

JUSTIFYING THE INTEGRATION OF CLINICAL LEGAL EDUCATION WITH PROCEDURAL-LAW MODULES TO DEVELOP PRACTICAL SKILLS IN LAW STUDENTS

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SUMMARY

This article focuses on the integration of Clinical Legal Education (CLE) with the conventional teaching methodologies traditionally employed for teaching procedural law modules, i.e., civil procedure, criminal procedure and the law of evidence at university level. The aim of this integration is to teach law students professional practical skills as a means to promote effective and efficient interpersonal relations with clients, including attorney-client consultations. This article addresses the concerns of many legal practitioners that law graduates need to improve their practical skills before entering legal practice. The legal education system at university level is often blamed for this inadequacy. It has been argued that universities have the responsibility to develop those students lacking practical skills to prepare them for practice. In this article, it is argued that an integrated teaching and learning approach, as far as CLE and procedural-law modules are concerned, should involve more than just the mere transmission of the theory of procedural law and the principles of substantive law to students. It should go further and involve students practising such theory to achieve the desired effect or goal of excellence in legal practice. The Legal Practice Act is supportive of this argument. In addition, the concept of transformative constitutionalism is invoked to strengthen the argument that there is a constitutional

imperative on law teachers to conduct teaching and learning in a transformative manner. By teaching students only or mainly by way of lectures based on theoretical presentations, law schools are not doing students justice in preparing them for legal practice. It is consequently argued that blending CLE with the teaching and learning of procedural-law modules would combine the teaching of theory with practice, which is foundational in preparing law students for their entry into the profession. This means that students would be taught so as to make them more skilled and ready to enter the working world after graduation. Besides possessing a sound theoretical basis required for practice, law graduates entering the profession would also then have some experience in legal practice; both legs of such an education serve the way in which the law should be applied practically.

1 INTRODUCTION

This article focuses on the integration or blending of Clinical Legal Education (CLE) with the conventional teaching methodologies traditionally employed for teaching procedural law modules, i.e., civil procedure, criminal procedure and the law of evidence, as well as all other law modules, at university level. CLE, in rudimentary form, may be defined as the use of the clinical methodology to teach law students procedural-law skills by making use of simulations, or real-life situations, to illustrate how legal practitioners would in practice approach a legal issue under investigation. The aim is to teach law students professional practical skills to promote effective and efficient interpersonal relations with clients, including attorney-client consultations. Such an approach includes reference to professional ethics and improves students' capacity to combine the facts of cases with the substantive law and procedure. Clinical pedagogy of the lived experiences can be shared with students in classrooms; and at those universities that have the benefit of institutionalised law clinics, students can practise law under the mentorship and coaching of an experienced legal practitioner.¹ Such clinics, at the same time, provide access to justice to the poor and vulnerable.

In light of the aforementioned, the following question may be posed: why should this integration of CLE be considered at all?

Law graduates need to improve their practical skills before entering the legal profession. Legal practice requires this. These two statements have been uttered countless times by various stakeholders in legal practice.² In

¹ Du Plessis "Designing an Appropriate and Assessable Curriculum for Clinical Legal Education" 2016 49(1) *De Jure* 1 5–6; Welgemoed "Die Balans Tussen Kliniese Regsopleiding en Regstoegang Per Se – 'n Delicate Spankoord" 2016 2 *Lithet Akademies* 753 758; Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* (doctoral thesis, Nelson Mandela University) 2013 289.

² In this regard, see Vukowich "Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" 1971 23 *Case Western Reserve Law Review* 140 140; Redding "The Counterintuitive Costs and Benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 55; Holmquist "Challenging Carnegie" 2012 61(3) *Journal of Legal Education* 353 353, as well as Du Plessis 2016 *De Jure* 1 1; Greenbaum "Re-Visioning Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism With the Challenges of our Educational Legacy" (undated) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575289 (accessed 2024-02-02) 10; Biggs and Hurter "Rethinking Legal Skills Education in an LLB Curriculum" 2014 39(1) *Journal for Juridical Science* 1 2, 3; and Engler "The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow" 2001 8 *Clinical Law Review*

this regard, the judiciary, members from legal practice and even some law teachers have complained that law students, after graduation, lack the necessary practical knowledge, skill and ingenuity expected of a practising attorney.³ Keeping in mind that law graduates follow various career paths, it is not clear to what extent the LLB degree prepares them for their careers.⁴ Many legal practitioners are of the opinion that law graduates, who, after graduating from university, join law firms for a period of practical vocational training, lack the essential practical and theoretical knowledge necessary to make a good start in practice.⁵ It appears that the legal profession would prefer to receive ready-made legal practitioners immediately after their graduation from university.⁶ This appears to be an international trend. In 2011, the New York Times published an article about how ill-equipped many new legal practitioners appear to be.⁷ Graduates also appear to display low levels of literacy, research and numeracy skills.⁸ It is the authors' experience

109 115. This is not only a concern as far as the legal profession is concerned, but also in other fields and professions; see Griesel and Parker "Graduate Attributes: A Baseline Study on South African Graduates From the Perspective of Employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 in this regard.

³ Vukowich 1971 *Case Western Reserve Law Review* 140; Snyman-Van Deventer and Swanepoel "The Need for a Legal-Writing Course in the South African LLB Curriculum" 2012 33(1) *Obiter* 121 121; Manyathi "South African LLB Degree Under Investigation" 2010 (April) *De Rebus* 8 8; Chamorro-Premuzic and Frankiewicz "Does Higher Education Still Prepare People for Jobs?" (7 January 2019, revised 14 January 2019) <https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs> (accessed 2020-02-13); SASSETA Research Department "SASSETA Research Report: Assessment of Learning Conditions of Candidate Attorneys During a Transformation Attempt" (March 2019) <https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf> (accessed 2020-01-14) 30–31. Sassetta specifically commented on the "very sloppy" work and initiative of some candidate attorneys. In this regard, it must be kept in mind that most candidate attorneys have just come from university law school training and this complaint may reflect on the training received while at university.

⁴ Manyathi 2010 *De Rebus* 8.

⁵ Dednam "Knowledge, Skills and Values: Balancing Legal Education at a Transforming Law Faculty in South Africa" 2012 26(5) *South African Journal of Higher Education* 926 929; Gravett "Pericles Should Learn to Fix a Leaky Pipe – Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 2) 2018 (21) *Potchefstroom Electronic Law Journal* 1 2, 26; Chaskalson "Responsibility for Practical Legal Training" 1985 (March) *De Rebus* 116 116; Vukowich 1971 *Case Western Reserve Law Review* 140; Swanepoel, Karels and Bezuidenhout "Integrating Theory and Practice in the LLB Curriculum: Some Reflections" 2008 (Special Issue) *Journal for Juridical Science* 99 100. These stakeholders also include magistrates and judges, advocates at the bar, as well as legal educators. Also see Kruse "Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice" 2013 45 *McGeorge Law Review* 7 8 and Boshoff "Professional Legal Education in Australia: Emphasis on Interests Rather Than Rights" 1997 (January) *De Rebus* 27 27 in this regard, as well as Modiri "The Crises in Legal Education" 2014 46(3) *Acta Academica* 1 2, where the perspective of the stakeholders of the 2013 LLB Summit is indicated.

⁶ Dednam 2012 *South African Journal of Higher Education* 926; Bowman and Brodoff "Cracking Student Silos: Linking Legal Writing and Clinical Learning Through Transference" 2019 25 *Clinical Law Review* 272.

⁷ Stetz "Best Schools for Practical Training" (undated) https://bluetoad.com/publication/?i=482098&article_id=3038646&view=articleBrowser&ver=html5#%22issue_id%22:482098,%22view%22:%22articleBrowser%22,%22article_id%22:%223038646%22 (accessed 2019-06-24).

⁸ Biggs *et al* 2014 *Journal for Juridical Science* 1; Campbell "The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice?" 2014 1 *Stellenbosch Law Review* 15 17.

that graduates also display an inability to apply reasoning and logical skills to integrate factual scenarios with the law, a skill that is absolutely essential in legal practice. Furthermore, there also seem to be pockets of a concerning lack of intuitive ethics present among some graduates. The legal education system at university level is said to be to blame for this.⁹ It is argued, by some critics, that universities have the responsibility to develop those lacking skills in the students admitted for tertiary studies.¹⁰ The aim of this article can be summarised as follows: that an integrated teaching-and-learning approach, as far as CLE and all law modules, including procedural-law modules are concerned, is required. This teaching-and-learning approach should involve more than just the mere transmission of procedural-law theory and substantive-law principles. It should go further and involve students practising such theory so as to achieve the desired effect or goal of excellence in legal practice. It is submitted that the profession would prefer ready-made legal practitioners straight out of university in order to be able to use such “practitioners” effectively the moment they are employed as candidate legal practitioners (CLPs), enabling law firms to start earning fees immediately from for example, court appearances, without the need to train graduates extensively in court etiquette and procedures.

