THESIS TITLE

EMBEDDING SKILLS IN AFRICAN CUSTOMARY LAW AND CULTURE IN THE LLB CURRICULUM: AN EMPIRICAL STUDY OF PEDAGOGICAL APPROACHES IN SELECTED AFRICAN UNIVERSITY LAW SCHOOLS

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DECLARATION

I declare that this thesis is my own work, and that the entire work was done while I was a registered student for the Degree of Doctor of Philosophy in Law, Institute of Advanced Legal Studies, School of Advanced Study of the University of London.

Signed

Name in capitals: **VICTOR CHIMBWANDA**

Date: 7 December 2021

DEDICATION

I dedicate this thesis to my late grandmother, Mwadini Chimbwanda

Who, like a mother hen, jealously shielded me,

Always clasping me close to her bosom,

Her love as gentle as rain,

Her caress as soft as dew.

With a subtle mind, she imparted wisdom beyond measure.

My foremost educator, she taught me how to live,

Always inspiring me to soar to greater heights of academic excellence.

Now here I am

Standing up to be counted,

Among those at the summit,

The initiates of hypothesis and inquiry,

With whom I now join to see

Beyond, yonder....

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One last thing to note is that the information in this thesis is largely informed by material available up to and including 1 December 2021. However, the interpretations expressed in this thesis, including any omissions or conclusions, are entirely mine and should not be attributed to any third party or institution.

PREAMBLE

"As I grew up, my reality was further separated from my education. In history I was taught that the Scottish explorer, Mungo Park, discovered the Niger River. And so, it bothered me - my great, great grandparents grew up quite close to the edge of the Niger River and it took someone to travel thousands of miles from Europe to discover a river right under their nose? What did they do with their time? Playing board games? Roasting fresh yams? Fighting tribal wars? I mean, I just knew my education was preparing me to go somewhere else to enrich another environment. It was not for my environment - where and when I grew up and this philosophy under-guarded my studies all through the time I studied in Africa." (Chika Ezeanya-Esiobu, 'How Africa can use its traditional knowledge to make progress', TED Conference, August 2017)

ABSTRACT

This empirical study of African law and culture in the LLB Programme is based on data collected from documents, qualitative interviews, and observations at 15 university law schools in common law and Roman-Dutch jurisdictions in Africa. At least 100 students, lecturers and legal practitioners participated in this study, which was premised on the assumption that undergraduate legal education in African common law systems could involve skills associated with African customary law and culture. The findings show that most of the university law schools are using skills-based approaches of one kind or the other. Data from interviews with LLB students showed that integrating clinical courses provides the best opportunity to learn law in context because students would learn from their own experiences. In the view of some legal academics and practitioners, integrating skills in the curriculum is central to understanding law. On this issue, the findings suggest that widening the scope of skills to include those associated with customary law would strengthen the LLB degree programme. The findings also show that there are many other practical skills that could be incorporated into the undergraduate law degree. To strengthen the law degree programme, the informants suggested a range of skills such as negotiation, mediation, proficiency in indigenous languages, knowledge of customary traditions, values, and mores and an understanding of *Ubuntu* and other cultural beliefs. Also, clinical methods such as internships and externships were considered to be some of the best ways of learning skills. The findings further showed that adopting African cultural skills of decision making such as *Indaba* premised on collaboration, communitarianism, and compromise, rather than the adversarial techniques used in Western jurisdictions, may be more relevant to the African context. This is because lawyers routinely deal with cases involving African customary law and culture that require a sound knowledge of customary law and culture. Given these findings, it is recommended that the existing legal

training system in Anglophone Africa, which is based on the British model, should be reformed in order to prepare graduates who are more grounded in African legal practice.

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1.1 Nature of the problem

This study investigated the extent to which approaches to legal education in Anglophone African university law schools involve skills related to African customary law and culture. It examined the context and challenges of studying and teaching law in African law schools and interrogates the nature, relevance, and quality of legal education in the universities. The study is premised on the assumption that the training of lawyers in African common law systems should involve skills associated with African customary law and culture at the undergraduate level because such 'skills'[1] are necessary for the practice of law given the pluralistic nature of legal systems in Anglophone Africa. Currently, skills in undergraduate legal education are considered to be a 'trade' school task or a matter for other professionals or forms of legal training.[2] While there are conceptual difficulties about 'skills', other academics have argued that the undergraduate law curriculum should incorporate *"skills that might appropriately be developed at that stage and through the adoption of a broad range of educational practices."*[3] As a result, the undergraduate degree programme in some law schools is being modified through the integration of academic and vocational elements involving some aspects of skills. This study therefore asks what those skills are or should be in the light of the fact that Anglophone jurisdictions are based on mixed legal systems that also recognise customary law as a source of law in addition to English common law. The objective is to address issues pertaining to the epistemology of law in order to develop new perspectives on African legal education. The importance of this study is to analyse specific approaches to African legal

1 William Twining acknowledges the conceptual difficulties surrounding 'skills' and related terms. See Karl Mackie, 'Lawyers' Skills: Educational Skills', in Gold, Mackie and Twining (eds) Learning Lawyers' Skills (Butterworths, 1989) 9-11.

2 Steve O. Manteaw, 'Legal Education in Africa: What Type of Lawyer Does Africa Need?' McGeorge Law Review, (2008) Vol. 39 903, 919

3 Philip A. Jones, 'Skills Teaching in Legal Education – The legal Practice Course and Beyond' in Peter. B. H. Birks (ed.) Examining the Law Syllabus: Beyond the Core (OUP, 1992) 104

education that can help us to understand if there are any distinguishing characteristics. It asks questions about the content and methods of teaching law in African universities, how students learn in university law schools, and whether what they learn involves those skills that are associated with customary law. It has been observed in previous studies that there is still very little that is known about the life of those engaged in "scholarly, pedagogical, or creative activity."[4] It has also been noted in another study on the undergraduate law degree in South Africa that studies on legal education generally do not focus on the experiences and perspectives of students[5] who are important stakeholders.[6] As a result, our current conception of legal education is mainly based on the experience of academics. This study was therefore designed to obtain the perspectives on legal education from both legal academics and students from selected African university law schools. It is based on qualitative data collected from selected African university law schools in English common law and Roman-Dutch jurisdictions. Interviews were conducted with law lecturers as well as current and former deans, current LLB students, and LLB graduates from a total of 15 law schools selected for this study. In addition, data was obtained from documentary sources and observations of classroom teaching and other academic activities. The fieldwork to collect data was conducted between 2015 and 2021. Where possible, such data was updated during the course of the study. Investigating the approaches of those involved in legal education in African universities is likely to help us appreciate how law as a discipline has evolved and whether it is developing its own identity as calls for the Africanisation of the law curriculum are currently being made

4 Fiona Cownie, Legal Academics, (Hart Publishing, 2004) 2

5 Lesley Greenbaum, 'The Undergraduate Law Curriculum: Fitness for Purpose?' (PhD thesis, University of KwaZulu-Natal 2009). See also William Twining, 'Rethinking Legal Education', Law Teacher, (2018) Vol 52 Issue 3, 241

6 Fiona Cownie (ed), Stakeholders in the Law School (Hart Publishing, 2010) 1

at conferences.[7] It is therefore important to examine how legal education is approached in African universities and how it addresses some of the concerns being raised, especially given the historical links with the British system of legal training. For instance, there is need to examine problems associated with teaching law in plural legal systems in Anglophone Africa, where other forms of dispute resolution may require specific skills that are not normally emphasised in conventional legal training under English common law. An analysis of existing teaching methods and their justification is necessary in order to learn more about legal education and the discipline of law in African university law schools. Inevitably, we can begin to find answers to questions concerning how and why law is taught in a certain way and the factors influencing different pedagogical approaches. It is when we find answers to these questions that we can begin to appreciate the nature of the discipline of law and its practice in the African context. As noted by Cownie, such a study can help us to:

> "…contribute to debates about the nature of academic law, its place in the academy, its epistemology and its future development. One can also form views about the nature of law schools, the kinds of values they are transmitting, and their potential for producing cultivated human beings and/or potentially desirable employees."[8]

To contextualise legal education in Africa, there is need to identify the various factors that influence legal academics and how they approach law. This is important because after independence, African university law schools continued to be influenced by Anglo-American approaches to legal scholarship so much that what we have in terms of data no longer reflects the characteristics of the present African law school. The other factor is that much of the

7 The theme of the Association of Law Schools Annual Law Deans' Forum hosted by the Faculty of Law, University of Cape Coast at Elmina, Cape Coast, in Ghana on 11-12 May 2017 was titled: 'Decolonising Legal Education in Africa'. One of the themes for discussion at Southern African University Law Clinics Association (SAULCA) 2017 on 10-13 July 2017 at Broerderstroom was 'Transformative Decolonisation of the Curriculum' (See <www.saulca.co.za/conferences> accessed 5 July 2020), Most recently, the theme of the 2018 Society of Law Teachers Conference of Southern Africa Conference held at Cape Town on 11-13 July 2018 was, 'Transformation of the Legal Profession and Decolonisation of Knowledge', with several panels focusing on decolonisation of legal education in South Africa.

8 See Cownie (n 4) 3

research on African legal education is not supported by empirical evidence.[9] There is therefore need to transcend the limits of the well-rehearsed and too-familiar debates in legal education that focus on issues that too often characterise research in legal education.[10] Hence, calls are now being made for more empirical work along with "greater sophistication in the application of theory to legal education scholarship."[11]

The 1975 Report of the Committee on Legal Education in the Developing World also acknowledges the paucity of data on legal education because much of the research on legal education is "based on either rhetoric, myth or aspiration"[12]. According to the report: *"There are few empirical or historical studies of legal education in particular countries, and in many countries even the most elementary information is not readily available."*[13] Regarding theory in legal education, the general conception of law is based on Anglo-American legal perceptions such as the idea that law is precedent based, an idea that does not fully capture the nature of dispute in an African context.[14] As a result, the study and practice of law is dominated by a positivist orientation of Western legal theory that is based on a "rule-based paradigm" rather than a "processual paradigm" which reflects the reality of the African society.[15] While common-law and civil-law systems place emphasis on the mechanical relationship between rule and outcome because of a rigid system of rules and reasoning, of legal principles and their relationship to judicial decisions, the African judicial process shows a lot of latitude in the adjudication of disputes.[16] It is for this reason that some experts recognise the need to view law

9 John Harrington and Ambreena Manji, 'The Emergence of African Law as an Academic Discipline in Britain' (2003) African Affairs 102, 110, (see footnote 4)

10 Chris Ashford and others (eds), Perspectives on Legal Education: Contemporary Responses to the Upjohn Lectures (Routledge, 2016) 2

11 Chris Ashford (ibid)

12 International Legal Centre (ILC) (New York, 1975) 13

13 International Legal Centre (ibid)

14 John L. Comaroff and Simon Roberts, Rules and Processes: The Cultural Logic of Dispute in an African Context (UCP, Chicago 1981) 7

15 Comaroff and Roberts (ibid)

16 Comaroff and Roberts (ibid) 8; Phyllis M. Christian, 'Administration of Justice by Traditional authorities in Ghana: An Exposition on the Law and Practice in Richard. F. Oppong and Kissi Agyebeng (eds), A Commitment to Law, Development and Public Policy, A Festschrift in Honour of Nana Dr. S.K.B. Asante (Wildy, Simmonds & Hill, London 2016) 278-294

in a broad sense in order to include "the norms and processes commonly included under the notion of "customary law."[17] This study therefore seeks to investigate the extent to which the law curricula in African university law schools cater for the skills that reflect the social and cultural realities of the discipline of law in African societies.

It is important to explore these issues so that one can interrogate the structure and content of the curriculum that was not designed for an African context *per se*. This point is highlighted by South African academic Paulus Zulu in his remarks: 'Transformation and Decolonisation of the Curriculum' at the 2017 South African University Law Clinics Association. He refers to various perspectives about the content of the curriculum and teaching methodology by observing that "…the present curricula used in higher education are inappropriate to the African experience and need to be replaced by subject materials and teaching methods suitable to this experience." He also refers to the assertion by other proponents of decolonisation who argue that the curriculum introduced in African universities during the colonial period undermined African values and the conception of reality, thereby reinforcing the belief that it is only the West that can generate knowledge and not Africans.

As noted above, to date much of the research on African legal education has not involved empirical studies to help us understand the cultural dimension and its place in law as an academic discipline. Much of the data that we have concerning customary approaches in dispute resolution, for instance, is still based on ethnographical studies conducted by anthropologists such as Isaac Schapera[18] and Max Gluckman.[19] This study therefore provided an opportunity to obtain empirical data that could help identify the different perceptions about

17 See ILC (n 12)

18 Isaac Schapera, A Handbook of Tswana Law and Custom (OUP, 1938)

19 Max Gluckman, The Judicial Process Among the Barotse of Northern Rhodesia (Manchester University Press, Manchester, 1955)

how law is taught as part of "an ethnography of disciplines" in an African context.[20] It is argued that such data is useful in advancing scholarly research on most issues in African legal education that is currently hampered by the fact that fieldwork associated with such research is usually demanding and time-consuming, because many legal academics often do not have the relevant research skills to undertake fieldwork.[21] The result is that law continues to be approached doctrinally, which often affects the learning of law in that teaching methods mainly emphasise positive norms as opposed to other methods that encourage the discussion of "perspectives which transcend a strictly legal framework."[22]

Earlier studies on legal education have tended to concentrate on how to reconcile the differences in the approach of practitioners and academics, that is, between those who approach law practically and those who are theorists.[23] Hitherto, the focus has been to develop a training system that balances the interests of the academy and that of the legal profession. However, satisfying both interests has always been problematic.[24] As a result, practitioners and academics have continued to influence legal education in different ways because they have not always agreed on what is appropriate.[25] This is particularly true about the approaches of Lord Denning,[26] LCB Gower[27] and Anthony Allott about how lawyers are supposed to be trained in post-colonial Africa.[28] For Denning, the teaching of law needs to reflect law as practised by practitioners,[29] while Allott prefers the professional training of lawyers who can obtain a

20 See Cownie (n 4) 9, William Twining, 'The Camel in the Zoo' in Law in Context: Enlarging a Discipline (Clarendon Press, Oxford 1997) 28

21 Twining (ibid) 29

22 IFC (n 12) 63

23 R.A. Samek, 'Legal Education and University Education: An Analysis with Special Reference to Australia', (1964) Vol. VIII, No. 1, JSPTL, 1-2

24 Roger Ormrod, 'The Reform of Legal Education', (1971) The Law Teacher, Vol. 1, No.2

25 Ormrod (ibid)

26 Lord Denning, Report of the Committee on Legal Education for Students from Africa Cmnd. 1255 (1961)

27 L.C.B Gower, 'English Legal Training', (1950) MLR, Vol. 13, 137

28 See Harrington and Manji (n 9) 124-127

29 John Harrington and Ambreena Manji, 'Mind with Mind and Spirit with Spirit': Lord Denning and African Legal Education' (2003) Vol. 30, No.3, Journal of Law and Society, 376, 379-387

university law degree that grounds them in legal doctrines.[30] Gower, on the other hand, supports a thorough system of training lawyers which encompasses a theoretical approach where general principles and techniques are taught, followed by a practical apprenticeship (supplemented by institutional training) and a final qualifying examination.[31] Whatever the merits of Gower's model, which was widely adopted in common law jurisdictions in Anglophone Africa, especially in Ghana and Nigeria, it never achieved its intended objective of emphasising skills, as it resulted in a more conservative and black-letter approach to law.[32]

In recent years, however, some African university law schools have started to use skills-based approaches to legal education. Such trends appear to be a coordinated effort to transform the law curriculum in specific places. For this study, it was necessary to investigate selected law schools in order to obtain data that would help us understand how some of these initiatives are transforming the structure and content of the law curriculum in relation to skills. While efforts to integrate skills in the law curriculum in the US, UK, and Australia have often been a matter of official policy,[33] that has not been the case in African legal education, at least since Lord Denning's 1961 report on legal education for African students.[34] Although there have been isolated instances involving commissioned or doctoral research on some aspects of legal education,[35] there has been little or no sustained research on legal skills. The question that arises is whether legal education in many African university law schools should continue to be influenced by the two-tier British system of legal training premised on the philosophy that

30 Harrington and Manji (n 9) 126. This approach was also preferred by Professor Harvey, Dean at Legon, Ghana. See William Harvey, 'The Development of Legal Education in Ghana': mimeographed report to the SAILER Project of the Institute of International Education and the Ford Foundation (1964)

31 See L.C.B Gower (n 27) 150

32 See J.A. Omotola and A.A. Adeogun (ed), Law and Development, 1987, Lagos, cited by Yash Ghai, 'Law, Development and African Scholarship', (1987) MLR, Vol. 50, No.6, 750. Post independent East Africa in contrast developed a more critical sociological and political economy approach to legal scholarship associated with Dar-es-Salaam. See Yash Ghai, 'Law, Development and African Scholarship', (1987) MLR, Vol. 50, No.6, 750

33 See in the US MacCrate (1992), in the UK Ormrod (1971), Marre (1988), ACLE (1996), Clementi (2004) LETR (2013) and in Australia 'The Pearce Report', Australia (1987)

34 See Lord Denning (n 26), Harrington and Manji (n 9)

35 KSL and KIPPRA, 'Factors Influencing Students' Performance in the Kenyan Bar Examination and Proposed Interventions' (2019) <https://www.ksl.ac.ke/wp-content/uploads/2019/10/KSL-KIPPRA-Bar-Examinations-Report-2019.pdf> accessed 7 July 2020; see also Greenbaum (n 5)

skills teaching should only be at the professional or vocational stage of legal training, and not at the academic stage whose focus should be the teaching of doctrinal law.[36] The dilemma in African legal education is sufficient evidence about the problems brought about by transplants.[37] It is important to ask whether the adversarial nature of English legal training is suitable for Anglophone Africa which has mixed legal systems that perhaps require a different approach focusing on a different set of skills currently not emphasised in the existing curriculum of undergraduate legal training. As pointed out elsewhere, students are less likely to see law as adversarial if both academic and practical elements are integrated in the law curriculum.[38] Also, some judges in England are advocating the resolution of some disputes in a less adversarial solutions-based way.[39] Should law schools then take a more practical approach that reflects the kind of work that law students will do during vocational training? If so, what effect will that have on the teaching of black-letter law and what methods should law schools use? In England, the first stage of the newly-proposed Solicitors Qualifying Exam, which is skills-based, may be incorporated into the law degree, making the current system redundant.[40] These are the issues that the researcher wanted to investigate in order to understand the importance of skills in the curricula of law schools in mixed legal systems.

1.2 Background of the problem

This research is motivated by the fact that legal education in both developed and developing jurisdictions in many common law systems is failing to meet expectations not only of the profession and the academy, but also of the public. Consequently, radical reforms are being

36 See Kahn-Freud, 'Reflections on Legal Education' (1966) 29 M.L.R. 121; Gower (n 27) See also Harvey (n 30); Harrington and Manji (n 29) 376, 396

37 Alan Watson, Legal Transplants, An Approach to Comparative Law (SAP, 1974)

38 Fiona Martin, 'The Integration of Legal Skills Into The Curriculum of the Undergraduate Law Degree: The Queensland University of Technology Perspective', The Journal of Professional Legal Education, (1995), Vol. 13, No.1, 45

39 Lord Justice Briggs' remarks at the 2016 Bar Conference as cited by Hon. Dame Linda Bobbs DBE, 'Is the legal landscape changing? Reflections from the UK and South Africa', (2017) The Law Teacher, 112-122, 116

40 See Bobbs (n 39) 117

proposed, sometimes with far-reaching implications for the profession. The fixation with legal education is not surprising as observed by Sullivan, et al (2007):

> "Law is, of course, a particularly public profession. Besides representing private clients, lawyers have official standing as officers of the court, charged with making the legal system function. In addition to their more conspicuous roles as champions in courtroom conflicts, lawyers have become indispensable suppliers of what an observer has called "artificial trust" – the enforceable agreements and contracts that formalize social relationships and seem increasingly necessary to hold together a turbulent and litigious society."[41]

Increasingly, society is becoming more reliant on lawyers in the light of opportunities and challenges presented by globalisation. At the same time, there are those who advocate '*glocalisation*' that seeks to promote local culture.[42] In Africa, this has resulted in a clash between modernity and culture, with complex legal situations that may require approaches based on traditional justice systems.[43] And yet skills and processes associated with African customary law are generally not stressed in the undergraduate law curriculum. It is therefore inevitable for the public to take an interest in how lawyers are prepared for their role in society because, unfortunately, contemporary legal education is struggling to respond to the needs of industry and society. In the US, calls have been made for a 'creative adaptation' to legal education so that law schools can promote effectively skills that adequately prepare students for the reality of today's working world.[44] In England, the Teaching Excellence Framework (TEF) now requires Higher Education providers to offer degrees with a lasting value.[45]

41 William Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass, 2007)

42 Josef De Beer and Ben-Erik van Wyk, '*Glocalisation*: The role of indigenous knowledge in the global village', in J. De Beer (ed.), The decolonisation of the curriculum project: The affordances of indigenous knowledge for self-directed learning (NWU Self-directed Learning Series Volume 2, 2019) 1–23, AOSIS, Cape Town. https://doi.org/10.4102/aosis.2019.BK133.01

43 See M. Ocran, 'The clash of legal cultures: The treatment of indigenous law in colonial and post-colonial Africa' Akron Law Review (2006), 480 cited in J. Osogo Ambani and Ochieng Ahaya, 'The Wretched African Traditionalists in Kenya: The Challenges and Prospects of Customary Law in the New Constitutional Era', Strathmore Law Journal Vol. 1, Number 1, June 2015

44 Deborah Jones Merritt, 'What happened to the class of 2010? Empirical Evidence of Structural Change in the Legal Profession', (2015) Mich. St. L. Rev. 1043

45 Green Paper, "Fulfilling our Potential: Teaching Excellence, Social Mobility and Student Choice", November 2015

In some parts of Anglophone Africa, governments and regulators are having to implement controversial reforms in order to respond to an unprecedented rise in the demand for legal education which, in many cases, is not fit for the purpose.[46] In Ghana, such issues have now spilled into the courts,[47] while in South Africa demands have been made to increase the length of the law programme from four to five years to provide for the teaching of generic skills such as language, research, critical analysis and information technology.[48] Recently, the high failure rate of trainees in final exams of the professional law programme in Uganda, Ghana,[49] and Kenya[50] has become an issue for investigation by parliament as the system of legal education comes under scrutiny. There are also demands for the decolonisation of the law curricula across South Africa with several universities revising the content, methodology, and philosophy of legal education to reflect a more Afro-centric orientation that reflects the values and culture of an African society. In Kenya, case law such as *Republic v Mohamed*[51] has created an opportunity for legal education to integrate cultural practices to resolve some disputes that would normally be resolved in the courts. In Uganda, the Supreme Court in *Mifumi and Others v A-G and Another*[52] has resisted pressure from NGOs to abandon the traditional practice of bride price in African marriage, suggesting that there are aspects of African tradition and culture that still occupy a central place in African society.

It is important, therefore, to analyse the implications of these developments on African legal education. Are we going to see new approaches to law, and how prepared are university law

46 See Emmanuel E. Hawkson, 'Mushrooming law schools threat to democracy' Daily Graphic (Accra 27 April 2017) <http://www.graphic.com.gh/news/general-news/mushrooming-law-schools-threat-to-democracy-cj.html> accessed 29 April 2017

47 Professor Stephen Kwaku Asare v A-G and Others [Suit No: J1/1/2016] (Ghana) and Irene Korley-Ayerteye & Others v GLC HR/0066/2017 (Ghana)

48 See Bongani Nkosi, 'Major Shake-up for law degree following report', IOL (3 June 2019) <https://www.iol.co.za/news/south-africa/major-shake-up-for-law-degree-following-report-24834116> accessed 9 July 2019). See also Nicola Jenvey, 'Law skilled-lawyers prompt calls for law degree reform' University World News (15 June 2013) <http://www.universityworldnews.com/article.php?story=20130613155812925> accessed 24 August 2016)

49 See 'Parliament calls for 5 changes in Law School exams after mass failure' Joyonline (Accra 3 April 2019) <https://www.myjoyonline.com/parliament-calls-for-5-changes-in-law-school-exams-after-mass-failure/ > accessed 9 July 2019)

50 Caroline Wafula, 'Stakeholders step in as mass failures rock law school' Kenya Daily Nation (Nairobi 26 June 2019)

51 Republic v Mohamed Abdow Mohamed, Criminal Case No. 86 of 2011 (Kenya)

52 Constitutional Petition No. 12/2007 (Uganda)

schools to transform the law curricula to accommodate these developments? Also, how can skills be integrated to achieve a more holistic system of legal education that can properly reflect the practical nature of the discipline in plural legal systems previously influenced by the biases and prejudices of English common law? There is need, therefore, to examine empirically how university law schools can strengthen the law degree as a foundation for a variety of social and professional roles that appropriately reflect an African context.[53] This is an aspect that has not stimulated much empirical research in Africa, unlike in other jurisdictions with an English common law background.[54]

The challenge for this study is that it investigates two aspects of legal education: "doctrine" and "skills", which traditionally have been viewed as independent of each other, resulting in the current structure of legal education in Anglophone Africa− academic, professional and vocational. The effect is that instead of concentrating on identifying the skills that can be emphasised in legal training as is the case in other jurisdictions such as the United States,[55] the debate in many common law jurisdictions including England and Anglophone Africa has been whether students at the academic stage should learn skills at all.[56] This study therefore seeks to examine the prevailing perceptions of skills teaching in African legal education. As skills have now become necessary in higher education, an investigation of the teaching approaches used in African universities is necessary in order to create an ethnography of law as a studied discipline in Africa.

53 See Manteaw (n 2)

54 See for instance Roger Burridge, 'Learning Law and Legal Expertise by Experience', in Roger Burridge, et al. (eds) Effective Learning and Teaching in Law (ILT, 2002) 25

55 See Report of the Task Force on Law Schools and the Profession: Narrowing The Gap - 'Legal Education and Professional Development - An Educational Continuum' (1992) (hereinafter referred to as "the MacCrate Report"

56 William Twining,'Legal Skills and Legal Education' in William Twining, Law in Context: Enlarging A Discipline (OUP, 1997) 180-197

An important dimension of the inquiry relates to the issue of whether African legal education is sufficiently contextualised to deal with issues arising from the internal conflict of laws because legal practice in an African context often requires lawyers to reconcile the traditions of English common law with the reality of African customs that are often part of legal problems confronting the average person, even the elite.[57] Available literature shows that African customary law is often disengaged from the legal system because lawyers do not "practice" African customary law *per se*, despite the fact that many disputes involving the interpretation and application of customary law come before the courts.[58] The reality is that there are options for those seeking legal redress: either to pursue legal remedies under English common law or to invoke customary law. However, while most issues may be resolved under customary law, lawyers often circumvent this option, preferring adversarial approaches that lead to unnecessary litigation considered anathema to African customary law whose essence promotes conciliatory approaches in the resolution of disputes. Unfortunately, undergraduate legal education does not reflect this reality.

Despite numerous initiatives, including the adoption of Clinical Legal Education by universities and training institutions to deal with some of these issues, the university law degree is still viewed as traditionally knowledge based. As a result, the debate about the direct learning of skills has "produced a misleading and prejudicial distinction between skills and knowledge."[59] As Kruse notes, there exists in legal education a myth that "aligns the teaching of doctrine with theory and the teaching of skills with practice"[60] Twining prefers to call that

57 LCB Gower, Independent Africa: The Challenge to the Legal Profession, (OUP, 1967) 3

58 John Murungi, 'The Question of an African Jurisprudence: Some Hermeneutic Reflections' in Kwasi Wiredu (ed), A Companion to African Philosophy (Blackwell Publishing, 2004) 519, 524. In South Africa courts often intervene in disputes involving status of common law marriages in Family Law and/or Succession (see Mabuza v Mbatha [2003] (4) SA 218 (C) (South Africa), Shibulana and Others v Nwamitwa [2007] (2) SA 432 (SCA), [2009] (2) SA 66 (CC) (South Africa).

59 Tracey Varna and Roger Burridge, 'Revising legal education', in Roger Burridge et al. (ed), Effective Learning & Teaching in Law (The Times Higher Education Supplement, 2002) 25

60 Kathrine R. Kruse, 'Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice', (2013-2014) 5 McGeorge L. Rev. 7, 9

myth "the Luddite fallacy" which creates the impression that "emphasis on skills in legal education is necessarily illiberal, amoral, narrow, reactionary, anti-intellectual, impractical or unnecessary".[61] This study is anchored in the argument that there is need to develop a law curriculum that also integrates those skills that are associated with African customary law, which is a recognised source of law.

1.3 Purpose of the study

The purpose of this study is to analyse the existing approaches to legal education in African plural legal systems that include both English common law and indigenous customary law.[62] Although after independence there have been attempts to 'Africanise' universities, including their law curricula,[63] developing a system of legal education against such a historical background is not a straightforward process. This is mainly because a different approach to legal education is necessary to accommodate indigenous law that is mostly unwritten but was once considered "repugnant to any provision of the written received law and if [they were] not incompatible with the rules of natural justice, morality and civilised standards of conduct."[64] Moreover, some Africans who, because of the lack of training facilities in Africa, obtained their legal education in Britain prior to and immediately after independence, did not study

61 Twining (n 56) 181

62 This is a characteristic of former British colonies in Africa and the South Pacific that resulted in the creation of pluralistic legal orders divided into the formal system, based both on English common law, and informal customary law. The formal system comprises formal courts, while the informal system comprises traditional customary courts or local/traditional systems that apply customary law. In some countries such as Botswana and Malawi, customary courts are integrated into the 'mainstream' justice system as 'one-line judicial system' (Botswana) or 'hybrid courts' (Malawi) that combine characteristics of formal courts and customary courts. See Charles Manga Fombad, 'Customary Courts and Traditional Justice in Botswana: Present Challenges and Future Perspectives', 15 Stellenbosch l. Rev. 166 (2004) and Janine Ubink and Sindiso Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi', Law & Society Review, Vol. 51, No. 4 (2017). The role of these informal courts is critical in African legal systems in that they adjudicate over disputes involving the majority of the population because they are the most accessible aspect of the justice system. In Botswana, the role of customary courts surpasses that of the 'modern' courts that apply Roman-Dutch and English common law. See Charles Manga Fombad, 'Customary Courts and Traditional Justice in Botswana: Present Challenges and Future Perspectives', 15 Stellenbosch l. Rev. 166 (2004). For contemporary perspectives on customary law and its role in the legal system see Isaac Madondo, The Role of Traditional Courts in The Justice System (2017), Jeanmarie Fenrich and Paolo Galizzi et al. (ed), The Future of African Customary Law (2011) CUP, Miranda Forsyth, A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu, (Australia National University Press, 2009); Manfred O. Hinz (ed) The Shade of New Leaves (LIT, 2006)

63 Carel Stolker, Rethinking the Law School (CUP, 2014) 34

64 The so-called repugnancy principle provided in most African statutes that deal with the administration of indigenous law. See K. Chanda, 'Continuing Legal Pluralism with Gradual Juridical Integration: The Way Forward for Post-Colonial Africa' in Manfred O. Hinz (ed) The Shade of New Leaves (LIT, 2006)

customary law.[65] Complications arose mainly because foreign law took precedence over customary law as a result of legal transplants.[66] A British legal education was therefore clearly inadequate because such training did not include the practice of customary law.[67] If customary law is an inherent part of the legal system in Anglophone Africa, it is important to investigate the extent to which skills associated with it are integrated in the curricula, how they are taught in the universities, and whether they are used as a system for the resolution of legal disputes. Such an investigation is necessary because it will inform us as to whether the approach to legal education in Africa is sufficiently contextualised. The main aim of the study is to investigate the existing approaches to African legal education and whether, in addition to promoting the acquisition of knowledge, they are promoting skills relevant to the African context.

As universities embark on curriculum innovation, there is need to investigate, perhaps to re-examine, the essence of legal education. This is because "the way in which we conceive of knowledge as either practitioners or teachers of law, impacts directly upon what we consider the study and the practice of law to be about, what is of value, and how it should best be learned."[68] As more suggestions are made regarding the content of the undergraduate law degree, including the widening of the range of courses, there is need to study the factors influencing the process. It is submitted in this thesis that many legal curriculum changes, particularly those in Africa, do not reflect a broad educational philosophy that should determine pedagogical and epistemological issues.

In many African jurisdictions that have historical links with Britain, the situation is complicated by the fact that they have not been able to develop their own model of legal education based

65 See Stolker (n 63) 35

66 See Watson (n 37)

67 Carel Stolker (n 63)

68 Julie Macfarlane, 'Look Before You Leap: Knowledge and Learning in Legal Skills Education' (1992) 19 Journal of Law and Society 293, 297-298

on their peculiar circumstances. Attempts by scholars such as William Harvey, who sought to reform legal education in Ghana through the teaching of doctrinal law together with skills, have never been successful.[69] This is partly because the focus of legal education at the academic stage has been to stress the learning of legal doctrines and rules rather than developing analytical and reasoning abilities.[70] Ndulo is also critical of this rule-based teaching. He quotes Whitehead (1959) who states:

> …whatever be the detail with which you cram your student, the chance of his or her meeting in life exactly that detail is almost infinitesimal and if he or she does meet it, he or she will probably have forgotten what you taught him or her about it. Whitehead goes on to say: The really useful training yields a comprehension of a few general principles with a thorough grounding in the way they apply to a variety of concrete details. [71]

This is consistent with Twining's philosophy that the concern of legal education should be to maintain a balance between knowledge, theory, and skills (know-what, know-why, and know-how).[72] As part of the reforms, new trends that stress the teaching of specific skills, values and competencies have been recommended.[73] This is partly in response to the criticism of traditional law curricula by some stakeholders who are in favour of alternative approaches that ensure law schools have the capacity to produce practice-ready graduates with relevant skills. For instance, Justice Wahl Rosalie (1987) speaking at the National Conference on Professional Skills and Legal Education at the University of New Mexico in the United States, made the following remarks:

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69 William Harvey, 'The Development of Legal Education in Ghana': mimeographed report to the SAILER Project of the Institute of International Education and the Ford Foundation (1964) (on file with researcher)

70 See Harvey (ibid); see also the speech by Yvonne Dausab at the Gala Dinner of the Southern African Law Teachers' Conference held on 20 January 2017 in Namibia where she remarked that legal education and training should endeavour to develop the capacity to address and resolve issues that affect our society.

71 Muna Ndulo, 'Legal Education in Africa in the Era of Globalisation and Structural Adjustment' (2002) 20 Penn St. Int'l l. Rev. 487

72 William Twining, 'Introduction: Wandering Jurist' in William Twining, Law in Context: Enlarging A Discipline (OUP, 1997) 18-20

(n 56) 18-20

73 Twining (ibid)

> Have we really tried in law schools to determine what skills, what attitudes, what character traits, what quality of mind are required of lawyers? Are we adequately educating students through the content and methodology of our present law school curriculums to perform effectively as lawyers after graduation?[74]

These views are also reflected in Lord Denning's approach to Legal Education in Africa[75] who maintains that the spirit of the profession, "frankness, fairness, honesty, courage and the recognition of one's duty to the court and client" must underlie all legal training.[76] Even some African judges are challenging law faculties to impart values of the profession to trainee lawyers.[77] This study, therefore, seeks to find out how African university law schools can influence the agenda for legal education reform, and whether knowledge and skills based on African customary law and culture should be part of the reform. In Ghana, the former Chief Justice in her capacity as the chairperson of the regulatory body responsible for legal education, suggested to 'marry theory with practice' in order to make legal education socially relevant by sensitising students to the broader social obligations of the legal profession in practical terms.[78] As a result, she recommended that the focus should be to develop programmes that encourage *pro bono* work and public interest litigation.[79] This has also become the focus of regulators and law schools in developed countries, a notable example being Chief Justice Lipman's initiatives in the New York Bar in 2012.[80] For this reason, skills-based teaching has been, and remains, relevant in legal education. In several African university law schools, moot courts, mock trials,

74 Justice Wahl Rosalie of the Minnesota Supreme Court speaking at the National Conference on Professional Skills and Legal Education (1987). See the Forward in Stuckey, R., Best practices for legal education - A vision and a roadmap (2007)

75 Lord Denning, 'Legal Education in Africa, Sharing our Heritage' (1961) 58 Law Society Gazette 147, 148

76 ibid

77 See remarks by CJ of Namibia at the Gala Dinner of the Southern African Law Teachers' Conference held on 20 January 2017 in Namibia (on file with researcher)

78 Chief Justice Georgina T. Wood, Keynote address at the 10th Anniversary of the establishment of KNUST Faculty of Law, Kumasi (20 March 2013) (on file with researcher)

79 ibid

80 See NYU Law News, 'Lippman unveils rule detailing bar admission pro bono mandate'<https://www.law.nyu.edu/news/NY_CHIEF_JUDGE_JONATHAN_LIPPMAN_UNVEILS_PRO_BONO_REQUIREMENT> accessed 30 September 2021, See also, Staci Zaretsky, 'New York Announces the Specifics of the New Pro Bono Requirement — and They're Actually Not That Bad!' <https://abovethelaw.com/2012/09/new-york-announces-the-specifics-of-the-new-pro-bono-requirement-and-theyre-actually-not-that-bad/> accessed 30 September 2021

and debates have been recommended to provide students with the necessary skills for legal work in the African context.[81]

This study, therefore, presents an opportunity to examine current teaching methods to determine how effective they are in the training of lawyers at the academic stage of legal training. Some scholars such as Maughan and Webb have noted that legal knowledge obtained in a theoretical form is of little value to a profession such as law unless it is accompanied by other skills and competencies necessary for the resolution of complex legal problems.[82] In this context, legal knowledge must be viewed "as encompassing both factual information and processing skills, such as problem-solving," (process-rather than content-led) so that it can have attributes which are necessary for professional competence.[83] In the African context, the question is whether skills rooted in African customary law and culture can provide another avenue for resolving some disputes. Answers to this question can help to reformulate "the intellectual mission of legal education" by integrating different forms of knowledge, skills and competencies that will enable the learner to move from "law-on-the-books to law-in-action."[84]

The scope of this study focuses on the approaches adopted by university law schools in Ghana, Kenya, Uganda, South Africa and Zimbabwe to address concerns about the lack of skills in legal education. One of the approaches is clinical legal education pioneered in the UK by Sherr[85] and Grimes.[86] Other scholars such as Giddings in Australia have already done pioneering studies on the sustainability of clinical legal education programmes,[87] which feeds

81 See Wood (n 78)

82 Caroline Maughan and Julian Webb, Lawyering Skills and the Legal Process (2nd edn CUP, Cambridge 2005) 20-25

83 See MacFarlane (n 68) 301

84 E. Mertz, 'Social Science and the Intellectual Apprenticeship: Moving the Scholarly Mission of Law Schools Forward', 17 J. Legal Writing Institute 427 (2011) 435-436 cited by Stewart Macaulay in the Foreword to Llewellyn, The Bramble Bush - On our Law and its Study, (Legal Legends, 2012)

85 Avrom Sherr, 'Professional Legal Education and the Clinical Method: From 'CLEPR Colonies' to Competency Taxonomies' (September 2009) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1891844> accessed 21 February 2019)

86 Richard Grimes et al., Clinical legal education: Active Learning in your Law School (Blackstone, London 1998)

87 Jeff Giddings, Promoting Justice through Clinical Legal Education (Justice Press, 2013)

into this study. This study further provides the necessary background material before analysing existing clinical programmes at selected African universities and whether such programmes show evidence that skills related to African customary law can be taught, and how they can be taught.

