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I hereby declare that I have read and understood the regulations governing the submission of the postgraduate diploma in social justice research paper, including those relating to length and plagiarism, as contained in the rules of the University, and that this research paper conforms to those regulations.

Date: 9 February 2011

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Abstract

This research seeks to establish a framework for teaching law that enables graduates to practice law in a manner that furthers social justice. The first half of this paper investigates why it is legitimate to prioritize social justice in the Legal Education discipline. Three sets of literature support this argument. First, South African higher education policy, which emphasizes the need to produce graduates who are able to contribute to societal transformation. Second, the University of Cape Town's Social Responsiveness Policy and the University's Strategies for Change, which mirror national higher education priorities. The third set comprises discussions emerging from Critical Legal Studies as to the purpose of Legal Education. The second half of this paper turns to the framework itself. Experiential learning theory and Paulo Freire's "critical consciousness" shape the design of the three-pillared framework. The three pillars emerging are: social consciousness, sensitivity to context, and critical, social-orientated thinking. This framework embodies the kind of commitment to social justice needed for transformation in South Africa.

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University of Cape Town

INTRODUCTION: A SOCIAL JUSTICE FRAMEWORK FOR LEGAL EDUCATION

If the rule of law is to be part of democratic culture and if human rights and social justice as envisioned in our constitution are to be respected there is no alternative except to abandon inappropriate methods of teaching law. It is in the classrooms of the law faculties and law colleges that the future lawyers, judges, legislators, human rights activists and social reformers are groomed.
- Mohammed Monirul Azam¹

South Africa has witnessed radical change over the past 20 years. Previously a site of inequalities, injustices and oppression, contemporary South Africa prides itself on having one of the most progressive constitutions globally; one that prioritizes equality, freedom and human dignity. The restructuring of the legal system has framed and directed in powerful ways the transformation that has occurred in the country over the past two decades². The nation-building project is one that is in progress, and national priorities that emphasize the progressive realization of rights illustrate that there is still work to be done. Change across all sectors of society are necessary for the full potential of South African citizens to be enabled, and these changes can be fueled by a number of drivers. This paper will look at one driver, for one site of potential change: the education of law students, who are critical to the project of furthering justice for all in South Africa. What I aim to establish in this paper is a framework for teaching law that embeds in students a knowledge of how to practice law in a way that furthers social justice.

DEFINING SOCIAL JUSTICE

Social justice is a complex construct and is understood and embodied differently by theorists as well as social justice “practitioners”. For the purposes of this paper, I will not delve deeply into the philosophical debates that define social justice, but will

¹ M Azam 'Reforming Legal Education in Bangladesh' (2005) 55 *Journal of Legal Education* 560 at 560

² Specific Acts that are particularly impressive for their focus on social transformation include: the Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000, the Children's Act 38 of 2005, the Child Justice Act 75 of 2010, the Employment Equity Act 55 of 1998, the Consumer Protection Act 68 of 2008, and the National Credit Act 34 of 2007.

focus instead on how it can be interpreted to apply to Legal Education. The general themes that are covered by the umbrella of “social justice” —which commonly cite the arguments of John Rawls as reference—include principles of equality and solidarity, the value of human rights and the dignity of all human beings³. The distribution of social primary goods is fundamental to understanding social justice, but social justice refers to more than redistributive justice. In addition to distribution of rewards and burdens, the term refers to the system of social values that determines such distribution⁴. Deciding on what those social values are requires a measure of group consensus, as to what is valued and why. Rawls referred to this process of value consensus as “public reasoning”⁵ and outlined that for this process to generate a set of social norms based on liberty and equality, all discussants in the process needed to participate from the “original position” where they are deprived of any attributes like social status, historical background or demographic profile.⁶ Unfortunately, the “original position” is not a realistic one to postulate. The best that can be hoped for is that participants are sufficiently aware of the social context in which they operate, and take sufficient account of inequalities and injustices in their construction of social norms and values.

Rawls' definition of social justice forms a strong base, however, it does not take into account the individual capabilities needed to negotiate distribution of rewards and burdens. Amartya Sen has written extensively on the achievement of freedom being the most appropriate marker for development. I do not wish to conflate development and social justice, but wish to highlight that much of what Sen argues about development is similarly applicable for social justice, in that much of what he identifies as markers of development, are markers too of social justice. Sen argues that freedom is both the primary end and principle means of development⁷. What this means is that development cannot be said to exist unless individuals enjoy a measure of freedom—not just economic security—and further, that to reach a state of development, individuals need to be able to exercise freedoms. Substantive freedom according to Sen refers to a set of capabilities. Capabilities are the feasible or realistic options or choices that an individual can make. They refer to the freedom to make

³ Zajda et al 'Introduction: Education and Social Justice' (2006) 52 *Review of Education* 9 at 10

⁴ D Miller *Principles of Social Justice* (1999) Chapter 1

⁵ R Goodin and P Pettit *A Companion to Contemporary Political Philosophy* (1993) 174

⁶ D Raphael *Concepts of Justice* (2001) 198 - 199

⁷ A Sen *Development as Freedom* (1999) 36

these choices without coercion, and they refer to the opportunities that individuals are free to embrace⁸. Similarly, for social justice to be realized, individuals must have the capacity to maximize the effect of social rewards available to them, and to minimize the effect of social burdens. This capacity can be understood as power. If individuals do not have the power to negotiate with social structures and agents, they will not be able to maximize rewards and minimize burdens; they will not be able to exercise their capabilities. Thus, along with rewards and burdens, power too needs to be redistributed⁹. There is an obvious connection here with equality, in that if each individual has equal power they are less able to coerce one another, and less vulnerable to coercion by others¹⁰.

This definition is consistent with the principles of social justice that are embodied by the South African Constitution. The Constitution is based on the interrelated and mutually supporting values of equality, human dignity and freedom¹¹. Human dignity in the context of the Constitution is very broadly defined, and defined as self-esteem and personal integrity, as well as in relation to equality and freedom¹². It is important to note that these values are important intrinsically and are also important for their capacity to achieve positive change in terms of enabling participation, democracy and greater social cohesion. The Constitution also acknowledges the necessity of recognizing past injustices, which includes the inequitable distribution of power, when approaching the nation-building developmental project¹³. Therefore, social justice is a crucial component of the South African Constitution.

⁸ A Sen *Development as Freedom* (1999) 75

⁹ S Rand 'Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach' (2006) 13 *Clinical Law Review* 459 at 464

¹⁰ The term "equality" is itself contested, and arguments have been made that equality is not necessarily intrinsically good, particularly in cases where equality requires redistribution where that redistribution is "not deserved", or if redistribution might harm social cohesion (A Flew, 'Social Justice' Isn't any kind of Justice' (1993) *Libertarian Alliance*). However, post-Apartheid South Africa creates an interesting case, as equality was historically intentionally and forcibly denied (AZAPO v President of the Republic of South Africa 1996 (4) SA 671 (CC) para. 1). Thus, it is difficult to work out what is deserved or not from Flew and Nozick's position (D Raphael *Concepts of Justice* (2001) 214-219), as millions of people were denied the opportunity to "deserve" anything for an extended period of time. Therefore, the constitutional definition of equality (Constitution of the Republic of South Africa Section 9 (1)), which does not qualify equality except to say that it applies to "everyone", stands as the authority on equality for want of a more contextually relevant definition from critics of this view of equality.

