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A Case for Business Transactions Clinics in South Africa

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Abstract

It is about time that law school curricula be reformed to accommodate important practical skills for transactional practice, whether for legal practitioners or providers of advisory services in corporate commercial law. Evidence shows that a substantial percentage of law school graduates do not pursue a career in legal practice. However, the only practical vocational training offered by law schools is geared towards imparting legal practice skills. Given the importance of practical transactional skills in the pursuit of corporate commercial practice in the world, the continued insistence on limiting practical skills to legal practice is acutely inadequate. The establishment of business transactions clinics proposed in this article is a first step in diversifying practical skills within law schools that should prepare graduates for the dynamic world of pursuing a professional career after graduation. It is a revolution that should be welcomed by South African law schools.

Keywords: Business transactions clinics; professional practice; corporate commercial career; transactional law; law graduates

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1 BACKGROUND

The continued practice in professional legal education — pursued primarily through LLB studies — to provide practical skills to students with the assumption that all law graduates should be prepared for a profession in legal practice is fundamentally misguided. This is because a substantial number of law graduates do not enter the legal profession.

This research aims to investigate whether there is merit in considering a more profession-neutral practical skills course for law students, particularly as this will prepare students for a profession outside legal practice, if they choose to consider an alternative career. The idea of a business transactions clinic proposed in this research should ideally fill that gap.

According to research undertaken since the mid-1980s, the percentage of law graduates entering the legal profession has decreased gradually — with a substantial number deciding to pursue their skills in professions other than law practice, such as entrepreneurship, politics, public administration and so forth.[1]

The question this article seeks to answer is whether the introduction of the subject of a business transactions clinic within the legal education curriculum could address the gap in practical skills needed by law graduates who choose not to pursue a career in the legal profession?

2 INTRODUCTION TO BUSINESS TRANSACTIONS CLINICS

The concept of business transactions clinics is new to South Africa but it is a common feature of clinical legal education in the United States.[2] There is an urgent need for business transactions clinicians, as formally recognised professionals and the tertiary legal institutions should be tasked with the responsibility of providing the university environment needed and working with the legal profession and the transactional advisory industry. In 1973, traditional law clinics were established in South Africa in response to a need, to "increase access to legal services for

1 Klaaren "South Africa: A Profession in Transformation" in Abel *et al.* (eds) *Lawyers in 21st-Century Societies: National Reports* (2020) 538. See also Godfrey "The Legal Profession: Transformation and Skills" 2009 *S ALJ* 91. For almost the same statistical evidence of law graduates who do not enter the legal profession in both South Africa and the United Kingdom, compare Klaaren 538 and Higher Educational Statistics Authority (HESA) *A Report on UK Law Graduates Who Entered the Legal Profession* (2012).

2 Most of the major law schools that have highly visible operational business transactions clinics include the Business Transactions Clinic at New York University (NYU) Law School; the Organizations and Transactions Clinic at Stanford Law School, Stanford University; the Transactional Law Clinics (TLC), a clinical program of Harvard Law School; the Small Business Clinic (SBC) at the University of Southern California's (USC) Gould School of Law; the Small Business Clinic and Trademark Clinic at SMU Dedman School of Law; the Intellectual Property and Transaction Clinic at the University of New Hampshire's Franklin Pierce School of Law; the Clayton Center for Entrepreneurial Law at the University of Tennessee Knoxville; Transactional Clinic at the University of Arkansas; Nonprofit and Small Business Clinic at New York Law School; Startup and Small Business Clinic at University of California, Irvine School of Law; Community Enterprise Clinic at Duke University School of Law; Startup NC Law Clinic at the University of North Carolina at Chapel Hill; Advanced Entrepreneurship & Community Development Clinic at Columbia Law School; Intellectual Property and Transactional Law Clinic at the University of Richmond School of Law; Tech Startup Clinic and Securities Arbitration Clinic at Cardozo Law School; Small Business & Nonprofit Law Clinic at Northern Kentucky University's Chase College of Law;Community Development Law Clinic at University of North Carolina (UNC) School of Law; Entrepreneurship and Innovation Clinic at Yale Law School; Transactional Law Clinic at the University of Mississippi School of Law; Community Development Clinic at Case Western Reserve University School of Law; Community and Economic Development Clinic at Hofstra University Law School; Intellectual Property Clinic and Entrepreneur Assistance Clinic at Penn State Law School; Community Enterprise Clinic at Boston College School of Law; Entrepreneurs' Clinic at Santa Clara University School of Law; Intellectual Property and Entrepreneurial Law Clinic at Michigan State University Law School; Trademark and Entrepreneur Clinic at University of Detroit Mercy Law School; Community Enterprise Clinic at Wayne State University Law.

the poor and the vulnerable, as only limited state legal aid facilities were available at the time".[3]

While access to affordable legal services is still a priority in this country — particularly in the context of a constitutionally guaranteed right to legal access[4] — the potential for commercial law experts within universities to contribute to economic development efforts cannot be gainsaid.