1.4 Research questions

This study examines the legal education system in African Anglophone universities using case study evidence from law schools in Botswana, Ghana, Kenya, Malawi, Nigeria, Uganda, South Africa and Zimbabwe. More specifically, the study attempts to answer the following fundamental questions:

1. What skills, if any, are undergraduate law students learning in African university law schools and how are they learning them? Are such skills based on African customary law and culture that are characteristic of mixed legal systems in Anglophone Africa?
2. What methods are used to teach such skills and what do they reveal about undergraduate legal education in the African context?

These questions will, hopefully, enable the researcher to find out what the context and teaching of law reflect about undergraduate legal education in African universities.

1.5 Importance of the study

Surveys conducted at several African universities suggest that skills education is a relatively new approach to the teaching of law, even at the professional stage. There is a clear gap in the existing literature concerning the benefit or otherwise of skills teaching in the African context. There is also no clarity about what constitutes ‘skills’, because ‘skills’ in African universities are generally associated with professional training. Even so, interviews with students at African professional schools, both current and past, indicate that there is an academic approach to the

teaching of professional courses that does not focus on skills. Where skills are taught in African universities, they are normally restricted to analysis and synthesis. The importance of this study is that it seeks to justify proposals for the development of a new law curriculum that includes specific skills that are relevant to the African context. The focus of this study, therefore, is to investigate the extent to which African legal education caters for skills that reflect the social realities and cultural dimensions which relate to the practice and enforcement of law in Anglophone African legal systems.

As part of the study, the viability of approaches advanced by experiential learning theorists of law will be examined. This is necessary because while previous studies elsewhere have found that such approaches facilitate an effective transfer of knowledge to stimulate "authentic learning"[88] and improve the learning process,[89] this has not been proven to be the case in African universities. New strategies such as the Problem Based Learning approach which are closely related to modern cognitive views, in which learning is seen as a constructive, active, co-operative and contextualised process are now being adopted by universities in Europe and Africa.[90] It has been argued that the benefit of adopting such approaches in legal education and training is that students can learn from an early stage that being a skilled lawyer means much more than acquiring the capacity to manipulate legal rules[91] and that there is a distinction between 'law school thinking' and 'lawyer thinking.'[92] As has already been observed, when

88 J.H.C. Moust, 'The Problem Based Approach at the Maastricht Law School', (1998) The Law Teacher, No. 1, Vol. 32, 5

89 See David Kolb's Experiential Learning Cycle in Experiential Learning: Experience as The Source of Learning and Development (1984)

90 See Moust (n 88) 29. See also details of the PBL approach at York Law School <https://www.york.ac.uk/law/undergraduate/pbl/> last accessed on 29 November 2021. At KNUST, a conference was recently held on Problem-Based Learning. See Victor Chimbwanda, "Why We Need to Transform the Law Curriculum to Integrate Skills Teaching at the Academic Stage of Legal Training", paper presented at the 1st National Conference on Problem Based Learning/E-Learning, Kwame Nkrumah University of Science & Technology, Ghana, 23-24 September 2015. Other academics are suggesting PBL in Engineering education in Africa. See Mona Dahms and Diana Stentoft, 'Problem Based Learning in Engineering Education – a Development Option for Africa?', Paper presented at The 4th African Regional Conference on Engineering Education (ARCE-2008): 'Capacity Building in Engineering Education for Sustainable Development', Dar es Salaam, Tanzania

91 Maughan and Webb (n 82)

92 Maughan and Webb (n 82) 22; See also Muna Ndulo (n 71)

law graduates start practising, they discover that legal problems are not so clear-cut[93] because some of them are 'situational'.[94]

In defining the research problem, it is assumed that since the law curriculum in Anglophone countries in Africa is modelled on the English legal system, the current system of training African lawyers is dominated by Western approaches. In the context of Africa, the legal landscape arises from the pluralistic nature of the legal system, which creates problems that are unique to Africa. Addressing such problems requires new skills that are currently not catered for in the traditional curricula. Currently, the trend is that African university law schools emphasise the teaching of substantive law devoid of any skills, even at the professional level.[95] It is submitted that legal education must focus on developing skills that enable the practitioner to resolve legal situations that are unique to Africa, and that legal education must be "driven by African systems and by the peculiar African demand for an orderly change and development" in order for it to be relevant to the socio-economic and geopolitical needs of Africa.[96] The 2012 communique by Law Deans at a summit in South Africa suggests the need to redefine legal education in Africa to accommodate Africa-focused ideas.[97] A study of African legal education is therefore warranted because even the teaching of professional courses has been criticised for concentrating on academic subjects instead of professional skills that are relevant in Africa.[98]

93 Maughan and Webb (n 82) 23

94 ibid

95 See Ndulo (n 71) and Manteaw (n 2)

96 See Manteaw (n 2) 903

97 University World News, 'Law deans to create continental collaboration forum' (30 September 2012) <http://www.universityworldnews.com/article.php?story=20120929103435412#.V0lFqVmC9TI.twitter> last accessed 9 July 2019

98 See Ndulo (n 71)

1.6 Definition of operational terms

A study of this nature which uses technical terms such as ‘legal education’, ‘skills education’, ‘academic stage’, ‘legal training’ and so forth has the potential to convey different meanings to different people. It is therefore necessary to explain how the key terms are used in this thesis.

The term ‘legal education’ is used in this thesis to mean a formal study of law as an academic discipline at a university. While it is acknowledged that various experiences and training in different settings may provide one with a legal qualification, the focus of this study is on the traditional system of training lawyers in common law jurisdictions that requires one to obtain a university degree as the first stage towards qualifying as a lawyer.

The ‘academic stage’ therefore refers to the first stage of legal training at university where all aspiring lawyers embark on a formal academic study of law in order to obtain an undergraduate degree in law commonly referred to as the Bachelor of Laws Degree (LLB) in preparation for the next level of their training in the qualifying process.

In this thesis, ‘legal training’ (in common law jurisdictions) refers to the process of qualifying as a lawyer which usually involves three stages. This qualification process means that in many common law jurisdictions, a law degree alone is inadequate if one wants to practise law. To be eligible to practise law, the holder of an LLB degree must embark on further professional and vocational training before they are licensed to practice law.

‘Professional training’ in this thesis therefore refers to the imparting of professional legal skills to trainees after they have graduated from the academic stage. It is at this stage that trainees should learn ‘legal skills’ by adopting a professionally-oriented approach in their training. Trainees, therefore, focus on subjects pertaining to legal procedures and processes that prepare them for the practice of law.

To ensure that trainees are sufficiently trained, the training process for lawyers in most Anglophone African common law jurisdictions includes the 'vocational stage' as the last stage of legal training. It is at this stage that trainees are provided an opportunity to acquire 'skills', which is an approach that enables them to 'learn how' rather than simply 'learning about'.

'Skills education' in this thesis refers to the direct teaching and assessment of 'skills.'[99] In this context, 'skills' entail a wide range of practical competencies, from intellectual areas which are not exclusively legal such as problem solving, analysis, oral and written communication to practical legal skills such as document drafting, advocacy and other practical skills which are not law specific such as client interviewing. It may include all forms of experience-based and experience-directed learning, such as mooting, or legal writing and drafting programmes.

'Customary law' in this thesis is defined as a normative order observed by a society, having been formed by regular social behaviour and the development of an accompanying sense of obligation.[100] The study of customary law may include a study of disputes in the community, but is not limited to this. Today, customary laws are considered as integral parts of the local, indigenous cultures that are the basis of members' identities.[101]

'Official customary law' is the version of customary law that is perceived by observers outside the community in which the concerned norms are observed. This category includes the customary law pronounced in court judgments, textbooks, and codifications.[102]

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99 See Martin (n 38) 46 and MacFarlane (n 68) 293-294

100 Gordon R. Woodman, 'A Survey of Customary Laws in Africa in Search of Lessons for the Future' in Jeanmarie Fenrich et al., (ed), The Future of African Customary Law, (CUP, 2011) 9, 10

101 Woodman (ibid) 13

102 Anthony C. Diala, 'The Concept of Living Customary Law: A Critique' (2017) 49:2 The Journal of Legal Pluralism and Unofficial Law, 143-165

'Living customary law' on the other hand is regarded as the norms that regulate people's daily lives, in contradistinction with the views of outsiders, especially legal experts.[103]

'Internships' refer to all those academic activities that involve carefully monitored work in which students have intentional learning goals that enable them to reflect on what is being learned throughout the experience.

'Externships' are curriculum-based courses in which students learn by performing professional roles under supervision by practising lawyers, judges and others involved in legal work. Students normally do this on their own initiative to obtain legal experience.

'Work placement' in this thesis refers to a period of supervised practical work that is integrated as part of the curriculum such as judicial attachments.

'*Ubuntu*' is a way of life and a set of norms rooted in African culture and philosophy which express compassion, justice, reciprocity, dignity, harmony, and humanity in the interests of building, maintaining and strengthening the community, and subjugates individualism to communitarianism.[104] Such norms and values determine how a person behaves – and ought to behave – as a human being towards other human beings. Such 'humane' behaviour includes empathy, consultation, compromise, consensus building and dialogue, among others.[105] *Ubuntu* is often used to modify the effect of rules of law when their application yields morally or ethically unjust results so that its role in African culture is similar to the concept of equity as originally developed in English common law.[106]

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103 Diala (ibid)

104 Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7 (South Africa); City of Johannesburg v Rand Properties (Pty) Limited and Others [2006] ZAGPHC 21 (South Africa)

105 TW Bennett, Ubuntu: An African Jurisprudence (Juta, 2018) 32

106 Bennett (ibid) 101

'*Indaba*' is a process of deliberation by male and female elders of a community used to discuss troublesome matters. It is primarily used to evoke the concept of a traditional African method of decision-making, rather than a more formal, typically Western process. The function of the *Indaba* complements the overarching normative goal of *Ubuntu*.

In the next chapter, the researcher reviews the literature pertaining to legal education and the professional preparation of legal practitioners, as well as the pedagogical approaches that influence legal education and practical training. In reviewing the literature, the researcher tries to show the lacunae that still exist in our corpus of knowledge and how the study fits into current debates and the competing theories that shape our notions about the nature of a contextualised legal education in Africa.

2.1 Introduction

This chapter discusses the literature pertaining to legal education and professional training in general and goes on to focus on legal education and training in Africa. According to Cownie (2004), there is need to examine the approaches to legal education in universities in order to ask the right questions about the discipline of law and those who teach it.[107] This is necessary because such studies will help us understand the teaching culture of legal education. Concerns in the literature on pluralistic legal systems are that the teaching of law is still influenced by western epistemology which continues to present knowledge as fixed categories, experiences and social practices.[108] Furthermore, the prevalence of western ideas about what constitutes valid knowledge has resulted in pedagogical approaches that do not cohere with indigenous values and knowledge that could enhance the teaching and learning experience in such mixed legal systems. Coupled with a lack of empirical research on issues concerning the teaching of law, there is insufficient data that can help us understand the research phenomenon of this study. As Varnava and Burridge (2002) note: "the continuing lack of consensus about the role and function of the law school is evidenced by periodic manifestations of the ongoing debate about 'what law schools are for.'"[109] For instance, there are still some questions about the relationship between knowledge and skills, the substance and form of law programmes and the teaching methods that can be used. This literature review is important in that it examines the developments which can influence new approaches to legal education in Anglophone African universities whose training methods are mostly based on the English system of training

107 See Cownie (n 4) 2

108 See S.G. J Dei, B.L. Hall & D.G. Rosenberg (eds), 'Indigenous Knowledges in Global Contexts: Multiple Readings of Our World. (University of Toronto Press, Toronto 2002)

109 See Varna and Burridge (n 59) 9

lawyers. While many themes that this study deals with may have been previously researched, scholars such as Kahn-Freund observe that:

> Every practitioner of the art of legal education moves in a landscape which has already been mapped by his predecessors, but it is almost impossible for him not to hit upon a trail here or an obstacle there which others had not noticed before him.[110]

Many other scholars continue to ask questions related to these themes. A conference paper by Sherr (2005) asks, albeit rhetorically, "Legal education, where do we begin? Starting again...and again."[111] African academics are now asking direct questions in their contributions in specialist journals. Manteaw (2008) investigates the question: 'What type of lawyer does Africa need?'[112] Such questions suggest that studying burning issues in legal education often requires us to retrace certain themes if we are to make headway. By analysing the literature on legal education, a new theoretical pathway may be discovered about African legal education, even though that may not resolve some of the highly contentious issues. In the words of Machiavelli in *The Prince*:

> Men nearly always follow the tracks made by others and proceed in their affairs by imitation, even though they cannot entirely keep to the tracks of others or emulate the prowess of their models. So, a prudent man must always follow in the footsteps of great men and imitate those who have been outstanding. If his own prowess fails to compare with theirs, at least it has an air of greatness about it. He must behave like those archers who, if they're skilful, when the target seems too distant, know the capabilities of their bow and aim a good deal higher than their objective, not in order to shoot so high, but so that by aiming high they can reach the target.[113]

110 O. Kahn-Freund (n 36) 121

111 Avrom Sherr, 'Legal education where do we begin? Starting again...and again', paper presented at the Australian Law Teachers (ALTA) Conference (University of Waikato, New Zealand, July 2005)

112 Steve O. Manteaw (n 2)

113 Niccolo Machiavelli, The Prince, as translated by George Bull (Penguin Books, 1999) 19

2.2 Legal education and conception of African lawyers

In his collection of essays on legal education, William Twining (1997) argues that simplistic images of the lawyer based on assumptions about legal education are partly responsible for existing controversies.[114] His view is that the problems of lawyer education require, as a starting point, a well-developed sociology of the legal profession.[115] There is a need for clarity about the type of end-product desired before we can start formulating policies and objectives relating to legal education.[116] In this regard, Twining (ibid) notes:

> In order to arrive at an adequate formulation of objectives, there is need to ask and re-ask the questions: What are lawyers for? What could lawyers be for? What should lawyers be for? A necessary foundation is a job analysis of what lawyers do, a skills analysis of the operations involved, and some reliable studies of the economics of the profession, the psychology of professionalism, and the many other fields of inquiry that fall under the general rubric 'the sociology of the legal profession.[117]

African academics such as Steve Manteaw (2008) therefore suggest the need for a different conception of lawyers in the African context. Citing Grady Jessup (2002) he claims:

> The law courses of early curricular design did not reflect the needs of the society, and the training of lawyers was based on doctrinaire teaching geared to an adversary setting catering to litigation for the fortunate few at the cost of social injustice to the deprived many.[118]

Manteaw then argues: "This initial focus on litigation still permeates the legal system. Rarely is it regarded as a lawyer's duty to settle cases out of court or to use the law as a tool for public interest services and socioeconomic engineering."[119] Historically, such views have also been shared rather controversially by African political revolutionaries who sought to influence the

114 William Twining, 'Pericles and the Plumber' in Law in Context: Enlarging a Discipline (Clarendon Press, 1997) 83

115 Twining (ibid)

116 Twining (ibid)

117 Twining (ibid)

118 Grady Jessup, 'Symbiotic Relations: Clinical Methodology—Fostering New Paradigms in African Legal Education', 8 Clinical Law Rev. 377, 387 (2002) cited in Steve O. Manteaw (n 2) 919

119 Manteaw (n 2) 919-920

form of legal training in post-independent Africa. Harrington and Manji (2003) quote Kenneth Kaunda who highlights that the traditional role of a lawyer does not suit the African context because "it becomes the duty of all those who are more fortunate to use their knowledge and skills not just for the benefit of their client, but for the advancement of the whole society."[120]

In a more recent article, Harrington and Manji (2019) also describe Kwame Nkrumah's exasperation with the "deficiencies of inherited laws and forms of practice" that make lawyers concentrate their efforts on litigation involving the wealthy "neglecting less lucrative disputes and effectively promoting 'colonial economic interests.'"[121] Nkrumah's philosophy was based on the belief that law must represent the will of the people and must be designed and administered in order to advance the social contract of the state. His views in a speech published in 1962 in the Journal of African Law[122], reflect the communitarianism of historic African societies. His view of legal education was that it must produce lawyers with a concern for everyday legal problems which had been neglected by elite litigators. Such arguments also resonate with African academics such as Raymond Atuguba (2017) who openly talks about the limitation of the justice system in Africa which:

> costs too much when we get in [court which is] ultra-crowded when we get there; the principles of Law and Justice applied to us in there are alien to us − some imported from [Britain] many centuries ago; we are lost in a maze of procedures and jargon whilst we are in there; it takes too long to get out; the results we get from the court halls are often spiced with corruption and flavoured with politics; and our relationships are damaged after we get out.[123]

120 See Harrington and Manji (n 29) 396

121 John Harrington and Ambreena Manji, 'Africa Needs Many Lawyers Trained for the Need of Their Peoples': Struggles over Legal Education in Kwame Nkrumah's Ghana', American Journal of Legal History (2019) 1, 21

122 p.103

123 Raymond Atuguba, 'We need a legal revolution. And we need it now!', Lecture delivered at the Maiden Revolutionary Lecture Series under the theme "Restoring the values of probity, accountability and truth in contemporary governance" (Accra, 2 June 2017). Raymond Atuguba also discusses the need to reform civil litigation to improve access to justice along the same lines as the Woolf Reforms to "level the playing field between litigants, by eliminating wealth gaps and taking away the power of one litigant to bully another with money." See Raymond Atuguba, 'Shaping the Future of Civil Litigation in Ghana', in Christine Dowuona-Hammond, Ama Hammond, Raymond A. Atuguba (eds), *Mobilising the Law for Ghana's Future: Appraising to Revolutionise* (Wildly, Simmonds and Hill Publishing, 2020) 558, 570. See also Isaac Madondo, The Role of Traditional Courts in The Justice System (2017) 7

Atuguba (ibid) further contends that formal systems of justice as administered by the courts are too adversarial and have paralysed all other alternative systems of justice that best express the will of the people. The argument here is that there exists two opposing domains of law and justice which need to converge to ensure, in Atuguba's words, that justice emanates from the people and is administered by the judiciary on their behalf as the community which must participate in the administration of such justice through the institutions that the community establish, including customary tribunals. It is therefore necessary to reform legal education in order to develop an African conception of law and justice so that what students learn reflects the African context.

Some reports such as the 1995 'Final Report of the Committee on Legal Education, Training and Accreditation in Uganda' recommend that law subjects should be restructured to address local problems and conditions; and should specifically consider problems of the rural community.[124] As a result, Atuguba (ibid) calls for simpler structures for legal education and changes in teaching methods to prepare students for a life of service and nation building.[125] The existence of such literature helps to contextualise the debate about the nature of legal training as scholars investigate how to reconceptualise the sociology of the legal profession in Africa. A book by Sherr (1995) shows that such a new sociology is inevitable because of new trends in the provision of legal services.[126] He notes that because the traditional role of lawyers is changing, the relationship between solicitor and client is also changing because legal work within the law firm has become more industrialised.[127] He explores this further in another book written in 1999[128] in which he analyses the changing lawyer-client relationship. He observes

124 at p.27. See also Madondo (ibid) 4

125 See Atuguba (n 123).

126 Avrom Sherr, Of Superheroes and Slaves: Images and Work of the Legal Professional (Current Legal Problems, Vol. 48(2), 1995)

127 Sherr (ibid) 327

128 Avrom Sherr, Client Care for Lawyers (2nd ed. Sweet & Maxwell, 1999) 138-147

that it is now common among law firms for several lawyers in the same firm to work on different aspects of the same case. This implies that different skills and approaches to education, training and socialisation are necessary to accomplish specific tasks.[129] Sherr's book (ibid) seems to support the view that law firms in Africa need lawyers who are specialists in customary law and culture in order to deal with cases that have cultural elements. As LCB Gower (1967) observes: "nothing is more misleading than the common assumption that Africans can be clearly distinguished as rural tribesmen or detribalised urbanites."[130]

In Africa, available literature suggests that the practice of law in Anglophone African jurisdictions is increasingly requiring expertise in customary law and culture. As noted by Gordon Woodman (1971), courts are constitutionally enjoined to apply and develop customary law.[131] In Ghana, the 1992 Constitution recognises rules of customary law as part of the common law. Accordingly, some legal scholars suggest that in some legal situations courts may have to apply both principles of customary law and common law to resolve some disputes which arise from a conflict of laws requiring internal conflict rules, especially in jurisdictions such as Zimbabwe where legal dualism or pluralism exists.[132] Consequently, courts routinely invoke customary law in matters pertaining to succession[133], chieftaincy[134], family law[135], criminal law[136] and land law.[137] For instance, decisions such as *Otieno v Ougo*[138] confirm that common law and African customary law are no longer mutually exclusive and that they are meant to complement each other. Some African legal academics such as Keneilwe Radebe

129 Sherr (ibid)

130 LCB Gower (n 57) 3

131 Gordon R. Woodman, 'Acquiescence in English Law and the Customary Land Law of Ghana and Nigeria', (1971) 15 J. AFR. L, 41

132 Woodman (ibid) 25; see also William Tetley, 'Mixed jurisdictions: common law vs civil law (codified and uncodified)', 1999-3 Unif. L. Rev. 591

133 K.A. Busia, The Position of the Chief in the Modern Political System of Ashanti (Routledge, 2018)

134 S.A. Brobbey, The Law of Chieftaincy in Ghana: Incorporating Customary Arbitration, Contempt of Court, Judicial Review (Advanced Legal Publications, 2008)

135 Robert Tsambo vs. Lerato Rubeta Sengadi SCA (Bloemfontein) SCA Case No. 244/2019 (South Africa) where the Supreme Court in Bloemfontein ruled that the appellant's contentions concerning the status of the respondent's marriage under customary law failed to take into account that customary law was constantly evolving.

136 Republic v Mohamed Abdow Mohamed (supra, n 51)

137 Gordon R. Woodman, Customary Land Law in the Ghanaian Courts (Ghana Universities Press, 1996)

138 Civil Case No. 4873 of 1986 (Kenya)

(2018) acknowledge that legal practice now involves "practising customary law."[139] As officers of the court, practicing lawyers are therefore concerned about case law which shows that courts continue making decisions that do not reflect the culture and customary law as perceived by the community concerning a range of fundamental issues pertaining to personal rights, duties and property rights in areas such as Family Law[140] and Land Law.[141] There are encouraging developments in some jurisdictions such as South Africa as illustrated by the South African Constitutional Court's landmark decision in *Alexkor Ltd & Another v Richtersveld Community & Others*.[142] The court endorsed indigenous law as an integral part of common law in that the court did not only determine the important aspect of ownership from a common law perspective, but also from a customary law one.

According to case law, it is inevitable for African lawyers to learn skills associated with customary law because some disputes are entirely in the realm of customary law such as chieftaincy matters.[143] This includes most disputes about the nomination, election, installation, deposition and abdication of chiefs, as well as the customary relationship between traditional authorities.[144] A.K.P. Kludze (1998) notes that jurisdiction in such matters is conferred on traditional councils and tribunals, whose processes and procedures do not require approaches associated with formal state courts.[145] Stephen A. Brobbey (2008) highlights customary arbitration as one of the approaches to chieftaincy disputes.[146] The knowledge of such cultural

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139 Keneilwe Radebe, 'Women, Customary Law and Legal Education' paper presented at the SALTC Conference (University of Pretoria, 11-13 July 2019)

140 Mavimbela v Minister of Home Affairs (49613/14) [2016] ZAGPPHC 889 (30 May 2016) (South Africa); Yaotey v Quaye (1961) 76 GLR 573 and Essilfie and Another v Quarcoo (1992) 80 2 GLR 180 (Ghana). In South Africa, the ascertainment and application of law to determine the validity of marriage continues to create controversy because parties usually are subject to both customary and state law. Recent cases reported in the media in South Africa show that courts continue to grapple with the issue. See Karishma Thakurdin and Nonhlanhla Msibi, 'Court rules that Lerato Sengadi is HHP's customary wife, denies interdict to stop funeral' <https://www.timeslive.co.za/tshisa-live/tshisa-live/2018-11-02-just-in-court-rules-that-lerato-sengadi-is-hhps-customary-wife-denies-interdict-to-stop-funeral/> accessed 5 June 2019)

141 See Samuel S.K.B Asante, 'Interests in Land in the Customary Law of Ghana – A New Appraisal (1965) 74 Yale L.J. 848

142 [2003] (12) BCLR 1301 (CC) (South Africa)

143 The Ghana Bar Association v. The Attorney General [1995-96] 1 GLR 598 (Ghana)

144 A.K.P. Kludze, 'Chieftaincy Jurisdiction and the Muddle of Constitutional Interpretation in Ghana', (1998) Journal of African Law, Vol. 42, No.1

145 A.K.P. Kludze (ibid)

146 See Brobbey (n 134)

processes concerning chieftaincy remains relevant in formal courts because the Supreme Court is often the court of last resort in chieftaincy matters.[147] The logical conclusion is that lawyers and judges should be well versed in cultural approaches associated with customary law to be able to assist courts in adjudicating legal disputes with elements of customary law that cannot be resolved using English common law. As A.K.P. Kludze (1998) notes concerning the adjudication of chieftaincy disputes in particular, such skills which are steeped in African customary law help in legal proceedings that are the opposite of the "acrimonious setting of a regular court-room."[148] Relevant case law also shows that there are often complex cases that do not only involve the application of customary law *per se*, but also the interpretation and application of statutory law since the traditional authorities that have original jurisdiction in those disputes are established by statute.[149]

African customary law is inherently complex especially concerning the laws that govern the daily lives of Africans such as Family Law, Law of Succession, Land and Property Law, among others. S.K.B. Asante (1965) notes that "the very nature of customary law makes reference to contemporary practice and usage in society an integral part of the legal process."[150] Asante provides a new perspective on customary law about land ownership in Ghana, arguing that customary law as administered by the courts is based on 'analytical positivism' with judges being heavily influenced by the doctrine of *stare decisis* "as an axiom of the judicial process."[151] Indeed, Gordon Woodman (1996) whose PhD thesis on Restatement of African Customary Law was supervised by S.K.B. Asante, has also argued that the litigation of land law matters in Ghanaian courts is complicated by customary practices that are peculiar to African

147 The Ghana Bar Association v. The Attorney General (supra n 143)

148 See Kludze (n 144) 62

149 Republic v. National House of Chiefs and Others (J4/32/2018) [2019] GHASC 6 (30 January 2019) (Ghana)

150 See Asante (n 141) 848

151 Asante (ibid) 849

customary law.[152] As Asante himself observes in his 1965 article, even the conveyance of such interests in land is a complex affair because of the evolving nature of customary law which is frequently misinterpreted by the courts.[153] The available literature therefore confirms this as one reason why lawyers must have knowledge of 'living customary law', as opposed to 'formal customary law' that is taught in law schools using analytical positivist approaches unsuitable for the study of a discipline that is grounded on the customs and culture actually prevailing in African communities. Hence, in his Preface to Isaac Madondo's book, *The Role of Traditional Courts in the Justice System*, Mandisa Maya the President of the Supreme Court of Appeal of South Africa, notes:

> Despite the massive urbanisation of the African society and the relentless human advances, customary law continues to exist in oral traditions, practices, codes and academic writings and in a system of a flexible and adaptable 'living law', which is by no means the exclusive preserve of traditional leaders and state functionaries, that regulates the lives of the vast majority of Africans.[154]

It is therefore difficult to disagree with Sherr's assertion that legal practice now requires lawyers whose training and socialisation transcends the traditional role of a lawyer. As already shown, law firms continue to deal with legal matters that require knowledge and processes steeped in African customary law so that 'skills' in the African context have a different connotation. As will be shown in the sections that follow, it is farcical for lawyers to assume that their traditional training based on the English system is sufficient for practice in a mixed legal system. In the context of South Africa, Lesley Greenbaum (2009) argues that law schools may have to adopt a training system that can help shape a new professional identity given the historical background of colonialism and non-inclusive society.[155] Greenbaum further notes

152 See Woodman (n 137)

153 See Asante (n 141) 869

154 Isaac Madondo, The Role of Traditional Courts in The Justice System (2017)

155 See Greenbaum (n 5) 24

that in South Africa, following a new democratic dispensation, there were new priorities in legal education in order to address issues associated with a more diverse and pluralistic legal system such as customary law, social justice, equality, poverty and access to justice. As a result, the existing LLB curriculum is not fit for purpose.

Available literature on international legal education such as The Pearce Report in Australia (1987), MacCrate Report (1992) in the United States, Report of the Lord Chancellor's Advisory Committee on Legal Education and Conduct (1996) and Legal Education and Training Review (LETR, 2013) in England makes several recommendations concerning the sociology of the legal profession following commissioned research in legal education and training. Such reports continue to catalyse major reforms and are often cited in debates and academic articles about legal education and training in the UK and elsewhere. Issues raised by these reports that often relate to the content of the law degree also dominate international conferences. While such reports have been a catalyst for change, this has not been the case in the majority of Anglophone African jurisdictions. The only major reforms were those that followed Lord Denning's 1961 Report of the Committee on Legal Education for Students from Africa and other isolated post-independence reports such as Gower's proposals for the structure of legal education, and other reports that looked at the reform of specific areas of the law such as the 1961 Gower Report on Company Law in Ghana. In relation to customary law and culture, the major reforms concerned restatements of customary law which only succeeded in distorting the nature of customary law due to the so-called repugnant clauses and their effect on Anglophone African legal systems.[156] As a result, there remains a gap in the literature concerning how African legal education should

156 See Harrington and Manji (n 9) 21

reconceptualise the nature and training of African lawyers to strengthen their role in African pluralistic legal systems.

2.3 Globalisation vs. '*Glocalisation*'

Sherr's (1995) observation about the new trends in the provision of legal services recognises how globalisation is transforming the traditional role of a lawyer. Some academics such as Ballakrishnen (2012) have focused on the impact of outsourcing of legal services as evidence grows of magic circle firms in the UK outsourcing legal work to their foreign-owned subsidiaries and other foreign firms in developing and emerging economies of India and South Africa.[157] In South Africa, Klaaren (2016) notes that there is an emerging African corporate legal elite as a result of corporate legal services rendered by South African lawyers who serve corporate clients of foreign corporations.[158] Klaaren (ibid) focuses on the internationalisation of law firms and the emergence of global law firms in parts of Africa such as Nigeria and Kenya. Some of the literature suggests that the globalisation of legal services should be contemporaneous with culturalisation. The recent 'Blueprint on Global Legal Education' by the IBA Commission on the Future of Legal Education identifies 'cultural globalisation' as one of the challenges of globalisation of legal services. Hence, Josef De Beer and Ben-Erik van Wyk (2019) advocate *"glocalisation"*, i.e., a globally competitive curricula, with local relevance to promote indigenous knowledge.[159] They argue that *"glocalisation"* builds on the notion of a 'third culture building' which entails an exchange of cultural wealth (cultural ideas,

157 Swethaa Ballakrishnen, 'I love my American Job: Professional Prestige in the Indian Outsourcing Industry and Global Consequences of an Expanding Legal Profession', International Journal of the Legal Profession (2012) 19 (No. 2-3) 379-404. See also: Chloe Smith, 'Freshfields plans new support sites in US and Asia' <http://www.lawgazette.co.uk/5049409.article?utm_source=dispatch&utm_medium=email&utm_campaign=GAZ160615> accessed 29 August 2019 for news of the UK Law Firm Freshfields and its plans to outsource work to Asia and the US; Margaret Taylor, 'A&O signs outsourcing deal with LPO provider Integreon,' (The Lawyer, 18 November 2009) <http://www.thelawyer.com/issues/online/ao-signs-outsourcing-deal-with-lpo-provider-integreon/> accessed 29 August 2019

158 Jonathan Klaaren, 'African corporate lawyering and globalization', International Journal of the Legal Profession, (2015) 22:2, 226-242

159 Josef De Beer and Ben-Erik van Wyk, '*Glocalisation*: The role of indigenous knowledge in the global village', in J. De Beer (ed.), 'The decolonisation of the curriculum project: The affordances of indigenous knowledge for self-directed learning' (NWU Self-directed Learning Series Volume 2), (2019) 1–23, AOSIS, Cape Town. https://doi.org/10.4102/aosis.2019.BK133.01

knowledge, stories, approaches...). African scholars such as Jenipher Owuor (2007) argue that despite the onslaught of globalisation, education must, of necessity, incorporate indigenous knowledge and African practices to enhance contextual learning.[160] This is because learners do not enter the classroom as *tabula rasa*; they come with their cultural knowledge based on the environments in which they live. Teachers are therefore encouraged to harness this knowledge by adopting Problem Based Learning strategies[161] which help to develop problem solving skills to resolve disputes with cultural elements. Hence, Austin (2009) discusses how the Navajo Nation courts apply Navajo indigenous culture like Hózhó (harmony), K'é (peacefulness and solidarity), and K'éí (kinship) to modern legal issues. He applies these cultural concepts both within the Navajo cultural context using the case method of legal analysis as they are adapted and applied by Navajo judges in virtually every important area of legal life in the tribe. He analyses the importance of indigenous traditional institutions in North America and how other indigenous people around the world can draw on traditional precepts to achieve self-determination and be able to solve community problems and control their own future.[162]

Some media reports also show that in Africa, there are some judges who acknowledge that certain cases should be resolved culturally. In one article, a Ghanaian Supreme Court Judge justifies the importance of involving elders in dispute resolution noting that the reliance on legal representation in formal courts inhibits justice delivery because court proceedings are often intimidating to parties.[163] The role of elders in African customary law has also been analysed in the context of 'gerontocracy', which is leadership by elders as in Roman

160 Jenipher A. Owuor, 'Integrating African Indigenous Knowledge in Kenya's Formal Education System: The Potential for Sustainable Development', (2007) Journal of Contemporary Issues in Education, 2(2) 21-37. See also J. Abah, et. al., 'Prospect of Integrating African Indigenous Knowledge Systems into the Teaching of Sciences in Africa, (2015) American Journal of Educational Research Vol. 3, No. 6, 668-673

161 See De Beer and Van Wyk (n 159)

162 Raymond Darrel Austin, Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance (University of Minnesota Press, Minneapolis: 2009)

163 Issah Mohammed, 'Consider societal values in arriving at decisions' (Ghana Daily Graphic, Accra 14 May 2018)

civilisations.[164] Hence, in terms of African customary law, elders are associated with wisdom along the same lines as the Greek philosophy of the Aristotelian era or the age of "Pericles", an image of a lawyer envisioned by Twining in his article 'Pericles and the Plumber.'[165] According to Peter Onyoyo (2014), elders gathering in a council can make binding rulings based on skills of analogy akin to the doctrine of judicial precedent.[166]

Part of this *'glocalisation'* involves the teaching of African indigenous languages which has become the focus of research by some academics, especially given the diversity of culture and languages in many African societies and jurisdictions such as South Africa. Hence, Zakeera Docrat (2017) explores these issues in her award-winning thesis titled, 'The Role of African Languages in the South African Legal System: Towards a Transformative Agenda.'[167] Even more interesting is the fact that there is a corpus of literature that talks about indigenous languages as an important aspect of an emerging special discipline called 'forensic linguistics.' In a separate article titled 'Forensic linguistics holds promise for South Africa's legal system' Zakeera Docrat and Russell H. Kaschula (2019) argue that understanding the intricacies of language and the law will enhance social justice in multilingual societies such as South Africa.[168] The literature suggests that forensic linguistics can improve informed language policies in the legal context, especially how languages should be used in courts of law. In the context of Ghana, Janine Ubink (2002) points out the challenges arising from cultural dynamics in courts because while court proceedings are recorded in English, most hearings are held in a combination of English and the local language.[169] Twining (1997) therefore notes that most

164 Peter O. Onyoyo, 'Kenya National Council of Elders & Theory of Gerontocracy in the African Customary Law' (University of Nairobi Digital Repository, 2014) (on file with researcher)

165 See Twining (n 114) 83

166 See Onyoyo (n 164)

167 Zakeera Docrat, MA Thesis (University of Rhodes, 2017)

168 Zakeera Docrat and Russell H. Kaschula, 'Forensic linguistics holds promise for South Africa's legal system' (The Conversation, 20 January 2019) <http://theconversation.com/forensic-linguistics-holds-promise-for-south-africas-legal-system-108113> accessed 17 January 2021

169 Janine M. Ubink, 'Courts and Peri-Urban Practice: Customary Land Law in Ghana' (2002-4) Ghana Law Journal 22, 25-77, 177

Anglophone African legal systems require approaches that consider the socio-economic, political and cultural peculiarities of such jurisdictions that still struggle to deal with problems created by legal transplants.[170]

The literature discussed in this section has spotlighted William Twining's (1966) concern that challenges in the training of lawyers in Anglophone African countries have been partly due to the fact that law schools have inherited a training model that is based on 'the private practitioner image of legal education – and of one kind of English practitioner at that.'[171]

2.4 Integrating customary law and culture in the law curriculum

The UK 2013 Legal Education and Training Review (LETR) recommends that the undergraduate traditional core courses should be reviewed by adding courses that are relevant to the profession and to the legal system. In his report published in the Law Teacher (2013), Lord Neuberger also suggests that university law schools must be given the leverage to expand their law curricula to include their own academic interests.[172] In his reflections about teaching law in the Sudan, Twining (1997) criticises the Khartoum LLB degree for failing to concentrate on areas of law that were relevant to Sudan.[173] Such literature suggests that there is need to investigate those additional elements that should be integrated in African legal education as part of the Africanisation of the law curriculum.