¹¹ De Waal et al *The Bill of Rights Handbook* 4ed (2001) Chapter 1

¹² P De Vos *The Principle of Equality* (2001) 142

¹³ South African Constitution (1996) Preamble and Chapter 1

This definition of social justice relates to the South African focus on “transformation”. Transformation is loosely understood as “change from one qualitative state to another” where the change is a positive one¹⁴. Transformation is used to describe a process that is currently underway as well as the outcome of that process. The precise meaning of the word differs according to the larger discourse in which it is being employed. However, in the South African context, there is general agreement that the societal move that is the project of transformation is one away from Apartheid¹⁵. The notion of “transformative constitutionalism” as articulated by Karl Klare includes “transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction”¹⁶. This kind of transformation extends from the legal into the political, but at all times is grounded in law¹⁷. It relies on the premise that the Constitution allows innovation in legal method, analysis and reasoning that is consistent with the values and goals of the Constitution¹⁸. While it might seem like quite a radical shift, when considered in light of the shifts that have already occurred in South African law, as well as the disjunct between what the Constitution envisions for South African citizens and what they actually experience¹⁹, transformative constitutionalism is an appropriate model for framing the role of the constitution in the transformation of South African society.

To summarize: social justice is defined—in the confines of this paper—as the fair distribution of rewards and burdens within society, as well as the power of an individual to utilize rewards to their maximum potential and to negotiate the minimal impact of burdens. Secondly, social justice includes a social consciousness that is active across all sectors and spheres in society. Lastly, social justice can be understood as that which enables, and is further enabled by, holistic transformation in society—as articulated in transformative constitutionalism. Legal Education as an academic discipline cannot achieve social justice as it stands in its entirety above. However, there are elements of social justice that Legal Education can, and should strive to, contribute to. Through Legal Education, social justice can be realized through students gaining an awareness of the social structures that shape power

¹⁴ N Shepherd and S Robins *New South African Keywords* (2008) 209

¹⁵ N Shepherd and S Robins *New South African Keywords* (2008) 210

¹⁶ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 150

¹⁷ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 150

¹⁸ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 156

¹⁹ J Sarkin *The Principle of Equality* (2001) Chapter 3

relations; a knowledge of social issues and how they are affected by economic/political/legal forces; a knowledge of how law relates to transformation and particularly equality, freedom, democracy, human rights and capabilities; and the capacity of the law to contribute to the quality of life in the South African citizenry. Essentially, Legal Education can contribute to the realization of social justice by graduating lawyers who have a social consciousness, are sensitive to social context, and are skilled in critical, social-oriented thinking. I will offer a rationale for emphasizing these three attributes in the second chapter of this paper.

ARGUMENT OUTLINE

The first section of this paper will explore three positions that shape and direct the nature of Legal Education as an academic discipline, starting with South African national higher education policies that present the purpose of education to be to contribute to the country's developmental priorities. I will then turn to policies that shape the approach to education at the University of Cape Town: the University of Cape Town's Social Responsiveness Policy and the six strategic goals. Finally, I will outline the disciplinary purpose of Legal Education that frames the teaching of legal principles and values as both necessary and desirable. The Critical Legal Studies movement will be my theoretical point of departure here. I aim to show that Legal Education at UCT must integrate legal principles such as fairness, equality and justice into the entire LLB curriculum. Furthermore it must be aligned to the University's vision of offering students a curriculum that builds their identities as responsible citizens, and it must fulfill its national mandate to deliver graduates who are able to contribute to the national project of transformation²⁰.

I will argue that the core theme that characterizes these three positions is that of social justice, as I have defined it above. In terms of how social justice should be included in the curriculum, I will draw on various theories within pedagogy to argue that it is more appropriate to use social justice as a framework through which content is taught, rather than as an isolated course within the curriculum. My argument is that

²⁰ The focus of this paper is what Legal Education at UCT *should* look like, not what it *does* look like currently. In many instances, UCT's Law Faculty is aligned to this vision and using UCT as the site for this model does not necessarily imply that their current curriculum does not already embody some of the elements of the approach outlined below. It is unfortunately not in the scope of this short research paper to offer a comprehensive critique of the LLB curriculum at UCT.

the framework approach will enable students to apply any content in a manner that further social justice.

The focus of this paper will be what such a social justice framework looks like, and how that framework reflects the purpose of Legal Education, from national, institutional and disciplinary standpoints. I will use the foundations of experiential learning theory to inform the construction of my framework, but it is important to point out that I am not advocating for an experiential learning model. I do not propose that social justice learning be relegated to clinic work or legal practice courses as has been done in many law schools world-wide. Social justice is not just about how you work with clients, or how you “do” law, but I will argue that for social justice to be realized it needs to permeate how students think about law, how they “know” law, and how they embody social justice values in their practice of law. I do believe—in accordance with much of the literature on the subject—that clinic work is an effective way of teaching students about social justice. However, the danger of positioning social justice in this way is that students learn only how to “work with clients” in a way that furthers social justice, and not necessarily how to “think about law” in a way that furthers social justice. Social justice needs to be integrated fully into the law curriculum, where it is not learnt as a separate aspect of law like contract, delict or criminal law, but rather where it is the lens through which this content is learnt. I will draw on Freire's model of “critical consciousness” to support the design of my own framework.

I aim to show that such a framework, one that offers social justice as a lens through which all content is taught, can fulfill the disciplinary, institutional and national mandates of creating a curriculum that takes into account social justice values, is socially responsive, and can produce graduates who can contribute to the transformation of South Africa.

CHAPTER 1: THE SHAPE AND SCOPE OF LEGAL EDUCATION

“[Law] graduates in our unique society must be aware of their ethical duties to clients and constitutional imperatives, and they must have a profound appreciation of the socio-political and economic contexts in which we, as a society, function.” Law Society of South Africa²¹

INTRODUCTION

Legal Education, like any other academic discipline, is influenced by a variety of sources that shape the teaching of content. This chapter will look at three sources of influence, starting with national higher education policy and specifically White Paper 3. I will highlight the strong mandate given to higher education institutions to structure their academic operations such that they produce graduates who are able to contribute to the developmental needs of the country, and are able to work toward furthering democracy in South Africa. I will then examine the institutional priorities of the University of Cape Town. The UCT Social Responsiveness Policy places social responsiveness on the same level as teaching and research in terms of the core business of the University. The University's six strategic goals reflect this commitment to social responsiveness, and because the Law Faculty has to align its own teaching policies with those of UCT, a socially responsive curriculum is therefore required. Lastly, I will outline the disciplinary purpose of Legal Education, and use the Critical Legal Studies movement as a point of departure to illustrate the opposition to teaching “black letter law”, particularly in instances where legal systems are undergoing transformation. I will place specific focus on the position of values in Legal Education in relation to the academic and social purpose of the discipline.

THE TRANSFORMATIVE ROLE OF SOUTH AFRICAN HIGHER EDUCATION

Subsequent to the dismantling of the Apartheid state, education policy in South Africa has undergone purposive change. Education as a state tool to perpetuate

²¹ N Swart 'Graduate Attorney skills gap' (2010) Mail and Guardian [23 December]

inequality, visible in legislation like the Bantu Education Act (1958), has become a state tool to facilitate the realization of constitutional aspirations including equality, freedom, democracy and participation. National education policy, including Education White Paper 3: A Programme for the Transformation of Higher Education, illustrates the state's commitment to redress and transformation in education, as well as to socially responsive teaching, learning and research²².

The core mandate of White Paper 3 is that of transformation within institutions—in terms of internal structure and governance—and of engagement with broader society. The White Paper positions higher education institutions (HEIs) as sites wherein transformative change in the citizenry can and should occur; HEIs must contribute to “societal transformation”²³. The White Paper outlines a number of ways to realize in practice this commitment to “societal transformation”. It also outlines the purpose of higher education as to address the developmental needs of society²⁴ through providing the labour market with expertise that enables transformative socio-economic development in the country²⁵.