In the recent past, it was confirmed by the Minister of Finance in South Africa, Enoch Gondongwana, ,[5] that the much needed manufacturing and industrialisation in this country is a key that will unlock economic growth.[6] Lamenting that the country now imports more manufactured goods to the decimation of the country's own manufacturing industry, the minister highlighted that the manufacturing industry shrunk from at least 22per cent of the country's Gross Domestic Product (GDP) to about 12 per cent.[7] This, he confirmed, translates to a reduction from R677.7 billion in 2008 to the current R545.9 billion in real terms.[8] Against this background it is clear that South Africa must increase the number of manufacturing business to make a meaningful dent in its trajectory for economic growth.[9] On its own, government cannot, or is unlikely to, establish and fund those needed for manufacturing businesses in the economy.[10]

The main contribution that corporate lawyers could make to the country's economic growth is to provide services to entrepreneurs by facilitating the formalisation of their businesses as public companies — particularly in the manufacturing sector —so that they could raise capital by issuing unlisted securities to the public as the process of listing can be costly and cumbersome for many entrepreneurs. Currently, the LL B. curriculum incorporates practical legal skills solely through practical legal training, which is offered by campus law clinics at law schools of almost all universities that offer legal education programmes, particularly the LL B degree.[11]

Currently, very few business transactions clinics in the world — including in the United States — offer courses to potential entrepreneurs to formalize enterprises for the purpose of offering unlisted securities to the public.[12] Therefore, the proposed versions of business transactions

3 Du Plessis "Forty-five Years of Clinical Legal Education in South Africa" 2019 *Fundamina* 17. See also McQuoid-Mason "Access to Justice and the Role of Law Schools in Developing Countries: Some Lessons from South Africa, Part 1: Pre-1970 Until 1990" 2004 *J for Juridical Science*, 28–51.

4 Section 34 of the Constitution of the Republic of South Africa, 1996, guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. This is regardless of the type of dispute in question: whether criminal or civil.

5 In September 2021.

6 He said this on 22 September 2021 during the launch of a book on the transformation of the economy's structure and industrial development: Mondliwa, Roberts and Tregenna *Structural Transformation in South Africa. The Challenges of Inclusive Industrial Development in a Middle-Income Country* (2021) https://www.sanews.gov.za/south-africa/manufacturing-industrialisation-key-unlocking-economic-growth(accessed 22.-07-2024).

7 *Ibid*. This was in a short period of 13 years between 2008 and 2021. This was clearly in addition to the shrinkage that may have taken place at the end of apartheid as earlier high percentage of manufacturing in the country would have been due, in part, to the international trade sanctions imposed on apartheid South Africa.

8 *Ibid*.

9 Contogiannis "Economic Growth, Constraints and Prospects for the South African Economy" 2007 *Discourse* 41.

10 The private sector would therefore utilise the gap.

11 For a list of campus law clinics and services offered, see the website of the South African University Law Clinics Association (SAULCA) https://www.saulca.co.za/law-clinics (accessed 22-07-2024).

12 A survey of the services provided by business transactions clinics at most law schools in the United States demonstrates that only a couple of the clinics were established with that service as a focus. Only the Business Transactions Clinic at New York University (NYU) Law School and Intellectual Property and Entrepreneurial Law Clinic at Michigan State University Law School appear to be set up to address the complex business transactional matters associated with securities issuance by public companies.

clinics in South Africa will be the first of its kind on the continent of Africa, and especially South Africa, which is in dire need of growth to enable inclusive participation in economic activities.[13]

The development of the LL B curriculum will be necessary to include a business transactions clinic module, which will be of assistance not only to those who want to enter legal practice as corporate commercial lawyers, but also to those who may want to build careers in business, but not necessarily in the legal practice.