In the UK, the media make a case for the decolonisation of the curriculum in British universities. Two articles, 'Academics: It's time to get behind decolonising the curriculum'[174]

170 William Twining, 'The Camel in the Zoo' in Law in Context: Enlarging a Discipline (Clarendon Press, Oxford 1997) 31-32

171 William Twining, 'Legal Education within East Africa' (1966) 12 Int'l & Comp. L.Q. Supp. Pub. 115, 139

172 Lord Neuberger of Abbotsbury, 'Reforming legal education', (2013) The Law Teacher Vol. 47, No. 1, 4-17, 11

173 See Twining (n 170) 30

174 James Muldoon, *Guardian* (London, 20 March 2019)

and 'Not Enough Africa in African Studies Course, Graduates Claim'[175] challenge academics to eliminate biases and omissions "that limit how we understand politics and society."[176] The articles encapsulate decolonisation as "a fundamental reconsideration of who is teaching, what the subject matter is and how it's being taught."[177] Indeed, in the African context, there appears to be a resuscitation of Steve Biko's Black Consciousness Movement which is reflected in contemporary student movements such as *#RhodesMustFall* and *#FeesMustFall* that are agitating for the decolonisation of education in elite universities in South Africa such as the University of Witwatersrand and the University of Cape Town. Such new impetus for change is already yielding a new consciousness in African scholarship as depicted in the collection of essays in *Rhodes Must Fall: The Struggle to Decolonise the Racist Heart of Empire*[178] which articulate the need to decolonise thinking in academic institutions, and Simukai Chigudu's *op-ed* in the *Guardian*, "'Colonialism had never really ended': My life in the shadow of Cecil Rhodes,'"[179] which expresses how young African scholars are struggling to find a new identity untainted by British colonial legacy in Africa. This renewed rejection of British hegemony in African scholarship complements W. Wesley Pue's (2016) *Lawyers' Empire* which, according to David Sugarman's Foreword, "makes a strong case for seeing law and legal professionalism and education as a means of representing and thus helping to create professional, national, religious, ethnic and cultural identities [because]… legal education and the socialization of lawyers seek nothing less than the transformation of souls."[180] Such concerns about identity are captured by Thabo Mbeki's speech, 'I'm an African', on the occasion of the passing of the new Constitution of South Africa on 8 May 1996: "A human presence among all these, a feature on

175 Eleanor Busby, *Independent* (London, 29 August 2019)

176 See Muldoon (n 174)

177 Muldoon (ibid)

178 Brian Koba et al (ed) (Zed Books, London 2018)

179 Simukai Chigudu, *Guardian* (London, 14 January 2021) <https://www.theguardian.com/news/2021/jan/14/rhodes-must-fall-oxford-colonialism-zimbabwe-simukai-chigudu> accessed 14 March 2021

180 David Sugarman, Foreword in W. Wesley Pue, Lawyers' Empire (UBC Press, Vancouver 2016)

the face of our native land thus defined, I know that none dare challenge me when I say – I am an African!...” It needs to be investigated how this new ‘African Renaissance’ is helping to reconceptualise African legal education.

There is therefore evidence of bold attempts by progressive governments to protect traditional and cultural rights by enacting legislation that seeks to preserve the ‘African identity’ by recognising indigenous knowledge and its expression. The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 in Kenya is a notable example. In this context, Paul Kuruk (2007) explores the role of customary law in his article, ‘The role of Customary Law under *Sui Generis* Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge’.[181] Kuruk (ibid) acknowledges the challenges of developing an appropriate regulatory framework owing to the extreme diversity in customary law amongst indigenous groups. According to Kuruk, customary law has become an important area of inquiry to enable the development of appropriate *sui generis* regimes so that indigenous knowledge can be protected as intellectual property. He further observes that there is not much information available in the literature about the effectiveness of customary law as a protective mechanism. Kuruk’s article presents a compelling argument for integrating culture in legal education because the diversity of culture in Africa requires lawyers and the courts to improve on the existing methods and procedures of ascertaining and applying rules concerning traditional knowledge particularly because the African Charter requires African states to respect positive cultural values.

181 (2007) Ind. Int’l & Comp. L.Rev Vol 17:1

2.4.1 Customary Dispute Resolution

While the existing law curriculum is still dominated by adversarial approaches based on the English system[182], Jacqueline Nolan-Haley (2015) notes that informal and non-adversarial dispute resolution approaches are inherent in the African society.[183] However, there is currently a dearth of literature about the skills associated with customary law and culture that could be useful in the administration of justice.[184] Although such skills are offered as part of Alternative Dispute Resolution (ADR) in other jurisdictions,[185] some African academics such as Andrew Chukwuemerie (2006) are concerned that ADR is a western concept whose approaches are too formal and inconsistent with customary law.[186] For instance, legal writers such as Susan Cain (2012) concentrates on how ADR skills such as negotiation can be deployed in the practical world of law and business,[187] while Ghanaian legal luminary S.K.B. Asante (2012) specifically draws attention to the importance of negotiating skills in international business transactions.[188] This literature does not treat such skills as an African cultural phenomenon *per se* but as a necessary part of legal education.

There is also very little evidence of how traditional approaches to customary dispute resolution can be incorporated in the curriculum. In Ghana, where the Alternative Dispute Resolution Act (2010) was enacted to promote ADR, perhaps because of Richard Crook's 2004 commissioned study recommending the need for definitive enforceable remedies to encourage out-of-court

182 This is because lawyers during the colonial period were trained by the Inns of Court. See Ndulo (n 71) and Matheaw (n 2)

183 Jacqueline Nolan-Haley, 'Mediation and Access to Justice in Africa: Perspectives from Ghana' (2015) Harvard Negotiation Law Review Vol 21, 59

184 See in particular Stewart Macaulay in his introductory remarks and references he cites on mediation and dispute resolution in Karl N. Llewellyn's The Bramble Bush: On Our Law and Its Study, (Legal Legends Series, Quid Pro Books, 2012) xvii-xxi

185 See for instance, ADR and Civil Justice, Final Report of CJC Working Group (November 2018)

186 Andrew Chukwuemerie, 'The Internationalisation of African Customary Law Arbitration' (2006) 14 Afr. J. Int'l & Comp. L. 143

187 Susan Cain, Quiet: The Power of Introverts in a World That Can't Stop Talking (Penguin Books, 2012)

188 SKB Asante, Welcome address on the inauguration of the Institute of International Negotiations (11 July 2012). See also, SKB Asante and Roland Brown, 'Negotiation with Transnationals: The Technical Assistance Programme of United Nations Centre on Transnational Corporations (UNCTC) (International Business Lawyer, 1988)

settlements[189], lawyers are still oriented towards litigation.[190] This is despite Galanter's observation (1984) that the traditional law curriculum does not consider the reality that litigation and settlement negotiations generally cohere, which he terms "*litigotiation"*.[191] Galanter therefore argues that a course in negotiation is critical to "challenge students to reorganise the cognitive map of the legal world implanted by an education centred on the reading of appellate cases.[192] To this extent, a report by the International Legal Centre (1975), 'Legal Education in a Changing World', notes that in some cases there is need to develop non-formal settlement processes by using unofficial institutions to achieve this.[193]

P.H. Gulliver (1979) identifies negotiation as one such approach for resolving dispute among Africans.[194] The empirical evidence from his study of the Arusha community in Tanzania shows that when disputes arise between parties who are peers in the same community, they tend to compromise to restore good neighbourly relations and avoid unnecessary escalation. While acknowledging that processes of negotiations occur in all societies, including in the West, Gulliver argues that in African communities, rules governing negotiation are themselves flexible and subject to negotiation unlike in the West where legal rules are fixed categories.[195] Characterising elements of African negotiation, Rathi (2015) considers the *Indaba* (a negotiating strategy used by the Zulu and Xhosa tribes of Southern Africa to resolve disputes involving many parties in a community) in an online article for Quartz[196] as akin to a conference held to discuss problems in a participatory, but fair manner in order to break a deadlock during

189 Richard C. Crook, 'Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspective (2004) Journal of Legal Pluralism 1

190 Kwado Sarkodie, 'Arbitration in Ghana – The Alternative Dispute Resolution Act 2010' (October 2011) The International Construction Law Review

191 Marc Galanter, 'Worlds of deals: using negotiation to teach about legal process' (1984) 34 J. Legal Education 268

192 Galanter (ibid) 270

193 ILC (n 12) 10

194 P.H. Gulliver, Disputes and Negotiations: A Cross Cultural Perspective (Academic Press, New York 1979) 234

195 P.H. Gulliver, 'Negotiations as a Mode of Dispute Settlement: Towards a General Model' (1973) 7 Law & Soc'y Rev. 667

196 See www.qz.com. Quartz is a website owned by Atlantic Media Co. Its staff includes reporters formerly employed at Bloomberg, The Wall Street Journal, The Economist, and The New York Times. The initial sponsors of Quartz were Boeing, Chevron, Cadillac, and Credit Suisse.

a dispute. The *Indaba* was adopted to achieve consensus during the 1995 Paris climate talks.[197] Schapera (1938)[198] and Comaroff and Roberts (1981)[199] also refer to the approach used by the Tswana whereby tribal authorities function through consultation and consent to resolve political and legal issues affecting the community using the *'Kgotla'* (a council comprising all elders and headmen who meet, sometimes on more than one occasion, to discuss matters of policy and administration until a pending matter is resolved by consensus). For instance, Susan Williams' (2007) book *Colour Bar: The Triumph of Seretse Khama and His Nation*[200] describes how the *Kgotla* system was used to avert a constitutional crisis that delayed Sir Seretse Khama's installation as the Chief of the Bamangwato tribe in central Botswana.

Jomo Kenyatta (1965), who studied anthropology under Bronislav Malinowski[201], in his anthropological account of the Kikuyu tribe, *Facing Mount Kenya*, observes that resolving family disputes focuses on achieving mutual agreement to avoid destabilisation of the family unit.[202] The procedure ensured that no case would be brought before the general assembly or public court of the elders before it had been tried by the family council. In the UK, recent reforms in family law practice and procedure also reflect an inclination towards mediation instead of litigation.[203] This is a recognised form of 'non-court dispute resolution' which has a statutory force. The Court of Appeal's decision in *S v. S (Financial Remedies: Arbitral Award)*[204] also endorses other forms of non-court dispute resolution such as collaborative law

197 Akshati Rathi, 'This simple negotiation tactic brought 195 countries to consensus', (Quartz, 12 December 2015) <https://qz.com/572623/this-simple-negotiation-tactic-brought-195-countries-to-consensus-in-the-paris-climate-talks/> accessed 8 July 2021

198 Isaac Schapera, A Handbook of Tswana Law and Custom (International African Institute, Hamburg 1994)

199 Comaroff and Roberts (n 14) 25

200 Penguin Books (2007) 40-51. The book is now a major motion picture, 'A United Kingdom', released in 2016 and directed by Amma Asante.

201 The Polish-born British anthropologist whose writings on ethnography, social theory, and field research were a lasting influence on the discipline of anthropology. His prominent work included Crime & Custom in Savage Society (1926)

202 Jomo Kenyatta, Facing Mount Kenya (Vintage, New York) 206

203 s10, Children and Family Act 2014. Mandatory mediation or conciliation programmes are also required in most family courts in the United States. See also in this regard, Carrie Menkel-Meadow, 'Crisis in Legal Education or Other Things Law Students Should be Learning and Doing', (2014) 45 McGeorge L. Rev. 1-28

204 [2014] EWHC 7 (Fam)

and arbitration in financial remedy proceedings following a divorce action. Most recently, perhaps owing to the challenges caused by the COVID-19 pandemic, the Housing Possession Court Duty Scheme (HPCDS) was piloted in the UK in a bid to ease the backlog of cases heading for court through mediation.[205] Some scholars refer to this approach to resolving disputes as "process pluralism."[206] Menkel-Meadow and Lela Porter-Love, et al. (2011) describe the process as follows:

> While litigation, and the adversarial process that inspires it, has its place in the legal order, modern life requires additional processes that better meet the needs of parties in conflict, as well as of the larger societies within which legal and other disputes occur.[207]

This suggests that the approach to law should not be confined to the 'rule-centred paradigm' which considers that social life is governed by rules, and normal behaviour is explained in terms of compliance with such rules. Such a legalistic approach which is based on western legal theory is not suitable in all situations, especially in non-western legal systems. Comaroff and Roberts (1981) use the Tswana dispute settlement process to argue that even where formal and specialised legal institutions exist to settle disputes, disputes must be considered using an approach that analyses conflict in the context of 'extended social processes' – "its genesis, successive efforts to manage it, and the subsequent history of the relationship between the parties."[208] It is this broader scope of the 'processual paradigm' which can help us to understand African dispute settlement by drawing our attention away from formal approaches of dispute settlement that are peculiar to the rule-centred paradigm. Accordingly, legal education in most common law jurisdictions is still based on analytical positivism, an assumption that legal

205 Press Release issued by The Law Society of England & Wales, 8 February 2021 <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/housing-mediation-pilot-must-not-replace-the-usual-routes-to-access-justice?utm_source=professional_update&utm_medium=email&utm_campaign=PU-02%2f12%2f2021&sc_camp=5C0FE0D28B474F6BA2EE374CB3EE601B> accessed 1 March 2021

206 Comaroff and Roberts (n 14)

207 See the Preface to the First Edition in Carrie Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model (3rd edn Wolters Kluwer, New York 2019) 32

208 Comaroff and Roberts (n 14) 14

situations will almost inevitably be resolved by the application of rules administered in a formal system.

In an earlier article, Simon Roberts (1971) argues that even lawyers interested in customary law do not focus on the study of actual disputes and the procedures followed in their settlement, choosing rather to concentrate on the discovery and systematic organisation of abstract rules purporting to constitute the legal norms of the society under investigation.[209] Hence, Max Gluckman's essay in Woodman and Obilade's edited book, *African Law and Legal Theory*, (1995) discusses the limitations of the case method used by legal anthropologists in analysing African customary law.[210] He stresses that a full understanding of law depends on the combination of cases, rules and *praxis* which must all be considered simultaneously.[211] His argument is that disputes must be understood within the context of the environment in which they occur. He contends that the study of the case, or the dispute, or conflict should not be the only focus of the study of law. He highlights the fact that "disputes illuminate a social process; but disputes cannot be understood without the knowledge of the social process."[212] He also refers to the 'extended case-method' which involves tracing the origins of a dispute to understand its genesis and then proceeding with an analysis of the development of social relationships among the persons involved following adjudication or settlement or reconciliation.[213]

209 Simon Roberts, 'The Settlement of Family Disputes in the Kgatla Customary Courts: Some New Approaches' (1971) 15 J. AFR. L (60)
210 Max Gluckman 'Limitations of the Case-Method in the Study of Tribal Law' in Gordon R. Woodman and A.O. Obilade (ed) African Law and Legal Theory (Dartmouth, Hants 1995) 87
211 Gluckman (ibid) 110
212 Gluckman (ibid) 112
213 Gluckman (ibid) 88

Unfortunately, in rare cases where ADR courses are used to expose students to non-judicial dispute resolution in Africa, they are considered an aspect of professional legal training[214] and not undergraduate legal education which must be the foundation of legal training in common law jurisdictions. Carrie Menkel-Meadow (2014) argues that a "modern legal education" should endeavour to train students who should be prepared to work in different settings since conventional approaches may not be suitable for all forms of legal problem-solving because of such factors as class, religion, race, gender, national and cultural differences.[215]

Mwambene and Kruuse (2017) in their empirical work on the practice of *Ukuthwala* (the mock abduction of a girl for the purpose of a Nguni customary marriage), are critical of the "liberal legal model" in South Africa.[216] They analyse the decision in *Jezile v State*[217] to highlight that those cases involving the litigation of criminalised cultural practices such as *Ukuthwala*, require lawyers to balance the interests of the state and the community. As SKB Asante, Paramount Chief of the Asokore Asante in Ghana, observes in a conference paper (2018); even some criminalised cultural practices remain prevalent in African communities because lawyers and legislators often fail to appreciate their full nuances so that such legislation never meets the proclaimed objective because the practices continue to be practised as living customary law.[218] Hence Mwambene and Kruuse's (2017) research[219] shows how African communities are alienated from western legal processes which do not have a "community-oriented" way of decision making that ensures cohesion in the community.[220] Even L.C.B Gower (1966) in his

214 See for instance, David McQuoid-Mason, 'Teaching Aspects of Alternative Dispute Resolution to Candidate Attorneys in South Africa' (2006) Journal of Commonwealth Law and Legal Education, Vol. 4 Issue 2, 157-170

215 Carrie Menkel-Meadow, 'Crisis in Legal Education or Other Things Law Students Should be Learning and Doing', (2014) 45 McGeorge L. Rev. 1-28, 135

216 Lea Mwambene & Helen Kruuse, 'The thin edge of the wedge: Ukuthwala, alienation and consent', (2017) South African Journal on Human Rights, 33:1, 25-45

217 Jezile v State [2015] 3 All SA 201 (South Africa)

218 SKB Asante, 'Law as a Tool of Social Change in The Pluralistic Legal Cultural Context of Ghana', paper presented at the African Studies Association of the UK (ASUK 2018)

219 See also Lea Mwambene and Helen Kruuse, 'Marital Rape and the Cultural Defence in South Africa, (2018) Stellenbosch Law Review, 25

220 Lea Mwambene and Helen Kruuse (n 216) 26

Oliver Wendell Holmes lectures[221] observes that members of a typical African society cannot all be subject to the same legal rules. Gower acknowledges the fact that African societies are not homogenous owing to differences in culture, language and religion, so that many problems cannot be solved by the same approach.[222] The implication of Gower's observation is that the concept of common law, as a system of rules to resolve legal disputes by way of precedent, often leads to injustice in such communities. In this context, African academics such as Offei (2013) have engaged in the discourse about African dispute settlement mechanisms.[223] He refers to the Barotse people of Western Zambia whose *kuta* (court) has authority to adjudicate disputes by adopting informal techniques of conciliation if the disputants are close relations.[224] Offei also refers to Gluckman's study (1955)[225] where he states:

> It is clear that where the demands of some British officers, that the kuta should follow English procedure, to be successful, the kuta would be prevented from fulfilling one of its main functions – the settlement of disputes arising out of the multiplex relations which are still basic in tribal life.[226]

In an earlier book, Offei (2006) also illustrates the complexity of settling disputes that are subject to both common law and customary law.[227] He refers to the decision in *Lemalu Puia'I v Frank Jessop*[228] where the custom of *'ifoga'* in Samoa was recognised as a defence in a claim in tort. In terms of the custom, a defendant who causes injury may give evidence of any gift or apology to the claimant to obtain mercy and settle the matter amicably. Any evidence of an *'ifoga'* is accepted as a compromise of the action that may be considered a full settlement of

221 See Gower (n 57) 3

222 Gower (n 57) 3-4

223 Stephen Offei, Jurisprudence and Legal Philosophy (3rd edn GIALS, Accra 2013)

224 Offei (ibid) 250

225 Gluckman (n 19)

226 Gluckman (n 19) 81 cited by Offei (n 223) 250

227 Stephen Offei, Law of Torts in the South Pacific, (2nd edn Vandeplas Publishing, 2006) 119

228 (1968/69) WS (SC) cited by Offei (ibid) 119-120

the matter.[229] Christa Rautenbach (2005) refers to a similar example in an academic article where she refers to a South African rape case that was resolved by compensation of three head of cattle to the victim's family which brought finality to the matter without recourse to criminal proceedings in the Magistrates' Court.[230] Even in English case law, appellate courts have taken account of the cultural background of the accused to justify reducing rape sentences such as the decision in *R v Bailey*[231] where a sentence of nine months was reduced to £50 and in *R v Byfield*[232] in which the defendant who was convicted of rape was discharged because the judge was persuaded that the defendant's Caribbean culture ought to have been taken into account during his trial. Similar 'cultural defences' have also been invoked in murder cases such as the Kenyan High court decision in *Republic v Mohamed Abdow Mohamed*[233] involving a murder case that was withdrawn by the Director of Public Prosecutions following a 'blood money' *(dia)* reconciliation settlement between the families, a practice common in traditional Somali society.[234]

It is not surprising that there is now a body of literature which discusses matters pertaining to cultural issues in legal proceedings, including the issue of 'cultural defence'[235] and cultural expertise in litigation whereby "cultural brokers" can assist courts with locating and describing relevant facts in light of the background of claimants and litigants.[236] Some scholars have begun to investigate the range of experiences individuals have in presenting cultural evidence and to highlight the need to "inspire practitioners to consider the possibility of raising cultural

229 See Offei (n 227)

230 Christa Rautenbach, 'Therapeutic Jurisprudence in the Customary Courts of South Africa: Traditional Authority Courts as Therapeutic Agents' (2005) 21 S. Afr. J. on Hum. Rts 323, 330

231 R v Bailey [1964] Crim LR 671 (UK)

232 R v Byfield [1967] Crim LR 378 (UK)

233 Supra (n 51)

234 Paolo Contini, 'Evolution of Blood Money for Homicide in Somalia' (1971) 15 J Afr L 77

235 See Marie-Claire Foblets and Alison Dundes Rentein (ed), Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense (Hart Publishing, Oxford 2009)

236 Livia Holden, Cultural Expertise and Litigation. Patterns, Conflicts, Narratives (Abingdon: Routledge, 2011)

defences in appropriate cases."[237] An interesting point to note about some of this material is the fact that most essays in one of the books concentrate on experiences in Western Europe, with only 1 out of the 14 essays focusing on Africa.[238] Perhaps this is because the cultural defence is often unavailable because many cultural practices have been criminalised despite sustained resistance by some communities as illustrated by the South African decision in *Jezile v State*.[239]

However, there is still some case law such as *Mifumi & Others v Attorney General & Others*[240] which suggest that courts still consider some cultural practices, such as the payment of bride price, as an integral aspect of African culture and that those practices should not be abolished. The African value system therefore remains very much the focus of courts and deserves further examination.

Gluckman's (1955) empirical study of the dispute resolution process among the Lozi of Western Zambia also demonstrates that even in traditional justice systems, there is evidence of western legal realism, and that substance should prevail over form even where the application of legal rules is concerned.[241] As observed by Comaroff and Roberts (1981), Gluckman's (1955) study shows that because of the flexibility of Lozi rules and their level of generality, judicial authorities are flexible in the adjudication of disputes.[242] Using her empirical study of customary arbitration in Ghana, Phyllis (2016) posits that post-independence constitutions in Africa have endeavoured to align traditional and formal justice systems.[243] Her study is

237 Holden (ibid) 1

238 See Foblets and Rentein (n 235)

239 Supra (n 217)

240 Mifumi & Others v Attorney General & Others (Constitutional Petition No. 12 of 2007) (Uganda)

241 Pnina Werbner, "'The Duty to Act Fairly': Ethics, Legal Anthropology, and Labor Justice in the Manual Workers Union of Botswana" (2014) Comparative Studies in Society and History 56 (20) 479-507

242 Comaroff and Roberts (n 14) 8

243 Phyllis M Christian, 'Administration of Justice by Traditional Authorities in Ghana: An Exposition on the Law and Practice' (2016) in Richard. F. Oppong and Kissi Agyebeng (eds), A Commitment to Law, Development and Public Policy, A Festschrift in Honour of Nana Dr. S.K.B. Asante (Wildy, Simmonds & Hill, London 2016) 278

important in that it demonstrates how customary arbitration plays an important role in African legal systems, and that its processes and procedures reflect some elements of common law practice.[244] In relation to Ghana, Joseph Akamba and Isidore Tufour (2011) note that customary arbitration is recognised by the courts which have laid down certain principles of law aimed at regulating the procedure to promote justice in the customary sense.[245] In Ghana, such arbitrations become enforceable in a formal court of law only if they meet judicial standards.[246] Judges have made remarks at conferences and in the media about the benefits of these approaches as part of reforming judicial standards.[247] In any event, as pointed out by Joseph Akamba and Isidore Tufour (ibid), courts are deemed to have judicial knowledge of customary law because it is a recognised source of law.[248] Moreover, available literature also shows that because of cases of internal conflict of laws when determining the applicable law (whether customary law or English common law), it is imperative for lawyers and judges to appreciate these customary law approaches.[249] The validity of approaches and skills in the African justice system is also endorsed by Max Gluckman's (1955) extended study of the Barotse because they correspond with the judicial process in Western society.[250]

Some African academics have taken an interest in traditional approaches reflected in African traditional systems such as the *Gacaca*[251] (community-based judicial system), which resolved the genocide cases in Rwanda because of its emphasis of reconciliation and reintegration.)

244 Christian (ibid) 286

245 Joseph B. Akamba and Isidore K. Tufour, 'The Future of African Customary law in Ghana' in The Future of African Customary Law, Jeanmarie Fenrich et al., (ed) (CUP, 2011) 202, 206

246 Budu II v. Caesar 29 G.L.R. 410 (1959) (Ghana)

247 Issah Mohammed, 'Consider societal values in arriving at decisions'(Ghana Daily Graphic Newspaper, Accra 14 May 2018); Remarks by Justice Esther Kisaakye (2017 IALS African Law Deans Forum held at Cape Coast, Ghana on 11-12 May 2017) (on file with researcher)

248 See Akamba and Tufour (n 245)

249 Akamba and Tufour (n 245)

250 See Gluckman (n 19)

251 See Bert Ingelaere, Inside Rwanda's Gacaca Courts, (University of Wisconsin Press, 2016) and Roelof H. Haveman, 'Gacaca in Rwanda: Customary Law in Case of Genocide', in The Future of African Customary Law (ed) Jeanmarie Fenrich and Paolo Galizzi et al. (CUP, 2011) 387-420

In a 2017 TED Conference talk, 'How Africa can use its traditional knowledge to make progress', Chika Ezeanya-Esiobu, advocates the adoption of such traditional approaches.[252] Some argue that the attraction of such approaches is that they do not draw a distinction between punishment and compensation in criminal and civil matters as is the case in Western legal systems.[253] It is this fact that complicates legal situations because in African customary law, disputes are not characterised as either criminal or civil[254] which may result in prosecutors exploiting any evidence of agreed settlements to prove *mens rea*.[255] Accordingly, Isaac Madondo (2017) considers that "customary law is most preferred for its conciliatory and restorative approach which helps to preserve and promote human dignity and social cohesion."[256]

2.4.2 African Philosophy

African academics such as Offei (2013) have attempted to develop an African philosophy of dispute resolution as a result of the complexity of a dual legal system, and also as an alternative to western concepts of dispute resolution.[257] Offei attempts to provide an answer, albeit partially, from an African perspective, to the philosophical questions posed by the legal realist, Karl N. Llewellyn in his book *Jurisprudence – Realism in Theory and Practice* (2008) "What is a court? Why is a court? How much of what we know as "court" is accidental, historically conditioned – how much is essential to the job?"[258] Offei argues that there are different dispute resolution processes used by various bodies which may be public, private, formal or informal.

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252 Chika Ezeanya-Esiobu, 'How Africa can use its traditional knowledge to make progress' TED Conference talk <https://www.ted.com/talks/chika_ezeanya_esiobu_how_africa_can_use_its_traditional_knowledge_to_make_progress?language=en> accessed 6 August 2021

253 Miranda Forsyth, A Bird That Flies with Two Wings: Kastom and State Justice Systems in Vanuatu, (Australia National University Press, 2009) xvii. See also Jomo Kenyatta (n 202) 217

254 Francis Kariuki 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of Republic v Mohamed Abdow Mohamed [2013] eKLR (2014) Alternative Dispute Resolution, Vol. 2, No. 1

255 Rautenbach (n 230) 330

256 Madondo (n 154) 6

257 Stephen Offei (n 223)

258 Karl N. Llewellyn, "Jurisprudence – Realism in Theory and Practice, (2008) Transaction (London), 374 cited by Stephen Offei (n 223)

He labels these processes 'Jural-like' forms of dispute settling.[259] He categorises these as adjudication, conciliation and therapeutic integration.[260] Offei concedes, however, that there is need for empirical evidence of actual practice involved in the various 'Jural-like' dispute settling in order to discover "many subtleties" that he is unable to consider in his book.

African philosophers believe that processes other than litigation often result in better solutions, improve relationships, and engender both justice and peace. This issue is explored by Woodman and Obilade (1995) in an edited collection of essays titled *African Law and Legal Theory* (1995).[261] Several contributors focus on developing an 'African legal theory' founded on African experience as reflected in African customary law. Similar attempts at developing an African philosophy can also be found in the collection of essays in *A Companion to African Philosophy* edited by Africa's foremost philosopher, Kwasi Wiredu (2014). His work provides interesting insights into the processes involved in the formation of postcolonial discourses in the project he calls 'conceptual decolonisation'[262], and his efforts to bring an African understanding to the study of philosophy. Another scholar, Molefe Kete Asante is credited for the theory of "Afro-centricity" which espouses the idea that Africans should be viewed as subjects and not mere objects.[263] The relevance of his theory in the context of this study is that Asante's philosophy helps us recognise that African legal education should be conceptualised to enable Africans to interpret legal issues affecting their own communities. A more recent article by Gebeye (2017) advocates an African legal theory that harmonises 'legal centralism' and 'legal pluralism' in order to develop a pure 'African' theory that recognises the influence

259 Stephen Offei (n 223) 251

260 Stephen Offei (n 223) 257-262

261 Gordon R. Woodman and A.O. Obilade (ed) African Law and Legal Theory (Dartmouth, Hants 1995)

262 See for instance, 'Conceptual Decolonization as an Imperative in Contemporary African Philosophy: Some Personal Reflections, Rue Descartes 36 (2):53 (2002)

263 Molefe Kete Asante, Afrocentricity: The Theory of Social Change (African American Images, 2003)

of both Western and African legal philosophy in postcolonial African legal thought.[264] As S.K.B. Asante (2018) observes in a conference paper, jurisprudence and legal philosophy are often not given the status they deserve in contemporary African legal education because of a reliance on western legal thought.[265] S.K.B. Asante's reference to F.K.V. Savigny's work must be lauded because at the heart of Savigny's conception of law is the recognition that law is derived "from internal, silently operating forces in a community" and that the true living law is customary law which is sustained by the spirit, faith and cultures of the people.

The essence of this literature is that it points to the need to reorient pedagogical practices in African legal education to fit local circumstances. The challenge here is that such initiatives require that the curriculum be reformed to expose students to the cultural realities in their communities. Yusef Waghid (2016) therefore recommends an African philosophy of education that bridges "the pseudo-dichotomy between theory and practice."[266]

Lawrence Tshuma (1991) describes the philosophical and ideological differences that influenced the development of legal education in the Faculty of Law at the University of Zimbabwe.[267] He notes that there are two schools of thought: one that seeks to teach law in a critical perspective within the economic and social context of Zimbabwean realities and the other which seeks to maintain the pre-independence 'black-letter' approach whose underlying objective was to mask racial policies in order to preserve the *status quo*.[268] In post-independence Ghana, teaching approaches were based on the Socratic approach because of the influence of

264 Berihun A. Gebeye, 'Legal Theory in Africa: Between Legal Centralism and Legal Pluralism' Queen Mary Law Journal, Special Conference Issue (2017) 37

265 Asante (n 218)

266 Yusef Waghid, 'African philosophy of education: A powerful arrow in universities' bow' (The Conversation, 29 July 2016) <https://theconversation.com/african-philosophy-of-education-a-powerful-arrow-in-universities-bow-62802> accessed 15 July 2019

267 Lawrence Tshuma, 'Twelve Years of Legal Education in Zimbabwe', Zimbabwe Law Review (1991-1992) Vol 9-10, 171

268 Lawrence Tshuma (ibid) 173-175

American expatriate staff.[269] In Zimbabwe, Tshuma (ibid) observes that the magisterial lecture method was the dominant approach, although contextual approaches were adopted by those academics who were no longer using approaches they associated with an unjust colonial system of education.[270]

Other academics such as the Ugandan feminist scholar, Sylvia Tamale (2011), are spearheading a new genre of African philosophy into subjects traditionally perceived as taboo in Africa, highlighting reflections on gender and sexuality.[271] Tamale's edited collection, *African Sexualities: A Reader*, has material on research methodology and pedagogical approaches to sexuality and related themes including reproductive health and rights, sexual orientation and human rights as well as perspectives on the place of the spirituality and supernatural in African sexuality.[272] Her work appears to build on Tamale's (2008) earlier article, 'The Right to Culture and Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa'.[273] Tamale argues that a new narrative about 'culture' and 'rights' is required in African feminist discourse to "present a different perspective to portrayals of 'tradition' as constraining and/or fixed often displayed in mainstream feminist legal thinking"[274]

2.4.3 *Ubuntu* and other Cultural Approaches

Some literature focuses on the need to reform the curriculum in order to reflect the moral, spiritual and cultural orientation of African societies. According to the scholar Metz (2011), "*Ubuntu*" as a moral theory is reflected in much of the South African Bill of Rights because

269 John Harrington and Ambreena Manji (n 121) 23

270 Lawrence Tshuma (n 267) 175

271 Sylvia Tamale, African Sexualities: A Reader (Pambazuka Press, 2011)

272 Tamale (n 271) 2, 36, 47 and 59

273 Feminist Legal Studies (2008), Vol. 16, 47-69

274 Sylvia Tamale, 'The Right to Culture and Culture of Rights: A Critical Perspective on Women's Sexual Rights in Africa' (n 273)

human rights are grounded in morality and human dignity."[275] *Ubuntu* also reflects the spirit of solidarity in the resolution of disputes because it is based on the essential human virtues of justice, compassion, compromise, harmony and humanity. Hence the post-amble to the South African Constitution states: "There is a need for understanding but not for vengeance, a need for reparations but not for retaliation, a need for *Ubuntu* but not for victimisation". Archbishop Desmond Tutu invoked the concept during the Truth & Reconciliation Commission in South Africa which sought to know the truth about crimes committed under apartheid and to encourage South Africans to reconcile with one another. *Ubuntu* is also frequently cited in South African case law[276] and was invoked in the South African Constitutional Court in *State v T Makwanyane*.[277] This concept is applicable in almost all aspects of life in African societies.

Contemporary moral philosophers such as Jonathan Sachs (2020) also capture the essence of '*Ubuntu*' by observing the importance of finding ways to elevate culture and community – the relations, values, and norms that bind us together that are now threatened by individualism.[278] Stephen Offei (2013) observes that there is support for these doctrines in Aquinas' natural law theory, especially divine law that is revealed in holy scriptures to direct human beings to their supernatural end, the vision of God.[279] Hence in the Biblical Old Testament, the Levitical laws in Numbers 35:11-15 enjoin Moses to create 'Cities of Refuge' where Israelites who kill someone accidentally can claim the right to asylum to prevent retribution before the perpetrators are tried by the assembly. We find in this the very essence of *Ubuntu*.

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275 Thaddeus Metz, '*Ubuntu* as a Moral Theory and Human rights in South Africa' African Human Rights Law Journal, (2011) 11 (2) 532-559, 541. See also Bennett (n 105)

276 S v Ramba 1990 (2) SACR 334 (A) (South Africa) at 335, S v Mbotshwa 1993 (2) SACR 468 (A) (South Africa) at 468, S v Ngcobo 1992 (2) SACR 515 (A) (South Africa) at 515, S v Bosman 1992 (1) SACR 115 (A) (South Africa) at 116; Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7 (South Africa); City of Johannesburg v Rand Properties (Pty) Limited and Others [2006] ZAGPHC 21 (South Africa)

277 State v T Makwanyane Case No. CCT/3/94 (South Africa)

278 Jonathan Sacks, Morality: Restoring the Common Good in Divided Times (Basic Books, New York 2020)

279 Stephen Offei (n 223) 77

The need to explore such doctrines that underpin African spirituality is also highlighted in some doctoral studies. Chioma Ohajunwa's (2019) research utilises narratives of participants regarding *Ubuntu* to build a thesis on an understanding of African spirituality and how it can be applied to manage conflict.[280] What is striking about this study is that it presents evidence which supports the perception that human rights introduced in the African context have failed to incorporate relevant moral and cultural beliefs that sustain African societies.