2 THE NEED FOR AN INTEGRATED APPROACH

The concept of “integration” refers to the action of combining two or more things in an effective manner.¹¹ The integration of CLE with procedural-law modules must thus have a desired effect, which requires some explanation. It must be kept in mind that the law should be viewed from a holistic perspective and not merely piecemeal. This perception becomes relevant in legal practice when assisting members of the public in solving their legal problems. Here, clients’ cases must be viewed from a holistic perspective. It includes all their social and human circumstances.¹² It is suggested that a holistic perspective should also be applied when teaching law. Students should therefore not be taught to view different areas and aspects of the law

⁹ Vukowich 1971 *Case Western Reserve Law Review* 140. According to Reed, complaints about the lack of practical knowledge, skill and ingenuity of law graduates started when legal education had primarily been taken over from law offices by universities. Also see Holmquist *Journal of Legal Education* 353 and Schultz “Teaching ‘Lawyering’ to First-Year Law Students: An Experiment in Constructing Legal Competence” 1996 52(5) *Washington and Lee Law Review* 1643 1644 in this regard.

¹⁰ Snyman-Van Deventer and Van Niekerk “The University of the Free State Faculty of Law Write/Site Intervention – Supporting Broader Access With the Skills for Success” 2018 43(1) *Journal for Juridical Science* 39 42; Akojee and Nkhomo “Access and Quality in South African Higher Education: The Twin Challenges of Transformation” 2007 21(3) *South African Journal for Higher Education* 385 396.

¹¹ Cambridge Dictionary “Integration” (2021) <https://dictionary.cambridge.org/dictionary/english/integration> (accessed 2023-06-21).

¹² See Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 2013 205–218 in this regard. In short, the involvement of human and social elements refers to an interpretation of the application of legal principles and procedure by keeping in mind the personal circumstances and social stance of persons in their individual capacity, as well as in society as a whole. Legal practitioners must determine what their clients really want by taking into account their personal circumstances and preferences, as well as what social justice would dictate for the situations in which they find themselves.

in compartments or “silos”, but rather to view the law as a holistic structure.¹³ This becomes very relevant when dealing with rather practical modules like the procedural-law modules. Although a firm theoretical knowledge is always necessary, the practical nature of procedural-law modules should not be left out of consideration in designing a curriculum and syllabus. Broussard and Gross opine that students must be able to see the contextual connection between substantive law and the practice of law.¹⁴ Singh, on the other hand, states that it is of the utmost importance to produce lawyers who possess a social vision, especially in a developing country.¹⁵ Changes in society, including modernisation, require alteration and improvements in legal education, as well as the expansion of the scope of legal education.¹⁶ The advent of the Fourth Industrial Revolution, with the concomitant modernisation of the legal profession to include electronic and digital means in daily work performance, constitutes an example of modernisation. An example of a relevant change in society is the fact that, every year more law graduates are looking for work. The economic circumstances in the world now require people to make a living as soon as possible to care for themselves as well as for their families. The implication is that law graduates need to be sufficiently equipped for legal practice when entering the legal profession. This means that legal education should not be limited to a study of theory and legislation, but should include a study of various legal procedures.¹⁷ Legal education must have breadth.¹⁸ It would therefore be beneficial to integrate or combine the procedural-law modules in a teaching methodology that can achieve this. Not only would this provide a firm theoretical foundation to students, but it would also serve to instil practical skills as far as legal procedure and analysis of evidence are concerned. It is submitted that CLE is such a teaching methodology in that it incorporates both theoretical and practical methods of imparting knowledge and skills to students.

The aforementioned integration can also be explained in a more theoretical and foundational manner. An integrated approach to teaching and learning gives rise to more active learning by law students. Although experience is a firm foundation for learning, it does not automatically lead to learning.¹⁹ Theory also plays an important role in learning and must therefore be integrated with experience to achieve effective learning.²⁰ Active learning therefore includes tasking students with instructional activities. After completing such tasks, they reflect on what they have done

¹³ See Bowman *et al* 2019 *Clinical Law Review* 269 271 in this regard. There must be opportunities in the curriculum where students can draw the various areas of the law together in order to become familiar with how the law functions as a holistic structure.

¹⁴ Broussard and Gross “Integrating Legal Research Skills Into Commercial Law” in Friedland and Hess (eds) *Teaching the Law School Curriculum* (2016) 362.

¹⁵ Singh “Importance of Legal Education” (18 March 2020) <https://www.ipemqzb.ac.in/> (accessed 2021-05-05).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Wrenn and Wrenn “Enhancing Learning by Integrating Theory and Practice” 2009 21(2) *International Journal of Teaching and Learning in Higher Education* 258 259.

²⁰ *Ibid.*

and self-evaluate their efforts.²¹ This serves as an important instrument for the law teacher to identify any challenges and to assist students in their development.

The following question can be asked: is there a need for this integrated teaching methodology? Owing to the legal profession having such a major stake in legal education, the profession depends on the educational system to provide the profession with skilled practitioners who have the required knowledge and experience.²² Governments in many countries, including Australia and the United Kingdom, have taken measures to facilitate a connection between higher education and the workplace.²³ Both government and the workplace in South Africa are exerting pressure on higher education to produce graduates who possess the capabilities, attributes and dispositions to perform work in a successful manner.²⁴ As far as the legal profession is concerned, graduates who enter the profession with the required skills and experience are able to provide better-quality legal services to the poor and vulnerable who access legal aid. The reason for this pressure is that current capabilities, attributes and dispositions appear to be unsuitable for the needs and expectations of employers.²⁵ Teaching-and-learning experiences must therefore develop and adapt in order to meet the demands of employers and the legal profession.²⁶

The former Chief Justice of South Africa, Justice Mogoeng Mogoeng, identified another contributing factor, namely the transition from basic education to higher education.²⁷ It has been suggested that the school system is failing and cannot equip students with the skills and concepts to deal with all the demands of tertiary education.²⁸ Universities are therefore facing the reality of admitting students who are products of an inadequate

²¹ *Ibid.*

²² Smith *The Legal Education – Legal Practice Relationship: A Critical Evaluation* (Master's thesis, Sheffield Hallam University) January 2015 15.

²³ Griesel and Parker 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 1, 4.

²⁴ Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1.

²⁵ Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1. Also see Broussard *et al* in Friedland *et al* (eds) *Teaching the Law School Curriculum* 362 in this regard.

²⁶ Smith *The Legal Education* 18.

²⁷ Die Vryburger "Law Degree Graduates Cannot Write, Read, Do Sums or Reason" (30 March 2018) https://southafricatoday.net/south-africa-news/law-degree-graduates-can-not-write-read-do-sums-or-reason/?fbclid=IwAR0qO_cyU-EIaPRXqenOL6Q9-0My3HNOMBV-yG696ELFxEdLgoOt-lot (accessed 2019-01-07); Biggs *et al* 2014 *Journal for Juridical Science* 2; Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 39; Campbell 2014 *Stellenbosch Law Review* 31. The shortcomings in the national schooling system contribute to the unpreparedness of graduates for practice.

²⁸ Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 42; Swanepoel *et al* 2008 *Journal for Juridical Science* 100; Dednam 2012 *South African Journal of Higher Education* 934; McQuoid-Mason "The Four-Year LLB Programme and the Expectations of Law Students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: Some Preliminary Results From a Survey" 2006 27(1) *Obiter* 166 167; Zitske "Stop the Illusory Nonsense! Teaching Transformative Delict" 2014 46(3) *Acta Academica* 52 53–54.

school system.²⁹ For this reason, universities bear the responsibility of adapting institutional measures in order to prepare such students for the “rigours of higher education”. A mitigating factor for the students being underprepared is that it is owing to “no fault of their own”.³⁰ The Chief Executive Officer of the Law Society of South Africa, as it then was,³¹ indicated that in most cases, students lack the required literacy and/or numeracy skills. This lack of skills poses an obstacle for them to complete the undergraduate LLB degree in just four years.³²

Many practising legal practitioners are of the opinion that law schools at universities should prepare students better for legal practice in that students are not experienced in routine tasks such as drafting wills, administration of deceased estates and court procedures.³³ Some of these practitioners assist in training graduates for practice when employing them at their law firms.

