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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?*

1. Introduction

The manner in which law students are taught and trained at undergraduate and post-graduate level impacts on the quality of the legal services that are delivered to clients once students qualify as legal practitioners.

Generally, undergraduate LLB programmes in Commonwealth university law faculties and departments are based on the English model which traditionally, apart from a few exceptions, focused on substantive law, academic legal education, rather than on training in procedural and practical aspects of the law.[1] Training in the latter were seen as the remit of post-graduate practical training programmes, and, to a decreasing extent, apprenticeship programmes.

The structure of the legal professions established in Commonwealth countries during the colonial era tended to mirror that of the English legal profession. Many countries followed the tradition of a divided bar which in most instances persisted until decolonization. Both the bar and the side-bar required a period of apprenticeship by law graduates before they could be admitted to practice. After decolonization, however, in many Commonwealth countries the divided bar concept was replaced with fusion, and the requirement of apprenticeship with compulsory attendance at post-graduate law schools which provide practical legal training. The fact that university law graduates were able to begin practising, without having to undergo an apprenticeship with an established law firm or public service institution, posed new challenges for legal training. The question arises as to whether undergraduate programmes at universities and post-graduate programmes at law schools are producing lawyers who are able to meet the needs of the public? It is intended to discuss each of these programmes in turn.

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1 See generally Hepple 1996:470.

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2. Undergraduate university legal education

Most university law faculties and law departments would probably agree that their job is to teach students (a) to think; (b) to solve legal problems; (c) to analyse and apply legal rules and principles; and (d) to undertake legal research.[2] They would probably also agree that it is not their job to train students: (a) to conduct fact investigations; (b) to communicate in writing or orally; (c) to counsel clients; (d) to negotiate on behalf of clients; (e) to conduct litigation; and (f) to recognize and solve ethical dilemmas.[3]

2.1 The ability to think

Traditionally university law faculties would claim that their function is to teach students how to think — not how to do.[4] However, in reality in many developing Commonwealth countries teaching methods have not progressed much beyond the didactic method of lectures inherited from the colonial period. This usually involves students sitting as passive recipients of information delivered by lecturers with little scope for active learning to develop skills or values. In the worst case scenarios the lectures themselves take the form of 'disguised dictation, undisguised dictation or lecture notes'.[5] Many Commonwealth universities in developing countries do not have the resources to mount tutorial or clinical classes to stimulate small group discussions in order to develop critical thinking skills or ethical value systems. The net result is that instead of exposing students to an environment of critical discourse about the law they are dragooned into dull uniformity and rote learning. The public demands lawyers who can think laterally in order to solve legal problems and unless universities fulfill this obligation they are neglecting their duties.

2.2 The ability to solve legal problems

University law teachers refer to decided cases during lectures and usually include problem-solving in their examinations. However, although cases are referred to during lectures, they are frequently not taught in a problem-solving format. For instance, problem-based learning probably occurs in a few institutions and the casebook method is used in others, but in under-resourced faculties there is often little follow up by way of tutorials or practicals outside of the lecture. The only real test of problem-solving ability may occur during the examination process. Even this is not certain, however, because sometimes examination question papers provide such a wide choice that it

2 Cf Woolman *et al* 1997:30.
3 Some of these categories are based on those in the *The MacCrate Report* 1992.
4 Cf Woolman *et al* 1997:30.
5 Dugard 1974:160: "In the first case, the law lecturer prepares notes which he then reads out or talks to at so slow a pace that students are able to take down his pearls of wisdom. In the second case the lecturer unashamedly dictates notes, complete with punctuation. And, in the third case, ... notes are handed out at the beginning of the year which are then read through together by the lecturer and [the] students".

is possible for students to avoid problem-type questions by answering essay questions.[6] Lawyers who cannot solve legal problems are not of much use to the general public. Unless the universities lay the foundation for young aspiring lawyers to develop problem-solving skills, they will be failing the public. The best method of ensuring that students are able to problem-solve is to expose them to interactive teaching methods.[7]

2.3 The ability to analyse and apply legal rules and principles

Law faculties traditionally claim that they are teaching students how to analyse and apply legal rules and principles.[8] This is obviously an important skill required of lawyers. Sometimes, however, this claim is more apparent than real. Some law students manage to get through law school by rote learning, regurgitation and focusing on non-problem questions in examinations. Unless they are specifically required to apply the skills of legal analysis in tutorials, tests and examinations they may graduate without being able to apply the theories of law they have learnt. Law faculties that produce law graduates who do not have the ability to apply what they have learnt in practice are doing a disservice to the students and the public. A method of overcoming this is to involve law students in small group work and to introduce clinical legal education teaching and examining methods.[9]

