

MOTIVATING LAW STUDENTS TO WRITE LIKE LAWYERS: CONTEXTUALISING LEARNING IN THE “WRITE IT LIKE A LAWYER” CASE STUDY

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SUMMARY

This article explores the incorporation of contextualisation as a teaching method in legal writing programmes in South African law schools. The article argues that teaching legal writing using contextualisation can take students on a transformative journey as they learn how to write like lawyers. This will enhance student comprehension and motivation, inspiring them to engage critically with the learning materials and encouraging them to transform both on a personal level and in the context of practising law within South Africa’s constitutional dispensation. This concept is examined through the lens of a case study on a legal writing programme, the “Write it Like a Lawyer” [WiLL] programme implemented at the University of KwaZulu-Natal, Durban, in 2019. The article begins by emphasising the importance of critical thinking and student motivation when teaching students how to write persuasively. It then goes on to describe the significance of transformative, values-based teaching in South Africa today. The article concludes with recommendations for further research that could be carried out to inform the implementation of future legal writing programmes in South African law schools.

1 INTRODUCTION

“Good legal writing is a virtual necessity for good lawyering. Without good legal writing, good lawyering is wasted, if not impossible. Good lawyering appreciates and is sensitive to the power of language to persuade or antagonize, facilitate or hinder, clarify or confuse, reveal or deceive, heal or hurt, inspire or demoralize.”¹

This quote emphasises the influence that persuasive legal writing can have on a target audience and makes the point that a well-written legal document can have the power to produce an intended outcome. In a recent two-part article in this journal, the author argued that law students must be able to think critically – like lawyers – in order to write critically and produce high-quality, persuasive legal writing. Also, it was submitted that students had to

¹ Feerick “Writing Like a Lawyer” 1994 21(2) *Fordham Urban Law Journal* 381–388.

be intrinsically motivated to engage with their learning materials and develop their ability to think critically.² The article further discussed three distinct teaching principles that are instrumental in intrinsically motivating students to engage with their writing in order to produce logical, coherent text containing well-substantiated legal arguments. These teaching principles are constructive alignment, student participation and conversations in feedback. The article also stated that each of these three principles embraces constructivist, participatory, peer-learning teaching methodologies. Part One outlined the theoretical underpinnings of the pedagogical practices considered essential to teaching and learning in a legal writing programme. Part Two focused on how the teaching principles discussed in Part One were applied in practice to the “Write it Like a Lawyer (WiLL)” case study.³ This legal writing programme was piloted in 2019 at the University of KwaZulu-Natal, Durban (UKZN).⁴ The WiLL programme formed part of a larger action research study comprising four iterations of legal writing programmes carried out over a period of about 10 years at UKZN.

Upon further evaluation of the pedagogy employed in the WiLL programme, however, it became clear that there is a further teaching principle that plays an equally important role in motivating law students to think and write critically. This additional teaching principle is transformative contextualisation.⁵

The purpose of this article is to expand on the discussion of the teaching principles that were incorporated into the WiLL legal writing programme by examining the transformative-contextualisation teaching principle. This teaching principle is particularly significant when striving to enhance student motivation, since the contextualisation of learning materials within the personal experiences of the students and in a contemporary, transformative South African constitutional democracy enables students to engage with materials in a very real way, thereby piquing their interest and increasing motivation. Thus, this article examines the importance of transformative teaching in South Africa today. It also considers how the contextualisation of legal study materials can be an important motivating factor when encouraging students to engage deeply with learning material – thereby inspiring the critical thought required to produce persuasive writing.

² Crocker “Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 1” 2020 41(4) *Obiter* 751–766.

³ Crocker “Motivating Large Groups of Law Students to Think Critically and Write Like Lawyers: Part 2” 2021 42(1) *Obiter* 1–19.

⁴ The face of teaching has forever changed since the advent of the Covid-19 pandemic so as to incorporate online teaching, or blended-learning practices at the least. However, although an in-depth discussion of online teaching techniques is beyond the scope of this article, it must be noted that the WiLL legal writing programme was conducted as a face-to-face programme before the Covid-19 restrictions on teaching practices were implemented. The pedagogical principles underpinning the concept of transformative contextualisation outlined in this article, however, remain unchanged, whether they are implemented solely online, in a blended-learning approach or in a face-to-face teaching environment. Also, the larger study referred to above, of which the WiLL programme forms a part, does address the necessity of using online and blended-learning teaching techniques post-pandemic and how this might impact the practical implementation of a legal writing programme using the teaching principles mentioned in this article.

⁵ It must be noted that the term “transformative contextualisation” was coined by the author.