It has been suggested that students themselves, as well as young lawyers, are to some extent in agreement that universities should prepare them better to enter legal practice.³⁴ Modules, like civil procedure, criminal procedure and the law of evidence, as well as skills and values, like trial advocacy, research, problem-solving, legal writing, handling ethical issues, consultation skills, litigation and counselling skills, are all of a practical nature. It thus makes sense that many students believe that they should, insofar as the practical application of the law is concerned, be better prepared for legal practice upon their exit from university.³⁵

According to Quinot and Greenbaum, an integrated approach to teaching law in South Africa is required.³⁶ They suggest that teaching law in a holistic way is preferable to adopting a piecemeal approach by way of distinct branches, fields and skills.³⁷ Such an approach acknowledges that the law is a complex discipline.³⁸ They also acknowledge that teaching law can be equally complex.³⁹ Supplementary to that, a more practical approach is suggested in this article to education – in particular, involving procedural-law

²⁹ Dednam 2012 *South African Journal of Higher Education* 934. Also see Quinot and Greenbaum “The Contours of a Pedagogy of Law in South Africa” 2015 1 *Stellenbosch Law Review* 29 33 in this regard.

³⁰ Akojee *et al* 2007 *South African Journal for Higher Education* 396.

³¹ The Law Society of South Africa now carries the title of The Legal Practice Council.

³² Du Plessis 2016 *De Jure* 1; Greenbaum https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575289 10; Biggs *et al* 2014 *Journal for Juridical Science* 1; Snyman-Van Deventer *et al* 2018 *Journal for Juridical Science* 41; Van der Merwe “Profession Can Make Important Contribution to Investigation into Effectiveness of LLBs” 2010 (April) *De Rebus* 4 4.

³³ Vukowich 1971 *Case Western Reserve Law Review* 140. Also see Gravett 2018 *Potchefstroom Electronic Law Journal* 1 and Beaton “When Will Legal Education Catch the Wave?” (2 October 2018) <https://www.collaw.edu.au/news/2018/10/02/when-will-legal-education-catch-the-wave> in this regard.

³⁴ Gravett 2018 *Potchefstroom Electronic Law Journal* 2.

³⁵ In this regard, see Adewumi and Bamgbose “Attitude of Students to Clinical Legal Education: A Case Study of Faculty of Law, University of Ibadan” 2016 3(1) *Asian Journal of Legal Education* 106 112.

³⁶ Quinot *et al* 2015 *Stellenbosch Law Review* 38.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

modules. Practical work, in this regard, refers to tasks in which students observe and/or handle actual clients and their cases themselves. Alternatively, they observe a teacher demonstrating various tasks.⁴⁰ In this way, they acquire practical skills. Such an approach provides motivation to students and stimulates their interest and enjoyment of the specific work. It is submitted that law schools should provide students with a proper foundation of legal knowledge and skills so that they may be better prepared for legal practice upon their exit from university. A sound foundation of practical learning enhances their continued training by their supervising principals. It also teaches them the essential skills needed to apply the law to solve various legal problems encountered in practice.

Most graduates generally have a firm understanding of substantive legal principles applicable to various legal disciplines. However, they lack the necessary practical skills and experience to apply such knowledge practically.⁴¹ This lack of problem-solving skills has been acknowledged by a variety of stakeholders⁴² and bears the risk of prejudice to clients in legal practice.⁴³ Students are, it seems, not prepared for legal practice when they exit universities after graduation.⁴⁴ It has been identified as a major shortcoming in the LLB curriculum that no provision is made for adequate exposure by students to practical legal experience during their time spent at university.⁴⁵ Warren Burger CJ, the former Chief Justice in the Supreme Court in the United States of America, correctly remarked in this regard: "Shortcomings of today's law graduate lies not in a decent knowledge of the law, but that he has little, if any, training in dealing with facts or people – the stuff of which cases are really made."⁴⁶ The public also demands that legal practitioners be skilled in solving legal problems; if universities are not training students for this, they are neglecting their duties.⁴⁷ It has been suggested that skills training, as well as those presenting such training, deserve attention and recognition by law schools. There has, however, been a measure of resistance to the suggested changes from academia. According to Geraghty,⁴⁸

⁴⁰ Nanny "Practical Teaching Experience 'Best Way to Learn'" (27 October 2016) <https://www.sun.ac.za/english/Lists/news/DispForm.aspx?ID=4429> (accessed 2024-02-02).

⁴¹ Vukowich 1971 *Case Western Reserve Law Review* 141; Holmquist 2012 *Journal of Legal Education* 360.

⁴² Domanski 2011 *Fundamina* 46; McQuoid-Mason "Can't Get No Satisfaction: The Law and Its Customers: Are Universities and Law Schools Producing Lawyers Qualified to Satisfy the Needs of the Public?" 2003 28(2) *Journal for Juridical Science* 199 200.

⁴³ Domanski 2011 *Fundamina* 47.

⁴⁴ Hansjee and Kader *The Survivor's Guide for Candidate Attorneys* (2013) 1; Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the Profession of Law: Summary* (2007) 8.

⁴⁵ Holness "Improving Access to Justice Through Compulsory Student Work at University Law Clinics" 2013 (16)4 *Potchefstroom Electronic Law Journal* 328 333.

⁴⁶ Kruse 2013 *McGeorge Law Review* 16. Also see Sullivan *et al Educating Lawyers* 6 in this regard, where it is stated that this omission is one of the major limitations of legal education as we currently know it.

⁴⁷ McQuoid-Mason 2003 *Journal for Juridical Science* 200.

⁴⁸ Geraghty "Teaching Trial Advocacy in the 90s and Beyond" 2012 66 *Notre Dame Law Review* 687 693.

“[a]cademia was critical of this rush to relevance, although it could not deny that students and the legal profession would benefit from curricula which improved lawyer skills. The debate between legal academia and those who advocated skills training focused on when and where such training should take place, who should be responsible for it, and what the status of the skills teachers should be within law school faculties. Law schools resisted giving ‘skills training’ curricula and its teachers status equal to ‘traditional’ curricula and faculty.”

The opposite view has also emerged in that some academics have supported practitioners and students who advocate for a change towards practical training.⁴⁹ In this regard, the LLB Summit is of significance. The summit was held by the South African Law Deans Association, the Legal and Education Development branch of the (then) Law Society of South Africa and the General Council of the Bar on 29 May 2013.⁵⁰ The purpose of the summit was to focus on problems surrounding the LLB curriculum, quality assurance, new models for legal education and community service.⁵¹ At the summit, it was made clear that law schools should assume responsibility for the calibre of future professionals that they produce through their education and training.⁵² The Carnegie Foundation for the Advancement of Teaching, very expressively views the role of the law school as follows:⁵³

“Law school provides the single experience that virtually all legal professionals share. It is the place and time where expert knowledge and judgment are communicated from advanced practitioner to beginner. It is where the profession puts its defining values and exemplars on display, and future practitioners can begin both to assume and critically examine their future identities.”

The question can now be asked: do law schools presently fulfil this role? It is submitted that the role is fulfilled in part only. It is further submitted that the synchronisation of the interests of law educators with the needs of legal practitioners, as well as with that of the public, is a challenge.⁵⁴ Civil professionalism, or the legal profession’s pledge to serve the public, must be kept in mind when educating future lawyers.⁵⁵ Another challenge presently is that there are more and diverse career opportunities available to students than there were a few years ago.⁵⁶ This means that more law teachers from various fields of specialisation are required to present practical programmes and courses to law students.⁵⁷ Nevertheless, it appears, from statistics

⁴⁹ See Vukowich 1971 *Case Western Reserve Law Review* 140 in this regard, where it is stated that educators themselves are criticising the lack of practical knowledge and skills of law graduates. Also see Snyman-Van Deventer *et al* 2012 *Obiter* 123 in this regard.

⁵⁰ Whittle “Legal Education in a Crisis? Law Deans and Legal Profession to Discuss Refinement of LLB-Degree” (4 February 2013) <https://blogs.sun.ac.za/legalwriting/2013/02/04/legal-education-in-crisis/> (accessed 2024-02-02).

⁵¹ *Ibid.*

⁵² Dicker “The 2013 LLB Summit” (August 2013) <https://www.qcbsa.co.za/law-journals/2013/august/2013-august-vol026-no2-pp15-20.pdf> (accessed 2024-02-02) 15.

⁵³ Sullivan *et al* *Educating Lawyers* 3.

⁵⁴ Sullivan *et al* *Educating Lawyers* 4.

⁵⁵ *Ibid.*

⁵⁶ Vukowich 1971 *Case Western Reserve Law Review* 146.

