

# A HISTORY OF THE RACIAL DISPARITIES IN LEGAL EDUCATION IN SOUTH AFRICA

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## I. INTRODUCTION

Although significant changes to legal education have been implemented in South Africa since the country's transition to a constitutional democracy in 1994, the remnants of previous inequalities continue to linger, replicating a cycle of disadvantage that is reflected in poor student graduation rates, high student attrition rates and the continuing domination of white males in the legal profession.<sup>1</sup> By tracing through the

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1. See Ian Scott et al., *Higher Education Monitor No. 6: A Case for Improving Teaching and Learning in South African Higher Education*, 2007 COUNCIL FOR HIGHER EDUC. 17, available at

historical development of South African law and legal education, I will illustrate how access to the legal professions was carefully regulated by those in power to ensure that the pattern of white male domination persisted.

This essay will begin with an overview of legal education, the legal profession and the court system in South Africa. Then, it will explain the historical background of South Africa's legal system followed by a discussion of the development of legal education in the country. Further, the essay will trace the effects that the transition to a constitutional democracy has had on legal education and, in particular, the effect that the change to an undergraduate Bachelor of Laws degree has had on legal education and the legal profession. Finally, this essay will conclude with an eye toward the future of legal education in South Africa.

## II. AN OVERVIEW OF LEGAL EDUCATION, THE LEGAL PROFESSION AND THE STRUCTURE OF THE COURTS IN SOUTH AFRICA

A brief overview of the current system of legal education, the divisions within the legal profession and the structure of the courts in South Africa is necessary to establish the context for the discussion that will form the main argument in this paper. The system of legal education that persists at present in South Africa consists of two distinct phases functioning in tandem to prepare candidates for admission to legal practice either as an attorney or as an advocate. The initial, or foundational, phase of legal education consists of obtaining a law degree, the Bachelor of Laws ("LLB"), conferred by a university. Many graduates who complete a law degree choose not to enter professional practice, opting for the business world, politics or government service.<sup>2</sup> The second phase of legal education is

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[http://www.che.ac.za/documents/d000155/HE\\_Monitor\\_6\\_ITLS\\_Oct2007.pdf](http://www.che.ac.za/documents/d000155/HE_Monitor_6_ITLS_Oct2007.pdf); see also *National Survey of the Attorney's Profession*, 2008 L. SOC'Y S. AFR. 5, available at <http://ssa.questweb.co.za/Uploads/files/National%20Survey%20of%20the%20Attorneys%20Profession%202008.pdf> [hereinafter *National Survey*].

2. SHANE GODFREY & ROB MIDGLEY, S. AFR. DEP'T OF LABOUR, LAW PROFESSIONALS: SCARCE AND CRITICAL SKILLS RESEARCH PROJECT 51 (2008) (statistics from 2007 suggest that approximately 40 to 50% of law

provided by legal professionals to prepare graduates for their admission or bar examination, which is a prerequisite to being admitted to legal practice.

Legal practitioners must elect to join one of two possible branches of the profession: attorneys or advocates. Members of the attorneys' profession generally provide day-to-day legal services to citizens litigating in the magistrate or lower courts.<sup>3</sup> Advocates function as specialists, preparing opinions on more complex legal issues and arguing matters in the high courts (including the Constitutional court) where judges preside. The primary distinction between the two branches of the profession is related to the level of the courts in which practitioners have a right to appear. However, other distinctions do exist; for example, advocates may only be accessed by clients through a referral from an attorney, while attorneys may be accessed by clients and take instructions directly from a client "off the street." Advocates cannot enter into partnerships with other advocates, while attorneys may operate either as sole practitioners or associates in large partnerships or firms.

The courts in South Africa are organized in a hierarchical structure which relates to the weight of authority that is attached to the judgments that emanate from each level of courts.<sup>4</sup> This is an important distinction because the application of the doctrine of precedent ensures that lower courts are bound by the decisions of higher courts, as all courts are bound to follow the decisions of previous courts of equal or higher ranking.<sup>5</sup> Magistrates' courts are located on the lowest tier at a local level.<sup>6</sup> Magistrates are appointed and employed by the Department of Justice.<sup>7</sup> Two categories of magistrates' courts exist.<sup>8</sup> On the first level are the district magistrates' courts

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school graduates do not enter the legal profession).