In the design and development of the business transactions clinic module, socio-economic aspects in the development of the curriculum should be at front and centre.[14] This is particularly important as the module, although it can be adapted to address institution-specific circumstances, should ideally be adopted nationally for all institutions offering the LL B degree. Also important are professional and economic considerations, learner-oriented aspects and the decolonisation of the curriculum within the context of the dynamics of global capitalism,[15] as invaluable considerations in curriculum development.[16]

With these considerations in mind, this article examines the importance of looking beyond the imparting of knowledge and skills and rather the transfer of competence skills in areas that will broaden learners' horizons beyond the competence capabilities of the profession immediately associated with their areas of study. The relevant curriculum considerations proposed for the business transactions module as part of the legal qualification programme, particularly within the LL B. degree are discussed. These considerations include those of a socio-economic nature, those related to professional and academic necessities and discipline-specific aspects, and the imperative of decolonisation

2 1 Required Competence Skills to Take Account of New Focus Areas

Business transactions clinics in the United States focus on corporate commercial transactions that are usually associated with the legal practice of commercial lawyers. The common transactions that these clinics focus on invariably include the practical application of normal business principles associated with typical transactions such as employment contracts, sale agreements, lease agreements, business planning and entity formation, insurance agreements, contracts and memoranda of understanding, intellectual property registrations and related

13 Contogiannis 2007 *Discourse* 41. This was recently identified by President Cyril Ramaphosa in his Opening of Parliament Address for the Seventh Administration as a priority for the Government of National Unity https://www.polity.org.za/article/sa-cyril-ramaphosa-address-by-south-africas-president-opening-of-parliament-2024-cape-town-city-hall-18072024-2024-07-19 (accessed 22-07-2024).

14 See, among others, Cornbleth "Curriculum in and out of Context" 1988 *Journal of Curriculum & Supervision* 85–96; Roberts "Higher Education Curriculum Orientations and the Implications for Institutional Curriculum Change 2015 *Teaching in Higher Education*, 542–555; Muller "Forms of Knowledge and Curriculum Coherence 2009 *Journal of Education and Work* 205–226; Uchiyama and Radin "Curriculum Mapping in Higher Education: A Vehicle for Collaboration" 2009 *Innov High Educ* 271–280.

15 Mbembe "Decolonizing the University: New Directions" 2016 *Arts & Humanities in Higher Education,* 29–45. Mbembe observes that there is a global restructuring of higher education curricula to encapsulate the phenomenon of global capitalism and, as such, there is a need for curriculum decolonisation to effect the Africanisation of higher education learning. The proposed introduction of the business transactions clinic in South Africa will position South Africa to Africanise business transactions, while ensuring that the resulting product remains closely related to the dynamics of global capitalism. It is this kind of curriculum restructuring that is relevant to the curriculum design of the business transactions clinic module.

16 Literature referenced in this article underscores the following important considerations, among many others: (a) historical, political, social and economic context; (b) structural and sociocultural contextualization; (c) discipline-based orientation; (d) professional and academic orientation; (e) personal relevance orientation; (f) social relevance and reform orientation; (g) systems design orientation; (h) the Africanisation debate and the South African context; (i) globalisation challenges in the South African context; and (j) responsiveness for the transformation of society.

contracts..[17] These are the usual areas of practical lawyering skills and substantive legal knowledge in transactional practice of a practising commercial lawyer.[18] These services may be appropriate for developed countries such as the United States, which has established businesses and non-profit organisations. For a developing country such as South Africa, which has yet to develop formalised entrepreneurs to contribute to the country's economic development — particularly in the manufacturing sector — services that are aimed to assist entrepreneurs to access or leverage on the limited business funding resources to grow their business are more important than run-of-the-mill transactions typical of the practice of a commercial lawyer. It is in this niche area that the proposed business transactions clinic curriculum for Witwatersrand University (Wits University) Law School and, possibly, other law schools across the country, is designed. This will enable students to pursue a career path as entrepreneurs — in addition to, or rather than, as legal professionals.

It is no secret that access to funding for South African entrepreneurs, particularly those operating within the small and medium-sized sector, is a major hindrance to growth and expansion. Traditional funding sources, such as loans from banks and other lending institutions, owners' capital and government funding, are almost impossible to access without collateral or an extensive trading history, characteristics which are not synonymous with recently formalised business entities or those with just potential for growth. It is in this environment that business transactions clinics in South Africa will be operating. As a result, innovative ways of how to tailor the services of these business transactions clinics will have to be devised and the proposed model will focus on services that are aimed at assisting clients to formalise as suitable corporate entities (either as public or private companies). However, the preference for formalisation as public companies is understandable so as to help entrepreneurs to take advantage of developing and registering their prospectuses with the Companies and Intellectual Properties Commission (CIPC). This will enable a company to offer its equity securities (shares) to the public with a view to raising capital for its business operations and growth, without having to comply with the bureaucratic requirements of a regulated market institution, like a stock exchange. The simplified process of achieving this goal is set out in chapter 4 of the Companies Act of 2008.[19] This is a very useful part of company law but inexplicably, it is employed rarely. The proposed business transactions clinic aims to change this by training business transactions clinicians, who will be advanced LL B students to serve deserving entrepreneur clients to access the benefits of raising capital by offering their companies' equity securities to the public. Therefore, the typical services that will need to be offered by these clinicians will include:

1. Business formalisation and structuring as a public company (services here will include assisting clients to formalise and register their companies with CIPC and preparing their public companies' memoranda of incorporation);

2. Advertisements relating to offers to the public (these are advertisements in terms of s 98 of the Companies Act, 2008);

3. Preparation and registration of prospectuses complying with s 100 of the Companies Act and Companies Regulations, including:[20]

    a. the assets and liabilities, financial position, profits and losses, cash flow and

17 A cursory review of service offerings from concerned clinics' websites and/or their affiliated law schools reveals this reality.

18 Moreover, both in South Africa and the United States — and, arguably, in most of the Common Law world — many of those focus areas are taught, theoretically at least, in LL B and JD programmes.

19 Companies Act 71 of 2008.

20 The Companies Act of 2008 s 100, sets out the requirements concerning a prospectus to be issued by a public company wishing to offer its securities to the public.

prospects of the company;

b. the securities being offered and rights attached to them;

c. any material agreement as prescribed by Companies Regulations;

d. a statement to the effect that the whole or any portion of the issue of the securities offered to the public has been or is being underwritten (including the filing of a copy of the underwriting agreement); and

e. names of the company's auditor, attorney, banker or broker and their written consents for their names to be used in the prospectus and to act in the stated capacity;

4. Assistance with preparation of sworn declarations (by underwriters of director(s) of underwriting companies) stating that to the best of the deponent's knowledge and belief the underwriter is and will be in a position to carry out the obligations in the agreement even if no shares are being applied for;

5. Assistance with corrections of any error; report on any new matter; and/or any relevant or material change of a matter included in the prospectus; and registration of such correction, error, new or change of a matter as a supplement to the prospectus;

6. Assistance with applications to court for an order negating the right of the subscriber to withdraw the offer after the publication of any correction, error, new or change of a relevant and material matter in a prospectus;

7. Assistance with written consents director(s) to be acquired before the prospectus is filed;

8. Assistance with statements by experts and written consents for such statements to be used before the prospectus is filed;

9. Assistance with application forms (attached to or accompanied by a prospectus) for subscription of securities; and

10. Assistance with the allotment of securities subscribed for and compliance with the Act in that regard.

The focal areas for the proposed business transactions clinic will promote impactful entrepreneurship within the South African business environment. To place the course as a springboard for the possible launch of an alternative career in entrepreneurship, it must be demonstrated that there is a conceptual framework supportive of the justification for competency-based training in legal studies, rather than the current entrenchment of knowledge and cognitive skills synonymous with legal training. The following section examines this statement.

2 2 The Current Campus-based Law Clinics' System is Inadequate for Transactional Skills

In South Africa, all public universities offering professional law qualifications (particularly the LL B qualification) have campus-based law clinics which offer generic legal services[21] to

21 There are few specialist clinics in South Africa, but none offer corporate commercial law services.

indigent members of communities within the locality of the clinic.[22] As litigation in general law forms the bedrock of the current law-based clinics on campuses in South Africa, they are required to register with the relevant provincial office of the Legal Practice Council (LPC) of South Africa, as law firms.[23] However, litigation makes up a small, but critical part of the work of the proposed business transactions clinics. In fact, the focus of these clinics will be almost exclusively on transactional law, which means that it may not be necessary for them to register with the LPC, although it may be ideal to do so to enable the clinic to offer a complete bouquet of legal services in transactional law. A question that may arise is: if the professionals at these clinics may not be accountable to the LPC as legal practitioners, with which profession should they be registered, if at all? The study of equivalent clinics in the USA, referred to above, indicates that those clinics do not register, and are not required to so, with the American Bar Association or relevant state bars. As regards professional responsibility, of all the clinics surveyed, only the Organizations and Transactions Clinic at Stanford Law School mentions that the Clinic operates in accordance with State Bar of California rules relating to student legal practice and, as with any law firm in the state, the California Rules of Professional Conduct.[24] The real possibility of business transactions clinicians in South Africa being involved in litigation — albeit on a very small scale — means that it may be peremptory for these entities to be registered with the Legal Practice Council.[25]

2 3 A Conceptual Framework for Creating a Study Environment for Acquiring Academic and Professional Competence Through Business Transactions Clinics

Considering the potential of the proposed module to lead to the creation of a distinct profession at the intersection of law and entrepreneurship, it is arguably indispensable, from a pedagogical point of view, to set out a conceptual underpinning of the proposal made herein and the preference of a competency-based over a cognitive-based mode of module.