2 THINKING LIKE A LAWYER IN ORDER TO WRITE LIKE A LAWYER

Law students must be taught the skill of critical thinking. Wegner describes “thinking like a lawyer” as “dealing with uncertainty in a very profound way” or, in an interesting turn of phrase, “domesticating doubt”. She maintains that “uncertainty is inevitable in every profession that introduces students to situations that are abstract in the first instance, but then are shaped in reality by a host of individual circumstances”.⁶ Thus, if legal educators are to teach their students how to think like lawyers, they need to teach them strategies for dealing with uncertainty. For example, law students must be taught how to reason by posing questions, developing a routine, and by reconstructing knowledge.⁷

Much has been written about the production of a persuasive piece of legal writing being a process, and about the importance of critical thinking to that process. Bean believes:

“Good writing ... grows out of good talking – either talking with classmates or talking dialogically with oneself through exploratory writing. A key observation among teachers of critical thinking is that students, when given a critical thinking problem, tend to reach closure too quickly. They do not suspend judgment, question assumptions, imagine alternative answers, play with data, enter into the spirit of opposing views, and just plain linger over questions. As a result, they often write truncated and underdeveloped papers.”⁸

So, students who are learning how to write need to learn how to engage critically with the material they are writing about. They need to be made aware that legal writing – good, persuasive legal writing in any case – is not an easy process and that it involves an “intellectual and often emotional struggle”.⁹ Bean argues:

“[S]tudents come to college imagining knowledge as the acquisition of correct information rather than the ability, say, to stake out and support a position in a complex conversation. Eventually, students develop a complex view of knowledge, where individuals have to take stands in the light of their own values and the best available reasons and evidence.”¹⁰

However, merely thinking like a lawyer is not sufficient, students must also acquire the skill of writing like a lawyer. But what is it to “write like a lawyer”? Feerick speaks of sound advice received as a young lawyer from experienced legal professionals who emphasised that “legal writing must be clear, precise, factually-based, and ethically sound”.¹¹ Greenbaum states that the term “legal writing” implies:

⁶ Wegner “Better Writing, Better Thinking: Thinking Like a Lawyer” 2004 10 *The Journal of the Legal Writing Institute* 9–22.

⁷ Wegner 2004 *The Journal of the Legal Writing Institute* 14.

⁸ Bean *Engaging Ideas: The Professor’s Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom* (1996) 7.

⁹ Bean *Engaging Ideas* 19.

¹⁰ Bean *Engaging Ideas* 25.

¹¹ Feerick 1994 *Fordham Urban Law Journal* 387.

“[a]n understanding of rhetorical structure and certain stylistic conventions, and an appropriate use of legal terminology within a range of fairly well-defined genres of legal texts, such as judgments, legal opinions, heads of argument and formal communications between members of the discourse community, as well as written communications to non-members, that is clients.”¹²

The nature of legal writing, however, is often more nuanced than this and may take on different characteristics in order to achieve a desired outcome. This outcome may be to persuade a client to accept a legal opinion using simple, clear wording devoid of legal jargon; or to persuade a judge of a client’s innocence in legal heads of argument using clear, unambiguous legal terminology and legal justification; or to provide an opportunity for negotiation at a later date in a labour contract by intentionally leaving certain clauses open-ended; or to draft government regulations using clear and unequivocal technical phrasing. Feerick illustrates the nuanced nature of legal writing:

“Some language that seems to be bad legal writing is not that at all. Vagueness or ambiguity is sometimes deliberate. It may result from compromises which are necessary to resolve a present dispute even though the possibility of future disagreement or even litigation is left open.”¹³

Thus, legal writing must use whatever literary devices are necessary to communicate persuasively. This is not an easy skill to teach but it can be done, and it begins with student motivation.

3 MOTIVATING LAW STUDENTS TO WRITE LIKE LAWYERS

Bean argues that, in order to think critically and write persuasively – like lawyers – students must engage deeply with the topic and with the materials underpinning that topic. In order to engage deeply, they must talk about the topic, be patient and sit with the topic, suspend their own judgement and look at alternatives, pose questions to expose any doubt contained in the materials, and enter into the spirit of opposing views. In this way, they will then be in the position to deconstruct the doubt that was exposed so that their knowledge of the topic can ultimately be reconstructed.¹⁴ Thus, students must realise that there is no one correct answer. Instead, they must be encouraged to take a stand in light of their personal values and the best available reasons supporting their decision.

Getting students to engage deeply with the required legal materials to produce well-written, critical comment requires motivation.¹⁵ Keller makes

¹² Greenbaum “Teaching Legal Writing at South African Law Faculties: A Review of the Current Position and Suggestions for the Incorporation of a Model Based on New Theoretical Perspectives” 2004 1 *Stellenbosch Law Review* 3–21, discussing the ideas of Benson in Benson “The End of Legalese: The Game is Over” 1985 *Review of Law and Social Change* 518–522.

¹³ Feerick 1994 *Fordham Urban Law Journal* 382.

¹⁴ Bean *Engaging Ideas* 5.

¹⁵ There is extensive literature confirming the importance of student motivation in effective teaching and learning. Keller (“How to Integrate Learner Motivation Planning into Lesson Planning: The ARCS Model Approach” *Paper presented at VII Seminario, Santiago, Cuba*

the assumption that providing students with motivation is, for the most part, the responsibility of the educator. He states:

“This assumption is important because educators, both designers and instructors, all too often assume that motivation is the student’s responsibility. ‘I can design (or teach) a good course,’ we often hear, ‘but it’s up to the students to decide if they want to learn it.’”¹⁶

Bean’s simple, practical approach of getting students to talk can be used to great effect to enhance student motivation to engage with legal material at a deeper, more critical level. If students are offered a range of materials that lend themselves to alternative views and creative solutions, this will spark their imagination and the will to start talking. They can then develop the stamina to continue this communication beyond the surface level. Then, as these students develop intellectually in a supportive learning environment, they can learn how to formulate insightful opinions and persuasive, cogent, complex arguments from disparate sources and evidence. Encouraging students to talk among themselves in groups or in pairs or in lecturer-led class discussions is the first step to motivating them really to think about the issues at hand. The more they talk in a guided environment, the more critical and worthwhile the discussions will become. However, Bean’s view that this approach needs time to embed in the minds of the students is also vitally important when considering the intrinsic motivation of students.

