

Knowledge, Skills and Values in Legal Education at a Transforming and Previously Advantaged Law School in Rural South Africa

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Determining curriculum content of legal education is a difficult task in any context. Criteria for determination of the curriculum might differ with reference to the applicable system, country, political stage, local experience of social justice issues such as sex gender, race, religion, etc., and significance of subject matter as foundational, core and optional courses. Internationalization of the curriculum, and incorporating indigenous legal systems as well as ethics and professionalism in the curriculum also creates huge debates, especially in developing countries. All these factors influence the equilibrium of envisaged outcomes such as knowledge, skills and values in legal education. In legal education at a transforming and previously advantaged law school in rural South Africa, solving the equilibrium becomes even progressively more difficult. Increasing measures of the knowledge, skills and values base required by the society seem to be opposed by decreasing levels of preparedness of students in all of those areas. Graduate surveys do not seem to provide reliable answers, and law school is met with a rational choice of relying on the ways of the good old days or seeking the unknown Y-generation curriculum.

Introduction

Determining curriculum content for legal education is a difficult task in any context. While the university would prefer to develop the student as a societal human being in a holistic way, the market would prefer to receive readymade legal technicians/practitioners. The university has to consider the value of universal foundational teaching-learning as opposed to more dedicated practical legal education. The preparation of practitioners on the other hand has to meet the requirements of fifteen or so different occupations for lawyers. Higher education tends to emphasize rather the generic skills development of students as opposed to the accumulation of mere knowledge of facts. The market is inclined to expect graduates with specialized/specific practical skills, whilst some lecturers still feel that all their students should know nothing less than all of the subject matter that is available in their specialized fields of law. Some thus see a curriculum more as a composite of educational subject matter, whilst others include the learning activities and experiences of a broader generic skills development into their definition of curriculum.

Finding equilibrium between these competing forces is already a daunting task. Having further to consider 'non-educational' forces in the equation make the task even more complex and, one feels, 'incompletable'. These additional contextual forces include, for some such as the historically advantaged law faculties in South Africa, expectations of transformation and redress. It is important to note how all of these forces influence the law curriculum and the resultant knowledge, skills and values base of graduates from such a faculty. The law faculty of the University of the Free State (UFS) is regarded as a historically advantaged institution, and also a historically Afrikaans (language) institution.

Criteria for Determination of the Curriculum

Criteria for determination of the law curriculum might differ with reference to the applicable system, country, political stage, local experience of social justice issues such as sex gender, race, religion, etc., and significance of subject matter as foundational, core and optional

courses. The South African legal system as a developed unique system based on the Roman Dutch foundations influenced by especially English Law in many respects, sets specific boundaries to the law curriculum. On the other hand, a new democratic dispensation and negotiated constitution geared for societal redress has ensured marked changes to the established law curriculum. In addition, the South African law curriculum increasingly has to cater for universal social justice issues such as gender, race, religion, language and even socio-economic class. The twin-system of pure legal practitioners, attorneys and advocates, in addition to thirteen other possible legal occupations, pressurize the demarcation of subject matter as foundational, core and optional courses.

While a curriculum is sometimes seen as merely a composite of educational subject matter, the UFS include the learning activities and experiences of a broader generic skills development into their definition of curriculum. "A curriculum is more than a syllabus (which mainly refers to content). A curriculum is composed of modules prescribed or outlined by an institution for completion of a programme of study leading to a qualification... Modules refer to all of the teaching and learning components that are part of a learning programme, which includes the overall aim of learning, learning outcomes, content, activities, methods and media, teaching-learning strategies, forms of assessment, and evaluation of delivery and moderation" (*'Generic Structure of Outcomes and Concept Definitions', Education Committee, University of the Free State, 22 November 2007, p. 9*).