3. Right of Appearance in Courts Act 62 of 1995 § 4(1)(b) (permitting practicing attorneys who have three years of experience as a practitioner to apply for permission to appear in the high courts).

4. See S. AFR. CONST. 1996 § 166; see also PEGGY MAISEL & LESLEY GREENBAUM, INTRODUCTION TO LAW AND LEGAL SKILLS, 66 (2001).

5. See S. AFR. CONST. 1996 §§ 166-70; see also George Devenish, *The Doctrine of Precedent in South Africa*, 28 OBITER 1, 3 (2007).

6. See S. AFR. CONST. 1996 § 170.

7. *Id.* at § 9A (a).

8. South African Government Information,

which are located in every region throughout the country encompassing 366 districts.<sup>9</sup> To be appointed as a presiding magistrate in a district court, a person must have obtained at least a three year law degree or an LLB degree. In addition, a person must have undergone some further training and mentorship at Justice College, which is the educational agency of the Department of Justice.<sup>10</sup> The jurisdiction of district courts in civil matters is limited to claims of up to 100,000 rands (\$1 equals approximately 8 rands) and criminal matters involving sentences not exceeding three years of imprisonment or a fine of 60,000 rands.<sup>11</sup>

The second level of magistrates' court is the regional magistrates' court, in which presiding magistrates must hold an LLB degree and have had at least seven years' legal experience.<sup>12</sup> Regional magistrates' courts deal with only criminal matters and were, in the past, permitted to impose a sentence of imprisonment not exceeding fifteen years or a fine of not more than 300,000 rands.<sup>13</sup> However, in response to the high crime rate and the increasing burden on the criminal justice system, recent statutory amendments have increased regional magistrate's penal sentencing jurisdiction to life imprisonment for certain offenses, in the absence of substantial and compelling reasons for not imposing this maximum punishment.<sup>14</sup>

There is a provincial division of the high court located in each of the ten major geographical regions of the country.<sup>15</sup> The jurisdiction of high courts is unlimited in terms of sentences imposed by or the size of claims heard in these courts.<sup>16</sup> Judges are appointed to the high courts by the president, acting on the recommendation of the Judicial Service

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<http://www.info.gov.za/aboutgovt/justice/courts.htm#05magistrate> (last visited Jul. 6, 2009).

9. *Id.*

10. Magistrates' Courts Act 32 of 1944 § 9(1)(a) (*substituted by* Act 90 of 1993 § 17.).

11. Magistrates' Courts Act 32 of 1944 § 29.

12. *Id.* at § 9 (b).

13. *Id.* at § 29.

14. The Criminal Law (Sentencing) Amendment Act 38 of 2007 § 51(1).

15. Renaming of High Courts Act 30 of 2008 § 1.

16. Supreme Court Act 59 of 1959 § 19.

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Commission, a statutory body created by the Constitution.<sup>17</sup> Appeals from decisions of the provincial high courts proceed to the Supreme Court of Appeals in Bloemfontein, South Africa's judicial capital.<sup>18</sup> The Constitutional Court, situated in Johannesburg, South Africa, is the highest court in the country as it has jurisdiction to review all matters of a constitutional nature, including disputes between organs of state, the constitutionality of any amendment to the Constitution, any parliamentary or provincial bill, any Act of Parliament, or the conduct of the President.<sup>19</sup> The President of the Constitutional Court and ten justices, also appointed by the President of South Africa on the recommendation of the Judicial Service Commission, preside in this court.<sup>20</sup>

This outline of the current structural features of the South African legal system foreshadows the divisions, hierarchies and levels of differentiation that have dominated the landscape of legal education. Historical separateness, culminating in the explicit "apartheid" policy, has characterized much of the texture of the legal system and continues to play a determinant role in the field of legal education despite attempts by the democratically-elected government to redress past disadvantage. As Dhlamini stated in 1992:

[O]ur legal education in South Africa was strongly influenced by the governmental policy of apartheid. This policy was not based on the idea of justice, and it had an effect on our approach to law, as well as on the relationship between law teacher and law student. As a result, our legal education was riddled with contradictions, anomalies and inconsistencies. There are various ways whereby our legal education either bolstered apartheid or was influenced by it.<sup>21</sup>

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17. S. AFR. CONST. 1996 § 178.