Materials must be carefully chosen around a complex, creative, central theme. This will allow them to delve deeper into more critical discussions about the topic, inevitably leading to more nuanced and interesting insights. These discussions are key factors in enhancing the intrinsic motivation of law students. Materials that contextualise issues so as to resonate with students at a personal level and transform their mindsets in a broader, values-based societal context can raise students’ interest level in class discussions and lead them on to more critical debates. One of a number of teaching principles that can be used to motivate students is transformative contextualisation.

4 THE TRANSFORMATIVE-CONTEXTUALISATION TEACHING PRINCIPLE

Implementing the transformative-contextualisation teaching principle in a legal-writing programme requires a great deal of thought to be given to the

11) writes: “[There has] never been any doubt about the importance of learner motivation, but there have been difficulties obtaining methods and approaches for systematically predicting and influencing motivation” .Keller advocates the use of the ARCS model of motivation, which, he writes, “(is) based on a synthesis of motivational concepts and characteristics into the four categories of attention (A), relevance (R), confidence (C), and satisfaction (S). These four categories represent sets of conditions that are necessary for a person to be fully motivated” (Keller *Paper presented at VII Seminario, Santiago, Cuba* 2). However, Keller also contends that, despite being widely recognised and implemented around the world, this model is still evolving and that alternative approaches will still be developed. See also Keller “Strategies for Stimulating the Motivation to Learn” 1987 *Performance and Instruction* 1–7.

¹⁶ Keller and Burkman “Motivation Principles” in Fleming and Levie (eds) *Instructional Message Design: Principles From the Behavioral and Cognitive Sciences* 2ed (1993) 4.

type of materials used to encourage intrinsic student motivation. It is vital that materials be contextualised. In other words, the materials about which students will be writing must place the writing exercise in a familiar reality that they understand on a personal level. In addition, ultimately the materials and facilitated discussions must be relatable, but still complex enough to take the students out of their personal context and into a new way of thinking about and understanding the issues raised by the writing exercise.

The transformative-contextualisation teaching principle leads students on a journey of transformation from the familiar (for example, a student's experience of racial prejudice) to the unfamiliar (for example, a gay or lesbian student's experience of homophobia or a disabled student's experience of ableism). It helps them to use their understanding of an issue such as discrimination but apply it to new contexts, thus exposing them to transformative thinking. The journey takes them out of one way of thinking (the rush to judgement based on a superficial understanding) and introduces them to a new way of values-based, critical thinking (taking their time and becoming immersed in the topic). This approach keeps students motivated, as the issue is relevant but potentially challenging to their value system.

This journey of transformation, however, cannot simply be personal. Given that South Africa has a transformative Constitution and that part of the role of lawyers is to contribute to achieving the goals of the Constitution, this journey has also to pay attention to wider societal needs and goals. In this way, contextualisation and transformative, values-based teaching are inextricably linked. Thus, a legal-writing programme (ranging from the theme chosen for discussions, to the materials chosen to support those discussions, and the forms of assessment used) must be contextual in a personal sense *and* in a transformative sense. The overall design of a legal-writing programme must situate the programme in a social context that is relevant to students at a personal level, as well as in the broader South African constitutional context of the transformative imperative. In this way, student motivation and engagement will be enhanced.

The discussion below unpacks this teaching principle and the link to intrinsic motivation. First, the contextualisation aspect of the principle is analysed, and then the transformative, values-based teaching aspect is reviewed.

4 1 Contextualised teaching

When teaching legal writing to law students, it is vital to encourage intrinsic motivation. To do this, it is important to use contextualised legal material and employ contextualised practical exercises to supplement teaching methods, as well as ensure that the programme's assessments are appropriately contextualised. This is especially important when teaching in our multi-cultural South African society where very often "words that may seem to have a single meaning may not be understood in the same way with people living and working in varying cultural contexts".¹⁷

¹⁷ Wegner 2004 *The Journal of the Legal Writing Institute* 16.

To motivate students intrinsically, the materials used must not only demonstrate how to write persuasively, but must also implicitly show why a law student should want to write persuasively. They must answer the student's questions: what is the purpose of persuasive writing and why should I care about this? In other words, when choosing the module materials to support the writing process, law teachers must choose materials that link to the lived experiences of the students that are to engage with those materials.¹⁸ This will stimulate discussion and active participation, as students will be inspired by their ability to contribute to the dialogue.

The pedagogical strategy underpinning the contextualisation principle uses Quinot's ideas on transformative legal teaching¹⁹ and Lovat's writings on values education.²⁰ Both these pedagogical concepts (discussed in more detail below) provide rich opportunities to contextualise material, thereby motivating law students to think critically and ultimately write like lawyers. Not all legal writing needs to be dry and formalistic. It may incorporate life stories²¹ that are intrinsically motivating because they expose real-world values that will resonate with students.