⁵⁷ *Ibid.*

provided by the Law Society of South Africa, that legal practice is popular as a career choice.⁵⁸ Law teachers should thus ensure that law students are adequately prepared for their future careers in legal practice. Moreover, teachers also have to fulfil their duty towards the legal profession and equip themselves with the necessary flexibility to cope with unknown future changes.⁵⁹ In short, changes in regulation, technology and what clients want, require changes in legal education. In this regard, Smith states that new forms of legal business are developing, as well as new ways of how to go about executing work, with a concomitant shift of attitudes by members of the profession.⁶⁰

It was further emphasised at the aforementioned LLB Summit that legal education plays a significant part of the problem that the legal profession is not fulfilling its proper role in society.⁶¹ The main duty of universities is to provide students with the essential, substantive theoretical knowledge they will need when entering practice.⁶²

The notion of an approach in which theory and experience are blended, was also discussed at a conference hosted by the Law Society of South Africa, in collaboration with Monash South Africa, on 1 and 2 March 2018 in Johannesburg.⁶³ In this regard, it was pointed out that the role of academic institutions should be to produce graduates with the necessary base-level skills, or graduates who possess the core competencies that are required within the legal profession, namely the following:⁶⁴

- a) critical thinking and analysis;
- b) drafting and writing; and
- c) sound business sense.

Following this discussion, the question as to how academic institutions can produce such graduates was asked.⁶⁵ The following suggestions were tabled:⁶⁶

- a) employing university law clinics to assist;
- b) the introduction of experiential learning to all LLB courses;

⁵⁸ Law Society of South Africa "Statistics for the Attorneys' Profession" (January 2022) <https://www.lssa.org.za/about-us/about-the-attorneys-profession/statistics-for-the-attorneys-profession/> (accessed 2024-02-02).

⁵⁹ Hall and Kerrigan "Clinic and the Wider Law Curriculum" 2011 *International Journal of Clinical Legal Education* 25 29.

⁶⁰ Smith *The Legal Education* 27.

⁶¹ 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* 234 237.

⁶² See Vukowich 1971 *Case Western Reserve Law Review* 143 in this regard, where it is stated that, at university level, it is easier to teach knowledge than it is to develop skills. Also see Vukowich 1971 *Case Western Reserve Law Review* 148–149 in this regard.

⁶³ Ramotsho "Uniformed PVT Discussed at Legal Education Conference" April 2018 *De Rebus* 6 6. The theme of the conference was "From a Disjointed to an Integrated Legal Profession: The Design of the Appropriate and Relevant Practical Vocational Training for Legal Practitioners."

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

- c) finding synergies between academic institutions and the LEAD (Legal Education and Development) division of the LSSA; and
- d) focusing on section 29 of the Legal Practice Act (LPA),⁶⁷ which provides for community service by candidate legal practitioners.

Professional and practical training, and most importantly, experiential learning, are prominently mentioned. Experiential learning is an important component of CLE and is elaborated on elsewhere in this article.⁶⁸ In law schools, it appears that there is a divide between doctrinal teachings and professional training.⁶⁹ The Carnegie Report has indicated that universities allow students to be detached theoretical observers with regard to legal issues, whereas they should be actively and practically engaged in such issues.⁷⁰ It appears that universities, more specifically law schools, are accentuating the teaching of theory above practical, professional and ethical legal training, the very qualities that legal practice requires from those who enter the profession.⁷¹ This is ironic, since the four-year LLB degree recognises the need for an integrated approach to legal education in the sense that theory should not be separated from practice, unlike the traditional approach to teaching law.⁷²

The challenges experienced in South Africa were similarly investigated in the United Kingdom. The first report of the Advisory Committee on Legal Education and Conduct (ACLEC) compiled in the United Kingdom in 1996 states, in this regard: "The rigid demarcation between the 'academic' and 'vocational' stages needs to disappear; what is required is a new partnership between the universities and the professional bodies at all stages of legal education and training."⁷³ During such education and training, skills training is to be paramount. The ACLEC managed to bring academics and legal practitioners together.⁷⁴ To them, the meaning of "skill" had to be investigated to ensure that law teachers, clinicians and other trainers approached such education and training with the correct goals in mind. A skill has been defined by them as "[e]xpertness, practiced ability, facility in an action or in doing or to do something".⁷⁵ It therefore denotes action,

⁶⁷ 28 of 2014.

⁶⁸ See heading 3 3 3 below.

⁶⁹ Grimes "The ACLEC Report: Meeting Legal Education Needs in the 21st Century?" <https://classic.austlii.edu.au/au/journals/LegEdRev/1996/12.html> (accessed 2024-02-02). The Lord Chancellor's Advisory Committee on Legal Education and Conduct, or ACLEC, compiled a report in 1996, which, *inter alia*, identified the need for intellectual rigour, core and contextual knowledge, legal values, ethical standards, as well as analytical, conceptual and communication skills in law degree curricula. Also see Chaskalson 1985 *De Rebus* 116 in this regard. Also see Greaves "Learning Leadership Is in Your Hands: Toward a Scholarship of Teaching in Practical Legal Training" 2012 *Journal of the Australasian Law Teachers Association* 1 4 in this regard.

⁷⁰ Morgan "The Changing Face of Legal Education: Its Impact on What It Means to Be a Lawyer" 2011 *GW Law Faculty Publications & Other Works* 1 20.

⁷¹ See Gravett 2018 *Potchefstroom Electronic Law Journal* 2 in this regard.

⁷² McQuoid-Mason 2006 *Obiter* 167.

⁷³ ACLEC's First Report on Legal Education and Training, April 1996, par 2.2; Hall *et al* 2011 *International Journal of Clinical Legal Education* 26.

⁷⁴ Smith *The Legal Education* 65.

⁷⁵ Wade "Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges" 1994 5(2) *Legal Education Review* 173 173.

practice and competence.⁷⁶ In order to learn skills, students have to do certain things on a repetitive basis until a certain level of objective competence is achieved.⁷⁷ A skill should have the following attributes:⁷⁸

- a) it must be goal-directed, i.e., it must be directed towards a particular result;
- b) it must be learnt, i.e., gradually built up by way of practice rather than acquired in a reflexive or instinctive manner;
- c) it usually involves certain micro-skills, i.e., a particular skill consists of various elements. An example in this regard is the skill of listening, which includes showing attention and interest non-verbally, providing acknowledgments, restating certain statements that have been uttered by the speaker, showing feelings in order to demonstrate empathy with what the speaker said; and
- d) when the skill has been accomplished, a shift to intuitive levels of response takes place for the elements of the micro-skill. With regards to the listening skill, for example, when this skill has been mastered, the listener automatically incorporates all the mentioned elements into his or her action without concentrating or focusing on it. The separate elements therefore become mechanical or artificial.

O'Regan J, a former South African Constitutional Court judge, emphasised the importance of skills training, stating that the provision of competent legal education to students is the primary responsibility of law schools.⁷⁹ According to Judge O'Regan, skills, and not content, form the foundation of a competent legal practitioner.⁸⁰ Skills training must therefore be a core component of legal education and not merely something that is presented as a by-product of legal education.⁸¹ Swanepoel, Karels and Bezuidenhout also investigated this issue. They found that there should not be a choice between content or skills, but a development of ways to integrate the two concepts.⁸² They further state that the way in which law students are prepared for entry into the legal profession should be regularly reviewed.⁸³

The pressing needs of the economy in South Africa have given rise to a skills revolution. This notion was explained as follows by former Deputy President of South Africa, Mlambo-Ngcuka:⁸⁴

“The phenomenon of unemployed graduates, who are without abilities to self-employ and self-determine, after spending three to four years of post-secondary education is an indication to all of us of the challenge in our education at a tertiary level ... the curriculum developers are not paying enough attention to issues of relevance and ensuring that we all pay attention

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ Wade 1994 *Legal Education Review* 173–174.

⁷⁹ Du Plessis “Access to Justice Outside the Conventional Mould: Creating a Model for Alternative Clinical Legal Training” 2007 32(1) *Journal for Juridical Science* 44 47.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Swanepoel *et al* 2008 *Journal for Juridical Science* 99 100.

⁸³ *Ibid.*

⁸⁴ Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 2.

to the skills and competencies learners require when they come out of higher education ... we need a skills revolution in the curriculum of tertiary education.”

However, Griesel and Parker state that a degree of realism needs to be sustained from both higher education and the employer regarding the extent to which higher education can bridge the gap between higher education and entry into the workplace.⁸⁵ The learned authors are correct and, in this regard, should be supported. It is not the aim of this article to suggest that higher education – more specifically law schools – should teach students everything that they need to know for success in the workplace as from their first day at the office. It is, however, submitted that law schools can equip students with adequate professional and practical skills to allow them to perform basic tasks when entering legal practice, more specifically tasks with regard to civil proceedings, criminal proceedings and the interpretation of evidence. It is then the public and professional duty of the candidate legal practitioner’s principal and/or employer to develop the employee further – through mentorship and coaching, supported by in-house training and external legal training offered by LEAD or other service providers.