In practice, what this means is that the programme mix of each HEI should reflect the labour needs of the country, and each programme must be designed to enable students to become proficient in the field of their discipline. In the case of Legal Education, this means that training for lawyers should reflect the legal needs of South Africa. As has been discussed, the greatest national priority across all spheres of industry is that of continued societal transformation. Thus, law graduates must, according to national policy, be able to contribute to this project. Higher education has been envisaged to generate graduates who are able to engage with, review and renew “ideas, policies and practices based on a commitment to the common good”²⁶. The implication thereof is that HEIs should ensure that their graduates have the capacity to reflect on their immediate context—including the legal, political,

²² The other authoritative policies are The Higher Education Act 101 of 1997 and the National Plan for Higher Education in South Africa (2001), both of which embody the same values and vision articulated in the White Paper.

²³ Department of Education White Paper 3 (1997) Section 1.3

²⁴ The understanding of “development” that the White Paper is aligned to includes more than economic growth. While the alleviation of poverty and economic growth are certainly included under the banner of developmental needs, broader social transformation, in line with constitutional aspirations, also forms core of the “development” agenda apparent in the White Paper.

²⁵ Department of Education White Paper 3 (1997) Section 1.3

²⁶ Department of Education White Paper 3 (1997) Section 1.3

economic and social practices of the country—as well as the ability to challenge these practices should they believe that such a challenge would further the common good.

The White Paper outlines the role of higher education in building a critical civil society, through “strengthening democratic ethos, the sense of common citizenship and commitment to a common good”²⁷. There is emphasis on the imperative to direct education to the local, regional and national needs of South African society, as well as the needs of Africa more broadly²⁸. It is clear that the role of HEIs encompasses more than just teaching students knowledge or skills. The institution becomes a site of academic engagement where social consciousness, contextual sensitivity and critical, social-orientated thinking are core components of graduates' education.

Academic engagement is desirable not only because it allows the institution to respond to the public, it also allows the public to respond to the institution. Public accountability of HEIs extends from a reporting on how public funds have spent in the institution, to how the institution has prioritized national policy goals²⁹. Thus, HEIs are required to demonstrate how, through their operational and strategic approaches, they are responding to national needs. The White Paper mentions socially responsive action explicitly in its section on goals for higher education. Goal eight outlines an aim to: “promote and develop social responsibility and awareness amongst students of the role of higher education in social and economic development through community service programmes”³⁰.

It cannot be disputed that the mandated role of HE and HEIs in South Africa is a socially engaged and developmental one. HEIs need to contribute to “societal transformation” through creating academic programmes that are relevant to the labour and development needs of the country, and through delivering graduates who have sufficient expertise and sense of citizenship to be able to continue the contribution to “societal transformation” on an individual level. Law graduates are not exempt from making this contribution and it is particularly important that these

²⁷ Department of Education White Paper 3 (1997) Section 1.4

²⁸ Department of Education White Paper 3 (1997) Section 1.4

²⁹ Department of Education White Paper 3 (1997) Section 1.25

³⁰ Department of Education White Paper 3 (1997) Section 1.27

students comply with the criteria of graduateness stipulated by the policy in light of the role that the constitution and legislation can play in the transformation project. This role is articulated in the notion of transformative constitutionalism, which outlines the potential of law to facilitate positive social change in South Africa. Human dignity, equality and freedom—foundational to the Constitution—form the core of a transformed society. While all citizens are called to work toward transformation, legal practitioners who have the kind of education stipulated by the White Paper will be able to enact this kind of transformation in law. The Treatment Action Campaign's 2002 case against the state³¹ illustrated that legal advocacy was necessary to achieve state provision of nevirapine for prevention of mother to child transmission of HIV. While the myriad of other strategies employed by the TAC facilitated the success of litigation, without litigation at constitutional level, this outcome would not have been achieved. In this way, legal professionals contributed to greater equality in the access to life-saving medicines³².

There is therefore a strong imperative to follow the guidelines outlined in national higher education policies, as a socially sensitive generation of lawyers dedicated to constitutional ideals have the potential to contribute powerfully to societal transformation.

THE VISION OF THE UNIVERSITY OF CAPE TOWN

The University of Cape Town's own internal policies mirror strongly the social responsiveness that emerges from national policy. In 2008 the University formalized its Social Responsiveness Policy, after years of debate and discussion over how best social responsiveness should manifest in the functions of the University. The University now recognizes social responsiveness as one of its core functions, along with teaching and research. The policy sets out three spheres in which socially responsiveness actions can take place: teaching and learning, research and community engagement³³. The Social Responsiveness Policy formed part of the reference base that informed the conceptualization of the University's strategic goals.

³¹ Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721

³² S Robins *From Revolution to Rights in South Africa* (2008) Chapter 1 and N Nattrass *The Moral Economy of AIDS in South Africa* (2004) 48

³³ UCT Social Responsiveness Policy (2008) 3

The strategic goals communicate the institution-wide vision of the University and will inform faculty goals and strategic plans in the future. While a participatory project, the strategic goals emanate from the Vice-Chancellor's office and are thus the authoritative documents guiding the University's operations and approach to education.

The University's strategy for change document aligns with the mission and foundation statement of the University and articulates six goals that are rooted in values of "engaged citizenship and social justice"³⁴. The six goals pertain to Afropolitanism, transformation, institutional size and shape, research, graduateness and contribution to national developmental challenges and one of the two questions the strategic goals aim to answer is; "how can UCT shape its activities to answer the social, economic and developmental problems in South Africa and Africa?"³⁵. The emphasis on social engagement and civic responsibility is clear, as is the University's commitment to "stimulating the social consciousness of students"³⁶.

The second goal, on transformation at UCT, outlines a movement towards non-racialism, inclusiveness and an African voice³⁷. The section of this goal that is pertinent for the purposes of this research is that on curriculum reform and creating an African voice. It is stipulated in national policy and mirrored in UCT's strategic goals that transformation in higher education refers not only to institutional changes, but also to what the university "researches, teaches and learns"³⁸. Teaching and learning that is directed at furthering transformation in the form of social justice and social and economic development is also not necessarily in conflict with the ideals of academic freedom as has been suggested³⁹, rather curriculum changes can expand epistemological territories and offer greater opportunities and scope for academic endeavour.

Goal six, aimed at "expanding and enhancing UCT's contribution to national,

³⁴ UCT Mission Statement (2009)

³⁵ UCT Strategies for change (2010) Introduction

³⁶ UCT Foundation statement (2009)

³⁷ UCT Strategies for change (2010) Goal two

³⁸ UCT Strategies for change (2010) Goal two

³⁹ M Hall 'Transgressive Partnerships: Community Engagement in a South African University' (2009) *2 Gateways: International Journal of Community Research and Engagement* 1 at 14

provincial and local development needs” highlights that UCT should focus on South Africa's developmental needs as well on addressing the challenges that South Africa faces as it negotiates the post-Apartheid transition⁴⁰. The University recognizes that South Africa faces particular challenges as a society in transition, and has made a commitment to addressing those challenges. This commitment includes developing a “civic literacy”⁴¹ in the student body. It is impossible to ignore the links between this vision of justice and equality and the role that UCT's law graduates have in enacting this vision. Law students have great potential to enact justice in society, as they have the appropriate knowledge, skills-set and values. I will expand on this idea in the following section on the purpose of Law School.

Social Responsiveness in the UCT context is designed to be a core, integrated part of the University, not an add-on to teaching and research. The commitment that the University has made is not just lipservice to national higher education mandates; the strategic priorities of the University reflect the vision of social responsiveness. One example of this commitment to producing socially responsive graduates who are motivated to work toward social justice in South Africa is the “UCT Global Citizenship: Leading for Social Justice” programme which was piloted in 2010. The programme was designed to foster a sense of critical citizenship and to nurture a culture of social justice in the student community; exactly what is espoused in the Social Responsiveness Policy and the University's strategic goals. The programme was supported by the Vice-Chancellor's office, the Institutional Planning Department and enjoyed considerable participation from two of the Deputy Vice-Chancellors. The continued support of all institutional stakeholders and the great sense of value placed on the programme pay tribute to the University's strong commitment to producing a body of graduates who have a social conscious and the knowledge and skills to act on it⁴².

