a fully fledged law office, teaching CLE.⁷⁵ This was partly due to funding received from the Legal Aid Board (LAB) and several other donors (discussed below) and opportunities made available for clinical programmes to employ Candidate

⁷¹ Ibid see annexure C

⁷² See Clinton Bamberger document titled The Practical Legal Studies Course: Now and in the Future – 17 April 1990 at 2–3.

⁷³ See Clinton Bamberger document titled The Practical Legal Studies Course: Now and in the Future – 17 April 1990 at 5.

⁷⁴ Ibid at 4–5.

⁷⁵ Also see the University of the Witwatersrand Faculty of Law Mission Statement dated 13 August 1993. (copy with author).

Attorneys.⁷⁶ According to De Klerk “[d]uring the early 1990s an important breakthrough was made when the Attorneys Act was amended, giving formal recognition to law clinics and allowing candidate attorneys to complete their internship at accredited clinics. ...The Legal Aid Board (LAB) capitalized on this opportunity by entering into partnerships with various clinics whereby salaried professions were placed at the clinics concerned.”⁷⁷ The final year law students, with the exception of a select few who were eligible to undertake a research report as an alternative, were obliged to serve a year in the law clinic for which they would receive a credit.⁷⁸

In April 1990, Clinton Bamberger wrote up a description of the clinic and proposed recommendations for anticipated future challenges within the programme. The document is titled *The Practical Legal Studies Course: Now and in the Future*. (see annexure F)⁷⁹ The document presented an overall study of PLS/WLC and identified a number of relevant challenges that clinicians experienced in PLS/WLC. The document was divided into several parts including, purpose and method, structure, enrolment, clinical practice and supervision, the classroom component and recommendations for the years ahead. Each of the parts that are relevant to this thesis will be discussed.

Bamberger stated that the purpose of PLS was “Practical Legal Studies (PLS) / Campus Law Office [which] is a course that uses the clinical methodology of teaching. It is experiential learning. The course is rooted in law practice for clients, as opposed to simulation or critique of another practice.... A teaching law clinic is not an efficient provider of proper service to clients. Teaching is its primary function. Teaching takes

⁷⁶ For further discussion on the Legal Aid Board see David McQuoid-Mason South African Models of Legal Aid Delivery in Non-Criminal Cases at www.legalaidreform.org at 4–7 accessed on 20 July 2013. In addition to clinical programmes receiving money from LAB, further donor funding was made available by the Ford Foundation. In 1998 Ford Foundation contributed \$1 million dollars towards the development of clinical programmes in South Africa. These funds were managed through AULAI Trust. Clinical programmes were called on to request funding depending on their needs. See Chapter 3 for further discussion on AULAI Trust. The Wits Law Clinic however opted not to be a recipient of such funding as funding was received independently from the Ford Foundation. Also see document cited as memos/mission.law pg 5 (copy with author).

⁷⁷ De Klerk op cit 5 note at 931.

⁷⁸ See Clinton Bamberger document titled ‘The Practical Legal Studies Course: Now and in the Future’ — 17 April 1990 at 2 where Bamberger confirms that since the beginning of 1990 PLS was considered as a “semi- compulsory” course offered to final year LLB students. Also see document cited as memos/mission.law pg 4 where it was noted that “[t]he LLB curriculum has accordingly been revised to make the clinical programme nearly compulsory, in the sense that students require special permission to be exempt from it, and the bulk of the class is required to participate in it.”

⁷⁹ Document is dated 17 April 1990. (original with author)

time, resources, and energy from the practice. ... The pedagogy of clinical legal education is founded on responsibility, reflection, and understanding. The students are responsible for law practice; responsible to the client and the watching attorney. The faculty lead the student to reflect upon what they have done, or plan to do, and to understand what they should do.”⁸⁰ Bamberger’s description of the purpose of PLS reflects what has been discussed regarding CLE in South Africa generally in chapter three — he clearly speaks of PLS within the context of clinical legal education and experiential learning. His usage of the words ‘experiential learning’ and ‘reflection’, identifies comfortably with what contemporary authors on the subject propose.

In terms of the structure of PLS, Bamberger described the course as being made up of three parts, classroom instruction, the practice in the Campus Law Clinic and students’ sessions with attorneys to examine their clinical practice. Bamberger described the third component as “[t]he sessions with the attorneys are in two forms. The first we call tutorials: when a pair of students meets with the attorney to discuss their work. The second is the case review sessions when all of the students supervised by an attorney meet to discuss selected cases.”⁸¹ This structure resembles partly how PLS/WLC operates today.

On clinical practice and supervision Bamberger stated: “The Campus Law Office is the site of the practice experiences for the students and the source of material for instructive supervision by the faculty. The Campus Law Office is not an ‘advice office’. It is a law office. Clients are given legal assistance; advice and advocacy.”⁸² Once again this description resonates with the present status of the WLC. He describes the programme in 1990 as organised, structured and one that offers continuous and regular supervision.⁸³

The classroom component included a double lecture period each week during term. The contents of the lectures included substantive law, procedural law, ethics,

⁸⁰ Ibid at 1–2.

⁸¹ Ibid at 1–2.

⁸² Ibid at 4.

⁸³ Ibid at 5. For a detailed description of the course in 1990 refer to Bamberger op cit note 78 at 5– 8.

structure and function of the legal profession and the theory and practice of lawyering skills.⁸⁴

On time spent by students on the course, Bamberger confirmed that students devoted between eight and ten hours a week to PLS/WLC. The times were made up as follows, two hours in the Campus Law Office, forty-five minutes in tutorial sessions, forty-five minutes in case review sessions with their law firm, and an hour and a half in the classroom. In addition students spent five hours researching and dealing with their cases.⁸⁵

On challenges anticipated for the years ahead Bamberger claimed that they included student numbers and availability of staff required to provide adequate supervision. He stated that: “An overcrowded clinical course is worse than none at all. The point bears emphasizing. The clients are poorly served, even injured. The students are taught nothing, or the wrong lessons.”⁸⁶

Therefore, Bamberger proposed the following options in an attempt to address future challenges: employment of additional clinical staff, PLS continue as a elective therefore reducing student numbers, reducing the time spent by students in the clinical component, teaching part of the course through simulations, street law as well as other practical engagements to be offered as an alternative (other engagements include placement on a Pro Deo basis with Advocates, placements at Dispute Resolution Centres, and public interest practices including the Centre for Applied Legal Studies).

On or about May 1993,⁸⁷ in an attempt to address the challenge of transformation, a document was drafted identifying the Campus Law Clinic (CLC) as an initiative (or development) aiming at addressing this challenge. In this document the goals of CLC were identified as “to improve the quality of the legal education offered to its students, and especially its black students; to enhance the prospects of employment of its graduates, and especially its black graduates; to improve the supply of legal services to

⁸⁴ Ibid at 8. Students were required to prepare for class “To prepare for each class the students are required to write a response to a legal research problem and to prepare an abbreviated memorandum on the substantive law, procedure, or lawyer task that is the subject of the class.”

⁸⁵ Ibid at 9.

⁸⁶ Ibid at 10.

⁸⁷ Document cited as memos/mission law at 1–11.

the community, and especially the black community, both immediately and, by the special kind of education that the Clinic offers, in the future.”⁸⁸

On 13 August 1993 as part of a document titled Draft for Discussion — University of Witwatersrand Law School Mission Statement service to the community through the provision of legal assistance was committed to. (See annexure G) As part of the statement the Campus Law Clinic and Centre for Applied Legal Studies were designated to provide such services. The statement further addressed the means by which these objects could be achieved and with specific reference to this paper the Law Faculty committed to “increase the number of posts for attorneys in the Law Clinic so as to meet the demands of adequate supervision of students working in the Clinic and increase the number of members of the public to whom we can render assistance.”⁸⁹

Other significant developments that should be noted during this period include the increase in funding for the WLC and PLS from the Legal Aid Board (LAB)⁹⁰ and Attorneys Fidelity Fund (AFF).⁹¹ The money received from the LAB further promoted the access to justice mission of the clinic whilst funding from the AFF was directed towards the clinical Directors salary, with the ambition of advancing the educational component of PLS. While the LAB concentrated on the quantity of cases dealt with by the WLC, the AFF advanced funding for the educational component linked to PLS. During this period further financial support was received from the Anglo American Chairman’s Fund, the Ford Foundation, Liberty Life Education Trust and Johannesburg Consolidation Investment Company.⁹²

In 1994, Philip Iya wrote *The 1994 P.L.S Course Evaluation — A summary with identified problem areas and some suggestions*⁹³ (see annexure H). In this document Iya

⁸⁸ Ibid at 3.

⁸⁹ University of the Witwatersrand Mission Statement — 13 August 1993. (copy with author)

⁹⁰ See Peggy Maisel Clinical Legal Education South Africa Part 1 A statistical report. (unpublished copy with author) pg 2 where the author notes “ In 1993 the Legal Aid Board, which is a government funded agency started a process of providing grants for the representation of indigent people by entering into a partnership with individual universities to establish legal aid clinics in conjunction with existing university based law clinics.” The LAB appointed an in house attorney to facilitate its function. Also see De Klerk op cit note 5 at 931. For further discussion on the Legal Aid Board see McQuoid-Mason op cit note 76 at 1–19 at www.legalaidreform.org accessed on 20 July 2013.

⁹¹ Also see De Klerk op cit note 5 at 931.

⁹² The author has in her possession a copy of a budget breakdown of PLS/WLC in 1995.

⁹³ Philip Iya “The 1994 P.L.S Course evaluation — A summary with identified problem areas and some suggestions.

discussed a number of matters after receiving feedback from students on the course. On course content/structure/organisation/relevance, students raised the following concerns, the length of the course and volume of work during the year. In view of the concerns Iya suggested: extending PLS to two years, retaining the one year but dedicating it solely to PLS or the transfer of some of the components of the PLS course into the LLB course so as to reduce the work load. On clinic work with cases, students raised the following concern: the scope of the cases was limited —addressing not only the nature of cases, but also the skills taught which throughout the course were dispersed. In view of these concerns Iya suggested the introduction of a balance between clinic-based training with skills-based training. On tutorials the main problem was staff to student ratio. Iya himself identified this area as problematic and proposed no immediate solution.

The information presented in this dissertation for the period between 1996 and 1998 is taken from the author's experience as a student in PLS/WLC (1996) and as a Candidate Attorney (from 1997-1998) at the WLC. From a student's perspective, PLS was an elective course offered in the final year of the LLB degree. Students were paired with a partner and allocated to a clinician. The clinic operated as a general clinic and students were expected to engage on a variety of cases. The structure of the course comprised of plenary lectures, compulsory tutorial sessions and compulsory clinic attendance. From the authors experience there was little emphasis on the educational elements of CLE but rather a firm understanding on quantity of cases dealt with. As a Candidate Attorney (CA) the author was assigned a Principal who assumed the responsibility for her training. As CA's we were expected to engage on a variety of cases, consult with clients and represent clients at both the Criminal as well as Civil Magistrates Court. We were expected to consult with our Principal on a regular basis. It was the responsibility of the Principal to give direction on cases and oversee all drafting.

By the end of the 1990s, as a response to the demands for skills teaching from the profession and at a point when the four year LLB degree was introduced, the Law Faculty at Wits declared PLS/WLC as a compulsory final course within the LLB degree. This decision had a double barrelled impact for PLS/WLC – on the one hand this decision was a positive one as PLS/WLC had finally gained recognition as an necessary course in the curriculum on the other hand with the increase in student numbers and limited teaching

staff the ratio of clinician to students increased and the law school failed to increase the number of staff needed to assist with supervision. It was therefore left up to the academics within PLS/WLC to consider how to deal with these challenges. In an attempt to address this challenge, clinicians sought funding outside of the university. Further discussion on funding received is noted below. Aside from Moot Court (which was and continues to be an elective) PLS/WLC was the only other course that taught practical legal skills.

Drawing an analysis from an educational perspective, by the end of 1990, PLS had made steady progress within its own defined space in the law curriculum. It was enlightening to discover that over the years clinicians continued to discuss the strengths as well as the challenges of the programme. The strength of the course continued to be that PLS was the primary course offering practical legal training and its model was unique to any other method of teaching adopted within the law degree. Funding received from the AFF reflected positively for the advancement of the educational component of the course. However, the challenges of balancing the demands of the model with the need to educate the students within a structured curriculum continued, as did the demand to sustain the method of teaching, particularly in relation to constraints in resources.⁹⁴ Nevertheless, up to this point PLS/WLC continued as an isolated course and there appears to be very little evidence (if any at all) of any serious consideration for understanding PLS within the context of a methodology that could be incorporated into other courses in the LLB degree.

From an access to justice perspective — as briefly discussed above — the challenges of balancing teaching and service delivery continued (in fact this continues to date). As noted by Bamberger “[c]linical faculty and students everywhere are pulled in opposite directions by the demands of service and teaching. The tension is worse in South Africa. There are so few providers of legal assistance for the poor. There are more clients

⁹⁴ See document titled Internal Memorandum – Proposed Law Faculty Plan for reduction of personnel and other costs — 1997 and 1998, written by Carole Lewis (Dean of the Law Faculty) to The Council Review Committee – 12 February 1997 pg 1- 6 at 3 where it was noted “We have been asked to achieve a 3 per cent reduction in operating costs in 1997. This is extremely difficult in the Faculty of Law, since as part of our teaching programme, students are required to do a course in Law Clinic.... Although the Faculty has raised funds for operating costs for the Clinic in the past, it has become increasingly difficult to do so....”

at the clinic's door than can be admitted, if the staff and students did nothing else.”⁹⁵ The increase in the role that the LAB played in PLS/WLC in fact presents a double edge sword — on the one hand the funding was much needed by the clinic to sustain its expenses, on the other hand the demands that such funding placed on clinicians was (and continues to be) overwhelming. Of course, the question that this challenge raises is: Is external funding necessary in light of the pressures it poses on delivering quality education to our students?

4.3.4 Development 2000-2012

In this part a discussion will first be provided on the growth of PLS/WLC. Following on this a description of the present structure of PLS/WLC will be provided. From 2000-2012 the information is taken from the authors own experience in PLS/WLC. From 2000-2004 the author was appointed as a Senior Tutor⁹⁶ — essentially a clinician with academic status. From 2004 -2011 the author continued to be employed in PLS/WLC but as the Director of the programme. In 2012, the author was deployed to Law School and was allocated a smaller teaching role in PLS/WLC.

From 2000-2004 Adjunct Professor Willem De Klerk was appointed as the Director of PLS/WLC. During this period the clinic witnessed a number of significant changes, including a shift to an integrated curriculum⁹⁷, stronger emphasis was placed on teaching as opposed to client services and an increase in funding for the WLC⁹⁸. A significant event during this period was the promotion of three senior clinicians to Adjunct Professor. The event marked the arrival of PLS as a respected academic course and was continuously noted by many South African academics as an extremely

⁹⁵ Ibid at 1.

⁹⁶ Up until 2012 the University of the Witwatersrand employed academic staff either on the lecture track or tutor track. Lectures are required to teach and research, however tutors were employed to concentrate their energies on teaching as opposed to research. Appointment as an academic within PLS/WLC was historically cast on the tutor track. This track offered the following positions, Senior Tutors, Principle Tutor and Adjunct Professor. Since 2012 the position has changed and the tutor track will in the future be absorbed into the lecturer track. Of course the primary reason for the change is motivated by the need to increase publication numbers of academics.

⁹⁷ The integrated curriculum was introduced in 2000. Further discussion on this will be led in chapter six.

⁹⁸ Whilst funding from LAB and AFF continued, funding was also received from the Rural Legal Trust which funded the Land Claims Clinic, the United Nations Refugee Project (UNHCR) which funded the Refugee Clinic and the International Commission of Jurists (Swedish Section ICJ) which partly funded the criminal project.

progressive step forward within Law Faculties.⁹⁹ A formidable explanation for change rested on the change in leadership. Professor De Klerk proved in subsequent years to be an extremely strong advocate for advancing the educational elements that CLE as a methodology should embrace.

From 2004-2008 several events influenced the direction of PLS/WLC; these included the appointment of a new Head of School Professor Glenda Fick, the appointment of a new Director for the Clinic, the implementation of the University's ten year Vision plan, an increase in scholarship on CLE, the hosting of an international conference on CLE, continuous funding received from the LAB and AFF and additional funding received from other organisations and lastly, the drafting of a Vision and Mission statement for the PLS/WLC. Each of these influences will be discussed with respect for all the role players' input.

The appointment of Professor Glenda Fick marked the first attempt at strengthening relations between Wits Law School and PLS/WLC. Prior to this — particularly with reference to financial security — the relationship between Law School and the PLS/WLC continued to be relatively isolated. PLS/WLC struggled to maintain its financial status (beyond the core salary support for the clinicians) and was often described by others as the stepchild of the Law School. Professor Fick — in line with the Wits Vision — took it upon herself to strengthen relations, provide moral as well as financial support and considered the growth of PLS/WLC as a priority to be undertaken by Law School. Motivation was further provided for the drafting of the PLS/WLC Vision and Mission Statement. (See annexure I)

The Vision and Mission statement represented the first written attempt by clinicians at Wits to understand what the core purpose of the programme is. The Vision and Mission statement was drafted in 2006 in line with the Wits mission statement, titled Wits 2010.¹⁰⁰ The Vision promotes that PLS/WLC aspires to be recognised internationally for its excellence in teaching, research and professional services. The Mission in line with the Vision promotes the following: to develop and provide an

⁹⁹ Subsequent to this many other clinicians have been promoted to Adjunct/Associate Professor level across a number of universities in South Africa. In fact at both KZN University and more recently at Rhodes University we have witnessed the employment of the Director of the Law Clinic as Dean of the Law Faculty.

¹⁰⁰ Mahomed op cit note 10 at 64–65.

effective Clinical Legal Education programme for students, to promote published research by clinical teachers, and to provide quality legal services to the community. In theory both the Vision and Mission sound ambitious, however, in practice a handful of clinicians have not aspired (or even lack the knowledge) to work towards these goals, preferring rather the option of advancing access to justice, as opposed to promoting the educational needs of our students.

In line with the Wits Vision and much probing from Professor Fick, scholarship on CLE at Wits increased. This further led to the clinicians being encouraged to participate in International Conferences, presenting papers and publishing articles in both local and international journals.¹⁰¹ This was particularly important as the University's increased emphasis on research and scholarship was impacting on the Law School itself at this point in time.

The support — both financially and morally — for the hosting of the fifth International Conference on Clinical Legal Education at Wits in 2007, further marked the commitment of the Law School to embrace PLS/WLC. The conference was sponsored and co-hosted by the University of the Witwatersrand, University of Johannesburg, AULAI and Northumbria University, the latter which publishes the *International Journal of Clinical Legal Education*. The theme of the conference was 'Unity in Diversity'. On the last day of the conference a significant presentation was delivered by Professor Cora Hoexter, a Senior Professor in the Law School, on the topic of Research, Writing and Publications. The presentation was delivered to all South African clinicians aimed at encouraging further research and publication about CLE. A significant outcome of the conference was the publication of a special edition by the University of the Free State in *Journal for Juridical Science*. A number of papers that were presented at the conference — specifically by South African clinicians — were published in this edition.¹⁰²

During this period the LAB and AFF continued to fund PLS/WLC and further funding was received from Atlantic Philanthropies (AP). AP donated R 3 million over a period of three years towards litigation projects specifically earmarked for the Refugee

¹⁰¹ See Willem De Klerk 'Unity in Adversity: Reflections on the Clinical Movement in South Africa' (2007) *International Journal of Clinical Legal Education* 95–104.

¹⁰² *Journal for Juridical Science* 2008 (special issue).

Unit. With this money, the WLC was able to expand on its resources and engage in a number of successful public interest litigation matters.¹⁰³

From 2008-2012 despite the change in leadership at the School of Law to Prof Angelo Pantazis and then Prof Jonathan Klaaren, the commitment embraced by Professor Fick towards PLS/WLC continued. This period has witnessed two significant events, one the engagement of two academics towards their PhDs on CLE — including the present thesis — and a dissertation by Adjunct Professor Riette Du Plessis. Secondly, the new skills based curriculum was introduced at Wits Law School. A detailed discussion on the new curriculum and its significance in relation to this thesis will be presented in chapter eight.

A description of the present structure of PLS/ WLC will now be provided as explication of the features of the course.

4.4 DESCRIPTION OF THE COURSE

PLS is presently described as a credit bearing, compulsory course, adopting an integrated method of teaching for all law students in their final year of study. Students in the final year of the LLB degree, require 180 points/credits to graduate and PLS contributes 36 points towards this. Prior to 1999 PLS, was an elective course in the LLB degree, however, its status has been elevated to that of a compulsory module for all students in their final year of study.¹⁰⁴ This decision influenced the development of the clinical programme during 2000.

Prior to January 2000, the clinic exposed students to a ‘general’ clinic,¹⁰⁵ however, in 2000 it adopted an integrated model — that is an incorporation of a specialised and general clinic model.¹⁰⁶ This integrated model will be discussed at length in chapter six. PLS/WLC offers the students the opportunity to participate in one of six

¹⁰³ See *Jeebhay v Minister of Home Affairs and Another* 2007(4) SA 294 (T) SCA.

¹⁰⁴ Not all South African Universities offer CLE as a compulsory course.

¹⁰⁵ David McQuoid-Mason ‘Law clinics at African universities: An overview of the services delivery component with passing references to experiences in South - and South-East Asia’ (2008) *Journal for Jurisprudential Science* (special Issue) 6. Also see Willem De Klerk & Shaheda Mahomed ‘Specialisation at a law clinic: The Wits Experience’ (2006) 39 *De Jure* 306.

¹⁰⁶ In chapter six the author explain why she have moved away from defining the PLS/WLC as a specialised clinic model and why I proclaim that our present structure represents an integrated model — that is, a combination of specialised and general clinic model.

areas of specialisation. The present areas of specialisation in the faculty include, Family, Delictual,¹⁰⁷ Labour, Consumer and General, Refugee and Housing and Evictions.

At present, PLS is taught using a combination of the in-house real-client teaching method¹⁰⁸ and simulation exercises. This is taught through a series of tutorial sessions, clinic engagement¹⁰⁹ and plenary lectures.¹¹⁰ As a way of introduction it needs to be highlighted that the in-house live-client teaching method provides students with an opportunity to learn through practice. Brayne et al, best describes this model as “in this model the clinic is based in the law school (hence ‘in-house’) and the unit is offered, monitored and controlled in-house too. The clients are real, with problems requiring actual solutions (hence ‘real-client’). The client base may be selected from the general public at large or from a *section* (my emphasis) of the public....”¹¹¹ Simulation exercises are problem exercises that resemble real life situations designed by clinicians. Students engaging in these exercises, are required to act like lawyers and role play, for example simulation exercises are used when teaching trial advocacy. Compulsory tutorial sessions are held on a weekly basis with the student peer-pairs.¹¹² During these tutorials clients’ files are discussed and students draft documents are commented on by the clinician and assessed on a formative basis. During plenary lectures, matters relating to substantive law, the drafting of documents, professional management, ethics, numeracy skills, interviewing skills, statement taking and trial advocacy skills are taught. Each of these methods and processes of teaching are discussed at length in the chapters that follow.

In an attempt to deal with student numbers,¹¹³ students are paired with a partner of their choice with whom they work together as a team.¹¹⁴ At the beginning of the course

¹⁰⁷ Also referred to as the law of Torts in other countries.

¹⁰⁸ Mahomed op cit note 10 at 53–70.

¹⁰⁹ See Vawda op cit note 28 at 2 where the author typically describes the clinical component to involve “work with live clients in a legal office environment. Here, students are put through their paces conducting interviews, drafting documents, conducting research and other legal tasks, all under the supervision of qualified lawyers.”

¹¹⁰ See chapter 7 for further discussion. Also see Vawda op cit note 28 at 2 where the author describes a typical classroom component as “consisting of approximately two hours per week, during which time supervisors meet with the entire class and offer instruction (through various media and methodologies) in the theory of clinical law, skills and values.”

¹¹¹ Brayne H, Duncan N. & Grimes R. *Clinical Legal Education* 1st ed (1998) 12.

¹¹² David Chavkin ‘Matchmaker, Matchmaker: Student Collaboration in Clinical Programs’ (1994-1995) 1 *Clinical Law Review* 199 at 217.

¹¹³ In 1989 there were 42 students that registered for PLS. The ratio of students to faculty was 15:1. In 1990, 74 students registered for PLS. The ratio of student to faculty was 19:1. In 2008 there were 308

students are afforded the opportunity to choose their partner and the unit that they want to be allocated to.¹¹⁵ Student pairs are allocated to one of nine clinicians¹¹⁶ and work closely with that clinician throughout the course of the academic year.¹¹⁷ According to Chavkin one of the primary benefits of dividing students up in pairs is simply that “two heads will be better than one”.¹¹⁸

Clients are seen on a ‘first come first served’ basis on different days for each unit.¹¹⁹ Individual clinicians are responsible for managing their weekly clinic intake sessions

students registered for the course, in 2009, 232 students registered for the course, and in 2011 there was 297 students registered for the course. Also see Mahomed op cit note 10 at 59. See David Chavkin op cit note 113 at 217 where he noted: “Especially at a time when the pressures to supervise more students may be compelling for the clinician, pairing students may help to reduce the daily supervision pressures on clinicians.”

¹¹⁴ Ibid at 199 and 242. Several other university CLE programmes adopt a similar approach for various reasons. Furthermore, many of them often include more than 2 students in a group and often refer to these groups as firms. Also see Philip G. Schrag op cit note 1 at 180 where the learned author cites collaborative working between students as a goal. Scrag notes that: “Learning to work with a partner and with the other members of a larger work group is a critical skill, yet it is one that is not usually taught in law schools, except through extracurricular settings such as journals and through clinics that choose to emphasize cooperative work.” Also see David McQuoid-Mason, *Teaching Social Justice to Law Students through Community Service: The South African experience, Transforming South African Universities* (1999) 89. Also see De Klerk et al *Clinical Law in South Africa* (2006) 2nd ed at 279.

¹¹⁵ Under most circumstances we do try and accommodate the students’ choices, but unfortunately we do experience those odd challenges where the student’s timetable does not allow his/her choice of partner or unit. Under these circumstances we allocate a partner for the student and place them in a unit that can accommodate their timetable. See Chavkin op cit note 113 note 19 at 239.

¹¹⁶ For the purposes of this thesis persons employed to teach within CLE programmes will be referred to as clinicians. Such persons include grant funded employees that actively engage in teaching students. In 2011 there were seven permanently employed clinicians in PLS. However, every year one of the permanent clinicians is afforded sabbatical — so only six permanent clinicians (which includes the Director of the clinic) are available to teach full student loads. In addition, the University has employed several grant funded employees that have the potential to assist in teaching, but they do not take on a full load of students. In 2011 there were three grant funded clinicians available to teach. So, in total for 2011, there were nine clinicians available to teach.

¹¹⁷ The present ratio of student to clinician at Wits is variable. Grant funded clinicians take on fewer students due to their added litigation commitments as noted in the above footnote. The ratio for full time clinicians is on average 1:40 and for grant funded clinicians is on average 1:10. This ratio is not ideal. See De Klerk & Mahomed op cit note 105 at 308.

¹¹⁸ Chavkin op cit note 113 at 204 where the author states that “Probably the major justification articulated for teaming students is that students will teach each other and learn from each other during the course of working together on cases – that two heads will be better than one. This increased knowledge will then contribute to a better work product. That approach, many clinicians emphasize, is very different from the typical law school environment of competition and grade distribution.” However, pairing has its disadvantages as well, for example, some students are just not able to work together, or some students individually assume the dominant role in the cases or a client may relate better to a particular student. Also see Elsabe Steenhuisen ‘Goals of clinical legal education’ in De Klerk et al op cit note 115 at 279 where Steenhuisen discusses learning and working in groups as one of a number of goals relating to CLE.