18. *Id.* at § 168.

19. *Id.* at § 167.

20. *Id.* at § 178.

21. Charles Dhlamini, *The Law Teacher, The Law Student and Legal Education in South Africa*, 109 SALJ 595, 598 (1992).

### III. HISTORICAL BACKGROUND OF THE LEGAL SYSTEM

The legal system in South Africa has its origins in Roman-Dutch Law, which was brought to South Africa from the Netherlands in 1652 with the arrival of Dutch colonizers.<sup>22</sup> The customary or indigenous law of the African inhabitants at the Cape colony was not recognized by the Dutch colonizers other than as a subsidiary and inferior system applied only between the inhabitants themselves.<sup>23</sup> Roman-Dutch Law ceased to be used as a living system of law in the Netherlands in 1806 when France took control and imposed the French Code.<sup>24</sup> However, in South Africa, Roman-Dutch law principles (“the common law”) remained in place in some areas of the law, such as property law, contracts and wills, because these were strongly grounded in equitable principles and supported by an adequate availability of authoritative text sources both in Latin and Dutch.<sup>25</sup> When the British assumed control over the colony in 1806, many aspects of English Law were adopted and shaped the existing South African procedural law and all branches of commercial law, such as insurance law, maritime law and company law.<sup>26</sup> English Law supplemented the deficiencies and gaps that had arisen in the law as it developed at the Cape and largely affected the administration of justice by establishing a Cape Supreme Court in 1832 and, thereafter, requiring advocates and judges to be trained in England.<sup>27</sup> This hybrid system of law at the Cape was taken to the other provinces into which the colonizers extended their control and was adopted as the law of the Union of South Africa in 1909 when all four

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22. Phillip Iya, *The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges*, 51 J. LEGAL EDUC. 356, 355-62 (2001).

23. *Id.* at 356.

24. PEGGY MAISEL & LESLEY GREENBAUM, FOUNDATIONS OF SOUTH AFRICAN LAW: CRITICAL ISSUES FOR LAW STUDENTS 59 (2002).

25. *Id.* at 60.

26. *Id.* at 59-60.

27. John Kaburise, *The Structure of Legal Education in South Africa*, 51 J. LEGAL EDUC. 363, 363-71 (2001).

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colonies, Cape, Natal, Orange Free State, and Transvaal, were united as one state.<sup>28</sup>

South African law developed through the application and extension of common law principles in the courts. These principles were also applied in statutes enacted by the Cape Parliament and other provinces, such as in the Transvaal and the Orange Free State, which were established as independent Boer Republics, and in Natal which became a British colony in 1843.<sup>29</sup> The law increasingly played an important role in formally establishing the dominance of the minority white population over the majority of the inhabitants of the country. Statutes such as the Natal Code of 1878, the Native Succession Act of 1884, and Law 4 of 1885 in the Transvaal Republic all served to reinforce the application of a separate body of customary law for Africans, depriving them of recourse to the courts and recognition as full citizens.<sup>30</sup> A policy of depriving the indigenous occupants of their land and their right to participate in the society, through limited access to political and legal processes and through a lack of educational and employment opportunities, was reflected consistently in the developing body of rules enacted by the British administrators and Boer governments.<sup>31</sup>

When the four colonies were joined as the Union of South Africa in 1909, racial segregation as *de facto* practice in almost every aspect of daily life was the accepted norm.<sup>32</sup> This separation of races became clearly articulated as the apartheid policy of the Nationalist Party, who governed the country from 1948 until the transition to a constitutional democracy in 1994. During this period, through an accumulation of legislative enactments, the government created racial classifications ensuring that citizens of different race groups occupied separate residential areas, used separate public amenities, attended separate educational institutions where different curricula were studied and were subject to restricted employment opportunities.<sup>33</sup> This separation of the races was enforced by

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28. *Id.* at 363.

29. MAISAL & GREENBAUM, *supra* note 24, at 62.

30. *Id.* at 62.

31. *Id.* at 86.

32. *Id.* at 84-5.