A careful selection of high-quality, contextualised subject matter is invaluable; only once students have seen the powerful difference that high-quality writing can make, will they be motivated to put in the hard work required to improve their legal writing. The material chosen must also aid the transformation journey that students embark upon in the legal writing programme and enable students to understand the importance of creative, persuasive writing in a transformative, contemporary South Africa. Quinot maintains that responsible teaching requires law teachers to follow a transformative teaching framework that

“embraces the normative framework put forward by the Constitution in its methodology. This involves not only overt substantive reasoning but also recognition of the possibilities for creativity in applying and developing the law to meet the aims of social transformation.”²²

4.2 Transformative, values-based teaching

When teaching legal writing in the context of a country bound by a transformative constitution, it is not enough merely to awaken a curiosity in law students in order to encourage critical thinking.²³ Students need to be

¹⁸ An example of contextualised legal material that could be used to teach writing skills to UKZN law students would be the case of *MEC for Education, KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC). The case discusses the right to dignity of a South Indian High School pupil. The principles discussed in this case would resonate with many students who are of a similar ethnicity and age and live in a similar geographical location to the persons in the case. These aspects will pique their interest and encourage deep engagement with the material.

¹⁹ Quinot “Transformative Legal Education” 2012 129 *South African Law Journal* 411.

²⁰ Lovat *Values Education: The Missing Link in Quality Teaching, Values Education for Australian Schooling* Keynote address summary, Values Education Forum (May 2006).

²¹ These life stories could include, for example, actual and fictionalised events, biographies, fables, literature, poems and songs.

²² Quinot 2012 *The South African Law Journal* 414.

²³ Crocker 2020 *Obiter* 756.

aware of the need to move beyond the views expressed in the legal materials with which they are engaging and to consider the transformative imperative laid down by the South African Constitution. The South African Constitution in its Preamble challenges South Africans to “(h)ead the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”.²⁴ Legal practitioners as guardians of the law are perfectly placed to uphold these foundational values that ought to permeate every aspect of legal practice. Freedman and Whitear-Nel note that lawyers are critical to the success of our democracy as they are able to use the law to hold the State accountable and to promote social justice. They suggest it is the responsibility of lawyers to ensure the Constitution does not become “dead letter” law.²⁵

This emphasis on the living law and its ability to transform not only the views of law students at a personal level, but also ordinary South Africans in society, has a powerful motivating effect. Legal educators who are committed to teaching law responsibly in a climate of transformative education are in the ideal position to transform student thinking by inculcating a social conscience in their students. This is reiterated in the writings of Freedman and Whitear-Nel on the 2013 LLB summit:

“Concerns that were prominent at the summit included the need to develop knowledgeable, skilled, value-driven and ethical law graduates who would be able to contribute meaningfully to society, who would have a highly developed social conscience, and who would strive towards social justice.”²⁶

Legal writing in South Africa today requires nuanced critical thinking and problem-solving skills, and curriculum design cannot be carried out in isolation. If legal educators are committed to teaching law responsibly, they must be aware of the wider context within which they teach, including the transformative constitutional dispensation of contemporary South Africa.²⁷

Quinot posits that teaching students how to think, read and write like lawyers in South Africa today requires some reimagining. He comments:

“As law teachers, our legal culture manifests in the way we teach and it is thus our teaching methodology with which we need to engage critically in order to align what we do with the transformative aspirations of our Constitution.”²⁸

He believes that constructivist teaching methodologies that encourage active participation to enable students to construct their own knowledge of the law are the best fit for a transformative teaching paradigm.²⁹

²⁴ Constitution of the Republic of South Africa, 1996.

²⁵ Whitear-Nel and Freedman “A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics” 2015 21(2) *Fundamina* 234 236.

²⁶ Whitear-Nel and Freedman 2015 *Fundamina* 247.

²⁷ Quinot 2012 *SALJ* 417. See also Crocker (“Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School” 2018 21 *PER/PELJ* 1 7), who makes the point with respect to teaching legal writing skills in particular that “the multi-faceted nature of legal writing, encompassing legal analysis and application, as well as logical sequencing and argument, could not be taught in a vacuum, particularly when most of the student base was largely unfamiliar with any form of legal discourse and many had English as a second language”.

²⁸ Quinot 2012 *SALJ* 416–417.

A teaching paradigm that incorporates transformative contextualisation also encompasses a values-based teaching approach. Lovat draws on Habermas's theory of knowing, which he says "has been instrumental in much of the thought that educationists have seized on in attempting to deepen our understanding of learning and stretching conceptions of the role of the teacher".³⁰ Lovat maintains that values education should further Habermas's ideas of what it is to understand, which he says is

"the knowing and understanding that comes from critique of all one's sources of knowledge and ultimately from critique of one's own self or, in Habermas's terms, from knowing oneself, perhaps for the first time."³¹

To encourage understanding in this way is to further values education, the focus of which is:

"[t]o push student learning towards self-reflectivity, that knowing of self that allows one to step out of the shadow of one's upbringing and cultural heritage, to challenge not only the preconceived beliefs and behaviours of this upbringing and heritage but, more painfully, one's own deep seated comfort zone of beliefs and behaviours. The task, in other words, is to transform."³²