¹¹⁹ Client appointments are not made for the initial consultation. Clients simply walk into the clinic and are screened accordingly. This has however contributed to the large numbers of clients that are consulted with on a daily basis. Each clinic operates on a different day, except for the family and refugee clinics that both

where students screen members of the public for suitable cases.¹²⁰ Case loads are allocated to each student pair, and all professional activities on the files are closely supervised during the weekly tutorial sessions.¹²¹

Students' summative assessment comprises of a written test on law and procedure¹²², a drafting test¹²³, oral exam¹²⁴, written assignment¹²⁵, portfolio assessment¹²⁶ and sometimes trial advocacy¹²⁷. The portfolio consists of a collection of clients' files with cases that the students engaged in. The portfolio assessment comprises of the following evaluation requirements: quality of statements, analysis of the problem, ability to assess and plan strategy, execution of strategy, drafting skills, verbal communication skills and attendance and participation of students in the course.

operate on a Monday, but at different times. Clients for whom files are not opened are advised or referred elsewhere.

¹²⁰ On average the clinics screen between 30–50 people per working day, which include student's vacation times. Suitable cases will include matters that have merit. The client must also meet a means test as prescribed by the Law Society of South Africa.

¹²¹ As a result of the large number of clients that are screened, students' case loads average between five and ten files per student pair per year. Although forty five minutes have been allocated for weekly tutorials, the time spent with the students may vary depending on the complexity of the files that are dealt with. Further see David Chavkin, 'Am I My Client's Lawyer? Role Definition and the Clinical Supervisor' (1997-1998) 51 *SMU Law Review* 1507 at 1511 where Chavkin explores the distinction between supervision and intervention. Supervision he notes "may include directing a student attorney towards a particular legal or factual resource or suggesting a particular cause of action." "Intervention includes any interaction in which the supervisor displaces the student as attorney for the client." Also see Elliot S. Milstein 'Clinical Legal Education in the United States: In-House Clinics, Externships, and Simulations' (2001) 51 *Journal on Legal Education* 375 at 377 where the author describes the best form of supervision — "The best supervision deals with the particular problems in the pending case and also uses that case or student experience as a metaphor for larger recurring issues that the students will face in their careers. Helping students extract theory from experience, apply theory to solve real-world problems, and revise theory in light of experience is the supervisory ideal."

¹²² The test was introduced in 2008. During the first teaching block students learn substantive law and procedure specific to their unit of allocation. At a planning meeting held in November 2007, clinicians felt that this test was necessary in order to improve the students' level of knowledge in the specialised field of their unit.

¹²³ The test seeks to assess students' ability to draft legal documents and their understanding of legal ethics.

¹²⁴ Oral examinations are conducted once a year by two clinicians serving together as assessors. Students are assessed on their portfolios and on the rules of ethics that govern professional practice.

¹²⁵ Students are required to attend at any court and observe a case being conducted and thereafter write a report on the matter.

¹²⁶ A file assessment or portfolio assessment entails the allocation of a mark based on the file work done by the student over the course of the year.

¹²⁷ The practical teaching of trial advocacy has always proved to be a challenging experience at the Wits Law Clinic. (See chapter six for further discussion.) This challenge is primarily due to the fact that we have large numbers of students, limited time and resources available. However we have found that should students be assessed on an ad hoc basis, they do not apply themselves sufficiently. In 2009, it was decided that a summative grade be allocated with the hope that students will take this task seriously.

4.5 CONCLUSIONS

Since inception PLS/WLC has advanced in many respects, including being confirmed as a recognised compulsory course within the LLB curriculum. From an educational perspective — drawing an analogy from the construction industry — the foundations of PLS have been laid and the structure is complete. What remains, however, is for the interior of the structure to be optimally designed. . For example, the goals should align with the curriculum and the method of teaching. This requires the need for further discussion in the chapters that follow.

From an access to justice perspective the WLC continues to promote client services — and as will be noted later in the thesis — often at the expense of the teaching of the students. The time has arrived for clinicians at Wits to explore other methods of teaching PLS — as discussed in chapter three — as this will relieve clinicians from the burden of having to continuously engage in a juggling act between providing access to justice and teaching.

In chapter five, six and seven, the author proceeds to critically evaluate the goals, curriculum and teaching methods attached to the PLS programme. In these chapters the author questions: What are our goals, do our goals align with our curriculum and are our teaching methods appropriate? Is there room for improvement and if so in what context? In chapter five a discussion on goals that were specifically identified for CLE programmes globally will be noted,¹²⁸ and these follow on which goals pertained to PLS — as identified and understood by the author— will be critically discussed. It will be argued that, the goals identified by the international community could be adapted for South African CLE programmes; the goals identified for PLS should be consistently applied across all units of teaching; and finally, that goals adopted should reflect a less conservative outlook and instead be aligned to the vision of PLS, the Law School and the University as a whole.

In chapter six, a discussion on global curriculum design of CLE programmes will be presented. Following this, the present PLS curriculum will be critically evaluated. In this chapter it will be argued that the curriculum design of clinical courses must align to the goals. Furthermore, the author make the following statement — the PLS curriculum is

¹²⁸ Schrag op cit note 1 at 179.

made up of many components, some of which could themselves be presented as courses within the broader degree. Therefore, the author argues that the curriculum should be streamlined according to the goals identified.

In chapter seven, the different types of teaching methods available to teach CLE programmes, will be discussed. Thereafter the methods adopted within PLS will be critically evaluated. It will be argued that, clinicians must be insightful about the values attached to different methods of teaching; that the challenges attached to each method must be acknowledged and addressed; and finally that it is best to integrate the methods of teaching PLS into other mainstream LLB or LLM courses.

CHAPTER 5

CRITIQUE OF GOALS

“The importance of a law school establishing educational goals for clinical courses cannot be overemphasized.”¹

5.1 INTRODUCTION

This chapter is motivated by two factors: first in the Introduction to the thesis the author submits that due to the lack of scholarship on Clinical Legal Education (CLE) in South Africa at the University of the Witwatersrand (Wits) Practical Legal Studies (PLS) programme has developed in relative isolation. In response hereto the author dares to question, what are our goals, do our goals align with our curriculum and are our teaching methods appropriate?² Is there room for improvement, and if so, in what context? Secondly, in chapter two the author recommends that goal setting be considered of paramount importance³ within any university,⁴ as the goals define *what* and *how* students learn.

Goals identified prompts questions such as *what* knowledge and skills do we want to teach our students and *how* do we go about teaching them knowledge and skills?⁵ Goal

¹ Roy Stuckey ‘Ensuring Basic Quality in Clinical Courses’ (2000) *International Journal of Clinical Legal Education* 47 at 48.

² Roy Stuckey et al *Best Practices for Legal Education – A vision and road map* (2007) at 93 where the author submits in terms of best practices for the organisation of the programme of instruction, that law schools must strive to achieve congruence. “Congruence, in fact, is a defining characteristic of effective educational programs, and to achieve congruence, law schools need to harmonize: their educational programs with their missions...., their curricula with their educational outcomes....and, their course-by-course instructional objectives with their curricula..”

³ Ibid at 8.

⁴ Also see Kathleen Burch & Chara Fisher Jackson ‘Creating the perfect storm: How partnering with the ACLU integrates the Carnegie Report’s three apprenticeships’ (2009) 3 *John Marshall Law Journal* at 57 where the authors note “the goal of law schools, as with any other professional school, is to impart the ‘specialized knowledge’ needed to successfully practice in the profession and to instil ‘professional identity’ which cannot be accomplished without the foundation of the first year of law school.”

⁵ See Peter Toll Hoffman ‘Clinical Scholarship and Skills Training’ (1994)1 *Clinical Law Review* 93 at 98 where the learned author notes that, to ask questions on goals before exploring areas of knowledge, the abilities and values that students should possess at graduation “is to turn the question on its head”. Hoffman further notes that: “Too often, however the process is the exact opposite: the decision is made to create a clinic and then objectives are selected consistent with the clinical method of teaching. Such an approach

setting further defines the design of the course and curriculum, for example, if a law school considers its primary goal the teaching of practical skills — the law school's curriculum will be designed accordingly.⁶ According to Stuckey “[a] statement of educational goals should describe, the extent possible, what the school's students will be able to do after graduating and how they will do it in addition to what they will know, that is, it should describe the school's desired outcomes.”⁷

The goal setting process within university faculties can be influenced by a number of factors⁸ including political demands⁹, the professions,¹⁰ the mission of the university and its faculties¹¹, resources available,¹² organisational demands,¹³ and student needs.¹⁴

ignores the possibility that there may be other, better pedagogies for achieving the same objectives and the possibility that the objectives selected may not address the most acute needs of the students.” Also see N.R. Madhava Menon *Clinical Legal Education* (1998) at 8 where the author refers to a discussion presented by Andrew Petter on the learning process and law school curricula. Petter identifies two educational objectives, subject-matter objectives and the learning objectives.

⁶ Also see Menon op cit note 5 at 9.

⁷ Stuckey et al op cit note 2 at 42.

⁸ See Chuma Himonga ‘Goals and objectives of Law Schools in their primary role of educating students: South Africa — The University of Cape Town School of Law experience’ (2010) 29:1 *Penn State International Law Review* 42 where the author argues “that there is no uniformity among law schools with regard to the purposes for which they educate students. The definition of a school's goals and objectives is influenced by factors peculiar to its own circumstances. ... This may change from time to time in response to national and international changes affecting the school in its own local setting, such as a country's political history or economic development needs.”

⁹ Ibid at 42–59. Political agendas are reflected in legislation, for example, with the enactment of South African Qualifications Authority and the drafting of the National Qualifications Forum, specific goals for law schools have been defined.

¹⁰ Since the 1980s there had been calls from members of the legal profession for the incorporation of teaching skills into the legal curriculum. For example, see in Willem De Klerk ‘University Law Clinics in South Africa’ (2005) 122(4) *SALJ* 929 at 935 where De Klerk notes submissions made by Chaskalson at a conference on legal education in October 1983. Also see report by The LLB Curriculum Project Colloquium, Council for Higher Education 2010 (copy with author).

¹¹ Shaheda Hassim Mahomed ‘United in our challenges — should the model used in clinical legal education be reviewed?’ (2008) *JJS* (special issue) 53 at 64 where it is noted that in 2003 the University of the Witwatersrand School of Law prescribed its strategic mission in line with the Strategic Plan Wits 2010 — in the document the first goal identified was research and it was noted that: “Our aim will be to develop our standing and reputation as a research driven university. This research focus will ensure that we operate at the leading edge of all academic disciplines with which we engage and that we respond appropriately to national, continental and international research opportunities. Our research will enrich our undergraduate and postgraduate teaching.” Obviously goal setting at the University will be centralised on this aspect. Also see Hoffman op cit note 5 at 93. Also see Himonga op cit note 8 at 42–44 where the author says, “[t]he goals of a law school cannot be divorced from the mission of the university or institution in which it is established.”

¹² Philip G. Schrag ‘Constructing a Clinic’ 3 *Clinical Law Review* 175 at 182 where the learned author notes: “A clinic's goals are in fact determined as much by resources as by the instructors' predilections or philosophies, and probably no resource is as critical as the teaching and support staff.”

Furthermore, goals do not always remain static but evolve in response to changes in institutional leadership and society's demands.¹⁵

Similarly, identifying goals for clinical courses are crucial to the success of the course.¹⁶ Although some may argue that valuable learning can take place in unstructured CLE programmes,¹⁷ the author argues that structure promotes credibility, particularly from an institutional perspective. Therefore, identifying goals influences the structure of the CLE programme.¹⁸ Of course, these goals are influenced by a number of variables as indicated by Stuckey: "The educational goals of a clinical course should be determined by the mission of the law school, the interests of the faculty, and the needs of the students."¹⁹

The Wits School of Law ascribes to the following dual mission: "Here you will hone your ability to analyse and solve problems, argue from a position of weakness or strength, and work effectively under pressure. In addition to a sound theoretical education, you will also have the opportunity to gain hands-on, real-world legal experience through cases in the Wits Law Clinic."²⁰ The goal of the Law School reflects

¹³ For example, requirements prescribed by the Association of University Legal Aid Institutes (AULAI). In the United Kingdom in a revised 2006 document titled 'Model standards for live-clients clinics, A Clinical Legal Education Organisation (CLEO) document guidelines for live-client clinics are noted.

¹⁴ Himonga op cit note 8 at 42.

¹⁵ A typical example of this is the shift in goals for Law Schools from the 1980s when the tradition was to concentrate on teaching doctrinal subjects. The late 1990s to date witnesses a shift in goals in law schools, as schools respond to demands of the profession for the inclusion of skills teaching in the curriculum. Also see Mahomed op cit note 11 at 64, where it is noted that: "In 2003 when the University of the Witwatersrand's School of Law prescribed its strategic mission, it emphasised the increase in research output from all academic staff members as one of its primary objectives. This requirement extends to clinicians as well."

¹⁶ For a discussion on the differences between goals of doctrinal courses versus clinical methodology see Willem De Kerk 'Unity in Adversity: Reflections on the clinical movement in South Africa' (2007) *International Journal of Clinical Legal Education* 101.

¹⁷ See chapter four at pages 82 and 83 for further discussion on unstructured curricula.

¹⁸ Jon C. Dubin 'Clinical Design for Social Justice Imperative' (1997-1998) 51 *SMUL Review* 1461 at 1478. See Mahomed op cit note 11 at 64 where the author asks specific questions that will influence goals. These questions include: "What is the primary objective of the clinical programme? Should the clinic identify education of its students through using the real-client model as its primary objective? The next question that must be asked is:

How best will clinicians achieve this objective whilst addressing the challenges that this model presents? By raising these questions, clinicians are forced to evaluate their programmes and develop appropriate objectives."

¹⁹ Stuckey op cit note 1 at 49.

²⁰ See www.wits.ac.za accessed on 20 July 2013. Also see Stuckey et al op cit note 2 at 39 where the authors submit that most law schools have multiple missions. "At its core, however legal education is a professional education, and part of the mission of every law school is to prepare its students to enter the legal profession. It is why law schools exist."

an engagement between theoretical teaching delivered through a range of doctrinal courses and practical engagement. At Wits the ‘real-world experience’ is undertaken by students during Practical Legal Studies (PLS).²¹

The author proclaims that the goals attached to PLS have been inherited from our past.²² In the 1970s, with the need to provide access to justice to the broader Johannesburg community, students at Wits took it upon themselves to engage in pro bono services. “The provision of legal services and access to justice, ... has been the driving force for the establishment of university law clinics, involving live clients, in most African countries.”²³ Through this engagement students began learning practical lawyering skills. During the early days of PLS there was very limited reflection on what the actual goals of the course were. In the late 1980s and through the 1990s literature reflects that there was an increase in thought about what the course promotes.²⁴ However, a limited number of articles have been written on the goals attached to PLS/WLC. The more contemporary articles include an article written by the author, titled *United in our challenges — should the model used in clinical legal education be reviewed*, published in 2008,²⁵ the PLS Vision and Mission statement drafted in 2006 and Willem De Klerk *Unity in Adversity: Reflection on the clinical movement in South Africa*.²⁶ In light of limited research on the subject, the author questions: *What are the goals?* This chapter seeks to explore an appropriate response to this question.

The chapter will therefore be divided into three parts. In part one, goal setting within CLE programmes, globally and in South Africa, will be discussed. Questions that will be raised include, what are some of the defined goals attached to clinical legal programmes globally and can these goals defined by foreign authors be aligned to clinical programmes in South Africa? In part two, goal setting within PLS will be explored.

²¹ See Stuckey et al op cit note 2 at 39–91 for a submission on the best practices for setting goals of the programme of instruction.

²² I do however believe that at some times during the years, some thought was cast on what our goals really are. However, in practice matters continued to operate as before. This is simply because of the demands imposed by the teaching methods, lack of understanding on CLE or even the know-how on how to go about transforming and promoting the idea of CLE as a methodology.

²³ D.J. McQuoid-Mason ‘Law clinics at African universities: An overview of the service delivery component with passing references to experiences in South- and South-East Asia’ (2008) *JJS* (special issue) 2.

²⁴ See chapter four for further discussion.

²⁵ Mahomed op cit note 11 at 54.

²⁶ De Klerk op cit note 16 at 95–104. Also see annexure F.

Existing goals will be identified. The author submits that in line with the teaching methods (that is, the live-client method and simulation exercises) adopted in the PLS course, goals can be divided into two streams, that is, primary goals and secondary goals. In this part, critical presentations on the goals will be noted and recommendations for the improvement on the goals will be advanced. In part three, the author concludes by posing a further question: Should PLS continue to embrace the goals noted in part two? Conclusions regarding this question will be formulated.

5.2 GLOBAL OVERVIEW ON GOALS ATTACHED TO CLINICAL LEGAL EDUCATION

Drawing on global CLE programmes, the question is: What are some of the defined goals attached to clinical legal programmes? The response depends on the perspective from which one views CLE programmes — that is, the access to justice versus the pedagogical perspective.²⁷ Pedagogical activists for CLE programmes best answer the above question by reflecting on the learning outcomes that students derive by engaging in experiential education. Both Stuckey and Feinman claim that learning outcomes for law students are attached to the three domains of learning which include, the cognitive domain, the psychomotor or performance domain and the affective or feeling domain. Feinman submits that: “Cognitive skills range from simple recall of facts, through the ability to apply prior knowledge to solve new problems, up to the ability to evaluate the use and implications of one’s knowledge. In law schools, these skills involve the understanding of substantive law, legal process, and related matters such as professional responsibility. Performative skills in law are increasingly defined by the MacCrate Report’s catalog of skills beyond legal analysis and reasoning, including legal research, factual investigation, counselling and management of legal work. Affective skills include personal and professional issues: how students feel about their competency as lawyers, how they relate to the client, how they respond to problems of professional responsibility, and how their values inform their role.”²⁸ The access to justice approach to goal setting reflects the

²⁷ As discussed in chapter three.

²⁸ Roy Stuckey ‘Can we Assess what we purport to teach in clinical law courses’ (2006) *International Journal of Clinical Legal Education* 15.

learning of practical lawyering skills with little emphasis on affective skills or lifelong learning skills.²⁹ Affective skills may be defined as skills relating to emotions. They include values that students learn through active engagement in CLE programmes. Goal setting within the access to justice environment is described from the ‘socially conscious’ perspective³⁰ — where greater emphasis is placed on providing access to justice, rather than on exploring the values that students learn through this engagement.³¹ The author maintains that although this may be true, structured and well managed CLE programmes that promote the access to justice method, may well be designed to allow students the opportunity to learn the above mentioned skills. The challenge, however, remains to ensure that the goals are appropriately defined and the course is structured accordingly.³²

In light of the above, the international clinical community — understanding CLE as a methodology rather than a subject — has proposed the following goals for clinical programmes. John Bradway has identified five goals for clinical programmes. These include, first that the divide between theory and practice be narrowed, second that aligning substantive law and procedural law learnt by students, third introducing real clients and practice, forth teaching advocacy and fifthly teaching students the practice of law from inception rather than at the concluding stages.³³ Stuckey has identified five important educational objectives, which include: developing problem-solving skills, becoming more reflective about legal culture and lawyering roles, learning how to behave as well as how to think like a lawyer, understanding the meaning of justice and the responsibility of all lawyers to strive to do justice, and discovering the human effects of the law.³⁴ Hyams states that the clinics have a greater purpose than just promoting the integration of practical legal skills with theory — he promotes that “Clinicians can (and

²⁹ Ross Hyam ‘On teaching students to ‘act like a lawyer’: What sort of lawyer?’ (2008) *International Journal of Clinical Legal Education* 21–32.

³⁰ De Klerk et al *Clinical Law in SA* (2006) 2nd ed at 266.

³¹ See David F. Chavkin ‘Am I my Client’s Lawyer?: Role Definition and the Clinical Supervisor’ (1997–1998) 51 *SMUL Rev* 1507.

³² Also see Menon op cit note 5 at 9 where the author notes “Properly devised and implemented, the clinical method of law teaching will give law students a deeper and more meaningful understanding of the legal profession, the lawyering process and the role of law in social engineering than would be possible if these same subjects were taught with traditional methods in the classroom.”

³³ See John O. Sonsteng ‘A Legal Education Renaissance: A Practical Approach for the Twenty-First Century’ (2007) Legal Studies Research Paper Series at 71 (<http://ssrn.com/abstract=1084098> accessed on 10 November 2009).

³⁴ Stuckey op cit note 1 at 50–51.

should) take on the mantle of teaching for lifelong learning.”³⁵ Brayne et al discussed the goals within the context of the definitions attached to CLE programmes.³⁶ The authors divided the definition between the broad and the narrow approach. “The broad definition is learning by doing the types of things that lawyers do.... The narrow definition takes as its focus the reason for using the method. Its premise is that through clinical techniques students are capable of learning far more than skills, and can develop critical and contextual understanding of the law as it affects people in society.”³⁷ On this the authors argue that should the purpose of CLE be to teach technical lawyering skills, placing such a course within the undergraduate degree would not be appropriate.³⁸ The authors argue that: “Indeed this would be narrow and impoverished.”³⁹

Menon notes that the goals of CLE programmes will depend on the role that the programme adopts in the law school curriculum.⁴⁰ He submits a list of goals that can be adopted by individual clinical courses or incorporated into the broader curriculum.⁴¹ His list includes skills teaching (including the teaching of legal research, writing, litigation etc); ethics and values; analysis of practical experience; ability of students to think critically about the social, economic and political role of law societies; and substantive law.⁴² In the Report of Committee on the Future of the In-House Clinic, nine goals were identified for in-house live-client clinics. These goals can be summarised to include, developing a plan and analysis strategy to deal with unstructured situations, advancing professional skills teaching, teaching through practice, advancing collaborative learning,

³⁵ Hyam op cit note 29 at 25. Also see Stuckey et al op cit note 2 at 66 where the author submits that: “Law school graduates should be skilful in planning their learning by setting goals and identifying strategies for learning based on the task, their goals, and self-awareness of their personal learning preferences.”

³⁶ Hugh Brayne, Nigel Duncan & Richard Grimes *Clinical Legal Education* (1998) xiii.

³⁷ Ibid at xiii. A similar approach is shared by Menon op cit note 5 at 1 where he notes, “Clinical Legal Education has wider goals of enabling law students to understand and assimilate responsibilities as a member of a public service in the administration of the law, in the reform of the law, in the equitable distribution of the legal services in society, in the protection of individual rights and public interests and in upholding the basic elements of ‘professionalism’.”

³⁸ Ibid at xiv.

³⁹ Ibid at xiv.

⁴⁰ Menon op cit note 5 at 4.

⁴¹ Menon op cit note 5 at 264-265 where the author notes “These goals may be modest (such as teaching some specific skills of lawyers) or may be very ambitious (such as developing a law school along a pedagogical model completely different from the prevailing lecture system at any universities).”

⁴² Ibid at 264-265.

advocating access to justice and developing a laboratory where students a faculty learn and study law through practice.⁴³

Schrag indicates the following goals: responsibility, doctrine and institution, service, problem-solving, collaboration, cross-cultural awareness, the role of emotions, coping with facts, values, ethics, creativity, authority, learning to learn and traditional skills.⁴⁴ In terms of the Justice Initiative Database on CLE six goals are identified for CLE programmes. These goals include that CLE programmes are identified as unique and structured educational opportunities to learn from practice; the ideal way to supplement access to justice services; a tool for creating awareness of social justice in students; beneficial for the advancement of experiential teaching methodology; contributing factor to the advancement of scholarship on skills and practice and, finally, CLE programmes aim to strengthen civil society.⁴⁵ Chavkin declares that one of the goals should be the development of the “reflective practitioner”⁴⁶

Common goals identified by the above authors include: practical lawyering skills that is learning the types of things that lawyers do, the promotion of social justice, life-long learning skills, ethics and reflection. Furthermore, most of the above authors refer to goal setting within the context of skills based learning. From an academic perspective, skills based learning can be defined as understanding the theoretical premise of a matter and then learning how to apply such knowledge within a particular context. The nucleus of skills based learning premises that the knowledge gained and applied is remembered.⁴⁷ From a practical perspective skills training “could be defined as learning techniques for pre-trial activities such as interviewing and negotiating, or trial activities such as direct examination or a closing argument”⁴⁸

In chapter two I raise the question: *How do we as (South African) law teachers advance effective learning methods upon our students considering their diverse backgrounds?* In this chapter, I echo a similar question on goal design: *Can the goals submitted above be aligned to clinical programmes in South Africa?* — bearing in mind

⁴³ Report of the Committee on the Future of the in-house clinic (1992) 42 *Journal of Legal Education* 512 – 516.

⁴⁴ Schrag op cit note 12 at 179–182.

⁴⁵ Justice Initiative Database on CLE (2001) at 2. (copy with author)

⁴⁶ Chavkin op cit note 31 at 1509.

⁴⁷ See chapter two for further discussion on how do students learn?

⁴⁸ Nina W.Tarr ‘Current issues in clinical legal education’ (1993) 37 *Howard Law Journal* 31 at 4.

the diverse needs of our students *and* considering how CLE programmes are perceived in South Africa?⁴⁹

In South Africa very little has been written on goals within CLE programmes. Steenhuisen, the leading author on this matter, introduced a list of seven generic goals, “the goal relating to professional responsibility; judgment and analytical abilities; substantive law; applied practice skills; legal services to the community; learning and working in groups; and integration of all or some of these goals.”⁵⁰ Within each of these goals exists a series of sub-goals. For example, in terms of the goal on professional responsibility, Steenhuisen includes the following sub-goals: a system of legal ethics, an ethical philosophy, personal norms/morality, professional role, analysis of legal institutions, social awareness and reforming the system.⁵¹ However, these goals were “formulated following a study from sources from South Africa, the USA, Britain and Australia”,⁵² and are therefore not unique to the South African environment. Vawda lists four educational outcomes attached to CLE programmes that include the development of lawyering skills, enabling students to identify and demonstrate in practice ethics and professional values, creating awareness on social justice issues and the development of reflective and self-critical skills in students.⁵³

De Klerk, whilst drawing on a comparative between teaching within traditional academic courses and the clinical methodology, highlights twelve goals that could be extracted by students whilst engaging on a legal matter. Although the author refers specifically to students’ engagement in contract law, the author believes that similar goals can be extracted from the study of any area of law.⁵⁴ The goals include: applied research and analytical skills, knowledge of substantive law, problem solving skills, factual investigative skills, knowledge of procedural law, drafting skills, numeracy skills, client counselling skills, knowledge of professional rules and values, learning and working in groups, values and the role of lawyers in society and reflection.⁵⁵ In summary, the author maintains: “What clinic does aim to do, in conjunction with academic legal education, is

⁴⁹ See chapter three.

⁵⁰ De Klerk et al op cit note 30 at 266.

⁵¹ De Klerk et al op cit note 30 at 266–280.

⁵² De Klerk et al op cit note 30 at 266.

⁵³ Yousuf Vawda ‘Best Clinical Teaching Practices in South Africa’ (unpublished copy with author) at 2.

⁵⁴ De Klerk op cit note 16 at 101.

⁵⁵ Ibid at 101.

to produce a law graduate that is competent to engage in professional training with a view to admission, or to choose another career whilst having a firm grasp of law and its application in practice. Academic legal education alone, cannot achieve this goal.”⁵⁶

South African clinical programmes define their goals within the context of the teaching method adopted. As noted, earlier this is generally within the access to justice model or better known as within the ‘in-house live-client teaching method’. This method has broadly shaped the primary goals — teaching practical lawyering skills to students⁵⁷ and providing access to justice. This belief was well described by Steenhuisen, when she reflected on the factors that influence CLE teaching. Steenhuisen stated: “Clinical legal education is influenced by many different factors, although it is normally approached from one of two perspectives — the socially conscious or pragmatic-professional perspective. The main difference between the two is that the socially conscious perspective, unlike the pragmatic- professional perspective, does not make use of simulation as the learning opportunity. Rather, it uses the tension of client representation by law students as its central motivation.”⁵⁸ It is submitted that goals of CLE programmes in South Africa are influenced by the socially conscious perspective.

The author submits that despite the teaching method used, limiting goals to generalised practical lawyering skills and providing access to justice is very short sighted. In fact, by failing to stretch the ideas on goals — whilst using the live-client method of teaching — we imprison the clinical ideology to one method of teaching. As discussed in chapter three this could potentially result in clinicians failing to apply their minds to the options that CLE as a methodology promotes. The author submits that the present goal setting model in South Africa is largely an inheritance from our past and has had negative effects on the development of a number of clinical programmes in South Africa. As discussed in chapter three clinical programmes in South Africa continue to operate primarily within the live-client context with little thought of expanding the methodology further.