33. *See generally* Population Registration Act 30 of 1950; Group Areas

harsh policing and tight administrative control, severely limiting the legal educational and professional opportunities available to those outside the white male population.

#### IV. THE DEVELOPMENT OF LEGAL EDUCATION

The first qualification offered in law was the Law Certificate, which was taught informally by practitioners and qualified lawyers and required to practice law at the Cape in 1858.<sup>34</sup> Formal university teaching of law began at the University of Cape Town (“UCT”) in 1859, and the LLB degree was introduced there in 1874.<sup>35</sup> The UCT Law Faculty was established as an official department within the University in 1918.<sup>36</sup> The University of Stellenbosch Law Faculty, teaching law in Afrikaans, was established in 1921.<sup>37</sup> The Stellenbosch Law Faculty offered an LLB degree which focused on practice-related subjects, such as Roman Law and Roman-Dutch Law, as many faculty members were practicing lawyers. Law faculties were established in other regions of the country, following one of two curricular models: the English “liberal arts approach,” which encouraged students to obtain a varied educational background in other disciplines, or the “UNISA model,” which concentrated only on law courses and did not include many

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Act 41 of 1950; Bantu Education Act 47 of 1953; Reservation of Separate Amenities Act 49 of 1953; Extension of University Education Act 45 of 1959.

34. Act 4 of 1858 and Act 12 of 1858 were passed by the Cape Parliament to establish a Board of Public Examiners and to regulate the admission of candidates to practice.

35. DENIS COWEN & DANIEL VISSER, *THE UNIVERSITY OF CAPE TOWN LAW FACULTY, A HISTORY 1859-2004*, 22 (2004).

36. *Id.* at 15.

37. Rob Midgley, Address at the Meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association: South Africa: Legal Education in a Transitional Society (Jul. 28, 2007).

non-law subjects.<sup>38</sup> The UNISA model was the pattern mainly followed by Afrikaans and black universities.<sup>39</sup>

In 1934, the South African Parliament enacted the Attorneys, Notaries and Conveyancers Admission Act 23 of 1934, to regulate the practical training of attorneys.<sup>40</sup> This statute required law graduates to complete two years of articles of clerkship, a type of apprenticeship where graduates would work in a law firm acquiring legal skills prior to being admitted to practice as an attorney. On the other hand, rules relating to the professional training of advocates were not statutory in origin and varied from province to province. Graduates wishing to be admitted as advocates have been required to complete a period of pupillage, which has now been fixed at one year's duration since 2004. Pupil advocates learn advocacy skills under the close tutelage of a practicing advocate before writing a bar examination that is administered by the General Council of the Bar, the advocates' professional association.<sup>41</sup>

By the 1970s, three law degrees were offered at South African universities. First, most law faculties offered the LLB degree, which, by then, was a two or three year post-graduate degree which followed a Bachelor of Arts, Bachelor of Commerce or other undergraduate degree and qualified graduates for practice in both the higher and lower courts. Second, some faculties offered a four year undergraduate degree, the Baccalaureus Procuratoris ("B Proc"),<sup>42</sup> which qualified graduates for practice as attorneys only. The B Proc degree replaced the Law Certificate which was a qualification for practice until 1979 and permitted persons who did not have

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38. *Id.* at 3. The University of South Africa ("UNISA") is a non-contact university which supplies written materials to students who study the materials alone wherever they might live. Examinations can be written in various centers throughout the world.

39. *Id.*

40. Attorneys, Notaries and Conveyances Admission Act 23 of 1934 (*repealed* by the Attorneys Act 53 of 1979 and *amended* by the Qualification of Legal Practitioners Amendment Act 78 of 1997).

41. GEN. COUNCIL OF THE BAR, UNIF. RULES OF PROF'L ETHICS, R. 8 (amended 2004), *available at* [http://www.sabar.co.za/ethics\\_rules.pdf](http://www.sabar.co.za/ethics_rules.pdf).

42. The minimum entry requirements for the attorneys' profession were promulgated in the Attorneys' Act 53 of 1979 § 2. The minimum entry requirements for advocates were promulgated in the Admission of Advocates Act 74 of 1974 § 3.

a university degree to access the attorneys' profession, even after the LLB degree had been introduced.<sup>43</sup> Finally, a few faculties offered the three year Bachelor's degree, the Baccalaureus Juris, ("B Juris") which qualified graduates for practice as civil servants (prosecutors and magistrates) in the lower courts.

