

Time on their Side? A Review of the Four Year LLB as a Tool for the Transformation of the Legal Profession

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1 INTRODUCTION

South Africa's history of racial segregation and apartheid affected every aspect of black South Africans' lives negatively, including access to education, the availability of opportunities for black professionals and the opportunity for black South Africans to participate as equals in the socio-economic sphere.

The demise of apartheid required that the means and effects of structures and institutions that could perpetuate inequality and segregation had to be removed. The achievement of the constitutional goal of dignity, equality and freedom demanded no less. This demand also played itself out in respect of the legal profession, and particularly in relation to legal education and the entry requirements to the profession.

As South Africa entered a new era of constitutionalism it required that every facet of society had to be changed and realigned with the rights enshrined in our constitution. The constitution re-imagined a state founded on equality and the respect of the dignity of all of South Africa's people. The socio-economic exclusion of the past meant that in terms of its professionals, South Africa was greatly under-representative of a majority of its population.

This under-representation was evident in the law profession, which in the 1990s was predominantly male and white. In seeking to change the "structures and institutions" that could perpetuate inequality; the South African government introduced a shortened under-graduate LLB in order to fast track access to the legal profession for previously disadvantaged groups. This paper seeks to enquire whether shortened legal study, introduced by the post-apartheid government played a significant role in transforming the legal profession.

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2 POST APARTHEID CHANGES TO LEGAL EDUCATION

In 1997, the newly elected post-apartheid South African government introduced a single four year undergraduate LLB degree, as the only academic entrance requirement into the legal profession.¹ The rationale given for the four year LLB degree was that of the transformation of the legal profession. This stemmed from the alarming under-representation of certain sectors of the South African population. The legal profession, as with other professions at the time, reflected the politically inherited reality of a country that was not in sync with its constitutional order. In 1994, approximately 85% of all lawyers practising in South Africa were white, more alarming was the fact that at that time there were only four black judges and two female judges.² It was argued that the promotion of access to the legal profession for previously disadvantaged groups would result in the transformation of the profession.³

This thinking was based on the belief of the Department of Justice that access to the profession could be fast-tracked by decreasing the number of years of legal study from five or/ six years to a four-year undergraduate qualification.⁴ The Department's approach appeared to be based on the assumption that the shorter duration of legal study would make the profession more financially accessible for previously disadvantaged students. Another change introduced by the Department of Justice, was to do away with some of the other legal qualifications which had been in existence prior to 1997, namely the B.Proc and B.Juris degrees.

Those who argued in favour of a shortened four-year undergraduate LLB degree maintained that the post-graduate LLB degree served as a barrier to restrict the entry of black South Africans into the legal profession. This argument stemmed from the belief that the high costs that a person would have to incur to obtain a post-graduate law degree would further entrench the apartheid systems exclusionary practices. Simply put, they contended that those who had been previously subjected to racial segregation and economic exclusion during apartheid did not have time on their side to complete the post-graduate LLB. Due to this group's economic exclusion, time was equated with money and there was a drive to remove further burdensome financial constraints.

¹ Campbell "The role of law faculties and law academics: Academic education or qualification for practice" 2014 *Stellenbosch Law Review* 17.

² Greenbaum "The four-year LLB Degree: Progress and Pitfalls" 2010 *Journal for Juridical Science* 8.

³ Campbell "The role of law faculties and law academics: Academic education or qualification for practice" 2014 *Stellenbosch Law Review* 17.

⁴ *Ibid.*

The proponents of changing post-graduate legal study into a single four-year undergraduate LLB degree felt that this change was necessary in order to transform the demographical make-up of the legal profession. It was argued that the demographical make-up of the profession needed to be changed to ensure that it is more representative of a new South Africa in which all its people are to be treated equally. It means that the participation of black and female professionals had to be fast tracked and that a single shorter legal qualification period would achieve this goal. The transformation of the profession was a requirement that could not be ignored in a constitutional dispensation, where lawyers would be required to play a critical role in promoting access to justice.