⁵⁶ Ibid at 102.

⁵⁷ De Klerk et al op cit note 30 at 273 where Steenhuisen notes that: “Often clinical legal education is mistaken for practical skills or practical training. Teaching applied practical skills is but one of the goals of clinical legal education!”

⁵⁸ De Klerk et al op cit note 30 at 266. Also see M.A. du Plessis ‘Access to justice outside the conventional mould: creating a model for alternative clinical legal training’ (2007) 32(1) *JJS* 45–46.

The goals premised on access to justice has led many in academia — particularly in South Africa — to question the role of CLE in the legal curriculum.⁵⁹ The above statement gives rise to a controversial question — *have clinical programmes in South Africa thought out their goals at all?* In chapter three, the author argues that the CLE methodology promotes a strong educational dynamic and that narrowing our thoughts premised on the access to justice ideology is a travesty of learning. Du Plessis, looking at this challenge from the angle of university commitments, says the following: “Where clinical legal education is compulsory, the role of law clinics in the academic environment becomes more pronounced and a stronger emphasis is placed on the academic training of students in the clinical environment. Access to justice for the indigent is no longer the main or only focus of the law clinic, but remains a strong component, as client service is inseparable from the clinical methodology. The supervisor bears the responsibility to strike a balance between training and teaching of the students and service to the community.”⁶⁰ Whilst the author agrees with the learned author on the commitment to promote academic learning, the author raises a further question: *Are we responding to academic commitments or does this idea just exist in theory?*

The challenge on goals in South Africa is further entrenched by the perception that CLE programmes should be a “stand alone practical skills course”⁶¹ in the law degree, as opposed to being integrated into the broader degree. This has resulted in us limiting our thoughts on the deeper goals that we are actually achieving, but failing to reflect on. De Klerk submits that this false perception has restricted our understanding of what CLE is really about.⁶² He notes that although “[p]ractical legal skills naturally do form part of what is taught during clinical programmes, [but] these skills are merely tools used by the profession. Applying these tools appropriately requires a thorough

⁵⁹ In June 2011 at the first AULAI National Conference in South Africa, similar questions were raised by many. I perceive that many actively involved in the ‘clinical mission’ had begun to understand the need for us to move away from our past and commit to future engagements. For example, it was noted by Bodenstein in his presentation at the AULAI conference in 2011, on the Role of Access to Justice versus CLE, that he himself had in the past been convinced that CLE was primarily about access to justice. However, he has now moved away from this line of thinking and now promotes that CLE is first about educating the students.

⁶⁰ M.A.du Plessis op cit note 58 at 46-47.

⁶¹ In South Africa clinical programmes at all universities operate as standalone courses. In some universities these courses are still considered as electives.

⁶² De Klerk op cit note 16 at 95–104.

understanding of what law is all about. The problem with viewing clinical programmes as merely engaging in practical skills' training, is that it amounts to a reduction of the educational goals of such programmes to being a purely unreflective activity, not worthy of a place in tertiary education.”⁶³ Therefore, while many continue to promote practical lawyering skills (taught in a live client environment) as a primary goal, deeper goals including life-long learning skills, critical thinking and value orientation⁶⁴ must not be neglected, particularly in our dispensation. Furthermore, these goals must not be restricted to a single course but should be spread across the LLB curriculum. As with the increase in demand for skills teaching within the law degrees at South African universities,⁶⁵ broader goals, as discussed by the international community must be noted.

5.3 UNIVERSITY OF THE WITWATERSRAND PLS/WLC — GOAL CRITIQUE

Literature on this subject is limited. Therefore, in addition to what is available the author's account on the goals defined for PLS are drawn at length from her personal engagement, as well as management experience of PLS/WLC between 2000-2012. Whilst the University of the Witwatersrand PLS Mission statement⁶⁶ provides a broad framework emphasising an effective clinical legal education programme for students, promoting published research by clinical teachers and providing quality legal services to the community from a narrower perspective, the author declares that the historically adopted goals for PLS can be divided between primary and secondary goals. The primary goal is: educating students on practical legal engagement. The secondary goals are: (arising out of the primary goal) social justice consciousness, understanding particular

⁶³ Ibid at 101.

⁶⁴ This chapter does not deal with values at length, however, the author proposes that aside from the goals, CLE as a methodology should transmit values to students as well. See Menon op cit note 5 at 43–44 where the author notes the following as examples of values: provision of competent representation, striving to promote justice, fairness and morality, striving to improve the profession and professional self-development.

⁶⁵ Council for Higher Education 2010 report (copy with author).

⁶⁶ See annexure F.

areas of substantive law⁶⁷ and teaching a subsidiary of skills including consultation, problem solving, legal writing, advocacy, professional management, and research skills.⁶⁸

Before these goals are discussed the following must be stated: PLS at Wits is not considered as a methodology by some clinicians. These clinicians view PLS as a vehicle to drive the access to justice project. Therefore, the sequence of preference for secondary goals differs between clinicians. Some of the senior clinicians emphasise the role of access to justice as more important than skills teaching thus promoting quantity of files as opposed to quality of matters.⁶⁹ Having large number of files has adverse effects on teaching.⁷⁰ Little time is left to address students' needs or abilities, as the client's needs take preference. The clinicians employed during the early 1990s inherited the ideologies of their predecessors who were at that time influenced by the political circumstances of our country. The struggle to try and get all clinicians to share a common vision on the secondary goals continues and the author states that it remains the most contentious argument in PLS.⁷¹ *Are we lawyers or teachers?* This question continues to be debated. The author submits that PLS as it is presently taught does not effectively address the needs of the students but rather focuses on advancing its access to justice programme.

5.4 PRIMARY GOAL

5.4.1 PRACTICAL LEGAL ENGAGEMENT

As discussed in chapter four, until the late 1990s the University of the Witwatersrand Law School considered the teaching of doctrinal law as a preference. PLS was one of a

⁶⁷ David McQuoid-Mason, *Teaching social justice to law students through community service: The South African experience, Transforming South African Universities* (1999) 89 at 92.

⁶⁸ See Sonsteng op cit note 33 at 11 where in his discussion on the downfalls of contemporary legal education he notes that "the legal education system does not provide a significant source of training in nine legal practice skill areas: (1) understanding and conducting litigation; (2) drafting legal documents; (3) oral communication; (4) negotiation; (5) fact gathering; (6) counselling; (7) organizing and managing legal work; (8) instilling others' confidence in the students; and (9) providing the ability to obtain and keep clients."

⁶⁹ Mahomed op cit note 11 at 64.

⁷⁰ Mahomed op cit note 11 at 63 where the author notes: "Dealing with large numbers of matters result in excessive strain being placed on both clinicians and students. It is within this context that one could easily forget about the educational elements of clinical legal education and get completely absorbed in providing access to justice."

⁷¹ See chapter four for a discussion on the present Vision and Mission of PLS.

very few courses⁷² that allowed (and continues to allow) students the chance to gain practical legal experience.

Practical legal engagement (within the context of this chapter) is defined as the practical experience students receive from engaging in legal matters. That is – as noted by the authors above- learning the things that lawyers do. The goal aims to bridge the gap between theory and practice. It allows students the opportunity to engage with clients and practice law through simulated exercises. In chapter two the author submits that the ‘theory of learning promotes the integration of theory, practice and reflection as a platform on which knowledge should be transferred. The introduction of practical exercises should be deemed compulsory and the introduction of clinical legal methodology into curricula or individual subjects may be one way to achieve this end.’ Practical legal engagement allows for the engagement of both practice and reflection. Further this goal serves as the foundation upon which secondary skills are built.

During the first three years of the LLB degree, students’ at Wits receive little opportunity to learn how to apply the theory of law to practice. PLS is therefore viewed as the course that engages students’ on practice. In order to assess the effectiveness of this goal in PLS, a brief description on how the goal is advanced will be noted.

Practical legal engagement is taught through a series of methods during PLS. The methods include student engagement in the in-house live-client clinic and simulation exercises delivered through the following processes: plenary lectures,⁷³ tutorial sessions, unit based teaching⁷⁴ and the trial advocacy programme. At the WLC, students work in pairs.⁷⁵ They are required to engage directly with clients for two hours on a weekly basis throughout the academic year.⁷⁶ During the two hours students consult with clients and

⁷² Other practical courses included Street Law, Moot court, Alternative Dispute Resolution and Civil Procedure.

⁷³ For a brief history on the introduction of plenary lectures into the PLS syllabus see letter from Mr Clinton Bamberger 1989 — see annexure D.

⁷⁴ Each of these methods of teaching is discussed in chapter seven.

⁷⁵ Also see De Klerk et al op cit note 10 at 279 where Steenhuisen submits that learning and working in groups should be defined as a goal attached to CLE programmes. She notes that: “It is essential in legal practice to seek advice from colleagues. By doing so, teamwork is promoted. The study of law at university level is normally directed at individuals. Clinical education offers a golden opportunity for students to work and study in groups. This means taking responsibility for the clinic in general, and for clinic clients in particular.”

⁷⁶ The two hour participation in the clinic is considered compulsory for every student. Should students fail to participate without a valid explanation, they will not receive due performance to continue with the examinations. Also see Anthony Amsterdam ‘Clinical Legal Education —21st-Century perspective’ (1984)

attempt to identify the area of law relevant to the client's problem. After speaking to the client and then seeking advice from the respective clinician, the students advise the client on his/her matter. Should the clinician consider the matter to have merit, a formal file is opened. Further discussion on the files takes place during student tutorials.⁷⁷

Some believe that through engagement on active files students fulfil the goal of practical legal engagement and acquire knowledge on a number of the secondary goals listed above.⁷⁸ The author submits that this is a false perception and mere engagement with clients is not enough to complete the learning process and therefore satisfy the goal. As discussed in chapter two learning should include theory, practice and reflection. Therefore students will absorb more through a process of reflection. Although a simple consultation with a client may teach a student a number of basic skills, including the art of communication, allowing the student a chance to reflect on his/her experience after consulting, allows the student the opportunity to absorb his experiences and helps consolidate what was learnt.⁷⁹ Some might not consider reflection as the cornerstone of CLE programmes, as traditional law school teaching methods do not prescribe to reflective practices between lecturer and student.⁸⁰ In chapter two the author concludes

34 *Journal of Legal Education* at 616 where the author says that one of the forms that CLE adopts is the engagement of students with legal problems in role play. Under these circumstances students, "bore the responsibility for decisions and action to solve the problem."

⁷⁷ For a discussion on tutorials see chapter seven.

⁷⁸ See Menon op cit note 5 at 33 where he states: "Demonstration of the skill is by the teacher; rehearsal by the taught. Practice, repeated practice, is the only way to learn a skill. So the classroom has to become the workplace."

⁷⁹ Also see Amsterdam op cite note 76 at 616-617 where the author considers reflection as a basic technique that defines CLE. "The students' performance was subjected to intensive and rigorous *post mortem* critical review. With faculty and other students, the performing students sat down, re-created, and criticized every step of their planning, decision making, and action. Sometimes this was done by replaying video-tapes or audiotapes of their performance, sometimes by reviewing notes and memoranda that they had made during the performance stage, often by both. The students' own thinking and behavior in role were thus made the central subject of study This critical review focused upon the development of models of analysis for understanding past experience and for predicting and planning future conduct. It identified and explored the questions to be asked following any experience — a meeting with a client, a negotiation with another lawyer, a conference with a government official, a trial, the closure of a case — in order to draw from that experience the maximum of learning it can provide." Also see Vawda op cit note 53 at 4. Also see Sonsteng op cit note 33 at 72 where the author notes "Reflective teaching and learning are essential to education. To be effective and grow as a teacher or student, an individual must reflect on the experience."

⁸⁰ Georgina Ledvinka 'Reflection and assessment in clinical legal education: Do you see what I see' (2006) *International Journal of Clinical Legal Education* 29 where the author notes: "Reflection is a vital part of the process; it is the magic ingredient which converts legal experience into education." Ledvinka's article provides a comprehensive summary on the description of reflection from several leading authors.

that reflection is in fact the cornerstone to effective learning and therefore should be practiced in all law school courses.

The reflection process within the clinical context can be understood as an in-depth discussion between clinician and student, where areas of law, emotions and skills are explored. It involves a process of taking existing student experiences, allowing them to engage in further experiences and thereafter consolidating the knowledge gained and understood. Bezdek describes reflection as “seeking to understand what happened, why it happened, and what and how you are learning about lawyering and yourself as a lawyer”⁸¹ Vawda notes that reflection is one of the most valuable lessons of experience-based learning. He notes that: “Through discussions with fellow students and supervisors, the students’ performances are critiqued and they are given extensive feedback on both positive and negative aspects of their work.”⁸²

Menon, preferring to use the word ‘critiquing’ notes that: “The ultimate goal of critiquing is to help students develop the professional habit of reflecting on their theories and behaviours, so they can identify and correct ineffective choices when they practice on their own. The goal is the reflective, self-corrective practice that is achieved by learning how to learn from experience.”⁸³ Hess, in his article, refers to several leading authors that promote reflection, these include John Dewey, Stephen Brookfield, Van Manen and John Smyth.⁸⁴ In summary, Dewey noted that “reflection involves the direct experience of a situation; thoughtful examination of existing beliefs, knowledge, or values; and the systematic contemplation of observations and potential actions.”⁸⁵

Therefore as concluded in chapter two the author submits that practical legal engagement as a goal will be consolidated through the process of reflection. The best opportunities for student and clinician to engage in the reflection process should be

⁸¹ Bezdek B.L. ‘The CUNY Law Program: Integration of Doctrine, Practice and Theory in the Preparation of Lawyers’ (1991) 1 *Journal of Professional Legal Education* 69. Also see De Klerk et al op cit note 30 at 272 where Steenhuisen notes that: “Reflection thus aims at an approach that is: deep and substantive rather than shallow; complex and holistic rather than simple and superficial; broad and deep rather than narrow; and multiple rather than singular.

⁸² Vawda op cit note 53 at 4.

⁸³ Menon op cit note 5 at 204.

⁸⁴ Gerald F. Hess ‘Learning to think like a teacher: reflective journals for legal educators’ (2002) 38:1 *Gonzaga Law Review* 130–135.

⁸⁵ Ibid at 133.

during formal independent sessions.⁸⁶ During PLS these sessions could take place during tutorials between the clinician and student pairs.⁸⁷

It is submitted that clinicians teaching PLS do not always spend enough time with their students to reflect on that which has been learnt. In PLS the underlying assumption persists that students learn best only once a file is opened and through active litigation. Furthermore, there seems to be this perception among some students that the more files you open in the clinic, the better the student's grade in PLS will be. The author submits that both these perceptions are untrue.

Recommendations for the advancement of this goal include, all clinicians must be encouraged to engage in reflection with their students, the value attached to this process must be highlighted and all new clinicians must be educated on what the process involves. Furthermore, although many may argue that practical legal engagement requires interaction between student and a live-client, it is the author's opinion that there are other methods that can be adopted to achieve the same goal,⁸⁸ for example, simulation activities and externship programmes.⁸⁹ The challenges associated with the live-client clinic have been noted in chapter three and the benefits of teaching through simulation and externships are discussed in chapter six.

5.5 SECONDARY GOALS

Secondary goals include, teaching particular components of substantive law, specific skills teaching (including consultation skills, problem solving, file management, legal writing, advocacy, professional management and research skills), and allowing students the opportunity to be alert to social justice needs within our society. Each of these goals will be discussed.

⁸⁶ Ledvinka op cite note 80 at 30.

⁸⁷ For further discussion on tutorials see chapter seven.

⁸⁸ For a discussion on the challenges attached to the "live client" teaching model see Mahomed op cit note 11 at 53-70. See further chapter seven.

⁸⁹ See chapter seven for further discussions.

5.5.1 SUBSTANTIVE LAW ⁹⁰

Many CLE programmes have incorporated the teaching of substantive law as a goal.⁹¹ Steenhuisen submits that, “Substantive law is central to clinical legal education because most clinical educational goals require legal theory — either existing or newly acquired legal knowledge.”⁹² According to Schrag, “[s]ome clinics are general practices civil or criminal clinics, but many clinics specialise in one or two areas of substantive law and, amongst other goals, hope to familiarize students with the doctrines, institutions, procedures, conflicts, folkways, and ethical problems unique to that area.”⁹³ Students must understand the theory of a particular subject matter before applying it in practice. Substantive law is relevant, irrespective of the teaching method used within CLE programmes. According to Stuckey one of the elements defining best practice for setting goals of the programme of instruction includes students demonstrating core knowledge and understanding of the law.⁹⁴ The inclusion of substantive law as a goal ties in with submissions made in chapter two on the theory of learning as this goal advances the theoretical component of the transfer of knowledge. What follows is a description of the implementation of this goal within PLS and secondly a critical analysis on the implementation of the goal.

The teaching of substantive law in PLS is limited to practical knowledge on the subject. A historical overview of curricula adopted in PLS highlights that, already from the late 1980s, substantive law was taught to students. In 1986, students learnt substantive law relevant to Labour Law. In 1998, students were exposed to Criminal Law and Labour Law. In 1999, students were taught Family Law, Delictual Law, Criminal Law and Labour Law. (see annexure J)

Since January 2000 substantive law was subsumed under unit based teaching. Unit based teaching forms part of the curriculum. It is best explained as: In PLS students are placed in one of six specialised clinics.⁹⁵ In order to be able to assist clients with

⁹⁰ See De Klerk et al op cit note 30 at 272.

⁹¹ See Menon op cit 5 note 265.

⁹² De Klerk et al op cit note 30 at 272

⁹³ Schrag op cit note 12 at 4.

⁹⁴ Stuckey et al op cit note 2 at 73-76.

⁹⁵ See chapter six for details of transition from a general clinic to a specialised clinic. Presently there are six specialised units: family, refugee, consumer/general, labour, housing and evictions and delict. Each of these clinics operates on a different day of the week.

confidence, students learn the theory relevant to the practice of law for their specific specialised clinic. For example, students that participate in the Labour clinic are taught the procedure of referring matters to the CCMA or Labour court; students in the Family unit are taught how to file divorce proceedings. During the Unit based lectures a further set of sub-goals on the specific areas of law are set. For example, in 2011 the Labour law unit prescribed the following outcomes: At the end of this module, students should be able to: define and demonstrate an understanding of the basic principles of labour law; take instructions from clients with regard to labour law issues; identify the procedures needed to be followed after a particular dismissal; know of the existence and function of various statutory bodies that deal with labour matters; identify, understand and draft various Labour Court applications; understand conciliation; con-arb, mediation and arbitration processes and be able to draft and understand a Statement of Claim. (see annexure L)

There are several challenges attached to this goal including the possibility of over teaching and trying to maintain a balance between teaching doctrinal law and theory relevant to practice. These challenges intersect at a particular point and will now be discussed.

Clinicians should be alert to the possibilities of what the author describes as over teaching. As discussed in chapter two doctrinal law courses are often taught at an abstract level making it difficult for students to understand. Therefore before teaching the theory relevant for practice, clinicians often revisit the subject matter so as to make it easier for students to understand. This often results in over teaching. The author submits that as long as PLS exists as an independent course, the content of substantive lectures should be limited to teaching the practical application of the law. This leads one to a discussion on how does one balance teaching doctrinal law and practical application? The author believes that the answer to this question will be dictated by the goals of the institution. In chapter two the author concludes that it is fundamental to identify the goal of one's law school and that some law schools may opt to adopt a purely academic angle, others a more integrated model of theory and practice. Therefore should law schools consider that the goal is to teach from a purely academic angle then the courses taught will focus on doctrine as opposed to practice. In the instances that the law school consider hosting a CLE

programme within its curriculum – as is PLS - and in this instance clinicians should consider confirming the goal on substantive law to the knowledge on practical application. It is also recommended that discussions between lecturers – teaching in main stream courses and CLE programmes - be encouraged as this will help streamline a curriculum accommodating for both theory and practice. Therefore it is important that the goals be strictly defined and that clinicians consider at the outset what the limitations the goals are.

5.5.2 SKILLS TEACHING⁹⁶

Teaching skills is considered by many learned authors as a necessary outcome derived from student engagement in CLE programmes. Steenhuisen refers to this goal in the context of goals regarding applied practice skills.⁹⁷ The author notes that often CLE programmes are perceived as practical skills or practical training courses, however, she argues that this is just *ONE* of the goals attached to CLE programmes — there are six others as mentioned in the text above.⁹⁸ The author submits that the following skills are “absolutely necessary for a successful career in the legal profession”.⁹⁹ These include consultation skills, client counselling negotiation, trial advocacy, applied advocacy, drafting of legal documents legal research, factual investigation and office management.

Menon provides a list of ten skills that he considers of significance. These include: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counselling, negotiation, litigation and alternative dispute-resolution procedures, organisation and management of legal work and recognising and resolving ethical dilemmas.¹⁰⁰ Menon further provides literature on how each of these skills can be narrowed into sub-goals, for example, on the goal relating to legal research he states: “In

⁹⁶ Menon op cit note 5 at 41–91.

⁹⁷ De Klerk et al op cit note 30 at 273–277.

⁹⁸ Also see De Klerk op cit note 16 at 100 where the author similarly argues that: “The second assumption, namely that clinical legal education is solely about practical legal training, is just plainly wrong. Elsabe Steenhuisen, formerly head of the University of Johannesburg Law Clinic, in her research identified seven goals of clinical legal education, only one of which relates to applied practice skills.” Also see Schrag op cit note 12 at 8 where the author also argues that although non-clinical faculty attribute the teaching of skills as the primary function of CLE programmes, there are “many more subtle skills clinics can teach along with traditional skills.”

⁹⁹ De Klerk et al op cit note 30 at 273.

¹⁰⁰ Menon op cit note 5 at 41–91.

order to conduct legal research effectively a lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design.”¹⁰¹ Schrag notes that: “A final goal, listed last here because it is so obvious, and so widely shared by clinics, is to give students experience, guidance, and detailed personal feedback as they execute such standard legal activities as interviewing, case planning, investigating facts, counseling, legal writing, witness examination, and oral argument.”¹⁰²

In PLS, students ought to learn the following skills: consultation, problem solving, file management, legal writing¹⁰³, advocacy, professional management, and research skills. Most of these skills are taught through multiple methods including, formal lectures on the subject, engagement of students in the clinic and for some students through a process of reflection. This process will now be discussed in more detail.

A number of these skills are taught through formal lectures that are included in the curriculum. Following on the lectures, students engage in the clinic and gain practical experience on the relevant skills. For example, on the skill relating to legal writing, students learn how to draft a number of documents, for example, drafting of clients’ statements, pleading and letters. On letter writing students are initially taught on the theory relevant to letter writing. “During this lecture, students are presented with a letter that has been very badly drafted and are asked to identify and correct errors.”¹⁰⁴ Students then engage with clients throughout the course of the year and draft a number of letters. “The client demand for legal services ensures that each student has the opportunity to draft any number of different letters that would serve different purposes.”¹⁰⁵ The letters are then discussed in tutorials and students receive feedback.

However, some skills are not taught directly, for example, there is no prescribed lecture on problem solving skills.¹⁰⁶ Therefore, students learn these by engagement and reflection.¹⁰⁷ A typical example of how problem solving skills can be learnt through the

¹⁰¹ Ibid at 53.

¹⁰² Schrag op cit note 12 at 8.

¹⁰³ Also see Shaheda Mahomed & Philippa Kruger ‘Teaching Legal Writing at the University of the Witwatersrand Law Clinic’ (2009) 3 *John Marshall Law Journal* 106–134.

¹⁰⁴ Ibid at 119.

¹⁰⁵ Ibid.

¹⁰⁶ See Stuckey op cit note 1 at 52.

¹⁰⁷ Ledvinka op cit note 80 at 30 for further examples on the reflective process.

reflective process is: students attend at their clinician office to discuss a labour matter — during these discussions students are often asked a series of questions, including what they consider to be the best course of action for the client? How do students plan on implementing the action? What is the legal basis supporting the action? What have the students learnt from their experiences? Further through these discussions clinicians act as a guide to students and students are required to exercise their own problem solving skills and come up with appropriate solutions.¹⁰⁸

Despite the fact that this goal offers students the opportunity to learn multiple skills the author questions, should PLS be responsible for the teaching of all these skills? Are there other courses in the LLB degree — stretching over the four years— that could help teach some of these skills. While the author is not averse to the teaching of the skills, it is simply a lot for one course to absorb in one year. This challenge is further enhanced by the large number of students that engage in PLS — the chances of students falling through the cracks are highly probable. Therefore, the author recommends that some of the skills included in this goal should be absorbed by other courses, for example, drafting skills could be taught in a number of courses including, Civil Procedure and many Private Law courses; advocacy skills could be taught in Moot Court and legal writing skills could be encouraged throughout the curriculum. This will further allow students to rather complement skills in PLS than be exposed to all of them for the first time. In annexure M the author provides a recommendation on how PLS can address this goal. The author proposes that as skills are incorporated into other law courses PLS concentrate broadly on two skills that is interviewing skills and trial advocacy skills. Both these skills offer students the opportunity to learn a variety of other skills for example, oral communication, drafting skills and analytical skills just to mention a few. In light of this the author proposes that PLS consider narrowing its focus within this goal.

¹⁰⁸ See Vawda op cit note 53 at 4 where the author discusses the problem-solving approach. The author notes that: “Problem-solving is a highly interactive methodology whereby students and supervisor work together in solving problems. Central to this approach is the notion that students’ responses to the challenges of their profession depend on their thinking of themselves as lawyers.” Vawda proceeds to identify a number of important steps involved in problem-solving, including problem definition, problem interpretation, option identification, decision-making and implementation.

5.5.3 SOCIAL JUSTICE CONSCIOUSNESS

This goal is promoted by several leading authors. According to Steenhuisen: “Clinical education aims to develop in students a social perspective and insight by [them] experiencing the study of law in context. Clinicians must expose students in a structured way to the ideas and complexity of social justice and role of the law in this regard. Clinical legal education aims to expose students to the plight of the indigent and complexities of legal problems experienced by the poor, the illiterate and the vulnerable.”¹⁰⁹ De Klerk affirms that: “The idea that clinical experiences result in a ‘new consciousness’ and a sensitization of future legal practitioners to issues affecting the poor, has been expressed by many clinicians around the world”¹¹⁰

As noted earlier in the thesis, access to justice was the primary reason for the inception of the clinical movement in South Africa. At the time of inception there were very little (if any at all) legal resources available to the poor and oppressed in South Africa. Furthermore, as noted earlier, this goal is considered primary for many of the senior clinicians at Wits. Many authors share similar sentiments, in particular emphasising the fact that it is only during the CLE programme that students gain exposure to social justice issues.

Whilst being cognisant of the context within which these authors promote their thoughts, the author submits the following: “Since 1994, the South African state legal aid system has undergone intensive transformation with greater commitment towards providing access to justice to the poor and marginalized.”¹¹¹ Furthermore, the Law Societies in various provinces have prescribed pro bono commitments for all practitioners

¹⁰⁹ De Klerk op cit note 30 at 268. Similarly see Stuckey op cite note 1 at 51 where the author submits that: “Clinical students learn more about justice in their society from their clinical experiences than any book could teach them. They gain insights into what justice is, why it is important, what systems exist for adjudicating disputes, and the role and limitations of lawyers and judges in securing justice. They learn to appreciate the importance of the rule of law for ensuring justice in a society.” Also see Stuckey et al op cit note 2 at 84. Also see Schrag op cit note 12 at 4. Also see Justice Initiative Database op cit note 45 at 2 (copy with author) where it is noted that “clinics seek to strengthen civil society itself, through nurturing of the professional responsibility of lawyers and through provision of much needed legal services to build and protect underserved and vulnerable populations.” Also see McQuoid-Mason op cit note 23 at 1–23.

¹¹⁰ De Klerk op cit note at 10 at 944. Also see Maisel P & Greenbaum L Foundation of South African Law Critical Issues for Law Students(2002) Butterworths 191-227.

