
**DEVELOPING THE LAW CURRICULUM
TO MEET THE NEEDS OF THE
21ST CENTURY LEGAL PRACTITIONER:
A SOUTH AFRICAN PERSPECTIVE**

1 Introduction

The law curriculum in African countries must reflect the realities of the needs of their own societies, but law faculties and law schools in developing countries also need to equip their law graduates to deal with the wave of globalization sweeping the world. This is particularly important for countries in transition from dictatorship to democracy, and from closed to open societies. Using South Africa as an example, it is intended to deal briefly with the changes made to the law curriculum to meet the domestic needs of the new democratic order. Thereafter, the broader curriculum needs of aspiring African lawyers in the 21st century, again with reference to South Africa, will be considered in the context of globalization.

1.1 Meeting the domestic needs of the 21st century

After the first democratic elections in South Africa in 1994, a number of legal forums were convened by the Ministry of Justice to re-examine different aspects of legal practice, legal qualifications and legal education. Amongst these were forums dealing specifically with the university law curriculum (see for instance, Ministry of Justice *Legal Forum on Legal Education: Proceedings* (1995)).

The law deans of the country's 21 law faculties came together at several legal education forums and by 1997 there was agreement that the LLB degree in South Africa should be changed from a three-year postgraduate to a four-year undergraduate programme. It was agreed that in formulating a new curriculum law schools should: (a) take into account that South African law exists in and applies to a pluralistic society; (b) endeavour to ensure that students acquire skills appropriate to the practice of law; and (c) strive to inculcate ethical values. To this end it was agreed that in addition to the traditional core courses taught in the three-year LLB programme a number of new skills courses should be introduced. However it was left to individual law schools to decide which courses they wished to teach (McQuoid-Mason "Message from the Chairperson of the Board of Control, Durban School"

1998 *Law Society of South Africa and University of Natal School for Legal Practice: Commemorative Brochure 1994-1998* 14-15).

The law deans suggested the following skills courses: (a) analytical skills to understand the relationship between law and society; (b) language skills (including indigenous languages); (c) communication and writing skills; (d) legal ethics; (e) cultural, race and gender sensitivity; (f) practice management skills; (g) accounting skills; (h) research skills; (i) trial advocacy skills; and (j) computer skills (McQuoid-Mason 1998 *Law Society of South Africa and University of Natal School for Legal Practice: Commemorative Brochure 1994-1998* 15). It was also agreed that law schools should encourage community service work by law students in law clinics and street law programmes. (Law clinics were first set up at South African university law faculties in the early 1970s and by the early 1980s the majority of universities had clinics: McQuoid-Mason *An Outline of Legal Aid in South Africa* (1982) 139-163. The first street law programmes were set up at South African universities in the mid-1980s: McQuoid-Mason "Reducing Violence in South Africa Through Street Law Education of Citizens" in Kirchoff, Kostvski and Schneider (eds) *International Debates of Criminology* (1994) 347-371.)

An important consideration in these recommendations was the recognition of the need for an integrated approach to legal education, rather than the traditional approach which separated the theory of law from practice. In other words it is not enough to provide students with knowledge about the law without developing their skills to apply such knowledge or inculcating them with the necessary values concerning the practice of law (this holistic approach is well set out in American Bar Association Section of Legal Education and Admissions to the Bar *Legal Education and Professional Development – An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (The MacCrate Report)* (1992)). It can be argued that these principles apply equally to law faculties and law schools in other African countries (for instance, there is considerable emphasis on the teaching of skills in the final-year LLB programmes at the Universities of Zimbabwe and Botswana, and at the postgraduate law schools in South, West and East Africa).

2 Responding to the impact of globalization

African countries in the 21st century cannot escape the wave of globalization sweeping the world (*cf* Howse and Mutua "Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization" in Stokke and Tostensen (eds) *Human Rights in Development Yearbook 1999/2000: The Millennium Edition* (2001) 53) and law faculties and law schools in developing countries need to equip their law graduates to deal with its

results. This means that apart from exposure to traditional core courses, law students in Africa need to be prepared to engage with relevant aspects of (a) information technology; (b) intellectual property; (c) human rights; (d) HIV/AIDS; (e) the environment; (f) international trade and investment; (g) women's and children's rights; and (h) alternative dispute resolution. It is intended to deal with each of these in turn.