2.4 The ability to conduct fact investigation

At law faculties students are presented with facts and case studies neatly packaged by the professors. Very often only those faculties with clinical law programmes provide students with training in fact finding. Some academics would probably argue that it is not their place to teach fact investigation. However, some very eminent legal scholars have pointed out that fact-finding should be at the heart of the law curriculum.[10] Lawyers have to be able to identify the facts before they can consider the likely legal implications. Fact finding is an essential skill for all aspiring lawyers. Law faculties should equip their students to understand that very often it is more difficult to identify the relevant facts than the relevant law. Law graduates need to be trained in how to engage in effective fact investigation.

6 Personal experience of the present writer who has been external examiner for a number of Commonwealth universities. He managed to persuade most of them to ensure that at least the majority of questions in their examination papers were problem-based.
7 See generally, Bligh 1971.
8 Cf Woolman *et al* 1997:30.
9 See generally, Brayne *et al* 1998.
10 See generally, Anderson and Twining 1991.

2.5 The ability to communicate in writing or orally

Law faculties will argue that the very nature of their degrees is such that students will acquire the ability to write and express themselves orally and that there is no need for them specifically to teach these skills.

While it may be true that students who write examinations or essays learn some skills in written communication, it is possible for law students to graduate from law school without having the basic lawyering skills of letter and opinion writing and legal drafting. Furthermore, unless there are regular tutorials, a compulsory moot court programme or a course in advocacy, students are unlikely to have much opportunity to practice their oral skills. Communication, written and oral, is the lifeblood of a lawyer's profession[11] and the universities should be laying the foundations for this from the student's first year in the law faculty.[12]

2.6 The ability to counsel clients

Client counselling is an important aspect of legal practice.[13] Nonetheless it is probably absent from the curriculum of the vast majority of Commonwealth law faculties even though internationally it is gradually becoming established in competitions along the lines of the moot competitions.[14] Unless a law faculty has a clinical programme it is unlikely that client counselling will be given much attention, although it may feature as part of a professional training course. Client counselling cannot be taught academically and, unless students have an opportunity to practice the skill the course is not likely to be worth much. Young lawyers are likely to be required to engage in client counselling from day one of their exposure to legal practice. Law faculties should provide them with the foundations of this basic lawyering skill from an early stage.

2.7 The ability to negotiate on behalf of clients

Negotiating skills are the lifeblood of a lawyer's work,[15] but this skill is unlikely to be taught in university law faculties unless they have a clinical law course. However, international negotiation skills competitions are also being introduced and law faculties and law schools are being invited to participate. Negotiating skills cannot be taught academically and require interactive skills training. Such training can be included in either a clinical law course or a professional training course.

11 See Palmer and McQuoid-Mason 2000:3.
12 For a South African example of this see McQuoid-Mason 2002:107-124.
13 See Binder *et al* 1991; Twist 1992; Chapman 1993:25; Alexander 1997.
14 For example, the annual Louis M Brown International Client Counselling Competition.
15 See Lee and Fox 1994:150-151; Halpern 1992.

2.8 The ability to conduct litigation

Lawyers require training in litigation[16] even if they subsequently decide to engage in non-litigious work such as conveyancing. Athough litigation skills can be fine-tuned at a postgraduate practical training school, law graduates need to know how litigation works in order to provide them with a proper picture of the legal process. Traditionally civil and criminal procedure are taught academically.[17] However, if a law faculty offers clinical law or professional training courses the syllabi can include aspects of litigation. A well-rounded law graduate should at least have a basic idea of the litigation process.[18]

2.9 The ability to recognize and solve ethical dilemmas

The ethical rules of the legal profession should be designed to protect the public from unscrupulous lawyers and to ensure that legal practitioners conduct themselves appropriately. Some academics might argue that ethics can be adequately taught at post-graduate level once law students have graduated. However, the better view is that ethics needs to be inculcated into students from day one of their legal studies at university. If law faculties are to assist in the production of ethical lawyers they should integrate legal ethics across their curriculum.[19] Ethics is an inherent part of legal practice. It is probably true to say that at most Commonwealth law faculties there may be little more than a passing reference to ethics in the law curriculum unless there is a clinical law or professional training course. Full courses on legal ethics are probably the exception rather than the rule at most law faculties.