¹¹¹ Mahomed op cit note 11 at 55.

across the country.¹¹² Therefore, considering the above as well as the plight of academics (including clinicians) at South African universities, where we are required to research and publish, the time has come for CLE programmes to show a stronger commitment towards education. Through this process clinicians will aid in educating others in the Law Faculty on the broader values that CLE as a methodology promotes.

Unfortunately, as long as the traditional law school curricula continue to shy away from social justice responsibilities, CLE programmes will continue to engage in a balancing act trying to balance its educational desires versus satisfying clients' needs and instilling values attached to social justice consciousness on students. As Steenhuisen so aptly questions: "Clinical legal education worldwide is confronted with a dilemma: should clinical education to students have preference over rendering legal services to the community?"¹¹³

5.6 CONCLUSIONS

In conclusion, the author will respond to statements presented and questions raised at the outset of this chapter before recommendations are discussed.

At the beginning of this chapter, the author states that the goals attached to PLS are inherited from our past and in light of limited research and thoughts on the subject matter, the author questions: *What are our goals?* In an attempt to provide an adequate response to the question, goals setting within CLE programmes internationally, as well as in South Africa were explored. This gave rise to further questions on what are some of the defined goals attached to clinical legal programmes globally and can these goals defined by foreign authors be aligned to clinical programmes in South Africa?

Reflecting on the literature discussed in part two of this thesis, it is difficult to prescribe a universal set of goals, as CLE programmes are designed differently. However, the author maintains that at minimum, each programme aspires to include the following set of goals: practical lawyering engagement, the promotion of social justice, life-long

¹¹² See Law Society of the Northern Provinces Rule 79A. Also see Cape Law Society Rule 21. See David McQuoid-Mason South African Models of Legal Aid Delivery in Non-Criminal Cases 8 at www.legallaidreform.org accessed on 20 July 2013.

¹¹³ De Kerk et al at op cit note 30 at 277.

learning skills including writing skills and communication skills, professional ethics and reflection.

Considering the goals for CLE programmes in South Africa, the author submits that until an understanding of the broader purpose of CLE as a teaching methodology is accepted, we will continue to promote practical programmes as a space where ‘exclusively’ lawyering skills are taught. CLE programmes in South Africa — from an ideological perspective — remains rather underdeveloped and therefore continues to remain stuck. The author submits that CLE as a methodology advances a range of goals, including life-long learning skills specifically based on planning and analysis, value disposition specifically linked to understanding the need to provide access to justice and assist the poor, professional skills instruction, more pertinently linking theory with practice and providing a platform for student and teacher to engage in discussion on the application of law.¹¹⁴

Having said this, the author proposes that considering our dynamics and present disposition, (as discussed in chapter two) CLE programmes — as they continue as isolated courses — should consider keeping their goals simple but effective. Therefore, the author proposes that in South Africa CLE programmes identify ‘specific’ skills teaching as a primary goal — each programme should reflect on the gaps within their own law school’s curricula and teach skills that are not repeated elsewhere in the curriculum or those skills that can be incorporated into other courses. This will hopefully allow the course to attain more focus in particular to the needs of the students. These skills should be identified, outcomes determined, curriculum designed and appropriate methods adopted to teach.

In response to the question, should PLS continue to embrace the goals noted in part two of this chapter, the author proposes the following. First, unless a broader understanding of the value attached to PLS as a methodology is accepted and incorporated into other courses, the goals attached to PLS will continue to promote lawyering skills very broadly. Secondly, having already made many submissions above, the author concludes that PLS would be better managed if the course confines the goals to specific areas of teaching. This belief stems from the fact that PLS as a course is

¹¹⁴ Report of the Committee on the Future of the in-house clinic op cite note 42 at 512–516.

completely overloaded and further discussions on this will be introduced in chapter six. In an attempt to provide a recommendation to improve on this challenge the author proposes that PLS should for example restrict its focus to teaching skills that the rest of the curriculum may be unable to each teach for example interviewing and trial advocacy skills. Having identified these skills as a goal, outcomes attached to each should be defined and through this process students will learn a variety of generic skills. (See annexure M — titled Sample Design — for an example of a proposed goal statement for PLS).

In summary then, the author considers goal setting fundamental to the success of any institution. The idea is to agree on common goals and design the programmes accordingly. In agreement with Stuckey, the author submits that legal education is professional education and therefore, there should be a commitment to prepare students for practice. In light of this, the author submits that law schools should commit to the goals of embracing both the study of doctrinal law and practical application.

CHAPTER 6

CRITIQUE OF CURRICULUM

“... most law schools will want to consider overall goals and objectives of its clinical program. These should be kept in mind while designing the specific courses that make up the program, to ensure that the curriculum implemented addresses all the intended goals.”¹

6.1 INTRODUCTION

The curriculum is the articulation of a plan that a lecturer puts in place to achieve course objectives. According to Osman “Hartman and Warren summarise curriculum as being the content of subject matters, the organization of knowledge, how teachers teach, how learners learn, and how the whole is evaluated.”² The curriculum is generally a document specifying the subject matter, course or syllabus.³ Stuckey recommends that best practice in organising the programme of instruction is for a school to strive to achieve ‘congruence’ in its programme of instruction.⁴

The curriculum⁵ design can be influenced by a number of factors, including the goals of the law school;⁶ the predetermined outcomes of a course;⁷ the material to be taught; the length of

¹ N.R. Madhava Menon *Clinical Legal Education* (1998)179.

² Munirah Osman ‘Meeting quality requirements: A qualitative review of the clinical law module at Howard College Campus’ (2006) vol 2 *De Jure* 268.

³ Also see The National Qualifications Framework and Curriculum Development document produced by SAQA at <http://www.saqa.org.za> accessed on 1 February 2013 for a further discussion on the definition of a curriculum.

⁴ Roy Stuckey et al *Best Practices for legal education* (2007) 93. According to Stuckey congruence is the defining element in educational programmes and to achieve congruence “law school(s) need to harmonise:

- their educational programs with their missions in the sense that the educational outcomes derive from the missions,
- their curricula with their educational outcomes in the sense that the curricula have been structured to build students towards mastery of the outcomes, and
- their course-by-course instructional objectives with their curricula in the sense that the curricular design dictates course objectives.”

⁵According to a document published by the Council on Higher Education titled *Work-Integrated Learning: Good Practice Guide* August 2011 at 13 (copy with author) - “The term ‘curriculum’ is widely used in an everyday sense to refer to subject matter or ‘syllabus’.”

⁶ See Osman op cit note 2 at 267–269. Osman refers to Fox who suggests that “... the starting point is to determine the reason for the existence of law school.”

⁷ See Stuckey et al op cit note 4 at 42–49.

the programme;⁸ the methods used to teach;⁹ and the assessment process that is adopted.¹⁰ Further curriculum design could be influenced by suggestions as well as prescriptions from various external bodies— that is, those outside of law school, for example, in the United States the Association of Bar Admissions proposed requirements for a law school curriculum.¹¹ In South Africa with the advent of our democratic disposition, legislation in the form of the South African Qualifications Authority (SAQA) along with the National Qualifications Forum (NQF), prescribed ten exit level outcomes for all LLB graduates,¹² thus prescribing that law schools

⁸ The length of CLE programmes at Universities differ — some programmes run for the entire academic year while others may just be scheduled for half the year. Some programmes may also be scheduled over a few years of academic study. For example, students at Yale Law School in the United States are allowed to engage in CLE programmes from their first year. This course allows the students the opportunity to learn a wide range of skills.

⁹ For example, the methods used with Law Schools include the case method, Socratic dialogue, the live-client teaching method, simulations, externships etc. Each of these methods prescribes almost unique formulae that influence the design of the curriculum. Most of these methods are described through the course of this thesis.

¹⁰ See Stuckey et al op cit note 4 at 3 where the following four stages to basic curriculum development are discussed: “Stage 1: Identifying educational objectives that the school or course should seek to attain.

Stage 2: Selecting learning experiences that are likely to be useful in attaining those objectives.

Stage 3: Organizing the selected learning experiences for effective instruction.

Stage 4: Designing methods for evaluating the effectiveness of selected learning experiences.”

¹¹http://www.americanbar.org/content/dam/aba/migrated/legaled/standards/20072008StandardsWebContent/Chapter_3.authcheckdam.pdf accessed on 20 July 2013.

In the 2007–2008 Standards for Approval of Law Schools:

Standard 302. Curriculum

(a) “A law school shall require that each student receive substantial instruction in:

- 1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
- 2) legal analysis and reasoning, legal research, problem solving, and oral communication;
- 3) writing in a legal context, including at least one rigorous writing experience in first year and at least one additional rigorous writing experience after the first year;
- 4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
- 5) the history, goals, structure, values rules and responsibilities of the legal profession and its members.

(b) A law school shall offer substantial opportunities for:

- 1) live-client or other real-life practice experience, appropriately supervised and designed to encourage reflection by students on their experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence;
- 2) student participation in pro bono activities; and
- 3) small group work through seminars, directed research, small classes, or collaborative work.”

¹² The ten exit level outcomes are summarized as: a coherent understanding of and ability to analyse fundamental concepts, an understanding of relevant methods, techniques and strategies involved in legal research and problem solving in theoretical and applied situations, the ability to collect, organize, analyse and critically evaluate information and evidence from a legal perspective, the ability to communicate effectively in a legal environment by means of written, oral, persuasive methods and sustained discourse, the ability to solve complex and diverse legal problems, creatively critically, ethically and innovatively, the ability to work effectively with colleagues and other role players in the legal process as a team... contribute to group output, computer literacy to effectively communicate and retrieve data, ability to effectively manage and organise his/her life and professional activities,

design their curricula accordingly.¹³ In 2003, the Association of University Legal Aid Institutes (AULAI) recommended options of courses that could be included in the curriculum design of Clinical Legal Education (CLE) programmes and prescribed specific outcomes for each course.¹⁴ Similarly, the findings by the Council for Higher Education in 2010 noted gaps within legal curricula particularly on skills teaching and have expressed that these gaps be addressed.¹⁵

The curriculum design of traditional law courses¹⁶ generally emphasises the teaching of doctrine.¹⁷ Clinical curricula, on the other hand, primarily promote the teaching of lawyering skills.¹⁸ Menon submits that: “The most important difference between clinical courses and most other law courses is this: in designing clinical courses, the first question — about skills — predominates. In designing most classroom courses the second — about knowledge — is the most important ...”¹⁹ In 1980 in the Committee on Guidelines for Clinical Legal Education it was declared that: “The purpose of the clinical legal studies’ curriculum is to provide law students with an understanding of the fundamental processes of lawyering.”²⁰

At the University of the Witwatersrand (Wits), Practical Legal Studies (PLS) is technically made up of two parts: the educational component and the access to justice programme. As noted in chapter four the programme promotes the educational component under

ability to participate as responsible citizens in the promotion of a just, democratic and constitutional society under the rule of law and the ability to understand the different employment and income generating opportunities in the legal field... and outside.

¹³ Willem De Klerk ‘University Law Clinics in South Africa’ (2005) *SALJ* 939 where the author refers to the SAQA document and notes that the document provides that: “the generation of a generic LLB qualification will provide an opportunity to promote the establishment of curricula with an innovative approach to legal education in order to achieve the aims of not only inculcating knowledge in a learner, but also imparting skills and values essential for lawyers living in a democratic society.”

¹⁴ See Shaheda Mahomed & Danny Wimpey ‘The practice of freedom — the South African Experience’ (2006) paper presented at the International Journal of Clinical Legal Education conference in London. (unpublished copy with author) at 11 — where the authors note “Since 2002 AULAI has planned, hosted and run, 5 further workshops, all aimed at building capacity and at improving teaching skills at law clinics.” Also see Jonathan Campbell De Jure May 2004 at 14. The curricula discussed interviewing skills, statement taking, ethics and professional responsibility, alternative dispute resolution, trial skills and practical application in selected areas of substantive law. Also see Y Vawda (ed) Association of University Legal Aid Institutions (AULAI) Manual vol 1 Curriculum and Teaching Manual (2005).

¹⁵ Council for Higher Education report 2010 power point presentation. (copy with author)

¹⁶ Some examples of traditional law courses include, the Law of Contract, Property, Criminal, Jurisprudence etc.

¹⁷ Also see Willem De Klerk ‘Unity in Adversity: Reflections on clinical movement in South Africa’ (2007) *International Journal of Clinical Legal Education* 96 where the author presents an example on the teaching of the Law of Contracts.

¹⁸ See chapter six for further discussion on skills.

¹⁹ Menon op cit note 1 at 179.

²⁰ Report of the Association of American Law Schools — American Bar Association Committee on guidelines for Clinical Legal Education, *Clinical Legal Education* 1980 at 47.

the title Practical Legal Studies (PLS) and the access to justice programme is subsumed under the name Wits Law Clinic (WLC). Within the educational component the curriculum is defined. Students then practice the skills taught in the WLC. The curriculum serves to draw a nexus between theory and practical engagement undertaken by students. For the purpose of this chapter it is the content offered by the curriculum that will be critically analysed.

This chapter will be divided into three parts. In part one a discussion on global curriculum design of CLE programmes will be noted. Within this part the author will identify three potential curriculum designs that can be implemented: general, specialised and integrated. In part two a discussion on the present PLS curriculum will be advanced and critically analysed. PLS has moved from a general to an integrated clinic. In part three conclusions will be drawn and the following statement made — the PLS curriculum is made up of many components, some of which could themselves be presented as standalone courses within the broader degree or alternatively be integrated into other substantive courses. Therefore, it will be argued that one should be wary of ‘overloading’ the PLS curriculum and recommendations as to how this can be avoided will be provided. The author will argue that each clinical programme focus on its strengths and that curriculums in line with this be designed and taught. Therefore reflecting specifically on the challenges within PLS and as part of a series of recommendations the author has designed a curriculum aimed at addressing the challenges of overloading. The proposed curriculum is attached as annexure M and further discussions on the proposed curriculum will be led.

6.2 GLOBAL PERSPECTIVE ON THE CURRICULUM DESIGN OF CLINICAL LEGAL EDUCATION PROGRAMMES

There are no legislated curricula for CLE programmes — only guidelines²¹ — curricula are designed in various ways. Menon submits that the basic elements that are involved in designing a curriculum include goals and objectives, material to be taught, teaching methods, student activities, assessment of students and the development of a detailed syllabus.²² According to Bengtsson the curriculum should aim to achieve three things, one, develop lawyering skills, two, create socially conscious students and thirdly, develop reflective and self critiquing skills. He

²¹ Ibid at pg 14-15. Also see Mahomed & Wimpy op cit note 14 at 11.

²² Menon op cit note 1 at 179.

states that these can be achieved “through the modules designed to teach the basic lawyering skills of interviewing, counselling, fact investigation, case analysis and planning, negotiation, legal drafting, litigation and advocacy. Each of these skills is taught in the classroom through simulations and problem solving in small group work. Thereafter, the skill is explored further in the specialised units. Once this process is completed in the classroom, students practice the skill with live-clients in the clinic, under the supervision of an attorney. In other words, they interview and counsel clients and work on real case files.”²³ According to Stuckey curricula should be structured in response to the educational goals of the course.²⁴

In the United States in 1980 the Committee on Guidelines for Clinical Legal Education, proposed a clinical legal studies curriculum. It included: interviewing, fact gathering and field investigation, identifying and applying law to case facts, diagnosing a clients problem, developing case strategy, counselling, drafting legal instructions and writing legal briefs, analysing the operation of legal institutions, defining professional competence and the lawyer’s professional responsibility in the attorney- client relationship, negotiating and settling, preparing for and conducting trials, preparing appellate briefs and arguing appeals, and developing a methodology to evaluate one’s career. Schrag submits that depending on the goal of the programme, the curriculum will be designed accordingly. For example, if the focus of the clinic is on traditional skills, a curriculum promoting interviewing, case planning, legal research, fact investigation, written advocacy, witness examination, negotiation and formal oral arguments might be taught.²⁵ The author continues to note that, should the programme aspire to teach other elements, for example social consciousness, a class focusing on this should be included in the curriculum.²⁶

Focusing on South Africa, once again, literature on the subject is limited. Du Plessis notes that: “Clinics have to devise a curriculum that aims at both academic excellence and quality access to justice.”²⁷ In 2003, AULAI hosted a workshop proposing potential subject matters to be included in CLE curricula. According to Campbell “[t]he first workshop produced

²³ Dan Bengtsson ‘Justice for all Law Clinics in South Africa’ (2001) at 19. (extract from LLM thesis unpublished copy with author)

²⁴ Roy Stuckey ‘Ensuring Basic Quality in Clinical Courses’ (2000) *International Journal of Clinical Legal Education* 51.

²⁵ Philip Schrag ‘Constructing a Clinic’ (1996) 3*Clinical Law Review* 40-41.

²⁶ *Ibid* at 40.

²⁷ M.A. Du Plessis ‘Access to justice outside the conventional mould: creating a model for alternative clinical legal training’ (2007) 32(1) *JJS* 47.

a standard curriculum for use in South African law faculties and a standard manual for use in South African law clinics.”²⁸ The curriculum covered interviewing, statement taking, ethics, professional responsibility, alternative dispute resolution, trial skills and practical application in selected areas of substantive law.²⁹ “The standard curriculum provides a guide for developing clinics and all existing clinics were given a chance to reflect on what they actually taught.”³⁰ De Klerk referring specifically to SAQA, states that at least five of the ten exit level outcomes touch on activities within clinical programmes. He notes that “[o]f the ten listed exit-level outcomes, clinical education has a direct application in at least five and arguably has a role to play in all of them.”³¹ The five identified exit-level outcomes include, the ability to analyse legal concepts, principles and theories and their relationship to values; the ability to solve complex and diverse legal problems; the ability to work with role players in the legal process; the ability to manage and organise professional activities responsibly and effectively; and the ability to apply skill and knowledge in a social context.³² Of course these elements must be considered when drafting a curriculum for clinical programmes.

As noted above, the curriculum designs are influenced by a number of factors, more especially the goals and the methods used to teach. Furthermore, authors discussed above generally prefer to discuss curricula of CLE programmes from a general perspective. Whilst the author appreciates the context of this approach, she believes that CLE programmes should not be overloaded and should rather aim to specialise in specific areas rather than aspire to teach all sorts of skills that could otherwise be taught through traditional means.

Considering the various methods available to teach CLE, the author submits that CLE curricula may be designed in one of three ways: first, a curriculum advancing general practical skills to all students; secondly, a curriculum that promotes specialised skills, and thirdly, a curriculum that presents an integrated model that is integrating the general and specialised components. A discussion on each of these designs follows.

²⁸ Campbell op cit note 14 at 14.

²⁹ Mahomed & Wimpy op cit not 14 at 12.

³⁰ Ibid at 12–13.

³¹ Also see C.F. Swanepoel, M. Karels & I. Bezuidenhout ‘Integrating theory and practice in the LLB curriculum: Some reflections’ (2008) *JJS* (special issue) 99–111.

³² De Klerk op cit note 13 at 939.

6.3 CURRICULA DESIGNED TO ADVANCE GENERAL PRACTICAL SKILLS

By definition, this curriculum allows students the opportunity to learn a variety of skills.³³ According to McQuoid-Mason: “These clinics require law students to be trained in dealing with a broad spectrum of poverty law problems, that may include labour matters such as wrongful dismissals, unemployment insurance and workmen’s compensation for injuries; consumer law problems such as credit agreements(hire-purchase), defective products, loan sharks and unscrupulous debt collection practices; housing problems such as fraudulent contracts, non-delivery and poor workmanship; customary law matters such as emancipation of women and succession rights; maintenance; and, criminal cases.”³⁴

A typical example of a curriculum of this nature was the curriculum adopted at the University of the Witwatersrand Law Clinic prior to January 2000 (see annexure J). Reflecting on this curriculum, it is evident that the intention of the clinicians was to teach the students on a wide range of skills relating to several areas of law. According to De Klerk and Mahomed: “In terms of this model, each clinic supervisor engaged in (and taught students on) a spread of legal matters. Whilst supervisors enjoyed a relatively wide discretion as to the types and number of matters taken on, it was a requirement that each student pair had to deal with a spread of at least one family law matter, one labour matter, one contractual matter, one delictual(tort) claim and one criminal matter. The idea was to expose students to as many areas of law as possible...”³⁵

The advantage of a curriculum of this nature is that students are exposed to a wider range of subject areas. For example, students in these clinics learn the practice of Labour Law, Matrimonial Law, Delictual Law etc. The challenges, however, are that students do not get an opportunity to specialise in a particular area of law and that clinicians are required to teach areas of law that they may not specialise in.³⁶ McQuoid-Mason notes a further challenge on how this model attracts large numbers of clients.³⁷ According to Mahomed: “Dealing with large numbers

³³ Also see David McQuoid-Mason ‘Law clinics at African universities: An overview of the services delivery component with passing references to experiences in South- and South-East Asia’ (2008) *JJS* (special issue) 6.

³⁴ *Ibid* at 6.

³⁵ See Willem De Klerk & Shaheda Mahomed ‘Specialization at a law clinic: The Wits experience’ (2006)39 *De Jure* 309.

³⁶ *Ibid* at 306. The author was a student during the period when PLS was offered under a general curriculum. From the authors own experience it was often challenging to deal with a variety of different matters. The author observed that often supervisors would refer students to colleagues that specialised in particular areas as they did not have the expertise to deal with the matters.

³⁷ McQuoid-Mason *op cit* note 33 at 6.

of matters results in excessive strain caused for both clinicians and students.”³⁸ In response to this challenge McQuoid-Mason states that intake must be limited and clients must be referred to other agencies once capacity is reached.³⁹

6.4 CURRICULA DESIGNED TO ADVANCE SPECIALISED PRACTICAL SKILLS

By definition, teaching within specialised programmes centre on advancing specialised knowledge within specific areas of law. Everything, including the curriculum is geared towards a specialised clinical model. A typical example of this type of clinic is the criminal clinic at the Ramington Centre at the University of Wisconsin – Madison⁴⁰, the Refugee clinic at the University of Cape Town⁴¹ and the Human Rights clinic at both Harvard⁴² and Yale Law School⁴³.

Specialisation has several advantages, including that it may work towards the benefit of clinical supervisors, benefit students, improve funding and potentially reduce the influx of matters.⁴⁴ According to De Klerk and Mahomed supervisor efficiency improves as they feel more comfortable to engage in matters that they have specific knowledge on.⁴⁵ Students derive an advantage as they are allowed the opportunity to gain greater insight into a particular area of law and therefore become possible ‘experts’ in that area.⁴⁶ Funders prefer to fund specific projects rather than general projects.⁴⁷ On the advantage of reducing the case loads, McQuoid-Mason notes that specialised programmes may reduce the volume of cases in a live-client

³⁸ Shaheda Hassim Mahomed ‘United in our challenges—should the model used in clinical legal education be reviewed?’ (2008) *JJS* (special edition) 63.

³⁹ McQuoid-Mason op cit note 33 at 6.

⁴⁰ http://www.law.wisc.edu/fjr/about_fjrc/ accessed on 20 July 2013.

⁴¹ See <http://www.refugeerights.uct.ac.za> accessed on 20 July 2013 – “The object of the course is to assess the evolution of the international legal framework for refugee and asylum law. Students will attain a thorough understanding of the UN Convention relating to the status of refugees (1951), as well as certain regional conventions, in particular the OAU Convention. The work focuses primarily on the basic criteria for the attainment, denial, and withdrawal of refugee status and the rights and treatment of refugees. A review of the case-law of international, regional, and national courts will provide an understanding of how refugee law is interpreted and implemented.”

⁴² <http://www.law.harvard.edu/academics/clinical/clinics/ihrc.html>

⁴³ <http://www.law.yale.edu/intellecualife/lowensteinclinic.htm>

⁴⁴ De Klerk & Mahomed op cit note 35 at 306-318.

⁴⁵ Ibid at 312.

⁴⁶ Ibid at 313. Also see Schrag op cit note 25 at 185.

⁴⁷ Ibid at 314.

clinic.⁴⁸ According to Lopez clinical programmes move to specialise for a variety of reasons namely, “Specialization promotes efficiency in delivering legal services. Second specialization makes the teaching experience more predictable. It increases the comfort level of both students and teachers. There is a perception that the quality of representation is likely to be higher. Some clinics specialise to further a specific service or social justice agenda. Some clinics respond to student demand or interest. Some clinical programs limit the subject matter as a method of financing the clinic.”⁴⁹

The limitations or challenges as noted by De Klerk and Mahomed include that some students may prefer to gain a wider range of practical knowledge and of course there is the possibility that students may get bored focusing on just one area of law.⁵⁰ According to Lopez “limiting the subject matter of representation is failure to provide full service quality legal work for poor people, leaving their myriad and multiple needs for legal services unmet.”⁵¹ According to McQuoid-Mason the challenge may also be that the area of specialisation is not part of the law curriculum and under these circumstances further classes may need to be held to cover the respective areas of law.⁵²

6.5 THE INTEGRATED MODEL — ADVANCING BOTH GENERAL AND SPECIALISED PRACTICAL SKILLS

Within this model the curriculum is designed to give the students the opportunity to gain the best of both worlds — that is, students engage in specialist clinics but receive exposure during plenary session (and/or during tutorials) on other aspects of practical lawyering engagement. A typical example of this sort of curriculum is the one presently offered at the University of the Witwatersrand (see annexure K). In an earlier article written in 2005 by the author and Professor Willem De Klerk we advocate that the present curriculum at Wits represents a specialised model.

⁴⁸ See D.J. McQuoid-Mason ‘The organization, administration and funding of legal aid clinics in South Africa’ (1986) 1 *Natal University Law and Society Review* 194 where it was proposed that developing specialised clinics may help reduce the volumes of cases. Initially when the specialized units were introduced at the Wits Law Clinic, clinicians believed the same. However, over the years the volumes of cases continue to increase.

⁴⁹ Antoinette Sedillo Lopez ‘Learning through service in a clinical setting: the effect of specialization on Social Justice and Skills training’ (2000-2001) 7 *Clinical Law Review*, 30 at 309. Also see Schrag op cit note 25 at 186.

⁵⁰ See De Klerk & Mahomed op cit note 35 at 306–318.

⁵¹ Lopez op cit note 49 at 317.

⁵² Also see McQuoid Mason op cit note 33 at 6.

However, some years later, the author dares to challenge herself on the definition advanced then, and promotes that the present model does in fact represent an integrated model.

The reason for the author's submission rests on the argument that at Wits students' specialise in one of six areas of law but are taught on (and are exposed) to other areas through plenary lectures and trial advocacy engagements. The areas that are outside of the specialised model include the drafting of generic legal documents engagement in trial advocacy and exposure to the criminal courts. Through an assignment allocated to students during the course of the year they are required to attend a criminal trial and produce a written report.

The advantage of this model is that students get the opportunity to partially specialise. Students learn generic skills – that is “skills capable of application in any area of law”⁵³ and have the opportunity to learn the practice within other areas of law as well.

The challenge however is ensuring that clinicians achieve the goals of the programme. One needs to be alert to not overreach on the goals. As discussed in chapter two and five, goals must be clearly defined and contained in order to avoid overloading the course.

At this point the author will proceed to discuss the present PLS curriculum advanced at Wits.

6.6 UNIVERSITY OF THE WITWATERSRAND PRACTICAL LEGAL STUDIES COURSE — CURRICULUM DESIGN

As noted above, prior to January 2000, the curriculum design for PLS was structured to accommodate the demands for a general curriculum as opposed to that of an integrated curriculum.⁵⁴ As noted by De Klerk and Mahomed: “The curriculum included plenary sessions on the practice and procedure of each of the areas law students were expected to engage in.”⁵⁵ A snap analysis of the curriculum in 1983 (or teaching programme as it was referred to) confirms the following: the students were taught on the administration of the clinic and a lawyer's practice, interviewing, statement taking, drafting of documents, problem analysis, advice on

⁵³ De Klerk & Mahomed op cite note 35 at 311.

⁵⁴ See chapter six. Also see De Klerk & Mahomed op cit note 35 at 306–318.