22 See https://www.saulca.co.za/law-clinics (accessed 22-02-2022). The following campus law clinics exist in South Africa, all of which offer generic legal services, focusing primarily on criminal law, family law (particularly divorces), and labour law: (a) Rhodes University Law Clinic, (b) Stellenbosch University Law Clinic, (c) UCT Law Clinic, (d) University of Fort Hare Legal Clinic, (e) University of Johannesburg Law Clinic, (f) University of KwaZulu-Natal Law Clinic, Durban, (g) University Law Clinic, Pietermaritzburg, (h) University of Limpopo Law Clinic, (i) University of Pretoria Law Clinic, (j) Unisa Law Clinic, (k) Unizulu Law Clinic, (l) Univen Law Clinic, (m) Wits Law Clinic, (n) Mandela Law Clinic at Nelson Mandela University, (o) University of the Free State Law Clinic, (p) Potchefstroom Law Clinic at North West University, Potchefstroom campus, (q) Mahikeng Law Clinic at North West University, Mahikeng Campus, (r) Walter Sisulu University Law Clinic, and (s) UWC Law Clinic. No litigation or training on transactional law is offered at any of these campus-based law clinics. It is, therefore, opportune for South African law faculties/schools should establish business transactions law clinics, preferably in collaboration with business schools.

23 This is because, in accordance with s33(1) of the Legal Practice Act, only legal practitioners are required to be registered and no person, in expectation of any fee, commission, gain or reward, may appear in any court of law or any board, tribunal or similar institution unless such a person is a legal practitioner. In addition, no person, except for legal practitioners, is authorised to draw up or execute any instruments or documents relating to or required or intended for use in any action, suit or other proceedings in a court of law.

24 The LPC South Africa, or its provincial offices, does not seem to have rules relating to student legal practice and it is recommended that these rules should be developed so that business transactions clinics can be run with professional responsibility.

25 If not so, then there is a need for a Code and Standards of Conduct for corporate commercial law consultants, which may be administered by the LPC or a professional body specifically established for that purpose.

This article builds on and contributes to work in the field of the design of a study environment for acquiring academic and professional competence. Although a number of studies[26] have examined the acquisition of systematically organised bodies of knowledge followed by — or together with work-based learning — there has been very little focus on designing new work-based learning environments to accommodate graduates who decide to follow a different career path to the one for which they are studying, such as law graduates who decide not to join the legal profession. These graduates may opt to use their acquired knowledge and skills to pursue entrepreneurship, for example.[27] As such, this study provides additional insights about the design of work-based environments to accommodate law graduates who may choose to follow a career in entrepreneurship,[28] rather than that of legal practitioner. This research differs from previous studies in that it attempts to focus on this phenomenon by investigating whether a business transactions clinic, in particular, can better prepare a majority of students for a career in entrepreneurship, rather than, strictly, in the legal profession. In doing this, it draws strongly on the work of the Higher Educational Statistics Authority in 2012, which showed that only 45.8 per cent of UK law graduates were working in the legal sector in 2009.[29] Although no similar studies have been undertaken in South Africa, this research will attempt to establish the data in this regard for South Africa, which is likely to be similar to that of the UK.

There are a couple of views expressed by commentators, which reflect a variety of views on learning for the acquisition of competence. On the one hand, there is a view that learning in a higher education setting can be designed to transcend the transmission of knowledge and cognitive skills to focus on competence within the context of situational learning.[30] One commentator conceded that this approach inculcates functionally effective behaviour on the part of the learners.[31] Further, others acknowledge that situational or experiential knowledge enhances the potential for acquiring capability and, consequently, enhances the integration of confidence in one's knowledge, skills, self-esteem and values.[32]Another view propagates the need to prepare learners for unstable working lives by rethinking knowledge and learning to promote the idea of flexible skills, preparing people for work with broad generic skills, leading to discretionary specialisation.[33] The latter kind of specialisation depends on "fresh judgement" since the tasks cannot be performed in a standard repetitive way.[34]

While arguments advancing the importance of competence in learning arguably advance the choice of priorities in designing a suitable learning environment for acquisition of functional

26 Such as Kirschner, Van Vilsteren, Hummel and Wigman "The Design of a Study Environment for Acquiring Academic and Professional Competence" 1997 *Studies in Higher Education* 151–171; Cagne *The Conditions of Learning* 3 ed (1977); Wiemann and Backlund, "Current Theory and Research in Communicative Competence" 1980 *Review of Educational Research* 185–199; and Spitzberg "Communication Competence as Knowledge, Skill, and Impression" 1983 *Communication Education,* 323–329.