The law curriculum, as other higher education programmes in South Africa, has to comply with the requirements of the South African Qualifications Authority (SAQA) (<http://www.saqa.org.za/>) and the National Qualifications Framework (NQF) in terms of the South African Qualifications Authority Act, 1995, and its successor the National Qualifications Framework Act, 2008; as well as the Higher Education Act, 1997, and the Higher Education Qualifications Framework (HEQF) deduced from the NQF (*'The Higher Education Qualifications Framework'. Policy issued under the Higher Education Act, 1997. October 2007. Pretoria: Republic of South Africa. Ministry of Education 1-29*). The NQF description of a qualification impact on learning programme and curriculum development in terms of planned combination of learning outcomes with a defined purpose, intention to provide qualifying learners with applied competence and a basis for further learning, Critical Cross-field Education and Training Outcomes, integrated assessment, learning assumed to be in place, recognition of prior learning (RPL), and credits (http://www.saqa.org.za/-/structure/nqf/docs/curriculum_dev.pdf). These requirements focus much more on generic skills development than on subject matter, and especially lecturers of the older generation find it difficult to deviate from a subject specialist approach to a teaching and learning focus.

The HEQF establishes common parameters and criteria for qualifications design and facilitates the comparability of qualifications across the system. Within such common parameters programme diversity and innovation are encouraged with ample scope to design educational offerings to realise different visions, missions and plans and to meet the varying needs of the clients and communities served (<http://www.che.ac.za/documents/d000148/>). This for example enabled the UFS to develop three different *B.luris* programmes in specialized fields not aimed at the attorneys or advocates professions.

Internationalization of the curriculum, and incorporating indigenous legal systems as well as ethics and professionalism in the curriculum also creates huge debates, especially in developing countries. South Africa, as a developing country running a developed legal system, has to cope with the challenge of internationalization of the curriculum in a more open worldly society while on the other hand meeting the constitutionally safeguarded expectations of the majority population seeking recognition of their various indigenous legal systems (See section 211(3) of the *Constitution of the Republic of South Africa, 1996*). The attempt to also incorporate ethics and professionalism into the curriculum is somewhat undermined by a general

societal attitude of everyone for himself. Apart from certain content material, the UFS attempts to strengthen ethics and professionalism through subscribing to student and lecturer codes of ethics and compulsory class attendance (http://law.ufs.ac.za/dl/userfiles/Documents/00000/224_eng.pdf).

Equilibrium of Envisaged Outcomes

All the above mentioned criteria influence the equilibrium of envisaged outcomes such as **knowledge, skills and values** in the curriculum for legal education. Universities have consistently to fend off the pleas or threats of various stakeholders to increase the load on either side of the balanced scale. In particular practicing attorneys have felt that graduates, who become their articulated clerks, are not equipped with the necessary practical skills.

Numerous stands have been made over several decades on the positions of the academe as opposed to the practicing attorneys' profession. This has led to an agreement to request the Council on Higher Education (CHE) to do an appraisal of LL.B. curricula across the board of seventeen law faculties. This project was not a national review in the sense of a quality assurance exercise, but sought only to confirm the nature and extent of the problems reported with legal education. The resulting research question, negotiated between the law deans, the professions and the CHE was the following: "To what extent does the current law curriculum at South African universities meet the requirements of the different professional career paths which law graduates follow?" (*The LLB Curriculum Research Report, A research report produced for the Advice and Monitoring Directorate of the Council on Higher Education, by Georgina Pickett, November 2010, p.15*).

Research in support of the project entailed two large-scale electronic surveys, the first addressed to legal academics and the second to legal practitioners both in their individual capacity and as employers of legal practitioners, allowing access to a wide range of views from people in different kinds of legal work and at different stages of their careers, and providing the information about what academics and practitioners think students should be learning, and how well the universities are doing in preparing them. It also entailed an analysis of the LLB curriculum at the 17 universities in South Africa offering the degree. Further, legal organizations were invited to make submissions to the project. Finally, international trends in legal education, particularly the duration of LLB studies, the requirements for admission, and how curriculum is established, were looked at (*The LLB Curriculum Research Report, p.15*).

The results of the project (which was only internally revealed for lack of completeness) included a confirmation of the existence of a core curriculum for LL.B. in South Africa: "it is immediately apparent that there is a great deal of agreement concerning the core building blocks of an LLB curriculum. Of course, one must be cautious that these are only names, and do not go into any level of detail about what might be taught under each of these titles. However, there is considerable general agreement concerning the subject matters" (*The LLB Curriculum Research Report, p.133*); "There is a great deal of similarity in the substantive law curriculum components offered at every law faculty. In fact, it would not be overstating the matter to say that there is a *de facto* core curriculum in place. These courses, at least in name, are in keeping with the recommendations of both the Law Deans and the attorneys' profession" (*The LLB Curriculum Research Report, p.134*).