Under the apartheid, separate education, including university education, was provided for students according to their racial designation, with separate institutions established for white, black, Indian and colored persons.<sup>44</sup> The "historically black universities" ("HBUs") were under-resourced and inconveniently located in rural areas so that the quality of the education provided was not comparable to that offered at generally urban white institutions ("HWUs").<sup>45</sup> Black students were permitted to attend white urban universities only if they obtained permission by the Minister of Education to do so.<sup>46</sup> This separation perpetuated a sense of different quality degrees for different races and impacted graduates' abilities to obtain employment in top law firms.

#### V. TRANSITION TO A CONSTITUTIONAL DEMOCRACY

With the transition to democracy in 1994 came an urgent call to transform the legal profession and legal education. The need to address the under-representation of people of color in all areas of the legal profession and to establish a single, affordable academic qualification that would provide access to both branches of the profession was undeniable. After the new Department of Justice had convened several National Consultative Forums, involving all stakeholders in the legal system, a dramatic change to legal education was introduced.<sup>47</sup>

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43. Midgley, *supra* note 37, at 4.

44. University Education Act 45 of 1959 (*repealed*). Persons of mixed racial origins were termed "coloured" persons by the Population Registration Act 30 of 1959 to distinguish them from other "black" persons: the term "black" was and is still used in South Africa to include persons of African, Indian (Asian) and mixed race origins.

45. Iya *supra* note 22, at 358.

46. *Id.*

47. The National Consultative Legal Forum on the Administration of Justice in South Africa was held November 11 through 13, 1994, in Cape

The Qualification of Legal Practitioners Amendment Act of 1998 required all universities to introduce a four year undergraduate LLB degree, with agreement by the Law Deans on twenty-six “core courses” that would be incorporated into the curricula to be designed by each university.<sup>48</sup> A commitment to incorporate the teaching of legal skills and ethical values, and to heighten students’ sensitivity to diversity, formed part of the proposal by the curriculum Task Team of Law Deans and professional representatives in 1996.<sup>49</sup> This undergraduate LLB degree was registered by the South African Qualification Authority (“SAQA”) and exit level outcomes for a law graduate were formally specified in 2002.<sup>50</sup>

The changed legal framework in South Africa, founded upon a Bill of Rights as part of a supreme Constitution that enshrines the values of dignity, equality and democracy, has infused law curricula with a pervasive human rights discourse that affects almost every law subject that is now taught. The effects of section 39(2) of the Constitution, which requires that in interpreting any legislation or in the development of the common law and customary law, courts must promote the spirit, purport and objectives of the Bill of Rights, have been to challenge the validity of many discriminatory principles and statutory provisions.<sup>51</sup> Similarly, section 39 of the Constitution requires that when courts are called on to interpret customary or indigenous African law, their rulings should harmonize with the values set out in the Bill of Rights.<sup>52</sup> Most faculties have in the

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Town, South Africa. The Legal Forum on Legal Education was held April 21 through 22, 1995, also in Cape Town. The purpose of both conferences was to consult with stakeholders on the transformation of the legal system and legal education in the new democratic society.

48. Qualification of Legal Practitioners Amendment Act 78 of 1997 §§ 1-2.

49. David McQuoid-Mason, *Developing the Law Curriculum to Meet the Needs of the 21st Century Legal Practitioner: A South African Perspective*, 1 *OBITER* 101, 101-08 (2004); Iya, *supra* note 22 at 359.

50. Samuel B.A. Isaacs, *Bachelor of Laws, NQF Level 7*, 16-20 (S. Afr. Qualifications Auth. Gov’t Gazette No. 23845, Aug. 20, 2002), available at <http://www.info.gov.za/view/DownloadFileAction?id=65308>.