In international criminal cases[281], there are calls for those facing genocide to be subjected to customary conflict resolution such as *mato oput* (drinking the bitter root), an Acholi justice process in Northern Uganda used to bring to justice those who commit homicide accidentally or intentionally by applying principles of truth, accountability, compensation and restoration embedded in *Ubuntu*.[282] There is also more evidence about the communal nature of African customary law and how it emphasises harmony and reconciliation rather than retribution. According to Hollemen (1995) in his essay on the nature of Bantu law with special reference to the Shona of Zimbabwe, interests of the community rather than the individual are always prioritised to maintain communal harmony and cohesion.[283] It is for this reason that disputes in African societies are frequently subject to mediation and various forms of negotiation, rather than adjudication. In the US, The Navajo Tribal Nation Peace-making Courts based on Navajo common law, informed by Diné wisdom, customs and practices provide an alternative justice system that demonstrate how a combination of existing Anglo court procedures and tribal law can transform the judicial system. Unlike the Navajo Tribal Court System that mirrors the

280 Chioma Ohajunwa, 'Understanding, Interpretation and Expression of Spirituality and its Influence on Care and Wellbeing: An Explorative Case Study of a Southern African Indigenous Community' (PhD thesis, University of Stellenbosch 2019)

281 See The Prosecutor v Dominic Ongwen (ICC-02/04-01/15) (ICC)

282 Erin Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda', (2007) International Journal of Transitional Justice, Vol. 1 91-114, 104

283 J.F. Hollemen, 'An Anthropological Approach to Bantu Law' in Gordon R. Woodman and A.O. Obilade (n 261) 5

western adversarial court model, Peace-making Courts are deeply rooted in Navajo culture. Based on Diné peace-making, they use a consensus-based, community-centred approach that focuses on harmony and open communication. This 'restorative justice' model ensures productive co-existence in tribal communities, instead of using incarceration or retribution as tools of justice.[284] Despite the importance of such approaches that are based on the traditions of indigenous communities, they are currently not given much prominence in African legal education.

2.4.4 Teaching Methods

In light of the above issues, some African academics have asked questions about the teaching methods that are appropriate for legal education in African universities. Philip Iya (1994) specifically explores clinical experience as an integral part of legal education in Botswana, Lesotho and Swaziland (BOLESWA) countries of Southern Africa.[285] His article attempts to address the questions: "should legal education remain essentially 'academic' and, therefore, largely theoretical or should its thrust be towards preparing the student for a day-to-day professional life? What formal training should be provided to assist young lawyers to cross the gap between classroom instruction and the actual practice of law?"[286] Manteaw (2008) in a commissioned study of the development, structure, and reform needs of African legal education curricula recommends that the approach to legal education in African university law schools "must be practical and multi-disciplinary, drawing upon intellectual strength and clinical skills to address development and societal problems."[287] He notes further that "the traditional clinical and practical teaching/learning pedagogy has served indigenous African societies so well for

284 'Navajo Nation Peacemaking Program' <http://www.tribaljustice.org/places/traditional-practices/navajo-nation-peacemaking-program/> accessed 16 August 2021

285 Philip F. Iya, 'Educating Lawyers for Practice-Clinical Experience as an Integral Part of Legal Education in the BOLESWA countries of Southern Africa', (1994) 1 Int'l J. Legal Prof. 315

286 Iya (ibid) 316

287 Manteaw (n 2) 962

thousands of years."[288] He therefore identifies externships, in-house or live-client simulated projects, mediation clinics, and advocacy clinics as effective teaching methods because they advance social justice, help improve access to legal services, address the problems of the poor, and contribute to the rule of law in Africa.[289] In some parts of Africa, there is evidence of a successful "integration" of skills into the law curriculum. Fourie and Coetzee (2012) discuss how therapeutic jurisprudence is integrated into the law programme at the University of Johannesburg using simulations as a mode of instruction.[290] Kakuli (1989) and Quansah (2005) have also written about the mandatory clinical legal education programme at the University of Botswana that combines academic legal study with elements of practice-oriented subjects in the curriculum.[291] Kakuli (1989) in particular considers that a more vocational approach that incorporates professional skills and compulsory practical courses in the undergraduate law degree programme can achieve the goal of preparing effective lawyers for the future.[292] His article provides an interesting case study about the University of Botswana law programme that combines both the academic and professional elements of legal training which Taylor (2002) refers to as a 'mixed model'.[293] Such models appear to satisfy Twining's recommendations in *Blackstone's Tower* where he argues that such programmes may provide the best way of achieving the aims of a classical education curriculum that includes the teaching of skills and values, making the law schools "multi-purpose centres of learning."[294] Even in those universities lacking the clinical resources and infrastructure such as Kenyan university law schools, there is evidence of some form of clinical approaches. Recent articles published

288 Manteaw (ibid)

289 Manteaw (ibid)

290 E. Fourie and E. Coetzee, 'The Use of a Therapeutic Jurisprudence Approach to the Teaching and Learning of Law to a new Generation of Law Students in South Africa' (Jan 2012) Potchefstroom Electronic Law Journal, Volume 15, Issue 1 367 - 390

291 G.M. Kakuli, 'Experimentation in Clinical Legal Education in Botswana', (1989) Lesotho L.J. No.5 Vol. 2, 433; E. K. Quansah, 'Educating Lawyers for Transnational Challenges: Perspectives of a Developing Country-Botswana' (2005) 55 J. Legal Educ. 528

292 G.M. Kakuli (n 291)

293 Lyndal Taylor, 'Legal Education – A Discipline?' (2002) 1 (2) JCLLE 127-44, 131

294 William Twining, Blackstone's Tower: The English Law School (Sweet and Maxwell, 1994) 54

in international journals by aspiring clinicians such as Kok and Osiemo[295] (2020) and Kotonya[296] (2020) note that the lack of a structured pedagogy and institutionalisation of clinical legal education in Kenyan law schools has not prevented some universities from adopting clinical approaches such as judicial attachments, externships, public interest clinics, clinic clubs and student associations, most of which are organised through students' initiatives that are supervised by faculty staff. The articles suggest that most of the activities are extracurricular with a focus on access to justice. The only problem is that there is no evidence of clear outcomes. This contrasts with Nigerian universities where a more coordinated approach by Nigeria's Network of University Legal Aid Institutions (NULAI) has resulted in the establishment of more than 15 live-client university law clinics that are integrated in the law curriculum.[297] In the Nigerian context, Afolasade A. Adewumi and Stella Uju Ojuade (2019) demonstrate in their article that law clinics are an effective way of teaching customary arbitration such as in cases involving child support.[298] Previous research by Molokomme (1991) highlights the importance of customary arbitration as a skill to address child maintenance cases owing to the prevalence of extramarital pregnancy in many African tribal communities.[299] She notes that most cases are resolved through mediations between families. Where there are 'trouble cases', she notes that mediations and adjudication by third parties could follow.[300] This is enough evidence that clinical approaches are probably the best method of equipping aspiring lawyers with the necessary skills to practise in jurisdictions governed by plural laws.

295 Lynette Osiemo and Anton Kok, 'Promoting a Public Service Ethic in the Legal Profession in Kenya: The Imperative Role of Clinical Legal Education' (2020) Journal of African Law 1, 22

296 Anne Kotonya, 'Defining the role of the university law clinician: Perspectives from Kenya' (2020) The Law Teacher, DOI: 10.1080/03069400.2020.1840054

297 Described as Africa's CLE rising star, NULAI was formed in 2003 to promote CLE, legal education reform, legal aid and access to justice in Nigeria where it has been responsible for the establishment of over 15 live-client university law clinics in Nigeria. See Lynette Osiemo and Anton Kok (n 295) 22

298 Afolasade A. Adewumi and Stella Uju Ojuade 'Customary Arbitration: An Effective Way of Managing Maintenance Cases in Law Clinics Unconnected with Courts' (2019) UNIMAID (University of Maiduguri) Journal of Private and Property Law, Vol. 4, No.1, 9

299 Athaliah Molokomme, Children of The Fence: The Maintenance of Extra-Marital Children Under Law and Practice in Botswana (African Studies Centre, Leiden 1991)

300 Molokomme (ibid) 159

David McQuoid-Mason's work on street law shows that this is more apparent in South African universities.[301]

However, there is some scepticism in some jurisdictions about such practical approaches– including those involving practical customary approaches and procedures–as part of university legal education. As far back as 1964, William Harvey in his account of the development of legal education in Ghana proposed that the Department of Law at the University of Ghana, Legon should assume responsibility for the full range of formal instruction without the need for a separate 'practical programme'.[302] Such proposals only succeeded in putting himself in an invidious position, culminating in his deportation.[303] Although Ofosu-Amaah, one of Harvey's Ghanaian successors, echoed the same views 25 years later in 1987 when he spoke in favour of the same training system at a judges' conference[304], the academic-practical distinction is still preferred by many.

There is also the problem that even where practical approaches have been embraced, there is still no consensus on the exact skills to be included in the law curriculum. While this may not be an issue in the United States where law schools are responsible for both academic and professional legal training, university law schools in other parts of the common law system still suffer from an 'identity crisis.' Referring to Twining's *Blackstone's Tower*, Sherr (2009) notes that law schools have generally been uncertain about their mission because of the tension between the academy and the profession on one hand and the objectives of legal education on

301 David J. McQuoid Mason, 'Teaching Social Justice to Law Students through Community Service: The South African Experience' in PF Iya, NS Rembe and J Baloro (eds.), Transforming South African Universities: Capacity Building for Historically Black Universities (Africa Institute of South Africa and Fort Hare University, 2000) 89-203

302 See William Harvey, 'The Development of Legal Education in Ghana': mimeographed report to the SAILER Project of the Institute of International Education and the Ford Foundation (1964)

303 Harvey (ibid) 80

304 See GEA Ofosu Amaah's remarks in the proceedings of the first ever conference of all judges of the Supreme Court of Judicature of the Republic of Ghana held in Accra from 24 to 29 July 1987 in S.Y. Bimpong-Buta (ed.) (1983-86) Review of Ghana Law, Vol. 15, 61

the other.[305] It is for this reason that in *Blackstone's Tower*, Twining (1994) devotes an entire chapter to addressing the question: "What are law schools for?" He identifies, just as Sherr (2009) did, the existence of two models, the professional model which is "the legal profession's "House of Intellect" and the academic model associated with the academy.[306] The challenge is that unlike the classical European university that provided a liberal arts education which equipped individuals with a range of transferable skills, the modern university is no longer responsible for the professional grooming of students. As it stands, the professional model of legal education is still viewed as the "service institution for the profession", while the academic model views the law school as "an academic institution devoted to the advancement of learning about law".[307] The problem, as Kahn Freund (1966) argues in his reflections on legal education, is that the modern university is limited in its capacity for 'professional formation' or *'bildung'* because skills such as critical thinking are not included in contemporary legal education. This is because the teaching methodology is constrained by the case law system which stresses "authority" rather than critical thinking.[308]

Considering the dynamics of the legal profession, the Gower model[309] of legal training that separates university legal education from professional training is no longer appropriate for the African context. As far back as 1990, Twining noticed that the Gower model was increasingly coming under pressure to move away from the rigidity created by the barriers between the academic and vocational stages in order to develop single four-year integrated law

305 Avrom Sherr, 'From "CLEPR Colonies" and Competency Taxonomies to Evidence Based Legal Practice' presentation at the (2009) Workshop on New Directions in Japanese Legal Education Building a Collaboration of Academics and Practitioners for the Training of Law (on file with researcher)

306 Twining (n 294) 51-58

307 William Twining (n 294) 52

308 O. Kahn-Freund, 'Reflections on Legal Education', (1966) Modern Law Review, Vol. 29, No. 2, 121, 122-123

309 LCB Gower (n 57) 118

programmes.[310] In this regard, Iya (1994) refers to the 'Gower Report'[311] (1969) in Uganda and considers clinical legal education as "one obviously needed in Uganda because of the complaint that institutions of legal education offered education that was theoretical, academic and far from being practical for purpose of legal practice."[312] In Ghana, however, there is still some scepticism about clinical legal education because of alleged "negative public perception and want of confidence in the concept" that had been recommended in a 1998 report by Professor Grady Jessup of the North Carolina Central University School of Law after undertaking a study in Ghana sponsored by the United States Information Service.[313] But that concept had been proposed for the professional school of law and not for university law schools.[314] Even then, authorities in Ghana were open to a robust pupillage system[315], underscoring the view in some conference papers by Chimbwanda (2011, 2015, 2017) that the system for training lawyers should be more practically-oriented.[316] A more recent paper by Kankindi and Chimbwanda (2021) proposes a new epistemology of legal education based on the unity of knowledge:

310 William Twining, 'Developments in Legal Education: Beyond the Primary School Model' (1990) 2 Legal Educ. Rev. 35, 54

311 Sessional Paper No. 3 of 1969 on Government Memorandum on the Report of a Committee Appointed to Study and Make Recommendations Concerning Legal Education (Government Printer, Entebbe, Uganda, 1969)

312 Sessional Paper No. 3 of 1969 (ibid) para 64-66

313 Seth Y Bimpong-Buta, 'The Organisation, Objectives and Challenges of Legal Educatıon in Ghana', Paper presented at the The Law Teachers' Conference held at Royal Lamerta Hotel, (Kumasi, Ghana) 3– 5 November 2011 (on file with researcher)

314 Bimpong-Buta (ibid)

315 Bimpong-Buta (ibid)

316 See the following: Victor Chimbwanda, J.A. Cabot and S. Mondino, 'Sending Students to Jail: Challenges and Best Practices for University Legal Clinics Working in Detention Centres', paper presented at the 9th Worldwide Global Alliance for Justice Conference in Puebla, Mexico (5-12 December 2017); Victor Chimbwanda, 'Legal Education in Ghana: Whither are we bound?', paper presented at the Conference of Legal Academics on the theme of The Future of Legal Education in Ghana at Kwame Nkrumah University of Science & Technology in Kumasi, Ghana (20-22 October 2017); Victor Chimbwanda, 'Why We Need To Transform The Law Curriculum to Integrate Skills Teaching at the Academic Stage of Legal Training', paper presented at the 1st National Conference on Problem Based Learning/E-Learning, Kwame Nkrumah University of Science & Technology, Ghana (23-24 September 2015); Victor Chimbwanda, 'Legal Education: Practice or Theory', paper presented at the Law Teachers Conference held at Royal Lamerta Hotel, Kumasi, Ghana (November 2011) (all on file with researcher)

> Unity of knowledge provides the intellectual maturity predisposing a lawyer to find solutions to complex problems…This assumes in the lawyer sufficient mastery to translate theory into practice, to apply theoretical principles to solving problems that practical life brings with it. Practical skills are not possible where there are no habits of the mind that guide the right way to effectively cultivate and use practical skills...[317]

The argument of this article is that theoretical training and experiential learning should not be viewed as opposing paradigms but should be used to integrate skills based on indigenous laws and customs that can help to develop a broad view of legal education that unifies knowledge for the greater good.

Cownie (2004) contextualises the debate about the exact role of universities in legal training, arguing that it can be traced back to Dicey who posited this question: 'Can English Law be taught at the Universities?'[318] In his lecture, Dicey (1883) argued that law as an academic discipline must be taught at universities because entrusting the responsibility of training lawyers to the legal profession leads to an arbitrary, partial legal education and an instruction that depends on the goodwill of untrained instructors. Referring to an editorial by Sherr and Sugarman (2002), Cownie (ibid) argues that the training of lawyers by practitioners inhibits the 'diversity of legal education.'[319]

Against this background, some scholars have pointed out some of the problems associated with the teaching of skills. MacFarlane (1992) urges law teachers to explore the ways and means of translating skills education into classroom practice before the curriculum can be reformed to make it more skills-oriented.[320] Her research is useful in that it stresses the fact that the way in

317 Antoinette Kankindi and Victor Chimbwanda, 'Legal Education and its Contemporary Challenges in Sub-Saharan Africa', (2021) Strathmore Law Journal, Vol 5, Number 1, 145, 157

318 Fiona Cownie (n 4) 31

319 Avrom Sherr and David Sugarman, International Journal of the Legal Profession (Special Issue, 2002) 167 cited in Legal Academics, Cownie (n 4) 29

320 Julie Macfarlane, 'Look Before You Leap: Knowledge and Learning in Legal Skills Education' (1992) 19 Journal of Law and Society 293, 295-296

which knowledge is characterised "as content, as fact, as context, as hands-on experience, as reflection on experience is crucial to how we understand and make use of the ideas of skills education."[321] Such literature is useful in the African context because it reminds us about the need to reform "the relationship between professions and universities with regard to knowledge and ways of knowing."[322] To this extent, there is evidence of academic work by some African academics that acknowledges pedagogical approaches rooted in African culture as part of 'Africanising' the curriculum. For instance, in an unpublished paper, Festus Emiri (2017, 2020) suggests that storytelling has always been a teaching method that is underutilised in African universities.[323] He argues that stories are such a powerful tool in communicating and creating experiences that challenge existing knowledge, belief and received wisdom in law. More importantly, his research demonstrates through a step-by-step analysis how stories can be used to teach doctrine, skills, and ethics in both litigation and transactional law practice subjects. Other literature has also shown how such storytelling in the form of film can be harnessed as a pedagogical tool.[324] For instance, Susan A. Ambrose (2010) has been able to demonstrate that such methods may be effective in teaching the Millennial and Generation Z students because it is more engaging for them.[325]

Other African academics have discussed new pedagogical initiatives that expose learners to practical issues in dispute settlement such as the impact of law on emotional and psychological wellbeing of disputants. As already stated, Fourie and Coetzee (2012) in their article (2012),

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321 Macfarlane (ibid)

322 L. Rutter, 'Theory and Practice within HE professional education courses−Integration of academic knowledge and experiential knowledge' (6-7 April 2009 at the 6th LDHEN Symposium: Bournemouth University, The challenge of learning development)

323 Festus Emiri, 'Incorporating Skills And Values in Legal Education: Moving Narrative Pedagogy from the Margin to the Centre', paper presented at the Conference of Legal Academics, 'The Future of Legal Education in Ghana' (20-22 October 2017) Kumasi, Ghana; See also Oghenemaro Festus Emiri, 'Learning Critical Reading and Case Analysis: King Solomon's Judgment as Case Study', in Festus Emiri, Ernest Owusu-Dapaa & Ayuba Giwa (ed.) Essentials of Lawyering Skills in Africa (Malthouse Press, Lagos 2020)

324 Paul Bergman & Michael Asimow, Reel Justice (Andrews McMeel Publishing, 2006)

325 Susan A. Ambrose, et al., How Learning Works (Jossey-Bass, San Francisco 2010)

discuss the need to integrate therapeutic jurisprudence in university legal education.[326] They argue that this will transform teaching and learning from being primarily concerned with the transmission of knowledge (learning about) to being concerned with the practices of a knowledge domain (learning to be).[327] Such proposals have led to calls for interdisciplinary learning, with some scholars such as Jane Aiken and Stephen Wizner (2003) suggesting that lawyers ought to learn to embrace the social work inherent in working with clients, especially low income ones, with which clinics primarily deal.[328] There are already some experts who are suggesting that in the post-COVID-19 era, there will be new skills needed such as empathy, to enable people to solve a new set of problems at the workplace.[329] Interestingly, such notions are inherent in the concept of *Ubuntu*.

2.4.5 Africanising the curriculum

Based on the above literature, there is a compelling argument by some academics for Africanising the curriculum by integrating cultural approaches in the curriculum despite the fact that customary courts do not permit legal counsel.[330] According to Ubink and Weeks (2017), the argument that because trained African lawyers do not appear in customary courts is no longer a valid argument for not stressing skills associated with customary arbitration because such skills are needed when applying customary law.[331] As already shown, some practitioners concede that legal practice now involves "practising customary law" because courts routinely deal with the internal conflict of laws involving customary law often on

326 Fourie and Coetzee (n 290) 367-390

327 Fourie and Coetzee (n 290) 367

328 Jane Aiken and Stephen Wizner, 'Law as Social Work' (2003) 11 Wash. U. J.L. & Pol'y 63; See also Carrie A. Hagan and Stephanie K. Boys, 'Catching Fire: A Case Study Illustration of the Need for an Interdisciplinary Clinical Case Partnership and Resulting Student Successes' (2015) Vol. 2(1) Asian Journal of Legal Education, 46–56

329 'The Future of Universities in a new Global Context', IFC Education Webinar Series, Learning in the age of disruption (17 December 2020)

330 See Christian (n 243) 278

331 Janine Ubink and Sindiso M. Weeks, 'Courting Custom: Regulating Access to Justice in Rural South Africa and Malawi', (2017) Law & Society Review, Vol 51, Number 4, 826

appeal.[332] Fortune Charumbira, President of Zimbabwe Chiefs' Council and Vice President of the Pan-African Parliament argues that the judicial functions of chiefs may be challenged all the way to the Supreme Court on a range of issues concerning customary law. He acknowledges that although the concept of "customary justice" exists, formal courts may have to intervene if called upon to do so.[333] In such instances, a unique skill is needed in order to apply customary law which is generally not codified and cannot be ascertained using methods based on English common law.[334] Woodman (2011), a leading authority on customary laws in Africa, notes:

> Trained lawyers, like those who cut a path through the forest with their cutlasses, are prone to assume that the product of their skill, the elaborated state law, is the more fundamental one. The social reality is that the customary laws existed first, and have continued to be generally observed, whether or not they are in accord with state laws.[335]

Woodman (ibid) further notes that the law that academics teach and conduct research on is predominantly state law. As a result, trained lawyers are barely able to investigate and apply the law that is accessible to most African communities. Keneilwe Radebe (2018) criticises the traditional doctrinal methodology because it is unsuitable for ascertaining the contexts of customary law in some legal situations. The 1995 'Final Report of the Committee on Legal Education, Training and Accreditation in Uganda' recommends that law subjects should be restructured to address local problems and conditions and should specifically consider problems of the rural community.[336] Madondo (2017), the Deputy Judge President of the High

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332 Keneilwe Radebe, 'Women, Customary Law and Legal Education' paper presented at the SALTC Conference, University of Pretoria (11-13 July 2019)

333 Interview of Fortune Charumbira, International Security Sector, Advisory Team (Geneva Centre for Security Sector Governance) <YouTube: https://www.youtube.com/watch?reload=9&v=uLaSCVvjFN4> accessed 16 August 2021

334 See Alexkor Ltd v Richtersveld Community [2004] 5 SA 460 (CC) para [52-53] where it was stated: "…It is important to note that indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life…In applying indigenous law, it is important to bear in mind that, unlike common law, indigenous law is not written. It is a system of law that was known to the community, practised and passed on from generation to generation. It is a system that has its own values and norms. Throughout its history, it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its values and norms consistently with the Constitution." Cited by Isaac Madondo (n 154). See also Keneilwe Radebe (n 332)

335 Gordon R. Woodman, 'A Survey of Customary Laws in Africa in Search of Lessons for the Future' in Jeanmarie Fenrich et al., (ed), The Future of African Customary Law, (CUP, 2011) 9, 20

336 at pp 11-16

Court of South Africa (KwaZulu-Natal Division), expresses the same view in his book.[337] As already shown, some South African cases have stirred controversy because court decisions did not interpret customary law as perceived by the community.

Writing about the regulation of access to justice in South Africa and Malawi, Ubink and Weeks (2017) note that in the 'hybrid courts' which combine characteristics of formal courts and customary courts in Malawi, magistrates often become obstacles to justice because of their limited knowledge of customary law.[338] They note that this is often because "living customary" law is always in conflict with "formal customary law" that is administered by the courts.[339] As noted by Himonga (2017), there is need for a "shift in the legal theoretical paradigm within which law is taught, and the interdisciplinary study of law."[340] Such a conclusion is based on the fact that questions arising from the interpretation and application of customary law are empirical in nature (Ubink and Weeks, ibid). A conference paper (Chimbwanda, 2018) presented in honour of Professor Gordon R. Woodman at the 2018 ASAUK Conference in England argues for the redefinition of customary law in contemporary legal education because

337 Madondo (n 154) 4

338 Ubink and Weeks (n 331) 846. Even in Francophone Africa, some academics are critical of this 'lack of professionalisation' in the administration of customary law by some judges. In his article about judges in Anglophone Cameroon, Emmanuel Milano Kiye notes: "The lack of professionalisation in the administration of customary law in these courts is worrisome. Indeed, the composition of the courts, of judges with no customary pedigree, except, arguably, for customary courts, ensures they struggle to engage with customary issues appearing before them. The requirements of judgeship in these courts are weighted in favour of proven knowledge in colonially received laws as opposed to customary law. Indeed, at the inception of their legal training at the university on to their professional training at the School of Magistracy, Yaoundé, fondly referred to in its French acronym as ENAM, judges are schooled in the principles of Western-oriented laws with little attention paid to customary law education.." See Emmanuel Mikano Kiye, 'The myth of 'Judicial customary law': Reflections from Anglophone Cameroon', Nkanyiso, Jnl Hum & Soc Sci 2020, 12(1)) 86 at 92

339 Ubink and Weeks (ibid). Emmanuel Mikano Kiye notes that conventional legal training based on Western models results in "measures that are liable to alter the substance of customary law, creating a divergence between customary social norms in practice (which he refers to as "sociologists' customary law"), and norms enforced by state courts under the name of customary law (which he refers to as "lawyer's customary law"). He opines that each of these qualifications is liable to produce divergence in customary law. (See Emmanuel Mikano Kiye, 'The myth of 'Judicial customary law': Reflections from Anglophone Cameroon', Nkanyiso, Jnl Hum & Soc Sci 2020, 12(1)) 86 at 90). In other words, lawyers do not have the relevant skills to establish the validity of customary norms as they have to rely on "calling expert witnesses, the use of authoritative textbooks, personal knowledge of the judges, use of expert assessors, and opinions of native courts." (Emmanuel Mikano Kiye (ibid))

340 Chuma Himonga, 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law', (2017) Vol 20 / Special Edition: Potchefstroom Electronic Law Journal, Engaging with Customary Law < https://journals.assaf.org.za/per/article/view/3267> accessed 16 August 2021

the study and teaching of law is predominantly influenced by a 'Blackstonian mind-set' which exalts 'black-letterism' associated with Western legal education.[341]

In summary, the above literature review suggests the need for an Africanised curriculum that reflects the social realities within which it is imparted and for which it is designed. As noted in a recent paper by Kankindi and Chimbwanda (2021), legal education that is not sufficiently Africanised will impede the coherent practice of law.[342]

2.5 Conclusion

The literature review in this chapter has shown that there are still some gaps in our conception of what constitutes legal education and the purpose of the university law school in relation to legal practice. In the African context, there is still the old dilemma as to whether legal education should focus on transferring concrete knowledge or skills and whether such skills should also be rooted in African customary law and culture. Although we have begun to see published work on legal education generally, such work has not yet involved sustained qualitative study of fundamental issues about how to address challenges caused by the transplantation of foreign training systems. This study, therefore, seeks to fill the gap by extending our knowledge of this legal conundrum.

In the next chapter, the research methods that were used to collect the data are discussed.

341 Victor Chimbwanda, '(Re)Defining Customary Law in Contemporary University Legal Education', paper presented at the African Studies Association of the UK (ASUK 2018) Conference at the University of Birmingham, England (11-13 September 2018)

342 Antoinette Kankindi and Victor Chimbwanda, 'Legal Education and its Contemporary Challenges in Sub-Saharan Africa', (2021) Strathmore Law Journal, Vol 5, Number 1 145

3.1 Introduction

This chapter describes in detail the qualitative research methods used to collect data in African university law schools offering undergraduate legal education that were selected for this study. The choice of the qualitative research paradigm is influenced by the fact that it does not necessarily take precedence over another methodological approach, and neither is the researcher confined to one research technique.[343] This approach, based on the hermeneutic tradition, is concerned with 'interpreting deeper meaning in discourse and understanding multiple realities as opposed to one "objective" reality.'[344] The study is therefore anchored in an interpretive framework that facilitated the collection and analysis of data to enable the researcher to understand the system of undergraduate legal education in Africa and what influences it. The interpretivist epistemology[345] for this study focused on the views of purposively sampled participants in order to understand undergraduate legal education, the curriculum, its structure, objectives, approach and the pedagogy used. The following sections provide a detailed description of the strategies used to collect the data for this study.

3.2 Methods of collecting data

To answer the research questions, data was collected and triangulated using a plural research approach consisting of qualitative interviews, in-class observations including some incidents of participant observation, and documentary analysis. Fieldwork involved visits to eight university law schools in west, east and southern Africa, with each visit lasting at least one

343 Norman K. Denzin & Yvonna S. Lincoln, 'Introduction: The discipline and practice of qualitative research' in Norman K. Denzin & Yvonna S. Lincoln (eds) The Sage Handbook of Qualitative Research (4th edn Sage Publications, California 2011)

344 Greg Guest et al., Applied Thematic Analysis (Sage Publications, California 2012) 14

345 See John W. Creswell and J. David Creswell, Research Design: Qualitative, Quantitative, and Mixed Research Methods Approaches (5th edn Sage Publications, California 2018)

week. There was also a visit to the United States in order to obtain additional data to understand the research phenomenon. Before embarking on the field study, the researcher had spent one year as an insider with ethical clearance at one law school where he taught and did some research. During this period, there was an opportunity to visit two other university law schools. An emergent research design[346] was used for all interviews and observations, modifying the interview questions, observation notes, and sampling strategy as new leads for analysis emerged. A record was kept throughout the research process of the methods used and other related issues concerning the analysis of the emerging data.

3.2.1 Face-to-Face Qualitative Interviews

To gain a deeper understanding of the intricacies of African legal education, face-to-face qualitative interviews were conducted on a broad range of issues highlighted in an interview schedule. Three separate interview schedules were designed for interviews with students (with relevant adaptations for interviews with LLB graduates), law lecturers, and deans (**Appendices 2-4**). The schedules were designed following initial interviews in London in October 2015 with prominent ideologues, Professors William Twining and David Sugarman, both of whom are professor emeriti at leading UK institutions. William Twining taught law in East Africa in the 1950s and 1960s where he was also a legal education expert in the 1990s. His work as a legal scholar on issues pertaining to legal education has been mentioned in Chapter 2. Interviewing David Sugarman, a legal historian, helped to put African legal education in an historical context.

346 Pamela Maykut and Richard Morehouse, Beginning Qualitative Research: A Philosophical and Practical Guide (The Falmer Press, London 1994) 44

To identify informants who could participate in this study, it was important to attend conferences and other events as part of the research process because that is where scholars and experts in the field could be found talking about their research away from work environments that often create problems with access. For instance, during the African Studies Association of the UK Biennial Conference in September 2018, there were panels to recognise the late Professor Gordon Woodman's contribution to African Law. This provided an opportunity to speak with the anthropologist, Max Gluckman's protégé, Richard Werbner. A conference organised in July 2018 by the Society of Law Teachers of Southern Africa in Cape Town, South Africa, titled 'Transformation of the Legal Profession: Decolonisation of Knowledge' presented the researcher with another opportunity to engage with African scholars whose work focuses on customary law and efforts currently underway to Africanise the law curriculum in South Africa.

Interacting with such people before the actual collection of data provided useful insights that helped to formulate the themes for this study. It also enabled the researcher to establish good rapport with those interested in the area, some of whom became interviewees in this study.

The attraction of qualitative interviewing was that it was less structured, allowing in some cases a departure from the interview schedule, which was useful in achieving a deeper understanding of the issues being investigated. For instance, some of the questions were modified to obtain relevant views on specific issues such as pedagogical approaches in African universities and the relevance of culture in African legal education. Also, while the initial interview schedule had been designed for law students studying in university law schools, it also became necessary to obtain the views of trainees who had subsequently enrolled at the professional programme

which is the last stage of the two-tier system of training lawyers in most Anglophone African jurisdictions.[347]

In other instances, participants were allowed to develop their own conversations to obtain insights into the issues the interviewees considered important in African legal education. This was important to have a richer understanding of the different perspectives concerning legal education in African pluralistic systems. Also, because these interviews were conducted in law schools in different African countries, it was imperative to allow participants to give as many detailed perspectives as possible because there was little opportunity for follow-up questions. Some of the participants also needed leeway beyond the standard 30-60 minutes to express their experiences, which were useful for comparative analysis of the different approaches to legal education in Africa. According to Gubrium and Holstein (1995), the objective of an active interview is "not to dictate interpretation but to provide an environment conducive to the production of the range and complexity of meanings that address relevant issues, and not to be confined to predetermined agendas."[348] The flexibility of qualitative interviewing, therefore, made it possible to obtain views on a wide range of issues which emphasised the advantages of this research method.[349]

The interview schedules were designed to investigate four broad themes with open-ended questions that were the focus of this thesis: whether undergraduate law students are learning skills, what those skills are, whether they have any bearing on African customary law and cultural dispute resolution in the teaching and learning of law and the methods for teaching any

347 Manteaw (n 2), LCB Gower (n 27), Twining (n 310) 52, See also Avrom Sherr, 'The Case of the Common Law in European Legal Education' in Christopher Gane and Robin Hui Huang (eds) Legal Education in the Global Context (Routledge, 2015) 215-222

348 James A. Holstein and Jaber F. Gubrium, The Active Interview (Sage Publications, California 1995)

349 Alan Bryman, Social Research Methods (4th edn OUP, Oxford 2012) 470

such skills. The schedules focused on obtaining answers to questions on what the teaching approach informs us about African legal education. There were also questions on the attitude of both students and lecturers to the teaching of skills.

The interviews were 'conversational' in style, which satisfied the requirements of qualitative research because open-ended questions and conversational inquiry enabled research participants "to talk about a topic in their own words, free of the constraints imposed by the kind of fixed-response questions typically seen in quantitative studies."[350] As Bryman (2012) notes, qualitative researchers prefer methods that do not require the use of highly specific research questions in advance unlike quantitative research which requires the researcher to devise instruments specifically designed to answer specific questions.[351] The strategy was to interview participants in ways that put them at ease in order to obtain responses that would help with the formulation of specific research questions based on the review of existing literature. Anderson (1978) argues that approaching interviewees with a pre-determined set of views restricts certain lines of enquiry that can prove counterproductive.[352] An open-ended approach was therefore useful in this study to formulate more focused research questions. Also, the approach enabled the use of inductive probing, which is necessary to clarify meaning and to encourage participants to "tell their story."[353]

Many richly detailed responses to questions posed were obtained. It was important to stress right at the beginning of each interview that anonymity was guaranteed. Also, there was need to reassure students that their responses would not be communicated to their lecturers.

350 Guest, et al (n 344) 13

351 Bryman (n 349) 403

352 Elijah Anderson, 'Jelly's Place: An Ethnographic Memoir' in D. Hobbs and R. Wright (eds.), The Sage Handbook of Fieldwork (Sage Publications, London 2006) 40

353 Guest, et al (n 344) 13

This was necessary to allay the fears of those students who were involved in the study that they would not be victimised if their lecturers were to find out that they had given negative views about the teaching approach used by their lecturers. Reassuring the students of the confidentiality of their responses was necessary because victimisation of students who are not favourably disposed to their lecturers is a common phenomenon in African universities. A study conducted in Ghana and Tanzania by Morley (2011) of Sussex University confirms the abuse of power by lecturers in some African universities.[354] Recently, a Nigerian student's experience with her law professor was widely reported on CNN news channel resulting in the Nigerian Senate launching an investigation that led to Professor Akindele's conviction for sexual coercion.[355] Even after assuring the students of anonymity, some of them would still require further reassurances of anonymity and confidentiality. Although participants were informed that the interviews would be kept anonymous, they were advised that information obtained for the study would not be confidential because the final thesis would be accessible to a global audience through an institutional repository and used in further research or publications. To protect the identity of participants in face-to-face interviews, letters and numbers are used. Hence, S is used for student/graduate, e.g., S1, L (for law lecturer, e.g., L1) or D (for Dean), DD for Deputy Dean and FD (for former Dean). For the three focus groups (see paragraph 3.2.2 below) the identities of individual participants are hidden.

354 Louise Morley, 'Sex, grades and power in higher education in Ghana and Tanzania', (2011) Cambrige Journal of Education, 41:1, 101

355 Bukola Adebayo, 'Nigerian professor in sex for grades scandal gets prison term' <https://www.cnn.com/2018/12/17/africa/nigerian-professor-jailed-in-sexual-assault-case-intl/index.html> accessed 17 August 2021; See also Kiki Mordi's exposé titled, 'Sex for grades: undercover inside Nigerian and Ghanaian universities' a BBC Africa Eye documentary available at https://www.youtube.com/watch?v=we-F0Gi0Lqs accessed 17 August 2021. The exposé contains allegations of a wide array of abuses of students at African universities including the Universities of Lagos and Ghana.

The effect of protecting the identity of participants in this way is to render their institutions anonymous in reporting the findings of the study. Where the participants are well known because of their published work or research, and they granted permissions to be identified (e.g., Professors William Twining and David McQuoid-Mason), they are identified by name.

All interviews were taped, except in a few exceptional cases where the subjects were uneasy. In one interview with a law dean, it was clear that the interviewee was not comfortable to be taped because he was a member of the regulatory body whose members were constrained by an oath of secrecy not to publicly talk about the regulator's position concerning some issues on legal education. Where a tape recorder was not used, the researcher took notes of the discussions. Yet others were quite happy to talk freely and would jokingly state how pleased they were that the interview was confidential as it enabled them to talk candidly about the issues affecting African legal education. It was important, therefore, to establish good rapport with participants if well-informed data was to be obtained.[356] An effective strategy used by the researcher was to talk freely first with prospective interviewees about the nature of the study and how views of the participants were necessary to obtain data that would potentially contribute to the reform of legal education in Africa, a subject that is currently topical in Anglophone Africa.

Interviews took place in mutually convenient venues, such as an office, which offered sanctuary to the interviewee. Where there were some disruptions or the venue turned out to be unsuitable for a variety of reasons (such as the interview with one dean which took place at a quiet restaurant but on a couple of occasions it became necessary to relocate on account of bees

356 Fiona Cownie (n 4) 16

that kept on hovering around), it was always easy to relocate without interfering with the interview or making the interviewees uneasy.

The difficulties of this method of collecting data are acknowledged. The first is that it is time-consuming to interview, transcribe and analyse all interviews. Secondly, the study focused on legal education in different law schools located in different countries. Even where the law schools were in the same country, conventional fieldwork required the researcher to be present physically to conduct interviews, an approach which is supported by Bryman.[357] It was costly to conduct fieldwork which is why this researcher selected some countries with which he had connections in order to reduce what could have been a very expensive research exercise.