3 A SOUND BASIS FOR INTEGRATING CLINICAL LEGAL EDUCATION IN TEACHING PROCEDURAL LAW

3.1 The importance of practical experience

It is trite knowledge that, in practice, the application of all legal principles is accomplished by way of specific legal procedures. It has already been pointed out that various stakeholders in legal practice require improvement in the calibre of law graduate who enters legal practice.⁸⁶ Erasmus states: that a “[p]ractical mechanism that may have the effect of improving the competency and calibre of ... legal representatives ... would be to put proper mechanisms in place to ensure quality legal representation”.⁸⁷ Although he primarily refers to defence attorneys and state prosecutors, it is submitted that the statement is equally applicable to legal practitioners who specialise in civil litigation. However, Erasmus does not state which mechanisms should be employed. It is submitted that legal education at tertiary level is a good place to start. In this regard, law schools employ primarily the Socratic and case-dialogue teaching methodologies in all years of academic study.⁸⁸

⁸⁵ Griesel *et al* 2009 *Higher Education South Africa & The South African Qualifications Authority* 1.

⁸⁶ See heading 1.

⁸⁷ Erasmus “Ensuring a Fair Trial: Striking the Balance Between Judicial Passivism and Judicial Intervention” 2015 3 *Stellenbosch Law Review* 662 674.

⁸⁸ See Cambridge Dictionary “Socratic” (2020) <https://dictionary.cambridge.org/dictionary/english/socratic> (accessed 2020-12-10); Sullivan *et al* *Educating Lawyers*; The Carnegie Foundation for the Advancement of Teaching 4; Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 179–192 and Wizner “The Law School Clinic: Legal Education in the Interests of Justice” 2002 70(5) *Fordham Law Review* 1929 1930 in this regard. The Socratic teaching methodology has been said to be very effective as far as the training of attorneys is concerned. It involves training by way of classroom sessions with

These methodologies mainly entail students attending lectures while undergoing learning in a passive manner. It is submitted that, although these methodologies do hold value as far as acquiring knowledge is concerned, something additional is required to prepare students for practice. In this regard, Huber⁸⁹ stated that students who merely listen to law teachers in a classroom setting are not at all sufficiently provided with a ready and sound knowledge of the law.⁹⁰ He suggested that students should get practice in disputing existing legal rules and doctrines, and this should permeate through and continue for the duration of the students' academic training.⁹¹ This will prepare the students' minds and modes of expression, and equip them with an appropriate manner of practising public speaking, which is important in the case of litigation.⁹² These aspects are central to the successful discharge of duties by jurists.⁹³

Although Huber focused on rhetoric and public speaking, which is a pivotal skill that law students should develop, it is submitted that students will not be able to "discharge their duty successfully" without applying, through practical skills, the law that they have acquired. Knowledge of substantive legal principles is important, but it is submitted that it is more important to know how to go about enforcing such legal principles in order to reach a specific outcome desired by a client. Legal procedure now becomes important, and students cannot become familiar with procedure and the intricacies thereof if they do not practise it at university level, perhaps at their moot court or at the law clinic. This involves specifically the procedural-law modules. The Preamble of the LPA provides that the legal profession must be accountable to the public by providing high-quality legal services. It is submitted that this will be achieved with greater success should legal education be adapted in order to instil principles and skills in law students that will shape them into professional legal practitioners for the future. Law schools must therefore also focus on the future of law students after graduation when considering appropriate teaching methodologies for these modules – in particular, the procedural subjects. Parmanand believes that law schools should become more proactive.⁹⁴ To achieve this, law schools should demand that all students, from their first academic year onwards, become involved with clinical legal training. Students can achieve this, *inter alia*, by working in the offices of attorneys and/or advocates. They could also engage in performing clerking duties for judges or magistrates during their

very little or no practical sessions. The case-dialogue teaching methodology, also referred to as the Langdellian methodology, in essence, involves students reading appellate cases to determine what judgments the courts have reached in the past and present, as well as to predict what their judgments might be in future.

⁸⁹ See Van der Bergh "Book Reviews: *De Ratione Juris Docendi & Discendi Diatribe Per Modum Dialogi*, by Ulrich Huber" 2011 128(2) *South African Law Journal* 381 382. Ulrich Huber is described as an outstanding Roman-Dutch jurist and an exceptionally good law teacher.

⁹⁰ Domanski 2011 *Fundamina* 52.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ Parmanand "Raising the Bar: A Note on Pupillage and Access to the Profession" 2003 2 *Stellenbosch Law Review* 199 202.

vacations.⁹⁵ As an alternative, Parmanand innovatively suggests that law schools could implement the whole pupillage curriculum as a final-year course, which should be set as a prerequisite for the law degree.⁹⁶ It is submitted that the learned author is correct in stating that law schools should be more proactive. Whether it will be logistically possible for a university law clinic to train additional students, apart from the students enrolled for the clinical course, is more challenging. It is also not certain whether members of the legal profession will have the necessary infrastructure and/or time to host students for shadowing purposes. It may also not be possible to provide legal training at their respective offices or other venues. Whatever the case may be, it is submitted that, while students are involved in clinical work, even first-year students will be able to learn more about procedural law and how to enforce the law. However, it will not be an easy task since first-year students will not know the specific legal principles that must be enforced as they would not have studied the theory yet. University law clinics generally only offer a module in clinical law in the final academic year. It is then that students perform practical work at the law clinic for the first time, either in a live client-student setting, or as part of simulations.⁹⁷ Although this module is an important one as far as legal practice is concerned, two problems are apparent. First, the module is not compulsory at all universities,⁹⁸ which means that not all students are exposed to legal practice before graduation. Secondly, the module is only offered for one year, and sometimes for less than a year. What impacts negatively on the academic year is the start and end times of the official university academic programmes, student recess periods and public holidays. It would therefore be desirable if students' exposure to legal practice could be prolonged or enhanced by integrating legal practice with their conventional academic curriculum.

3 2 A theoretical basis supporting the integration of clinical legal education in teaching procedural law

The theoretical cornerstone, argued in this article to support the provision of more practical training to law students, is the concept of transformative constitutionalism, which should impact the content of, and methodologies used to present procedural-law modules to law students.

Transformative constitutionalism denotes a change brought about in a structured manner to better things by way of adherence to a constitutional system of government.⁹⁹ In the South African context, transformative constitutionalism is a process, not an event that has taken place and been

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Hall *et al* 2011 *International Journal of Clinical Legal Education* 33; Bloch "A Global Perspective on Clinical Legal Education" 2011 4 *Education and Law Review* 1 3; Du Plessis and Dass "Defining the Role of the University Law Clinician" 2013 13(2) *South African Law Journal* 390 395; Welgemoed *Integration of Clinical Legal Education with Procedural Law Modules* 24, 52, 151 and 293.

⁹⁸ In this regard, see Holness 2013 *Potchefstroom Electronic Law Journal* 328 333.

⁹⁹ Mbenenge "Transformative Constitutionalism: A Judicial Perspective From the Eastern Cape" 2018 32(1) *Speculum Juris* 1 2.

completed.¹⁰⁰ It is a transformative process in itself.¹⁰¹ This is significant, especially considering South Africa's former apartheid regime. During the apartheid regime, the law was based on a culture of authority and coercion.¹⁰² The apartheid regime was founded upon parliamentary sovereignty.¹⁰³ What Parliament stated was law, without any justification needed.¹⁰⁴ However, with the advent of the constitutional dispensation, a major change occurred, namely a move away from a culture of authority and coercion towards a culture of justification.¹⁰⁵ Contrary to the apartheid regime where actions did not have to be justified, all government actions are now expected to be justified.¹⁰⁶ To illustrate the importance of such justification for the purpose of this article, it is necessary to discuss briefly the impact that transformative constitutionalism should have on the law, as well as how it should be instilled in law students as far as the procedural-law modules are concerned.

It has been stated before that the South African civil-law tradition had conceptual clarity.¹⁰⁷ From this, general legal principles could be deduced – principles that would apply to specific scenarios.¹⁰⁸ This is apparently different from the casuistic English common law.¹⁰⁹ However, the difference has not been apparent. Instead, a manner of formalised legal reasoning was developed, immobilising the flexibility, adaptability and fairness of the civil-law system.¹¹⁰ A formal manner of reasoning, or a conservative approach, is confined to a purely textual interpretation of a particular legal text.¹¹¹ The effect was that substantive legal reasoning, as the basic underlying corrective measure to ensure that formalised rule and concepts fulfilled their original purpose, was not being applied at all.¹¹² A substantive manner of reasoning invokes a contextual and purposive interpretation of a particular text, taking into account, *inter alia*, the background of a specific scenario.¹¹³ The advent of the Constitution however brought change. The Constitution is a protective measure to ensure that substantive legal reasoning is considered when all legal principles are considered.¹¹⁴

¹⁰⁰ Mbenenge 2018 *Speculum Juris* 2; Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 354.