It was also argued that those victims of socio-economic exclusion would be further prejudiced if after having completed post-graduate study, they still had to do articles of clerkship or pupillage, with the low salaries that come with pre-qualification practice. This argument failed to take into account that many law graduates do not enter the legal profession after university. Many who have followed the B Com. (Law) stream of legal study enter the corporate sphere. Thus, a single undergraduate LLB programme does not adequately serve this group.

A further argument made in favour of the shortened undergraduate programme was based on the view, by some legal stakeholders, that law is vocational;⁵ and students only need practical skills which could be gained in a shorter period of time during which emphasis is placed on practical skills. The rationale for “the law is vocational” argument was based on the belief that previously excluded individuals needed legal skills, such as research, drafting and litigation.

It was argued that pro-longed legal study would not serve this group of prospective lawyers but would serve as a hindrance to them entering the profession. This, it was argued, was due to a belief that studying other disciplines, which at times were not related to the legal profession, would waste the resources of the previously disadvantaged group, thus, frustrating their entry into the profession. The “law as vocational” argument is problematic in that it fails to take into account the multi-layered experiences law practitioners encounter. Ethical issues require a multi-faceted individual, and disciplines such as philosophy may provide assistance.

⁵ *Ibid.*

Post-apartheid changes to legal education brought about a situation where the duration of legal study was shortened, but curriculum was still to be determined by individual law faculties. This then called into question the whole rationale of the under-graduate LLB; as this had the outcome of students not being taught law in the same manner.

3 TRANSFORMATION

Many have discussed at length as to what the term transformation, which is often over-used, really means. The definition of Mamphela Ramphele is very useful in this respect. She defines transformation as “fundamental changes in structures, institutional arrangements, policies, modes of operation and relationships within society”.⁶ She compares the transformation of society to the cycles of insects such as butterflies; the metamorphosis of an insect from an invisible egg, to a larva to a butterfly.⁷ She states further that transformation requires a complete change both in form and substance.⁸

In the South African context, transformation “calls for the reorientation from past values and practices defined by racism, sexism, inequality and a lack of respect for human rights towards the values reflected in our constitution”.⁹ Dr Ramphele further states that successful transformation would require the antithesis of all that was bad about apartheid.¹⁰ Thus, since in 1994, 85% of the legal profession was made up of white South Africans, any transformation agenda would require the reversal of this apartheid legacy. Transformation as an antithesis demands that all the remnants of the unjust apartheid system must be removed from the legal profession. This process calls for change in attitudes and a united effort by all role-players to ensure that the profession is more equitable in terms of representation.

Transformation within the legal profession must be seen as a commitment to the constitution, which is South Africa’s blueprint for structural changes. The constitution is a clear statement of a commitment by all South Africans to abolish the legacy of apartheid hence. Further, it is submitted that transformation would also require a concerted effort to ensure access for all those who were previously excluded.

⁶ Ramphele *Laying Ghosts To Rest: Dilemmas of the transformation in South Africa* (2008) 13.

⁷ *Ibid.*

⁸ Ramphele *Laying Ghosts To Rest: Dilemmas of the transformation in South Africa* (2008) 13.

⁹ Jenkins and du Plessis *Law, Nation-Building & Transformation: The South African experience in perspective* (2013) 20.

¹⁰ *Ibid.*

4 THE FOUR YEAR LLB: CURRENT CHALLENGES

One would be hard pressed to deny the socio-economic exclusion of a vast sector of the South African populace during apartheid. This exclusion continues to plague current generations. Thus, the transformation of various sectors of South Africa as a constitutional state needed to be actively undertaken by all the relevant stakeholders. Despite the admirable transformational agenda underpinning the four year LLB degree, there are now calls from within the profession to revert back to post-graduate LLB legal study.¹¹ These calls have been made from within the legal profession by judges, attorneys and advocates.¹² One cannot down play the views of the legal profession in legal education, as it is the profession that receives and will inevitably have to retain some law graduates.