⁵⁵ Ibid at 309. Also see memo of Clinton Bamberger, The Practical Legal Studies course now and in the future, April 17 1990 at pg 8, where he discusses the syllabus adopted in 1990 he submitted that: “The syllabus includes the substantive and procedural law necessary for the practice; the ethics, structure and function of the legal profession; and the theory and practice of lawyering skills.” (copy on file with author)

evidence, the trial and on various areas of public law including individual labour law problems, consumer exploitation, social benefits, unemployment insurance, pension, housing and influx control.⁵⁶

In 1986, students received lectures on interviewing and statement taking, drafting of Credit Agreements, Law of Dismissal and the Basic Conditions of Employment Act, ethics, negotiation, problem analysis and litigation (see annexure B). Similar lectures were delivered in 1987 and in 1988 (see annexure B). In 1999, the curriculum reflected plenary lectures on interviewing and statement taking, letters' ethics, pleadings, Matrimonial law, Labour law, Criminal law and Delictual law. (see annexure J)

In 2000, PLS moved towards what the author defines as an integrated model and the "idea of teaching generic legal skills"⁵⁷ These skills can be divided into primary skills and secondary skills. Primary skills are taught through the curriculum and include interviewing, legal writing (or drafting skills), advocacy, legal research, professional management and ethic skills.⁵⁸ These primary skills advance a number of secondary skills, for example through the process of teaching students interviewing skills, students learn listening skills and communication skills; by teaching students how to draft a statement, they are learning writing skills and fact gathering skills. What follows are the modules offered in the PLS curriculum (2011)⁵⁹ and the methods that were used in the teaching process (see annexure K for a copy of curriculum in 2000).

The curriculum modules composed of, interviewing skills and statement taking, professional management and ethics, legal writing, preparation for trial, trial advocacy, substantive law, legal research and numeracy skills. The methods used to teach these seven components include plenary lectures, simulation exercises and the in-house live client engagement. This chapter aims to deal primarily with the modules of the curriculum and further discussions on the methods used to teach will be led in chapter seven.

⁵⁶ P. Pretorius 'Legal Aid Clinics as teaching instruments' in D. J. McQuoid-Mason *Legal Aid and Law Clinics in South Africa* (1983) at 91–92.

⁵⁷ De Klerk & Mahomed op cit note 35 at 311.

⁵⁸ Ibid at 311.

⁵⁹ The curriculum content has remained relatively unchanged since January 2000. Alternative Dispute Resolution has been discontinued and numeracy skills has been introduced.

In chapter five the author submits that the contemporary goals for PLS could be divided between primary and secondary goals. The primary goal is educating students on practical legal engagement. The secondary goals — arising out of the primary goal — includes, social justice consciousness, understanding particular areas of substantive law and teaching a subsidiary of skills including consultation, problem solving, legal writing, advocacy, professional management, and research skills. Thus the question that arises is: Does the present curriculum align with the goals submitted?

What follows is a critical discussion on the curriculum modules identified above and developed for PLS.

6.6.1 INTERVIEWING AND STATEMENT TAKING ⁶⁰

According to Hyams, Campbell and Evans, "... interviewing is a process that can be learnt. Interviewing is a structured procedure, not a general 'chit-chat' with a stranger."⁶¹ Many consider interviewing skills as a primary skill to be taught to students that engage in clinical studies particularly in live-client clinics. The author submits that learning interviewing skills is a necessary tool for students for two reasons: one, attorneys in practice interview clients everyday and in order to understand and succeed in a client's case the interview must be meaningful to all parties concerned,⁶² secondly, the skill learnt from interviewing has a broader consequence for students, for example students learn communication skills and problem solving skills. Furthermore, through the process of interviewing students learn the art of statement taking and from the statements drafted students draft other necessary documents (including pleadings and letters) as may be required in the client's matter.

Interviewing skills at Wits is exclusively taught during PLS. In PLS students are taught interviewing skills during the second week of the first term.⁶³ They are taught interviewing skills through plenary lectures, actual engagement with clients and sometimes during tutorial sessions.

⁶⁰ De Klerk et al *Clinical Law in South Africa*, (2006) 2nd 55–71. Also see Hyams R, Campbell S. & Evans A. *Practical Legal Skills* (2004) 13–33. Maisel P & Geenbaum L *Introduction to Law and Legal Skills*(2002) Butterworths 1- 238.

⁶¹ Hyams, Campbell & Evans op cit note 60 at 13.

⁶² Ibid at 14 where the authors note "The primary objective of the interview between lawyer and client is that the lawyer obtain the necessary facts and, eventually, instruction from the client."

⁶³ See Schrag op cit note 25 at 42 for further examples on how interviewing skills are taught. Also see Menon op cit note 1 at 99–116.

During the plenary lecture, students watch a DVD on an interview process⁶⁴ conducted between a client and an attorney. During the plenary session (that is after watching the DVD) students are taught the theory relevant to interviewing.⁶⁵ Following this, students attend at the WLC and interviews are conducted with clients. After the clients are interviewed by students, statements are drafted and placed in the clients files. It is maintained that only if a reasonable interview is conducted will the students be in a position to draft a good statement. One of the impediments towards conducting a reasonable interview is the large numbers of clients that are required to be consulted with. In selected specialised clinics emphasis is often placed on ‘a quick’ screening of the clients. The challenges with this approach include that whilst this may be a means to deal with high numbers of clients the author declares that it defeats the purpose of the actual learning process that students need to engage in during the interviewing process.⁶⁶ Students must be given the opportunity to learn from their experiences.

During tutorial sessions with students, clinicians are meant to discuss the lecture and allow the students the opportunity to reflect (as discussed in chapter five) on their experiences during the actual interview.⁶⁷ While each clinician might do things differently, during tutorials, the author engaged her students in a further learning process — students were encouraged to engage in a peer and self assessment⁶⁸ task after they had participated in the clinic and interviewed their first client.⁶⁹ The author dedicated the first term toward encouraging students to improve their techniques of interviewing skills and continuously ask them to reflect on how it

⁶⁴ The DVD was produced by Monash University in Australia. It demonstrates a discussion between client and attorney. It is an insightful introduction to the interviewing skills component as it demonstrates all the necessary emotions between client and attorney. During 2008 students in PLS watched the DVD in their respective units — thus in smaller groups — this allowed for personal engagement with the students. In addition to the DVD students practised their interviewing skills on clients in the presence of their clinicians.

⁶⁵ See David F. Chavkin ‘Am I my clients Lawyer?: Role Definition and clinical supervisor’(1997-1998) 51 *SMUL Review* 1507 at 1538 where the author describes teaching interviewing skills through firstly simulation exercises, that are videotaped then critiqued by the supervisor before the students receive real-life cases.

⁶⁶ Hyams, Campbell & Evans op cit note 60 at 14 where the authors state: “A proper interview should follow a definite structure so that you, the interviewer, can control and direct the interview in an efficient manner in order to best serve your client.” The authors propose a three stage interviewing process made up as follows: “1. Listening to the client’s story in its entirety 2. asking questions to obtain a complete understanding of the facts and of the chronology of the story 3. assessing the options and giving advice.”

⁶⁷ For a discussion on the value of reflection see chapter six.

⁶⁸ The idea to introduce these assessments stems from an article I wrote with Frans Haupt the Director of the CLE programme at the University of Pretoria. Franciscus Haupt & Shaheda Mahomed ‘Some Thoughts on Assessment methods used in Clinical Legal Education Programmes at the University of Pretoria Law Clinic and the University of Witwatersrand Law Clinic’ (2008) 41(2) *De Jure* 7. In this article we compared the assessment methods used in the CLE programmes at the University of Pretoria and the University of Witwatersrand.

⁶⁹ This assessment is for formative purposes only, as this allows students to reflect with each other.

felt interviewing for the first time compared to when they had interviewed after a few weeks. In 2012 the author introduced a diary system particularly with the idea that students should track their experiences during the interviewing process. At the end of 2012 students were asked to reflect on their experiences and most responded that their confidence and knowledge advanced as they proceeded with the interviews during the year.

In 2011, at the outset of teaching this module, the following outcomes were identified: the overall outcomes attached to this module include: whether the students have learnt the theory and skills relating to an interviewing process. The specific outcomes included: Did the students introduce themselves to the client?⁷⁰ Did the students make the client feel comfortable? Did the students explain the working of the clinic? Did the students take notes? Did the students explain the structure of the interview? Did the students listen to the client?⁷¹ Were the students able to identify the client's legal problem? Did the students clarify the client's problem? Did the students ask questions?⁷² Did the student conclude the interview appropriately? Did the student get useful and accurate information from clients so that they can advise him/her correctly and act efficiently on his/her behalf and to record this information in a statement for use throughout the litigation/matter.⁷³ These outcomes promote a client oriented approach to interviewing as opposed to a fact finding process. Students are taught to make the client feel comfortable, listen to their clients and advise accordingly.

Some positive comments on the module are that the outcomes are identified at the outset of the course and that various methods are adopted in teaching the module. Identifying the outcomes at the outset of the course allows this module to be aligned with the goals in PLS as identified in chapter five. In chapter five, interviewing skills is identified as part of the primary as well as secondary goals. Furthermore, the above module promotes that students learn interviewing skills through a variety of methods including through the plenary lectures, engagement with clients and through a reflective process during tutorials (further discussion on

⁷⁰ De Klerk op cit note 60 at 57.

⁷¹ Ibid at 58–59.

⁷² Ibid at 60– 62

⁷³ Ibid at 63. Also see outcomes or interviewing skills proposed by AULAI op cit note 14 at 40, “At the end of this course the student ought to be able to, set up an interview, conduct an effective interview by listening attentively, empathizing with the client, identifying blockages, and gathering all relevant information, understand the client's goal and objectives, identify the relevant facts, identify the issue/s emanating from the facts, identify the applicable legal principles, conduct investigation of facts and law, make effective use of the library and internet resources, integrate the various sources in identifying possible solutions to client's problem, use inductive and deductive reasoning to identify possible solutions to client's problem.”

theses methods are led in chapter seven). The author submits that this process of acquiring knowledge ties in with the recommendations submitted by learning theorist in chapter two – that is that students learning should incorporate theory, practice and reflection.

The challenge of this module is that whilst students learn interviewing skills through a variety of methods, they learn this within a period of two weeks. Therefore, the fear that we could be ‘surface teaching’ surely cannot go unnoticed. In response to this challenge in annexure M the author proposes that interviewing skills and trial advocacy be considered as primary modules that define the curriculum. This will allow a considerable amount of academic time available to teach this module.

Further suggestions for improvement include, introducing simulation exercises advancing interviewing skills, allowing each student’s interview process to be digitally recorded, followed by a critical reflection process on the interview, students are to receive summative grades on their performances and to introduce a formalised formative peer and self assessment task for each student. Teaching interviewing skills should be a continuous process that students engage in throughout the course of PLS.

6.6.2 SUBSTANTIVE LAW/UNIT BASED TEACHING⁷⁴

As noted earlier (in chapter five), many learning theorists have noted the importance of learning theory before practise. Furthermore, many clinical theorists consider that the understanding of substantive law should be a defined goal for CLE programmes (particularly if the programmes adopt the ‘live-client’ method as a mode of teaching).⁷⁵ Similarly, in chapter five, the author submits that substantive law be considered as a secondary goal attached to PLS.

A brief recap confirms that prior to introducing the ‘integrated model’ in PLS (which was introduced in 2000) students were required to take on a wide variety of files including — but not limited to — a family matter, labour matter, contractual matter, delictual (torts) matter and a criminal matter. However, since January 2000 PLS adopted the integrated model.⁷⁶ Students studying PLS can specialise in one of six areas of law and as discussed earlier in this chapter be

⁷⁴ See chapter five for a discussion on substantive law as a goal identified in PLS.

⁷⁵ De Klerk et al op cit note 60 at 272, where Steenhuisen submitted that: “Substantive law is central to clinical legal education because most clinical educational goals require legal theory — either existing or newly acquired legal knowledge.”

⁷⁶ See De Klerk & Mahomed op cit note 35 at 312–317 for a discussion on the advantages and challenges associated with specialist clinics.

exposed to other areas of practical legal engagement. The areas of law that are offered include, Family Law, Refugee Law, Consumer and General Litigation, Labour Law, Housing and Evictions and the Law of Delict.⁷⁷ Students are divided into their respective groups at the beginning of the academic year — each group consists of on average forty students. Each group is allocated to a clinician that is considered a specialist in one of the above areas of law.⁷⁸ The students then attend a series of three (sometimes four) Unit based lectures. The lectures are presented by the specialist clinician and are delivered to the allocated groups starting the third week of the academic year. The lectures are designed to teach students substantive law relevant to practice. Clinicians generally use a number of simulation activities during these lectures. The aim of these lectures is simply to prepare the students for practice in the clinic. Upon completion of these lectures students are presented with a written assessment that contributes towards their final grade. Prior to teaching this module clinicians are required to submit lecture outcomes defining their teaching plan. An example of the outcomes documents in the Labour law unit includes: At the end of this module students should be able to: define and demonstrate an understanding of the basic principles of labour law including: dismissal for misconduct, dismissal for incapacity, constructive dismissal, reasons unknown, operational requirements, automatically unfair dismissals, take instructions from clients regarding labour issues, identify the procedures needed to be followed after a particular dismissal, know of the existence and function of various statutory bodies that deal with labour matters namely the CCMA, Bargaining Council, Labour Court and Department of Labour, identify, understand and draft various Labour Court applications, including, Review application, Condonation application, Rescission application, Contempt of court application, Section 142 A read with Section 158 (1) (c) application, Understand conciliation, con-arb, mediation and arbitration processes, Identify, understand and draft a statement of claim.⁷⁹ (see annexure L)

⁷⁷ Rule 115A.5 of the Law Society Rules of the Northern Province notes that Law Clinics in the Northern Province are precluded from taking on certain matters — the rule reads “the clinic may not undertake work in connection with the drawing up of a will or other testamentary writing, the administration or liquidation or distribution of estates of any deceased or insolvent person, mentally ill person or any person under any other legal disability, or the judicial management or the liquidation of a company, nor in relation to the transfer or mortgaging of immovable property, nor in relation to the lodging or processing of claims under the Motor Vehicle Accidents Act, 1986, or any amendments thereof or such other work as the Council may from time to time determine.”

⁷⁸ See De Klerk et al op cit note 60 at page 273.

⁷⁹ Also see AULAI op cit note 14 at 60 for defined outcomes for teaching practical Labour law to include: Labour law “On completion of this unit, the learner should/ought to and/or be able to identify and/or list:
1. The sources of labour law.

A distinct advantage of teaching students substantive law is that students are better prepared when they interview clients with the same or similar problems. However, limiting a syllabus to three or four lectures continues to be a challenge. The outcomes noted above are a clear example of an extensive syllabus that needs to be taught over a short period of time. As a means to address this challenge clinicians often find themselves trying to ‘specialise’ further within their own specialised areas.⁸⁰ In chapter five the author notes that the challenge attached to this goal includes the possibility of over teaching and trying to maintain a balance between teaching doctrinal law and theory relevant to practice. In chapter five the author submits that as long as PLS exists as an independent course, the content of substantive law lectures should be limited to focus more on the practical application of the law as opposed to the law itself. The author submits that the adoption of this goal as well as the design of the module rests on the goals of the institution. In chapter two the author concludes that it is fundamental to identify the goal of one’s law school and that some law schools may opt to adopt a purely academic angle, others a more integrated model of theory and practice. Therefore should a law school consider that the goal is to teach from a purely academic angle then the courses taught will focus on doctrine as opposed to practice. If the law school decides to host a CLE programme within its curriculum – such as PLS - clinicians should consider confining the goal on substantive law to knowledge based on practical application. Therefore it is important that the goals be clearly defined and that clinicians consider at the outset what the limitations of this goal and the content of the module should be. A further remedy may be for leading substantive courses in the broader LLB degree to include a practical component into their syllabus. Thus by the time students get to PLS the burden on teaching an extensive practical syllabus is alleviated.

6.6.3 PROFESSIONAL MANAGEMENT⁸¹

Professional management skills can be divided into two categories:

-
2. The different types of employment relationship.
 3. The forms of termination of employment; and dismissal.
 4. Procedures, statutory time limits, and legal remedies applicable to termination by dismissal.
 5. The relevant documents in the CCMA AND Labour Court
 6. Remedies and procedures relating to unfair labour practices in the workplace, and their application
 7. The different statutory bodies and state departments available for dispute resolution.”

⁸⁰ See De Klerk and Mahomed op cit note 35 at 315.

⁸¹ See M.A. du Plessis ‘University Law Clinics meeting particular student and community needs A South African Perspective’ (2008) vol 17 (1) *Griffith Law Review* 134. Also see De Klerk et al op cit note 60 at 103–125.

- Ethics and professional responsibility⁸²
- Everyday management of a legal practice

Each of these areas will be respectively discussed.

6.6.3.1 Ethics and professional conduct

“Professional ethics concern themselves with the rules of conduct regulating the attorney’s profession.”⁸³ Within this module students are made aware of the rules governing the practice of law. The rules are defined by the common law, statutory bodies governing the legal profession and through case law.⁸⁴ For example, students are taught about conflict of interest, touting, attorney-advocate relationships and the definition of a fit and proper person amongst various other forms of professional conduct.⁸⁵ Often students are confronted with ethical dilemmas in consultation with real clients and need to be alert to the professional rules governing their conduct.

In PLS students are taught the theory relevant to Ethics and Professional conduct during a double plenary lecture.⁸⁶ It is hopeful that clinicians continue to engage with students on this matter during tutorials. The students are assessed on this module particularly during the oral examination at the end of the year. Prior to students doing PLS, they receive very little (if any at all) teaching on Ethics and Professional Responsibilities within attorneys practice, therefore this brief introduction to the subject at the very least serves to create a sense of awareness for students.

In PLS the outcomes document for this sub module reads as follows. At the end of this module the students should be able to: explain the meaning of ‘fit and proper’ as a requirement for admission to the legal profession, explain the meaning of ‘professional misconduct’ and list its potential consequences, explain the meaning of ‘professional negligence’, give an example thereof and distinguish it from misconduct, discuss the duties a legal practitioner owes to the state, discuss the duties a legal practitioner owes to the court, including, the meaning of contempt

⁸² De Klerk op cit note 60 at 266.

⁸³ NLELC Meeting document 4 November 2010, page 7. (copy with author)

⁸⁴ De Klerk *et al* op cit note 60 at 32 where De Klerk notes that the sources of professional conduct include legislation, rules, regulation practice directions, court decisions common law, academic writing and foreign influence.

⁸⁵ Ibid at 29.

⁸⁶ A single lecture comprises of forty five minutes.

of court and give examples, the duty not to mislead the court and ethical debate around defending the guilty, discuss the duties a legal practitioner owes to clients including the importance when accepting a mandate, the importance of adhering to a mandate, for example during settlement negotiations, what constitutes a conflict of interest and give an example, the basic rules regarding confidentiality and legal professional privilege, when will a legal practitioner incur liability to a client for professional negligence, explain the concept of an attorney's trust account and discuss basic duties in respect thereof. The outcomes document further requires that, the lecturer, explain the duty of a legal practitioner towards an unrepresented party, with reference to case law, explain the split bar system in South Africa and discuss the relationship between attorneys and advocates, with reference to exclusivity of work, the referral rule, briefing procedures, control over the case and liability for fees, discuss the duties of legal practitioners in respect of pro bono work, briefly discuss some rules of etiquette in the legal profession by giving examples.⁸⁷

The advantage of this model centres on creating awareness amongst students of the various rules governing attorneys' practice. As nowhere else in the LLB degree at Wits provision is made for this module, at the very least PLS alerts students to the rules of professional conduct. The challenge, however, is how does one succeed in teaching students such an extensive area within a double lecture?

⁸⁷Also see AULAI document op cit note 14 at 56 where the followings outcomes for the ethics and professional responsibility module are noted:

"On completion of this unit the learner ought to be able to:

- Understand and explain the concept of legal ethic
- Identify and list the sources of legal ethics
- Understand and explain the practitioner's duties towards:
 - o the courts
 - o the state
 - o the clients
 - o colleagues.
- Identify the admission requirements for legal practitioners, in particular, the requirements of a "fit and proper person".
- Explain the functions of the organizational structures governing the legal profession.
- Understand the concept of trust accounts; list and explain the difference types of trust accounts, and the rules governing them; and explain the role of the Attorneys Fidelity Fund in respect of the theft of trust funds.
- Understand and explain what constitutes professional negligence with the aid of examples, and to discuss the role of the Professional Indemnity Insurance Fund.
- Explain the operation of a legal practice as a business.
- Explain fee structures and the role of the prescribed tariffs in fee arrangements; and be able to list and explain different types of costs orders.
- Discuss the relationship between the instructing attorney and an advocate, with reference to fee arrangements, respective roles and briefing procedures."

Reflecting on the above, the author cannot help but note the extensive syllabus in relation to the limited time available to teach this module effectively. Therefore, the author submits that the outcomes attached to this module may be too ambitious considering time constraints. It may be best to narrow down the outcomes to selected areas so as to enable effective teaching. The author recommends that this module be divided into three categories: responsibility towards clients or professional ethics, business ethics (rules on practise management and accounting) and opportunities available for students within the legal profession. In order to afford value to PLS the author recommends that the PLS curriculum include teaching students on practitioners responsibilities towards clients – the other two categories that is, business ethics and opportunities within the legal profession be taught elsewhere in the LLB curriculum. Business ethics should be taught within an accounting module that the author encourages law schools to teach and the discussion on options within the legal profession should be taught in Introduction to South African Law. The author's recommendations are further demonstrated in annexure M where the author recommends that matters involving the responsibility towards clients be taught during interviewing skills and trial advocacy.

6.6.3.2 Everyday management of a legal practice⁸⁸

During these lectures students are exposed to matters relating to attorneys' practice. Students learn how the everyday workings of an attorney's office is managed. For example, file management and financial management which include the opening up of a business account and a trust account.

In PLS, matters relating to financial management, file management, attorney's insurance and staffing matters are discussed with students during a double plenary lecture. The knowledge acquired during these lectures is reinforced when students actively engage in the clinic and manage their own files under the supervision of their clinicians. Students are assessed on file management at the end of the academic year. In PLS the following outcomes are attached to this module: At the end of this module students will be able to: understand attorneys' trust accounts,

⁸⁸ De Klerk et al op cit 60 at 103–125.

understand the different bank accounts relating to attorneys' practice and understand how files are opened and managed at the clinic.⁸⁹

Similar to the teaching of ethics and professional responsibility students at Wits Law School receive very little teaching on the above subject — so the clear advantage of teaching this during PLS, extends to creating a sense of awareness for students. However, similarly to the challenges noted above — how does one do justice in teaching this module in merely a double lecture setting? Surely students that aspire to engage in the practice of law — be it as an attorney, advocate or a legal advisor — should not be leaving law school without having gained knowledge on practice related matters? The author recommends that a practice management course be designed and incorporated into an accounting module and together this course be offered as an elective course particularly for students wishing to enter the practice of law.

6.6.4 LEGAL WRITING⁹⁰

Many clinicians consider the teaching of legal writing skills as one of the core objectives for any clinical legal studies programme. It has been considered that, "Law is nothing without language. It is only through language that the rules and principles of law can be communicated. A lawyer who cannot state a fact or express an idea clearly, unambiguous and concise in language, will not be able to do justice to a case."⁹¹ Teaching legal writing includes drafting a number of legal documents, for example, drafting of letters (or correspondence), court documents or pleadings, opinions and briefs to counsel.⁹² According to Mahomed and Kruger "[s]tudents participating in Practical Legal Studies are taught a number of writing skills: the drafting of clients' statements, letters, file notes, case reports, briefs to counsel and legal opinions. Some of these skills are

⁸⁹ See AULAI document op cit note 14 at 32 where the following outcomes for this module are noted as :

"At the end of this course the students ought to be able to:

1. Identify ways to improve communication
2. Distinguish between everyday tasks in order of priority
3. Have a basic understanding of unemployment benefits, the Workmen's Compensation Act, and skills levy
4. Identify why staff training is important.
5. Understand why insurance is important for a practitioner.
6. Be familiar with various types of insurance.
7. Understands assets management."

⁹⁰ De Klerk et al op cit note 60 at 155–192.

⁹¹ AULAI op cit note 14 at 46.

⁹² See Shaheda Mahomed & Philippa Kruger 'Teaching Legal Writing at the University of Witwatersrand Law Clinic' (2009) 3 *John Marshall Law Journal* 106–134.

taught in a formal setting while many are learned incidentally, as the real-client case work unfolds.”⁹³

Legal drafting at Wits is taught in Civil Procedure, Moot court and PLS. In both Civil Procedure and Moot court students learn the art of drafting through simulation exercises. In PLS students learn to draft through real client engagement, during plenary lectures and during tutorial sessions. Further in PLS, drafting skills are divided between letter writing and the drafting of pleading, notices and affidavits.

In PLS letter writing skills are taught during a double plenary lecture.⁹⁴ During this lecture a simulation exercise is presented to students illustrating common mistakes that can be made when drafting a letter. Students are asked to correct this letter. Students further continue to learn letter writing skills as they engage with real clients and during tutorial sessions. Instructions to draft letters or any other legal correspondence is generally received by students during tutorial sessions and after students consult with their respective clinician, students draft the letters and forward copies to their clinician for comments — students then correct accordingly. The idea when teaching letter writing should be for the students to always correct their letters — not the clinician. It can safely be submitted that as the students continue to draft more letters their skills in drafting improves.⁹⁵

Similar to the letter writing process students learn the drafting of pleadings, notices and affidavits during the Unit based lectures. Therefore, their drafting knowledge is limited to their specialised area.⁹⁶ “For example, students in the family unit will draft a Particulars of Claim in a

⁹³ Ibid at 114.

⁹⁴ In PLS the outcomes attached to Letter Writing include:

At the end of this module students will be able to:

- Understand the structure
- Plan and organise a letter
- Use the correct terminology and language
- Choose the right format
- Draft the body
- Structure the paragraphs
- Use the correct salutation with corresponding ending
- Apply methods of privacy when using a fax
- Understand ‘without prejudice’.

⁹⁵ Mahomed & Kruger op cit note 92 at 118–119.

⁹⁶ Ibid at 121. In PLS the outcomes attached to Drafting of Pleading in the Labour Unit include:

- Identify, understand and draft various Labour Court applications, including,
 - a. Review application
 - b. Condonation application
 - c. Rescission application

divorce matter. Students in the Delict unit encounter matters such as civil claims for damages for unlawful unrest and detention, police brutality and medical negligence.”⁹⁷ After consulting with clients students receive instructions from their clinician on which pleadings would be the most appropriate to draft. Following on these instructions students draft the pleading, forward it to their clinician for comment and correct as may be necessary. All students’ drafts are kept in the clients’ files, particularly for assessment purposes.

The advantages of the module include that, students learn drafting skills through real client engagement and simulation exercises and that the learning is continuous, as students learn drafting skills throughout the year under supervision. The real challenge is: How does one teach drafting? Is it through a process of trial and error or getting students to be more confident in their drafting exercises and less reliant on precedents or is it through exposing students to a broader range of drafting exercises? A further challenge - as discussed in chapter two – is that we as South African experience a number of other diversity issues including language disparities.⁹⁸ In light of this many students struggle with drafting whether in the format of a letter or drafting a pleading. In this instance some may argue that drafting through precedents may resolve issues based on language. The author recommends that drafting skills should be learnt through a process of trial and error. Over time students will become more confident in their own ability to draft. In addition the author recommends that should the need arise additional tutorial lessons should be arranged for students. The author is not in support of drafting through precedents as this only serves to teach students the art of copying.

d. Contempt of court application

e. Section 142 A read with Section 158 (1) (c) application

- Identify, understand and draft a statement of claim.

⁹⁷ Ibid at 121–122.

⁹⁸ Also see Shaheda Mahomed & Philippa Kruger ‘Teaching legal writing at the University of the Witwatersrand Law Clinic’ (2009) 3 *John Marshall Law Journal* 105–134 at 125. See Randall op cit note 36 at 202. See Baker op cit note 102 at 150 where she discusses the crippling effect that ‘Bantu’ education has had on our students. She argues that “[t]he absence of a writing pedagogy was incapacitating for Black African students, most of whom spoke English as a second or third language and had had little opportunity under Bantu education to learn basic English, let alone to have any real experience in critical reading, textual analysis, and composition. As a consequence, some students tried to compose their exams mentally in Zulu and then simultaneously translated back into English with predictable, disastrous results given the enormous incongruities of grammar, diction, and syntax. Even worse, students were not exposed to the rigors of sustained legal analysis that comes from the discipline of writing.” Also see Fedler op cit note 26 at 1002 where the author states that Black students have been entering university linguistically disadvantaged.