¹⁰¹ *Ibid.*

¹⁰² Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" 1994 (10) *South African Journal on Human Rights* 31 32.

¹⁰³ Mureinik 1994 *South African Journal on Human Rights* 32.

¹⁰⁴ *Ibid.*

¹⁰⁵ Mureinik 1994 *South African Journal on Human Rights* 32; Langa 2006 *Stellenbosch Law Review* 353; Klare "Legal Culture and Transformative Constitutionalism" 2017 14(1) *South African Journal on Human Rights* 146 147.

¹⁰⁶ Mureinik 1994 *South African Journal on Human Rights* 32.

¹⁰⁷ Froneman "Legal Reasoning and Legal Culture: Our 'Vision of Law'" 2005 16 *Stellenbosch Law Review* 3 17.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Froneman 2005 *Stellenbosch Law Review* 6.

¹¹² Froneman 2005 *Stellenbosch Law Review* 17.

¹¹³ Froneman 2005 *Stellenbosch Law Review* 6.

¹¹⁴ Froneman 2005 *Stellenbosch Law Review* 17.

It therefore appears that the Constitution does not afford the courts any choice other than to apply substantive reasoning.¹¹⁵ A formalised system of law would not regard such an approach as proper law.¹¹⁶ This clearly shows the impact that transformative constitutionalism has – or should have – on the legal system in South Africa, including both substantive law and adjectival or procedural law. It is consequently submitted that the traditional teaching and learning methodologies, as far as procedural-law modules are concerned, should be subjected to change, based on substantive rather than conservative reasoning. The challenged background of education in South Africa, the notion of development of people as informed by the Constitution, and the spirit of the LPA are all important factors in motivating such change. Moreover, law teachers will have to take into account that millennial students are in need of extensive justification for whatever tasks they are required to perform or complete.¹¹⁷ The rationale behind each strategy and task they have to perform therefore becomes important. In addition, centennial students have been born into a technology-rich world and prefer the use of technology in teaching-and-learning experiences.¹¹⁸ Law teachers can therefore no longer ignore changes to the teaching-and-learning environment. Such changes will contribute towards the development of students and society as a whole.

Froneman advocates that the study and practice of law is a practical discipline aimed at solving practical issues.¹¹⁹ Practising law often requires instantaneous decisions. There is no time to postpone conclusions.¹²⁰ According to Froneman, when practising law, decisions are made by a process that involves the following:¹²¹

- a) an analytical element, i.e., the use of language to systemise and make sense of the various areas of legal disciplines;
- b) an empirical element, i.e., what is happening in practice, how the law is being applied and what is happening in the courts; and
- c) a normative element, i.e., the justification for a particular principle that is being applied.

¹¹⁵ Also see Froneman 2005 *Stellenbosch Law Review* 17 and Le Roux “The Aesthetic Turn in the Post-Apartheid Constitutional Rights Discourse” 2006 1 *Tydskrif vir die Suid-Afrikaanse Reg* 101 112.

¹¹⁶ Froneman 2005 *Stellenbosch Law Review* 17.

¹¹⁷ Laskaris “How to Engage Millennials: 5 Important Moves” (2016) <https://www.efrontlearning.com/blog/2016/03/5-strategies-to-engage-the-millennials.html> (accessed 2023-06-20); Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 391.

¹¹⁸ Meola “Generation Z News: Latest Characteristics, Research and Facts” (2023) *Insider Intelligence* <https://www.insiderintelligence.com/insights/generation-z-facts/> (accessed 2023-06-20); Francis and Hoefel “True Gen’: Generation Z and its Implication for Companies” (12 November 2018) <https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/true-gen-generation-z-and-its-implications-for-companies> (accessed 2023-06-20); TTI Success Insights “10 Defining Characteristics of Generation Z” (16 January 2019) <https://blog.ttisi.com/10-defining-characteristics-of-generation-z> (accessed 2023-06-20); McKinsey & Company “Who is Generation Z?” (March 2023) <https://www.psychologytoday.com/za/blog/nudging-ahead/202012/who-is-generation-z> (accessed 2023-06-20).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ Froneman 2005 *Stellenbosch Law Review* 15–16.

These elements apply to legal education in general, including the teaching and learning of the procedural-law modules. The “stock-in-trade” culture, as indicated by Froneman, is therefore also applicable to teaching and learning. Law teachers must question the direction in which the teaching and learning of these modules is heading.¹²² Where needed, innovative steps should be introduced in providing programmes to promote access to justice and high-quality legal services. Here, law teachers involved in promoting CLE and practical legal training would play a role in getting students, for example, to draft pleadings in live sessions at law clinics and oversee the quality thereof. Transformative constitutionalism plays a pivotal role in this exercise in that a critical pedagogy is required, i.e., a methodology where students can be taught to look at the law, as it currently is, and critically evaluate the *status quo* in light of the values of the Constitution.¹²³ Turning to students drafting pleadings, it is especially in cases involving motion-court applications where students often rely on constitutional rights and values in promoting their clients’ interests. In this regard, Zitske suggests that, because the Constitution is the supreme law of South Africa, it applies to all laws, thus promoting transformative constitutionalism. There is a constitutional duty on all law teachers to conduct teaching and learning in a transformative manner.¹²⁴ This argument is fully supported in this article and forms the basis of the plea for change as far as the teaching and learning of procedural-law modules are concerned. It aligns with the constitutional spirit of justification. Law teachers of procedural-law modules are encouraged to use such justification as a good reason for new teaching and learning methods. This involves introspection regarding what is taught, and how it is taught, as well as providing justification to students as to why study content is being taught.¹²⁵

3 3 The importance of an integrated approach to the teaching and learning of procedural-law modules

3 3 1 The importance of Clinical Legal Education

In light of the theoretical basis of CLE, it goes without saying that students will need to be knowledgeable and skilled in legal procedure and the principles of evidence to promote the spirit and purport of the Constitution and the LPA in legal practice. As stated by Froneman,¹²⁶ the study and practice of law is a practical discipline. It is consequently argued in this

¹²² Zitske 2014 *Acta Academica* 54.

¹²³ See Zitske 2014 *Acta Academica* 55 in this regard. This approach is an answer to the Critical Legal Studies theory. See Legal Information Institute “Critical Legal Theory” (undated) https://www.law.cornell.edu/wex/critical_legal_theory (accessed 2020-03-29) with regard to Critical Legal Studies (CLS). In short, this theory promotes the point of view that the law is intertwined with social issues. CLS theorists believe that the law supports the interests of those who created the law. They state that law is in favour of the historically privileged members of society but is a disadvantage to underprivileged members.

¹²⁴ Zitske 2014 *Acta Academica* 55.

¹²⁵ *Ibid.*

¹²⁶ See heading 3 2.

article that, by presenting the procedural-law modules by way of CLE, the students will experience a much more practical approach to these modules, as they should be. Generally, legal procedure encountered in practice, does not appear to take a theoretical form, but rather a practical one. By subjecting students only or mainly to lectures based on theoretical presentations, law schools are not doing students justice in preparing them for legal practice. It is consequently argued that CLE is an appropriate methodology, for it combines the teaching of theory with practice, which is foundational to training law students for legal practice. It does not mean that law schools need to choose between theory and practice, as both disciplines are important and complement each other.¹²⁷ It simply means that the one must not exist without the other. As far as procedural-law modules are concerned, students should not merely study abstract doctrinal principles that may be confusing and difficult to understand, but should also practise legal procedure, including, for example, practically orientated tutorials, mock trials, moot courts or undertaking duties at a university law clinic.

3.3.2 *The need for a new approach to teaching procedural-law modules*

Cappelletti convincingly argues that legal education should not follow a traditional, easy and abstract approach.¹²⁸ As motivation, he states: “[T]he law is a tool for the pursuance of social policies and therefore, the role of a legal practitioner, includes a responsibility towards such social policies.”¹²⁹ Therefore, the law must be seen and taught as an instrument for ordering and changing society.¹³⁰ In this regard, Cappelletti states that professional ethics and clinical education must be included in the law curriculum and, in the process, the connection between clinical education, legal aid and other public legal services needs to be emphasised.¹³¹ His argument is founded on the fact that the law consists not only of norms and doctrines, but also of processes, stakeholders and institutions that create and operate the legal system.¹³² Legal education therefore needs to focus on such processes, stakeholders and institutions in order to evaluate their actions in light of values such as freedom and equality.¹³³ Cappelletti’s argument further strengthens the importance of human elements in the legal system. He believes that, wherever possible, the law should be used as an instrument to improve human lives. The learned author further states that law clinics and CLE are important in this regard.¹³⁴ He calls upon all law schools to sponsor a system in terms of which final-year law students are encouraged to work at law clinics in return for academic credit.¹³⁵ Although this system is currently

¹²⁷ Parmanand 2003 *Stellenbosch Law Review* 202.