Proponents for changing the four year LLB degree into a post-graduate degree cite the under-preparedness of graduates who enter the profession and the low completion rates of students registered for legal study.¹³ However, these proponents fail once more to recognise that not all LLB graduates enter the legal profession. Although the views of the profession should be listened to, one could argue the same for business, non-governmental organisations and the government.

At the Society of Law Teachers of Southern Africa Conference held at the Wits School of Law in January 2014, members of the academy readily admitted that the four year LLB does not adequately prepare graduates for the legal profession.¹⁴ Further, it seems as though only 30% (which is higher than the national average of 25%) of students who enrol at the Wits School of Law complete the undergraduate degree in four years.¹⁵ This fact then calls into question the whole rationale behind the 1997 decision to introduce the four-year LLB.

Another argument raised by proponents of reverting back to post-graduate legal study is the fact that on average only 50% of law graduates actually enter the legal profession.¹⁶ This in part is due to the lack of articles available for law graduates in South Africa. A university law

¹¹ "Wits axes undergrad LLB degree" <http://witsvuvuzela.com/2014/04/16/wits-axes-undergrad-llb-degree/> (accessed 18-05-2016).

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ "Changes to the undergraduate LLB" <https://www.wits.ac.za/.../2014-04/changes-to-undergraduate-llb.html/> (accessed 18-05-2016).

¹⁵ "Wits axes undergrad LLB degree" <http://witsvuvuzela.com/2014/04/16/wits-axes-undergrad-llb-degree/> (accessed 18-05-2016).

¹⁶ *Ibid.*

clinic in South Africa receives an average of 48 applications for an advertisement for one candidate attorney. This means that there are a number of law graduates not able to get articles and thus enter the legal profession. Proponents for changing the four year LLB degree state that in light of the above it would be advantageous to give a more multi-disciplinary education to law students. An education that includes other fields of study such as the humanities, commerce and even the sciences to enhance employment opportunities for law graduates.¹⁷

The University of the Witwatersrand is one institution that has taken these concerns into account and decided to discontinue the undergraduate four-year LLB programme. From 2015, students wishing to enrol at the University of the Witwatersrand for legal studies will have to follow the postgraduate LLB programme after having completed a BA Law or a B Com. Law degree.¹⁸ This inevitably means that this university is going against the legal framework established for law studies in 1997.

The introduction of the under-graduate LLB degree and the current move towards post-graduate study in legal education raises some pertinent questions. For instance, does the four year LLB degree, as an intended tool for transformation in the late nineties achieve its intended objective? In other words, the legal profession needs to ask whether the four year under-graduate programme achieved its goals and objectives of changing the demographic make-up of the legal profession and of promoting access to those previously excluded? This enquiry needs to be cognisant of the current state of legal education and the views of all relevant stakeholders. In answering this question, an investigation of what transformation means within the context of legal education and the legal profession in South Africa needs to be undertaken.

5 THE LEGAL FRAMEWORK

In terms of section 2 (1) of the Attorneys Act¹⁹ and section 3 of the Admission of Advocates Act²⁰, an LLB degree is a prerequisite for admission as an attorney or an advocate in the Republic of South Africa. In terms of the South African Qualifications Authority²¹ the purpose of an LLB is:

¹⁷ “Wits axes undergrad LLB degree” <http://witsvuvuzela.com/2014/04/16/wits-axes-undergrad-llb-degree/> (accessed 18-05-2016).

¹⁸ *Ibid.*

¹⁹ 53 of 1979.

²⁰ 74 of 1964.

²¹ South African Qualifications Authority “Registered Qualification: Bachelor of Laws” <http://regqs.sqa.org.za/viewQualification.php?id=22993> (accessed 18-05-2016).

“to produce graduates who have a systematic and coherent body of knowledge and an understanding of the relevant concepts and principles; a high level of cognitive and other generic skills including problem-solving and practical application of principles, written and spoken communication and computer literacy; and competence in applying knowledge through basic research methods and practice”.

From the above it is clear to see the importance of an LLB for those candidates who wish to enter the legal profession. Thus the quality of the degree and the duration of the degree is incredibly important, as the above mentioned Acts require an LLB for entry within the profession.