THE PURPOSE OF THE LEGAL EDUCATION DISCIPLINE

Critical Legal Studies (CLS) emerged in the 1960s in opposition to the Anglo-

⁴⁰ UCT Strategies for change (2010) Goal six

⁴¹ UCT Strategies for change (2010) Goal six

⁴² My own experiences as a member of the operational team for the Global Citizenship Programme inform this assessment. A comprehensive report that supports what has been said here has been compiled by the Centre for Higher Education Development, UCT.

American emphasis on “black letter lawyering”, which was perceived as unable to challenge inegalitarian and oppressive systems within law⁴³. CLS was heavily influenced by Critical Social Theory, which had emerged from the Frankfurt School, as well as feminist and Marxist discourses that were gaining popularity within the social sciences. Thus, CLS has a strong deconstructionist orientation that is critical of conservative academic approaches. CLS embraces the view that law cannot be understood fully according to its internal rules, but rather analysis and explanation of the law and legal norms are connected to the socio-political environment in which it operates⁴⁴. CLS challenges the notion that law can exist apolitically and neutrally and instead positions the law as something that exists in a moral and ideological order, thus opposing blind formalism and objectivism in legal practice⁴⁵. Those that propose the latter nature of law articulate a positivist and universal nature of law, one that cannot be influenced or shaped by those who practice it, but rather that exists independently of a moral code or political mandate⁴⁶. Law is viewed as a science and is taught as such; reduced to a fundamental set of rules arrived at through scientific analysis⁴⁷.

CLS proposed a radical reformation of law curricula in order to teach law students that the law and legal systems are contextually embedded in social relations, and that law can contribute to the advancement and development of society when understood as an engaged and socially responsive practice. CLS has changed shape and focus over the past few decades, but much of the current literature around Legal Education and law curriculum reform has roots within CLS. The view of law I use in this paper is more closely aligned with the CLS vision of law than the other, precisely because authoritative curriculum reform documents embrace this less positivist approach.

The current authoritative documents on curriculum reform in Legal Education are the Carnegie Report on Legal Education (2007) –as a global point of reference—and locally, the South African Council on Higher Education (CHE) review of the LLB

⁴³ P Fitzpatrick and A Hunt *Critical Legal Studies* (1987) Introduction

⁴⁴ R Goodin and P Pettit *A Companion to Contemporary Political Philosophy* (1993) 185, 195-199

⁴⁵ R Unger 'The Critical Legal Studies Movement'(1983) 3 *Harvard Law Review* 563 at 563 - 567

⁴⁶ R Goodin and P Pettit *A Companion to Contemporary Political Philosophy* (1993) 185

⁴⁷ B Henderson 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48 at 72

curriculum (2010)⁴⁸. Both reports will be used to supplement the literature in the discussion following, to support the arguments for the intentional inclusion of social justice values in the law school curriculum. While this was not the focus of either report⁴⁹, both make clear that the beyond equipping students with the knowledge and skills to enter and succeed in the legal profession, students also need a certain level of values teaching, in order to graduate as lawyers who have a “civic professionalism”⁵⁰.

Law schools prepare students for the practice of law by teaching students about different areas of law, as well as functional skills including legal reasoning and analysis, problem solving, capacity to form and defend judgments and the capacity to communicate effectively⁵¹. However, teaching students knowledge and skills does not cover all that they will need to be effective lawyers. The Law Society of South Africa’s submission to the CHE Review stipulated that law graduates should have an understanding of “legal ethics, constitutionalism and the social context in which attorneys operate”⁵². The South African Law Deans' Association wants law graduates to have an “understanding of the prevailing social and legal culture”⁵³. The Society of Law Teachers of Southern Africa submit; “the purpose of the LLB degree is to produce well-rounded graduates who are capable of dealing with legal concepts in a meaningful way, and thereby, contributing to law and society.”, and further that, “[t]hinking skills are also a prerequisite for law graduates. They must learn how to identify legal problems and issues, to consider and analyse them critically and to think innovatively around possible solutions that are socially and culturally

⁴⁸ It has not been possible to access a copy of this report, however, the submissions made by participating bodies have been included here.

⁴⁹ The major challenge articulated in these two reports is the practical expertise of law students, and their level of competency in the application of their studies to the practice of law. This concern; whether law schools are striking the right balance between being traditional academic institutions and a training ground for professionals (see Carnegie Report Summary Overview 2007), emerges at several places in the literature. It is unfortunate that it is not within the scope of this paper to explore this concern. The extensive literature on legal clinic work in law school offers insight into this debate.

⁵⁰ The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 4

⁵¹ B Henderson 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48 at 58 and 62, and The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 4

⁵² LSSA submission, available at <http://www.che.ac.za/monitoring/llb/LSSA.pdf> [accessed 27.12.2010]

⁵³ SALDA submission, available at <http://www.che.ac.za/monitoring/llb/SALDA.pdf> [accessed 27.12.2010]

sensitive.”⁵⁴

Acknowledgement of the context in which they will be practicing law is seen as key for law graduates. This challenges the objectivist notion that law will manifest identically irrespective of the context in which it exists. The above submissions show that authoritative bodies within the legal community of South Africa believe that a social awareness is necessary in order to practice law effectively in the country. Thus, students having an awareness of society and social issues—imbalances in power, unequal distributions of, and access to, resources, and disrespect of human rights to name a few—is desirable because of what that awareness means in relation to legal practice.

From the CLS-inspired school of thought, values are an important aspect of Legal Education. It is the balance between knowledge, skills and values that is contested in the literature, as well as the actual shape that value teaching takes in law schools. If the purpose of law school is a socially responsive one, then positioning values at the core of the curriculum is justified. In the South African instance, legal values cannot really be separated from the values of transformation; they are driven by the same attributes like equality, fairness and justice. A socially responsive lawyer will need to align their practice with these values. The question is then how values should be included in the curriculum. The Carnegie Report argues against isolating values in legal ethics or jurisprudence courses; instead, it articulates a need for new frameworks of integrating values into the curriculum⁵⁵. The ethical-social values that are relevant for consideration in the legal profession should be integrated into the law school curriculum, not an additive that is stuck on only when time and resources permit⁵⁶.

It is in classes that law students are taught how their role as lawyers should manifest and what their legal practice should be guided by: Legal Education structures a

⁵⁴ SLTSA submission, available at <http://www.che.ac.za/monitoring/llb/SLTSA.pdf> [accessed 27.12.2010]

⁵⁵ The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 8

⁵⁶ The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 8

student's response to, and outlook on, law in society⁵⁷. However, the legal ethics and values of law—as they apply to both the individual ethical responsibilities of lawyers, as well as the broader social responsibilities of the legal profession—are often relegated to designated courses and modules, and not integrated in the “content” of the curriculum⁵⁸. It is problematic to marginalize values in this way. Many of the reasons why students study law in the first place have to do with a strong belief in legal values. Ideas of working towards the common good, desires to help people through protecting them from social ills, and a general interest in social justice is what motivates many students to study law⁵⁹. If a sense of justice brings students to law, this should not be stifled⁶⁰. Students should not be alienated from these values and ideals. Not only does it leave them disillusioned with the law, which can affect negatively their legal practice, but it also leaves them less able to situate legal issues in broader moral and philosophical debates⁶¹. This is problematic because when students encounter real cases, they find that these cases are not removed from their context.