3.2.2 Group Interviews

Group interviews or focus interviews are increasingly being used in a number of disciplines including marketing and political research.[358] They provide an opportunity to express different views while at the same time other interviewees can challenge the views of fellow participants in context and in situ.[359] On two occasions, the group interview was both a good opportunity to develop the ideas of the group as well as saving time and costs in conducting multiple interviews with individual participants. Similar to a teaching seminar and discussion, such group interviews needed careful management to ensure that different views could be permitted, and that a group would not necessarily be led by the most vociferous participants.

In West Africa, focus group interviews involved students who were selected from those who had participated in skills-based courses. Employing a snowballing research sampling

357 Bryman (n 349) 469
358 Bryman (n 349) 231, 502
359 Bryman (n 349) 503

technique, the researcher then relied on these students to recommend participants from other institutions to obtain the views of students who had not taken any skills-based courses. All the interviewees in the group interview had completed their LLB and were trainees at the professional school of law where they were undertaking the final stage of their legal training. The group interview provided an opportunity to listen to students discuss issues on African legal education as members of a group rather than simply as individuals.[360] As observed by Bryman, group interviews are mainly associated with qualitative research in that they seek to obtain participants' views on issues which confront them.[361] In the group interview conducted in Ghana, participants provided the author with data concerning the different views of students about skills teaching in undergraduate legal education.

In East Africa, the students who took part in the group interview were participating in a clinical course. It was important to gain insight into the impact of the course at the law school and the participants' views on the benefits, or otherwise, of skills teaching as well as the importance of recognising African culture in African legal education.

The last group interview was at a university in Southern Africa. The LLB graduates who were interviewed were undertaking the last stage of their legal training as candidate attorneys in a law clinic. The diverse nature of the participants was critical because their white and Asian backgrounds provided perspectives that were unique, enriching the study with data based on their experiences in dealing with "clients" from black, Asian and white backgrounds.

360 Bryman (n 349) 501

361 Bryman (ibid)

This dimension was important because it provided a rare discussion of legal issues arising from a conflict of laws and an examination of the curriculum in this respect.

The three group interviews in West, East and Southern Africa satisfy Bryman's description of the nature of what is often referred to as a focus group method of data collection. Although it has been extensively used in market research, it is increasingly gaining popularity in social science research. According to Bryman:

> The focus group method is a form of group interview in which: there are several participants (in addition to the moderator/facilitator); there is an emphasis in the questioning on a particular fairly tightly defined topic; and the accent is upon traction within the group and the joint construction of meaning. As such, the focus group contains elements of two methods: the group interview, in which several people discuss a number of topics; and what has been called a focused interview, in which interviewees are selected because they are known to have been involved in a particular situation (Merton et al. 1956: 3) and are asked about that involvement.[362]

It is interesting to note that the group interviews in each case involved students who had been involved in learning skills during the first stage of their legal training at university. This technique, therefore, generated data that was relevant to the research question on the extent to which skills can be taught/learned in university undergraduate legal education. In West and Southern Africa, the group interviews went further in soliciting the views of students who had not been involved in the direct learning of skills. In both cases, the group interview provided an opportunity for the researcher to 'study the ways in which individuals collectively make sense of a phenomenon and construct meanings around it.'[363]

362 Bryman (n 349) 502

363 Bryman (n 349) 504

Despite the benefits of group interview, transcribing was a very tedious process. It was also more time-consuming than transcribing normal interview recordings. On several occasions it was difficult to identify who was speaking during the interview and exactly what was said, especially where there were too many interruptions. In one group interview, for instance, some of the vocabulary had some references to local languages, especially about culture. Transcribing required the author to *Google* some of the languages and vocabulary used. For example, it took a considerable length of time to identify the Acholi justice process of *mato oput* ("drinking the bitter root"), a Ugandan local custom in dispute resolution similar to *Ubuntu* in Southern Africa[364] to which participants kept on referring. Although the interviewees could be asked to explain or spell some of these unfamiliar terms for further investigation, much may have been lost in translating them. Also, interrupting the interviewees tended to affect the flow of the interview. Because some of the participants sometimes talked over each other, transcription was made even more difficult. It was for these reasons that the author used group interviews sparingly and only in circumstances that were absolutely necessary.

3.2.3 Observations

An open observation instrument which falls within the qualitative research paradigm was used to collect data on the teaching approaches used by lecturers in six of the university law schools selected for this study. Observation was used as part of triangulation so that the researcher could enhance the validity of the data and to explain what was emerging from the interviews and the documentary sources.[365] The data obtained from the observation schedule (**Appendix 5**) shed more light on the teaching approach, the skills taught and the entire learning process of undergraduate law students. Also, the objective of the observation schedule was to ensure that

364 Baines (n 282)

365 Norman K. Denzin, The Research Act: A Theoretical Introduction to Sociological Methods (Routledge, New York 2017)

each lecturer's approach, as a type of teaching behaviour to be measured, was systematically recorded to enable the aggregation of approaches of those in the selected sample. As noted by Bryman: *"The resulting data resemble questionnaire data considerably, in that the procedure generates information on different aspects of behaviour that can be treated as variables."*[366]

This method has been used in similar studies by McFarlane (1988) to collect data for her doctoral thesis on clinical legal education approaches in the UK.[367] Her strategy involved what she described as 'observation visits' in universities in the US during which time she embarked on a three-week tour from October to November in 1986. During this period, she collected data on six programmes from three major US cities.[368] Sullivan et al. (2007) also employed a similar strategy for their research on legal education in the United States sponsored by the Carnegie Foundation.[369] In this study, the observation approach was quite useful for collecting data on teaching approaches at selected law schools.

As part of the observation strategy, the researcher also observed an oral examination, a moot rehearsal and oral arguments during a skills-based course. This approach is considered more likely to produce accurate information since observation enables a comparison of the observed phenomena, although the financial costs incurred could be significant during such visits. During the visits, it was possible to participate in academic activities that provided another opportunity for collecting data. At one institution, the researcher attended an extra-curricular activity involving staff and students who met to analyse a video of a documentary that was followed by discussions. Participating in such activities provided an opportunity to analyse

366 Bryman (n 349) 272

367 Julie McFarlane, 'An Evaluation of the Role and Practice of Clinical Legal Education, with particular reference to undergraduate legal education in the United Kingdom (PhD thesis, South Bank Polytechnic, 1989)

368 McFarlane (ibid) 113

369 William Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (1st edn Jossey-Bass, San Francisco 2007)

other forms of instruction being used by some law schools and to gain more insight into the different approaches that enable students to acquire useful skills that prepare them for the world of legal practice.

3.2.4 Documentary sources

Several documents provided a useful source of data for this study, including material on the content of law programmes. This material was often available on university websites, university brochures or prospectuses of the selected law schools.[370] Such data was relevant for purposes of identifying the structure and focus of law programmes and the teaching approaches. The material was also useful for analysing the extent to which law schools were integrating skills in their law programmes.

The data was extracted from university brochures, prospectuses, faculty handbooks, official course descriptions and relevant information from websites. It is accepted that such documentary material does not always provide accurate information, perhaps because of lapses in the updating of such material, especially websites. To ensure that such data was reliable, Scott's (1990) criteria for assessing documentary sources was used to ensure authenticity, credibility, representativeness and meaning.[371] Corroborating evidence from other data such as interview transcripts and observation notes were used to verify the accuracy of the data. The data from the documentary sources was cross checked which resulted in a greater than usual reliability.

370 Some data pertaining to the teaching of law was obtained while the researcher was an insider at one law school between 2014-2015

371 John Scott, A Matter of Record: Documentary Sources in Social Research (Polity Press, Cambridge 1990) 19-28

Random searches on the internet yielded very little information because many African universities do not update their websites. It also became apparent that with the proliferation of university law schools, some of them considered information about their law programmes as intellectual property and so they only uploaded abridged versions in order to maintain a competitive edge. In some cases, the researcher obtained hard copies, which were not always easily available. At one law school, the university prospectus was available from another section of a huge campus which took long to locate. Also, at another university, the researcher had to pay for a faculty handbook! On some occasions, contact persons who had links with some of the universities were relied upon to obtain material that was not otherwise accessible online.

More enriching documentary data was obtained from Professor David McQuoid-Mason. Documents concerning the teaching and assessment policy at one institution were also obtained from a former Deputy Dean responsible for teaching and learning. Other documents that were available included teaching resources such as course outlines, examination questions and assessment criteria, the minutes of faculty meetings and the network of deans in some cases. These official documents and reports were quite useful for this study. For instance, documents on legal education reform efforts in the form of legislative/regulatory instruments such as the Joint Statement of the Law Society and Council of the Bar in England[372], reports such as Legal Education Training Review (LETR) in England[373], and Stakeholders' Report on the Proposed Legal Education Reform in Ghana[374], The Final Report of The Committee on Legal Education,

372 SRA, 'Joint statement on the academic stage of training https://www.sra.org.uk/become-solicitor/legal-practice-course-route/qualifying-law-degree-common-professional-examination/academic-stage-joint-statement-bsb-law-society/ accessed on 8 September 2021

373 See LETR report <http://letr.org.uk/the-report/> accessed 29 August 2019

374 "Report of the Ad Hoc Committee of the General Legal Council on Professional Education" presented at the Stakeholders Meeting on Professional Legal Education held at the Ghana Bar Centre (Accra, 13 April 2012) on file with researcher

Training and Accreditation in Uganda[375], press releases such as those issued by the General Legal Council in Ghana, advertisements of faculty events[376] and communiques[377] were available. Recent meetings by law deans in South Africa and Ghana concerning the need to reform the curriculum for the undergraduate law degree programme also provided important data. However, such documents did not always provide objective accounts, and it is for this reason that it was necessary to use Scott's (1990) criteria for assessing the quality of documents such as authenticity, credibility, representativeness and meaning.[378]

3.3 Sampling Faculties for Interviews and Observations

A total of 15 law faculties in west, east, and southern Africa were purposively selected based on whether the law school was at a private or public university and whether it was in a common law or Roman-Dutch jurisdiction.[379] The objective was to interview at least 5 participants in each faculty, representing a range of variables including gender, status, age group, culture, teaching approach and ethnicity (this was particularly critical in South Africa because of ethnic diversity). However, there were difficulties in getting some of the faculty members to participate because of the time of the year that the researcher visited the universities, resulting in more interviews in some countries than in others.

Despite the logistical and financial constraints, the sample of nearly 100 participants was achieved by widening the range of interviewees to include deputy and associate deans, the director of a professional school of law, a retired judge, a member of a university council, an

375 Kampala, 28 September 1995 (on file with researcher)

376 KNUST Faculty of Law, 'Faculty Excellence Awards' 2016 Daily Graphic (Accra, 21 March 2016)

377 Minutes of an emergency meeting of the Conference of Law Deans held at Faculty of Law, University of Professional Studies (Accra 4 August 2017) (on file with researcher)

378 Scott (n 371)

379 Universities in South Africa and Zimbabwe teach civil law inherited from the Dutch and common law inherited from the British, as well as African customary law based on indigenous African culture and tradition. See A.J. Jerr, 'The Reception and Codification of Systems of Law in Southern Africa', (1958) Journal of African Law, Vol. 2, Issue 2, 82-100

expert in African cultural studies, and an education consultant. A combination of volunteer, snowballing, and purposeful sampling techniques were used to recruit participants. With snowball sampling, the researcher made initial contact with a small group of participants and used them to establish contacts with others.[380] Purposeful sampling involved selecting participants based on their relevance to the research questions, the subject matter of the thesis, the conceptual framework of the study, and the argument that is being developed.[381] Purposeful sampling in this study was critical because it ensured credibility[382] in the interpretation of the data. According to Baxter and Eyles (1997), credibility is the most important guiding principle of qualitative studies.[383] The researcher must demonstrate 'a conscious effort to establish confidence in an accurate interpretation of the meaning of the data.'[384]

To recruit participants, a number of steps were taken. Ethical clearance and an invitation letter endorsed by the researcher's institution requesting access was emailed to deans of the law schools targeted for participation in the study.[385] Where permission was granted, the participants were approached using appropriate administrative channels, in many cases with the direct involvement of the dean or his/her representative. Some deans at institutions that were included in the original sample of participants did not reply to several emails. As a result, interviews could not be arranged at those institutions although some participants, particularly law lecturers, were willing to be interviewed or to allow in-class observations or provide access to documents.

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380 Bryman (n 349) 202

381 Jennifer Mason, Qualitative Researching (2nd edn Sage Publications, London 2002) 124

382 The SAGE Encyclopaedia of Qualitative Research Methods, Vol. 2 (Sage Publications, California 2008). See also Alan Bryman (n 349) 418-419

383 Jamie Baxter and John Eyles, 'Evaluating qualitative research in social geography: Establishing "rigour" in interview analysis' (1997) 22:4 Transactions of the Institute of British Geographers, 505 at 512 cited by Annie Rochette, 'Teaching and Learning in Canadian Legal Education: An Empirical Examination' (DCL thesis McGill University, 2010) 93

384 Robin Whittemore, Susan K. Chase & Carol Lynn Mandle, 'Validity in Qualitative Research' (2001) 11:4 Qualitative Health Research 522, 530

385 School of Advanced Study, University of London Ethical Clearance Approval Reference No. SASREC_1617-66-PhD and Invitation to Deans (See Appendix 1)

One dean acknowledged the invitation in person but was only able to answer general questions, so it was not possible to conduct a full interview. A legal practitioner who was also teaching at a university in Zimbabwe was willing to discuss the law programme, but was not prepared to be interviewed, although he consented to the taking down of some notes. The letter sent to the deans described the scope of the research, and the data that the researcher intended to collect, including specific requests for in-class observations, course materials and interviews.[386]

As there were time limitations and logistical constraints, it was also important to be imaginative in accessing participants. Deans or associate deans were asked to suggest possible participants representing a variety of teaching approaches and other phenomena relevant to the study. This often yielded very good results in terms of access to useful data. While on site, the snowballing method to recruit participants was often used with some surprising results. As noted by Sarsby (1984), one also needs an element of luck, especially in qualitative research:

> Every field situation is different and initial luck in meeting good informants, being in the right place at the right time and striking the right note in relationships may be just as important as skill in technique. Indeed, many successful episodes in the field do come about through good luck as much as through sophisticated planning...[387]

The sampling method used for this study, to a large extent, was based on a pool of volunteers who represented a range of experiences including status, age, experience, gender, race and teaching approaches.

386 Appendix 1

387 J. Sarsby, 'The Fieldwork Experience' in R.F. Ellen (ed) Ethnographic Research: A Guide to General Conduct (Academic Press, London 1984) cited in Bryman (n 349) 431

3.4 Conclusion

In this chapter, a detailed description of the qualitative research techniques used for collecting data for this study has been made, including some assessment of their relative strengths and weaknesses. The research strategies that the researcher used included sampling procedures, individual and group interviews, classroom observation of teaching approaches and an examination of official documents. The research ethics that underpinned the process of data collection were equally considered in order to protect the anonymity and integrity of the participants and the institutions involved. The use of a variety of research techniques, otherwise known as triangulation, was necessary to enhance the reliability of the interpretation of the data.

In the next chapter, the researcher describes in some detail the theoretical approaches to data analysis and interpretation.

4.1 Introduction

In the previous chapter, the research process was described, more specifically the methods that were used to collect data for this study. This chapter proceeds to describe the theoretical approach to data analysis, bearing in mind that the aim of the study is to determine whether undergraduate legal education in selected African law schools involves the learning of skills and what such skills tell us about the nature and practice of law in Anglophone jurisdictions in Africa. The research also seeks to understand the extent to which such skills reflect elements of African customary law, given that Anglophone countries in Africa have plural legal systems where common law exists alongside indigenous legal systems and cultures. This chapter, therefore, focuses on describing the theoretical aspects of data analysis from interviews, observations, and documentary sources. Additional information and notes obtained through interactions with other participants such as retired academics, law graduates, practitioners and those involved in the regulation of legal education are carefully analysed.

4.2 Context of the study

The primary objective of this study was to find out whether skills are being taught as part of undergraduate legal education. One institution was used as an initial case study because of its skills-based curriculum.[388] After preliminary observations of teaching approaches at the initial institution, during the 2015/16 academic year, an interview guide and observation schedule were designed and pre-tested there and at a second institution in June 2016. The amended version of the interview guide was also pre-tested at a separate law school in 2017. The initial

388 See Appendix 7

interest of the researcher was to investigate whether there was any correlation between skills teaching in university law schools and performance of trainees at the professional stage of legal training.[389] Statistics at the professional school of law, where qualified law graduates enrolled for the last stage of their legal training, seemed to suggest that the initial institution had the highest proportion of students excelling during their professional training.[390] LLB graduates at that institution tended to do better at the professional law school than students from other institutions[391] in that country.[392] In Kenya, a recent report by the Kenya School of Law and the Kenya Institute for Public Policy Research and Analysis shows that LLB graduates at those university law schools with a skills-based law curriculum seem to perform better at the Kenya School of Law.[393] It is this data that justified widening the scope of this study to include other Anglophone African university law schools. It was important to explore this dimension because African law faculties focus on providing academic legal training for a bachelor's law degree (LLB).[394] In many jurisdictions in Africa, legal skills are associated with postgraduate professional law training institutions controlled by professional bodies, generally referred to as 'Law Schools.'[395] This results in a bifurcated system where theory is taught in the university and the professional elements in the 'law school'.

In Ghana, preliminary data showed that some institutions were gravitating towards skills education in undergraduate legal education which is in sharp contrast with the 'Gower Model', the British two-tier system of legal training.[396] The preliminary data made it necessary to

389 In Africa, most common law jurisdictions still have a two-tier system of legal education. See Manteaw (n 2) 921-925 and Professor Stephen Kwaku Asare v A-G and Others (Ghana Supreme Court, Suit No: J1/1/2016, Irene Korley-Ayerteye & Others v GLC HR/0066/2017 (Ghana)

390 On average, graduates from that institution had won awards for outstanding performance in at least 5 out of the 8 core courses between 2009-2015. See Fig. 5 (paragraph 6.2.2)

391 In April 2017, there were 12 institutions offering undergraduate legal education in that country

392 Until 2003, there was only one university law school in that country

393 KSL and KIPPRA (n 35).

394 LCB Gower (n 57) 118-121, See also Berthan Macaulay, 'Students for Law Schools and Faculties in Africa' (1962) 6 J. AFR. L. 81; William Twining (n 310)

395 Manteaw (n 2) 924

396 LCB Gower (n 27), LCB Gower (n 57) 118

expand the scope of the study to investigate whether this was true of other Anglophone African law faculties, and what place skills generally have in undergraduate legal education. This is because there is growing evidence that legal education that is devoid of skills is considered not only insufficient but also unhelpful to students.[397] This is despite the fact that undergraduate legal education has always been considered as antecedent to professional training that is supposed to focus on imparting legal skills.[398]

The data-gathering experience in Ghana, therefore, was akin to an "ethnographical study" of law schools that is supported by Twining's reflections based on his imaginary English university law school, Rutland, in Blackstone's Tower.[399] Cownie (2004) refers to this to illustrate that "in a context where there are hardly any empirical studies about law students and legal academics, such work could greatly increase our knowledge."[400] She notes, further, that the best qualitative research emerges "from those who are already familiar with the setting and the phenomena which they are studying."[401] As a result, such 'insider' researchers have the advantage of benefitting from a shared cultural experience which enables them to formulate the right questions and "speak through the research" because such a researcher is able to tap into personal knowledge of the researched phenomena as long as such personal experiences are relevant to the study and are clearly indicated.[402]

The importance of the pilot study in Ghana is that it provided background data that enabled the refinement of themes and topics which became the focus of the main study, as well as the basis

397 Maughan and Julian Webb (n 82) 20-25; Muna Ndulo (n 71)

398 LCB Gower (n 27), LCB Gower (n 57) 118, See also Nigel Duncan, 'Why Legal Skills – Whither Legal Education' (1991) 25 Law Tchr. 142. Note also that plans are underway to reform the system of training lawyers in England with plans to adopt a new SQE in Autumn 2021. See SRA, 'Solicitors Qualifying Examination (SQE)' <https://www.sra.org.uk/sra/policy/sqe/solicitor-persona/> (accessed 18 August 2021)

399 Twining (n 294) 64

400 Cownie (n 4) 42

401 Cownie (ibid) 23

402 Greenbaum (n 5) 12

for the formulation of appropriate research instruments and snowball sampling. For instance, students at the initial institution subsequently participated in a group interview in circumstances similar to Skeggs' (1994) research where she used students she had previously taught as subjects for a doctoral project.[403] More importantly, being an 'insider' at a Ghanaian university acted as a form of triangulation for the data obtained in Ghana. According to Cownie, as an insider, one can easily detect blatant misinformation.[404] Consequently, the reliability of data analysis on legal education in Ghana is arguably enhanced by virtue of this researcher's familiarity with the academic system.

However, the pilot study in Ghana could not be considered by itself as a 'case study evidence' representative of legal education in Africa. The Ghanaian study is simply an example of the problems associated with conducting case study research because of the need to decide what the unit of analysis should be.[405] The main study therefore sought to obtain data from a number of law schools in order to develop a hypothesis about the benefits or otherwise of skills teaching at the academic stage of legal education. An important effect of the pilot study in Ghana is that it emboldened the researcher's resolve to spend more time in the field in order to contextualise issues on skills teaching.

Following the pilot study in Ghana, the researcher refined the research instruments before visiting university law schools in east and southern Africa. To maintain research ethics, official clearance letters were obtained from the researchers' institution and sent by email to deans of targeted university law schools inviting them to participate in the study. In many ways, personal contacts at the institutions provided a direct link with the deans, which helped to reduce delays.

403 Bryman (n 349) 445

404 Cownie (n 4) 24

405 Robert Yin, Case Study Research: Design and Methods (4th edn Sage Publishing, California 2009) 29-33

In some of the cases, the deans were already familiar with the research based on previous interactions with the researcher at international conferences or other events, which made it easier to obtain access. Other law faculties did not respond at all and in some instances, despite showing initial interest in the research, the deans simply ignored further communication. Where this was the case, it was not possible to interview participants or make observations as it would have been unethical to do so without clearance. However, even where some deans showed no enthusiasm to participate, some of the participants agreed to be interviewed or permitted class observations in strictest confidence. In order to widen the sources of data, documentary sources such as course descriptions with information about pedagogical approaches in the selected cases and several other law faculties were obtained from the internet and university brochures. Some material was also provided by contacts at universities where it was not possible to obtain access clearance.

4.3 Sampling

The sampling strategy used in this study was intended to enable some general conclusions to be drawn about legal education approaches in Anglophone African university law schools. Accordingly, the sample of respondents cannot be considered as statistically representative of the targeted population as a whole. Given the logistical and financial constraints involved in collecting data from universities in different countries, it was important to limit the scope of the research in order to address the question: 'What does this data represent?' rather than an attempt to answer the question 'How representative is this?'[406] The sampling technique was therefore intended to make the findings valid rather than representative of a study population.[407] The rationale of theoretical sampling as part of qualitative research is that it enables some

406 See Cownie (n 4) 17

407 Cownie (ibid)

degree of generalisation to be made, hence the need for the sampling processes to be systematically carried out.[408]

As already stated, the law schools selected as case studies were located in east, west, and southern Africa. Considering their diversity, there were variations in the type of universities selected, with data obtained from both new universities and old universities that were both privately and publicly funded. A list of the selected sample of law schools is indicated in **Table 1** below. Data was also obtained from a law school in Virginia, United States, during a visit to understand what skills teaching entails there. The law schools selected for interviews, observation and documentary sources are shown below. To avoid identifying the specific institutions, the law schools that were used in the study are listed in random order.

408 See Annie Rochette, 'Teaching and Learning in Canadian Legal Education: An Empirical Examination' (DCL thesis McGill University 2010) 98-105 and Cownie (n 4) 17-20

Table 1: Selected sample of law schools

INSTITUTION	COUNTRY	PRIVATE/ PUBLIC	INTERVIEW PARTICIPANTS	OBSERVATIONS	OTHER DATA SOURCES
1	Ghana	Public	24 – Dean + Fmr. Dean + 4 Lecturers + 9 LLB Students + 9 LLB Graduates	3 (Legal Writing & Study Skills, Law Clinic & Mooting, Company Law)	Brochure, Handbook, Course Outlines, Exam Papers
2	Ghana	Public	5 – 1 academic staff (anonymous) + 1 Fmr. Dean + 3 LLB Graduates	0	Prospectus
3	Ghana	Private	5 – Dean + Council Member (Ret. Judge) + 3 LLB Students	3 (Legal Writing & Study Skills, Law Clinic & Mooting, Legal Method)	Handbook, Course Outlines, Exam Papers, Faculty board minutes
4	Ghana	Public	2 – Dean's representative + 1 LLB Lecturer	0	LLB Programme
5	Uganda	Public	10 – Dean + Fmr. Dean + 4 LLB Lecturers + 4 LLB students	2 (Clinical Legal Education, Family Law, Public Interest Law Clinic (PILAC))	Handbook, Law Clinic Brochure, LLB Pre-Entry Exam Questions, Final Report of The Committee on Legal Education, Training & Accreditation in Uganda (1995)
6	Kenya	Public	0	1(International Law)	LLB Programme Reviewed Curriculum (Version 2, Jan 2016)
7	Kenya	Public	2 LLB Graduates	0	0
8	Kenya	Private	12– Dean + 6 LLB Lecturers + 4 LLB Students + 1 LLB Graduate	6 (Oral examinations in international Law), 1 extra-curricular group activity: video 'Black Kingdoms of the Nile' followed by group discussion with staff and students	LLB Course Description, Examination questions, Public Int'l Law Oral Exam Mark Sheet
9	South Africa	Public	10 – Ass. Dean + Fmr. Ass. Dean + 4 LLB Lecturers + 1 Edu. Consultant + 1 LLB Graduate + 2 Clinicians	4 (Media Law, Intellectual Property, Private Law (Unjust Enrichment, Legal Problems of HIV & AIDS)	2017/2018 LLB Faculty Brochure, Law Faculty Teaching & Assessment Policy (2010), Workstream on Curriculum Transformation (2016), Legal Skills Course Description (2009-2010)
10	South Africa	Public	8 – Dean + Fmr. Dean + 4 LLB Lecturers + 2 Clinicians	2 (Street Law), 1 extra-curricular mooting rehearsal for the 27th African Human Rights Moot Court Competition	Street Law Course Outline
11	Botswana	Public	1 (researcher's experience as student and graduate)	0	LLB Programme
12	Zimbabwe	Public	1 Practitioner/ Lecturer	0	LLBS (Hons) Course Structure
13	Zimbabwe	Public	0	0	LLB Honours Programme
14	Zimbabwe	Public	0	0	LLB Honours Programme
15	Malawi	Public	0	0	LLB Honours Programme
16	USA	Private	1 Instructor/Clinical Professor	1 (Legal Writing)	Moot Questions

The first case study involved a law school whose law programme integrated some skills courses that are traditionally associated with clinical legal education.[409] Evidence from this case study showed that the curriculum had been reformed to include a skills component by a new dean who had many years of international experience as a professor of legal education.[410] The same curriculum was adopted by another university law school that was selected as a second case study.[411] A visit at that law school enabled the researcher to test the same research instruments piloted at the initial case study and to observe how the skills-based law curriculum was being implemented at both institutions. Another case study selected was a university law school that offered the LLB degree to graduate students only.[412] Available literature shows that some universities in Africa offer the LLB degree to graduate students only,[413] a system of legal training associated with universities in the United States.

As observed by Manteaw (2008), some African universities offer law programmes to undergraduate and post-graduate candidates.[414] Undergraduate students selected after completing high school can enrol for a law programme for a duration of four years.[415] There are also some institutions that offer law programmes to university graduates for periods ranging from 2-4 years on a full-time or part-time basis.[416] After obtaining an LLB, candidates who meet the criteria may then enrol for the professional programme at a professional school of law if they intend to practise law.[417] Those qualified from abroad may take a professional course and exams designed for those who are already qualified as lawyers.[418] Against this background,

409 Faculty of Law Handbook (on file with researcher)
410 The Dean was also a UK trained Barrister
411 Law Faculty Handbook (on file with researcher)
412 Such LLB Programmes are referred to as Post First Degree LLB Programmes in that country
413 See Manteaw (n 2) 920
414 Manteaw (n 2) 923
415 Manteaw (ibid)
416 Manteaw (ibid)
417 Manteaw (ibid)
418 Manteaw (n 2) 124

an interesting issue to examine is the question of whether the variation in the duration of such law programmes influences the approach to legal education, especially in relation to skills teaching. It was therefore necessary to understand whether the performance of trainees at the professional stage of legal training correlated with a particular route to obtaining an LLB. The postgraduate law programmes were also of interest because in other jurisdictions such as the United States and Canada, where law is offered as a postgraduate course, such postgraduate law programmes are offered as a professional course. Visiting a law school in the United States provided an opportunity to understand the phenomenon of skills teaching there.

Two university law schools in East Africa granted the researcher full access. Although it was not possible to obtain permission for a full visit at all selected institutions in East Africa, some lecturers agreed to have their classes observed. One institution provided a good case study because of its effort to introduce clinical legal education.[419] One of the case studies was a private institution whose law programme had elements of both substantive and procedural law.[420] This aspect is directly relevant to this study in that undergraduate law programmes are traditionally associated with the teaching of substantive law leading to an LLB degree. It was interesting, therefore, to investigate how the procedural aspect of the law programme at that law school was being taught, and whether such teaching involved skills as well. It was necessary to investigate university law schools in East Africa to understand the impact of recent regulatory reforms such as the Legal Education Act, 2012 in Kenya.[421] Most importantly, East African universities were selected in order to analyse the impact of the history of apprenticeship training on legal education, a training model that is similar to the Gower Model (the theoretical

419 At this law school, the researcher conducted interviews with both staff and students. It was also possible to observe students in the law clinic and in lectures.

420 School of Law LLB Programme and Law Clinic Brochure (on file with researcher)

421 See the Kenya Gazette Supplement No. 130 (Acts No. 27)

and professional model) in West Africa.[422] Data from **Appendix 7** shows that some law schools in Kenya offer clinical courses.[423] Some law programmes make provision for Clinical Legal Education constituting Judicial Attachment, Clinical Externship, Mooting, Public Interest Law and Practice which are offered as core units.[424] Although a visit to all the law schools was not possible, the researcher was able to interview law graduates whose experiences provided relevant data for this study.

Southern African universities provided an interesting dimension to the study because selected universities in South Africa and Zimbabwe teach Roman-Dutch law, which has elements of civil law and common law.[425] African customary law based on indigenous African culture and traditions is also stressed in the curriculum.

In South Africa, the researcher was granted full access at two institutions that are highly ranked internationally whose curricula have a strong skills component.[426] One of the universities has a degree programme that is considered a "liberal arts" law degree. Given the strong views that William Twining has about the benefits of liberal education and how its elements can be harnessed in legal education,[427] this provided an important case study.

In Zimbabwe, logistical problems impeded visits that had been planned in August 2018. However, an interview with a lecturer from one of the three selected universities was a useful source of data. The law programmes offered by Zimbabwe university law schools represent what Twining refers to as a "collapse of the academic and vocational stages into a single four-

422 See Gower (n 57) 126-127

423 This is based on documentary evidence including course outlines, law school brochures and handbooks.

424 See Appendix 7

425 A.J. Jerr, 'The Reception and Codification of Systems of Law in Southern Africa' (1958) Journal of African Law, Vol. 2, Issue 2, 82-100

426 See Appendix 7

427 See Twining (n 294) 170

year integrated course," a trend towards the removal of traditional barriers between the academic and vocational stages.[428] Based on media reports, new university law schools in Zimbabwe have recently earned regional and international recognition especially for their practical-oriented programmes.

Other law programmes at universities in Southern Africa resemble the model in Zimbabwe that integrates both the academic and vocational aspects of legal education. In England, such a model is also used by the M Law (Exempting) BPTC degree at the University of Northumbria. This is a 4-year master's programme that is practically oriented and provides an exemption from the professional stage of legal training.[429]

For this study, the selected law schools were useful for purposive sampling whose goal, according to Bryman (2012), "is to sample participants in a strategic way so that those sampled are relevant to the research questions that are being posed."[430] It is submitted that while the conduct of such multiple case studies is challenging, the data yielded tends to inspire greater confidence in the findings.[431]

4.4 Data sets

The strategies used to collect data generated six categories of data obtained from face-to-face interviews and focus groups with current LLB students, LLB graduates, deans, former deans, deputy deans, director of a professional programme, law lecturers at different levels, a cultural studies expert, a paramount chief qualified as a barrister and a law faculty education consultant.

428 See Twining (n 310) 54

429 Northumbria M Law Exempting (BPTC) <https://www.northumbria.ac.uk/study-at-northumbria/courses/law-llb-hons-uuslwz1/m-law-exempting-bptc/> accessed 4 April 2020

430 See Bryman (n 349) 418

431 Robert Yin, Applications of Case Study Research (3rd edn Sage Publishing, California 2012) 9

Triangulation of the data was achieved by using data from in-class observations, oral examination observations, and observation of moot court presentations. Other documentary sources (including law faculty handbooks, university prospectus/brochures, etc.) were used to complement this data. **Table 2** below shows a full list of the different data categories that were used for the study.

Table 2 Data sets showing different categories of data generated from the study

Data Set	Data Source	Method	Analysis	Findings
1	Documents including: Course Descriptions & LLB Programmes Prospectus/Brochures, Handbooks, Course Outlines, Exam Papers, Board Minutes, Internal Policy Documents and Communiques	Documentary Analysis	Paragraph 5.2.1	Paragraphs 5.2.2 & 5.2.3
2	20 LLB Students + 1 Focus Group (4 participants))	Qualitative Interview	Paragraph 5.3	Paragraph 5.4
3	17 LLB Graduates + 2 Focus Groups (11 participants)	Qualitative Interview	Paragraph 5.3	Paragraph 5.4
4	7 Current Deans, 2 Deputy Deans, 3 Former Deans + 1 Director of a Professional School of Law + 1 Retired Judge & University Council Member	Qualitative Interview	Paragraph 6.2.1	Paragraph 6.2.2
5	25 Law Lecturers + 1 Law Faculty Education Consultant + 1 Cultural Studies Expert + 4 Clinicians + 4 Others (Academics/Practitioners)	Qualitative Interview	Paragraph 6.3.1	Paragraph 6.3.2
6	15 In-Class Observations, 6 Oral Exam Observations, 4 Extra-Curricular Activities incl. 3 Moot Court/Oral Argument Observations	Observation	Paragraph 6.3.1	Paragraph 6.3.2

Legal academics who were interviewed included private practitioners, adjunct and full-time lecturers, and career academics in order to obtain a wide range of views on the issue of skills teaching. The academics who were selected also reflected varying levels of status and experience: professors, associate professors, senior lecturers, lecturers, and assistant lecturers. The selection of participants took into account variables such as diversity including gender, age, and race. Some of the interviewees freely talked about issues of feminism and sexuality, areas that have not been given much prominence in African legal education.

The same consideration was made in the selection of students. Views were also obtained from academics with different ideological persuasions such as those subscribing to black-letter, socio-legal, clinical, and feminist ideas. The documentary sources used to supplement this data were most useful in cases where access could not be obtained.[432]

Having considered the variables mentioned above, it is submitted that the data collected reflects African legal education sufficient to satisfy Cownie's requirement 'to make the case' of validity.[433] As already stated, this study is qualitative in nature, and it is not suggested in any way that the sample used is statistically representative of the larger population.