27 See Shalem and Allais "Linking Knowledge, Education and Work: Exploring Occupations"(Working Paper Centre for Researching Education & Labour, University of the Witwatersrand, 2018).

28 Mainly as consultants or transactional advisors.

29 https://www.theguardian.com/law/2014/may/30/students-alternative-careers-law-degree (accessed 23-02-2022).

30 Kirschner *et al*. 1997 *Studies in Higher Education* 151–171; and Wiemann and Backlund 1980 *Review of Educational Research* 185–199.

31 Spitzberg 1983 *Communication Education* 323–329.

32 Fergusson-Hessler *Over Kennis en Kunde in de Fysica: Een Studie van de Cognitieve Aspecten van het Leren en Doceren van Natuurkunde* (On Knowledge and Expertise in Physics: A Study of the Cognitive Aspects of Learning and Instruction in Physics)~ (unpublished doctoral dissertation, Technische Universiteit Eindhoven, 1989). See also Kirschner, *et al.* 1997 *Studies in Higher Education* 151–171and Spitzberg 1983 *Communication Education,* 323–329.

33 Freidson *Professionalism, the Third Logic: On the Practice of Knowledge* (2001) 18.

34 *Ibid*.

knowledge — and appropriately makes a dent on an experiential learning trajectory — a situational or experiential learning environment may be appropriate specifically for occupational specialisation.[35] The latter entails the performance of "only the bundle of tasks connected with a defined productive end in an occupation", which leads to the specialisation being mechanical when the tasks are simple and repetitive.[36] This type of specialisation is not in accordance with the main aims of the business transactions clinic which intends to equip learners with competence that does not only prepare graduates for a particular profession, but provides them with skills for accessing an alternative funding source for business activities, regardless of the industry in which those business activities are pursued. The reason why the competency-based approach propagated by Shalem and Allais[37] is preferable for the proposed competency-based module for law graduates is because its preparation of learners for discretionary specialisation lends itself better to the intended purpose of the business transactions clinic module. When the competence acquired in a business transactions clinic is put to use, it can be in the context of the legal profession or in another setting, ideally, the entrepreneurial setting. That is why the proposal is for the module to be in addition to, but not as a replacement for, the existing practical legal training course to provide learners with a choice of an appropriate competency-based training.

2 4 Curriculum Development Considerations for Business Transactions Clinic

Wide-ranging considerations in curriculum development have been documented by a number of curriculum development scholars and they include: (a) discipline-based factors, which aim to acquaint learners with the discipline; (b) professional and academic factors, whose purpose are to prepare learners for a range of future pathways that include professional practice, research and learning; (c) personal relevance factors, which help students make sense of their everyday experiences for the purposes of self-understanding and personal growth; and (d) socio-economic relevance and reform factors, which aim to develop learners' understanding of social issues and structures, with a view to social reform. While all these factors will invariably influence the development of the business transactions clinic curriculum for Wits University, those that are pertinently relevant are discussed hereunder:

2 4 1 Socio-economic Considerations

As it is envisaged that the embedding of the business transactions clinic skills in the LL B curriculum will invariably lead to the establishment of a sought-after specialist service in the provision of business finance solutions, it ought to effectively train sufficient numbers of qualified professionals in this important sector of the economy, which takes account of social conditions[38] that have evolved after many years of segregation of the majority of the population.

Any efforts to design a curriculum aimed at equipping learners to assist deserving entrepreneurs with novel ideas of raising capital for their business have to be inspired by research in the curriculum, which should be conceptualised as providing specialist disciplinary knowledge and competence, which will invariably lead to the creation of a profession of business transactions clinicians.

35 *Ibid*.

36 *Ibid* 23 and 111.

37 Shalem and Allais "Linking Knowledge, Education and Work: Exploring Occupations" (Working Paper, Centre for Researching Education & Labour, University of the Witwatersrand, 2018).

38 Roberts "Higher Education Curriculum Orientations and the Implications for Institutional Curriculum Change" 2015 *Teaching in Higher Education*, 542–555.

2 4 2 Professional and Academic Considerations

As the proposed business transactions module is aimed at learners in the penultimate or final year of their LL B studies or for postgraduate law students, the transfer of skills to participants will tend to emphasise professional and research graduate outcomes. This is necessary as the goals will be expressed with a stronger focus on professional learning, on the one hand, and on the other, developing specialist competence skills for providing much needed services and conducting further research. This prepares learners for achieving satisfactory graduate outcomes, qualified to enter the professional market.[39]

2 4 3 Discipline-specific Considerations

Yet again it must be emphasised that not all law students will enter the legal profession upon completion of their studies. Therefore, the curriculum of a business transactions clinic must be planned accordingly. While it is commendable that the legal qualification, particularly the LL B. degree, has built-in legal practical skills due to a strong influence of procedural subjects and the element of practical legal training through clinical legal education, particularly in the final years. However, these have been conceptualised with a misconceived assumption that every graduate intends to join the legal profession. However. a substantial number of law graduates do not study with the intention to practice law, but to engage in a wide range of professional services and/or novel market options, including administration, politics, in-house advisory services, consulting, company secretarial services, etc. — the list is endless.