The Carnegie Report outlined how law schools do not reward the moral code and compassion of students and argued that they should⁶². The primary reason thereof is that the legal system does not exist in a vacuum; it exists in a complex web of social, economic and political threads that can have moral significance. What this means in real terms is students need to understand the “social consequences and ethical aspects”⁶³ of legal issues placed before them, instead of viewing issues abstracted from the context in which it exists. Context offers relevant considerations in the achievement of justice.

⁵⁷ B Henderson 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48 at 48, and A Goldsmith 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 143 at 145

⁵⁸ B Henderson 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48 at 69

⁵⁹ B Henderson 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48 at 48, and D Maranville 'Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning' (2001) 51 *Journal of Legal Education* 51 at 51

⁶⁰ D Maranville 'Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning' (2001) 51 *Journal of Legal Education* 51 at 53

⁶¹ B Henderson 'Asking the Lost Question: What is the Purpose of Law School?' (2003) 53 *Journal of Legal Education* 48 at 51

⁶² The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 6

⁶³ The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 5 -6

Teaching values links necessarily to ideology and moves away from the formalistic tradition in law, of teaching a values-neutral law. Proponents of the inclusion of values in the curriculum link this inclusion to social justice, as well as to the broader purpose of law schools and justify values inclusion in this way. Henderson argues that the purpose of Legal Education should reflect the legal needs and interests of the public; in essence he makes an argument for socially responsive teaching. Goldsmith supports this argument by emphasizing that law affects so many people in society, therefore “the stakeholders in legal education in a democratic society cannot be narrowly defined”⁶⁴.

Goldsmith argues that Law Schools are not academically isolated spaces designed to accommodate only the law and law students. Rather, Law Schools are sites where students learn how “to help human beings solve legally the problems and predicaments encountered in the pursuit of conflicting social ends”⁶⁵. Burrige takes a more radical stance, arguing that the purpose of legal education is far broader than just teaching students how to think like lawyers, rather, legal education has the capacity to add to Sen's⁶⁶ idea of substantive freedoms through not only teaching students about social justice but impressing upon them the importance of acting in socially responsible ways that contribute to societal development⁶⁷. Burrige agrees further that it is important for students to learn about the significance of law and its role in society, in order to know what their role within the legal system is⁶⁸. By positioning Legal Education as a tool to create socially responsible student-citizens, both Burrige and Goldsmith support a social justice approach to teaching law.

Azam follows Burrige's line and argues that legal education should teach students about the capacity of law to facilitate social justice and should further instill in students a sense of social responsibility. He goes on to outline the purpose of education as one which teaches students how to reshape society in instances where there has been undemocratic and unconstitutional regimes in power, and further that

⁶⁴ A Goldsmith 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 144

⁶⁵ A Goldsmith 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 144

⁶⁶ A Sen *Development as Freedom* (1999)

⁶⁷ R Burrige 'Six Propositions for Legal Education in Local and Global Development' (2005) 55 *Journal of Legal Education* 488 at 488

⁶⁸ R Burrige 'Six Propositions for Legal Education in Local and Global Development' (2005) 55 *Journal of Legal Education* 488 at 490

law students should learn how to contribute to the national transformative goals of the country. Azam's arguments pertain to legal education in Bangladesh, however the similar pattern of legal reform that Bangladesh and South Africa share make his arguments as relevant in this instance.

The above literature, from both the United States and the submissions to the South African Council on Higher Education, illustrate a desire for law students to learn about the social context that they are to practice law in, in order to be better able to apply their legal knowledge with sensitivity to all the factors that contribute to the realization of justice. There is a further desire to integrate values into the curriculum, in order to “prepare students for the varied demands of professional legal work”⁶⁹, demands which, in the South African context, include contributing to the constitutional and national project of transformation. Finally, there is a growing trend of viewing law schools as socially responsive sites of engagement that serve not only law students but also the broader community.

CONCLUSION

This chapter began with a discussion of the national vision for higher education, where higher education plays an important role in societal transformation through delivering graduate professionals who are adequately prepared to work toward addressing the developmental needs of South Africa. Next, I outlined how the University of Cape Town prioritizes such an education for their students. UCT's Social Responsiveness Policy and strategic goals reflect a desire to produce graduates who are critical citizens, both able and willing to contribute to the resolution of challenges facing South Africa and the continent. Finally, I discussed the disciplinary purpose of Legal Education, which includes training graduates to be lawyers with a social consciousness. Graduates who experience an integrated curriculum, where knowledge, skills and values are not isolated from one another, are believed to be better able to practice law in ways that further the interests, and address the legal needs of, society as a whole. The following chapter will explore this statement in more depth. In essence, the forces that drive and shape Legal Education at UCT, are

⁶⁹ The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 8

directing attention to an education that prepares graduates to practice law in a socially responsive manner.

CHAPTER 2: LEARNING LAW THROUGH A SOCIAL JUSTICE LENS

"Education either functions as an instrument which is used to facilitate integration of the younger generation into the logic of the present system and bring about conformity or it becomes the practice of freedom, the means by which men and women deal critically and creatively with reality and discover how to participate in the transformation of their world." Paulo Freire⁷⁰

INTRODUCTION

In the introduction to this paper I outlined a broad definition of social justice, as well as an interpretation of that definition that can be applied to Legal Education. I stated that for Legal Education to contribute to the broad achievement of social justice, students studying law need to graduate with three attributes: one; social consciousness; two; the ability to read, and sensitively respond to, social context; and three; they should be skilled in critical, social-oriented thinking. In this chapter, I will argue that we should not teach these skills and values to students as one or more courses in the curriculum, but rather, they should form a framework that structures the rest of the academic content in the curriculum. The core purpose of this chapter is to describe what a social justice framework built on these three attributes could look like. I will conclude the chapter by highlighting how this framework supports the visions of Legal Education as described in the previous chapter.

THE FRAMEWORK APPROACH

There are two broad ways to incorporate new content into the curriculum: as a component of the curriculum, or as the frame through which other content in the curriculum is taught. In the former case, students could take a course on social justice or a course that prioritizes social justice in the context of another branch of law. In the latter approach, the content of a course is taught to students within a social justice framework, that is, content is taught to students in a manner that allows them to apply that content in ways that further social justice. I have chosen the second model for inclusion of social justice in the curriculum. The primary reason for this being that as

⁷⁰ P Freire *Pedagogy of the Oppressed* (2006) 34

individuals, our idea of the world is mediated by our experiences and ideologies⁷¹, and more specifically in the case of learning, we learn through a lens that is informed by our social existence⁷². Thus, it is as important to learn a lens through which to view the world (or law), as it is to learn facts about the world (or law). The purpose of teaching students through a social justice lens is that they learn that lens, and use that lens in their legal practice.

Learning involves a range of activities including thinking, feeling, perceiving and behaving⁷³ and is widely understood as a social practice⁷⁴, not a purely cognitive one. As a social practice, learning is as susceptible to social influences any other social practice. Therefore, the existing experience base of students and their patterns of relating to society shape their interpretation of what is taught to them. In the South African context, students are being not taught not only *about* injustice, but also *in response to* injustice⁷⁵ and this distinction is key when considering the students' frames of reference and the lens through which they make sense of what they are being taught. It is impossible to universalize the experience of a group of individuals and to assume that individuals in a shared space, like UCT, have a shared set of experiences and ideologies that inform their engagement with the world. What can be done, however, is to facilitate the modification of existing ideas that are inconsistent with the values of social justice⁷⁶. For social justice to be the dominant "shaper" of interpretation, it needs to be the primary lens through which students view law. In some cases, the experience base of students might already create this kind of lens, but in other cases, a social justice lens may be in conflict with the existing lens of the student, thus the existing lens needs to be modified if not replaced entirely.