Lovat makes another important point. This transformation of student beliefs and behaviours

"[d]oes not mean imposing a different set of beliefs and values on students than those they came in with. Imposing someone else's comfort zone would be a contradiction of everything implied by critical and self-reflective knowing. It does however mean challenging students to see that whatever beliefs and values they brought with them are but one set, one life-world, and to consider the life-worlds of others."³³

This ability to accept other world views is essential to thinking like a lawyer, since lawyers are obliged objectively to assess problems presented by clients and then advocate the best course of action for those clients, regardless of who they might be.³⁴ Lawyers are frequently required to advise

²⁹ Quinot notes: "Under constructivist pedagogy, the teacher is no longer the sole authoritative figure in the class, presenting students with ready-made knowledge for them simply to accept. Rather, the process of learning occurs by students engaging with the materials and each other and forming their own constructions that they must justify within the knowledge community, guided by the teacher using a set of explicit and clear normative values." Quinot 2012 *SALJ* 422.

³⁰ Lovat *Values Education: The Missing Link in Quality Teaching* 3.

³¹ *Ibid.*

³² Lovat *Values Education: The Missing Link in Quality Teaching* 4.

³³ *Ibid.* In a similar vein, Fink (*Creating Significant Learning Experiences: An Integrated Approach to Designing College Courses* (2003) 7) talks of increasing student motivation by providing students with "significant learning experiences". These experiences, the author maintains, are learning experiences that change the students in some important way and have two outcomes, namely: "Significant and lasting change: Course results in significant changes in the students, changes that continue after the course is over and even after the students have graduated. Value in life: What the students learn has a high potential for being of value in their lives after the course is over, by enhancing their individual lives, preparing them to participate in multiple communities or preparing them for the world of work."

³⁴ An in-depth exploration of values-based teaching practices and ethical pedagogy are beyond the scope of this article. However, in this respect, the pedagogy developed by Mary Gentile – giving voice to values (GVV) – is important to note. Holmes ("Giving Voice to

and represent clients whose values do not reflect their own. Therefore, in order to represent their clients adequately and to maintain the standard of professionalism required, they must learn to manage this separation between their own beliefs and that of their clients.³⁵

The importance of upholding the transformation imperative as set out in the Constitution, and by extension the necessity for law teachers to adopt values-based teaching methodologies, is echoed in several documents that are designed to regulate the conduct of legal professionals – from the time they begin their tertiary studies as potential legal professionals to the time they enter legal practice as qualified legal professionals. For example, the exit level outcomes of South African law students are clearly articulated in the South African Qualifications Authority (SAQA) registered qualification document, which describes the purpose and rationale of the Bachelor of Laws qualification as, *inter alia*:

“To provide the South African community with lawyers who are empowered to accept their responsibility towards the realisation of a just society based on a constitutional democracy and the rule of law within an international legal order.”³⁶

Also, the Legal Practice Act³⁷ requires the professional conduct of legal practitioners to be regulated in terms of the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities. Sections 3.1 and 3.2 of the Code state:

“Legal practitioners, candidate legal practitioners and juristic entities shall–
 3.1 maintain the highest standards of honesty and integrity;
 3.2 uphold the Constitution of the Republic and the principles and values enshrined in the Constitution, and without limiting the generality of these principles and values, shall not, in the course of his or her or its practice or business activities, discriminate against any person on any grounds prohibited in the Constitution.”³⁸

The transformative-contextualisation teaching principle was implemented in the WiLL legal writing programme, which formed part of the LLB module “Legal Research, Writing and Reasoning” at the University of KwaZulu-Natal.

Values: Enhancing Students' Capacity to Cope with Ethical Challenges in Legal Practice” 2015 18(2) *Legal Ethics* 115–137, discussing Gentile *Giving Voice to Values. How to Speak Your Mind When You Know What's Right* 2010) makes the comment: “Legal ethics pedagogy does not often attend to the gap between principles and effective action. A pedagogy that directly addresses this gap is ‘Giving Voice to Values’ (GVV). Developed by US academic, Mary Gentile, GVV focuses not on the normative question of ‘what is the right thing to do?’, but on the behavioural question of ‘how do we get the right thing done?’”

³⁵ This concept is not dissimilar to the idea of decolonisation of the mind.

³⁶ <https://regqs.saqa.org.za/viewQualification.php?id=22993> (accessed 2021-03-04).

³⁷ 28 of 2014.

³⁸ This Code of Conduct is published in terms of s 97(1)(b) of the Legal Practice Act 28 of 2014, published in GG 42337 of 2019-03-29.

5 TRANSFORMATIVE CONTEXTUALISATION IN THE WiLL LEGAL WRITING PROGRAMME: A CASE STUDY

The Legal Research, Writing and Reasoning module (LRWR) is an eight-credit,³⁹ semesterised, second-year LLB module. The module content covers theory and practical exercises in critical thinking and legal-writing skills, with some practical application, and uses a transformative, constructivist teaching pedagogical framework.⁴⁰ The Write it Like a Lawyer legal writing programme (WiLL) took a small-group, participatory, skills-based lecture format, using an active learning ethos to encourage student motivation. The materials, formal lecture preparation, lecture tasks and assessments (examples of which are discussed under heading 6 to follow) were all carefully chosen, so as to be congruent with a contextualised, transformative teaching paradigm.