It is, however, important to note that the report also emphasizes the importance of equilibrium of outcomes: "However, these similarities are off-set by the significant differences in the course duration and credit rating of seemingly similar courses... reflects a considerable difference in the thoroughness and depth of study of each... cannot assume any minimum

competence... It is far more difficult to identify and compare the skills training components of the LLB programme, due to the variety of different ways that skills training is delivered, and the fact that much of the skills training is integrated into substantive law courses, and is not assessed separately” (*The LLB Curriculum Research Report*, p. 134).

While it is clear that academics and practitioners alike agree as to the importance of skills training, it is not clear that they agree on the type and depth of skills involved. In fact, there are six competencies which are rated in the top ten by all groups (individuals and employers, attorneys, advocates, judicial officers, legal advisors in the public sector, legal advisors in the private sector, and academics). These are (*The LLB Curriculum Research Report*, p.92, 161):

- ability to understand, analyze, investigate and solve problems;
- proficiency in reading, writing and speaking English;
- ability to read and interpret statutes and legal documents;
- ability to construct and communicate an argument;
- understanding of the principles of SA law and how they apply in practice; and
- research skills, both in general and specific to the profession.

These six competencies neither directly relate to specialized subject matter (which the academics would prefer) nor to professional practicing skills (which the attorneys would prefer). They seem to be more of a generic nature.

While academics and practitioners alike agree as to the importance of skills training, it is clear that they do not agree on the approach to and type, volume and depth of skills involved. From the CHE survey results it would appear that “the divide between legal education for the professions and legal education as a “liberal arts” education, generally recognized around the world, persists. Roughly one-third of law faculty respondents believe they are educating students for a profession, while nearly two-thirds of respondents believe the purpose of legal education is to develop “well-rounded law graduates who engage with legal concepts and can contribute to the legal profession and to society” (*The LLB Curriculum Research Report*, p.162). However, ‘educating students for a profession’ is not always well defined, not even by the profession. The Law Society of South Africa and the General Council of the Bar agreed to, and submitted to the deans in 2005, a draft profile applying to both branches of the profession, and that the SAQA registered outcomes for the LLB (only the ability to process numerical data has been added) be accepted as the learning to be in place at the time of commencement by graduates of the training for admission. A provisional list of learning fields and skills required was also submitted, which in itself indicated the lack of practical skills complained of. A more elaborative document of 93 pages, *Knowledge Outcomes*, was submitted in October 2006 which, strangely enough but in line with the title, dealt only with knowledge outcomes and not with the practical skills outcomes propagated for by the profession.

Reflective studies amongst graduates, or academics, do not seem to provide reliable answers, and law school is met with a rational choice of relying on the ways of the good old days or seeking the unknown Y-generation curriculum. Attempts to rely on the insights of graduates as to what would have been the ideal curriculum for them to have followed, seem fruitless because of the often diverse responses received on the same question, the often miss-interpretation of questions, and the often inexperienced graduates having to exercise an opinion on the value of their completed studies.

As indicated above the CHE has conducted such studies on a national basis in 2010. The views of graduates of seventeen different law faculties in South Africa were sought. What came through very clearly from the CHE surveys is that there is a great deal of commonality in the competencies which are highly valued by law faculty and all types of legal practitioners. There are six competencies which are rated in the top ten by all, as indicated above (*The LLB*

Curriculum Research Report, p.92, 161). Perhaps the important question in the follow-up, whether the graduate regarded his/her own completed curriculum “at **your** faculty” as adequate, was phrased somewhat subjectively. The responses of the less than 5% of aggregate graduates who came from a small rural university like UFS would be negligible.