This modification cannot happen through introducing new content into the curriculum only, as it requires a shift in the way students think, not just what they think about. Jack Mezirow writes about meaning schemes and meaning perspectives

⁷¹ M Merleau-Ponty *Beyond the Body Proper: reading the anthropology of material life* (2007) 133-149.

⁷² J Mezirow *Fostering Critical Reflection in Adulthood* (1990) 1

⁷³ D Kolb *Culture and Processes of Experiential Learning* (1993) 147

⁷⁴ J Lave 'Teaching, as Learning, in Practice' (1996) 3 *Mind, Culture, Activity* 149 - 153

⁷⁵ This distinction was made in relation to the challenges that service-learning programs encounter when trying to negotiate the relationship between education, democracy and service (S Pollack *Service-learning: A Movement's Pioneers Reflect on its Origins, Practice and Future* (1999) 19). However, I believe it is also usable in the South African educational context.

⁷⁶ D Kolb *Culture and Processes of Experiential Learning* (1993) 146

as important filters that inform the way we think. Meaning schemes are habitual expectations and rules that govern interpretation and are shaped by personal history⁷⁷. Meaning perspectives are “higher-order schemata, theories, propositions, beliefs, goal orientations and evaluations” that guide how new experiences are assimilated and consolidated with existing ones⁷⁸. These meaning perspectives can be acquired through socialization, but can also be intentionally learned⁷⁹. Examples of learnt perspectives could be positivism, Marxism or liberalism. Social justice arguably falls into this latter category of perspectives that can be intentionally learned. Therefore, when social justice is not the dominant lens employed by a law student, they can learn it, through the intentional use of it as a tool to make sense of content presented to them.

The implementation of social justice as a lens, when it is in conflict with an existing lens, might need the support of a teacher⁸⁰. This may require educators to analyze their own “intentions and actions that inform [their] work”, in order for them to be aware of their own learning and teaching lenses⁸¹. Collective critique of pedagogical practice on the part of academics aligns with the broader institutional patterns at UCT of reviewing, revising and reforming teaching and learning practices⁸².

In addition to the pedagogical reasons for preferring a framework approach over a course content one, there are the practical ones. Each student has a different interest in law and different motivations for studying law. Whether interested in corporate, criminal, contract or public interest law, students should all be exposed to social justice. The previous chapter argued why this exposure is legitimate in the South African context. The argument might be made then that social justice be offered in a compulsory course that students need to take in order to graduate, thus ensuring that all students are exposed to social justice at some point during the course of their degree. However, there is a danger in isolating social justice from the rest of the curriculum. If students are to practice law in ways that further social justice, they

⁷⁷ J Mezirow *Fostering Critical Reflection in Adulthood* (1990) 2

⁷⁸ J Mezirow *Fostering Critical Reflection in Adulthood* (1990) 2

⁷⁹ J Mezirow *Fostering Critical Reflection in Adulthood* (1990) 2

⁸⁰ D Kolb *Culture and Processes of Experiential Learning* (1993) 146

⁸¹ K Morton 'The irony of service: charity, project and social change in service-learning' (1995) 2 *Michigan Journal of Service Learning* 19 at 31

⁸² See the University's “Strategies for Change” (2010)

need to understand the relationship between law and social justice. There would be little point in students understanding what social justice is, but not knowing how to apply it in their legal practice. In other words, they need an operational understanding of the concept⁸³. It would be most helpful for students to learn law and social justice as deeply connected constructs, where law cannot fully be understood without considering social justice.

An interesting case study on the effectiveness of teaching technical communication to engineering students outlined how, when technical communication was taught as a stand-alone course and not integrated into the curriculum, students were not able to transfer successfully all the knowledge from the communication course to the core engineering curriculum⁸⁴. In essence, the students learnt technical communication as part of the curriculum, not as part of engineering practice; they learnt it as a “curriculum genre”⁸⁵. Johns makes a similar distinction between a “classroom genre”; referring to activities that are carried out in the classroom, and “authentic genres”; referring to activities that relate directly to the industry that the students are preparing for⁸⁶. She argues that unless there is a strong enough connection between the two genres, students may be unable “to move beyond the requirements of the curriculum genres to an initiation into an academic or professional discourse community”⁸⁷. The Carnegie Report on Legal Education makes similar mention of the *additive* way in which practical skills and ethics are included in the law curriculum, and proposes that an integrated model of inclusion that does not separate the teaching of legal doctrine, practice and values would “better prepare students for the varied demands of professional legal work”⁸⁸. Thus, an integrated model of Legal Education that does not isolate social justice from the rest of the curriculum is both pedagogically sound and professionally desirable.

THE FOUNDATIONS OF THE FRAMEWORK:

⁸³ S Rand 'Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach' (2006) 13 *Clinical Law Review* 459 at 463

⁸⁴ J Wolfe 'How Technical Communication Handbooks Fail Engineering Students' (2009) 18 *Technical Communication Quarterly* 351 at 352

⁸⁵ F Christie *Functional systematic linguistics* (1991) 235 - 256

⁸⁶ A Johns *Academic writing in a second language: Essays on research and pedagogy* (1995) 282

⁸⁷ A Johns *Academic writing in a second language: Essays on research and pedagogy* (1995) 283

⁸⁸ The Carnegie Foundation *Educating Lawyers: Preparation for the Profession of Law-Report Summary* (2007) 7 - 8

Social Consciousness, Contextual Sensitivity and Critical, Social-orientated Thinking

In this section, I am going to develop a framework for teaching law through a social justice lens. I will use Paulo Freire's notion of "critical consciousness" as my point of departure, but will develop my own three pillars of the framework that differ from his. The social justice framework I am proposing has three elements to it: social consciousness, contextual sensitivity and critical, social-orientated thinking. The discussion below will show how these three pillars link both to social justice and to transformative constitutionalism.

Freire's model of "critical consciousness" outlines three phases of consciousness: *intransitive*; individuals are not conscious of their own abilities to enact change in society but rather accept their fate and the power structures that be, *semi-transitive*; individuals are able to engage with social problems in isolation, but are not able to see them in their full social context, and *critical consciousness*; individuals are able to see larger power structures in society as well as act against these structures⁸⁹. It is this level of social consciousness that students need to leave university with, in order to enact maximum positive change in the society they operate within. Four qualities characterize critical consciousness. The first is an awareness of power relations in society, and how historical forces have shaped those relations. The second is critical literacy, which refers to analytical reading, writing and discussing social matter that embodies a deep understanding of social context. Third is desocialization, essentially an examination of the myths and values of mass culture to uncover internalized prejudices. Lastly, self-organization or self-education; the active participation in social change through taking initiative in transformative projects⁹⁰

Freire's four-pillared model of "critical consciousness" is a strong one, but I would like to change its format and break it up thus: social consciousness is the base of the framework I am proposing and contextual sensitivity and critical-social-orientated

⁸⁹ I Shor *Paulo Freire: A Critical Encounter* (1993) 32 and T Deans 'Service-learning in Two Keys: Paulo Freire's Critical Pedagogy in Relation to John Dewey's Pragmatism' (1999) 6 *Michigan Journal of Service-learning* 15 at 21

⁹⁰ I Shor *Paulo Freire: A Critical Encounter* (1993) 33 and T Deans 'Service-learning in Two Keys: Paulo Freire's Critical Pedagogy in Relation to John Dewey's Pragmatism' (1999) 6 *Michigan Journal of Service-learning* 15 at 22

thinking serve to support that base. I am breaking it up like this because these three pillars are more easily identified in national and institutional policy—as described in the preceding chapter—than Freire's four pillars. I want to try to have as explicit an overlap as possible between the social justice framework and the goals set out in these policies. The first pillar, thinking and acting in ways that are contextually sensitive, means that what an individual or institution is aware of, and what they acknowledge, shapes the way that they respond to, and engage with, social structures and actors. It means that actions are informed by an understanding of society, and what an individual or institution thinks and does is influenced by the context in which they exist. The second pillar, critical, socially-orientated thinking, enables questioning and challenge of social structures and agents; the latter includes self. All three attributes combined—social consciousness, contextual sensitivity and critical-social orientated thinking—enable individuals to support or to challenge social structures and agents, with an awareness of social issues and the context they exist within. This supports the transformation of society and realization of social justice as envisioned by the South African Constitution in a number of ways.