51. S. AFR. CONST. 1996 § 39(2).

52. *Id.* at § 39; Hon. Yvonne Mokgoro, *The Customary Law Question in the South African Constitution*, available at [http://www.vanuatu.usp.ac.fj/library/Online/Customary\\_law/Mokgoro.htm](http://www.vanuatu.usp.ac.fj/library/Online/Customary_law/Mokgoro.htm).

last twenty years introduced specialist LLM programs that cover a variety of fields, as well as doctoral degrees, in the form of a PhD or an LLD.<sup>53</sup>

Although the post-1994 democratically elected government promised to redress the historical inequity of the HBUs, the reality is that their goals have not been met.<sup>54</sup> HWUs continue to have better facilities and more resources, which attract more students and more state funding because state subsidies are linked to students enrollment numbers.<sup>55</sup> Their superior facilities make them more attractive to students and academic staff alike.<sup>56</sup> Many of the historically disadvantaged institutions continue to be plagued by the structural and agential legacies of the past, such as poor management, funding crises and declining student enrollments.<sup>57</sup> Although these universities were often the site of resistance to the apartheid regime and the focus of political opposition to the Nationalist government, since 1994, their appeal to black students and staff has diminished as they have not been able to develop strength in meeting the new imperatives of skills development, quality research production and creating improved facilities.<sup>58</sup>

The further statutory requirement for all practicing lawyers to have passed a university course in English, Afrikaans and Latin remained as an impediment to black candidates until it was removed in 1995.<sup>59</sup> The cost and the length of time required to obtain an LLB degree to qualify as an advocate resulted in that branch of the profession being dominated by white males. Further, appointment as a judge could only be made from the ranks of experienced advocates. This served to reinforce the discriminatory effect that the differential qualifications had in terms of racial, gender and socio-economic bias.<sup>60</sup>

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53. Midgley, *supra* note 37, at 4.

54. NICO CLOETE ET AL., TRANSFORMATION IN HIGHER EDUCATION: GLOBAL PRESSURE AND LOCAL REALITIES IN SOUTH AFRICA, 398 (2002).

55. *Id.*

56. *Id.* at 397.

57. *Id.* at 396.

58. *Id.* at 399.

59. Admission of Advocates Amendment Act 55 of 1994 § 5; Admission of Legal Practitioners Act 33 of 1995 §§ 1-9.

60. GODFREY & MIDGLEY, *supra* note 2, at 21.

The obstacles in gaining access to high quality tertiary education, together with the difficulty of obtaining articles of clerkship in urban white male-dominated law firms, as well as the unaffordable expense of the one year of pupillage ensured that black lawyers were effectively restricted to the lower levels of practice within the legal profession, even if they were successful in overcoming the many structural barriers within the differentiated education and legal systems. Black practitioners were geographically segregated by being restricted to practice in “townships” or black “homelands” according to the government policy of having separate trading areas for each racial group.<sup>61</sup>

It is estimated that in 1994, 85% of the legal profession in South Africa consisted of white lawyers.<sup>62</sup> At that time, there were only four black judges and two female judges appointed to the bench.<sup>63</sup> Twenty law faculties offered academic qualifications in law.<sup>64</sup> Law curricula reflected the concerns of the economically dominant white population, with emphasis placed on commercial subjects.<sup>65</sup> Scant regard was paid to issues such as customary law, poverty, social justice or a lack of access to the legal system that affected the majority of the population, who are black persons.<sup>66</sup> Thus, the structure and regulatory framework of both legal education and the legal system contributed to and reinforced patterns of racial separation, socio-economic and political inequality that were endemic to the broader South African society.

#### VI. THE EFFECT OF THE LLB DEGREE ON THE REPRESENTIVITY OF THE RACES WITHIN THE LEGAL PROFESSION

Ten years after introducing the undergraduate LLB degree, the pedagogical soundness of implementing this attenuated LLB

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61. Black Lawyers Association, <http://www.bla.org.za> (last visited Jul. 6, 2009).

62. David McQuoid-Mason, Address at the International Conference on the Future of Legal Education: Transforming Legal Education for a Transformed Society: the Case of South Africa (Feb. 20-23, 2008).

63. *Id* at 1.