The WiLL programme began by introducing the theme of the programme: the right to dignity in South Africa. This theme was chosen because it allowed for the transformative contextualisation of the module materials in two ways. First, much of the material dealing with the right to dignity contextualises real-world issues relating to this right, thereby enabling students to identify at a personal level with the issues discussed in the academic articles and law reports that are studied throughout the programme. Secondly, the theme highlights a range of important societal issues that the right to dignity addresses, both in a historical context and currently in a transformative South African society.⁴¹ This transformative contextualisation of the teaching materials increases students' intrinsic motivation, encouraging students to engage deeply and to think critically about the issues raised in the materials, thereby enhancing their persuasive writing skills.

Thus, the subject materials chosen to facilitate the acquisition of legal writing skills in the WiLL Legal Writing programme were specifically selected to fit within a transformative teaching framework and to contextualise the use of creative, values-based, persuasive legal-writing skills. The materials are embedded in a contemporary South African context, illustrating the power of critical, persuasive writing to transcend conservative legal thinking and to promote social reform and transformative constitutional norms and values. Quinot states:

“Matters of morality and policy, even politics, can no longer be excluded from legal analysis ... It will call into question our own professional sensibilities and will require a critical self-assessment of whether we are able to engage in the kind of value-based reasoning that we are now required to teach.”⁴²

³⁹ An 8-credit module is one that has 80 notional study hours allocated to it and usually has two 45-minute lecture slots per week for 13 weeks.

⁴⁰ See a detailed discussion on the structure of this module in Crocker 2020 *Obiter* 763.

⁴¹ For example, the interrelationship between the right to freedom of culture and the right to dignity, which addresses the expression of cultural identity in the form of dress, as well as the plight of same-sex partners and their historical legal struggle for the right to marry under the same law as heterosexual couples.

⁴² Quinot 2012 *SALJ* 415.

Three main source materials were used in the programme: an academic journal article written by Peté, entitled “South Africa’s Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation”;⁴³ the Constitutional Court judgment of *Minister of Home Affairs v Fourie*;⁴⁴ and a legal blog article written by De Vos entitled “Newsflash: Sex Workers Also Have Dignity”.⁴⁵ These materials were chosen to highlight the value of the right to dignity and the dignity of difference in South Africa. Thus, the sources were chosen not only because they are simply and persuasively written and thus demonstrate how to write clearly and simply – like a lawyer – but because these sources lend themselves to a critical, values-based discussion on an important foundational value of the Constitution, namely dignity. This is a value that requires the protection of the highest court in the land and which, if adequately protected, will lead to the transformation of the lives of ordinary South Africans. The topics discussed in the materials were also contextually relevant to the students. Programme facilitators encouraged a close reading of and discussion on the legal language, legal argumentation and legal logic of these three sources in order to demonstrate how persuasive quality writing can be.

The first source, the academic journal article written by Peté,⁴⁶ discusses a Constitutional Court case⁴⁷ about the right to dignity and the background of the judge who penned the judgment, Justice Albie Sachs. The persuasiveness of the academic journal article lies not only in its eloquent outline of the importance of human dignity as an abstract value, but also in its focus on the human connection, that is, the man behind the Constitutional Court judgment that was creatively and elegantly written and which strongly facilitated the protection of dignity in South Africa. Students were able to connect with the creative, story-telling writing style of the journal article on a number of levels. It enabled them to contextualise the subject matter of dignity jurisprudence in an easy-to-understand manner and to appreciate how a well-written piece can draw in the reader, while still encouraging critical thought. Peté’s focus on personalising the man behind a Constitutional Court judgment was a strong motivation for students to appreciate not only the profound impact that Sachs J’s words had on certain sectors of society, but also to appreciate the passion and care behind the Constitutional Court Justice’s powerful words. Peté voices this sentiment:

“What, however, of the man behind the stark details set out above? A romantic and idealistic thread is apparent throughout both the judgments and other writings of Sachs. Indeed, it is precisely the emotional thrust behind his ideas, his sensitivity to the pain of others, his willingness to dream, and his

⁴³ Peté “South Africa’s Quixotic Hero and His Noble Quest: Constitutional Court Justice Albie Sachs and the Dream of a Rainbow Nation” 2010 *Obiter* 1–15.

⁴⁴ *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC).

⁴⁵ De Vos “Newsflash: Sex Workers Also Have Dignity” (7 June 2010) <https://constitutionallyspeaking.co.za/newsflash-sex-workers-also-have-dignity/>.

⁴⁶ Peté 2010 *Obiter* 1–15.