6.6.5 PREPARATION FOR TRIAL

Within this module students are taught on the relevant procedures that need to be followed after pleadings have closed (*litis contestatio*). Matters relating to analysis of evidence, discovery of documents, pre-trial conference and minutes, indexing and pagination are taught and discussed with students. Generally Law Schools tend to shy away from advocating a module in preparation for trial,⁹⁹ primarily because most believe that teaching students about the preparation for trial is the responsibility of the profession. For example, in South Africa there continues to be this debate between academics and the profession that it is the duty of the Law Society — through its various projects¹⁰⁰ — to educate young graduates on the practical aspects of legal studies. However, most clinical programmes — particularly in South Africa — teach students on preparation for trial.

In PLS students are taught the preparation for trial during a double plenary lecture and through real-client engagement. As students take on clients' matters they learn about the various stages in litigation. Depending on the types of matters that students engage in, students may or may not have the opportunity to be actively involved in the preparation for trial. For the students that are not exposed to this experience the author suggests that respective clinicians explain to students through their cases (or through simulations) what the different stages in the litigation process entail. In PLS the outcomes attached to this module include: At the end of this module students should be able to understand the processes involved including the documents that need to be drafted in preparation for trial.¹⁰¹

The advantage of teaching students this module is the knowledge that students gain from exposure to preparation for trial. As some of the other modules discussed above, it is only during

⁹⁹ One example of such a module could be Moot court.

¹⁰⁰ For example through LEAD or the Practical Legal Schools.

¹⁰¹ See AULAI document op cit note 14 at 64 where the following outcomes for this module are proposed: "On completion of this unit, the learner ought to have mastered the following skills, and obtained the following knowledge:

1. How to prepare adequately for trial, more specifically:
2. Be able to identify the issues in dispute between the parties.
3. Who bears the onus of proof regarding these issues.
4. What evidence to present at trial in order to discharge this onus.
5. Pre-trial notices:
 - Which notices
 - How to draft them
 - When to deliver
6. How to prepare the client and witnesses for trial."

PLS that students learn how to prepare for trial. For students that are fortunate enough to witness an entire matter from inception to judgement the experience is priceless. The challenges, however, can be narrowed down to the time constraints available to teach this module. It appears quite obvious from the outcome submitted that the PLS module on preparation for trial is seriously lacking in depth. Clinicians in PLS would argue that due to time constraints the module can only cover basic learning outcomes. Whilst the author is in agreement with the fact that PLS as a course is overloaded further outcomes in respect of this module need to be advanced. The author recommends that the processes be broken down to include a discussion on the admissibility of evidence, witnesses and possible judgements that can be handed down.

Like with most other modules in PLS it does feel at most times that we are simply surface teaching. PLS is used to expose students to the practice of law but within the confines of trying to teach all of the skills required within one academic year. It is therefore submitted — and further arguments will be advanced in the conclusion of this chapter — that law schools consider the idea of incorporating certain clinical modules in the broader curriculum. For example, preparation for trial could be incorporated into Civil Procedure and Criminal Procedure. A further recommendation by the author includes narrowing the PLS curriculum as noted in annexure M.

6.6.6 TRIAL ADVOCACY¹⁰²

Trial Advocacy may be defined as the training of law students on active court processes including, opening statements, leading arguments, cross examination and closing statements. During this module students are taught how to represent clients in court.

How should this module be taught? Should it be taught through theory presented to students, through simulation activities thereby allowing students the opportunity to role play the court process or should students simply be taken to court to observe the trial process (thereby learning through observation)? The answer to this question is dependent on a number of variables, including the time available to teach this module, resources that are available for teaching, student numbers and the existence of student practice rules¹⁰³(if any exist at all).

¹⁰² De Klerk et al op cit note 60 at 233–250. Also see Menon op cit not 1 at 177–189.

¹⁰³ Chavkin op cit note 65 at 1515.

Over the last few years during PLS various methods of teaching were explored, for example in 2006 and 2007 members of the Black Law Association (BLA) were employed to assist in teaching.¹⁰⁴ The BLA attempted to teach the module during a series of plenary lectures to a class of three hundred students. Students were presented with a simulation exercise and randomly asked to present oral submissions. Further on during these lectures the BLA taught students on the theory underlying trial advocacy. This method proved unsuccessful particularly due to the large number of students that engaged in PLS.

Presently students in PLS are taught trial advocacy through a simulation exercise that the students are required to role play. This module is scheduled to be taught during the last semester of the academic year. Generally four or five weeks are allocated for oral presentations. Students are divided into groups. Each group consists of twelve students — six students acting in favour of the Plaintiff and six students acting in favour of the Defendant. The students are presented with a set of facts and are required to decide amongst themselves how each student will participate. It is mandatory for each student to participate either as an attorney or witness. Each group gets an opportunity to present their client's case. The groups are required to lead evidence and cross-examine witnesses. The role plays are assessed by two clinicians who also provide feedback to students on their performances. In PLS outcomes have *not* been drafted for this module. In light of this the author proposes the following as possible outcomes. At the end of this module the learner ought to have gained knowledge on, oral presentation skills, team work, understanding opening and closing statements, understanding basic rules of evidence, gaining a basic understanding of leading and cross examination and understanding a basic format of a trial.

The advantages of teaching this module include that, PLS is the only course in the LLB degree that promotes trial advocacy, and students learn a variety of skills including lawyering skills, oral communication skills and analytical skills. Essentially they learn the law in action.

Whilst the advantages of teaching trial advocacy are clear, this module continues to pose a number of challenges for PLS — with the large number of students, limited resources and time available to teach the module clinicians continue to wonder how can we improve our teaching of this module? Considering our limitations, are we doing justice to a module that should in reality be taught over a lengthy period of time, with a small group of students?

¹⁰⁴ Du Plessis op cit note 81 at 134.

The author proposes two options in response to the challenges one, Trial Advocacy should be a half year elective module within the LLB curriculum offered in the final year of study. Alternatively the PLS curriculum should be unpacked and Trial Advocacy be taught as an area of specialisation as recommended in annexure M.

6.6.7 LEGAL RESEARCH AND PROBLEM-SOLVING¹⁰⁵

Successful practitioners are often efficient researches and problem solvers. As the study of law is wide, practitioners are often presented with requests from their clients on matters that they are not able to answer to immediately. Similarly, students in the clinic are often asked questions by clients that they are unable to answer to immediately. Under these circumstances students need to consult relevant sources in search for the answers. However, teaching students how to access these sources can prove to be rather mundane and an unchallenging task.

In PLS a double plenary lecture is allocated for teaching this module. Prior to 2011, during these lectures clinicians pointed out relevant sources (including digital texts) to students that may prove to be helpful in their research. In PLS the outcomes attached to this module include: from the information obtained from the client during the consultation, be able to classify his/her legal problem correctly, from the detailed facts/information, answer questions of law and identify the necessary tools to enable them to conduct proper and effective research.

Often, after these lectures clinicians were left feeling like they had added no value to the students' learning. Clinicians further continue to question if the solution to teaching research would be for the students to take the initiative to visit the Law School librarian and get a lesson on how to use the library.

So, how does one make this lecture interesting and of course add some sort of value for the students? For the first time in 2011, instead of just identifying sources, a research methodology was presented to all students. The methodology promoted that:

- First, students identify the subject matter¹⁰⁶
- Secondly, narrow down the area – questions such as: ‘What does the client really want?’, ‘What are the legal issues that must be responded to?’ need to be explored.

¹⁰⁵ Also see De Klerk *et al* op cit 60 at 129–153.

¹⁰⁶ Identifying the subject matter is not allows an easy task in the clinic as clients often present their cases in a convoluted manner. Further some clients require advice or assistance on multiple matters.

- Thirdly, further narrow down the area of law that needs to be researched.
- Fourthly, identify appropriate sources that may help you find the answers.
- Fifthly, study the appropriate sources and apply to the facts at hand.

Students were taught on this methodology and were then asked to apply the method to simulation cases presented to them.

Aside from reminding students on how the library works, the author does not see the value of teaching students how to research in their final year, in PLS. The author submits that research methodology should be incorporated into other courses in the first year curriculum, for example, in Introduction to South African law.

6.6.8 NUMERACY SKILLS¹⁰⁷

Teaching numeracy skills at law schools is motivated by the fact that some law students just don't know how to engage in simple mathematical calculations. This has promoted fear within members of the profession that practitioners will not be able to balance their business and trust accounts — thus exposing clients to fraud and possible theft.

In PLS, the struggle on how best to teach this module continues, as we often question what are we supposed to teach? Some clinicians simply teach the students arithmetic skills — including, simple addition, subtraction, multiplication and division. In PLS, we have identified the following as outcomes attached to this module: At the end of this module, the learner ought to have gained knowledge on the following, the role of numeracy in legal matters and the application of numerical skills to legal matters.¹⁰⁸

However, trying to get legal academics to teach final year law students how to add, subtract, divide or multiply can prove to be rather challenging. The author recommends that law school include a compulsory accounting module in the curriculum — this will help students understand financial processes and further assist them with practice management skills.

¹⁰⁷ De Klerk *et al* op cit note 60 at 83–101.

¹⁰⁸ See AULAI op cit note 14 at 34 where the following outcomes are noted:

“At the end of this course, the students ought to be able to:

1. know the different types of legal costs;
2. advise the client regarding cost implications of a case;
3. know the difference between trust and business accounts;
4. have a working knowledge of the process of taxation; and
5. have a working knowledge of the billing of clients.”

6.7 CONCLUSION

The conclusion aims to address a number of issues: First, throughout this chapter submissions are continuously made on the importance of a relationship between the goals and the curriculum. Ultimately, the question is raised and asked, does the present PLS curriculum align with the goals submitted in chapter five? The author affirms that the curriculum does in fact align with the goals as submitted. Of course, this does not make either the goals or curriculum perfect models, as is reflected by the challenges discussed in this thesis.

Secondly, the author argues that the PLS curriculum is made up of many components, some of which could themselves be presented as standalone courses within the broader degree or alternatively be integrated into other courses. A typical example of a potential standalone course is trial advocacy. The subject area is so vast and the existing PLS module aims to teach a number of legal skills. This module could easily be formulated into a half year course. Alternatively as proposed in annexure M this module could be a specialised area within PLS and taught over a semester instead of a few weeks. A typical example of modules that can be shared or incorporated between PLS and other courses is Legal Drafting and Preparation for Trial. For example, both can be incorporated into Civil Procedure, Criminal Procedure, Introduction to South African Law and even a course like Administrative Law where students can learn the art of opinion writing.

One should be wary of overloading the PLS curriculum. The author submits that presently PLS serves as a skills capturing course, or better yet, as a catch-net course. Many may therefore question: Why do we teach all of the above in PLS? The classic answer is: If not in the PLS then where else? The author recommends that clinicians in PLS consider designing a specialised curriculum — aiming to teach a few core skills, but of course teaching them well. For example, the curriculum very easily facilitates for interviewing skills and trial advocacy — these modules should be considered as primary courses within the curriculum upon which core skills are learnt. Further the author submits annexure M is an example of what a PLS curriculum could look like. The annexure accommodates two areas of specialisation, including interviewing skills and trial advocacy and it is in line with these modules that the goal, curriculum and teaching methods for PLS can be designed. The author submits that annexure M will serve to reduce the

burden on PLS – whilst this may not be ideal solution for some, so long as PLS continues as a catch net course and its value as a methodology is not advanced the true value that the course can promote will be overshadowed by an ambitious curriculum.

CHAPTER 7

CRITIQUE OF TEACHING METHODS

“The clinical legal studies curriculum utilizes a variety of methods. As a general rule, a classroom component is essential to each course in clinical legal studies curriculum. Where resources, cases, and law permit, law students work on live cases or problems is a valuable but not an exclusive method for the development of lawyering competencies.”¹

7.1 INTRODUCTION

In addition to the goals and curriculum design, it is critical to examine the teaching methods within Clinical Legal Education programmes (CLE). Traditional Law School teaching centres on the lecture method, Socratic dialogue or Landelian method of teaching.² Traditional legal education emphasises the study of doctrine, leaving students with limited practical skills development. By contrast, in addition to CLE being a teaching methodology it is also a course orientated towards the aim of exposing students to practical legal skills.³ Whilst CLE promotes a variety of practical methods of teaching,⁴ there are three methods that many consider to be universally accepted, namely the live client teaching method, simulation exercises and externships.⁵

¹ Report of the Association of American Law Schools- American Bar Association Committee on guidelines for Clinical Legal Education, Clinical Legal Education 1980 at 20.

² See chapter two for a discussion on teaching methods in Law Schools.

³ Roy Stuckey et al *Best Practices for Legal Education* (2007) 149–157.

⁴ Aside from the live-client teaching method, simulation exercises and externship other methods include street law programmes and community engagement projects. Also see David McQuoid-Mason ‘Law Clinics at African universities: An overview of the service delivery component with passing references to experiences in South- and South—East Asia’ (2008) *JJS* (special issue) 1–23. Also see N.R Madhava Menon *Clinical Legal Education* (1998) 266 where the author notes that there are several teaching methods that could be used to accomplish the goals identified. These methods include, simulation-based classes and case study work, legal aid clinics, field placements, combination and integration of clinical methods.

⁵ Stuckey op cit note 3 at 153. Also see Shaheda Mahomed ‘United in our Challenges Should the model used in clinical legal education be reviewed?’ (2008) *JJS* (special issue) 53–70. Also see McQuoid-Mason op cit note 4 at 7 where the author discusses street law type clinics and describes them as, “clinics that train law students to teach people legal literacy using interactive teaching methods.” Also see Elliott S. Milstein ‘Clinical Legal Education in the United States: In-House clinics, Externships, and Simulations’ (2001) 51 *Journal on Legal Education* 375 at 376.

In chapter three several authors propose that CLE cannot be taught through a single method, but rather through the use of several methods or an integration of methods. These thoughts tie in with propositions submitted by learning theorists — as noted in chapter two — in that, there is no single method that advances good learning, as no two individuals learn the same. Therefore, although CLE methods can be taught independently, it is suggested that an integrated approach be adopted. The above quotation by the Report of the Association of American Law Schools supports this suggestion. De Klerk furthermore argues that “clinical courses have become stale, following essentially the same formula since their inception. It appears that these courses are trapped in a certain mould, with very little growth or innovation being apparent over the past number of years.”⁶ Mahomed and Klaaren further state: “To date most South African clinical programs perceive the ideal clinic to include an in-house live client teaching model. In our view, this perception is misplaced. Clinical legal education is a method of teaching students practical skills. This method of teaching can be implemented in various ways. For example the clinical method can be incorporated into mainstream legal courses, the method can be taught using simulation exercises or by allowing students to engage in externship programs.”⁷ Amsterdam in support of the above suggestion notes that in its most basic form CLE includes student’s confrontation with a problem situation as lawyers encounter in practice. “The situation might be simulated — role-playing exercises in which some students played the role of legal counsellors and others played the role of clients, for example. Or, they might be real — students might be assigned to represent actual clients and to counsel those clients under the close supervision of clinical faculty members...”⁸

This chapter will be divided into three parts. In part one the three different methods — as mentioned above — will be discussed. The strengths and challenges that these methods promote will be discussed. In part two a critical discussion on the teaching methods adopted within PLS will be provided. Included in this part will be a discussion on the teaching processes used, more specifically the plenary lectures, unit based teaching and tutorial sessions. Each of these processes will be evaluated against the following two questions, first, is the process a necessary

⁶ Willem De Klerk ‘Integrating clinical education into the law degree: Thoughts on an alternative model’ (2006) 39 (2) *De Jure* 245–246.

⁷ Shaheda Mahomed & Jonathan Klaaren ‘Externships, and how could we possibly do this – A South African perspective’ (2010) at 7 – (unpublished copy with author). Also see Rodney J. Uphoff, ‘Why in-house live client clinics won’t work in Romania: Confessions of a clinical educator’ (1999-2000) 6 *Clinical Law Review* 315 at 328.

⁸ Anthony G. Amsterdam ‘Clinical Legal Education - 21st Century Perspective’ (1984) 34 *Journal of Legal Education* 616.

component of PLS? If so, what value does it add to the course? Secondly, what are the challenges of this process and how can they be addressed? In part three, conclusions will be drawn from the arguments presented.

7.2 GLOBAL PERSPECTIVE ON METHODS AVAILABLE TO TEACH IN CLINICAL LEGAL EDUCATION PROGRAMMES

As noted earlier, there are essentially three universally accepted methods in which CLE programmes could be taught, namely the live-client clinic, simulation exercises and externship programmes. Each of these methods will be discussed.

7.2.1 LIVE-CLIENT TEACHING METHOD

The live-client teaching model provides an opportunity for students to learn through practice.⁹ It is also referred to as ‘experiential learning’, whereby students learn while at the same time assisting clients with their legal matters.¹⁰ This model has been described by the Clinical Legal Education Organisation in the United Kingdom (CLEO)¹¹ as “Live-client clinics can take a variety of forms, ranging from advice only, through assistance and partial representation to fully fledged solicitors’ practices — ... the clinic may also be in-house or run through an external agency...”¹² According to Brayne *et al* this method has been described as follows: “In this model the clinic is based in the law school (hence ‘in-house’) and the unit is offered, monitored and controlled in-house too. The clients are real, with problems requiring actual solutions (hence ‘real-client’). The client base may be selected from the general public at large or from a section

⁹ Roy Stuckey *et al* op cit note 3 at 151.

¹⁰ Y. Vawda ‘Best clinical teaching practices in South Africa’ (2003) at 4 (unpublished copy with author) the author states that: “They are typically confronted with real life problem situations which are not discrete, pre-packaged legal problems, but messy, raw life experiences in all their concreteness and complexity.”

¹¹ CLEO – stands for Clinical Legal Education Organization it’s the United Kingdom equivalent of AULAI.

¹² Model standards for live- client clinics A Clinical Legal Education Organisation (CLEO) document (2007) at 4. (copy with author)

of the public...”¹³ Within this method clients are interviewed by the students, their matters discussed with the clinician and a way forward determined.¹⁴

According to McQuoid-Mason the physical location of the law clinic could include an on or off campus clinic and could therefore comprise of, the campus law clinic, off-campus law clinic, mobile law clinics and farm-out law clinic.¹⁵

The advantages of this method many have argued, is that it defines the unique characteristics of clinical programmes, namely to teach through practice.¹⁶ Furthermore, the live-client teaching model provides the foundation on which some of the goals of clinical legal education have been defined.¹⁷ According to Milstein these goals are described as, client-centred lawyering, theory-driven preparation and advocacy, professionally responsible legal work, fact investigation and development, persuasive advocacy, strategic planning and problem-solving, critical analysis of the justice system and reflective practice.¹⁸ According to CLEO the aims of the live-client clinics are to “enhance the students’ learning experience and understanding of:

- 1.1 the substantive law and legal process
- 1.2 professional responsibility and ethics
- 1.3 legal and transferrable skills
- 1.4 the role of law and justice in society”¹⁹

Within this model, students are typically taught a variety of skills, including how to conduct interviews; statement taking; drafting of letters and legal documents; analysis and problem solving; ethical responsibilities, procedural application and advocacy skills.

¹³ Brayne H, Duncan N. & Grime R. *Clinical Legal Education* (1998)12. Also see Milstein op cit note 5 at 376 in – house live- clients clinics are defined as “build around an actual law office, usually located in the law school, that exists for the purpose of providing students with a faculty- supervised setting within which to practice law and learn from the experience.”

¹⁴ See Milstein op cit note 5 at 376 where the author notes that, “In-house live-client clinics are built around an actual office, usually located in the law school, that exists for the purpose of providing students with a faculty-supervised setting within which to practice law and learn from the experience.”

¹⁵ McQuoid-Mason op cit note 4 at 3-6.

¹⁶ Brayne et al op cit note 13 at 15. Also see Milstein op cit note 5 at 376 where the author notes that “the advantage of this model is that the primary purpose of the law office in which students work is education. In these clinics, students’ first professional experiences are undertaken under the supervision of faculty. The pedagogy is designed to engender appropriate professional values while also teaching students the theory and practice of lawyering.”

¹⁷ See chapter six for a discussion on goals. Also see Elsebe Steenhuisen ‘The goals of Clinical Legal Education’ in De Klerk et al *Clinical Law in South Africa* (2006) 2nd ed at 279, where it is submitted that: “Clinical education and especially the live-client model is regarded as the best learning opportunity when it comes to the integration of these goals.”

¹⁸ See Milstein op cit note 5 at 378 for a discussion on the goals.

¹⁹ Model standards for live-client clinics A Clinical Legal Education Organisation (CLEO) document (2007) at 5.

Furthermore, this method is taught within an educational setting under the supervision of trained faculty members (or clinicians).²⁰

Stuckey et al lists the following to be the best practices for in-house clinical courses:

- “Use in-house clinical courses to achieve clearly articulated educational goals more effectively and efficiently than other methods of instruction could achieve.
- Be a model of law office management
- Provide malpractice insurance
- Approve student work in advance and observe or record student performances
- Balance student autonomy with client’s protection
- Have a classroom component
- Provide adequate facilities, equipment, and staffing
- Respond to the legal needs of the community”²¹

Although CLE goals have been modelled on the live-client method, it does not make the method itself perfect. The reality is that this method poses several challenges for all parties concerned, namely the client, clinician and student.²² These challenges include funding concerns, client numbers, supervision, infrastructure, assessment, the continuity of service and a high standard of professionalism from both clinician and student. These challenges have been addressed in chapter three and in an article written by the author titled *United in our challenges — Should the present model of teaching clinical legal education be reviewed?*²³ In this article recommendations in aid of dealing with these challenges are submitted. These recommendations centre on the following: how should clinics with large numbers of clients respond, how should clinics with limited client numbers respond, how should clinics with limited resources respond, options for clinics with a large number of students and how should clinicians wanting to increase their research output respond. The recommendations proposed for each of these will be discussed:

²⁰ See Milstein op cit note 5 at 376. Also see Model standards for live-client clinics A Clinical Legal Education Organisation (CLEO) document (2007) at 5.

²¹ Roy Stuckey et al op cit note 3 at 189–197.

²² David McQuoid-Mason ‘Clinical Legal Education: Its future in South Africa’ (1977) 40 *THRHR* 347 where he states that: “The main disadvantage of a legal aid clinic is that if it is too service-orientated it may be reluctant to limit its case-load which then leads to: repetition, low level work, heavy case loads, strain on students’ time, failure to focus on underlying legal concepts and loose supervision.”

²³ Mahomed op cit note 5 at 53–70.

(a) Clinics with large numbers of clients should consider:

- Client consultations by appointment only and initial screening to be conducted by a paralegal. This will reduce the number of consultations between students and clients in addition to limiting the number of files that are opened.
- Pro bono relationships with law firms and other non-governmental organisations should be established to allow the quantity of files to be reduced and to allow clinicians more time for research and publications.²⁴

(b) Clinics with limited number of clients should consider:

- Establishing working relationships with non-governmental organisations; the courts, the Legal Aid Board, the CCMA or other organisations that will refer matters to the clinic.

(c) Clinical programmes with limited resources should consider:

- Restructuring the clinical course to include placement opportunities, for example, students could observe matters at various courts or other quasi legal forums. Through this process of observation students could learn valuable skills relating to practices and procedure.
- Simulation exercises can be used to teach consultation skills and statement taking.
- In order to reduce the number of files that are being dealt with, clinicians should reflect on quality as opposed to quantity of files, ensuring that each file opened will contribute to the educational goals of the programme.

(d) Clinical programmes with large numbers of students should consider:

- Reducing the number of students, by converting compulsory clinical programmes to an elective programme. This option is bound to receive extensive criticism from the legal profession.
- Clinical programmes could be staggered over two or more academic years, instead of being concentrated in a single year at final year level.

(e) Clinicians wanting to increase their research output should consider:

- Attending research workshops to enhance their skills;
- Attending and presenting at conferences nationally and internationally;
- Mentorship programmes;
- Simply creating the time to 'just do it'.

²⁴ P. Stilwell *Clinical Law in South Africa* (2004) 1st ed at 40.

Therefore, although the live-client clinic has both its advantages and challenges, it is important to note that the method offers an ‘almost complete’ experience for students’ learning.

7.2.2 SIMULATION EXERCISES

Milstein notes that: “Simulations is a teaching method in which students are put into simulated lawyer roles to perform some aspect of the lawyering process in a controlled setting.”²⁵ Simulation exercises are problem exercises that resemble real life situations. Students engaging in these exercises, are required to act like lawyers and role play, for example simulation exercises are used when teaching interviewing skills, drafting skills, preparation for trial skills, legal ethics and trial advocacy.²⁶ “Simulation-based courses effectively allow learning to take place in a context that gives critical meaning to the subject matter. When students learn through the performance of actual lawyering tasks, they are able to encode learning in distinctive, active, and multiple ways.”²⁷

According to Stuckey et al the best practices for simulated courses include: a) simulation based courses that should be used to achieve educational goals more effectively and efficiently than other methods of instruction could achieve, b) ensuring that simulations are appropriate for participants and that their purpose and instructions are clear, c) simulations should be based on articulated theories of practice, d) each simulation should be balanced in detail, complexity and usefulness, e) simulations should be debriefed with all students in the course and f) law schools should provide adequate facilities, equipment and staffing.²⁸

There are many advantages to using simulation exercises.²⁹ The facts used to teach can easily be manipulated to achieve the goals of the exercise as this allows the teacher to

²⁵ Milstein op cit note 5 at 376. Also see Roy Stuckey et al op cit note 3 at 179 where it is noted that, “Simulation-based courses are courses in which a significant part of the learning relies on students assuming the roles of lawyers and performing law-related tasks in hypothetical situations under supervision and with opportunities for feedback and reflection.”

²⁶ Stuckey op cit note 3 at 151 & 180. Also see Menon op cit note 4 at 177–189 for an example by means of teaching trial advocacy through simulation exercises.

²⁷ John O. Sonsteng’ A Legal Education Renaissance: A Practical Approach for the Twenty-First Century’ (2007) Legal Studies Research Paper Series 66 (<http://ssrn.com/abstract=1084098> accessed on 10 November 2009).

²⁸ Stuckey op cit note 3 at 180–188.

²⁹ See AULAI manual vol 3 – Teaching Methodology editor Yousuf Vawda (2005) at 22–23 (copy with author) where the following advantages are noted: students are active participants, students could make decisions and respond accordingly, this method is fun, interesting and motivating, this method requires little preparation, allows students the chance to assume roles of others and provides opportunity for practice skills.

concentrate on particular issues.³⁰ Assessment of the performance poses no real problems, as the exercise takes place in a structured environment. Also, simulation exercises are cost effective, requiring only adequate premises and human resources. Because of the absence of actual clients, issues around professional duties are mostly absent. Finally, this process is less time consuming than those involving real clients and often are repeated from year to year.³¹

The disadvantage of this model is that students often find it less stimulating and rewarding than when dealing with real clients. As Tarr appropriately states, “simulations have limited value and do not begin to teach a fraction of what is taught in live-client clinics. Simulations do not create experience upon which students can draw to learn and develop their skills. Only real cases create the challenge of interviewing a person who is both similar to and different from the students...”³² According to the Association of University Legal Aid Institutes (AULAI) manual (volume three) on Teaching Methodology, there are several limitations to simulations courses. In summary, these include: simulation exercises can be time consuming, they involve considerable preparation, evaluation of the extent of student learning may be difficult to process, not all students may be comfortable with simulation exercises, simulation exercises are not appropriate for large groups and simulations’ processes must be carefully planned and managed or students may fail to take the activity seriously.³³

7.2.3 EXTERNSHIP PROGRAMMES

This method is also referred to as the out-house real-client (‘real-world’) method, ‘field placement programme’ or the ‘participation-observation’³⁴ model. Franklin has defined the externship programme as one that “consists of placing law students in public or private law offices outside the law school where they work under the supervision of attorneys who are not

³⁰ McQuoid-Mason op cit note 22 at 348 argues that: “Simulation has the advantage of being controlled by the teacher, which ensures that cases are completed before the end of the academic year and enables students to participate in, and observe the workings of, the legal process.” See also N. Franklin ‘The clinical movement in American legal education’ (1986) 1(2) *Natal University Law and Society Review* 13.