In the 1990s the newly elected government was painfully aware of the “different educational histories” in South Africa and a need to create a “single, national non-racial system of education”.²² The White Paper on Education and Training²³ was prepared for the development of the education and training systems, that would be for the benefit of the country as a whole and all its people. The document also noted that education can empower people to participate effectively in all processes of a democratic society, economic activity, cultural expression and community life.²⁴ It also states that education can also help citizens to build a nation free of race, gender and other forms of discrimination.²⁵ The framers of the White Paper further noted the legacy of the apartheid system in that it led to the “poorly resourced educational systems for the majority of the population, high dropout rates and a small minority who could easily enter and complete tertiary studies”.²⁶

The subsequent changes in the nineties to legal education must be seen in the context of a realisation that education has the potential to empower those that had been previously excluded. Further, the four year LLB undergraduate degree must also be viewed from the prism that the education system previously did not cater for all. It was a system that was designed to accommodate a small minority. This is the minority that made up the majority of participants in the legal profession.

²² Ministry of Basic Education *White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System* 1995 19.

²³ Ministry of Basic Education *White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System* 1995 17.

²⁴ *Ibid.*

²⁵ Ministry of Basic Education *White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System* 1995 17.

²⁶ Ministry of Basic Education *White Paper on Education and Training in a Democratic South Africa: First Steps to Develop a New System* 1995 18.

The Pickett Report also noted a link between poverty and deprivation and educational outcomes.²⁷ The report also noted that children do better academically if parents have a higher income and higher levels of education. The Pickett findings on the correlation between the parent's means and academic success further motivated the need to change the framework of legal study. The majority of prospective law students do not have educated and well off parents; this would thus have a negative effect on their accessing legal education.

6 THE LEGAL PROFESSION IN SOUTH AFRICA

There have been numerous complaints within the legal profession at the slow pace of transformation within the profession.²⁸ Many claim that the legal profession still inhibits the same patterns that were prevalent in the pre-democratic dispensation. An example of this lack of transformation within the legal profession is the fact that in 2013 there were only nine black women out of the 473 senior counsels.²⁹ Around the same period, there were only 20 white women within the ranks of senior counsel.³⁰

A survey by the Law Society of South Africa, in conjunction with LexisNexis, found that in 2016 white professionals still dominated the legal profession. The survey found that 60% of respondents were fully white-owned and only 11% fully black-owned.³¹ In terms of the gender make-up of the profession, 53% of law firms surveyed were fully male-owned and only 20% fully female-owned.³² The balance of the law firms follow a mixed-ownership model. The survey also looked at the briefing patterns and found that 57% of briefing was done on the basis of long established relationships.³³ This trend in briefing patterns has the net effect of excluding new entrants to the profession who are not privy to such relationships. A further disturbing trend in the survey was the fact that only 6% of respondents considered transformational imperatives in their work.

²⁷ Pickett *The LLB Curriculum Research Report. A Research Report Produced for the Advice and Monitoring Directorate of the Council on Higher Education* 2010 3.

²⁸ Dicker "The 2013 LLB Summit" 2013 *GCB News* 15.

²⁹ Kgosana and Mokone "Its women vs the State in the legal profession" <https://www.timeslive.co.za/news/south-africa/2013-04-21-its-women-vs-the-state-in-the-legal-profession/> (accessed 28-06-2016).

³⁰ *Ibid.*

³¹ Legal Brief Today Issue no: 4124.

³² *Ibid.*

³³ Legal Brief Today Issue no: 4124.

The above statistics are more concerning in light of the fact that every facet of society needs to be reflective generally of the racial and gender composition in our country. Further it was customary practice for judges to be appointed from the ranks of senior counsel. Thus, if the bar and even side bar, are not transformed, this will have a knock-on effect on the racial and gender composition of the judiciary. It is submitted that an untransformed judiciary that does not reflect the society that it adjudicates over is highly undesirable, due to the enormous power that the judiciary wields over litigants personally and their constitutional role of interpreting and developing the law.