3. Post-graduate law school legal education

Most post-graduate law school programmes probably train law graduates: (a) to conduct litigation; (b) to recognize and solve ethical dilemmas; (c) to draft documents and communicate in writing or orally; (d) to organize and manage legal work; and (e) to use alternative dispute resolution mechanisms (sometimes). Very few, however, train law graduates: (a) to conduct real life fact investigation; (b) to experience live client-centred counselling; (c) to promote justice and fairness; (d) to strive to improve the profession; and (e) to promote professional self-development.[20]

3.1 The ability to conduct litigation

As previously mentioned, the ability to litigate is an essential requirement for all aspiring lawyers seeking admission to the profession. Law graduates

16 See generally, Daniels 1993.
17 For an example of how civil procedure can be taught clinically see McQuoid-Mason 1982:160-171.
18 See also Gold *et al* 1989: where an attempt is made to teach legal skills in a systematic manner.
19 Cf Menkel-Meadow 1991:3-10.
20 These categories are based on those in the *The MacCrate Report* 1992.

who attend professional training schools should have a basic knowledge of litigation and legal skills which can be built on at the post-graduate law school. Such fine-tuning should be done using interactive teaching methods such as role-plays and simulations rather than lectures.[21] Clients who approach newly admitted lawyers to litigate on their behalf are entitled to expect that such lawyers have the necessary skills to advance the client's interests adequately and professionally.

3.2 The ability to recognize and solve ethical dilemmas

Law graduates attending post-graduate law schools should arrive with some foundation in legal ethics. Without such a foundation it is unlikely that they will instantly adjust their behaviour to incorporate ethical values in a matter of a few months or a year. As has been mentioned, the most effective way of instilling an ethos of ethics in future lawyers is to expose them to such issues from year one of their legal studies. From their first year at university ethical conduct should be inculcated as a way of life for aspiring lawyers.[22] Practical training schools usually focus on the ethical rules of the particular professional bodies in the country concerned rather than on broad principles of ethics.[23]

3.3 The ability to draft documents and communicate in writing or orally

The drafting of legal documents is usually an integral part of training at postgraduate law schools. At clinically-orientated law faculties, courses such as clinical law and professional training may incorporate aspects of legal drafting. Writing and oral communication skills should be developed during the university undergraduate law programme.[24] Post-graduate law schools cannot be expected to undertake radical remedial education in writing and speaking skills, although it is reasonable that they should engage in fine-tuning some of these skills. As has been previously mentioned, communication is the lifeblood of the legal profession. Lawyers have to be scrupulously accurate when drafting documents or writing letters[25] — a single misplaced comma could have catastrophic consequences in a contract or a will.

21 See for instance, Brayne *et al* 1998:173-208.

22 Menkel-Meadow 1991:3-10. For a South African example see McQuoid-Mason 2002:107-124.

23 For example, General Council of the Bar of England and Wales *Barristers'Code of Professional Etiquette* and the English Law Society *The Guide to the Professional Conduct of Solicitors*, cf Sherr 1993; General Council of the Bar of South Africa *Uniform Rules of Professional Ethics* and the different ethical rules of the South African provincial law societies, cf Lewis 1982.

24 For an example of this see McQuoid-Mason 2002:107-124.

25 See generally Costanzo 1995; Ray and Ramsfield 1993; Dernbach *et al* 1996.

3.4 The ability to organize and manage legal work

In Commonwealth countries where law graduates are not required to undergo a period of apprenticeship, they need to have the ability to organize and manage legal work and to set up an office. The same is also true of law graduates required to do apprenticeship training. Setting up a legal practice, bookkeeping, the management of trust accounts, office management and legal practice are subjects that are taught at many post-graduate law schools. In particular, they should be taught at all law schools which train aspiring lawyers who will deal directly with the public. Knowledge of these aspects of legal practice is essential if clients are going to be protected against unscrupulous or incompetent lawyers who misuse trust funds or cannot manage a legal practice properly.[26]

3.5 The ability to use alternative dispute resolution mechanisms

Lawyers are increasingly being required to diversify their activities and to assist their clients in saving costs and shortening the period of time it takes to settle disputes. The most common method of doing this is through alternative dispute resolution mechanisms such as arbitration and mediation.[27] In most of the developed and some of the developing Commonwealth countries alternative dispute resolution is well-established.[28] Some of the practical training law schools in these countries expose law graduates to limited alternative dispute resolution training. In the majority of developing countries it is probably true to say that alternative dispute resolution is not used very often by lawyers, although indigenous forms of dispute resolution are an inherent part of some customary law practices. The large backlogs in court rolls and expense of modern litigation make it imperative that lawyers are in a position to offer their clients speedier and cheaper methods of resolving their disputes.