³¹ Brayne et al op cit note 13 at 15. Also see N. Tarr ‘Current issues in Legal Education’ (1993) 31 *How. L. J.* 5.

³² Brayne et al op cit note 13 at 15. Also see Tarr op cit note 31 at 5.

³³ AULAI manual volume 3 – Teaching Methodology editor Yousuf Vawda (2005) at page 19 – 20(copy with author).

³⁴ McQuoid-Mason op cit note 22 at 348. Also see Brayne et al op cit note 13 at 14. Also see Franklin op cit note 28 at 134.

employed by the university.”³⁵ Within this model students could be placed domestically or internationally. They could be placed at various courts, prisons or any other organisations that would allow students to learn legal skills.³⁶ Mahomed and Klaaren have noted the following on externship programmes:³⁷

- the placement of students will depend on several factors including the goals of the CLE programme,³⁸ supervision capacity, time constraints, finances and student needs,
- externship programmes could be designed as formally controlled placement opportunities or informal arrangements,³⁹
- the programmes can be compulsory programmes or elective programmes,
- students could be active in their placements or simply act as observers,
- externship programmes could be incorporated within doctrinal study programmes or be complements to existing CLE teaching,
- externship programmes can be scheduled for as long or short as may be necessary.

The goals attached to externship programmes may include, “training of students in the skills of being a lawyer, the acquisition of greater insight into the workings of various aspects of the legal system and profession, the development of a sense of professional responsibility, the

³⁵ Franklin op cit note 30 at 134. Also see Justice Initiative Database on CLE 2001 at 1 (copy with author). For examples on externship programmes see University of Wisconsin Madison – Prosecution and Public Defender project at www.law.wisc.edu/fjr/prosecutionproject/ accessed on 20 July 2013. Also see example at Yale Law School, prosecution project at www.law.yale.edu/academics/prosextern.htm accessed on 20 July 2013. For further examples see externship clinical programmes at Harvard Law School at www.law.harvard.edu/academics/clinical/clincs/externships.html accessed on 20 July 2013

³⁶ Milstein op cit note 5 at 380, where the author describes externships as programs where students are placed at various legal jobs, to perform legal work under the supervision of a lawyer in those agencies. Also see Menon op cit note 4 at 219 where the author discusses skills that could be learnt. These include legal research, legal analysis, argumentative legal writing, negotiation, client counselling etc.

³⁷ Mahomed & Klaaren op cit note 7 at 1–22.

³⁸ These goals can be influenced by legislation for example in South Africa the enactment of the South African Qualifications Authority Act of 1995 (SAQA) which lead to the establishment of the National Qualifications Forum (NQF). See Mahomed & Klaaren op cit note 7 at 10 where the authors note the following: “The NQF has identified a list of 10 exit level outcomes which promote the incorporation of skills teaching at law schools. At least 4 of these stated outcomes could be achieved by universities allowing their students to undertake externship programs.”

³⁹ Shirley M, Davies I, Cockburn T. & Carver T. ‘The Challenge of Providing Work — Integrated Learning for Law Students — the QUT Experience’ (2006) *International Journal of Clinical Legal Education* 135, the authors note : “Such experiences range from highly structured university controlled placements for academic credit, to informal situations where students volunteer to be part of a workplace outside of the formal university semester.”

growth of the student's capacity to reflect on and learn from experience."⁴⁰ According to Stuckey et al the best practices attached to externship courses are ensuring that externship courses achieve clearly articulated educational goals, that faculty are involved enough to ensure the achievement of educational goals, criteria should be established for approval of sites and supervisors, standards should be established assuring that work assigned to students will achieve educational objectives, establish standards to assure that field supervision will achieve educational objectives, students' needs and preferences must be considered when placing, adequate malpractice insurance must be provided, students' work should be approved in advance as well as observed or performances that are recorded, students must be prepared to meet obligations, students should be given a chance to interact with externship faculty and other students and there must be assurance of adequate facilities, equipment and staffing available.⁴¹

The advantages of this model are that students learn by observation and gain work experience,⁴² and a diverse range of students' needs can be met.⁴³ The model is also relatively cost effective, as opposed to in-house clinics.⁴⁴ The externship model could also benefit clinicians by allowing them space and time for research and writing.⁴⁵

The benefits are however overshadowed by several challenges, including problems relating to the assessment of students,⁴⁶ supervision and monitoring⁴⁷ ensuring that the students derive sound educational value,⁴⁸ student numbers⁴⁹ and identifying appropriate placements.⁵⁰

⁴⁰ Menon op cit note 4 at 219–220. Also see Milstein op cit note 5 at 380 where the author notes: "Learning goals of externships include providing students with a milieu within which to learn a substantive area in-depth while developing a critical perspective on the organization of legal work."

⁴¹ Roy Stuckey et al op cit note 2 at 198–205.

⁴² Idid at 198–199 when the authors submit, "In-house clinics have special strengths, but most do not accurately replicate the atmosphere of law practice in terms of their office settings, workloads, and ivory tower approaches to practice. Placing students in practicing lawyers' and judges' offices removes this artificiality, and students know they are working in contexts similar to those that await them after graduation."

⁴³ See Menon op cit note 4 at 220 where the author submits that: "Placements can be made in terms of student subject-matter interests as well as geographical interests. Timing can often be flexible in order to meet student need."

⁴⁴ Mahomed & Klaaren op cit note 7 at 5, where the authors note: "We note a final reason that clinical legal programs and law schools ought to consider externships — the budget. A benefit of this type of clinical program is that it could be much cheaper than operating an in house live client program." Also see Menon op cit note 4 at 220.

⁴⁵ See Mahomed op cit note 5 at 67–68.

⁴⁶ As students are not under close academic supervision during this period, developing an objective assessment is problematic. See Mahomed & Klaaren op cit note 7 at 13.

⁴⁷ See Brayne et al op cit note 13 at 14–15 the authors submit, "The principal difficulty in this approach lies in the supervision and monitoring of the clinic. All supervision in clinical work is time consuming and challenging. In the out-house clinic it is physically removed from some, if not most, of the day-to-day activity of the law school and therefore potentially more difficult to integrate and control the student's learning experience." Also see Mahomed &

As there are both advantages and disadvantages attached to the methods discussed above the author proposes that whilst considering which method to adopt one must be cognisant of the following: the goals of the University, Law School and clinical programme, the resources available to effectively implement a particular model (including staff and finances) and the learning needs of the students (as highlighted in chapter two). Ideally (as the author proposes in chapter five) the methods suggested above should be incorporated into courses within the broader law degree. However, in the event that the Law School curriculum is resistant to integration in this way, the author proposes an integrated model, whereby clinical programmes embrace components of all the different methods within a CLE programme. For example, when teaching trial advocacy skills, a simulation can be used to introduce students to the skill, students should then engage in a clinical matter that is ripe for trial and finally students should be given the opportunity to attend at court, engage with the various role players, observe the trial and finally reflect on their experiences. In annexure M the author attempts to demonstrate how the above mentioned models can be incorporated in teaching interviewing and trial advocacy. For both modules recommended the author proposes the use of simulation exercises, live-client clinic engagement and externship type experiences including visits to courts or other legal entities to witness interviews and trials conducted by other role players. The author submits that for some the through of integrating methods may seem challenging however the author submits that once the different methods are understood and examples of how they can be implemented demonstrated, academics may find integration very useful.

Klaaren op cit note 7 at 12 where the authors explore solutions to the above challenge. Also see Menon op cit note 4 at 221.

⁴⁸ Also see Tarr op cit note 31 at 7 where the author submits: “The main disadvantage is the lack of control over the quality of educational experience.”

⁴⁹ See Mahomed & Klaaren op cit note 7 at 11.

⁵⁰ Idid at 11.

7.3 UNIVERSITY OF THE WITWATERSRAND PRACTICAL LEGAL STUDIES — TEACHING METHODS

At the University of the Witwatersrand PLS is taught using the in-house real client teaching method and simulation exercises. These methods are often integrated, for example, during PLS simulations are used (during plenary lectures and unit based teaching) in aid of teaching writing skills, numeracy skills, research skills and trial advocacy skills. These simulations are often complemented with activities and experiences in the real client clinic.

The process (or mode) through which we teach the above methods includes plenary lectures, unit based teaching and tutorial session.⁵¹ For the purposes of this thesis, each of these processes will be critically discussed and responses to the following questions explored:

- Is the process a necessary component of PLS, if so, what value does it add to the course?
- What are the challenges of this process and how can they be addressed?

7.3.1 PLENARY LECTURES

Plenary lectures (also referred to as seminars) are lectures that are presented to the entire student class.⁵² Although some may argue that plenary lectures enhance students' knowledge base, it should be noted that: "The *pure* lecture method has been shown to be only marginally effective as a means of conveying knowledge, as it caters to the needs of the small proportion of students who are especially intuitive, verbal, deductive, reflective, and logical. Lectures should ideally always be delivered in combination with active learning methods..."⁵³ Therefore, it is recommended that these lectures incorporate simulated exercises⁵⁴, "tell/ show/do practices"⁵⁵, or

⁵¹ See Milstein op cit note 5 at 377 where processes of teaching are also referred to as learning modes and for a discussion on other 'modes' of teaching including case rounds.

⁵² For the last eleven years these lectures are presented on a Tuesday afternoon for 90 minutes. (In 2012 the lecture times were changed to Monday) Also see AULAI manual volume 3 – Teaching Methodology editor Yousuf Vawda 2005 at page 32–33 (copy with author) where a definition of a lecture was noted as "A lecture is a discourse or presentation by a teacher, usually to a large group of students, with emphasis on substantive content and theory. On its own this format is not suited to skills development or practical training: in such a context the lecture should be used in combination with other teaching methods."

⁵³ AULAI manual volume 3 – Teaching Methodology editor Yousuf Vawda(2005) at page 37 (copy with author).

⁵⁴ Milstein op cit note 5 at 377.

⁵⁵ According to the AULAI manual volume 3 at 35, the tell/show/do (used by the Law Society in the practical legal training schools) practices propose that: "The initial portion of the lecture time is devoted to outlining and explaining the relevant legal theory or principles (TELL). This is followed by demonstrating the principle in action by way of examples, precedents, anecdotes or observing role play (SHOW). The final portion of the lecture is

guided reciprocal peer questioning that demonstrate the practice.”⁵⁶ Menon suggests that plenary lectures incorporate pre-assigned reading to students on skills, followed by a demonstration during the lecture and a discussion on how and why the task was performed. Students then receive problem exercises that require them to perform the skill required. Subsequently students receive feedback on the performances.⁵⁷

These lectures generally cover a wide spectrum of topics as demanded by the curriculum. Milstein notes that: “The syllabus for the seminar typically includes client interviewing, client counselling, case theory, strategic planning, fact investigation, negotiation, persuasion, and trial skills such as direct and cross-examination and closing arguments.”⁵⁸ Similarly during PLS, plenary lectures are delivered on the following: interviewing and statement taking, drafting skills, professional management, numeracy skills, research and problem solving, drafting skills and preparation for trial. The curriculum content attached to each of the above mentioned lectures is further discussed in chapter six. Most of these lectures are taught by clinicians that have expertise in a particular area.

In response to question one raised above: Is the process a necessary component of PLS, if so, what value does it add to the course? The author submits the following:

Plenary lectures play a vital role in PLS, as during these lectures students are introduced to the theory associated with relevant skills. Once the theoretical framework has been set students often engage in simulation exercises.⁵⁹ Knowledge gained through theory and simulation is then put into actual practice in the live-client clinics. Stuckey et al notes that the classroom component is essential for the best practice of in-house clinics.⁶⁰ It must be submitted that the present PLS curriculum — although overloaded as discussed in chapter six— is structured, allowing for fluidity within the course. Further to gain value from these lectures it must be assured that the methods used to teach align with the outcomes noted in the curriculum which of course should

devoted to engaging students in doing exercises where they are required to apply the knowledge gained in the first two phases. Here students can be called upon to do written or oral or to engage in role play (DO).”

⁵⁶ According to AULAI manual volume 3 at 35 – within the guided reciprocal peer questioning model students are divided into groups and are presented with a set of generic questions related to the lecture. Students are then required to provide answers to these questions. (copy with author)

⁵⁷ Menon op cit note 4 at 180.

⁵⁸ Milstein op cit note 5 at 377.

⁵⁹ Roy Stuckey et al op cit note 2 at 146 – where the authors note “Hypothetical problems can provide contexts for helping students develop their analytical skills and attain knowledge and understanding of theory and doctrine. They can be used as spring boards for discussing justice, professional roles, and other important concepts.”

⁶⁰ Ibid at 196–197.

then align with the goals of the programme. The author submits that goals, curriculum and method need to be supportive of each other in order for the course to be considered of any value to the students. The author submits that plenary lectures in PLS does met the above standard.

What are the challenges of this process and how are they best addressed? The challenges with plenary lectures include the following: These lectures are not compulsory lectures. As with most parts of the academic curriculum students have a choice as to whether they should attend lectures or not. However, the value as well as foundation that these lectures, provide are vital for student engagement, particularly in the live-client clinic. Further as submitted in chapter six most students are exposed to certain matters for the first time in PLS, for example matters on professional management. As noted in chapter six the broader law school curriculum does not facilitate for teaching professional management. Therefore the author submits that these lectures should become a compulsory part of the student curriculum alternatively the substance relevant to these lectures be incorporated into other courses during the course of the law degree.

Having said the above, teaching large numbers of students can prove to be very challenging. During PLS in 2008 there were 308 students registered for the course, in 2009, 232 students registered for the course, in 2011 there was 297 students registered for the course and in 2012 there were 308 students registered for the course. Students often get distracted or even get lost in the crowd as one might say. Similarly, if students are asked to engage in simulations during these classes, one cannot help wonder how many students are actually engaging in the activities presented or gaining any valuable experience from it.

7.3.2 UNIT BASED LECTURES

This process of teaching was introduced just a few years ago — particularly in response to the need to teach students specialised practical skills. Unit based lectures are lectures delivered to smaller groups of students. As noted in chapter four, students in PLS are divided into groups. Each group specialises in a particular area of law. At the beginning of the academic year students are initially taught in their respective groups. Clinicians teach the integration of substantive law and practice relevant to our own disciplines.⁶¹ For example, as a labour law clinician the author

⁶¹ See chapter five and chapter six for further discussion.

taught her students how to apply the theory of labour law to practice.⁶² These lectures incorporate the usage of simulation exercises that further afford students the opportunity to link theory with practice.

There are two possible benefits of teaching within the unit based lectures: first, these lectures allow student and clinician the opportunity to engage one on one; secondly, this allows the students the opportunity to gain practical knowledge in a respective area of law as they proceed to engage in the live-client clinic.

Is the process a necessary component of PLS, if so, what value does it add to the course? In response to this question the author submits: This method of teaching has proven to be extremely successful. It has been noted that after students complete the unit based lectures they are able to confidently identify relevant legal problems and basically apply the litigious processes required. As this process of teaching involves excessive usage of simulations, these lectures stimulate the link between theory and practice.

What are the challenges of this process and how are they best addressed? The shortfalls of this method include the following: Students are only taught the practical application relating to their unit of allocation.⁶³ Furthermore, as with plenary lectures, unit based lectures are not compulsory. During PLS, unit based lectures only take place during the first teaching term. It is suggested that lectures continue throughout the academic year as it may be better served to convert some of the plenary lectures as unit based lectures. Finally, in chapter six the author argues that one should be wary of overloading the PLS curriculum and in line with this argument the author proposes that the courses in the LLB and LLM degree integrate the teaching of both theory and practice.⁶⁴ Of course, this will elevate the burden on PLS.

7.3.3 TUTORIAL SESSIONS

Tutorial sessions (or otherwise referred to as supervision-meetings) may be defined as sessions between clinician and student pairs (or teams)⁶⁵ where matters relating to clients' cases are extensively discussed. Milstein describes these sessions as intensive sessions between supervisor and student teams used "to discuss preparation or to analyze critically work that has been done.

⁶² See chapter six for a breakdown of the outcomes attached to the Labour Law Unit based lecture.

⁶³ For a further discussion on the challenges of a specialised clinic/integrated clinic see chapter six.

⁶⁴ Further evidence on this argument will be led in chapter eight.

⁶⁵ See chapter four for discussion on student pairs.

These meetings are frequent and include, among other things, review of the students' written work, strategic choices, and reflections on what has been learned."⁶⁶ In PLS, it is mandatory for each student pair to meet with their appointed clinician on a weekly basis or as often as may be required — depending on the nature of the matters that the students are engaged in. Tutorial sessions primarily allow student and clinician the opportunity to discuss and strategise client's matters and of course provide the ideal opportunity for reflection.⁶⁷ As discussed in chapter two and five in the author's opinion the process of reflection completes the learning process.

During tutorial sessions primary skills⁶⁸ are emphasised and students are often taught a number of secondary skills⁶⁹ including, consultation skills, problem solving, legal writing, advocacy, professional management, and research skills.

Is the process a necessary component of PLS, if so, what value does it add to the course? The author submits the following: Tutorial sessions should be considered as an indispensable process within clinical teaching as it is during these sessions that students and clinician engage best with each other. It is during these sessions that students' learning is internalized.

What are the challenges of this process and how are they best addressed? The strength of any clinical programme depends on the strength of the clinician leading the tutorial session. Thus, tutorial sessions must be used effectively. This raises the question: 'when are tutorial sessions effective?' Is it when students are told what to do OR when students are asked what needs to be done? It is submitted that tutorials should be used as a platform to stretch students thinking. Questions should be posed that encourage students to think for themselves and ask questions that are enquiring. Students should be taught to explore options and go out and research appropriate solutions for the clients.

Student numbers have an effect on the quality of tutorials delivered. As noted above in 2008 there were 308 students registered for the course, in 2009, 232 students registered for the course, in 2011 there was 297 students registered for the course and in 2012 there were 308 students registered for the course. On average in any given year there are nine clinicians available to tutor students. These persons include permanent employees as well as grant funded employees. Grant funded employees in general are allocated a smaller load of students as they

⁶⁶ Milstein op cit note 5 at 377.

⁶⁷ See chapter five for a discussion on reflections and tutorials.

⁶⁸ Chapter five for identification of primary goals.

⁶⁹ See chapter five for further discussion on secondary skills.

are in addition required to meet funders' demands.⁷⁰ Therefore on average permanently employed clinicians are allocated a load of forty students – that is twenty pairs. It is submitted that the large numbers of students engaged in PLS does not allow clinicians the opportunity to engage in quality tutorial sessions. Often most clinicians tutor continuously for five hours on a number of days in the week. This does not allow enough time for reflection. Therefore as discussed and submitted in chapter six clinicians teaching PLS do not always spend enough time with their students to reflect on that which has been learnt. Recommendations for the advancement of this goal include reducing student numbers in PLS and educating new clinicians on what the process of reflection involves. As noted earlier in this chapter students numbers could be reduced by changing the status of PLS from a compulsory course to that of an elective course. This recommendation is bound to receive much criticism as it goes against the ideology for the incorporation of skills teaching in the legal curriculum. As noted earlier in this thesis PLS serves as the primary skills teaching course or rather the catch net course at Wits and therefore converting the course to an elective programme will prove to be challenging.

7.4 CONCLUSION

Practical Legal Studies portrays a perfect example of a coin. On the one side there is no doubt that PLS embraces many dynamic features, for example its one of the few courses at Law School that promotes the integration of theory and practice — and an illusion that it does this with such grace. Both the goals and curriculum are inspirational, the methods of teaching innovative, as the cliché goes, it's thinking out of the box.

On the other side of the coin, we have the intensity of the course — a course that carries the burden of the profession. Its goals are over-ambitious, its curriculum overloaded and its method of teaching stretched between addressing needs of the students versus the needs of society.

⁷⁰ In 2011 there were seven permanently employed clinicians in PLS. However, every year one of the permanent clinicians is afforded sabbatical — so only six permanent clinicians (which includes the Director of the clinic) are available to teach full student loads. In addition, the University has employed several grant funded employees that have the potential to assist in teaching, but they do not take on a full load of students. In 2011 there were three grant funded clinicians available to teach. So, in total for 2011, there were nine clinicians available to teach. Also see Mahomed op cit note 5 at 59.

This gives rise to a series of further unanswered questions. Has PLS reached its peak? Where to from here? Responses to these questions are explored in the chapter that follows.

PART THREE

CHAPTER 8

THE WAY FORWARD: RECOMMENDATIONS FOR ADVANCING CLINICAL LEGAL EDUCATION IN THE LLB AND LLM DEGREES: (ONE STEP BACKWARD AND TWO STEPS FORWARD)

“We accept that clinical legal education has its limits. We do not suggest it is the best methodology for achieving all objectives of the law school. However, we argue that its integration with other techniques can provide students with a more complete legal education. It has value not only in developing skills competencies but in deepening understanding of the substance of the law.”¹

8.1 INTRODUCTION

This chapter concludes the dissertation by engaging with a crucial yet little discussed feature of Clinical Legal Education (CLE) — its differentiation from mainstream law school teaching. In chapter two the author argues that the best form of teaching within law schools should include theory, practice and reflection. During the concluding remarks of the chapter the author states that one of the most effective ways for law schools to achieve the best formulae of teaching would be to introduce the clinical methodology² into substantive courses. In chapter three the author discusses the contemporary nature of the clinical legal methodology. In that chapter the author argues that clinical legal methodology or experiential learning — as it is now so often referred to — promotes a teaching methodology that incorporates theory, practice and reflection. It is not limited to the live-client clinic but can rather be adopted in a variety of formats and

¹ Jonny Hall & Kevin Kerrigan ‘Clinic and wider law curriculum’ (2011) *International Journal of Clinical Legal Education* 37. Also see Jonny Hall & Kevin Kerrigan Clinic for All 2006 16 (unpublished copy with author)

² At this point in the thesis the terms clinical methodology can be used synonymously with experiential learning and skills teaching.

it is through this process that students learn a range of lawyering skills. Further on in that chapter, the author discusses and promotes the idea of integration of the methodology into the broader legal curriculum. It is this idea of integration that the author plans to develop further within this chapter as a conclusion to the thesis' argument.

The idea of promoting integration is not a new one. For years many academics have promoted the incorporation of experiential learning methodology throughout the law degree.³ For example, De Klerk submitted that "firstly, that clinical experiences must be spread over the four year degree as opposed to being limited to the final year; secondly, that clinical courses should be integrated and taught in conjunction with academic courses; and thirdly, that a clinical experience during the law degree must be compulsory for all students."⁴ The process of implementation of this methodology has however been a slow one.

According to Brayne *et al* the starting point would be for the law school to have clearly articulated learning objectives and assessment criteria. The role of skills would need to be addressed as well as a close liaison between colleagues in both regular classes and clinical courses will be necessary.⁵ De Klerk states that "integration could be achieved, as suggested by Woolman et al, by linking specialized clinics to substantive areas of law, a viable option for many clinics where specialized clinical practice has already paved the way for specialized clinical teaching. Integration could also be achieved by 'unpacking' clinical activities and spreading them over the four-year law degree."⁶ Sonsteng proposes a *seventeen year* plan.⁷ He says that "the model addresses the criticisms of the current system, uses available tools, keeps what works well while discarding what does not, is flexible enough to incorporate new and creative ideas, recognizes the needs of a diverse adult learning population, is cost effective, and lives up

³ John O. Sonsteng A Legal Education Renaissance: A Practical Approach for the Twenty-First Century (2007) Legal Studies Research Paper Series 20- 48 (<http://ssrn.com/abstract=1084098> accessed on 10 November 2009).

⁴ Willem De Klerk 'Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model' (2005) 39(2) *De Jure* 2 245 at 249.

⁵ Huge Brayne, Nigel Duncan & Richard Grime *Clinical Legal Education* (1998) at 258.

⁶ Willem De Klerk 'University Law Clinics in South Africa' (2005) 122(4) *SALJ* 948.

⁷ The seventeen year plan includes, year one: informal discussions, year two — formal meetings, year three — and four — the design phase, year five — the debate, year six—revisions and adoption of plan and year seven through to seventeen — implementation and revisions.

its promise to train lawyers for the practice of law.”⁸ Stuckey’s proposition for the best practices for organising the programme of instruction, promotes the integration of the teaching of theory, doctrine, and practice.⁹

Over the last forty years CLE programmes in South Africa have not advanced as a teaching methodology. Instead they remained static, isolated and most often elective courses in the law school curriculum.¹⁰ Similarly, as shown in chapters four, five, six and seven, while it is clear that Practical Legal Studies (PLS) at the University of the Witwatersrand (Wits) has made significant inroads towards helping that law school develop and offer a dynamic law degree¹¹, little has consciously been done to advance the formulae of teaching, either by expanding on the methodology or consciously incorporating the teaching methods into the broader law degree.¹²

In conjunction with such apathy from law schools, various professional and legislative bodies have begun to advocate and promote the need for change within legal education. The Council for Higher Education (CHE) proposed in 2010 the need for the incorporation of skills teaching in the law degree. In summary, the Council proposed that literacy, reading, writing, research and problem analysis be incorporated into the law degree as “legal education must be skills oriented”¹³. The Council further proposed that students should be exposed to the practical application of the law, for example through work placements, moot courts and /or law clinics.¹⁴ In response to these sorts of requests some national universities are attempting to revise their curriculum to incorporate skills teaching.¹⁵ However, in most instances, including at Wits Law School this continues to

⁸ Sonsteng op cit note 3 at 94– 98.

⁹ Roy Stuckey et al *Best Practices for Legal Education* (2007) 97–100.

¹⁰ Hall & Kerrigan op cit note 1 at 27 where the authors note: “Although clinical legal education often thrives in law schools it does so with a distinct identity, purpose and values so that a psychological (and sometimes physical) barrier is erected between regular learning and clinical learning. In most institutions clinic is seen as an optional course or extra-curricular activity rather than a core vehicle for delivering knowledge and skills.”

¹¹ See University of the Witwatersrand Law School report 2011 titled ‘Developing an integrated skills-based curriculum for the LLB degree at the School of Law’, University of the Witwatersrand at pg 1. (unpublished copy with author)

¹² De Klerk op cit note 4 at 245–246. A discussion on further developments at the University of the Witwatersrand Law School follows later in this Chapter.

¹³ Power point presentation led by members of Council for Higher education, The LLB Curriculum Project Colloquium, 11 November 2010 at 8. (copy with author)

¹⁴ See NLELC meeting document 4 November 2010 at pages 4– 6.

¹⁵ For example University of the Witwatersrand, the University of Pretoria etc. See below for further details.

be done in isolation from the already existing CLE programmes. The author cannot help but question whether the universities that are actively engaging in curriculum reform, are unconsciously incorporating into their curricula the clinical methodology in the guise of skills teaching – as previously defined in this thesis? If so, such universities should explicitly draw on the rich body of CLE scholarship and experience and should increase integration even further.

In an attempt to provide a reasonable answer to the above question, this chapter is made up of four parts: first, the author reflects on the benefits and challenges of integrating the clinical methodology into mainstream substantive courses. Some national and international (with particular reference to universities in the United States of America) law schools have incorporated the CLE methodology into their curricula—either consciously or otherwise. Second, the author will discuss the Law School curriculum at Wits. Between 2008 and 2012 the University of the Witwatersrand Law School developed and implemented a skills based curriculum. The author will explore the effectiveness of the new curriculum and argue that although an integrated skills’ curriculum has been implicitly incorporated, the non-reflective nature of the process and the accompanying failure to consider questions that would have been raised by CLE promoters, give rise to a number of challenges. For example, are the lecturers adequately trained to teach skills based courses? Thirdly, the author proposes a realistic alternative and discusses how clinical legal methodology can be consciously integrated into a primary course, for example Civil Procedure. Fourthly, the author concludes by addressing the questions: Are university Law Schools unconsciously incorporating the clinical methodology — as previously defined in this thesis — into their curricula? Should the answer to the above question be in the affirmative, the author additionally asks what the purpose of a course like PLS at the University of the Witwatersrand will be in the future? The author will argue that as the newly introduced curriculum at the Wits Law School improves and develops, in future, PLS should be discontinued as a standalone course, as the skills it transfers should be incorporated into mainstream courses. The author argues that although some universities including Wits have made significant inroads in introducing skills’ teaching into their curricula, more work still needs yet to be done.