Firstly, for a social problem to be resolved comprehensively and permanently, both the problem and its causes need to be acknowledged and understood in the manner of Freire's critical consciousness. Many of South Africa's post-Apartheid legislative Acts that direct social reform illustrate that acknowledgement of both the current problem and its cause is critical in the process of transformation. For example, the Employment Equity Act explicitly states that it exists because of the discrimination and resulting disparities in employment, occupation and income during Apartheid and after⁹¹. The Act responds to past injustices, in order to facilitate greater equality. It is not just in national legislation that it is important to engage an awareness of social history, structure and power; rather, the general practice of law can help people “solve legally the problems and predicaments encountered in the pursuit of conflicting social ends” in an attempt to minimize “injustice and suffering”⁹². I would argue that for the critical conscious to be realized one has to have an awareness of what those social ends are, whose ends they are, how the pursuers of these ends relate to one another, how and why they conflict, and what fuels the construction of those

⁹¹ Employment Equity Act No 55 of 1998

⁹² A Goldsmith 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 143 at 143

conflicting ends, in order to draw conclusions as to how such conflicts should be resolved, in a way that furthers social justice.

Secondly, sensitivity to context is what—in the development industry at least—separates successful interventions from unsuccessful ones⁹³ and contributes to societal transformation. The same could be argued for law; the most “successful” law—in this instance that which furthers social justice—is law that recognizes and responds to its social embeddedness. The Sociology of Law movement offers great support for this thesis; one of the pillars of the discipline is the rejection of legal formalism and the belief that “law is an internally consistent and logical body of rules independent of the variable forms of its surrounding social institutions”⁹⁴. For law to have meaning the legal and the non-legal cannot be fused⁹⁵ and I am not proposing this. I am proposing instead that the relationship between the legal and non-legal be considered as relevant in legal process and practice. The importance of contextual sensitivity in law can be argued independently of “law and society” movements. There are many examples in South African jurisprudence that support the idea that “the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large”⁹⁶. While constitutional adjudication is mentioned explicitly above, the entire judicial process—a whole assemblage of legal practices that are enacted by a range of legal professionals—is a site where social context is an important point of reference.

The connections between law and society are again found in transformative constitutionalism, which holds that the values enshrined in the constitution can move into the social space through legal channels⁹⁷. Klare argues too that the rule of law should not be depoliticized, nor should it be separated from the greater national project of social change. This is to ensure the above-mentioned translation of constitutional values from the Constitution to broader society. Sociology of Law,

⁹³ K Gardner and D Lewis *Anthropology, Development and the Post-modern Challenge* (1996) Chapter 4

⁹⁴ M Deflem 'The Escape for Jurisprudence: Talcott Parsons and the Foundations of the Sociology of Law' (2007) Prepared for the ASA Annual meeting, 1 at 4

⁹⁵ R Wilson 'Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights' (2000) 41 *Current Anthropology* 75 at 77

⁹⁶ *State v Makwanyane*, 1995 (6) BCLR 665 (CC), at para 207

⁹⁷ K Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *SAJHR* 146 at 154

transformative constitutionalism and South African legal practice show that law is influenced by society in terms of how law comes into being; that law needs to take into account social forces to realize justice; and that legal practice enables societal transformation.

Thirdly—another lesson from the development industry—changes that yield good results initially may not continue to do so⁹⁸, and structures and institutions that are supposed to facilitate change do not always fulfill this mandate⁹⁹. For there to be transformation, there needs to be a level of critical thinking that goes beyond accepting the status quo and the presumed roles of institutional and individual actors, and it needs to be thinking that is orientated around society, not individual interests. The former criterion (“critical thinking”) refers to more than a critical reading of text or circumstance; for my purposes it refers to the capacity to challenge or transform, and not just reproduce, legal structures and practices. I will argue in the following section that this requires a careful assessment of both the cause of legal problems—including power relations in legal conflicts—and the consequences of the resolution of legal problems. The latter criterion (“social-oriented thinking”) would require legal practitioners to promote not only their client's interest, but also “the integrity of the framework in which these interests exist”, and in so doing illustrate a “commitment to the values of the legal system”¹⁰⁰. These values, of equality, fairness, freedom etc, are foundational to social justice.

What we have then, is a framework inspired by Freire’s conception of critical consciousness, with social consciousness forming the base of the framework, supported by contextual sensitivity and critical-social orientated thinking. These three attributes combined in a pedagogical framework should facilitate the kind of learning that will enable law graduates to practice law in ways that further social justice in South Africa.

BUILDING ON THE FOUNDATIONS:

Cause and Consequence in the Legal Process

⁹⁸ K Gardner and D Lewis *Anthropology, Development and the Post-modern Challenge* (1996) Chapter 4

⁹⁹ G Mills *Why African is Poor and What Africans Can Do About It* (2010) Chapter 4

¹⁰⁰ A Goldsmith 'Legal Education and the Public Interest' (1998) 9 *Legal Education Review* 143 at 155

A legal problem does not “begin” when it is brought to the attention of an attorney. There is a history that precedes its presence as a “conflict of interests”. Similarly, the resolution of the problem does not necessarily resolve the cause of the problem as such. It is what happens during, as well as what comes before and after the legal practitioner’s involvement that is important when considering how social justice manifests in legal practice. That is, unless legal practitioners take into account the underlying cause of a problem, as well as the extent to which a resolution to a problem addresses that underlying cause, the extent to which social justice can be achieved is somewhat limited. This is not to say that lawyers themselves have to be the ones who address the underlying cause, they can partner with civil society organizations or social movements whose mandates are strongly aligned to challenging structural inequalities. The point is that lawyers should be aware of the ways in which the resolution of a case contributes—or does not—to the resolution of the underlying cause, and if they cannot themselves address this cause, they need to communicate with individuals and institutions who can. To return to the definition of social justice offered in the introduction, the process of redistributing power from the powerful to the powerless was a key requirement for the achievement of social justice. I will argue here that unless the underlying causes of a legal problem are addressed, a meaningful shift in power cannot be achieved. Before I do that however, I would like to look at why power is such a fundamental component of social justice.

As discussed in the introduction, inequities in the distribution of power make the equal distribution of social goods as defined by Rawls a difficult endeavour. As Sen argued, citizens need to have a capability set that allows them to maximize the effect of social rewards and to minimize the effect of social burdens. Power forms a key channel through which capabilities are accessed and exercised. In terms of legal practice, working toward social justice with an understanding of this role that power plays in the realization of social justice would mean “working to reduce power imbalances between clients, between clients and the community, and between communities and larger communities and governments”¹⁰¹. “Communities” refer to both physical communities as well as public and private institutions. Again, it might not be the individual responsibility of the lawyer herself to reduce such power

¹⁰¹ S Rand 'Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach' (2006) 13 *Clinical Law Review* 459 at 484

imbalances, but part of her work might include partnering with institutions who are able to challenge such imbalances, or who are able to offer support to less powerful parties in legal disputes.

Students thus need to be taught how to recognize power imbalances in legal problems, and how to situate those power imbalances in the greater legal process¹⁰². With a nuanced understanding of power, law graduates can carry out their work with a greater awareness of how and why legal problems have come into being, and how different resolutions of legal problems can have differing effects on the power imbalances that may have contributed to their cause. In order to accomplish such a nuanced understanding, students need to have a strong contextual sensitivity, and need to practice critical, social-orientated thinking. They need to understand not only the context, but they need to be able to question how that context came into being. It is this kind of legal practice—one that includes an analysis of power relations of all parties and processes—that contributes to the realization of social justice.