The UFS has itself conducted two such studies recently, the most recent being *Assessment of the LLB programme of the Faculty of Law (University of the Free State) as perceived by alumni and employers* (Compiled by the Centre for Development Support, UFS, November 2008). A concern in the interpretation of this report was the fact that only about one-third of the graduates whose addresses were known and who were contacted has responded, and 60% of those have graduated within three years of the survey, indicating very little practising experience (*Table 3 in the report*). Some four out of ten alumni indicated that the LLB programme did not equip them sufficiently for their profession in that they wanted more exposure to practical work, “particularly with regard to deeds and conveyancing” (for which, strangely enough, there was absolute no exposure even in theoretical work). Interestingly also, in response to Question 16 (*Were there any aspects of the LLB programme that struck you as being particularly weak?*), ‘Lack of practical experience/training’ was the majority response with 30% of respondents having that view. On the other hand, in response to Question 15 (*Which aspect of the LLB programme would you single out as being the programme’s strongest point?*), ‘Legal Clinic’ (5.7%) and ‘Law practice’ (4.7%) took fifth and seventh places (Tables 17 & 16).

It is contended that the adversary stances of the academe versus the profession will not be solved as long as clarity and agreement is not reached on the meanings and scope of concepts like general and subject knowledge, generic skills and practical skills, and scholarly and professional values. Outcomes are the basis for assessment and are the end-product of a learning process which involves three elements of learning: knowledge and understanding - content (know that), concepts and theories (know why); doing - application of knowledge, skills and competencies (know how); and attitudes - behavior and values (professional conduct) (*‘Generic Structure of Outcomes and Concept Definitions’*, p.11).

Critical cross-field outcomes (CCFOs) are the broad, over-arching outcomes towards which all programmes work (in terms of regulation 7(3) of the *SAQA Regulations, 1998*). They are critical for the development of the capacity for lifelong learning and are about the needs of the individual and the needs of society. CCFOs envisage individuals who are able to:

- Identify and solve problems in which responses display that responsible decisions using critical and creative thinking have been made.
- Work effectively with others as a member of a team, group, organization, community. Organize and manage themselves and their activities responsibly and effectively.
- Collect, analyze, organize and critically evaluate information.
- Communicate effectively using visual, mathematical and/or language skills in the modes of oral and/or written presentation.
- Use science and technology effectively and critically, showing responsibility towards the environment and health of others.
- Demonstrate an understanding of the world as a set of related systems by recognizing that problem- solving contexts do not exist in isolation.

In order to contribute to the full personal development of each student and the social and economic development of the society at large, it must be the intention underlying any programme of learning to emphasize the importance of personal, social and economic outcomes envisaging individuals who are able to:

- Participate as responsible citizens in the life of local, national and global communities.
- Be culturally and aesthetically sensitive across a range of social contexts.
- Explore education and career opportunities.
- Develop entrepreneurial opportunities
- Further empowerment of professional individuals not only to understand the way by which they function but also to empower themselves to empower others.

(‘Generic Structure of Outcomes and Concept Definitions’, Education Committee, University of the Free State, 22 November 2007, p.11-12)

What is evident from these lists is that they do not relate directly to any legal subject matter nor to any specific legal practical skill. Clarity and agreement should be reached on the meanings and scope and contextual application of concepts like general and subject knowledge, generic skills and practical skills, and scholarly and professional values. Skills training as a generally accepted outcome should be dissected so as to clearly indicate the generic or specific purpose thereof. This also seems to be the direction the CHE indicates: “... there is a need to be clear about what every law student must know, and what skills and abilities he or she must possess in order to further his or her education and career, and to ensure that all universities provide at least this minimum to their law students; but then to have each institution build towards a complete curriculum in a manner that expresses the particular strengths and focus of the university” (*‘The LLB Curriculum Research Report’*, p.163). It is emphasized that the concept of a minimum core curriculum “should extend not only to knowledge, but also to skills and attitudes. Definition of the required skills outcomes and desirable attitudes would also help to define the respective responsibilities of universities and professional training, with universities taking responsibility for developing high-level, generic skills, while leaving to the professions the teaching of more particular skills (*‘The LLB Curriculum Research Report’*, p.165).

Transformation and Redress

In legal education at a transforming and previously advantaged law school in rural South Africa, solving the equilibrium becomes even progressively more difficult. Apart from the pressures put on law schools from the professions, the societal pressures of transforming the legal professional and higher education landscapes in South Africa became enormous.