Legal professionals do not operate in a vacuum, but are part of the society they serve. An untransformed legal profession is especially undesirable, when one takes into account the social role to be played by the profession. Lawyers, by design, should seek to promote the rule of law and access to justice. Access to justice requires the active promotion of legal services, access to legal work and access to the courts.³⁴ A profession grappling with access for prospective members cannot readily meet its social role of promoting justice.

Another reason that may play a role in the lack of transformation in the legal profession is:

1. The institutional alienation that black attorney's experience working in previously white firms.³⁵
2. The individual racist attitudes of some white practitioners against their black colleagues.³⁶

In a study by Lisa Pruitt, examining the lack of transformation in South African commercial law firms, the author noted the different reasons given by black lawyers versus the reasons given by white lawyers for the lack of transformation:

1. The majority of the black lawyers complained of not being given enough work to be considered as partners. They also complained that they believed that most white colleagues did not view them as equals.³⁷
2. The white attorneys offered an alternative version to explain black under-representation in these firms, the majority spoke of black shortcomings, including intellectual inferiority, no

³⁴ Law Society of South Africa *Legal Services Sector Charter* 10.

³⁵ Pruitt "No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession?" 2002 *Michigan Journal of International Law* 549-553.

³⁶ Pruitt "No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession?" 2002 *Michigan Journal of International Law* 627-633.

³⁷ Pruitt "No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession?" 2002 *Michigan Journal of International Law* 672.

interest in black lawyers in commercial work, a lack of loyalty and perseverance.³⁸

From Lisa Pruitt's research, it is clear that the profession is far from operating as a united and single entity. The Lisa Pruitt research also betrays the Legal Services Charter; which undertook that all legal stakeholders should ensure the equitable procurement from previously disadvantaged professionals.³⁹ The Legal Services Charter also spoke of the need to develop procurement strategies which will enhance and promote equality, thereby creating opportunities for the establishment of new enterprises.⁴⁰

6 1 Transformation within the legal profession

As previously stated, the under-graduate LLB was introduced to try and transform the legal profession. But if the numbers and attitudes within the profession are anything to go by; the insect is still a larva and has not morphed into a rainbow coloured butterfly. Further, many stakeholders have complained about the under-graduate programme, which led to Wits School of Law discontinuing the undergraduate LLB degree in 2015. Thus, we need to ask the difficult question; has the four-year undergraduate degree, which was introduced nineteen years ago, done much to transform the legal profession.

The short answer has to be a 'no'; and perhaps the reason for this is that, firstly, there was a failure on the part of those involved in the introduction of the four year LLB to look at the pedagogic soundness of the change.⁴¹ Secondly, as Dr Lesley Greenbaum has stated that;

“an effective transformation strategy requires a complete over-haul of the education system in its entirety, state commitment to additional public funding of higher education and a solid theoretical foundation to underpin the pedagogical change that was made”.⁴²

The failure to do the above might have the opposite effect. For instance, students who come from poor backgrounds and reach the higher education system after years of being exposed to poor primary and secondary education may not fare well if not enough support, academic and financial, is provided during their time at university. This is evident in the low completion rates

³⁸ *Ibid.*

³⁹ Law Society of South Africa *Legal Services Sector Charter* 9-10.

⁴⁰ Law Society of South Africa *Legal Services Sector Charter* 10.

⁴¹ Greenbaum “The four-year LLB Degree: Progress and Pitfalls” 2010 *Journal for Juridical Science* 3.

⁴² *Ibid.*

of law students.