3.6 The ability to conduct real life fact investigation

At most practical training law schools graduates are probably given some training in simulated fact investigation when conducting interviewing exercises. However, there are few law schools that provide students with real life fact investigation opportunities in the law school context. This usually occurs if the law school has a legal aid clinic attached to it. Some practical legal training programmes require students to undertake work in private law firms or appropriate government departments for short periods of time. The most structured method of doing this is to expose students to live client law clinic work as is done at some university law faculties[29] and some practical training schools.[30]

26 See Pannett 1992.
27 For some Australian examples see Noone 1996; Boulle 1996.
28 For examples of the different forms of dispute resolution in South Africa see Pretorius 1993.
29 See for instance, Brayne *et al* 1998:64-135.
30 The College of Law in England runs legal advice and street law clinics at its five branches: Chester, Guildford, London, York and Birmingham: see Grimes 2000:54-57.

3.7 The ability to experience live client-centred counselling

As in the case of fact investigation, most practical training law schools probably run courses on interviewing skills, which may include some discussion on client counselling. It is however unlikely that law graduates get any experience in client-centred counselling with real live clients unless the law school has a legal aid clinic.[31] Most Commonwealth law schools do not have law clinics and therefore, apart from any vacation work placements, it is probable that law graduates are not exposed to an integrated client counselling programme. The skill of client counselling taught on a simulated basis is being encouraged by international client counselling competitions.[32]

3.8 The ability to promote justice and fairness

Some people might regard it as idealistic that a lawyer's role should be to promote justice and fairness rather than to get on with the task of making a living as a legal practitioner. However, unless one is a cynic who subscribes to the 'whorehouse' or 'hired gun' theory of law,[33] one would hope that aspiring lawyers, particularly those about to practice within the context of a justiciable bill of rights, would subscribe to the idea that their function is to promote justice and fairness.[34] Apart from the course on ethics, most practical training schools tend to focus on the nuts and bolts of legal practice, rather than on the duty of lawyers to promote justice and fairness. It is probably assumed that such notions are usually dealt with during jurisprudence courses taught during the undergraduate law degree and that the function of post-graduate law schools is to deal with more practical aspects of professional responsibility.

3.9 The ability to strive to improve the profession

As in the case of promoting justice and fairness, there are probably few post-graduate law schools in the Commonwealth that pay more than lip service to the idea that individual lawyers should be striving to improve the profession by participating in the profession's activities, assisting in the training of new lawyers, and ensuring that the values of equality and non-discrimination are promoted and practiced by lawyers.[35] Some of these issues may be covered in the course on ethics, but they should be mainstreamed into a professional responsibility course.

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31 See Brayne *et al* 1998:64-135.

32 As previously mentioned, the annual Louis M Brown International Client Counselling Competition is an example.

33 See generally, Lefcourt 1971.

34 See *The MacCrate Report* 1992:213-215.

35 See American Bar Association Section of Legal Education and Admissions to the Bar *Legal Education and Professional Development — An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (The MacCrate Report)* (1992):216-217.

3.10 The ability to promote professional self-development

The practice of law is a life-long learning experience and lawyers should be in a continuous process of updating their legal knowledge and improving their skills.[36] They should engage in activities that allow them to develop as professionals even if the regime under which they practice does not require them to acquire a specific number of continuing legal education (CLE) 'points' annually. Lawyers should be sufficiently motivated to provide their clients with the best possible service and to increase their own capacity to do so without the introduction of professional rules compelling them to acquire CLE points. The challenge for university and post-graduate practical training law schools is to inculcate in aspiring lawyers a desire to engage in lifelong learning for the benefit of not only their clients but also themselves.

4. Conclusion

It is clear that in order for universities and law schools to produce lawyers qualified to satisfy the needs of the public an integrated approach to legal education is required. At both undergraduate and post-graduate level law students should be exposed to learning programmes that do not simply focus on the transmission of information about the law. They should also develop the legal skills and values required for legal practice.

In many of the developed countries in the Commonwealth, and in some of the developing countries, the importance of an integrated approach has been recognized by the establishment of law clinics for use in the academic and training programmes. However, in developed Commonwealth countries where some universities have a more classical approach to legal education, and in many developing Commonwealth countries where there is a shortage of financial and material resources, the traditional form of legal education that separates theory from practice still prevails. University law faculties and law schools that do not adopt a more integrated approach to legal education are likely to be accused of producing lawyers who are not responsive to the needs of the public — particularly in developing countries where there are large disparities in the distribution of wealth.[37]

36 The MacCrate Report 1992:218-221.

37 Such criticism of South African university law degrees was one of the factors which led to the introduction of a new undergraduate LLB degree in 1998: McQuoid-Mason 1998:14,15.

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