64. Iya, *supra* note 22, at 358.

65. McQuoid-Mason, *supra* note 62, at 1.

66. Dhlamini, *supra* note 21, at 598.

degree is being questioned by law academics and practitioners.<sup>67</sup> The anticipated outcome of increasing black representation in both branches of the legal profession by offering the undergraduate LLB degree as a single, affordable qualification has not yet been met. A recent survey indicates that 80.2% of law firms are still owned by whites.<sup>68</sup>

At universities, the composition of LLB graduates in 2008 reflected a gradually increasing number of black graduates: 1703 black (African) graduates, 1636 white graduates, 253 Indian graduates and 381 colored graduates.<sup>69</sup> However, as a reflection of the demographics of the total population of the country, these statistics indicate a continuing over-representation of white graduates. The participation rate of each racial group in higher education in terms of the potential number of students within a given age group is problematic. A recent study shows the following racial group participation rates: 16.3% of those students within the twenty to twenty-four age group are enrolled in the higher education sector; 59% of those students are white, 42% are Indian, 13% are colored, and 12% are black.<sup>70</sup>

A study of student drop-out rates in South African higher education, based on enrollments in 2000, determined that about 30% of students dropped out in their first year of university; a further 20% dropped out in their second and third years of study.<sup>71</sup> Of the 50% who remained studying, less than half (22%) graduated within the minimum time period for the degree.<sup>72</sup> By the end of 2004, that is, five years after entering

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67. S. AFR. L. DEANS' ASS'N, REVIEW OF THE LLB DEGREE, 3-4 (2005).

68. *National Survey*, *supra* note 1, at 6.

69. *Legal Education and Development Statistics*, L. SOC'Y S. AFR., 64 (2007-08).

70. S. AFR. MINISTERIAL COMM., REP. ON TRANSFORMATION AND SOCIAL COHESION AND THE ELIMINATION OF RACIAL DISCRIMINATION IN PUBLIC HIGHER EDUCATION INSTITUTIONS (2008), *executive summary available at* <http://www.mg.co.za/uploads/2009/04/30/executive-summary.pdf>.

71. Scott et al., *supra* note 1, at 13.

72. Moeketsi Letseka & Mignonne Breier, *Student Poverty in Higher Education: The Impact of Higher Education Dropout on Poverty, EDUCATION AND POVERTY REDUCTION STRATEGIES: ISSUES OF POLICY COHERENCE*, 83-101 (2008), *available at* [http://www.hsrc.ac.za/research/output/outputDocuments/5514\\_Letseka\\_Studentpovertyinhighereducation.pdf](http://www.hsrc.ac.za/research/output/outputDocuments/5514_Letseka_Studentpovertyinhighereducation.pdf).

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university, only 30% of the total first-time entering students had graduated; a further 8% graduated after an additional year. Fifty-six percent of the initial students had left their original institutions without graduating, and 14% were still in the system.<sup>73</sup> In this year cohort, 65% of African students dropped out and only 24% graduated, while 41% of white students dropped out and 48% graduated.<sup>74</sup> In terms of success rates, African students continue to under-perform in comparison to white students.<sup>75</sup> Thus, in 2006, the success rate of African students was 65%, while that of white students was 77%.<sup>76</sup>

Of particular concern for legal education is the following data which documents the success rate of graduates in four year professional undergraduate degrees in 2004, according to discipline:

|                     | Graduation within 5 years | Still Registered after 5 years |
|---------------------|---------------------------|--------------------------------|
| Business/Management | 60%                       | 7%                             |
| Engineering         | 54%                       | 19%                            |
| Languages           | 42%                       | 13%                            |
| Law                 | 31%                       | 15% <sup>77</sup>              |

Fourteen percent of black law students graduated in the minimum period for the degree while 33% of white students completed their LLB degree in four years. What is apparent about law students is that 46% of law students are taking at least one year more than the stipulated minimum time period for the LLB degree, which has significant cost implications for students from poor backgrounds.<sup>78</sup> Historical inequalities in students' educational backgrounds play an important role in their success

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73. Scott et al., *supra* note 1, at 14.

74. *Id.* at 12.

75. *Id.* at 16.

76. *Id.* at 17.

77. *Id.* at 16.