8.2 OVERVIEW ON THE QUESTION OF INTEGRATION — BENEFITS AND CHALLENGES

The integration of clinical methodology can happen at a number of levels,¹⁶ first, integration can take the format of introducing simulation exercises that help students learn a range of skills; secondly, integration could take place by engaging the students in externship opportunities and thirdly, integration could involve student's engagement in live-client clinics.

All of the above formulas of integration pose a number of benefits, as well as challenges that a Law School should consider. The benefits include financial sustainability, faculty integration and student engagement¹⁷. Challenges include institution buy-in,¹⁸ professional commitment, class sizes, resource commitments and curriculum design. Each of these will be respectively discussed.

Indeed, one of the most immediate benefits of integration is the cost saving to law schools in general. Standalone clinical programmes can prove to be very costly to sustain.¹⁹ Most clinical programmes receive little or no financial support from the Law School faculty. As a result, many programmes are forced to fundraise in order to sustain cost, diverting scarce teaching and management resources. Of course, with funding commitments come other obligations, including meeting the needs of the funders. This then evolves into a vicious circle of concentrating on meeting funders needs' as opposed to focusing on educational needs of the student. Integration of the clinical methodology into the mainstream law school will allow for costs to be absolved into Law School budgets, thus ensuring the sustainability of the clinical methodology. As noted by Hall

¹⁶ See Hall & Kerrigan op cit note 1 at 31. Also see De Klerk op cit note 4 at 247 where the author notes that the alternative for CLE programmes can be presented in three ways "that clinical experiences must be spread over the four year degree as opposed to being limited to the final year; secondly, that clinical courses should be integrated and taught in conjunction with academic courses; and, thirdly, that a clinical experience during the law degree must be compulsory for all students."

¹⁷ Hall & Kerrigan op cit note 1 at 30 where the authors discuss four benefits of integration; they include inclusivity, enhancing the personal development and expertise of the academy, sustainability and student engagement.

¹⁸ See De Klerk op cit note 6 at 948 where the author lists three challenges attached to integration that include, first, overcoming the negative perception attached to clinics held by academics, secondly, integration would mean a curriculum change which could promote further institutional resistance and thirdly, resource constraints.

¹⁹ See chapter three for further discussion.

and Kerrigan: “Integration of clinic with the core curriculum reveals its value as a teaching methodology and enhances its prospects of surviving and prospering in the long-term.”²⁰

A second benefit is faculty integration. To achieve this, clinicians would have to be employed as academic staff members — and not as administrators. To date, a number of university law clinics continue to employ clinicians, including the Director, in the capacity as administrative staff as opposed to academic members. Furthermore, salaries for clinical staff are mostly dependant on grant funding received. As a result, job security poses a major risk to the success of the programme.

Clinical staff employed as administrators do not receive the same employment benefits as academic staff, particularly in relation to promotions and sabbatical opportunity. Without integration, clinical teachers continue to be considered as part of the lower end of the spectrum of academic teaching, particularly because the research output from clinical staff is generally limited. Clinical members who do enjoy academic positions themselves need to understand that they are employed at academic institutions and therefore there is a need to concentrate on educational output as opposed to access to justice. Therefore, aside from having defined goals, curricula and assessments processes, clinicians must engage in research and publication. Integration will allow for a more unified faculty — benefiting both academics as well as students. Hall and Kerrigan refer to this form of benefit as creating an environment of inclusivity.²¹

A third benefit is addressing students’ needs. As already noted in chapters two and three, integration promotes positive learning, therefore, addressing a wide range of students’ needs. From a legal education perspective students’ needs may include (but are not limited to) reading, writing, analytical ability, oral communication and practical implementation. Whilst traditional teaching methodology may attempt to address some of these needs (consciously or unconsciously) a gap remains, particularly in areas of oral communication and practical skills. CLE as a learning methodology promotes the acquisition of knowledge through a variety of methods — the delivery of theory, practical application and reflection. Through this process various learning needs of students can be

²⁰ Hall & Kerrigan op cit note 1 at 30.(unpublished copy with author).

²¹ Ibid at 30.

addressed. Integral to the methodology is the promotion of a range of skills²² including life-long learning skills and values' orientation. The author submits that in particular to South Africa, the methodology caters for the needs of students at large; particularly, for students from disadvantaged backgrounds.

The benefits discussed are of course balanced against a range of challenges to the project of integration of CLE into the mainstream of law schools in South Africa. These challenges include those of professional commitment, class sizes, and curriculum design.

In terms of professional commitment, finding the right lecturer within a law school to advocate this methodology can be a challenge. In order to give effect to the clinical methodology, lecturers across the law school must understand how to implement the methodology — and the commitment of lecturers towards the methodology must be affirmed.

Some may argue that the clinical methodology may be a model suited only for teaching smaller classes and that this thus poses a challenge for the project of integration. Indeed, the teaching of larger classes may require the engagement of more simulated exercises. However, even this may prove challenging, should the class size be larger than between eighty–hundred students.

Finally, designing an appropriate curriculum as well as appropriate assessment tools may prove to be challenging, especially if one does not understand the methodology. Over the past few years a number of universities have overcome this challenge by being at least to some degree explicitly reflective in engaging in a process of curriculum design. This chapter continues by discussing how law schools have responded (if at all) and/ or continue to respond to curriculum change particularly in light of the need to increase skills teaching into the curriculum.

8.2.1 CURRICULUM INNOVATIONS AT SOUTH AFRICAN UNIVERSITIES

In South Africa several universities have submitted that their curricula are now skills driven. Some universities go so far as to note that skills curricula were implemented as

²² See chapter six for further discussion on skills.

far back as in 1998.²³ Thus, one cannot help but question why is there a disjuncture between the needs of the profession and legal education? Surely if we were all engaging in skills teaching, our students would be adequately prepared for the different professional careers they engage in? Is it that we are not articulating the concept of skills teaching clearly or is it that we would like to believe that we are teaching skills when in fact we are not? What follows is a discussion on skills teaching offered at five South African Universities and several American ones.

At the University of the Western Cape there are four skills courses taught during every year of the curriculum. In the first year, Introduction to Legal Studies, in the second year: Critical Legal Analysis, in the third year, Introduction to Advocacy, and in the fourth year, Preparing for Legal Practice. The aim of teaching these courses is to provide skills training including analytical and critical thinking skills, drafting and advocacy skills. Although these courses are designed as skills courses they are considered “academically substantive and equivalent to the traditional law courses”.²⁴ All other modules are encouraged to incorporate skills teaching.

At the University of Cape Town (UCT), in a document titled *Programmes in the Faculty* it is noted that their LLB degree facilitates for the teaching of generic practical skills “such as problem solving, analysis, research, and communication skills, as well as practical legal skills such as drafting of particular kinds of legal documents and legal arguments, both written and verbal. Law students are required in the Intermediate Level to make constructive use of knowledge and skills they acquire by contributing to the community through Legal Aid, Community Services, Shawco, Rape Crisis, Parliamentary Monitoring Group or similar outreach activities.”²⁵

At Rhodes University students participating in their third year are required to engage in Legal Skills and Legal Practice. Legal skills incorporate the teaching of research skills, legal ethics, writing skills, numeracy skills, applied logic and critical reasoning, structure and delivery of legal argument. In Legal Practice students participate in the Law Clinic. They engage with real clients and participate in file and case management, consultation interviewing, communication and drafting skills. The aim of

²³ For example University of Pretoria—discussed in more detail below.

²⁴ E-mail received from Professor Raymond Koen on 29 May 2012. (copy with author).

²⁵ http://www.uct.ac.za/downloads/uct.ac.za/apply/handbooks/fac_law_2012.pdf accessed on 20 July 2013.

this course is to apply the legal knowledge acquired in academic studies. Other skills driven courses include Negotiation and Mediation, Arbitration.

At the University of the Orange Free State skills teaching is administered by the Department of Procedural Law. The Legal Practice module is offered in all four years of study.

At the University of Pretoria two courses were introduced since 1998; these include Legal Studies 110, Legal Studies 120 and a compulsory Essay component in their final year of study. In the new proposed curriculum which will be introduced in 2013, Jurisprudence 110 and Jurisprudence 120 (which will integrate introduction to law, legal history and legal skills) will be introduced in the first year of study. In the second year Legal Practice 210 and 220 will be introduced and in the third year Research Methodology 320 will be introduced.

8.2.2 REFLECTION OF INNOVATION AT UNIVERSITIES IN THE UNITED STATES

In the United States, already in 1980, the American Bar Association Committee on Guidelines for Clinical Legal Education proposed a three year integration model.²⁶ The model aimed to introduce CLE methodology throughout the three year legal curriculum. It was envisaged that in the first year students would be taught on “Introduction to client representation, document preparation, and professional responsibility through simulated problems taught as part of the introductory writing program, or as part of a separate course.”²⁷ Further in the first year of study students should engage in the introduction to appellate advocacy. In the second year students should be taught interviewing, counseling, negotiating skills as well as preparation for trial. In their third year students, in summary, should be exposed to litigation or trial advocacy skills.²⁸ This proposal was motivated by two factors: first, integration will allow students “the opportunity to assimilate lawyering roles and integrate law school and summer work experience with

²⁶ Report of the Association of American Law Schools — American Bar Association Committee on Guidelines for Clinical Legal Education, Clinical Legal education 1980 62– 63.

²⁷ Ibid at 63.

²⁸ Ibid at 63.

clinical study specifically designed to focus on their professional development;”²⁹ and secondly, integration will allow students the opportunity to draw on their experiences during traditional course work.

In the 1990s the first form of curriculum change was witnessed at Seattle Law School. However, only since the publication of the MacCrate Report and Carnegie Report did the United States begin witnessing changes within other Law School curricula.³⁰ In March 2009, as a response of the Carnegie report, a consortium of ten law schools was formed.³¹ This consortium named Legal Education Analysis and Reform Network (LEARN) noted the following as its plan of action to “maintain and enhance the momentum for law schools across the country”³² to create a “wider array of learning environments including simulations and clinical work and to further integrate the teaching of substantive knowledge, legal skills, and professional values.”³³

At Drexel Law School a curriculum was designed to incorporate practice and theory — as noted by the Dean of the Law School, the goal of the curriculum is to get “our students embedded in the practice of law early and really trains them to hit the ground running.”³⁴ In 2006, Harvard Law School witnessed a change in its curriculum. The change aimed at introducing a curriculum that is more practical and one that adopted a more problem based approach. The changes included three new courses including a course on problem solving in the first year of study.³⁵ In the second and third year the programme is designed to allow students to engage more in clinical courses, internships and study abroad programmes.³⁶ At Vanderbilt University changes, are reflected with the

²⁹ Ibid 62 – 63.

³⁰ General Description of Planned Projects 2009-2010.

<http://www.albanylaw.edu/media/user/celt/learnprojects.pdf> accessed on 20 July 2013.

Document by Legal Education Analysis and Reform (LEARN) — at p 13 “During the two years since the Carnegie Report was published, many law schools have continued or began to reflect on their curricula and find ways they can improve.” (copy with author)

³¹ These Law Schools include: City University of New York, Georgetown, Harvard, Indiana University (Bloomington), New York University, Southwestern, Stanford, University of Dayton, University of New Mexico, and Vanderbilt University.

³² Clark D. Cunningham & Charlotte Alexander, ‘Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation’s Critique of American Legal Education’, - Draft copy and Abstract at 15. (copy with author)

³³ Ibid 15. (copy with author)

³⁴ Article written by Jill Schachner Chanen, Re-engineering Schools across the country are teaching less about the law and more about lawyering, *ABA Journal* , July 2007 42.

³⁵ Ibid at 44.

³⁶ Stuckey et al op cit note 9 at 286.

inclusion of more original sources as opposed to appellate opinions, into standard case-law courses like contract and civil procedure. At City University of New York (CUNY) the Law School promotes an integrated curriculum that promotes traditional substantive law and a lawyering programme that teaches skills. “The basic premise of the curriculum is that theory cannot be separated from practice, abstract knowledge of doctrine from practical skill, and understanding professional responsibility from professional experience.”³⁷ Other law schools witnessing change in the United States include Stanford Law School, Indiana University Maurer School of Law (Bloomington) and Washington and Lee School of Law.³⁸

In some sense, this discussion takes us no further in addressing the question posed at the beginning of this section. While it is apparent that some shift is occurring, such a shift may be more rhetorical than real — which is not to deny the power of the rhetorical framing of the skills’ teaching concept. In any case, it is only when one can present detailed evidence or insider knowledge that a relevantly confident observation can be voiced which addresses the question whether the universities that are actively engaged in curriculum reform, are unconsciously incorporating the clinical methodology into their curricula in the guise of skills’ teaching. The next section of this chapter attempts to address this question in respect to the author’s home institution, the Wits Law School.

The University of the Witwatersrand Law School curriculum change differs from the other recent ones in the wave, as a second order curriculum change, that is a post response to the ‘four year LLB’.

8.3 UNIVERSITY OF THE WITWATERSRAND LAW SCHOOL CURRICULUM 2012

In 2008, the University of Witwatersrand (Wits) School of Law decided to review the content of the LLB degree, last revised in 2000. The idea was motivated by several reasons, including but not limited to: addressing the needs of the lecturers, the calls from

³⁷ See <http://www.law.cuny.edu/academics.html> accessed on 23 January 2013.

³⁸ Sonsteng op cit note 3 at 76–85. For a discussion on what is happening in other jurisdictions see Sonsteng op cit note 3 at 85–88.

the profession for better prepared graduates³⁹ and addressing the contemporary needs of South African students.⁴⁰ It was also believed that the LLB degree at Wits was overloaded and incorporating excessive courses, leaving little room for academics to concentrate on research and publication. “The Law School has the potential to be a major contributor to the research profile of the university, but it cannot perform well if its basic offering – the LLB - is not optimally designed. An improved LLB will attract excellent students and researchers into the university. A large proportion of the time of Law School staff is currently allocated to teaching. An improved curriculum would make optimal use of the energy of academic staff, free up capacity for research and improve staff morale.”⁴¹

Throughout this process the Law School explored the incorporation of teaching appropriate skills and values into the revised curriculum. In a document titled *A new LLB in 2012*⁴² important features of the new LLB degree were noted. Specific to the discussion on skills teaching it was submitted that “A focus on legal skills: attorneys, advocates and other legal practitioners have argued that students need to acquire certain legal skills in order to improve their performance as lawyers. These include legal

³⁹ Also see document drafted by South African Law Deans’ Association (SALDA) Review of the LLB Degree dated 13 October 2005 at pg 3(copy with author) where it is noted that “universities cannot merely point to inadequate preparation of students and other possible deficiencies at entry level, and wash their hands of the problems at exit level. Despite such drawbacks, faculties should produce quality graduates at the end of the day, and if the professions indicate that our graduates lack certain skills that the market place needs, then we should address those concerns.” See Document drafted by SALDA — South African Law Deans’ Association 9 April 2010 “Knowledge, skills and abilities that LLB graduates should have (and how important each is). An LLB graduate should have:

- knowledge of the key disciplines of South African law as a distinct field of learning, including the essentials of the history, sources and practical operation of the law;
- skills associated with the effective articulation and communication of legal solutions to problems governed by law. These include advanced language skills (oral and written), analytical skills and an understanding of the prevailing social and legal culture, and
- the ability to keep abreast of new developments in law, to research the sources of law effectively and to develop new and specialized expertise in one or more disciplines of the law independently”

<http://www.che.ac.za/monitoring/llb/SALDA.pdf> accessed on 20 July 2013.

⁴⁰ See University of the Witwatersrand Law School report 2011 titled, “Developing an integrated skills-based curriculum for the LLB degree at the School of Law, University of the Witwatersrand” at page 1 (copy with author) where it is noted that: “The vast majority of students entering the LLB program at the Wits Law School do so straight out of matric (Grade 12). While some students already have a good grounding for development of the skills listed above, many are under-prepared. Additionally, for many students English is their third or fourth language. A common base for the development of the skills required by the legal profession cannot therefore be assumed.”

⁴¹ A document titled *Proposal for an allocation from Strategic Fund for research and development of the LLB curriculum* at 1 (copy with author). Also see document titled: *The need to prune our curriculum* (copy with author).

⁴² *A new LLB in 2012* (copy with author)

research, problem solving and legal writing. Although the existing curriculum teaches these skills indirectly, the new curriculum contains designated courses in which we will focus on teaching particular skills more explicitly.”⁴³

Following a series of discussions the curriculum development committee⁴⁴ decided on identifying a series of skills that were considered as necessary and therefore incorporated these skills into several selected courses in the LLB degree.⁴⁵ In 2009 the Curriculum Development Committee comprised of Professor Angelo Pantazis, Professor Iain Currie, Professor Willem De Klerk, Ms Ntombozuko Dyani, Professor Elsje Bonthuys and Professor Cora Hoexter. As part of the initiation of this overall review, an invitation was issued to engage in a series of discussions particularly on the course Practical Legal Studies (PLS) and its role in the new curriculum. On 15 September 2008 Desia Colgan (then a member of curriculum development) submitted an e-mail calling for a discussion on the role of PLS within the new curriculum. On 25 September 2008, an invitation was extended to all academic staff members to attend a meeting on 13 October 2008. The invitation was extended by the Head of School Angelo Pantazis to attend a workshop on the recommendations emanating from the Introduction to Constitutional Law Teaching and Learning Review. It was this meeting which initiated further discussion on the new curriculum. On 6 May 2009 a further invitation was extended by Angelo Pantazis to all academic staff members requesting a meeting on 21 May 2009. The content of the invitation read as follow “The Curriculum Development Committee has come up with a series of proposals for a major overhaul of our LLB curriculum. ... I will expect all staff to attend. There cannot be a more important thing than to change our curriculum. This will be the first of a series of staff meetings on the subject ...”⁴⁶ On 16 October 2009 a teaching and learning workshop was held, where further discussion on a new curriculum was led. From 2010 -2011 discussions between academics continued and members of the curriculum planning committee continued to research options for a workable curriculum. Throughout the process clinicians in PLS were continuously consulted on the role that PLS would play in the new curriculum. In discussions it

⁴³ Ibid at 1.

⁴⁴ Ibid

⁴⁵ Ibid at page 1 and 2.

⁴⁶ Ibid

emerged that Street Law as an elective course was to be discontinued. Therefore aside from Moot court and Alternative Dispute Resolution – both offered as elective courses- it was forecast the PLS would adopt the flagship role in teaching practical lawyering skills.

The final outcome included, a more focused curriculum including the incorporation of skills teaching in selected courses. The diagram below illustrates the courses as well as skills that were identified:

Course	Year	Skills set
Family Law	1 st year	Working with legal authority, i.e. finding, reading and writing about the Constitution, statutes and legislation
Contract Law	2 nd	Legal problem- solving (legal reasoning)
Jurisprudence	2 nd	Argumentation, critical thinking and essay writing
Civil Procedure	3 rd	Legal Drafting
Practical Legal Studies	4 th	Comprehensive legal practical skills(interviewing, statement taking, professional management, professional ethics, trial preparation, trial advocacy) in a live-client situation
Independent Research Report	4 th	Comprehensive legal research skills(ability to frame, analyse and respond to a particular research

		question)
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The new curriculum was finalized in 2010 and intended to be implemented immediately. After only one year of preparation, it was implemented in 2012. The effects of its successes or challenges on a broader scale are unknown at this early stage.⁴⁷ An initial assessment meeting was held on 7 December 2012 and the following challenges on the new curriculum were voiced: lack of training on the part of the lecturers', high student numbers and difficulty of devising assessment methods. Discussions were had on further workshops to discuss the successes and challenges but these are yet to be held. Unfortunately, the author does believe that it is much too early to draw appropriate conclusions on the matter at this stage save to state that the attempts at integration appear to purely amount to or can be summed up as an incomplete conceptualisation of how course curricula should be designed and taught. The author submits that a mere presentation of a curriculum is not enough. Academics need to be trained on how to teach skills and on what appropriate assessments need to be put in place to evaluate the result. Academics at law school are often not quite sure what they are expected to do and as a result courses are not taught as well as they ought to be.

However, despite the lack of appropriate conclusions on the above matter, in 2012 the author attempted what she believes to be a typical example of an integrated course in the LLB curriculum. The course identified was Civil Procedure and a discussion on the design of the course will now be provided.

⁴⁷ See comments submitted in the School of Law Strategic Planning Workshop Framework at pg 5 (copy with author) "The School's LLB curriculum was recently reformed effective 2012 with emphasis on skills development. Students and stakeholders have raised concerns about the new curriculum such as the disparity in fees and course content. There have been concerns that the changes to the LLB curriculum had been operationally driven, rather than strategic, and had not looked at the overall graduate attributes, teaching philosophy or co-curricular activities. There are also perceptions (among stakeholders, in the university and among students), that it is a "dumbed-down" version of the old LLB."

8.4 INCORPORATION OF EXPERIENTIAL TEACHING INTO CIVIL PROCEDURE⁴⁸

Civil Procedure is one of the courses that are promoted as a skills based course and it aims to teach the students' active procedures in litigation as well as drafting skills. In 2012 Civil Procedure was being taught on two levels — one, through the usage of a tutor and secondly, through primary substantive lectures. Students attend tutorials once a week and a double lecture once a week.⁴⁹

Tutorial sessions are compulsory for each student and during the first two terms the area of Jurisdiction is taught. During these lectures students are taught on the theory relevant to Jurisdiction and then taught through simulation exercises on how this area of law applies in practice. During the third and fourth terms students learn how to draft legal documents, for example, notice of motions, affidavits, particulars of claim and plea. Simulation exercises are used to further demonstrate the structure of legal documents as well as the contents of the documents.

During substantive lectures students are taught the theory relevant to Civil Procedure. For example, lectures are presented on Prescription, Applications, Trial actions, Service of documents etc. The conceptualisation of the theory has proven to be very challenging for students, thus accounting for the low pass rates in the course. Therefore in an attempt to assist students with the conceptualisation of the terminology and application of civil procedure in 2012, the author introduced a voluntary shadowing programme for the students. The students were divided into groups of four and were

⁴⁸ See Hall & Kerrigan op cit note 1 at 31–37, for further examples on how integration is possible in other courses for example criminal law. A further example of a potential course at LLM level that could demonstrate the incorporation of experiential teaching is the proposed new course in Human Rights and Advocacy at LLM level. In 2012 at the University of the Witwatersrand a committee composing of Human Rights academics and clinicians formed a committee with the idea to explore the possibility of a full year specialised course in Human Rights and Advocacy at LLM level. Although, at Wits, the present Master's curriculum does include an optional half year course in Human Rights and Advocacy – the idea to expand on the teaching of this course was tabled. The idea is to offer a year course in specialised Human Rights, including to offer the students the opportunity to engage in clinical programmes or externships within this area of study. The idea is that the course will be offered over four terms— in term one students will engage in substantive study on Human Rights and advocacy; in term two and three students will be offered the option to expand their substantive knowledge into two specialised areas in Human Rights, for example Human Rights and Business, Human Rights and Environmental studies. During the fourth term students will be offered the opportunity to either engage in an externship programme or participate in a clinical programme. For the purposes of this research paper — the author submits that the tabling of such a course has set a new mile stone in academic teaching because for the first time in South Africa we witness the integration of substance and practice at LLM level. This course clearly demonstrates that the opportunities for other courses to follow suit clearly exists.

⁴⁹ Tutorials are forty five minutes long and lectures are for an hour and thirty minutes.

required to shadow either the author or a candidate attorney employed at the Law Clinic once a week. During the shadowing activity students either attended at court or were allowed to sit in on a consultation with ‘real’ clients. The programme proved very successful as students were able to understand the theory through practical application. Furthermore, students were able to understand how and when legal documents are drafted.

Essentially, at the end of the course students were exposed to lectures (theory), simulation exercises and — although voluntary in nature — actual or live-client experience. The course demonstrates that it is possible for lecturers to be innovative and creative in advancing their teaching methodology.

8.5 CONCLUSION – THE WAY FORWARD

This chapter illustrates that the present thesis has not merely engaged in an abstract discussion on CLE (as a teaching methodology) and PLS but has also reflected on the active engagement within law schools to implement the methodology within the broader curriculum. Whether the implementation is being undertaken consciously, or not, remains open for discussion. What is important is that *visible change* is occurring.

With the increase in skills dominance in the legal curriculum, what will be the purpose of a course like PLS in the future? Unfortunately as noted in chapter six PLS at Wits is not considered as a methodology by some clinicians. These clinicians view PLS as a vehicle to drive the access to justice project. Some of the senior clinicians emphasis the role of access to justice as more important than skills teaching therefore little has consciously been done to advance the formulae of teaching, either by expanding on the methodology or consciously incorporating the teaching methods into the broader law degree. Further very few academics that teach main stream courses understand the value of PLS as a methodology. As concluded in chapter two academics should be educated on the different and the most effective types of teaching methods. There is no doubt that the time has come for universities to be more selective in their employment processes, particularly when it comes to academics. It is essential that prior to employment, academics engage in courses on teaching methodology, as this will allow them to have

insight into the different options available to cater for students' needs. Therefore the author submits that PLS is in fact a teaching methodology. It is a course that demonstrates the incorporation of balanced learning as discussed in chapter two – the course promotes theory, practice and reflection. Through this process it has the potential to address the learning needs of a diverse range of students and should be incorporated into other courses in the law degree.

As demonstrated above, a course like Civil Procedure could absorb the teaching of a number of skills taught in PLS, for example drafting skills. In chapter five, six and seven the author continuously argues that the PLS curriculum is overloaded — once again a course like Civil Procedure could assist in an attempt to reduce the burden on PLS. The author, therefore, argues that as the newly introduced curriculum at the Wits Law School improves and develops in future, PLS should be discontinued as a standalone course because the skills it transfers should be incorporated into mainstream courses. Some may question that PLS could continue as a course that facilitates for the live-client engagement between student and client? In response hereto the author submits that history has taught us and continues to teach us that the live-client clinic as a standalone method of teaching CLE presents a number of challenges that continues to place emphasis on access to justice as opposed to teaching. The author recommends that each course that adopts the CLE methodology design as part of its curriculum the opportunity for students to engage with live-clients either at pro bono centers or in consultation with other role players within the profession.

In conclusion, Hall and Kerrigan expressed it eloquently: “Our aim is not to limit the early years of undergraduate education, nor to confuse students: the ideal should not be the case method, Socratic dialogue, learning through problems, problem based learning or simulated/real clinical experience but experience of all of the methods, with the role of the lecturers to make explicit both to themselves and to students the marriage of content and process which is designed to maximize depth and breadth of learning.”⁵⁰ Similarly, the author contends that law schools, particularly in South Africa, should not shy away from attempting to explore the best teaching practices that will suit the needs of

⁵⁰ Hall and Kerrigan op cit note 1 at 29.

its students. Importantly, through this process of exploration cognisance must be taken of the true value that CLE as a methodology promotes.

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7. ANNEXURES

Annexure A — Wits Law School memos/mission.law May 1993.

Annexure B — Practical Legal Studies course outline 1986, 1987 and 1988.

Annexure C — Letter written by Authur Chaskalson dated 6 December 1989.

Annexure D — Letter received by Zilla Graff from Clinton Bamberger 11 December 1989.

Annexure E — Notes of the meeting concerning the Blumenson's Report 1989.

Annexure F — The Practical Legal Studies Course: Now and in the Future Clinton Bamberger 17 April 1990.

Annexure G — Draft For Discussion University of the Witwatersrand – Faculty of Law Mission Statement 23 August 1993.

Annexure H — The 1994 P.L.S Course Evaluation- A summary with identified problem areas and some suggestions by Philip Iya.

Annexure I — Practical Legal Studies Vision and Mission Statement.

Annexure J — Course outline displaying example of a general clinical programme curriculum.

Annexure K — Course outline 2000 — University of the Witwatersrand Law Clinic Curriculum.

Annexure L — Labour units course outline 2011.

Annexure M — Sample Design.