¹²⁸ Cappelletti “The Future of Legal Education: A Comparative Perspective” 1992 8 *South African Journal on Human Rights* 1 11.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Cappelletti 1992 *South African Journal on Human Rights* 12.

¹³⁵ *Ibid.*

in place in many law clinics in South Africa, CLE is not compulsory at all law schools. It is submitted that it would be beneficial if CLE could become compulsory at all law schools. That will ensure exposure to legal practice for all law students. This will also have an impact on how students experience the practical application of the procedural-law modules in a practical environment. It will also influence how students perceive procedural justice against a background of the values enshrined in the Constitution.

It is not only Cappelletti who calls for a new approach to the teaching and learning of the law. It is submitted that a novel approach to teaching law, more specifically, the procedural-law modules in the context of this article, can be inferred from the National Qualifications Framework (NQF). The LLB degree is currently registered at NQF level 8.¹³⁶ The South African Qualifications Authority (SAQA) exit level outcomes for the LLB degree are, *inter alia*, as follows:¹³⁷

- a) the learner will have acquired a coherent understanding of, as well as the ability to critically analyse, fundamental legal and related concepts, principles, theories and their relationship to values;
- b) the learner will have acquired the ability to communicate effectively in a legal environment by means of written persuasive methods and sustained discourse;
- c) the learner can solve complex and diverse legal problems in creative, critical, ethical and innovative ways;
- d) the learner is able to work effectively with colleagues and other role players in the legal process as a team or group and contribute significantly to the output presented by such a group;
- e) the learner is able to manage and organise professional activities in the legal field in a responsible and effective manner;
- f) the learner has sufficient skills and knowledge to participate as a responsible citizen in the promotion of a just society and a democratic and constitutional state under the rule of law; and
- g) the learner has acquired legal skills and knowledge in order to solve problems responsibly and creatively in a given legal and social context.

With the focus on procedural-law modules, these outcomes imply something more than mere legal education in the traditional sense, as students will not acquire skills and knowledge merely from studying theory in textbooks and other relevant study material. Students must therefore be afforded the opportunity to practise effectively what they have studied in the classrooms or elsewhere in order to acquire such skills. Also, because the LLB qualification is listed as generic, i.e., LLB degrees from various universities are not all required to be identical, innovation in curricular design can be facilitated.¹³⁸ Law schools can therefore devise new ways in which to teach

¹³⁶ Whitear-Nel *et al* 2015 *Fundamina* 244.

¹³⁷ South African Qualifications Authority "Registered Qualification: Bachelor of Laws" (undated) <http://regqs.saga.org.za/viewQualification.php?id=22993> (accessed 2023-06-20). Also see Swanepoel *et al* 2008 *Journal for Juridical Science* 101 and McQuoid-Mason 2006 *Obiter* 167–168 in this regard.

¹³⁸ Whitear-Nel *et al* 2015 *Fundamina* 244.

procedural-law modules. Taking into consideration the above-mentioned SAQA outcomes, it is essential that law schools consider more practical ways to better prepare students for legal practice when teaching procedural-law modules. Furthermore, the mentioned outcomes show a similarity to the focus of CLE, which the MacCrate Report describes as “[w]hat lawyers need to be able to do”.¹³⁹ As the law of procedure and evidence is the spool around which the functioning of the law is running, it is submitted that it should be taught by way of CLE. This will ensure that graduates are competent in putting substantive law in motion when confronted with legal problems in legal practice. It will also ensure that the SAQA outcomes, highlighted above, are complied with as far as the procedural-law modules – and CLE – are concerned.

In the United States of America, the MacCrate Task Force was established following the investigations of their Bar Association into the quality of their candidates applying for admissions. Part of their investigations had been to examine the extent to which law schools were really preparing law students for entry into the profession.¹⁴⁰ Their report was published in 1992 under the title *Legal Education and Professional Development – An Educational Continuum*, also referred to as *The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*.¹⁴¹ The latter title stated the problem, namely that there was an existing gap between what is taught at law schools and what is actually experienced in legal practice. The Task Force made specific recommendations with a view to improving legal education and professional development of students.¹⁴² Within the confines of “professional development” in the said report, the following aspects are of special significance to ensure that the teaching of lawyering skills and professional values is effective:¹⁴³

- a) the development of concepts and theories underlying skills and values being taught;
- b) the opportunity for students to perform lawyering duties, followed by feedback and self-evaluation; and
- c) reflective evaluation of the performance of the students by a qualified assessor.

What relevance does this have for the teaching of procedural-law modules? First, aspects, like lawyering skills and professional values, mentioned by the MacCrate Task Force, are all part of CLE training.¹⁴⁴ Secondly, it shows that, outside of South Africa, there are also efforts being made to increase the practical skills training of law students by way of experience. The MacCrate Task Force suggested that these skills and values can best be enhanced by

¹³⁹ Du Plessis “Forty-Five Years of Clinical Legal Education in South Africa” 2019 25(2) *Fundamina* 12 21.

¹⁴⁰ Chavkin “Experience is the only Teacher: Meeting the Challenge of the Carnegie Foundation Report” (2007) <http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html>.

¹⁴¹ Engler 2001 *Clinical Law Review* 110 113.

¹⁴² Chavkin <http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html> (accessed 2019-06-20); Morgan 2011 *GW Law Faculty Publications & Other Works* 19.

¹⁴³ Chavkin <http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html>.

¹⁴⁴ Chavkin <http://classic.austlii.edu.au/au/journals/LegEdDig/2007/48.html>.

way of a student's active involvement in the clinical programme of a university.¹⁴⁵ It stated the following:¹⁴⁶

"Clinics have made, and continue to make, a valuable contribution to the entire legal education enterprise. They are a key component in the development and advancement of skills and values throughout the profession. Their role in the curricular mix of courses is vital."

The aforementioned substantiates the argument in this article that CLE is the appropriate methodology by which practical modules like procedural-law modules (in which many of these skills and values find application) can and should be taught.

After the publication of the MacCrate Report, the Clinical Legal Education Association in the United States of America, better known as CLEA, appointed a joint task team of clinicians with regard to the implementation of the report's recommendations.¹⁴⁷ Briefly stated, this task team proposed that students undergo classroom training, as well as live-client representation or simulated activities.¹⁴⁸ It is submitted that the proposals of this task team resonate with the focus of this article. Classroom sessions are important for imparting foundational theoretical knowledge to students, which they can use as the basis and background for the other more practical tasks and activities that they will be required to do. The importance of classroom sessions is compatible with the argument that theory and practice should not be separated when using CLE as teaching methodology. This argument leads to a further discussion about experiential learning.

3 3 3 *Experiential learning*

Experiential learning¹⁴⁹ entails the integration of theory and practice by combining the foundational knowledge of students, acquired during classroom sessions, with the actual experience that they may acquire during live-client sessions at law clinics, at law firms or during simulated activities.¹⁵⁰ Students can gain experience by assuming the role of legal practitioners or observing how legal practitioners practise law.¹⁵¹ In doing so, students are active in contributing to their own education, which is fully underscored by the philosophy of constructivism. In short, constructivism entails student learning by way of new experiences, which learning adds to the knowledge they already possess.¹⁵² Contrary to the classroom component, student learning, as part of experiential learning, is active and students and law teachers engage on a regular level.¹⁵³ It is submitted that

¹⁴⁵ Morgan 2011 *GW Law Faculty Publications & Other Works* 20; Engler 2001 *Clinical Law Review* 114.

¹⁴⁶ Engler 2001 *Clinical Law Review* 114.

¹⁴⁷ Engler 2001 *Clinical Law Review* 121.

¹⁴⁸ Engler 2001 *Clinical Law Review* 121–122.

¹⁴⁹ See heading 2, where the concept of experiential learning was briefly mentioned.

¹⁵⁰ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* (2018) 229.

¹⁵¹ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 229.

¹⁵² Quinot *et al* 2015 *Stellenbosch Law Review* 29 35; Welgemoed *Integration of Clinical Legal Education With Procedural Law Modules* 63.

¹⁵³ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230.

this is the best method for teaching and learning in procedural-law modules. For example, in teaching civil procedure, students can be instructed to attend practical sessions at attorneys' firms or at law clinics during which they observe attorney-client consultations. During such consultations, students will be able to make educated decisions as to what type of questions to ask clients for purposes of determining *locus standi*, causes of action and jurisdiction, as well as the applicable issues that need to be included in legal documents such as letters of demand, summonses and particulars of claim, as well as other documents. During tutorial sessions and/or reflective exercises, the teacher can ascertain the students' progress in this regard, as well as assist them with anything on which they need clarification.