2 4 4 Considerations of the Needs of Learners

Yet again it must be emphasised that not all law students enter the legal profession upon completion of their studies. While it is commendable that the legal qualification, particularly the LL B degree, includes built-in practical legal skills, due to a strong influence of procedural subjects and the element of practical legal training through clinical legal education, particularly in final years. However, such competence skills have been conceptualised with a misconceived assumption that every graduate will join the legal profession, but a substantial number of law graduates do not study with an intention to practice law, but to engage in a wide range of professional services and/or novel market options, such as administration, politics, in-house advisory services, consulting, company secretarial services, etc.

With this realisation in mind, the conceptualisation of the business transactions clinic curriculum must not lose sight of the inalienable correlation between theoretical competence skills as opposed to reality, which is fluid and continually changing, the reason why why the business transactions clinic should not focus exclusively on the legal profession, but must be adaptable, as expected.[40]

2 5 Arguments for Decolonisation of the Business Transactions Curriculum

In recognition of the recent calls for the decolonisation of legal education, it would be opportune to consider how the curriculum for business transactions clinic module could be spared from being classified as colonial in nature. This is particularly important as the concept of business transactions clinics primarily emanate from United States law schools.

39 *Ibid* 544.

40 Moll "Curriculum Responsiveness: The Anatomy of a Concept" in Boughey *et al. Curriculum Responsiveness: Case Studies in Higher Education* (2004) 18.

Even though a clinical legal education methodology within an in-house clinic started to develop in the United States between 1920 and the 1940s,[41] South Africa only followed from 1973 in response to the imperative of social equality during the apartheid era.[42] Today's reality reflects that clients frequenting university law clinics mainly comprise the indigent in communities where their cultures differ from those of the students who represent them. However, according to Modiri, the architecture, framework and logic of colonialist apartheid remain, despite considerable changes to the country's laws.[43] As a result, the conceptualisation of the business transactions clinical legal education curriculum needs to avoid the same connotations of being based on apartheid foundations. In this regard, the training of the business transactions clinicians should be such that the quality and relevance of the services they provide should not only be seen as not perpetuating the "master–servant" relationship synonymous with the traditional university-based clinical legal education programme. As observed by Du Plessis, for clinical legal education to effectively rid itself of (i) real or perceived intolerance of diversity in terms of cultures and languages of both students and clients; (ii) real or perceived dearth of understanding of ethics on a deeper level, where a student is not limited to understanding a theoretical ideal; and (iii) the impression that in representing the poor, the clinics do not strive to empower their clients to be ethically and politically self-representing and self-defining. The business transactions clinic can achieve this by making the practical application of specialist corporate commercial subject-matters comparable to mainstream disciplines. Since the module will not be restricted to law students, the widespread incorporation of concepts, knowledge and skills into the process of advancing prior learning will help in insulating the module from being — at least being seen to be — elitist.

2 6 The Arguments for Implementation of Business Transactions Clinics Through Law Schools, Rather than Business Schools

The question as to why this experiential endeavour through a business transactions clinic is not ideally suited for implementation within business schools, given that they are the ones with formal entrepreneurship programmes, rather than law schools, may well be asked. While this suggestion would have made sense if the clinics were all about pure entrepreneurship services, the reality is that the services earmarked for these clinics are of a primarily legal nature. More particularly, legal education programmes (especially the LL B) have modules in company law, which offer "public offerings of securities" as their invariable constituent part. In the law of nusiness organisations, corporate law or the ;aw of business entities, which are offered at the third or final year of the LL B degree, students are introduced to public companies as entities whose memoranda of incorporation permit them to offer their securities to the public and to not restrict transferability of those securities. Moreover, these modules introduce students to the legal requirements for the public offering of securities.

Law schools are also better suited to host business transactions clinics as some of the processes for complying with the requirements for public offering of securities may necessitate court applications, which may be relatively easily done by professionals with the right of appearance in high courts, with such professionals typically found within law schools rather than business schools.