4.5 Data analysis

In order not to lose sight of the purpose of the study, one needs to reiterate the objective which was to investigate the teaching approach to legal education in African university law schools at undergraduate level and the extent to which skills are taught, if at all. Since African countries have mixed legal systems, the researcher's objective was to find out whether there is a pattern of skills that are unique to African legal systems. As this study was about legal education, it was important to select a data analysis approach that would effectively answer the research questions. As noted by Alase (2017), deciding on what analytical approach to use in a qualitative study is often daunting and tedious.[434] It was important to adopt a method of analysing data that would enable the exploration, in more detail, of the 'lived experiences' of the research participants. In the light of the issues that were being investigated, the researcher adopted approaches associated with other disciplines such as education, psychology, and

432 In some cases, access could not be obtained in time owing to administrative delays. It was logistically difficult to arrange visits to some of the selected law schools

433 See Cownie (n 4) 20

434 Abayomi Alase, 'The Interpretative Phenomenological Analysis (IPA): A Guide to a Good Qualitative Research Approach', (2017) International Journal of Education & Literacy Studies, Vol. 5 No. 2, 9

anthropology, in order to examine the emerging issues more meaningfully. In a study such as this one, which has links with other disciplines, it is advisable not to let methods stifle creativity.[435] Chamberlain (2000) also warns researchers to be wary of "methodologism" (Salmon, 2002)[436] or "methodolatry (Chamberlain, 2000)[437]", which is the tendency to be obsessed with methods on the misconception that such methods, by themselves, produce meaningful outcomes. As noted by Smith, et al. (2009):

> As researchers, we must be creative in our application of these methods. Successful data collection strategies require organisation, flexibility and sensitivity. Successful analyses require the systemic application of ideas, and methodical rigour; but they also require imagination, playfulness, and a combination of reflective, critical and conceptual thinking.[438]

This researcher, therefore, adopted the Interpretative Phenomenological Analysis (IPA) approach to analyse the data emerging from this study. Greenbaum (2010), acknowledging that she was a novice researcher in her study of the LLB Programme in South Africa, also utilised this approach.[439] IPA was ideal for this study because, as a tried and tested approach traditionally associated with psychology:

> …it has a theoretical commitment to the person as a cognitive, linguistic, affective and physical being and assumes a chain of connection between people's talk and their thinking and emotional state. At the same time, IPA researchers realize this chain of connection is complicated – people struggle to express what they are thinking and feeling, there may be reasons why they do not wish to self-disclose, and the researcher has to interpret people's mental and emotional state from what they say.[440]

435 See Rochette (n 408) 94

436 P. Salmon, 'How do we recognise research when we see it? Anarchism, Methodologism and the Quantitative vs Qualitative Debate', (2002) Psychologist, 16, 24-27

437 K. Chamberlain, 'Methodolatry and Qualitative Health Research' (2000) Journal of Health Psychology, 5 (3), 285-296

438 Jonathan A. Smith et al., 'Interpretative Phenomenological Analysis', (Sage Publications, London 2009) 40-41

439 See Greenbaum, (n 5)

440 Jonathan A. Smith and Mike Osborn, 'Interpretative Phenomenological Analysis', in Jonathan A. Smith (ed) Qualitative Psychology: A Practical Guide to Research Methods (2nd edn Sage Publications, London 2008) 54

The issues that the researcher was investigating involved students and their lecturers. Obtaining data for the study entailed interviewing students whose experiences needed a deeper analysis as they may have withheld sensitive information that could jeopardise their studies. Similarly, their lecturers may not have been candid enough as they probably thought the investigation was trying to pry into their teaching approaches. More importantly, many participants who were interviewed had very strong feelings which required an analytical approach that would enable the researcher to see through such emotions as part of a lived experience. It is argued therefore that IPA was the most effective tool to analyse in detail how students and their lecturers make sense of their personal and social world. IPA enables a researcher to get close to the participant's world in order to take an 'insider's perspective', which cannot be done directly or completely.[441] However, as noted by Smith and Osborn (2008), *"while mainstream psychology is still strongly committed to quantitative and experimental methodology, IPA employs in depth qualitative analysis."*[442]

Because of the time and financial constraints, IPA was ideal in that it enabled the researcher to focus on a smaller sample in each data set than is normal in other qualitative studies.[443] This ensured that the research project yielded 'rich' and 'thick descriptions' of the "lived experiences" of the research participants.[444] IPA was also appropriate because its primary concern is to make "a detailed account of individual experience. The issue is quality, not quantity, and given the complexity of most human phenomena, IPA studies usually benefit from a concentrated focus on a small number of cases."[445] The researcher was therefore able to conduct an in-depth analysis of the data sets 2-5 as shown in **Table 2** above.

441 Smith and Osborn (n 440) 53

442 Smith and Osborn (n 440) 54

443 See Alase (n 434) 12 and Smith and Osborn (n 440) 55

444 Greenbaum (n 5) 146

445 Smith and Osborn (n 440) 51

According to Smith and Osborn, "detailed case-by-case analysis of individual transcripts would take a long time, and the aim of the study is to say something in detail about the perceptions and understandings of this particular group rather than prematurely make more general claims."[446] In this study, IPA made it possible to do a slow but careful analysis of cases in this study, rather than jumping to conclusions.

To sum up, a detailed IPA analysis allowed the scrutiny of the data collected from interviews and observations and provided an opportunity to ask critical questions such as: What is the participant trying to establish here? Is something leaking out here that wasn't intended? Do I have the feeling that something is going on here that the participants are not aware of?

4.6 Data analysis process

In the sections below, the researcher's position in relation to the phenomenon under study is discussed before the data analysis process is elaborated.

4.6.1 Researcher's position

Before describing the phenomenological technique used to analyse the data collected in this study, it is important to state the researcher's experience of the phenomena to ensure that the researcher "brackets" himself away from the 'lived experience' of the research participants.[447]

In a study of this nature which examines the teaching of law in Africa, the researcher would like to state from the outset that he has multiple identities. He is a law lecturer whose work focuses on skills teaching. Apart from that, the researcher is a former law student who studied,

446 Smith and Osborn (n 440) 55

447 See Alase (n 434) 13

lived, and practised law in Africa. Although qualified as a lawyer from an African university law school which leans towards clinical legal education in a Roman-Dutch jurisdiction, the researcher also has common law experience as a solicitor in Britain, a common law jurisdiction where he also obtained a master's degree. Furthermore, the researcher has spent some time teaching in North Cyprus, a country whose legal system has influences of both civil and common law traditions.[448] Despite the familiarity with law teaching as an "insider", the researcher is in some ways a "novice" researcher with little previous experience conducting an empirical study. Yet it is these identities and past experience that are the motivation behind this study.

4.6.2 Phenomenological data analysis

The first step in the analysis of data involved reading through each interview transcript and observation notes several times to identify any emerging narratives and themes. Following this, key phrases and statements pertaining to the phenomenon were identified in each transcript and observation notes with different colour highlighters. The importance of doing this is that as a researcher, there is need to construct what Creswell refers to as "meaning units" or themes.[449] The highlighted material was then copied and pasted into a new document ensuring that no sources could be identified.

Following this process, key phrases and statements were studied closely to enable the researcher to "inductively develop a sense of common or familiar themes that appeared to be linked across several transcripts" and observation notes.[450] According to Greenbaum, these

448 Turgut Turhan and Arzu Alibaba et al., 'Legal Education in North Cyprus' (2006) 3:1 European Journal of Legal Education, 21-44

449 John W. Creswell, Qualitative Inquiry and Research Design: Choosing Among Five Approaches (3rd edn Sage Publications, California 2013) 193

450 Greenbaum (n 5) 148

emerging themes are "recurring regularities."[451] The discovery of such themes from empirical data is similar to the grounded theorists' concept of open coding.[452] Coding in data analysis generally refers to the process of organising the text of the transcript to enable the researcher to see patterns that will lead to some explanations that will answer the research questions.[453] Since the research questions and interview questions inherently defined the themes to be explored in this study, the initial codes were not only descriptive but also conceptual.

The recurring themes were then grouped together, and a label was given such as: "genre/type" e.g., advocacy, interviewing, legal writing, "perception to skills: acceptance vs. resistance", "mode of provision" e.g., integration or desegregation, "justification for skills: foreign or local influences", "resistance to skills: tradition vs. innovation", "skills and Africanisation" and "pedagogical approaches". Various literature refers to such themes as "categories"[454], "codes"[455], "labels"[456], "segments"[457] and "units"[458]. Because of the length of each of the 100 interviews, which ranged between 30-60 minutes, the researcher was literally "adrift in a sea of data"[459] requiring the transcripts, observation notes and extracts to be read repeatedly. Although Auerbach & Silverstein (2003) recommend sifting "raw text" from "relevant text" to save endless hours of coding, it is also important not to leave out relevant material.[460]

The incessant process of reading and isolating the themes emerging from the data resulted in the categorisation of themes under five headings as illustrated in **Figure 1** below.

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451 Greenbaum (ibid)

452 Greenbaum (ibid)

453 Carl F. Auerbach & Louise B. Silverstein, 'Qualitative Data: An Introduction to Coding and Analysis (New York University Press, New York 2003) 31

454 Barney G. Glaser and Anselm L. Strauss, The Discovery of Grounded Theory: Strategies for Qualitative Research (Aldine de Gruyter, Chicago 1967)

455 Matthew B. Miles and A. Michael Huberman, Qualitative Data Analysis (2nd edn Sage Publications, California 1994)

456 Ian Dey, Qualitative Data Analysis: A User-Friendly Guide for Social Scientists (Routledge, London 1993)

457 Renata Tesch, Qualitative Research: Analysis Types and Software Tools (Falmer, London 1990)

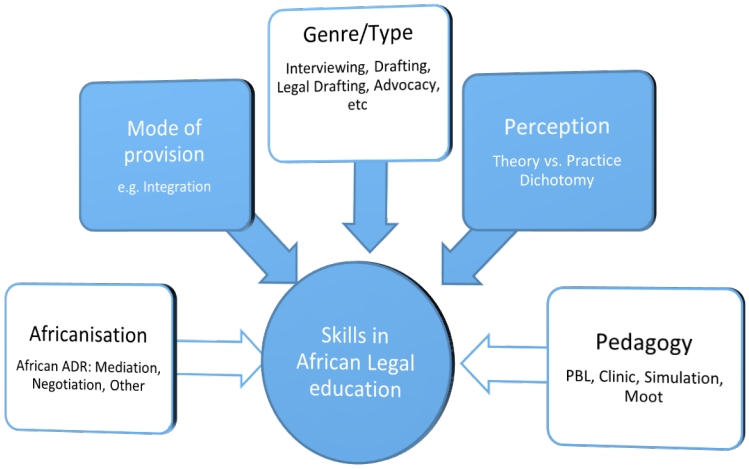
458 Creswell (n 449)

459 Auerbach and Silverstein (n 453) 32

460 Auerbach and Silverstein (ibid)

The categories were then aligned with the theoretical framework, literature review, and the research questions to focus on the phenomenon under investigation. Under each heading, an attempt was made to describe "what" the participants in the study "experienced" in terms of what they were learning or teaching in order to establish each participant's "lived experience". Such categories enhanced an understanding of "how" learning or teaching was taking place and the perceptions of participants in the study.

Fig. 1: Categories emerging from phenomenological analysis of transcript and observation data



The value of data analysis from a phenomenological point of view was that it enabled the researcher to distil meaning to capture the important elements of the lived experience of the participants according to the five data sets generated from the interviews and observations. Greenbaum (2009) contends that a phenomenological approach to data analysis enables themes to emerge whose meaning can be interpreted.[461] More importantly, this strategy of analysing data ensured that the participants' emotions and voices were an integral part of the

461 See Greenbaum (n 5) 150

interpretation that "evoked and intensified embedded meaning,"[462] which justifies the use of direct quotations from the interview transcripts and observation notes. As Greenbaum (ibid) notes: "Phenomenologists often draw on data from different narrators to create a "blended story", allowing the reader to feel what it would be like to have the experience."[463]

4.7 Conclusion

This study involved a novel approach to researching African legal education, an area that has not yet been sufficiently investigated. The researcher's approach is somewhat unconventional because legal research is predominantly doctrinal, which has often invited criticism for its lack of scientific integrity due to its "descriptive, authority-based, as well as an interpretative enterprise."[464] Cotterrell (2002) suggests that legal study must now be approached as an 'empirical, systematic study of a field of social experience.'[465] It is for this reason that this study was a journey into learning about social science research methodologies. Although the research process took longer than anticipated, in the final analysis the use of mixed methods ensured that there was a reasonable measure of validity and reliability in the interpretation of the findings. Also, the constant shuffling between the data and the emerging categories led to a more rigorous analysis.

In the next chapter, the data is analysed and the findings are discussed to show how law is being taught in African university law schools and the extent to which skills related to African customary and culture are taught, if at all.

462 Greenbaum (ibid)

463 Greenbaum (n 5) 150

464 Stolker (n 63) 203

465 Roger Cotterrell, 'Subverting Orthodoxy, Making Law Central: A View of Social Studies', Journ. of Law & Soc. (2002) Vol 29, 632-44

CHAPTER 5: LEARNING OF SKILLS IN THE UNDERGRADUATE LLB CURRICULUM

5.1 Introduction

This chapter analyses the data collected in response to the first research question, which was whether undergraduate law students in selected universities were involved in learning skills as part of the LLB degree programme, and the extent to which such skills involved elements of African customary law and culture. The question also sought to elicit information about how participants were learning such skills. The information yielded from an analysis of official documents and a phenomenological analysis of data from interviews with students provided the answer to the research question, as well as the data obtained from classroom observations about the teaching approaches used.

Paragraph 5.2 presents results of the documentary analysis of curriculum documents from the 15 law schools that were sampled (Data Set 1), and evidence of skills taught in the curricula, including the different strategies for integrating any such skills into the curriculum. Later on, the extent to which such skills embody African customary law and culture is discussed.

Paragraph 5.3 analyses the data that was collected from interview transcripts of LLB students and graduates from sampled universities in order to find out the kinds of skills they were learning (Data Sets 2 and 3), and the students' perceptions of the value of the skills, including those associated with African culture.

The findings indicate that clinical courses, especially those incorporating live-client experience and externships, provide the best means of learning skills, rather than traditional courses or other skills-based courses which are identified in the documentary analysis in Paragraph 5.2.

The results also show that experiences in a range of other legal settings – both curricular and extra-curricular – are useful in filling the "skills gap" that exists in the traditional LLB degree programme. The responses show that most students and graduates who were interviewed considered such experience to be synonymous with skills. Such a perception amplifies the structural issues in legal education, particularly the tension caused by the traditional approach of separating theory from practice or what is referred to as the myth that "aligns the teaching of doctrine with theory and the teaching of skills with practice."[466] The results further suggest that participants who went through "experiential learning" seem to appreciate traditional/cultural practices that are not currently emphasised in the conventional LLB degree. As explained in Chapter 4, the analysis of the data was meant to understand whether skills were being taught and whether such skills reflected elements of African approaches based on customary law and culture.

This chapter, therefore, discusses issues pertaining to the types of skills that are taught in the LLB degree programme and how they are integrated, whether directly or indirectly, into the curriculum. Such data is useful in answering questions concerning the training model used in Anglophone countries in Africa.

466 Kruse (n 60) 9

Data Table showing Data Sets 1-3

Data Set	Data Source	Method	Analysis	Findings
1	Documents including: Course Descriptions & LLB Programmes Prospectuses/Brochures, Handbooks, Course Outlines, Exam Papers, Board Minutes, Internal Policy Documents and Communiques	Documentary Analysis	Paragraph 5.2.1	Paragraphs 5.2.2 & 5.2.3
2	20 LLB Students + 1 Focus Group (4 participants))	Qualitative Interview	Paragraph 5.3	Paragraph 5.4
3	17 LLB Graduates + 2 Focus Groups (11 participants)	Qualitative Interview	Paragraph 5.3	Paragraph 5.4

5.2 Documentary analysis of current LLB curricula [Data Set 1]

Data Set 1 contains data that was extracted from official curriculum documents from law faculties including brochures, prospectuses, handbooks, course descriptions, and information from websites. The researcher is aware that such documentary material does not always provide accurate information, perhaps because such material is not always updated, especially websites. To ensure that such data was reliable, Scott's (1990) criteria for assessing documentary sources was used to verify their authenticity, credibility, representativeness and meaning.[467] Information from interviews with students and staff and from observations of class teaching was used to verify the accuracy of the data generated from Data Set 1. The data from documentary sources used for this section was cross-checked to ensure that it was reliable. The analysis was not intended to evaluate the distinctions between forms, approaches and levels of skills teaching but to report the findings from the research. As Philip Iya (1994) reminds us,

467 Scott (n 371) 19-28

many researchers are not consistent in what the full content or list should be.[468] Fitzgerald's (1995) study on lawyer competence suggests that *"the task should not be to produce a perfect list which is complete, and which shows all the right skills and assigns them to difficult (sic) levels."*[469]

Relevant details of the documents were organised into a research matrix **(Appendix 7)** which shows the skills from Data Set 1 that were identified in the curriculum of the law schools that were surveyed. The data shows that most of the selected law schools were inclined to integrate skills in order to improve the traditional structure of the LLB degree. Analysing the documents was useful in identifying specific skills emphasised in the curriculum, how they were integrated, and how students were learning them in the context of the research questions.

5.2.1 Content of skills in the LLB curricula

The data shows that legal research and writing are (as one might imagine) the skills emphasised in legal research and writing courses. Such courses feature as a prerequisite in Year 1 in 8 of the 15 universities that were sampled. In some cases, legal research and writing skills are also mentioned in the course descriptions of another module such as Legal Methods and Jurisprudence. Skills in legal research and case analysis are also stressed in almost all the course descriptions in the curricula that have legal research and writing modules. This is consistent with the content of most conventional legal research and writing courses that focus on basic skills in legal method such as identifying the holdings of cases, case synthesis, statutory interpretation, research and writing skills, legal reasoning and analysis, including formulating and presenting legal arguments. Some course descriptions focused on elements of legal writing

468 Philip F. Iya, 'Educating Lawyers for Practice-Clinical Experience as an Integral Part of Legal Education in the BOLESWA Countries of Southern Africa', (1994) 1 Int'l J. Legal Prof. 315, 319

469 Maureen F. Fitzgerald, 'Competence Revisited: A Summary of Research on Lawyer Competence' (1995) 13 J. Prof. Legal Educ. 227 238.

including grammar, legal language, and writing style, with students expected to learn, among other things, how to write legal documents such as letters, including emails and legal memoranda. Unfortunately, the traditional structure of legal research and writing courses gives the impression that the main business of lawyers is litigation. Because they focus on traditional black-letter based research and writing skills, such courses may not be an effective means to impart knowledge and skills associated with customary approaches and culture which remain largely unwritten. This is part of the reason why the Restatement of African Law Project spearheaded by Antony Allot in the 1960s[470] and other recent attempts[471] at codifying African customary law have failed because of the dynamic nature of customary law. Notwithstanding the failure to codify African customary law, there is evidence that some law schools are also teaching social research skills such as research methodology to develop analytical and research skills that transcend the textual positivist analysis that is not appropriate for the teaching and studying of customary law which, when reduced to writing, can lose its cultural meaning partly because it is constantly evolving.[472] Including social research skills in the curriculum therefore helps lawyers to learn how to research elements of customary law, especially living customary law that requires experience in field-based research in order to deal with conflict of law issues involving aspects of common law and customary law that often come before the courts. The documentary analysis shows that almost all selected law schools have a provision for a research paper/project, dissertation or long essay in the curriculum that enables students to develop research and writing skills. As the researcher observes in a published article in the

470 William Twining, 'The Restatement of African Customary Law: A Comment', The Journal of Modern African Studies (1963) 221; Harrington and Manji (n 9) 123

471 Ascertainment and Codification of Customary Law Project (ACLP), 'Report on Pilot Phase of Ascertainment and Codification of Customary Law on Land and Family Law in Ghana' (2011) Vol. 2 (on file with researcher)

472 Chuma Himonga, 'Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law', (2017) Potchefstroom Electronic Law Journal Vol 20 <https://journals.assaf.org.za/per/article/view/3267> accessed 22 June 2020

Asian Journal of Legal Education titled 'Interdisciplinary Approach to Legal Scholarship: A Blend from the Qualitative Paradigm' (2016) 3(1) pp. 55–71:

> As part of developing lawyering skills, law students are often made to engage in research work at varying stages in their studies, through long essay, thesis and dissertation writings which form part of the curriculum of law universities. Some students choose to engage in interdisciplinary legal studies aimed at addressing the relationship between legal systems and their social systems. This results in a blend of law, social sciences and humanities focusing on law as a social phenomenon. (p.56)

Communication skills courses also feature prominently in the curricula of at least 9 of the universities, especially in Year 1. Two out of the 15 law schools specifically stress academic and professional communication. Such courses do not normally have legal content. As a result some law schools have addressed this deficiency by having courses that focus on related skills such as logic and critical thinking that are taught as separate units at some of the law schools. The data shows that such communication skills courses not only assist students in their first year of study to transition from high school to undergraduate university education, but are also essential for developing relevant reasoning and analytical skills. In that context, such courses may be viewed as the appropriate backdrop for oral and written advocacy skills that are the focus of courses such as mooting. The communication skills courses also equip students with English language skills necessary for effective legal practice. One institution in particular offers English for Law Students as a prerequisite. This is important considering the fact that English remains the language of the courts in most Anglophone African countries. However, such a focus on English appears to ignore the reality that the majority of Africans still speak their indigenous languages, with most court proceedings relying on interpreters. Perhaps this explains why some institutions are now integrating indigenous languages as part of the LLB degree, a laudable initiative that recognises multilingualism in countries such as

South Africa.[473] Given the technical nature of the law, proficiency in African languages may help to ensure the accurate interpretation and application of the law during court proceedings especially in conflict of law situations involving English common law and African customary law.

The curriculum of at least 12 of the 15 law schools includes a wide range of practical skills associated with the lawyering process in practice such as client interviewing and counselling, legal drafting, including legal correspondence, contracts, pleadings, and other legal documents.[474] This is evidence that some law schools are adapting the undergraduate law curriculum to enable students to appreciate that practising law and studying it constitute different things. The data further shows that in some cases, students are being given an opportunity to learn the "how-to" of dealing with various legal situations by practically doing some of the work that lawyers do in real practice. This is apparent in 8 out of the 15 law schools with live-client clinics where students are involved in legal work associated with the provision of legal aid services as part of clinical legal education. Other specific legal skills such as legal drafting and trial practice are also taught directly as independent skills in some cases.

It is also striking to note that the curricula of 6 out of the 15 law schools combine such practical legal skills with skills in practice management. There is also evidence of the melding of the "theoretical" and "practical" including, in some cases, "practice management skills" as well as elements of "professional practice" and public interest law and practice. An interesting dimension relating to practice management skills is that in the surveyed universities in southern

473 Docrat (n 167)

474 These skills are also highlighted in the proposed SQE in England which is set to start in September 2021. The skills are: advocacy, client interviewing (with written attendance note/legal analysis) legal research, legal writing, legal drafting and case and matter analysis) see <https://www.sra.org.uk/sra/news/sqe-update/july-2020/> accessed 19 August 2021

Africa, all law schools offer accounting for lawyers as a separate compulsory module, apart from one law school. Elsewhere, not all law schools that were surveyed offer the course. Accounting as a module seems to address some of the concerns raised in the literature regarding the need for students to learn numeracy skills as part of their legal training.[475]

From the results above, there seems to be an underlying assumption that students studying for the LLB degree all intend to go into private practice and this appears to influence the nature of skills stressed in the curriculum.

There is also evidence of a more professional orientation in the structure of the undergraduate curriculum at some law schools. Some of the modules refer to professional conduct and its role in advocacy. Students are generally expected to develop the professional skills that enable them to analyse ethical problems from the standpoint of the practising lawyer confronted with real world issues requiring decision making on the lawyer's part, rather than abstract speculation. The methods used to teach such skills include problem-based learning, mooting, and field visits. From the results, some law schools offer Legal Ethics as part of the LLB degree. This finding is significant because traditionally, professional aspects of legal training are associated with professional courses that are part of the professional stage of legal training in terms of the traditional structure of English legal training.

5.2.2 The nexus between legal skills and African culture

The results show that Alternative Dispute Resolution (ADR) is commonly used as a vehicle to teach skills in mediation, negotiation, and arbitration that are an intrinsic part of African

475 See Greenbaum (n 5) 90

culture.[476] At least 9 out of the 15 universities offer ADR, with 6 of them offering it as a prerequisite. There is evidence, however, that some of the law schools offer ADR as part of Legal Systems and Method. Where such courses are offered, African ADR is taught as part of customary law, which is a source of law in Anglophone African legal systems. One ADR course states that "the law relating to ADR will be examined and students taken through practical demonstrations of the workings of negotiation, mediation, and arbitration". At one law school, students are expected to have knowledge and "competence" in alternative ways of resolving disputes such as core aspects of mediation and arbitration by participating in a number of simulation exercises designed to assist in the development of skills associated with legal processes. The ADR course content at another law school makes specific reference to *"traditional dispute resolution mechanisms and the role of social context and cultural settings."*

As shown in the literature, most African communities still resort to traditional dispute resolution approaches.[477] The extent to which participants in this study were exposed to legal situations involving such approaches are discussed fully in paragraph 5.2.3. What is noteworthy about ADR in the African context is that customary arbitration as an ADR method has been codified and adopted in some jurisdictions, so it is not surprising that some law schools are now integrating skills associated with it in their curriculum.[478]

Reference to traditional dispute resolution as part of African ADR is also made in the curriculum of 7 out of the 15 law schools in this study that offer customary law as a separate

476 See Offei (n 223) 119-120, 250, Max Gluckman (n 19)

477 The Final Report of The Committee on Legal Education, Training and Accreditation in Uganda (1995) 27

478 See for instance, Bakhita M. Koblavie and Christopher Y. Nyinevi, 'A review of the legislative reform of customary arbitration in Ghana' (2019) Commonwealth Law Bulletin, Vol. 45, No. 4, 587–607; Francis Kariuki, 'African Traditional Justice Systems', Strathmore Law School (on file with researcher). Article 9(2)(c) of the 2010 Constitution of Kenya requires the judiciary in dispensing justice to adopt alternative dispute resolution mechanisms in dispensing justice, including negotiations, mediation, reconciliation (and) arbitration, and traditional dispute resolution mechanisms

module. For example, details of the Customary Law compulsory course at one law school states that *"focus is on the student's skills to work with customary law and legal rules in a plurality of national and international laws… understand and utilise, essential structures, processes, and utility of customary law in a changing world."*

The importance of African culture in legal education is further illustrated in the curriculum at one institution which offers Introduction to Culture & Heritage in addition to Customary Law in Year 1. Furthermore, there is evidence which shows that customary law and ADR can still be taught as part of other core courses that have a component of customary law such as Property Law and the Law of Succession. In some cases, the curriculum also makes provision for customary law in Legal Methods. Some institutions in South Africa offer customary law as Legal Pluralism, which also encompasses legal systems based on religion. One law school has even gone further as it requires students to take an indigenous language which suggests that indigenous language skills, as part of African culture, are considered necessary in the administration of justice.[479]

Practising lawyers interviewed in this study also corroborated the researcher's experience as an attorney in Botswana that they are often constrained when representing non-English speakers in court because they must rely on court translators whose translation of cultural phenomena is not always accurate. As illustrated by the courtroom scene in the Southern African comedy film, *'The Gods Must Be Crazy'*[480], the right to a fair trial in criminal proceedings may easily be compromised by language barriers affecting lawyers who may not appreciate the fact that in many indigenous communities, admission of wrongdoing is not

479 Docrat (n 167)

480 An international co-production of South Africa and Botswana (1980) written, produced, edited and directed by Jamie Uys

synonymous with criminal or civil liability. As the literature has shown, merely relying on adversarial western legal techniques that are not accompanied by indigenous language skills often results in grave injustices in prosecutions for criminalised cultural practices that are considered legal under customary law.[481] Furthermore, the strict adherence to such litigation techniques was criticised by one academic lawyer who spoke on the condition of anonymity as follows:

> In some African countries you can't quote proverbs in heads of argument e.g., mhosva hairovi [criminal liability is not time-barred]. It is not the equivalent of the 12 Tables, but it is a precept in Shona culture. Unfortunately, the Anglo-Saxon approach to human rights ignores important African philosophical concepts such as Stanlake J. W. T. Samkange's 'Hunhuism or Ubuntuism: A Zimbabwe Indigenous Political Philosophy' ('hunhu' being the Shona equivalent of the Nguni 'Ubuntu'). There is also a collection of African proverbs in Kikuyu, Shona, Ibo, etc on equity, justice, social justice, fairness and dark side of justice that amplify English doctrines such as the audi alteram, e.g. "kumuzinda hakuna woko" [there's no partiality at the chief's court]. Such sayings are common among cultures.[482]

He concludes by posing a critical question pertinent to this study, which is also an apt conclusion to this section:

> Is it possible therefore to look at the justice system through language, in the same way that Shakespeare's literature such as the 'Merchant of Venice' has helped to contextualise some legal issues in the British system? What about African folklore, the Fulani, Kikuyu, etc? Can we not promote a framework of rights derived the African way?[483]

5.2.3 Approaches to learning skills

An analysis of prospectuses shows that university law schools that teach skills are more inclined to adopt clinical legal education (CLE) as a method of teaching skills. Such experiential learning takes place when students participate in live-client work where law clinics

481 See Jezile v State (n 217); Mwambene and Kruuse (n 216); Mwambene and Kruuse (n 219)

482 Interview with Legal Practitioner & Lecturer (6 September 2018)

483 (ibid)

exist. In cases where the university does not have a law clinic, students participate in externships and other forms of work placements, including internships. There is also evidence that in some cases students learn skills as part of substantive courses, although skills may not be the focus of the course.

5.2.3.1 Clinical legal education

Although a documentary analysis shows that CLE is the main vehicle for teaching skills at several universities, not all students seem to learn such skills because in some institutions CLE is not offered as a prerequisite. In such cases, students not doing CLE take alternative elective courses that may not expose them to the same set of skills taught in CLE. Furthermore, while CLE is part of the curriculum in most cases, **Fig. 2** below shows that only 8 universities have a live-client clinic. The researcher's analysis of documents shows that students can learn practical skills identified in paragraph 5.2.1 especially legal drafting, client interviewing and counselling, legal writing and research, negotiation, and advocacy by participating in live-client clinics. However, this approach raises further questions on the coherence of skills that are offered. For instance, the course content at one institution specifically mentions "skills necessary for legal practice" including interviewing, counselling, negotiation, arbitration, and trial advocacy. On the other hand, the clinical programme at another law school highlights case and file management, ADR, and trial advocacy.

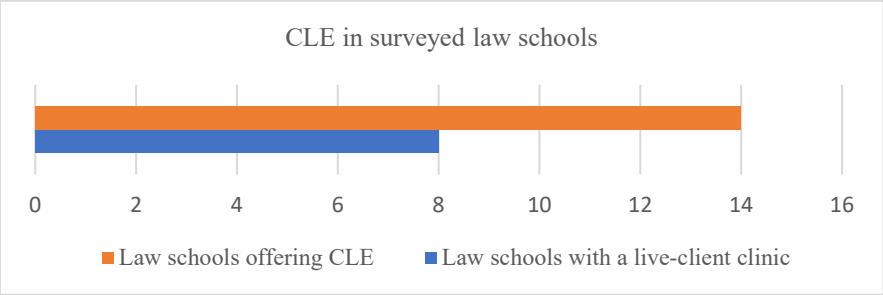
Where there is no live-client clinic, there is evidence that some law schools use other clinical approaches such as role plays and simulations to teach skills such as mediation, client interviewing, and counselling that are often used together with externships as part of the clinical module. Externships and other forms of work placements appear to be a very common method of imparting skills as part of CLE in several universities. This is the case in 12 out of the 15 law schools; but the analysis shows that these are usually extracurricular or 'out of semester'

activities. Interestingly, as shown in Paragraph 5.3, most students were of the view that it is the best way of learning skills associated with African culture and customs. Some universities, though, maintain that such "work experience" activities should be an integral part of undergraduate legal training. Hence, two law schools have an independent full-credit compulsory work-based module that is offered for the whole academic year in Year 4 which requires students to gain work experience in both private and public sectors. One of the law schools specifically requires students to spend six months at the magistrates' court. The findings also show that other activities such as mooting, expressly provided as part of CLE in at least 9 of the 15 law programmes and often considered as extracurricular, have been expressly integrated in the curriculum in some of the law schools. Some course descriptions and written assessment criteria that were analysed stress the following legal skills as part of mooting: legal writing, legal and factual analysis, legal reasoning, and structuring legal arguments for oral presentation.

Those law schools without a live-client clinic in some countries engage their students in Street Law as part of CLE, with students being involved in community outreach activities, prison visits, and legal awareness campaigns supported by NGOs and other civil society organisations, most of which focus on access to justice issues. Some of the courses, which are usually electives, encompass community engagement, street law and access to justice. Out of all the sampled law schools, however, only one institution has a separate module on Street Law that is offered as an elective. According to McQuoid-Mason (2008), students interested in Street Law are trained using a variety of student-centred activities including role-plays, simulations, games, small-group discussions, opinion polls, mock trials, debates, field trips and street

theatre.[484] It is submitted that institutionalising such elements as part of CLE provides the best opportunity for law schools to teach a more comprehensive set of skills in undergraduate legal education which ensures that students can more effectively learn law from the experience of practicing law.

Fig. 2 Surveyed law schools with clinical programmes



5.2.3.2 Learning skills in substantive courses

Some LLB course outlines mention learning skills as part of substantive courses. One law school has an official written policy that specifically mentions "skills development" and "integration between departments and modules."[485] This is part of its internal policy which recommends equipping students to become competent legal professionals endowed with "discipline specific skills."[486] Accordingly, the internal policy refers to a "problem-oriented approach" to enable students to learn specific skills, especially how to draft a letter of advice, legal memorandum, and heads of argument (skeleton argument in Britain).[487] This is expected to be part of the learning process in the teaching of substantive courses in a classroom setting. This is despite the fact that there is an independent skills unit focusing on reading, research,

484 McQuoid-Mason, 'Street Law as a Clinical Program - The South African Experience with Particular Reference to the University of KwaZulu-Natal' (2008) 17 Griffith L. Rev. 27

485 Teaching and Assessment Policy (2010) (on file with researcher)

486 Curriculum Transformation Framework (2016) 5 (on file with researcher)

487 Teaching and Assessment Policy (2010) 7-10

writing, analysis, drafting and advocacy which is intended to facilitate understanding and applying the principles of examination in chief, cross-examination and re-examination with a view to participating in a moot court or debate.

An analysis of some previous examination questions also shows how some lecturers focus on some skills related to the courses they teach such as drafting an agency agreement and power of attorney in the Commercial Law module at one law school.[488] However, this does not necessarily represent a trend because in an interview with the relevant lecturer, it became apparent that his approach was influenced by his experience from England where he had studied for the Graduate Diploma in Law and the Legal Practice Course.[489] Such influences are however not uncommon. For instance, the recently reformed LLB (Honours) Programme at another institution appears to have been influenced by the law-in-context approach at the University of Warwick because the 2017 proposal for reforming the LLB degree states that the rationale for the proposed reforms is based on the fact that "the law-in-context and clinical approaches as strategies for effective and holistic learning and teaching are firmly replacing orthodox legal instruction…"[490] What is apparent though, is that the nature of some courses such as Alternative Dispute Resolution (ADR) make it inevitable for the teaching of specific skills as part of the substantive course. Of all the courses constituting the LLB degree, ADR appears to be the only course that presents law schools an opportunity to focus on other specific

488 This is based on previous examination questions in the 2013/14 and 2018/2019 academic year Commercial Law final examination papers (on file with researcher)

489 Interview with L1, Assistant Lecturer in Law (14 June 2016). According to the Solicitors' Regulation Authority website, "The Legal Practice Course (LPC) is part of the vocational stage of training…[whose] aim… is to prepare students for work-based learning and to provide a general foundation for practice." <https://www.sra.org.uk/students/lpc/> accessed 22 June 2020. The training comprises two stages Core Practice Areas and Skills including Advocacy, Drafting, Interviewing and Advising, Writing and Practical Legal Research as well as Three Vocational Electives. See for instance course content of the LPC at one of the accredited providers, City, University of London <https://www.city.ac.uk/study/courses/postgraduate/legal-practice-course#course-content> accessed 22 June 2020

490 Proposal for LLB (honours) Programme (May 2017) (on file with researcher)

skills such as mediation, negotiation, and arbitration, an aspect which is discussed in the next chapter.

5.3 Phenomenological analysis of interview data [Data Sets 2 and 3]

Data Set 2 contains information extracted from transcripts of interviews with current LLB students and LLB graduates. Data from interviews with lecturers and other academic staff, including retired deans and practising lawyers involved in teaching, is contained in Data Set 3. Participants were given details about the nature and scope of the study before participating in the face-to-face interviews and focus groups. Consistent with the analytic process in Interpretative Phenomenological Analysis (IPA), an interview guide was used with a list of questions and topics to enable the participants to identify and describe in their own words the skills, if any, that they had learned as students or taught as lecturers. The questions sought to understand how the participants described such skills, whether the skills embodied African customs, the level of emphasis in the curriculum and the learning or teaching methods used.[491] As already mentioned, the participants' perceptions concerning skills in undergraduate legal education were a crucial aspect of the study.

As explained in Chapter 4, the phenomenological analysis of data yielded through interviews involved reading each interview transcript repeatedly to identify emerging narratives and themes which were then openly coded. Since the research questions and interview questions inherently defined the themes to be explored, the initial codes were not only descriptive, but also conceptual. The recurring themes were then categorised and aligned with the relevant literature and the research questions. Under each category, the researcher sought to describe "what" the participants in the study "experienced" as skills and how they were learning or

491 See Appendices 2-4

teaching them as "lived experience". Such categories enhanced an understanding of "what" skills the participants considered to be part of undergraduate learning, how and to what extent they embodied African customs and culture, how such learning was taking place and their perceptions of participants in general. The findings were then presented in a research matrix **(Appendix 6)** to show the recurring categories that emerged from the transcripts of those interviews that provided data pertinent to the research questions.

As already stated, the data obtained from observations was used to validate the results where possible. This involved using results from an observation schedule **(Appendix 5)** that was administered to collect data based on observations of classroom teaching at 7 of the 15 law schools surveyed in this study.[492] The observation schedule was designed to record evidence of knowledge or skills and how they were being taught and whether this included African customary law and culture. At one of the institutions, observations focused on what elements were being emphasised in oral exams in Public International Law. There was also evidence of the direct teaching of specific skills in substantive courses such as Street Law.[493] In one of the classes for instance, there was a simulation of court arguments in relation to *Soobramoney v Minister of Health, KwaZulu Natal*[494] which was the subject of discussion on health care and rights as part of socio-economic rights in South Africa. Students were divided into two groups and were required to come up with legal arguments in support of issues raised by *Soobramoney v Minister of Health, KwaZulu Natal* (supra). This developed into a legal debate involving written and oral advocacy skills, research and legal analysis. Before commencing the moot, students were given 10 minutes to use their mobile devices to research statutory law in relation

492 The researcher observed selected classes and other academic activities at Institutions 1, 3 , 5, 6, 8, 9 and 10 between 2016-2018.

493 Class Observation, Street Law, at Institution 10 (1 August 2018)

494 Soobramoney v Minister of Health, KwaZulu Natal 1998 (1) SA 765 (CC) (South Africa)

to healthcare law as part of socio-economic rights, followed by a discussion before the moot began. This was evidence of how students learned advocacy, legal research and analysis skills in that class. Most importantly, students had an opportunity to develop their arguments concerning healthcare rights within the historical context of South Africa, by focusing on arguments reflecting the African reality such as the validity of consent forms for sterilisation signed by women, contrary to their cultural beliefs.