2.1 *Information technology and the law*

Information technology and its impact on legal practice is becoming increasingly important. It may be true that in the 21st century there are still some African countries where the telephones do not always work properly. However, in those countries with a reasonably sophisticated infrastructure, and which trade with the outside world on a regular basis, the internet is one of the basic tools of commerce and communication (see *eg*, Department of Trade and Industry *Green Paper on Electronic Commerce for South Africa* (2000)). For example, information technology and internet law demands a new understanding by law teachers, legal practitioners and law students in the fields of contract and delict. In contract, questions arise as to where and when the contracts were entered into (for example, where was the offer made and when did the acceptance take place?). (See Reed "Internet Contracting" (1999) 9 *Computers and the Law* No 4 16-25; *cf* Department of Trade and Industry *Green Paper on Electronic Commerce for South Africa* (2000) Chapters 2 and 3.) Issues of delict involve such questions as: Are employees entitled to privacy concerning their e-mails during business hours? (See Michaelson "The Use of E-Mail and the Internet in the Workplace" in Buys (ed) *Cyberlaw: The Law of the Internet in South Africa* (2000) 193-230.) Is an employer vicariously liable for publishing defamatory e-mails circulated by employees on their local area network? (See Michaelson 193-230.) Not only should law students know how to use the internet, but they also need to have sufficient understanding of the impact of information technology on the law so as to be able to advise clients on such issues.

2.2 *Intellectual property law*

Intellectual property law in the 21st century requires aspiring lawyers, particularly in developing countries, to be vigilant against exploitation of indigenous intellectual property interests by developed countries. This is especially true in respect of the patenting of the genes and identity of indigenous flora and fauna (see for instance, Lupton "Patenting Genetic Material – Is it Permissible in South African Law?" 1997 9 *SA Merc LJ* 265). For instance, the patenting of Indian basmathi rice or South African barberton daisies by American firms illustrates just how easily developing countries can lose their intellectual property rights to entrepreneurs in the developed world. Another recent South African example is where "rooibos

tea”, which is the generic name for an indigenous tea that has been known under that name for about 300 years in South Africa, was recently registered as a brand name in the United States, so that South African exporters would have to pay a royalty to the American holders of the brand name. A related issue is that of “cybersquatting” where the names of famous people or places in a country are used as domain names on the internet and people, cities or governments have to pay exorbitant amounts to use their own names (see Woods “Securing Domain Name Registrations” 1998 9 *Computers and the Law* No 3 11-14; and Viljoen, Du Plessis and Vivier “Trademarks, Domain Names and Patents” in Buys (ed) *Cyberlaw: The Law of the Internet in South Africa* (2000) 71-94). Law students in Africa need to be trained to protect the intellectual property interests of their compatriots and countries against exploitation from abroad.

2.3 *Human rights law*

A positive spin-off of globalization has been the spread of human rights and democracy across the world since the end of the Cold War (*cf* Howse and Mutua 56-57). However, these gains received a major setback after 11 September 2001 when some areas of human rights protection came under attack during the “war on terrorism”, resulting in draconian anti-terrorism legislation in many countries, including some in Africa. This has led to a reversal of the human rights gains in many countries – both developed and developing. Aspiring lawyers need to be aware of these threats and equipped to devise appropriate responses. This is particularly true of developing countries that are still in transition from dictatorship to democracy. Every effort must be made to ensure that the human rights gains of the past are not reversed under the guise of defeating terrorism. Lawyers in transitional African democracies also need to be trained in how to use their countries’ constitutions to litigate on human rights issues. There is a good track record in this regard in Southern Africa (in South Africa, for instance, there have been thousands of cases involving human rights violations over the years. Court challenges regarding human rights issues also occur regularly in Zimbabwe, Namibia and to a lesser extent in Botswana), but elsewhere in Africa there is very little use made of this important mechanism, particularly to invalidate unconstitutional legislative or administrative acts. This is probably because, apart from a lack of financial and human resources, in many African countries there is no culture of challenging executive authority in the highest courts of the land on constitutional issues. There is an urgent need to train a new breed of African lawyers in the 21st century who will be prepared to hold the executive and legislature accountable when they violate human rights by breaching the provisions of the constitution.