The final element to legal practice that is valuable to include in this framework builds on all three pillars: social consciousness, contextual sensitivity and critical, social-orientated thinking. It is also possibly one of the most contested ideas within the legal profession; the nature of law being values-based, as opposed to value-neutral. In this paper, I have embraced the former understanding of law, which the Critical Legal Studies movement articulates most powerfully. If law is not value neutral, then students need to be aware of the role and position of values in the legal process¹⁰³. This awareness relates to my previous arguments on “meaning perspectives” and how the experiences and ideological background of learners shapes how they learn. Similarly, meaning perspectives can influence the way legal practitioners engage law. In response to the values-based nature of law, I have included an interrogation of self and perspective as the final support of my framework. The purpose of this interrogation is two-fold: to uncover the values-bias of students, and to establish the student's own power in the legal process and how their authority may affect that process. It is worth remembering Freire's model of critical consciousness at this

¹⁰² S Rand 'Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach' (2006) 13 *Clinical Law Review* 459 at 496

¹⁰³ S Rand 'Teaching Law Students to Practice Social Justice: An Interdisciplinary Search for Help Through Social Work's Empowerment Approach' (2006) 13 *Clinical Law Review* 459 at 461

point. To achieve such a consciousness, individuals must be aware of their ability to enact change in society, and this awareness comprises knowledge of the changes that society needs, as well as their own capability- and value-set that supports or limits their position as an agent for change¹⁰⁴.

I am proposing that when students receive cases to analyze, they are required to establish the potential impact that ideological preferences may have on the outcome of the analysis. Furthermore, they need to recognize their own approach and perspective in the process of selecting, positioning and assessing data. If students are not able to do this, they run the risk of not being able to identify others' ideological biases in the legal process—biases that may conflict with the process and end of social justice.

LINKING THE SOCIAL JUSTICE FRAMEWORK TO THE VISION OF LEGAL EDUCATION

The disciplinary purpose of Legal Education as articulated by CLS and its supporters, encourages an integrated curriculum, where knowledge, skills and values are not taught in isolation from one another and graduates are able to apply their knowledge in a socially responsive manner. The strategic goals of the University of Cape mirror this desire. UCT aims to produce graduates who are critical citizens, both able and willing to contribute to the resolution of challenges facing South Africa and the continent. As a point of reference for the institutional vision of UCT, the national vision for higher education outlines the role of higher education in societal transformation to be the delivery of graduate professionals who are adequately prepared to work toward addressing the developmental needs of South Africa.

The framework was designed with these three visions in mind. The framework approach ensures that the integration favoured by the discipline is realized through infusing social justice and its associated values in all curriculum content. A focus on contextual sensitivity and an awareness of social power dynamics means that students are better able to respond to their context, in ways that are relevant,

¹⁰⁴ I Shor *Paulo Freire: A Critical Encounter* (1993) 32 and T Deans 'Service-learning in Two Keys: Paulo Freire's Critical Pedagogy in Relation to John Dewey's Pragmatism' (1999) 6 *Michigan Journal of Service-learning* 15 at 21

constructive and transformative. Skilled in critical, social-orientated thinking, graduates can apply their legal knowledge in ways that benefit not only individual clients but also society as a whole. The social consciousness that students develop over the course of their academic career directs their practice of law in such a manner that facilitates the achievement of social justice¹⁰⁵.

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¹⁰⁵ See Freire's four characteristics of critical consciousness.

CONCLUSION

Given the demands of the South African transformation agenda, and the crucial role that higher education is positioned to fulfill, it is irresponsible not to take seriously the task of delivering graduates who are equipped with the knowledge, skills and values to contribute to this ongoing project. In this paper, I have used social justice as a departure point for thinking about how to educate law students to achieve the goal of socially aware and responsive graduates. I defined social justice as the fair distribution of rewards and burdens within society, as well as the power of an individual to utilize rewards to their maximum potential and to negotiate the minimal impact of burdens. In the definition of social justice, I included a social consciousness that is active in all sectors and spheres in society. In relation to South African social transformation, social justice emerged as that which enables, and is further enabled by, holistic transformation in society.

I explicitly stayed away from the philosophical debates that attempt to define social justice, because I wanted a definition that could be operationalized in the context of Legal Education. I did this so that there was something concrete to work from; not just rhetoric that doesn't quite translate from policy to practice. While defining social justice in this way might not be theoretically rigorous, the nature of the challenges that South Africa faces requires action. And that action requires firm and definitive guidelines. Thus, I defined social justice in the context of Legal Education to mean social consciousness, contextual sensitivity and critical, social-orientated thinking. An awareness of the underlying power structures that govern legal predicaments and practice, as well as an acknowledgment of self in the legal process supported the three pillars. I argued that it is through the achievement of these values and skills, that law graduates will be able to practice law in a manner that furthers social justice.

It was important in this paper to establish the legitimacy of this approach to Legal Education, as there has historically been some resistance to transformation of legal curriculum, particularly from “black letter” lawyers and law professors who embrace a more conservative approach to the law. I drew on the literature emerging from the Critical Legal Studies movement as well as authoritative guidelines informing Legal Education: the Carnegie Report on Legal Education and the CHE Review of the LLB

curriculum in South Africa. What this body of literature showed is that the movement away from “black letter law” is gaining momentum and support. National and UCT institutional policy may not explicitly oppose “black letter law” as such, but the vision for education broadly that both sets of policies espouse is far more aligned with the CLS vision for Legal Education than the positivist position. In this context, it becomes difficult to justify not embracing at least some elements of a less “black and white” approach to Legal Education.

I also included a brief analysis of the strategic goals of the University of Cape Town. What these goals outline, is a strong commitment to social responsiveness and a desire to produce graduates who are not just professionals, but who are also citizens. The University has prioritized social responsiveness to the extent that is weighted equally with teaching and research. I explained how, in the context of the University's policies and strategic priorities, all programmes and qualifications need to reflect a commitment to social justice values. It was not within the scope of this short paper to explore whether these recent policies of the University are justified, but it was within the scope of this paper to show that the institutional goals of the University are aligned with national priorities for higher education and are in this way legitimate. The national approach to higher education is one that mandates a social focus. Higher education institutions are required to produce graduates who can contribute to the nation's developmental challenges and transformation agenda. This is an unequivocal mandate; graduates of South African institutions of higher education must be able to further the national project of transformation through constructive contributions in the work force, and as citizens.

The combination of the disciplinary, institutional and national mandate of Legal Education illustrates a clear social justice agenda. Thus, the second half of this paper set out to establish a model for including social justice in the law school curriculum. I argued for a framework approach that does not isolate social justice in the curriculum, but integrates it fully. I used experiential learning theory to frame learning as a social process, and moved on from there to argue that the framework approach is not only pedagogically sound but also desirable in terms of preparing students for their role as legal professionals. I concluded the second half of this paper by linking the framework back to the vision of Legal Education outlined above.

I set out at the beginning of this paper to achieve two goals. First, I wanted to prove that it is a legitimate move to approach Legal Education as a vehicle for teaching social justice; to show that social justice is not an inappropriate addition to the curriculum. I did this through outlining the disciplinary, institutional and national visions for Legal Education. Second, I wanted to establish a model for inclusion of social justice in the curriculum. I argued for a framework approach and explained the benefits of this approach as an integrative model. This paper has offered a model for teaching social justice in a manner that will allow students to recognize the central position of social justice in their legal practice. It is hoped that such a model can contribute to educating citizen graduates who are motivated and equipped to work toward social change and transformation in South Africa.

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