78. Scott et al., *supra* note 1, at 16.

rates at university.<sup>79</sup> In addition, black students usually are not mother-tongue speakers of English or Afrikaans which are the two languages of instruction in higher education.<sup>80</sup> This factor, together with continuing poverty that aligns closely with race, and funding difficulties for black students at university, tends to reinforce a cycle of disadvantage which perpetuates the racial inequalities within the legal professions.<sup>81</sup>

## VII. LOOKING TOWARD THE FUTURE

Legal professionals complain endlessly about the quality of law graduates, particularly their lack of skills and most notably their deficient writing.<sup>82</sup> Legal academics are disillusioned with the poor quality of students entering university from a failing secondary school systems.<sup>83</sup> The Higher Education Monitor of 2007 specifically recommended that to address the disparities in the socio-economic and educational backgrounds of the diverse student intake “equity-related educational strategies” will become a key element in contributing to development.<sup>84</sup> Improving formal access to universities without enhancing *epistemological access*, which in this context implies “more than introducing students to a set of a-cultural, a-social skills and strategies to cope with academic learning and its products,” will not be sufficient to improve the success and retention rate of students in higher education.<sup>85</sup> Unless students are explicitly made aware of the conventions and rules of what counts as academic knowledge, including the use of appropriate academic language, the current inequities will no doubt persist.<sup>86</sup> The 2008 Ministerial Report on Transformation quotes a black student at one university: “[l]anguage is a major stumbling block, especially at undergraduate level. Basic language skills

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79. *Id.* at 23.

80. S. AFR. MINISTERIAL COMM., *supra* note 70 at 17.

81. Letseka & Breier, *supra* note 72, at 90.

82. *See generally* De Rebus, *The Poor Quality of Law Graduates*, S. AFR. ATT’YS J. (2007).

83. S. AFR. L. DEANS’ ASS’N, *supra* note 67, at 6.

84. Scott et al., *supra* note 1, at 50.

85. Chrissie Boughey, *Epistemological Access to the University: An Alternative Perspective*, 19 S. AFR. J. HIGHER EDUC. 639, 638-50 (2005).

86. *Id.* at 638.

are of critical importance if students want to make an impact and not just pass.”<sup>87</sup> The Ministerial Commission concludes:

The lack of epistemological transformation is further reflected in the role of language in higher education. The observation that “the language issue is at the heart of the education crisis in our society” may be an overstatement, as there are many other factors that contribute to the education crisis. But the language issue is undoubtedly one of the main obstacles to academic success for the majority of black students.<sup>88</sup>

While law faculties are attempting to address pressing teaching issues such as academic literacy, basic numeracy skills and oral advocacy skills, the funding of higher education and particularly of legal education has been reduced.<sup>89</sup> External drivers such as globalization, pressures to increase access and serious financial constraints in higher education make the task of providing high quality legal education even more difficult.<sup>90</sup>

In the absence of any empirical evidence to substantiate whether progress is being made with interventions to address poor student pass rates and serious writing deficiencies, academics are caught between the contesting demands of the profession, who wish to have “practice-ready” lawyers emerge from universities, and the real pedagogical challenges faced in lecture rooms every day. As a response to this situation, the South African Law Deans’ Association (“SALDA”) has recently approached the Council for Higher Education (“CHE”), a statutory body responsible for quality assurance in higher education and training established to advise the Minister of Education on all higher education policy issues, to undertake empirical research to present a critical appraisal of legal education in South Africa.<sup>91</sup>

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87. S. AFR. MINISTERIAL COMM., *supra* note 70 at 65.

88. *Id.* at 101.

89. National Higher Education Funding Formula (2004), <http://www.pmg.org.za/minutes/20040823-higher-education-funding-formula-department-briefing> (last visited Jul. 6, 2009).

90. Susan Scott, *Knowledge Production and Transmission in a Changing Society: Challenges Facing Law Lecturers in a Distance Education Environment in South Africa*, 20 S. AFR. J. HIGHER EDUC. 738 731-43 (2006).

91. Council on Higher Education, <http://www.che.ac.za/about/> (last

The anticipation of legal educators is that we will gain insights, informed by the data gathered in the study, to re-shape legal education. It is timely that after 15 years of democracy, the APPEAL Conference was held in South Africa in 2009, at a juncture in this country's history of legal education when curriculum change, a re-visioning of legal writing pedagogy and a review of teaching and learning strategies in law faculties is long overdue.