2 4 *HIV/AIDS and the law*

Africa, particularly sub-Saharan Africa and Southern Africa, is bearing the brunt of the world-wide HIV/AIDS pandemic. This is likely to continue into the 21st century. The disease is impacting on all areas of the law – not just medical law (see for instance, Dada and McQuoid-Mason *Introduction to Medico-Legal Practice* (2001) 29-32). HIV/AIDS is not simply a health issue, it is also a human rights issue. For instance, in the field of human rights it raises questions such as: (a) the rights of pregnant HIV-positive mothers to receive anti-retroviral treatment from the state to prevent transmission of the virus to their children (the classic South African case is *Minister of Health v Treatment Action Campaign (Case No 2)* 2002 5 SA 721 (CC)); (b) the rights of rape survivors to receive similar treatment to prevent them from contracting the virus (see for instance, McQuoid-Mason, Dhai and Moodley “Rape Survivors and the Right to Emergency Medical Treatment to Prevent HIV Infection” 2003 93 *SAMJ* 41); (c) whether the state may compulsorily licence the manufacture of cheap anti-retroviral drugs (see Cochrane “Access to Patented Technology for Developing Countries” paper delivered at International Bar Association Conference, Durban 2002 (unpublished) 8-10); or (d) whether the state may allow parallel importing of cheap anti-retroviral drugs (see Cochrane 6-7; and see generally International Intellectual Property Institute *Patent Protection and Access to HIV/AIDS Pharmaceuticals in Sub-Saharan Africa: A Report Prepared for the World Intellectual Property Organization* (2000)). Other issues include: (a) the legal liability of persons who intentionally or negligently infect others with the virus; (b) questions of confidentiality, informed consent and testing for HIV/AIDS (see for instance, Dada and McQuoid-Mason 29-32); (c) whether alleged rapists should be forced to submit to HIV testing; (d) discrimination against HIV-positive people in the workplace; and (e) the impact of HIV/AIDS on insurance law. Aspiring African lawyers, particularly at the epicentre of the pandemic in Southern Africa, need to be alive to these issues as they are likely to manifest themselves at some time during their practice. It may not be necessary for law schools to mount a course specifically on HIV/AIDS but it is essential that its impact on traditional fields of law such as delict, criminal law, insurance law, labour law and constitutional law should be canvassed with students.

2 5 *Environmental law*

Environmental degradation in developing countries has resulted in major damage to natural forests and the dangers of water shortages and floods. Pollution, hazardous mining operations, and the dumping of toxic waste by developed countries has also caused environmental harm and health hazards to people in developing countries. There are a number of examples from

South Africa. Thus at Lake St Lucia successful attempts were made to prevent ancient dune forests near nature reserves from being destroyed by strip mining activities to recover minerals from the sand (for the environmental impact assessment report on this issue see Council for Scientific and Industrial Research *Environmental Impact Assessment, Eastern Shores of Lake St Lucia* (1993)). People living south of the city of Durban have been exposed to pollution from oil refineries for decades and many suffer from respiratory problems as a result (see for instance, Kidd "Of Gas Pipelines and Sour Judicial Air: *Merebank Environment Action Committee v Executive Member of KwaZulu-Natal Council for Agricultural and Environmental Affairs*" 2001 8 *SA Journal of Environmental Law and Policy* 133). Thousands of workers in, or residents near, asbestos mines have contracted asbestosis which can result in lung cancer and/or cancer of the bronchus (see Glazewski *Environmental Law in South Africa* (2000) 646). A factory plant in the province of KwaZulu-Natal established to recycle tons of local and imported toxic mercury waste caused workers to fall ill from overexposure to mercury, while at the same time the mercury polluted a river used by the local community (see Glazewski 761-762). Aspiring lawyers in other African countries need to be trained to deal with similar threats to the environment in their countries.