Under pressure of having to deliver larger numbers of especially black graduates to the legal professions in South Africa, the law curriculum was drastically changed in 1998 to allow students to graduate in four instead of five years. This experiment has not been accepted as successful, and a large number of proponents have started to advocate a return to a five year and/or post graduate law degree. “In South Africa, one of the acknowledged reasons for reducing the duration of the LLB programme to four years was the desire to improve access of previously disadvantaged individuals to the legal professions. The need for transformation is compelling” (*‘The LLB Curriculum Research Report’*, p.168).

In his official information channel for staff of the UFS by the Rector and Vice-Chancellor (*Monday Bulletin*, <http://intranet.ufs.ac.za/SitePages/Home.aspx#>), Professor Jonathan Jansen pleaded on 14 February 2011: “Broadly, of course, you would know we have two strategic goals. The one we call the academic project, which is to raise the quality and competitiveness with regard to our academic mandate significantly. In this regard, we have, inter alia, increased academic admission scores, raised the bar for professorial appointments, and require class attendance. The other we call the human project, which is to make the UFS a beacon of hope for South Africa and beyond, by demonstrating how reconciliation and social justice can bring together formerly divided people as we discover and enjoy our common humanity.”

In relation to the class attendance requirement emphasis is also placed on the responsibility of the lecturer to add value. The lecturers’ responsibilities are driven by the institutional performance management and programme or departmental evaluation systems, and a new Teaching Learning policy and plan (http://www.ufs.ac.za/dl/-userfiles/Documents/00000/120_eng.pdf).

Preparedness of Students

Increasing measures of the knowledge, skills and values base required by the society seem to be undermined by decreasing levels of preparedness of students in all of those areas. Whereas the professions have blamed the faculties for delivering unprepared graduates, the universities seem to be confronted with the reality of having to admit students delivered by an inadequate schooling system. Apart from many other forms of evidence to this fact, the CHE surveys have also revealed definite perceptions amongst stakeholders in this regard: “There are a number of common threads that run through all or most of the submissions received: that entry-level students are under-prepared for tertiary study; that language proficiency and numeracy are found wanting; and that legal education must be more skills oriented” (*The LLB Curriculum Research Report*, p.143).

Apart from the stakeholders who have submitted submissions, many of the CHE survey respondents, both academics and practitioners, “have suggested that the failure of the secondary school system to adequately prepare students for tertiary studies lies at the root of the problem. For some, this was particularly in the areas of literacy and numeracy, while others referred to a more general lack of academic preparedness” (*The LLB Curriculum Research Report*, p.169).

The government have recently supported universities in addressing this problem by funding extended programmes aimed at preparing students in an additional foundation year to prepare for the successful completion of the main stream programme; in the case of the LL.B., in five rather than four years of study. The admission requirements for the extended programme would be lower than that of the main stream. In the case of UFS it seems to have been a fruitful extension of the law curriculum. In a statistical analysis of the results per module of the two groups of students it appeared that generally the success rate of the group in the extended programme was as high as that of the main stream group. In certain skills orientated modules, there was even a better success rate for the five-year group (*Report on the analysis of success rate data: LL.B. four year and five year programmes*, UFS, 30 June 2010).

While the admission to either the main stream or the extended programme was mainly determined by an ‘admission point’ system based on national senior certificate results (but also specifically language and mathematical results), results of students academic literacy and numeracy skills tests have shown that there might be other factors than average school results that predict success of students at higher education level. The NBT results of law students at UFS in 2010 show that 30% of the extended programme students might belong in the main stream,

while 60% of the main stream students would have rather followed the extended programme (*'National Benchmark Tests 2010', Faculty of Law Factsheet (Version One), UFS, 3 March 2010*). It must be borne in mind that the majority of these students are studying in their second or third language.

Implications

While there seems to be a core curriculum for LL.B. programmes at seventeen different law faculties in South Africa, it is also clear that paper is patient and what faculties pretend to deliver is not necessarily the real outcome. What needs to be done is a thorough investigation of what really happens in the class or during other learning and assessment activities, and not only what the curriculum compilers desire to be the outcome.

This implies a narrower definition of outcomes as well as preparation of lecturers in order for them to be competent in applying efficient methods to attain these outcomes. "It is no longer sufficient that lecturers be only legal experts. Subject-matter expertise must go hand-in-hand with educational expertise" (*'The LLB Curriculum Research Report', p.165*).