⁴⁷ *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs supra*.

courage not to allow the dream to die, which has endeared him to lawyers, academics and ordinary South Africans.”⁴⁸

The second source used in the WiLL programme was the Constitutional Court case of *Minister of Home Affairs v Fourie*.⁴⁹ This is the case that is also discussed in Peté’s academic journal article used for the first source. This case was introduced after the article to students in order to demonstrate the more formal, complex style of judgment writing and how to draft a case summary. Wegner maintains that “[c]ases provide a very neat framework by which to advance people’s cognitive skills – higher-order thinking skills, through systematic exploration”.⁵⁰ An in-depth exploration of this case allowed students to witness how the relevant legal principles were expertly applied to a complex set of facts supported by sound legal reasoning. This was a practical demonstration of how to write like a lawyer. They were then encouraged to discuss alternative outcomes to the case, should the facts have differed in any way – that is, a demonstration of how to think like a lawyer. In addition to this, students were taken through a critical reading of the judgment in some detail – to illustrate how mini-summaries and sub-headings were used throughout the piece by Justice Sachs to break up chunks of text and to keep the reader engaged and up-to-speed with the arguments presented.

However, in addition to showing students the necessity of a simple, structured writing style to help with the comprehension of a lengthy legal text with complex, nuanced arguments, this judgment was selected as it showed Sachs J’s superior, persuasive legal-writing skills and the ability to engage in a creative, critical discussion of important social issues in such a way that readers are elegantly persuaded by his point of view.

Thus, this source demonstrated how a creative writing style can be used, even within the confines of a formal judgment, in order to elevate the persuasiveness of the arguments. An excellent example of this is Sachs J’s eloquent writings about the right to be different:

“The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are ... At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.”⁵¹

This text also served to remind students of the importance of changing their mindset from one of authority to one of justification; to this end, they were asked to compare the different perspectives that emerged from the majority

⁴⁸ Peté 2010 *Obiter* 4.

⁴⁹ *Supra*.

⁵⁰ Wegner 2004 *The Journal of the Legal Writing Institute* 17.

⁵¹ *Minister of Home Affairs v Fourie (Doctors For Life International, Amici Curiae); Lesbian and Gay Equality Project v Minister of Home Affairs supra* 549 E–G.

and minority judgments in the *Fourie* case. Students were encouraged to conduct a close critical reading of both the majority and the minority judgments, and to use their critical thinking skills to decipher how judicial opinion in a single judgment can be both the same and different.

An important aim of studying this particular judgment, which dealt with the right of same-sex couples to marry, was to take the students on a transformative journey on two levels: first, at a personal level, learning about South Africans who may embrace a different lifestyle to themselves but who are nevertheless deserving of being treated with equal dignity; and secondly, at a broader societal level, seeing the powerful difference that dignity jurisprudence can make in certain sectors of South African society.

The third source used in the WiLL programme was a legal blog article written by De Vos, an experienced legal journalist and constitutional law commentator. The subject matter of this source mirrors the subject matter of the previous sources and provides an interesting discussion on the inherent right to dignity of sex workers. De Vos's legal blog piece illustrates to the students a third and final style of legal writing: the informal, factual, abbreviated writing style of newspaper journalists, with a completely different target audience to that of an academic journal article or judgment. Just as important, this source illustrates in a deft, uncomplicated fashion, the creative development of an argument. It also touches on the transformative, societal debate about the controversial topic of sex work in South Africa.

Thus, the transformative contextualisation of the materials used made the sources relevant to students at a personal level, which increased student comprehension of the subject matter and their intrinsic motivation to engage deeply with the materials. This deep engagement enabled students to think creatively about how a specific writing style could be used to communicate most persuasively with their target audience. The complex issues raised in the materials gave students the space to pose questions and debate any areas of doubt and ultimately reconstruct their knowledge of the issues addressed. Thus, the materials took students on a journey of transformation from a personal revelation of the importance of dignity to them as individuals – to a realisation of the importance of this right to South African society as a whole.

6 ASSESSMENT IN THE WiLL LEGAL WRITING PROGRAMME

The constructive alignment of the WiLL legal writing programme was designed to ensure that the transformation journey on which the students were taken during class translated into achievable module outcomes that were assessed by continuous assessment.

Students were given two assessments in the programme. These assessments were essential to anchor the programme in the Legal Research, Writing and Reasoning (LRWR) module, which formed part of the mainstream, second-year LLB syllabus lending credibility to the programme and motivating students to participate to the best of their abilities. The assessments used in the WiLL programme were designed to promote critical

thinking around issues such as the importance of social transformation, its practical implications and the value of dignity jurisprudence in South Africa today. They also served to motivate students to engage deeply with the source material by showing them that good legal writing can indeed make a practical difference.

The first assessment used was a case summary.⁵² Students were required to summarise a judgment by Chief Justice Langa in the *Pillay*⁵³ case. This judgment was chosen for the assessment, not only because of the elegant, persuasive way in which it was written, but because of its seamless alignment with the programme's theme of dignity jurisprudence. Understanding the principles outlined in this assessment judgment serves to supplement the knowledge required for the module outcome of understanding the value of dignity in South Africa today, as well as to test the students' functioning knowledge. In addition, the *Pillay* case contains arguments that students would immediately be familiar with, since both the *Fourie* case and the *Pillay* case discuss issues relating to the violation of human dignity. In this way, students were able to focus on applying their case-summary and critical-reading skills learnt during their interaction with the *Fourie* case, without being unduly distracted by unfamiliar complex arguments.⁵⁴

The second and final assessment was to write an article for a newspaper's legal column, discussing any aspect of South Africa's dignity jurisprudence. The assignment instructions clearly defined the maximum word count and writing style. However, the topic of the assignment was kept vague by design, encouraging students to think creatively while maintaining the need for them to justify their arguments.⁵⁵

⁵² The case summary was assessed by means of a rubric. Key ingredients to be assessed in the case summary fell into two categories: writing skills and substantive knowledge. So, for example in the skills category, an excellent case summary would make use of all the correct headings; include all relevant information, and be written succinctly, avoiding waffle and verbosity. In the substantive knowledge category, for example, the correct *ratio decidendi* had to be identified and the main principles of the case summarised and clearly explained. It is important to note that prior engagement during class on a deep level with judgments that discuss similar principles and issues to the assessment case is pivotal in ensuring that students can apply their minds to drafting a case summary that is not just rote but engages with the principles in the way a lawyer would – with understanding and intention.