2 6 *International trade and investment law*

A major impact of globalization has been the need for countries to open up their economies to international trade and investment. In order to promote international trade, developing countries, particularly in Africa, have been required to drastically reduce their import tariffs and to privatize their state assets. This trend will continue into the 21st century. The result of these structural adjustment programmes has been the closing down of many previously protected local industries and massive job losses. For instance, since South Africa signed the Uruguay Round of the General Agreement on Tariffs and Trade on attaining democracy in 1994, hundreds of thousands of people have lost their jobs in the television and radio manufacturing industry, the clothing and textile industry, and the motor industry (Ryan "Now the World's Our Stage" 2002 *Brand South Africa: Alive with Possibilities* 128). Some relief has been provided by the American African Growth and Opportunity Act (AGOA) (Ryan 2002 *Brand South Africa: Alive with Possibilities* 128) and negotiations are under way between the Southern African Customs Union countries and the United States government regarding a Free Trade Agreement. It is essential that during such negotiations Southern African trade lawyers remain vigilant to ensure that their countries are fully aware of the possible consequences. Aspiring African lawyers need to be trained to advise their governments and private sector on the intricacies of trade agreement contracts and the pitfalls of

privatization.

2 7 *Women's and children's rights*

Women's rights have been in the limelight since the Beijing Conference (Fourth World Conference on Women, Beijing, China 4-15 September 1995: see United Nations *Platform of Action and the Beijing Declaration* (1996) 7-11), but issues of women's reproductive rights, domestic violence, certain cultural and religious practices, and sexual exploitation are likely to remain major obstacles to the emancipation of women and girl-children during the 21st century. There is increasing recognition around the world of the need to protect and promote the human rights of women and children. This has resulted in the adoption of a number of international and regional documents by the international community (for instance, the Convention on the Elimination of Discrimination against Women (CEDAW); the Declaration on the Elimination of Violence against Women (DEVAW); the Convention on the Rights of the Child (CRC); and the African Charter on the Rights and Welfare of the Child (ACRWC)). African lawyers need to be aware of which international and regional agreements their countries have adopted, and should be prepared to assist in ensuring that the rights of local women and children are respected. Apart from the perennial issues of discrimination against women and sexual exploitation of women and children (see Network Against Child Labour *Child Prostitution in Southern Africa: A Search for Legal Protection* (1997) 35-36), the thorny problem of female genital mutilation (see for instance, Kopelman "Female Circumcision and Genital Mutilation" 1998 2 *Encyclopaedia of Applied Ethics* 249-259) remains a major concern in Africa, as does the question of child labour (*cf* Bekombo "The Child in Africa: Socialisation, Education and Work" in Rodgers and Standing (eds) *Child Work, Poverty and Underdevelopment* (1981) 117-118).

2 8 *Alternative dispute resolution*

World-wide the escalating costs of litigation have made it increasingly difficult for anyone apart from the wealthy to afford the services of lawyers. This is also true of the legal profession in many African countries where alternative dispute resolution was often the usual method of settling disputes before colonization and the introduction of lawyers as service providers. During the last quarter of the 20th century the use of alternative dispute resolution expanded as a response to the length and cost of litigation in the developed world (for the South African experience see Pretorius *Dispute Resolution* (1993)). The trend has spread to some African countries where several law schools are teaching alternative dispute resolution as a course for aspiring lawyers (for instance, alternative dispute resolution is taught in the LLM programme at the University of KwaZulu-Natal, Durban and as a skills

course at the Law Society of South Africa's Durban School for Legal Practice for candidate attorneys). This trend is likely to continue into the 21st century.

3 Conclusion

While African lawyers during the 21st century require the necessary knowledge, skills and values to provide legal services within the context of their own domestic legal systems, the influence of globalization means that they have to be prepared to provide legal advice and services to clients who are citizens of the "global village". They also need to be trained to protect the interests of their countries against some of the rapacious practices of global capitalism. Unless African lawyers are able to deal competently with such issues there is the danger that their countries will be subjected to a new era of exploitation and marginalization and the promises of an African Renaissance in the 21st century will be stillborn.

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