Furthermore, business transactions clinics may be required to register as law firms with the Legal Practice Council (a professional authority for legal practitioners), which will require to

41 Amsterdam"Clinical Legal Education – A 21st-century Perspective" 1984 *J of Legal Education* 612–618 at 616.

42 Kentridge "Lead-in Address" in McQuoid-Mason (ed) *Legal Aid in South Africa: Proceedings of a Conference* held in the Faculty of Law, University of Natal, Durban, from 2–6 July 1973, 87–89.

43 Modiri "Law's Poverty" 2015 *PELJ* 224–273 at 225.

be led by legal practitioners suitably qualified to practise law.

These reasons, coupled with the many years of similar experience of running general law clinics, make law schools to be better suited to host a business transactions clinic than business schools. There is, however, nothing that should prevent business school staff and students from being key professionals who can assist in business transactions clinics as some of the skills required for ensuring successful public offering of securities are held by staff and students in business schools.

2 7 Way Forward for the Business Transactions Clinics

At Wits University, the business transactions clinic is proposed to be a constituent part of the proposed Centre for Business Law & Society, which will be one of the four centres (including Wits Law Clinic, the Mandela Institute and the Centre for Applied Legal Studies) of Wits Law School. The concept of the Centre for Business Law & Society has already been approved by the Wits Law School's Executive Committee and is now awaiting the CLM Faculty Research Committee's approval before the decision is endorsed by Wits University's Senate. The parallel process of having the business transactions clinic module as part of the LL B curriculum also seved before the School's Teaching and Learning Committee in 2022. The argument in favour of locating the clinic within legal education at Wits or elsewhere is amply supported by the foreign experience, particularly in the USA, where 27 of the business transactions clinics researched are all located within relevant law schools.

3 CONCLUSION

Legal education is in dire need of a major overhaul since the introduction of university-based law clinics 51 years ago. With research showing that more and more students who complete their legal qualification do not enter the legal profession, the need for a new focus on the kinds of competence skills transferred to law graduates is urgently needed. This is particularly important as entrepreneurial skills are critical for economic growth and requires alternative sources of capital funding for growing enterprises. Law graduates urgently need practical skills to assist entrepreneurs, particularly new entrants in the entrepreneurial space, with services to enable them to compete for capital funding using legal corporate finance solutions by sourcing funding from the public in an unsecured securities market made possible by the Companies Act of 2008. The skills to provide these services can be made available through the reform of legal education curricula by introducing a practical course in business transactions clinics for third or fourth-year LL B students who are in the process of or who have completed a module on the Law of Business Organisations or any other equivalent module.

Business transactions clinics should be structured in such a way that students are provided with practical experience to assist entrepreneurs to structure their businesses as public companies and to raise funding through securitisation of their unlisted equity securities which will be made available to the public. University-based law schools, rather than business schools, are better positioned to spearhead the transfer of these competence skills as drafting skills of the necessary pre-requisite documents. The drafting of public companies' Memoranda of Incorporation and Prospectuses can be done more effectively within the LL B programme where students undertaking a compulsory module in corporate law or business entities law as part of their syllabus can be better put to practical application principles of that subject.

While the primary purpose of the current clinical programmes implemented through university-based law clinics is to increase access to pro bono legal services for the poor and the vulnerable because of limited state legal aid facilities, business transactions clinics should operate similarly to a consulting clinic within the school for a minimal fee, but not as an internship program.

Inasmuch as university-based law clinics were responding to the needs for social equality, the development of curricula for business transactions clinics must also take into account professional and academic orientation, knowledge discipline responsiveness and responsiveness to the needs of the learner, particularly as a sizable number of law graduates do not intend practising as legal practitioners. In 2012, the Higher Education Statistical Survey showed that only 45.8 per cent of the 2009 UK law graduates were working in the legal sector.[44]

Finally, the lack of a competency-based module for LL B students in South Africa is a concern. The only available competency-based module (i.e. the Practical Legal Training course) was introduced in all law schools many years ago, with the purpose of preparing learners for legal practice. However, research shows that many LL B graduates do not end up in legal practice but in alternative careers such as entrepreneurship. It has been argued that legal education in South Africa should be developed to accommodate a competency-based course that will be earmarked for those LL B graduates who choose not to enter legal practice or to focus on transactions law. Those intending to pursue a career in legal practice can also do the module to complement their practical skills. This article does not argue for the replacement of the practical legal training course, but for its retention in conjunction with the business transactions clinics module as a compulsory addition. The foundational concepts that make up the core of the clinics module would have been covered in the course on corporate law or business entities law.

44 The position in the context of South Africa is the same as that of the UK, as demonstrated by Klaaren (See Klaaren "South Africa: A Profession in Transformation" in Abel *Lawyers in 21st-Century Societies: Vol 1* (2020) 538.