⁵³ *MEC for Education, Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC).

⁵⁴ In addition to learning the nuts and bolts of how to summarise a case, students were encouraged to engage in a more nuanced analysis of the facts of the case and to brainstorm (as part of their class participation) possible outcomes of alternative legal interventions. Feerick (1994 *Fordham Urban Law Journal* 386) notes that any legal-writing programme should teach the essential skill of fact analysis, which "requires the ability to engage in different problem-solving techniques, such as brainstorming, ends-means thinking, cost-benefit analysis, risk-calculation, problem identification analysis, and integration of legal analysis with factual investigation".

⁵⁵ For example, some students wrote about the importance of South Africa's dignity jurisprudence in protecting the rights of certain minority groups in South Africa, while others argued that South African jurisprudence is not doing enough to protect the right to dignity of South African citizens. This assessment was designed to test the students' ability to draw together the threads of a number of sources of information (including the case summary assessment judgment) to formulate an opinion based on these sources and then to justify that opinion. Key ingredients to be identified in an excellent opinion would be a clearly defined aim and focus, supported by a well-reasoned, persuasive argument with logical flow.

7 EVALUATION OF THE WILL PROGRAMME AND RECOMMENDATIONS

The Write it Like a Lawyer programme was a reflective research project, undertaken at the time solely for the purposes of improving my own teaching practices. Evans interprets the concept of “reflective practice” as, “the constant striving for improvement by a process involving evaluative reflection to identify areas for improvement and creative reflection to identify remedial practice.”⁵⁶ Evans then relates this practice to educational research, saying:

“[T]his is achieved by a cycle whereby researchers analyse what they do, evaluate their output, seek a better way of doing things where they feel one is needed, and then apply to their research practice as much of that better way of doing things as circumstances permit.”⁵⁷

This project forms part of a larger reflective teaching exercise conducted at UKZN to improve the legal writing skills of first- and second-year law students, which comprises four cycles. The Will project is the last in the series of iterations of the project. The first three cycles were evaluated using a variety of instruments, including: personal student questionnaires; feedback from students by means of annual student module evaluations, regular informal meetings with students; author notes on informal class discussions; and reflective comments of peer tutors and first- and second-year students that were recorded in the module reports to the internal moderator and external examiner.⁵⁸ The fourth and final action research cycle – the Write it Like a Lawyer programme – was evaluated using the author’s personal observations as lecturer and course designer. These observations take place after a number of years of teaching legal writing in this module, during which time the author used a variety of teaching methods and perused hundreds of student essays each year.

When comparing student motivation and the persuasive writing skills of students who have been taught using a transformative-contextualisation approach to those of students from previous years (when the approach was not used), it was observed that students did in fact experience a transformation in their thinking as well as in their writing. Students in the Will programme were more motivated to take part in robust, respectful class discussions, often interrogating the course materials with enthusiasm long after the allotted lecture time had ended. Also observed was a marked difference in the persuasiveness of the students’ legal writing, with nearly every student showing an interest and willingness to complete more than one draft in order to hone their argument, despite not being required to do so.

⁵⁶ Linda Evans “Reflective Practice in Educational Research” 2002 Continuum, London.

⁵⁷ *Ibid.*

⁵⁸ See Crocker “Using Peer Tutors to Improve the Legal Writing Skills of First-Year Law Students at University of Kwazulu-Natal, Howard College School of Law” 2020 45(1) *Journal for Juridical Science* 93–118; and Crocker “Facing the Challenge of Improving the Legal Writing Skills of Educationally Disadvantaged Law Students in a South African Law School” 2018 21 *PER / PELJ* 1–27.

The teaching approach used is also well grounded in literature, which links the contextualisation of study materials to intrinsic motivation leading to critical thinking and critical writing. Further research is, however, needed to measure these outcomes formally, including the perceived increase in student motivation and improvement in the persuasiveness of the students' legal writing. It is therefore recommended that this study should be continued by testing these lecturer observations using qualitative instruments such as student and lecturer questionnaires.

8 CONCLUSION

If students are to be taken on a journey of transformation, it is essential that values-based teaching techniques and contextualised teaching materials are used to facilitate learning at a deep level. Thus, transformative contextualisation is an important teaching principle to incorporate into the curriculum design of legal-writing programmes at South African universities. Using this technique will provide students with the intrinsic motivation that is essential to engage at a deep level, which in turn gives students the intellectual space to think, to read and to write critically. This is imperative in South Africa today, where legal educators have a responsibility to heed the constitutional mandate to promote a society based on social justice, by inspiring a social conscience in their students.