The majority of clinicians are in agreement that the most important objectives of CLE are to teach lawyering skills and social justice to students.¹⁵⁴ The integration of the context of legal theory and lawyering skills into legal education can play an important role in motivating students to develop a passionate attitude towards other people, towards the craft of practising law and to seeking justice.¹⁵⁵ It is submitted that this passion and commitment is of crucial value as far as the role of transformative constitutionalism in legal education and legal practice is concerned. It may also move students to be amenable to render *pro bono* legal services for people who are not able to afford legal representation, but who are in definite need of legal assistance, especially where their fundamental rights are affected. In order to maintain students' passion for the practice of law and the social good,¹⁵⁶ opportunities, as part of legal education, need to be created where students can interact with people.¹⁵⁷ The most plausible way to achieve this is the live-client method.¹⁵⁸ Experiential learning of this nature will make students more familiar with people and their circumstances, social institutions, the tasks that legal practitioners perform, legal doctrines behind the performance of such tasks¹⁵⁹ and legal procedure.¹⁶⁰ Students will be able to assume responsibility for their actions in representing members of the public,¹⁶¹ which responsibility plays a significant role in the creation of accountable legal practitioners, as envisaged by the LPA.¹⁶² For example, in teaching criminal procedure students can be directed to attend court proceedings with legal practitioners to see how a bail application is

¹⁵⁴ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230. Also see Stuckey Barry, Dinerstein, Dubin, Engler, Elson, Hammer, Hertz, Joy, Kaas, Merton, Munro, Ogilvy, Scarnecchia and Schwartz *Best Practices for Legal Education: A Vision and a Road Map* (2007) 84.

¹⁵⁵ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230; Stuckey, et al *Best Practices for Legal Education* 84.

¹⁵⁶ Stuckey et al *Best Practices for Legal Education* 84.

¹⁵⁷ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 230.

¹⁵⁸ *Ibid.* However, see heading 3 3 5; the live-client model is not always practical to use for the learning and teaching of procedural-law modules.

¹⁵⁹ The doctrines of legal professionalism and ethical behaviour of legal practitioners are important in this regard.

¹⁶⁰ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 231.

¹⁶¹ See Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 235 and Stuckey et al *Best Practices for Legal Education* 195 in this regard.

¹⁶² See the Preamble of the LPA in this regard.

conducted. Students can thus gain an informed perception as to why certain questions are asked and what type of evidence is required for a person to be released on bail. Students will be placed in a position to learn what it means to perform services in the interest of the well-being of clients, as well as what it means to be a legal practitioner who ensures that, procedurally speaking, everything is done to promote access to justice and social justice. As mentioned before, students receive feedback from their supervisors and also have the opportunity to perform self-reflection as far as their efforts are concerned.¹⁶³

3 3 4 Reflection

Self-reflection further emphasises self-directed learning, which the philosophy of constructivism underpins. Reflection plays a key role in lifelong learning.¹⁶⁴ The law-school experience should assist students to develop expertise in reflecting on what they have learned.¹⁶⁵ This will contribute towards students identifying the causes of both their successes and failures and using such knowledge to plan any future efforts to learn so as to improve continuously.¹⁶⁶ It is submitted that this may advance transformative constitutionalism. Having received the appropriate foundational background during classroom sessions, students should reflect on their practical performance and continuously ask themselves whether what they are doing is advancing social justice and improving the lives of their clients. In repeating this exercise of reflection, students get into the habit of doing so during and after every practical activity, with the result that reflection moves with them past law school and into legal practice. For example, at some university law clinics, students may be in a position to learn how to operate digital data systems relating to clients and their cases. Teaching students how to use a digital system is part and parcel of transformative legal education, enabling them to embrace the demands of the Fourth Industrial Revolution when they enter legal practice. As students engage with digital systems in entering client data and client documentation, as well as document-generating software in creating legal documents, they are in a position to reflect on the benefits of such systems for their own education, as well as for their careers. They may, for example, discover how document-generating software can assist with the speedy and accurate drafting of legal documents, thus facilitating civil procedure in practice.¹⁶⁷ Should they, for example, enter legal practice after graduation, they will be in a position to transfer their new-found knowledge to law firms where digital systems are not yet implemented, thus assisting to modernise legal practice and the manner in which legal procedure and the handling of evidence are perceived and approached.

¹⁶³ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 236.

¹⁶⁴ Stuckey *et al Best Practices for Legal Education* 66.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.*

¹⁶⁷ As a side note, students should be reminded always to peruse the final document generated by document-generating software. They should be mindful that the responsibility for ensuring accurate legal documents always rests with the drafter of such documents.

3 3 5 *Simulated activities*

Although the live-client method is recommended, it will not always be possible to employ such a methodology. For this reason, simulations may also be beneficial in teaching skills and values. The use of simulations proves that teachers are increasingly making use of more active learning experiences.¹⁶⁸ Simulations are excellent exercises where the live-client model is not available, but where teachers nevertheless are looking for opportunities to introduce active learning in modules.¹⁶⁹ Simulations can be used as teaching tools for almost any activity in which legal practitioners may be involved,¹⁷⁰ and may include mock trials, moots, client consultations, negotiations, mediations and alternative dispute resolution, as well as drafting exercises based on real or simulated case scenarios.¹⁷¹ The more authentic simulations are being presented, the more purposeful and effective they can be as far as teaching and learning is concerned.¹⁷² Simulations should include topics from a variety of areas of law, including the law of property, law of succession, law of contract, law of delict, criminal law and law of persons and marriage. Some of these areas should even be combined in order to illustrate the complex nature of the law and that studying law should not be confined to compartments and silos.

3 3 6 *Tutorials*

Tutorial sessions are also part of the CLE teaching methodology that helps to place the knowledge gathered during classroom sessions, as well as the experience gained during practical sessions, into context, and to clarify any questions that students may have in that regard. A tutorial session is another opportunity to teach/train students in the same way that classroom sessions are being conducted. It should be used as an interactive manner to engage with students and to further develop their knowledge and skills. It is submitted that, during tutorial sessions, theory and practical experiences can be analysed, and important lessons from them should be highlighted. The topic of demand, in civil procedure, serves as a good example in this regard. During a classroom session, the relevance and importance of a demand can be explained and discussed. During a following practical or experiential session, the students can be required to draft a letter of demand, illustrating what they have learned from the classroom session, and whether they know how to apply such knowledge to a practical scenario. During a tutorial session, students must reflect on what they have learned, as well as identify their strengths and weaknesses in drafting a proper letter of demand. This will contribute to lifelong learning by students, enabling them to constantly review and expand their knowledge and skills with a view towards their entry into the working world and practical application of their procedural knowledge and skills to real-life events.

¹⁶⁸ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 217.

¹⁶⁹ *Ibid.*

¹⁷⁰ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 218.

¹⁷¹ Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 217.

¹⁷² Bodenstein (ed) *Law Clinics and the Clinical Law Movement in South Africa* 217. Also see Stuckey *et al Best Practices for Legal Education* 186 in this regard.

4 CONCLUSION

In this article, the importance of integrating CLE with the learning and teaching of procedural-law modules has been the focal point. As with all arguments, a foundation has to underpin such an integration. The foundation, advanced in this article, is a transformative approach to the learning and teaching of procedural-law modules. This simply means that, when approaching procedural-law modules, students must be taught in a manner that will make them more skilled to enter the working world after graduation. It is submitted that, for graduates wanting to enter legal practice, the effect of such training will be that they will have sufficient knowledge of procedure and evidence when entering practical vocational training. This will enable them not only to provide better access to justice to members of society, but also ensure that graduates are more employable, making them more attractive for employment to prospective employers. It is submitted that the same result is also attainable for graduates who may want to choose careers other than legal practice. They will learn to appreciate theory and to apply it practically, thus enabling them to think clearly through certain problem situations before deciding how to resolve them.

It is submitted that CLE is an approach that possesses all the qualities required for teaching procedural-law modules to students with the aim of preparing them more adequately for the working world. The CLE approach provides students with a firm theoretical foundation with regard to relevant concepts. Students also get the opportunity to engage with some of these concepts during practical sessions, either in a live-client or simulated scenario, depending on the preference of the particular law school. During tutorial sessions, students can further refine their skills by way of additional practical work and reflection. Reflection provides students with the opportunity to celebrate their successes, but also to learn from their mistakes. This leads to an improvement in student skills. It is furthermore submitted that, in light of the school system in South Africa,¹⁷³ such an approach to learning and teaching practical modules like procedural-law modules, is more than a necessity – it is a constitutional imperative.¹⁷⁴

A noteworthy challenge is whether sufficient time in the curriculum could be found to teach procedural-law modules in this proposed manner.

¹⁷³ See heading 2 in this regard.

¹⁷⁴ See headings 3 2 and 3 3 for a detailed discussion in this regard.