Based on the responses and the survey data, it was possible to determine the extent to which skills were being taught in Anglophone African university law schools and whether, in the perception of participants, such skills were being taught within the context of African culture.

5.4 Findings

In interviews with participants who were current students or graduates of the selected universities, there was evidence of skills learning in a range of legal contexts, including clinical courses as part of in-class learning, live-client clinical work, and other extracurricular activities that formed part of the students' learning experiences. In a minority of cases, some participants indicated that they had learnt skills as part of substantive courses.

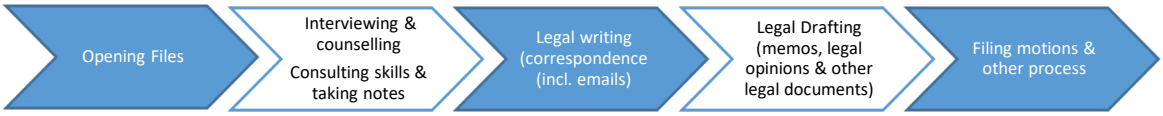
5.4.1 Skills forming part of the LLB degree [Data Sets 2 and 3]

As shown in **Appendix 7**, the findings show that some universities have successfully integrated independent skills-based courses such as Legal Writing, Legal Drafting, Advocacy and other out-of-class experiential learning courses like externships as part of the LLB degree. What is noteworthy is that most students and graduates who were interviewed felt that out-of-class learning was an equally useful method of learning skills even in those cases where some of the extracurricular activities did not necessarily form part of the curriculum. However, it was

possible that some participants confused experiential learning of skills with obtaining experience, which was important to them.

Generally, the data shows that most participants preferred experiential learning that equipped them with "practice-ready skills" to enable them to do some of the things that lawyers do in practice. Participants highlighted client interviewing, legal writing, drafting legal documents and legal research as such skills. Those who participated in clinical work were able to demonstrate those skills associated with the work that lawyers do in real practice as illustrated in **Fig. 3** below.

Fig. 3 Skills associated with clinical work



The data shows that participants who were involved in clinical activities, especially live-client work, provided concrete evidence of the skills shown in **Fig. 3**. In the words of one participant: *"Clinical work made me feel like we were being shaped to become lawyers though we were not yet lawyers."*[495] This was also apparent from some of the interviews with lecturers, with one remarking: *"Students need to be able to do something outside of the lecture… They should be exposed to such tasks where they have to really be given that opportunity to be lawyers.*[496]

Such views suggest that most participants felt that learning skills, lawyering skills in particular, must involve practical "hands-on" activities. At one institution, the Deputy Dean spoke of the

495 Interview with S2, LLB student (16 June 2016)

496 Interview with L13, LLB lecturer (23 July 2018)

need for "hands-on experience" in the teaching of courses such as Contract Law. To achieve this, the Deputy Dean suggested that students ought to be involved in some drafting exercises. Some books on the law of contract at the degree level in South Africa include the mechanics of drafting a contract.[497] In the survey of LLB graduates, participants mentioned practical activities that involved handling of actual documents—pleadings (writs and motions), transactional documents (contracts), and other everyday documents that practising lawyers deal with on a regular basis—as the most valuable part of their undergraduate clinical experience. By all indications, results from this sample of participants convey a sense of frustration with a system of legal education that does not provide students with opportunities to apply the knowledge that they learn. As one participant in a focus group, put it:

> …the professional programme is not where you are going to learn the skills… So, coming out with an LLB… is not only the acquisition of knowledge... It's an acquisition of the knowledge that you need and the ability to be able to practise that knowledge. I think that if we're going to reform the structure of legal education that is what we should be looking at more…I should be able to function as a lawyer.[498]

Perhaps this explains why very few participants (both students and graduates) mentioned those skills traditionally associated with the law degree, that are "notionally transferable 'intellectual' skills involving reasoning, analysis, and synthesis which fall largely within the cognitive, as contrasted with the affective, domain of learning."[499] For most participants, analytical and reasoning skills developed from traditional courses which stress the study of appellate cases engender a positivist reasoning process that is useful to them as lawyers, but may not be suitable for resolving legal problems involving African culture and customary law. Both students and lecturers, especially those already practicing law, pointed out that many cases often create

497 See Luanda Hawthorne and Birgit Kuschke, 'Drafting of Contracts' in Dale Hutchison, et al. (eds), The Law of Contract (3rd edn OUP, 2017) 407-433

498 LLB Graduate, Focus Group 1 (12 August 2017)

499 William Twining, 'Legal Skills and Legal Eeducation' in Law in Context: Enlarging a Discipline (Clarendon Press, Oxford 1997) 191

conflict of law as illustrated in the following legal scenario described by one LLB graduate in a focus group:

> I have a client who is mixed race, and his girlfriend is also mixed race, but her granny was black. So, my client had a baby with his girlfriend, whose father is mixed race and wants damages. And he's telling my client that he can't see the baby unless he pays damages. Now in our law, it says that if you're an unmarried father you have rights if you contribute to his upbringing, if you try to be part of its life and if you contribute financially. But under customary law he is also expected to pay damages. So, my client, who should be able to see the child, is not being able to see the child because the family are claiming damages.[500]

In the perception of those students who participated in the focus group, undergraduate legal training that focuses on developing litigation skills is not always suitable. A practising attorney and lecturer at one institution acknowledged this problem: *"I have realised that there is a ...problem with Customary Law because even your most experienced attorneys, still battle to find solutions to Customary Law."*[501] The lecturer referred to a conference paper titled: 'Women, Customary Law and Legal Education' which was presented at the Southern African Law Teachers' Conference [502] held at the University of Cape Town from 11-13 July 2018 at which it was argued that the LLB degree does not equip practitioners with the right skills to deal with matters involving African customary law marriages. The lecturer illustrated this further using the decision in *Mavimbela v Minister of Home Affairs*[503] where the court failed to ascertain the applicable customary law by relying on a precedent that resulted in the invalidation of a marriage which was otherwise valid in terms of customary law. The participant ascribed this to evidential challenges in a system hugely characterised by orality and a doctrinal approach of interpretation that over-emphasises text and legal interpretation. The argument here is that doctrinal methodologies are not suitable for ascertaining the contexts

500 LLB Graduate & Candidate Attorney, Focus Group 3 (1 August 2018)

501 Interview with L17, LLB Lecturer (23 July 2018)

502 The theme of the conference was 'Transformation of the Legal Profession: Decolonisation of Knowledge'

503 Mavimbela v Minister of Home Affairs (49613/14) [2016] ZAGPPHC 889 (30 May 2016) (South Africa)

of the applicable customary law. Criticising litigation that is reflected in traditional undergraduate legal training, another student in a focus group observed:

> And (litigation) is just so…adversarial. I know it's an adversarial legal system but it's unnecessarily adversarial, I think. If people negotiated more and approached ombudsmen more and tried to mediate more, I think we'd have a much happier bunch of people, and our legal system would cost a lot less, I think.[504]

Many students expressed the view that problem solving skills emphasising "how to think like a lawyer" predicated on legal reasoning and analysis skills as they are traditionally taught[505], is not compatible with African culture that stresses conciliatory, as opposed to adversarial approaches. As already stated in section 5.2.1, the analytical skills associated with the traditional case-method approach constrain students from developing those skills that are appropriate for the African context, given the nature of mixed legal systems. Quite clearly, a diversity of skills is required to transcend the conventional case-method approach in Anglo-American systems that only focus on the study of the case, the dispute or conflict instead of the social context of the dispute.[506] According to one student:

> …what you can relate to is not what we learn. The experience of learning law does not relate to the reality on the ground. So, if you want to apply the reality on the ground, you end up failing the course.[507]

In the view of some participants, students in undergraduate legal education prefer to develop those skills that best equip them to understand and apply the law in the African context, rather than mechanically applying legal rules in accordance with the doctrine of *stare decisis.* In other words, dispute processes in African culture *"simply cannot be reduced to, or explained by,*

504 LLB Graduate & Candidate Attorney, Focus Group 3 (1 August 2018)

505 James R.P. Ogloff et. al, 'More Than "Learning to Think Like a Lawyer": The Empirical Research on Legal Education' (2000) 34 Creighton L. Rev. 73, 110

506 Gluckman (n 210) 87

507 LLB Graduate, Focus Group 1 (n 498)

formalistic models or derivative legal logic."[508] In the view of most participants, the case law system does not promote independent thinking and neither does it embrace other cultural practices because of the reliance on "authority." O. Kahn-Freund (1966) explains this conundrum in his reflections on legal education:

> "Authority" is a concept which looms large in the thinking and in the practice of lawyers everywhere. All legal reasoning is based on established norms the existence of which cannot be questioned by the lawyer. In this sense law as an academic discipline is closer to theology than to the social sciences whose subject-matter it shares. The revolution in scientific thinking inaugurated by Francis Bacon has not extended to the law and can never fully do so. Our so-called "science" is still and will for ever be based on the interpretation of sources the validity of which is assumed and not an object of our study. These legal "authorities" occupy in our field the place which Aristotle occupied in the philosophical thinking of the earlier Middle Ages, or the classical medical writers of Antiquity in the science of medicine. All learning was based on the "book"; the student had to absorb its content and to seek to draw conclusions from it. It was not for him nor for his master to question the book itself. I say again: it is in the nature of law that its devotees are for ever condemned to live in a pre-Baconian world. There is therefore inherent in the idea of an academic legal education a contradiction which cannot be argued away. The student's mind must from the first day of his studies be adjusted to the acceptance of authority, and at the same time it is the fundamental object of all academic studies to teach him how to question it.[509]

One student illustrated this by mockingly dismissing the objective standard of "reasonable person" test in Tort, because in his view, *"what constitutes reasonable behaviour in an African context?... You read the law but it's like–this is normal everyday life…"*[510] The findings suggest that students were dissatisfied with conventional legal education that merely focuses on narrow doctrinal concerns that are unrelated to the real legal world. Experiential learning, therefore, seems to provide students with the best opportunity to learn the law in context because they learn from their own experience which in turn enhances academic rigour.

508 See Comaroff and Roberts (n 14) 18

509 See Freund (n 308) 123-124

510 LLB Graduate, Focus Group 1 (n 498)

Responses by participants in Data Sets 2 & 3 concerning what skills they were learning depended on the extent to which specific skills were catered for in the curriculum at respective universities, particularly those they were learning practically as part of the curriculum. For instance, some participants showed concrete evidence of learning those "lawyering skills" shown in **Figure 3**. In some cases, individual skills-based and substantive courses were used as vehicles for teaching specific skills such as legal writing, drafting and advocacy as part of the teaching of doctrine. Examples of those courses and the respective skills that participants identified in interviews are shown in **Figure 4** below.

Fig. 4 List of skills in specific skills-based courses

The findings however show that even where there is evidence of skills teaching in some courses, such skills do not necessarily cohere with the rest of the curriculum. To ensure some degree of context, some universities appear to be making provision for experiential learning by integrating out-of-class activities such as attachments. It was not surprising that some participants felt that such practical activities were a useful method of learning skills and should therefore be compulsory.[511] The only problem is whether such activities have a sound

511 Interview with S9, LLB Graduate (23 March 2018) and LLB Graduate & Candidate Attorney, Focus Group 3 (1 August 2018)

underlying doctrine because, as William Harvey notes: "The 'is' and 'how' of the law, if not based on acceptable theoretical underpinning, is either useless or pernicious."[512]

5.4.2 Skills and African customs [Data Sets 2 and 3]

The interview and observation data suggests that clinical legal education and other forms of experiential learning seem to provide students with the best opportunities to learn those skills that are appropriate for mixed systems that are influenced by conflicting legal customs and traditions.[513] According to one student:

> I like how this clinical programme combines theory that we've learned into a practicable kind of thing. When you actually meet the people behind the set of facts and you've interacted with them in all the different circumstances, you …cannot apply the law in such a direct…plain …removed kind of way.[514]

It is in the context of such clinical work, including externships, that participants referred to cultural practices such as *Ubuntu* and *mato oput* (drinking the bitter root, an Acholi justice process in Northern Uganda) which are identified in the literature[515] as modes of resolving legal conflict in some African communities, even in cases involving genocide, as highlighted by one student in Uganda.[516] Some academics at the Southern African Law Teachers' Conference argued that such cultural practices may well be used in resolving a range of legal disputes in formal courts.[517]

512 Harvey (n 69) Appendix 1 page 9

513 The researcher observed and interviewed students and staff (some of them clinicians) in the law clinics at three universities. The researcher's own experience as a law student in Africa also bears this fact.

514 LLB Student, Focus Group 2 (28 February 2018)

515 See Metz (n 275); Baines (n 282); Chuma Himonga et al, 'Reflections on Judicial Views of Ubuntu' (2013) PER 67 <http://www.saflii.org/za/journals/PER/2013/67.html> accessed 19 August 2021

516 LLB Student, Focus Group 2 (28 February 2018). The example of the Truth & Reconciliation Commission in South Africa is relevant in this context

517 Zama Mopai, 'Customary Law as a transformation tool in the South African legal system', paper presented at the Southern African Law Teachers' Conference (University of Cape Town (11-13 July 2018))

The students who participated in clinical programmes highlighted some skills necessary for African dispute resolution such as mediation because, in the words of one student, *"at times you just have to go outside the "law" so-called, to look at what is the root cause. Probably it's not legal as you see it but might be something entirely social."*[518] Such sentiments suggest that experiential learning helps students to appreciate that law does not exist in a vacuum and ought to be tied to the whole social fabric.[519] This suggests that participants involved in experiential learning were more conscious of the relationship between lawyering and the social context of legal problems. In their view, most of the cases they encountered during their clinical work helped them to develop more conciliatory approaches consistent with African culture, including restitution, which is usually sufficient to resolve both civil and criminal cases. To illustrate this, some students gave examples of legal problems arising from conflict of laws where formal law often conflicts with the realities of African culture. It is in these cases that participants emphasised the need for skills that transcend adversarial approaches based on formal processes associated with the traditional curriculum. In their view, there is need to balance competing interests in those legal situations, especially in Family Law and Succession where litigation-oriented techniques may not be suitable for resolving a problem that requires a different set of skills such as conciliation based on African culture.[520] The general feeling, therefore, was that formal law as taught in doctrinal courses in undergraduate legal education overlooks the fact that the reality of many problems in Africa requires skills that are not emphasised in the current LLB curriculum. As one participant noted:

518 Interview with S2, LLB Student (14 June 2016)

519 Robert Kidder, Connecting Law and Society: An Introduction to Research and Theory (Prentice-Hall, Englewood Cliffs, NJ., (1983))

520 LLB Graduate & Candidate Attorney, Focus Group 3 (1 August 2018)

> This Westernised law is very much litigation-centred and it's very autonomous, individual-centred. The undergraduate law degree teaches you very little by way of mediation, negotiation and that kind of thing and the African law… is far more community based. Far more, find a resolution rather than find a punishment.[521]

Relying on their lived experiences, participants felt very strongly that it was their responsibility to take the initiative to learn skills associated with their African cultural practices even though they were not being taught as part of the curriculum. In other words, there was a perception that skills at the undergraduate level should be extended to include the resolution of culturally-based legal problems. However, there was no hint as to how this could be done, except through anecdotal extra-curriculum learning or through what William Twining calls 'pick-it-up strategies.'

5.4.3 Learning skills and pedagogical approaches

The data yielded generally showed a more didactic approach to law that is unsuitable for the learning of skills. Observations of classroom learning showed that there was very little evidence of active learning involving the direct teaching of skills. The prevailing perception seemed to be that skills could not be taught as part of legal doctrine. Here, the researcher notes that a good clinical course should be able to deal with concerns about the content and pedagogy used because the essence of university education is that there is time to do both theory and practice. However, as is shown below, the findings show very little use of appropriate teaching strategies such as simulations or role plays that enhance the mastery of legal skills. Indeed, some senior faculty members, especially professors, were candid about their pedagogical limitations.[522] The data therefore indicates that for most participants, experience and 'pick-it-up' strategies seem to be the only means of learning skills. However, the researcher noted that

521 LLB Graduate & Candidate Attorney, Focus Group 3 (1 August 2018)

522 Interview with L3, Professor & Former Dean (26 February 2020)

there were some instances where students learned skills without realising it, as acknowledged by one student:

> I didn't even realise I had studied those skills until I did an internship last year and I was asked to do some research... then I realised …I learned something after all. While in law school you don't really see as if you've studied anything…I realised only then that I had learned something but if I hadn't done the internship, I would have been under the assumption that it's just academic subjects that I've been taught that I'm studying, and I hadn't really acquired any skills.…[523]

Responses after further probing on this issue revealed that passive learning techniques generally associated with the study of doctrine in undergraduate legal education left students with the perception that skills do not constitute part of the knowledge that students must acquire as part of the coursework at university. It is not surprising, therefore, that experience features prominently in participants' responses concerning how they learnt skills. This is why many participants thought that practical activities as part of experiential learning are necessary when learning skills. Several participants talked about a whole range of practical and other extracurricular activities such as mooting and student-led "law clinics" that are not formally integrated in the curriculum, faculty law societies, and other faculty-based clubs where students learned a range of skills, including legal writing for student journals as some of the practical skills. There was also reference to community outreach work through street law programmes and prison visits.

It is important to understand why there is a preference for experience as a means of learning law in general. According to one law graduate: "the way I learned from home is not by being sat down and told *"you … do this; this is how we do it."* It's…a doing process*"*[524] Reiterating

523 Interview with S1, LLB Graduate (19 May 2016)

524 LLB Graduate, Focus Group 1 (12 August 2017)

what the literature says about African traditional teaching methods[525], one lecturer went even further by suggesting that the study of law is partly ineffective because it does not utilise African cultural approaches that rely on practice in the learner's own environment.[526]

However, some university law schools are beginning to adopt experiential teaching approaches which depart from traditional methods that teach law as an abstract concept. One student illustrated this as follows:

> Some skills you can't learn through the lecture method… for example, interviewing skills - there's no way you're going to get it right unless you actually interview someone. They'll tell you this is how it happens but until you actually do it, then it's not the same.[527]

Such views seem to confirm that the problem in undergraduate legal education appears to be a lack of competence to teach skills because most, if not all, skills can be taught using clinical approaches. Interestingly, the data shows that doctrinal teaching at selected universities hardly involves clinical methods. However, there were a few participants who identified simulations and role playing as the main methods by which they learned interviewing and counselling skills. There was also scant evidence of simulations being employed in traditional courses such as Commercial Law[528], Public International Law[529] and Conveyancing[530], although the problem with conveyancing is that English conveying practices are not applicable to land held under customary law.[531] In fact, some students who had experienced the benefits of experiential

525 See Manteaw (n 2) 950

526 Interview with L13, LLB Lecturer (20 March 2018)

527 LLB Student, Focus Group 2 (28 February 2018)

528 Interview with S2, LLB Student (14 June 2016), LLB Graduate, Focus Group 1 (12 August 2017)

529 Interview with S3, LLB Student (20 March 2018)

530 Interview with S2, LLB Student (14 June 2016), Interview with S4 & S6, LLB Student (20 March 2018) and LLB Graduate, Focus Group 1, (12 August 2017)

531 Samuel S.K.B. Asante, 'Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana: A Comparative Study', (1965) Int'l & Comp LQ 1144

learning in clinical legal education suggested that simulations through mock trials would be an effective method of teaching traditional courses such as Criminal Law:

> …when they give you that substance what about following it up with a small mock trial or a moot problem so that it can expose you to a real problem before you actually reach this level where you're now asked and we're working hands-on with real things which are prevalent.[532]

Observations at two institutions showed that such simulations were an integral part of the teaching of skills in Street Law and Law Clinic. In some universities, the curriculum provided experiential learning through mooting, which is offered as part of clinical legal education, but is also a popular extracurricular activity for some students. As one LLB graduate noted:

> …mooting opportunities were the most important because they were very, very practical. I had to apply what I was learning in the classroom; things stuck better; I learned research skills; learned advocacy skills; learned writing skills from the mooting experience. And from my whole four years in the university, those are the things that really stick with me…[533]

The majority of the interviewees suggested that mooting, apart from teaching them lawyering skills such as advocacy, writing and drafting, is particularly useful in developing confidence and independent thinking.

From the interviews, it was evident that those students who were involved in some form of experiential learning whether it was mooting, internships, externships, or other extra-curricular activities identified specific skills that they had learned. For instance, a student doing the clinical legal course at one law school noted:

532 LLB Student, Focus Group 2 (28 February 2018)

533 LLB Graduate, Focus Group 1 (12 August 2017)

> In all honesty, in the one month we've had here... I've learned so much. I've gotten so many skills it is shocking that I can learn so much in one month and have learned not that much in two and a half years of education…the research skills, interviewing skills, counselling skills, we've learned how to write legal opinions, we're learning how to draft some papers. We are learning too much.[534]

It is possible, however, that students could only learn how to use such skills after they had learned the relevant underlying doctrine. It is important to mention this point because of the delusory assumption that the knowledge of principles and rules learnt at university *"plus a few 'bolt-on' skills, such as client interviewing and negotiation, is all that needs to be learned."*[535]

While some participants mentioned clinical education as part of their experiential learning of skills, it was not a prerequisite at all law schools. At one law school, only 20 out of 1,000 students that were enrolled on the LLB Programme did clinical legal education.[536] At another institution, the average law class was 300-500. As a result, less than 50 students got the opportunity to work in the law clinic.[537] Students at another law school were given the choice of taking the clinical programme or the street law programme.[538]

5.5 Conclusion

Overall, the findings show that while there were attempts to incorporate skills in the LLB curriculum, such skills were not entrenched in the law degree curriculum. Furthermore, although the findings show that some universities tried to make the LLB degree practical, the teaching of skills remained a distant call. As a whole, the findings reveal three distinct patterns: (1) some universities taught skills directly as part of the curriculum through clinical approaches, (2) there were some universities where skills were offered as part of other random

534 LLB Student, Focus Group 2 (28 February 2018)

535 Maughan and Webb (n 82) 21

536 Interview with L5, LLB Lecturer (27 February 2018)

537 Interviews with L15, Law Professor and former Deputy Dean (24 July 2018) and L18, Law Professor (23 July 2018)

538 Interview with L7, Lecturer (31 July 2018)

independent skills courses and (3) there were universities where students were expected to obtain skills from both curricular and extracurricular activities. An analysis of various documents showed that the pedagogy was alienated from African customs and traditions of conflict resolution. More disconcerting is the fact that where such skills were taught, they did not necessarily cohere with the rest of the curriculum.

CHAPTER 6: THE CHALLENGE OF TEACHING SKILLS IN AFRICAN CUSTOMARY LAW AND CULTURE

6.1 Introduction

The previous chapter analysed Data Set 1 (Faculty documents) and Data Sets 2 and 3 (LLB students and graduate interview transcripts) to identify evidence of learning skills in the LLB curriculum. The findings showed that in most cases undergraduate students learned skills through clinical work or work-related experience during attachments and externships. Also, where students provided evidence of skills related to African customary law and culture, the curriculum provided limited opportunities to learn such skills. As a result, most skills that interviewed students identified did not necessarily fit into the LLB degree.

This chapter analyses survey data from qualitative interviews with deans and lecturers (Data Sets 4 and 5) as well as findings from observations of classroom teaching and extracurricular activities (Data Set 6). Although it was not possible to conduct classroom observations at all the selected law schools, the observations from selected law schools revealed the teaching methods generally. Data Sets 4 and 5, which were transcripts of interviews with academic staff, especially deans and lecturers, were analysed. From the responses and interviews with an educational consultant and an African literature/cultural studies expert, it was possible to identify the different pedagogical approaches to the LLB curriculum at the law schools whose results are presented in **Table 3**. Observation results in Data Set 6 include the pilot studies at two institutions as well as the evidence of classroom teaching and other extracurricular activities that were obtained using an observation schedule at 7 of the 15 law schools that were surveyed in the main study. The results from the observation schedules are presented in **Table 4**. The data analysis was consistent with the analytic process described in Paragraph 5.3 of Chapter 5 and is useful in showing the pedagogical trends in undergraduate legal education at

the selected law schools. This information helped the researcher to understand the perceptions of deans and other academic staff as a lived experience in their institutions.

The information in Data Sets 4 and 5 was collected using an interview guide and observation schedule respectively (**Appendices 3-5**). The research instruments were designed to obtain responses and data that would provide insight into participants' approaches to the teaching of skills in undergraduate legal education, their lived experience, if any, of teaching skills. It was also important to capture views and experiences about teaching skills pertaining to customary law and culture and their place in the curriculum. The results were then used to answer the second research question which investigates the pedagogical approaches used to teach skills in undergraduate legal education especially those based on African customary law and culture.

Data table showing Data Sets 4-6

Data Set	Data Source	Method	Analysis	Findings
4	7 Current Deans, 2 Deputy Deans, 3 Former Deans + 1 Director of a Professional School of Law + 1 Retired Judge & University Council Member	Qualitative Interview	Paragraph 6.2.1	Paragraph 6.2.2
5	25 Law Lecturers + 1 Law Faculty Education Consultant + 1 Cultural Studies Expert + 4 Clinicians + 4 Others (Academics/Practitioners)	Qualitative Interview	Paragraph 6.3.1	Paragraph 6.3.2
6	15 In-Class Observations, 6 Oral Exam Observations, 4 Extra-Curricular Activities incl. 3 Moot Court/Oral Argument Observations	Observation	Paragraph 6.3.1	Paragraph 6.3.2

6.2 Results from interviews with deans (Data Set 4)

Of the seven Current Deans, two Deputy Deans, three Former Deans, one Director of a Professional School of Law and one retired Judge and University Council Member who make up this set, most were professors. Some of the former deans were interviewed about their teaching and practice of law. Two of the former deans deserve mention here. The first is Nana Dr S.K.B. Asante, a paramount chief who is a legal luminary whose public service and international legal experience is celebrated in a festschrift[539] in his honour. A former student of Professor Antony Allot, the English Scholar of African Law at the University of London, he worked closely with other leading scholars in African customary law such as Professor Gordon Woodman whose PhD thesis on restatement of customary law he supervised.[540] As an expert

539 Richard Frimpong Oppong and Kissi Agyebeng (ed.) A Commitment to Law, Development and Public Policy, A Festschrift in Honour of Nana Dr. S.K.B. Asante (Wildy, Simmonds & Hill, London 2016). I have been permitted to mention his name.

540 Interview with SKB Asante, Former Lecturer & Acting Dean (24 January 2018)

in customary law[541], his knowledge about African culture helped to contextualise most of the issues in this study, especially his work in arbitration[542] and African legal education.[543]

The second prominent former Dean is David McQuoid-Mason, the current President of Commonwealth Legal Education Association, a position previously held by William Twining. McQuoid-Mason's work in clinical legal education, especially Street Law in South Africa, is well documented.[544]

6.2.1 Data Analysis

As **Table 3** shows, it was possible to categorise responses from interviews with deans to show distinct approaches at the different law schools that were surveyed. Prominent among these are clinical legal education (including live-client/legal aid clinics), attachments, externships, mooting and community outreach. Interviews with those directly involved in using such methods such as clinicians, law clinic coordinators and directors enabled the researcher to understand the activities in which the students were involved in learning specific skills. Such data was also corroborated by observations where possible (See **Table 4** in paragraph 6.3.1). At some law schools, participants referred to specific internal university policies such as the teaching and assessment policy at one law school that was discussed in paragraph 5.2.3.2 which stresses a "problem-oriented approach" to teaching law. This helped to 'fill the gaps' and make sense of the data.

541 Yash Ghai, 'Law, Development and African Scholarship' (1987) MLR, Vol. 50, 750, footnote 11, 753

542 SKB Asante was instrumental in the establishment of the Ghana Arbitration Centre to promote alternative dispute resolution mechanisms

543 SKB Asante was a member of a committee appointed by the World Bank to make recommendations for the reform of legal education in Uganda. See 'Final Report of the Committee on Legal Education, Training and Accreditation in Uganda' (1995)

544 McQuoid Mason (n 301); McQuoid Mason (n 484); McQuoid Mason (n 214). I have been permitted to identify him.

Table 3: LLB Degree teaching approaches and methods (Data Set 4)

Institution	CLE	Community Outreach/Academic visits	Problem-Based Learning	Mooting	Data Source
1	Yes Attachments/ Placements	Yes	Yes (Legal Writing)	Yes	Interviews and observations
2	None	None	---	Yes Extracurricular	Interviews
3	---	---	Yes (Legal Writing)	Yes	Interviews and observations
5	Yes Externship /Internship/ Live-Client/Legal Aid Clinic	Yes	---	Yes	Interviews
8	Yes Attachments/ Placements + (Student-led Legal Aid Clinic (Extracurricular	Yes	Yes (Public Int'l Law)	Yes (Extracurricular)	Interviews
9	Yes Live-Client/Legal Aid Clinic (Elective)	Yes	Yes (Media Law)	Yes (Elective)	Interviews
10	Yes Live-Client/Legal Aid Clinic/ Street Law (Elective)	Yes	Yes (Street Law)	Yes	Interviews and observations

Key:

CLE: Clinical Legal Education includes a range of clinical approaches including live-client clinical work, role-plays, simulations and games. etc. Although almost all the universities used elements of CLE, not all of them had a live-client clinic on site.

--- -: Not mentioned in interview

6.2.2 Findings

Based on the data, most university law schools expose students to real-life situations by involving them in different forms of community outreach as part of their legal training. Such community engagement allows students to learn those aspects concerning law as it relates to their communities, including some elements of customary law and culture. The findings show that most university law schools are teaching a range of skills as part of the LLB degree.

There was, however, a general perception that postgraduate professional law schools do not necessarily teach skills and that the university law schools may be the best places to learn those skills necessary for the practice of customary law and culture.

6.2.2.1 General Skills

The findings show that most deans considered community outreach as an important element of legal education and this appears to justify the enthusiasm for clinical approaches, particularly at those universities where there is a live client clinic. But even those law schools without law clinics have found ingenious ways of involving students in community engagement. Hence, D1 referred to attachments as the means to expose students to "see how law functions in real-life situations" instead of just focusing on the theoretical aspects of the law. Such data suggests that most of the deans interviewed in this study considered practical activities as an opportunity for students to engage more with the community, an idea which is consonant with *Ubuntu*. One dean (D4) spoke about the need for students to visit impoverished areas where they could familiarise themselves with real legal issues in the community. Students taking customary law at one law school were expected to visit communities and traditional courts.[545] The results also show that students at another institution visited the National House of Chiefs, which handles chieftaincy matters, as part of the internship programme.[546]

What is striking about this data is that only one dean out of all those interviewed thought that skills should not be taught at university.[547] The dean's view reflects the school of thought that has historically opposed the teaching of skills at the academic stage of legal training as discussed in the literature review in Chapter 2. In Ghana, the debate concerning whether skills

545 Interview with L9, LLB Lecturer (4 August 2018)

546 Interview with L4, LLB Lecturer (3 June 2017)

547 Interview with D2 (11 May 2017).

should be taught at university or not is shaped by the fact that the professional school (Ghana School of Law) was specifically established immediately after independence to fast-track the training of lawyers, focusing on legal skills.[548] However, there were subsequent attempts to integrate the professional programme as part of the undergraduate law degree at University of Ghana, Legon, which were rebuffed for political reasons during the Kwame Nkrumah administration.[549]

It would seem that in Ghana the objection to the teaching of skills as part of the LLB degree curriculum is based on its historical background. For some academics in Ghana, the question of whether skills should be taught in undergraduate legal education is moot. According to data from interviews with law graduates enrolled on the professional programme at the Ghana School of Law, it does not appear that the law school has the capacity to teach skills as the number of LLB graduates is overwhelming.[550] Interviews with LLB graduates in Kenya and Uganda also confirmed this to be the problem in their own context. According to one graduate: *"Imagine a school with 2,200 students being addressed as if it is a political rally or an evangelical crusade."*[551]

As a result, some academics in Ghana now admit that as a matter of fact, skills are never actually taught at the professional level.[552] In their view, the professional school in fact focuses on the teaching of procedure, and not skills. As a result, some of the teaching staff want the skills courses to be taught at the undergraduate level.[553] This is also the case in other common law jurisdictions. According to one dean: "*The professional stage in many countries especially*

548 Harvey (n 69)

549 Harrington and Manji (n 121)

550 Focus Group Interview 1 (12 August 2017). See also Asare v A-G and Others [Suit No: J1/1/2016], Irene Korley-Ayerteye & Others v GLC HR/0066/2017

551 Interview with S9, LLB Graduate (23 March 2018)

552 Minutes of meeting of Conference of Law Deans held at Faculty of Law, University of Professional Studies (Accra 4 August 2017) (on file with researcher)

553 ibid

British colonies, only prepares students for court practice. It is procedure…"[554] Interviews with some LLB graduates who had completed their professional training confirmed this to be the case. There is also the argument that the instructors at the professional stage are not competent enough to teach skills, and the teaching approach is not skills oriented. This is an argument confirmed by Muna Ndulo's 2014 study which observes that the present system in most professional schools is not effective because students are taught academic subjects instead of practical ones.[555] LLB graduates who were interviewed in Ghana and Kenya complained about the curriculum of the professional programme that is so wide that, in the words of one graduate:

> …if you're going to study my summary notes, for instance under commercial law, I had about 5 A4 books of handwritten revision notes. The materials I had to consume and digest in those nine months [duration of the professional course in Kenya], for just one subject, would fill half my car boot. And I put it at the back. Let's say for instance…the compulsory question comes from the law of agency, and it is the only thing that you have not properly digested. I can almost assure you; you will fail.[556]

As noted in the 1971 Ormrod Report, the professional stage of training has two main objectives. The first is to enable the student to adapt the legal knowledge and the intellectual skills acquired at the academic stage to the problems that arise in legal practice. The second is to lay the foundation for the continuing development of professional skills and techniques throughout the student's career.[557] As noted by one Dean with a background in clinical legal education:

554 Interview with D4 (28 February 2018)

555 See Ndulo (n 71)

556 Interview with S9 (23 March 2018)

557 Report on the Committee on Legal Education, 1971, Cmnd. 4595, 57

> We have to acknowledge the various skills that are taught at the academic stage, even in the non-practical settings: real analytical skills such as thinking like a lawyer, problem solving, raising issues, resolving them, assembling the law, researching the law, all these are skills. It's just that they're not clinical legal education type of skills. Then there are those skills that you need to function, say in a courtroom or before a tribunal, before a commission of inquiry or working as a lawyer or as in-house counsel. In our case, we have a bifurcated system where we teach the theory in the university and then the practice in the law school. (D7)

In one focus group, some students were able to demonstrate the learning of such 'intellectual skills' during the academic stage of their legal training:

> So, from undergrad, I learnt how to identify issues. Prior to that, even when we got to the professional law school, when I get a case–like the facts of a case–sometimes it's not so easy to just identify the issues. I also learnt how to identify principles of law because it was very vague for me - like this is what the law states and if this is not it, then you must find the exception - like maybe the exception to the rule. From undergrad studies, you get to know which principle relates to which particular case. Even if this case has other principles, you should know that maybe this particular one is for this one. And the application too–how to apply the facts of the case to the rules. (Focus Group 1)

Some LLB graduates maintained that they had more confidence in their learning of skills through experience during undergraduate legal education than they had in their post-graduate professional legal training. For instance, one LLB graduate remarked:

> And even now that I'm in professional law school for a course like Conveyancing, which I do in professional law school, there are some aspects of Conveyancing and Drafting that he (an LLB lecturer) taught us in Equity and Succession. And I remember when the Conveyancing & Drafting lecturer in professional law school was teaching me, I'd just trail (sic) off because it was like I knew everything already and he was just repeating what I knew and even omitting some of the things I thought he should've added.[558]

This data shows that the high failure rate in professional schools is the main reason why many deans interviewed in Ghana, Kenya, and Uganda thought that the LLB curriculum ought to be

558 Interview with S2 (16 June 2016)

restructured to enable the teaching of skills traditionally associated with the professional programme. One dean suggested that making skills part of the LLB makes the curriculum:

> …stronger…comprehensive, but also provide the opportunity to teach the students the subjects they do in the professional school so that by the time they go there, it's a walk in the park because they have done conveyancing, civil procedure, criminal procedure, etc. (D5)

It is not only university law schools in the Roman-Dutch law system that have been able to integrate professional courses into the LLB degree, but also those African universities that inherited English common law, such as the curriculum at those institutions shown in **Appendix 7**. There are no postgraduate professional schools in those countries. Because of the limited capacity of professional law schools, some African specialists in legal training now advocate that professional schools of law should be converted into law clinics run by full-time practitioners.[559] As discussed in the literature review in Chapter 2, this view reflects the theory/practice dichotomy that still permeates debates about legal education in most common law jurisdictions.[560] Be that as it may, some people think that the benefits of clinical legal education at the professional level, let alone at the undergraduate stage, are overemphasised.[561] As a whole, the findings show that only those deans who had been exposed to clinical legal education as part of undergraduate legal education support the teaching of skills at university.[562] This is confirmed by the findings of the observations and interviews with deans in Ghana, Kenya, Uganda, and South Africa.