Further in 2008, ten years after the under-graduate LLB was introduced, 80.2 % of law firms were still white owned.⁴³ This is despite the increase in the number of Africans who have entered the legal profession. Despite the increase in the numbers of registered Africans in South African universities, data indicates that the graduation rates of African students are far lower when compared to the enrolment rate.⁴⁴

We must also move away from the notion of the legal profession, as a mere trade. As Judge Bosielo has stated “the legal profession should concern itself with the pursuit of justice and truth and not mere reward”.⁴⁵ Thus our law faculties should strive to ensure intellectual depth and disciplinary diversity in the curriculum.⁴⁶ Despite what others believe, law is not vocational. Legal education requires graduates who are well rounded and not mere tradesmen and women, but people who wish to serve humanity, promote social and economic justice and improve the lives of all South Africans.⁴⁷

7 MOVING FORWARD

The role of the legal profession in promoting access to justice and consolidating the gains made after 1994 cannot be underestimated. Similarly, it would be foolhardy and even malevolent to think that our noble profession has transformed at a satisfactory pace since the advent of the democratic order. This is so as the profession does not reflect the general population of South Africa. Similarly, a profession cannot be transformed if it is not accessible to the vast majority. Lastly the law profession cannot be transformed and fulfil its noble constitutional objectives if it continues to alienate the professionals already in the system.

Transformation, when defined through the prism of access, requires that the profession ensure sustainable and long careers for the previously disadvantaged. That is the only structural break that can end the legacy of apartheid. Legal education is one such tool that can greatly assist in the transformation of the profession as a whole if the legal education framework is

⁴³ Greenbaum “The four-year LLB Degree: Progress and Pitfalls” 2010 *Journal for Juridical Science* 10.

⁴⁴ *Ibid.*

⁴⁵ Dicker “The 2013 LLB Summit” 2013 *GCB News* 15.

⁴⁶ Campbell “The role of law faculties and law academics: Academic education or qualification for practice” 2014 *Stellenbosch Law Review* 17.

⁴⁷ Dicker “The 2013 LLB Summit” 2013 *GCB News* 15.

designed in a manner that takes cognisance of the inequalities within the profession. This was the rationale behind the introduction of the four year LLB.

However, the problem with the four year LLB degree was that it sought to implement change in a vacuum because it thought access would occur automatically with the change in the number of years of legal study. The high drop-out rates coupled with the fact that the majority of law students take five years to graduate in any case, means that the four-year programme has not guaranteed automatic access to the legal profession. Surely, in introducing the four-year LLB degree in 1997, the Department of Justice did not adequately consider the education and training of prospective lawyers holistically. Any change in legal education should have taken into account the quality of primary and secondary education. It should have enquired whether or not the schooling system adequately prepared prospective university students for the rigour of tertiary education. If students are failed by their schooling system it is highly improbable that they would succeed in legal study, despite the length of the degree.

Any change should have looked at what is commonly referred to as “Living and Learning” by university administrators⁴⁸ where, in providing the necessary academic support, the capabilities of students are investigated. This necessarily requires looking at the living conditions of all students to ensure that their circumstances are conducive for academic studies. This would mean looking at the quality of student accommodation, travelling to and from university, food and even toiletries for disadvantaged students.

Majority of students who do not complete their tertiary studies do so mainly due to bread and butter issues; hence the flare up of the “Fees Must Fall” protest. A student who cannot afford a yearly tuition of R40 000.00 will not be able to afford it whether it is for four years or five years. Thus, any future changes within the legal profession will need to take into account the adequate funding of disadvantaged and academically strong students. Further promoting proper access to legal study will serve no purpose if the profession itself is unable to accommodate new entrants in an effective and lasting manner.

⁴⁸ “Living & Learning Communities” <http://studenthousing.nmmu.ac.za/Living-Learning-Communities> (accessed 28-06-2016).

8 CONCLUSION

The four year LLB has led somewhat to the transformation of the legal profession, due in part to the increased number of black African students registered in South Africa's Law faculties. But this has not led to a significant change in numbers in the legal profession. Also of concern is the disturbing trend of low graduation rates for African students. This has been the startling feature in the four-year LLB degree; but it cannot be blamed wholly on the degree. It is submitted that the blame can also be placed on a failing schooling system and the high costs involved in tertiary study.

As legal stakeholders endeavour on a national review of the under-graduate LLB; it is important that they do not repeat the mistakes of 1997. Stakeholders need to do a thorough research on the future of legal education in South Africa, in order to promote access to the profession. This will ensure that South Africa has a legal profession that is representative of its population and can effectively foster the rule of law and social justice.