Interviews with deans further showed that many of them want the LLB curriculum to be of the highest quality instead of quibbling about peripheral issues regarding legal education in our

559 See Ndulo (n 71)

560 See Gower (n 27)

561 See Bimpong-Buta (n 313)

562 Minutes of meeting of the Conference of Law Deans held at Faculty of Law, University of Professional Studies, (Accra, 4 August 2017) (on file with researcher)

universities. Thus, they consider that disagreement about the nature and structure of legal education has distracted them from the real issue of "quality", whose definition remains fuzzy:

> …the problem is how does one become a lawyer? So, who is a lawyer? Who should become a lawyer? And how? I think the "how" is where the major problem is; the training you should give to him (sic) - is it your ability to commit the laws to memory? Is that how we should train? Or is it the ability to draft under examination conditions things that in real life you will never have to because there are precedents there to guide you? Or how should one become a lawyer? All the thinking is, now so many people are becoming lawyers - let's cut them off. So really what they think is a problem is not what constitutes the problem. So, whatever the solution is - let's set up an Independent Examination Board; let them cut off the numbers, this is all that I'm seeing. So, it doesn't address the issue of quality. (D1)

The same dean goes on to argue that the challenge should be finding ways to ensure that the curriculum is practical:

> I don't have a problem if the theory and practice divide is maintained but the issue is about the content. Because if for purposes of division of labour, the LLB is here and the BL [professional programme] is there to me, there's no problem. The problem only has to do with when you say the LLB must be exclusively academic. Right from day one, just as you train a doctor to cut up human beings. So right from day one it should have a practical aspect of learning. Right from day one. I think this is how I see it. (D1)

In South Africa, a more formal organisation of law deans, the South African Law Deans Association (SALDA), seems to have achieved what the Conference of Law Deans has been unable to do in Ghana, which is to have a more coherent message about the structure of the LLB degree curriculum. Indeed, one of the deans[563] cited SALDA as an important source of data concerning the undergraduate degree curriculum because of its work with the South African Council of Higher Education (CHE) which recently concluded that poor writing and research skills constitute one of the deficiencies of the LLB qualification.[564] Such data suggests

563 Interview with D6 (1 August 2018)

564 Council of Higher Education, 'The State of the Provision of the Bachelor of Laws (LLB) Qualification in South Africa' (2019)

that there is an attempt by some African deans to coordinate their efforts in order to deal with the quality of the LLB degree. To a large extent, such efforts echo what the literature says about the best approach to legal education.[565] Interviews with some deans suggest that making legal education more practical appears to be one constructive way of dealing with concerns about the quality of the LLB curriculum. One dean described how this is being achieved:

> We have tried to also posit students and the study of law within the social context by introducing the practical aspect. In this respect we have the Law Clinic where students get the opportunity to do real-life learning. Last semester for example, with our Law Clinic we… attached students to organisations…and many other institutions; some were … attached to the courts so that they don't just read, read, read. They see how the law functions in real-life situations. And for the first time, last semester we didn't do theoretical examination for Law Clinic & Mooting. We…did practical exams. So, at [our law school] here usually a week preceding the real examinations, we do all the practical exams–so that's what we did. So, we did mooting, and every person, every candidate taking that course had to moot. And so, we had a court set-up; we had them wear wig and gown; so, we didn't do a written examination for that. Traditionally, the practical components are supposed to take place at the professional level when the students finish [the LLB]. So, supposedly we are to just teach the law, the substantive law. (D1)

These views are important in that they provide anecdotal evidence which appears to show a correlation between the teaching of skills in university law schools and the performance of trainees at the professional stage of legal training. As **Figure 5** shows, during the professional stage of legal training in one country, LLB graduates at those law schools whose curriculum made specific provision for the direct teaching of skills outperformed students from those law schools that did not teach skills courses.[566] The results show that the overall best student awards were won by graduates whose university law schools taught legal skills. On average, graduates from those law schools have won prizes for outstanding performance in at least 5 out of the 8 core courses from 2010-2015. This performance is also corroborated by similar data from Kenya. One dean alluded to the fact that students who take practical courses often find it easier

565 Avrom Sherr, 'Legal Education, Legal Competence and Little Bo Peep', (1998) Vol. 32 (No.1), The Law Teacher, 37, 51-52

566 These statistics are based on a survey of bar course results between 2010-2015 that were collected at one professional school of law.

to transition to the professional programme at the Kenya School of Law. This is supported by data from interviews with LLB graduates which shows that students from law schools offering such practical courses generally perform better than other law schools in Kenya. As pointed out in a recent report on the quality of legal education in Kenya[567], over 65.8 per cent of LLB graduates who were surveyed felt that they would have been better prepared for their professional (bar) examinations had their LLB degree included "practicalities of law."[568] Unsurprisingly, the report recommends introducing aspects of clinical legal education in the LLB curriculum to improve the quality of undergraduate legal education and also as a way of enhancing performance at the professional stage of legal training.[569] In relation to conveyancing for instance, skills involved in the transfer of interests in customary land law, a very complex process in contemporary practice[570], is probably the reason why those students who take the course as part of the LLB degree perform better at the professional stage according to two students interviewed in Ghana[571] and in Kenya.[572] The students specifically mentioned the benefit of doing conveyancing and other procedural courses as part of the LLB degree as they felt that it enhanced their performance during the professional stage.

567 KSL and KIPPRA (n 35)

568 KSL and KIPPRA (ibid) 62

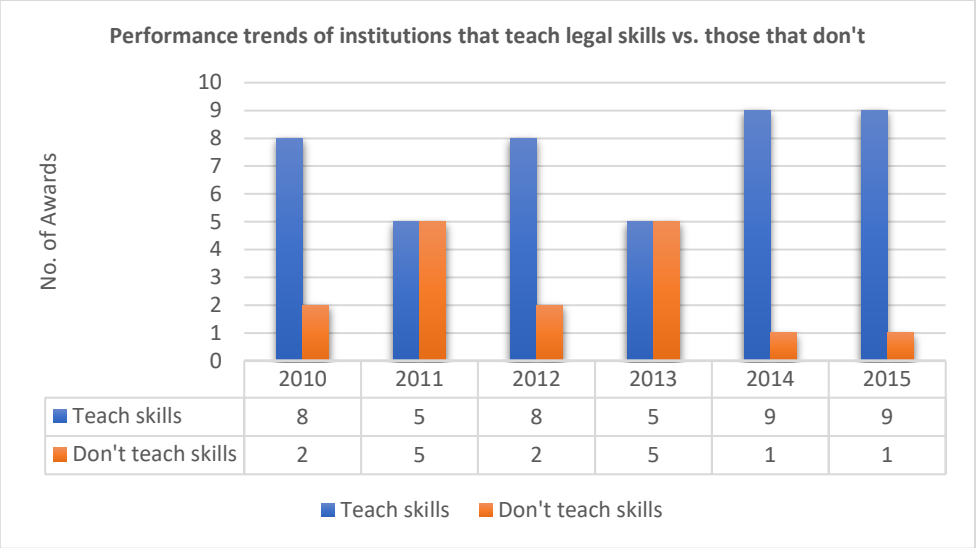
569 KSL and KIPPRA (ibid) 63

570 Janine M. Ubink, 'Courts and Peri-Urban Practice: Customary Land Law in Ghana' (2002-4) Ghana Law Journal 22: 25-77, 178. See also Samuel S.K.B Asante, 'Interests in Land in the Customary Law of Ghana – A New Appraisal (1965) 74 Yale L.J. 848; Gordon R. Woodman, Customary Land Law in the Ghanaian Courts (Ghana Universities Press, Accra 1996)

571 Interview with S2, LLB student (16 June 2016)

572 Interview with S37, LLB Graduate (11 June 2020)

Fig. 5 A comparison of professional bar course results of law schools that teach legal skills and those that do not



The reference to 'practical exams' by D1 is also noted because concerns are often raised in the literature about the need to review the system of examining students in legal education so that there is a "greater degree of approximation between law as taught and law as practised."[573] As already stated in the previous chapter, (see paragraph 5.3) interviews with some students at some law schools show their disdain for written examinations. One of the students had a disparaging view about exams:

573 Robert E. Megarry, 'Law as Taught and Law as Practised', (1966) Vol. IX, No. 2, Journal of The Soc. of Public Teachers of Law, 44; See also Twining (n 114) 83-86

> I think our exams are horrible. And it's because our exams don't really test us…They reward memory and not any of the skills that we really need and in our very short experience with our internships and all that, you realise that memory really is the least skill you need. Because the judge probably doesn't remember anything, and so you realise that all the other skills that we actually need we're not being tested for. During the LLB it's all about memory, when you have to write the entrance exam to the professional school of law, you're so stressed because you don't know your capacity to remember. And after that if you were fortunate enough to make it into the professional law school it's just worse and worse and then when you get out everybody starts complaining, "yeah the people that are coming (sic) they're not good; they don't fit into practice" and…so let's reduce the numbers; let's make it more difficult by setting more memory exams.[574]

Even some of the lecturers held a similar view:

> …because the examination is written, written, written there isn't time for straying with your students into discussions like the one we have had. You find that you are falling behind the syllabus and you just go straight to the concept and teach them as if they were black and white when in actual fact there are a thousand and one ways in which that concept will present itself and they don't fit neatly into the slot the academic concepts are taught. So, I think that we should be able to move to a situation where it could even be possible to give a tough case scenario to our students and give them two days to go and research and come and sit down and give us the answer.[575]

Acknowledging the problems which this may create, one former dean suggested that by making the law degree more practical, university law schools should ensure that they do *"not teach too much by giving students skills to do stuff…*[576] in order to achieve practical legal training. This seems to solve the problem of too wide a curriculum which some participants gave as the reason for not learning skills at university, the "dragon" of coverage that William Twining says must be slain in undergraduate legal education.[577] This may explain why many deans who were interviewed were of the view that the most feasible way of making the LLB degree more practical is to integrate clinical legal education into the mainstream curriculum in order to

574 LLB Graduate, Focus Group 1 (12 August 2017)

575 Interview with L2, Lecturer (13 June 2016)

576 Interview with David McQuoid-Mason, former Dean (2 August 2018)

577 William Twining, 'Legal Skills and Legal Education' in Law in Context: Enlarging a Discipline (Clarendon Press, Oxford 1997) 190

address issues concerning the objectives of undergraduate legal training programme, content and teaching methods.

6.2.2.2 Conceptions of skills in African customary law and culture

Interviews with deans also revealed that most of them wanted skills to be part of the LLB curriculum in order to make the law degree relevant to students and the legal profession. Their main concern revolved around the best teaching approaches to ensure that the curriculum reflects how the law works in practice in the African context. They also raised concerns about how to use the law to reconcile conflicting values given the existence of multiple legal systems, an issue that was also apparent in interviews with students (paragraph 5.4.1). Some academic lawyers in Ghana suggested that practising lawyers should respect culture in criminal litigation, a common example being cases involving those charged with petty crimes such as stealing a tuber of cassava for their sustenance. According to one prominent lawyer, one only becomes criminally liable if they sell the food instead of eating it.[578] While Ghanaian culture in this example is reflective of natural law theory[579], this should be contrasted with Jean Valjean in Victor Hugo's *Les Miserables* who was sentenced for life for stealing bread to keep his sister's child alive. The example of how Jean Valjean's case would be handled in African culture is emblematic of African customary practice, as one former South African dean noted:

578 Sam Okudzeto during the Round Table Discussion on the theme: 'Promoting Access to Justice for the Indigent Pre-Trial Detainees' held at La Palm Royal Beach hotel, Accra on 24 February 2016. It is such cases that justified the integration of a pre-trial detention programme as part of the law programme at one law school in Ghana during the 2013-2014 academic year (details on file with researcher)

579 Leviticus 23:22

> So, I think the most important thing we can learn from customary law practices is the ability to mediate solutions and the ability to try and get solutions which sort of restore the balance. Almost restorative justice in a way if you like, rather than punitive justice…. Restorative - how can we do this instead of going through the courts…However those sorts of things where you end up violating other people's rights in terms of the Constitution, those practices can't be adopted, but where it's something like if you steal a chicken or whatever you pay compensation of two chickens or whatever it might be, with those sorts of things where you can divert cases and minor crimes - you don't need to clog up the courts with minor crimes and things. You can use and learn how those things are mediated through the traditional systems.[580]

Even in serious cases such as murder, there is now evidence that in some communities, lawyers are utilising African traditional justice systems such as in the Kenyan High Court case in *Republic v Mohamed Abdow Mohamed*[581] wherein the judge dismissed a murder charge following an agreed 'blood money' settlement in accordance with Somali customs between the families of the deceased and the offender.[582] As discussed in the previous chapter, interviews with students showed evidence that during their clinical casework, they were often confronted with situations requiring them to use skills rooted in customary law and culture, such as restorative justice processes, to resolve some of the conflicts (see paragraph 5.4.2). This is consistent with evidence from the literature review that shows that such approaches based on restorative justice to maintain communal harmony and solidarity reflect principles of natural law—forgiveness, mercy, grace, and empathy that are inherent in *Ubuntu*. These issues have been echoed in the recent *Black Lives Matter* protests that are calling for the reallocation of resources to address issues confronting poor communities as a way of addressing incidents of crime that often result in cases of police brutality in the United States. This perhaps provides anecdotal evidence that when the educational system does not sufficiently address some cultural issues, it may lead to extreme pressures on communities. As noted in Bryan Stevenson's empirical account of his experience with the US criminal justice system, the

580 Interview with David McQuoid-Mason (n 576)

581 Supra (n 51)

582 See Kariuki (n 254)

cultural realities confronting ethnic minorities have contributed to the rise of crime in certain communities.[583] Hence, some social entrepreneurs in the US such as the former special adviser to President Barack Obama, Van Jones, are involved in projects that emphasise the importance of restorative justice in the criminal justice system.[584]

However, there are problems in integrating customary law and culture in mixed legal systems. Some academics, especially expatriates from Anglo-American jurisdictions, are concerned about the nature and practice of customary law and culture in some Anglophone jurisdictions. One participant, an American Fulbright scholar with teaching experience in South Africa, Tanzania, Ghana, and the South Pacific made some startling revelations that may have been overlooked by African scholars interviewed in this study. While acknowledging that mediation and other conciliatory approaches are the hallmark of customary law in mixed legal systems, such approaches can be a double-edged sword. The Fulbright scholar who was interviewed during the research visit in the United States notes that:

> …the primary sentiment is community harmony which only works if everybody gets along. So, if something happens, and there's some dissension or conflict, the effective way is to figure out what is fair. It's usually a two-part process that involves both a restitution and a reconciliation. And restitution can take a huge variety of forms. It can be, let's say that your brother got drunk, and he came to my house, and he smashed up my garden. The restitution then is that he has to come back and replant it and redo it and fix it up. Right? So, restitution sometimes looks like that–fixing it, making it back the way it was. In the instances where it isn't something that can be fixed, and you can't go back to the way that it was. Let's say your brother sexually assaults me–you can't undo that. You can't fix that.[585]

Such concerns seem to be justified. For instance, in the literature there is reference to a South African rape case before a headman that was resolved by compensation of three head of cattle

583 Bryan Stevenson, Just Mercy (Spiegel & Grau, New York 2014)

584 Antony "Van" Jones, "The Redemption Project" (a CNN television series)

585 Interview with L20, Law Professor (18 February 2019)

to the victim's family which brought finality to the matter without recourse to criminal proceedings in the Magistrates' Court.[586] But such characterisations of customary law are unfair because even in the formal justice system there are cases of miscarriage of justice in an imperfect criminal justice system such as the ones discussed by Bryan Stevenson in his acclaimed book, *Just Mercy*.[587] The literature also shows that even in the so-called advanced legal systems, the law does not always lead to just outcomes. Yet in the African context, culture has often guided courts to apply remedies that reflect values of *Ubuntu* as illustrated by the Constitutional Court of South Africa in *State v T Makwanyane*[588] which abolished capital punishment as being inhuman. Yet the US Supreme Court has maintained that the death penalty does not violate the Eighth Amendment's ban on cruel and unusual punishment.[589]

The interviews with deans showed that criticism of some cultural rights in African communities is unwarranted because if they are appropriately invoked, they often provide effective remedies in some areas of the law. For instance, one professor argued that some criticism is out of ignorance because there have always been remedies in African culture for women and children suffering from abuse:

586 See Rautenbach (n 230)

587 See Stevenson (n 583)

588 1995 (2) SACR 1 (South Africa)

589 Bucklew v. Precythe, 587 U.S. ___ (2019) (USA)

> Many women if we tell them the Constitution says you're equal to your husband, that concept just doesn't resonate with their lived experience - their lives and what they know. It's an alien concept. But when you talk about social justice: among the Baganda, for example, we have a concept called "Kunoba" in Luganda which is a right that married women have if they are being mistreated by their husbands or if he's being overly oppressive, they have that right to return to their parents. Not permanently–it's not divorce, it's very different from divorce. So, if you say that "I have Kunobadi", it was understood, and it still is understood to mean that after some cooling off period, your husband and a few elders from his clan and elders from the wife's clan would sit down with both the husband and the wife around a table and discuss and she will voice her grievances, the clan elders will listen, and they will advise. That is something that we can integrate into our so-called "rights" and every Muganda will understand that yes, I have that right, because it's in our tradition. I have that right. So, you being the man doesn't mean that you can treat me any way you want - like an object; like you know, beating me and all that. So, I think when we try as teachers of the Law to do our research and find corresponding concepts to what we are teaching in our traditions, in our customary practices and norms. It would need some work because it requires us to do research- maybe we need a research project. So that in every discipline you find equivalent norms and practices.[590]

Such approaches are recognised by some African judges such as Justice Emmanuel Ugirashebuja of Tanzania, who acknowledged at the 2017 African Law Deans' Forum[591] that sometimes when a wife alleges domestic abuse, she may simply be expecting intervention to end the abuse, not to end the marriage. An interesting example is *gupuro* (a token to end marriage) from Shona culture in Zimbabwe whereby a husband must give his wife a token to end an acrimonious relationship. Admittedly, such a process was often subject to abuse.[592] The findings show that some deans recognise the existence of suitable remedies in African customary law and culture that lawyers may well invoke in practice. Notwithstanding these efforts, there is little evidence that these African customs and traditions are being taught as part of undergraduate legal education in African law schools. Expressing his frustration with the lack of emphasis on these issues, one dean emphatically stated:

590 Interview with L3 (n 522)

591 2017 IALS African Law Deans Forum held at Cape Coast, Ghana on 11-12 May 2017

592 Joyce Jenje Makwenda, Divorce Token (Joyce Jenje Makwenda, 2019)

> **LAWYERS PRACTISE CUSTOMARY LAW**. When you go to court on a divorce case, the first thing that the judge if he or she knows what she's about– First thing they will ask you is, "have you performed a customary divorce? Otherwise, if I grant you a statutory divorce, there will still be a customary marriage subsisting." So, now you have to advise your client, what is the custom where you come from? How is the divorce supposed to be done? Go and do it and then come back, you have just practiced customary law without knowing it!
>
> You want to buy land. The land belongs to a family or a stool (chieftaincy), you negotiate with a stool to find out what their principal elders say. You practice customary law on a daily basis without even knowing it. So, we have to bring this reality to bear on people's minds and let us ensure that the customary law aspect of every subject area that we teach is privileged and taught as such.[593] (Researcher's emphasis)

Interviews with deans also showed that in some cases courts are often expected to resolve legal conflicts that require considerable cultural expertise which many lawyers and judges do not have. Such issues have arisen in some reported cases which have become the subject of research as discussed in the literature review in Chapter 2. The most notable one is the edited book titled: *Multicultural Jurisprudence–Comparative Perspectives on the Cultural Defence* which focuses on the cultural defence in criminal cases.[594] While some may argue that expert witnesses with relevant cultural expertise may be used, others point out that there is danger in an overreliance on experts in customary law who may *"also give a misrepresentation of local customary law because of a tendency to idealise the law, to present what it ought to be instead of what it is, and because of the connected failure to appreciate that the ancient traditional law has been modified by subsequent practice."*[595]

There is also anecdotal evidence from other pluralistic societies such as the United States where some judges in formal state courts have had to consider unique issues in matters involving American Indian Tribal Law. During a visit to the US, the researcher spoke with a Native

593 Interview with D7, Current Dean (19 September 2021)

594 See Foblets and Rentein (n 235), See further Holden (n 236)

595 Janine M. Ubink (n 570) 189

American Professor of American Tribal Law who gave examples illustrating the importance of cultural expertise in legal proceedings involving aspects of Indian tribal customary law:

a) Family Law – Divorce and division of property

> Students don't have enough of a background… to be able to see it. It also poses, very particular kinds of challenges to students who are trained in this very traditional Western model. In New Mexico we have so many different tribal pueblos and each tribal pueblo has a different way of dividing property in divorce action and some tribal courts don't even recognize divorce, so that the tribal member might have to get their divorce in our regular Western District Courts that have to have their part. …The district courts don't have jurisdiction over the division of property in the tribal setting because that has to be done in the tribal court according to the tribal customary law. So, it's a bifurcated dissolution; so the dissolution of the marriage is one thing, but the division of property is another and done in a completely different jurisdictional framework.[596]

b) Property Law – proprietary rights

> In the Navajo traditional way of thinking when a person is born, when a baby is born to a family their umbilical cord is buried at that place so that they always know they're rooted to that space in the land. And so, if there is…a land dispute…between family members or different families, the Navajo tribal court might [use] as one of their rules of evidence, a witness to say when so and so was born I buried his cord in this spot to determine what part of the land that he comes from traditionally. In a New Mexico District Court decision, when the parties took this case to a Western court, the district court judge was smart enough to try to understand the traditional values of the Navajo family, to where that umbilical cord was buried. So, he looked at the Navajo tradition and brought it into a state court system to resolve that dispute.[597]

596 Interview with L24, Law Professor (4 February 2021)

597 Interview with L24 (ibid)

c) Tort Law – Personal injury in tort

> So, you know the little whirls in your fingerprint on the end of each finger that we all have? In the Navajo way that is the way that it says that our deities and our ancestors bring wisdom to us and through those whirls on our fingertips. When a Navajo person, in this particular example, lost one or two of his fingers. If you look at just the insurance actuarial damages as to losing the tip of a finger, let's say or whole finger is just $1 amount put on it, based on some insurance calculation, right? But if it's a Navajo person it's much deeper because you are alert [to the fact] that person has lost the answers to the wisdom of his ancestors and his deities, because it comes in through the whirls on the tip of his fingers, or her fingers. So, this is just like another way where we think about the value of that difference. The value different traditions and cultural units have on these things which is wholly different [from] a Western way.[598]

Uncoincidentally, other deans in Africa also referred to similar legal situations concerning the application of customary law in legal practice:

> Customary law is an undeveloped area, but tremendously important. If you look at our Courts Act between sections 54-55, there's actually an assumption in there, that **we should use customary law to resolve issues of contract and tort, and that it is when you are unable to use contract customary law that you now go to the common law**. **But we are using common law as the first line of defence which is completely unstatutory (sic), but nobody notices it, and nobody cares. It just shows the schizophrenia where we have an African system, but we are all thinking and acting in a European fashion.** What is worse is that there's a chunk of our land law, a chunk of our family, a chunk of so many aspects of our law, even constitutional law when it comes to chieftaincy that is still based on customary law. In fact, the majority of family law, is customary law. The majority of land law is customary law. So, we have to address that otherwise one will have serious issues in those domains. That's why we have all this mess with land acquisition and land ownership interests. And second, we will produce lawyers who cannot operate in those domains, when it comes to customary law.[599] (researcher's emphasis)

However, while examples (b) and (c) above seem to suggest that formal western courts can apply remedies associated with customary law where a judge has the relevant cultural expertise, there are still those who remain sceptical, arguing that customary law is not always commensurate with the harm suffered especially in criminal law cases. The following remarks

598 Interview with L24 (ibid)

599 Interview with D7 (n 593)

by another professor interviewed during a research visit in the United States helps to illustrate this point:

> …Once a person has been convicted in the state court, and now it's time for sentencing, the fact that there has been restitution and reconciliation within the community should become a mitigating factor for sentencing in the criminal courts. And so, you say to the judge, if you're the defence attorney, "Judge, you found my client guilty, but there was a settlement and a ceremony and reconciliation confirming that my client has paid X amount in restitution. We submit that that it is sufficient punishment." What must the judge say? So, if you're convicted, should there be additional penalty beyond what the parties agreed as settlement? What happens when it's more important to the chief that everybody gets along than to recognise the harm that was really done to me by the sexual assault?[600]

As already discussed, there are also examples of cases in Africa where some judges have been able to apply such cultural expertise to resolve some disputes, including the murder case in *Republic v Mohamed Abdow Mohamed* [601] or 'burial cases' such as the Kenyan case of *Otieno v Ougo*[602] both of whom confirm that common law and African customary law are no longer mutually exclusive and that they are meant to complement each other.

The findings also show that some deans have experience of applying practical methods rooted in African customs and traditions. For instance, one dean talked about drawing from their experience working in post-conflict situations in Africa. Stressing the limitations of formal processes, the Dean noted:

600 Interview with L20 (n 585)

601 Supra (n 51)

602 Otieno v Ougo Civil Case No. 4873 of 1986 (Kenya)

> …law as a tool on its own is very limited in playing the role it is supposed to play unless it is added with other things. Because if you talk of Sierra Leone, fine we were doing hearings - like we were sitting to administer justice, but that kind of justice is known as 'restorative justice' as opposed to 'retributive justice' and that kind of justice you couldn't use the formal law alone. You need to apply it within the context, and you need to understand the socio-cultural political dynamics of the group in order to apply a particular law effectively."[603]

The Dean then criticised "the legal science approach where students learn [mostly] through statutes, case law - how they have to distinguish, analyse using [those] tools for analysis. That is the tradition. That's what we've been told, which is usually referred to as the 'black letter law approach'. But our law school has tried to also [posit] students and the study of law within the social context by introducing the practical aspect."[604]

Referring to the Dean's background working with a human rights organisation, the Dean further gave a very insightful example using mediation as an effective approach to legal education:

603 Interview with D1 (14 June 2016)

604 Interview with D1 (ibid)

> A man walks in my office and says, "I suspect my wife is getting rid of my house because I've been declared insane - and so she is now my next of kin [curator] so she manages my affairs and I know she is about to sell some of my properties, and I don't like that." All my colleagues who are typical lawyers usually will take the approach that, 'You don't have any standing in law'; do you get it? 'You don't have the capacity to pursue this matter you want to pursue.' But because of my background…they used to give what they considered as complex cases to me to handle. So, I invited the wife; the wife came and said, "But why are you dealing with a mad man? In law he doesn't have the capacity." I said, "I know that, but I'm still also standing on the law to ask you, 'Are you actually getting rid of this man's property?'" and she said, "Oh madam, don't mind him. This is a mad man. He's due to go for a review abroad but he doesn't want to go because of the opinion he has formed that I'm selling his property." Then I said, "Look. Now, are you selling his property or not?" The woman became so furious. So eventually I had to do mediation and said, "Ok, bring the documents. We're going to deposit the documents at the Bank of Ghana" and so it was then that the man said that "Ok, I'm now satisfied. I'll go for my review." If we want to talk of strict law, certainly there's no way this problem could have been resolved amicably, but we need to resort to other resources having the law at the back of the mind in order to…handle matters of this nature that have been brought to the law for a solution. You know, so I think …this has shaped me, you know, my philosophy.[605]

The dean's experience indicated above is not an isolated example because interviews with other deans show that some universities in Africa are institutionalising mediation as part of their law schools. A good example is the Dispute Resolution Centre at one of the law schools selected for this study.[606] Other law schools also emphasise alternative dispute resolution approaches as part of their clinical programmes.[607]

605 Interview with D1 (ibid)

606 Interview with D5 (20 March 2018)

607 Interview with D4 (28 February 2018)

The dark side of the findings is the effect of elitism on students doing law who are becoming increasingly detached from the reality in their communities.[608] The following remarks by some deans attest to this disturbing tendency:

> …university students and academics are privileged in society. In developing countries and in particular in Africa, we are this privileged elite often in a sea of poverty around us and unless we reach out to the communities and start strengthening the communities, we're going to lose out… FD1

> …who should become a lawyer is also a problem because presumably it is thought that certain people from certain exclusive backgrounds should be admitted into a profession that is known to be noble. But nobility for me is not to be defined through a person's pedigree. Nobility is the strength of the person's character and how the person applies himself or herself to their vocation… D1

> The emphasis should be put on 'skilling' the students. The lawyers cannot explain/expand the law, but they should be made to understand the motivation for that law, distil the law and understand its implication, understand that law in context, how does the law affect society, how does the law move in tandem with the evolution of society and things like that. It is very important for students to understand society. If you are dealing with society, what is your society, what are the unique aspects of your society, what are the unique challenges and things like that and what is your role? The training of lawyers should also awaken a sense of civic responsibility, for students to become civically conscious, to understand their civic responsibility, to know they are a part of society, they are privileged but they must do something to change things…D4

> We've had students in our clinical class who have never been to a slum, they were born in town. They are daughters and sons of judges. They don't know how life feels so when we send them out to internship like we do and we send them upcountry for two months, it is a life changing experience. They have not learnt any law but it is a life changing experience for them so they then get to understand their society and to understand that you know as much as they have grown up in privilege not everybody has, and they can do something about it. So, when such a person becomes a judge, they are confronted with a case involving that class but then they have an idea of what that class of people go through and how their judgement is likely to impact on them… D4

608 "As a corollary, the capacity of indigenous legal elites to avail themselves of the status granted them by British law rested also in their embeddedness in these local nodes of power, in other words: in their relative capacity to leverage and reflect the interests of a social basis. (See in this context Harvey (n 69)). In the Ghanaian context – in many ways comparable to the Nigerian one – it moreover built on the autonomy of indigenous lawyers, whose market for legal services was not controlled by the colonial government. Indeed, the pre-eminence of indigenous lawyers in waging these jurisdictional and political battles rested on their social basis as they were drawn from the ranks of the Ashanti elites, who 'took good care to establish what almost amounted to legal dynasties'" per R. Luckham Imperialism, Law and Structural Dependence: The Ghana Legal Profession, Development and Change (1978) 9(2): 201–243.

These views appear to illustrate what has been referred to as 'therapeutic jurisprudence' in the literature, which transcends traditional pedagogical approaches from being primarily concerned with the transmission of knowledge to being concerned with the practices of a knowledge domain, i.e. learning to be."[609] Hence, alternative dispute resolution and clinical legal education have been identified as being effective methods of integrating valuable therapeutic jurisprudence into the curriculum to enable students to engage critically with human values.[610] The findings similarly show that some students who participated in clinical programmes had acquired skills associated with therapeutic jurisprudence such as the ability to listen attentively to client's needs, show empathy, and learn how to communicate effectively and sensitively. In one interview, a law student who participated in an externship programme not only obtained police bail for an offender through mediation but was also able to help him get a job to fulfil the bail conditions.[611] Some deans therefore felt that the teaching of law should reflect African values embodied in the concept of *Ubuntu*. According to one former dean:

> Law involves conflicting values all the time. How do you deal with this? How do you deal with a serial wife-beater who beats his wife (and) she is dependent on him, if you stick him in jail who supports the family?[612]

As already noted in the literature review in Chapter 2, contemporary moral philosophy enjoins us to be more humane and communal in our dealings with each other, a valuable lesson especially in the light of the coronavirus pandemic afflicting our modern era. In this context, there is evidence which suggests interdisciplinary collaboration between law students and social work students can be used to develop interviewing skills. This is because in a typical clinical setting, questions such as, 'What do I do when my client cries?', 'How do I handle

609 See Fourie and Coetzee (n 290)

610 Elmarie Fourie, 'Constitutional Values, Therapeutic Jurisprudence and Legal Education in South Africa: Shaping our Legal Order' 2016 (19) PER / PELJ 1

611 Interview with S2, LLB student (16 June 2016)

612 Interview with David MacQuoid-Mason (n 576)

clients who tell me more than I want to know?' and 'Where do I send a client who needs psychiatric help?' are all common.[613] Such questions illustrate the need to use appropriate pedagogical methods, such as non-legal role plays in the teaching of law as argued by Avrom Sherr *et al.* in their article, 'Learning from Experience: Non-Legally-Specific Role Plays.'[614] Results from observations of teaching methods at some law schools show that such non-legal role plays are increasingly being used as a teaching strategy to make students more responsive to the needs of their clients during interviewing. This will be addressed in more detail in the sections that follow.

6.2.2.3 Conceptions of skills and pedagogy in the African context

Having discussed the findings pertaining to the perceptions of deans on customary law and culture in the LLB curriculum, it is also important to understand their conception of skills in the African context. The findings in Chapter 5, as well as evidence in the previous section, indicate that clinical approaches appear to be the best means of imparting skills to students. Although there is evidence of other means of incorporating skills in the curriculum, including skills-based courses such as Legal Drafting and Writing and other types of experiential learning like externships, the findings show that such skills often do not cohere with the rest of the curriculum. Also, it has been shown that in many cases students are only able to appreciate such skills when they carry out specific tasks associated with the performance of the skills. This section, therefore, presents the findings on what the deans thought about skills and pedagogical approaches, especially as they relate to customary law and culture.

613 Carrie A. Hagan and Stephanie K. Boys, 'Catching Fire: A Case Study Illustration of the Need for an Interdisciplinary Clinical Case Partnership and Resulting Student Successes' (2015) Vol. 2(1) Asian Journal of Legal Education, 46–56

614 Avrom Sherr, Paul Bergman and Roger Burridge, 'Learning from Experience: Nonlegally-Specific Role Plays' Journal of Legal Education, (1987) Vol. 37 (4) 535-553

The deans' views reflect their scepticism about the traditional approach to learning law. This was more revealing in interviews with some lecturers who expressed their frustrations about *"legal education which is very positivist…[and] very legalist. We think that all problems have to be solved by the law. But the law has only very specific problems it can solve. It can't solve everything. But because we think that all answers have to be provided by the law, we multiply laws.*[615] According to one ADR practitioner, it is this inclination that undermines confidence in cultural approaches in dispute resolution because *"sometimes disputants often come back to you and say, "what do you think is best?". …People… think that the law or litigation has a perfect solution to every situation and therefore when you say let's take it out of the law so that you can craft your own solution, they still want to know what the courts have said. Which sometimes may not be the best solution for them."*[616] This observation is consistent with Richard Cook's (2004) commissioned research about land disputes in Ghana in which he found that sometimes the reluctance to resort to out-of-court settlements is a result of the need for state-sanctioned remedies.[617] However, the role of the lawyer is to determine the effectiveness of remedies available in each legal situation, which is why knowledge of the underlying doctrine is important in the teaching of any skills, even those related to customary law. In any event, most legislation that recognises alternative dispute resolution approaches based on customary law, including customary arbitrations, have provisions for the registration and enforcement of any awards following the resolution of the matter.[618] However, mixing customary law with legal sanction can be construed as another way of formalising customary law that may lead to litigation in the event of non-compliance, which is inconsistent with its non-adversarial characteristics. In the case of Ghana, it is interesting to know whether the enactment of

615 Interview with L6, LLB Lecturer (22 March 2018)

616 Interview with L2, LLB Lecturer (13 June 2016). Interestingly, this has colonial connotations because the nature of legal training was designed to elevate state law with the effect that the indigenous elite would be trained to be subservient to 'authority'. See Freund (n 36) 123-124

617 See Richard C. Crook, 'Access to Justice and Land Disputes in Ghana's State Courts: The Litigants' Perspective' (2004) Journal of Legal Pluralism 1, 23

618 See for instance, Alternative Dispute Resolution Act 2010 (Ghana) ss57, 110 and 111

legislation providing for the registration and enforcement of awards in customary arbitrations has encouraged the use of African ADR approaches. Further, one may want to know the extent to which lawyers get involved in such processes. Unfortunately, there was neither time nor resources to collect data on these issues.

It is important to reiterate the fact that the undergraduate curriculum focuses on the teaching of common law and formal customary law. Perhaps it is for this reason that some deans thought that context is important in the teaching of law, as suggested by one former dean:

> "…you can't teach law in a vacuum. It's pointless teaching it in a vacuum. You may teach problem-solving skills but the way you're teaching it, you're allowing rote learning…not the way to do it... what's the point if we learn everything and you go out of here with an LLB - and with an LLB in South Africa you can still be admitted as an advocate without attending any practical training school - and you walk into court, you've never been to a court before, you don't know what a court looks like, you maybe don't even know where the hell the courts are sometimes. What is the point of that? So, you can't just teach law in a vacuum and there's lots of empirical evidence about that. [619]

The former dean then proceeded to illustrate how the teaching of law may be approached:

> …the first vacation we sent LLB students to go and observe in the Magistrate courts what is happening. "Your constitution says you've got a right of access to justice, and you can have a lawyer, go there and see what is happening." Three of them reported back that the village they went to the Magistrate was drunk and he was late! So, we sent a report to the Minister of Justice then and he flew these kids up to his office and they presented their papers to him. So, what you're doing is you're making it relevant. So, not only teach the substance but also get people to question why do we have this law? What are powers of arrest? Why do we have the right to get a lawyer? Those sort of things…. [620]

619 Interview with David McQuoid-Mason (n 576)

620 ibid

A further illustration in the teaching of law using Criminal Law as an example is necessary to underscore why a different approach is necessary especially in an environment as diverse as South Africa.

> ...in South Africa the kids obviously were getting harassed by the cops…, so I said let's do something on rights of the police to arrest… So, the way we started this I said, 'how many of you guys have been arrested here by the cops?' Every single black kid's hand went up. Not a single white kid. So, I gave them a scenario of a guy walking down the street with a box of second-hand clothes being stopped by a cop. So, I said to one of the white kids, come out here and come show us how you think the cops will arrest him. So, the white kid goes - he's watched LA Law or something - 'excuse me Sir, I'm arresting you and these are your rights.' So, the black kids just laughed, and I said, ok why don't you guys come out here and (show us). And the guy goes, *mimics aggressive sounds of arrest*; swears at the (black) guy…. That's what was really happening you see. So, I said…, 'Ok, now this is what the cops are supposed to do; this is what the law says, and this is what your rights as citizens are.'[621]

Inevitably, such data suggests that the teaching of skills provides a more effective way of addressing some of the concerns that deans noted, and that it provides an opportunity to integrate the elements associated with customary law and culture. One Deputy Dean pointed out that teaching must be "more hands on" because there is no point in teaching courses such as Contract Law if a student cannot interpret a simple rental agreement, let alone draft one. One of the deans rhetorically asked: *"Can a law student graduate with a law degree without having understood the basics of drafting and interpreting policy that is the foundation of laws?"*[622] In South Africa therefore, some institutions offer Street Law as one way of ensuring that there is some context in the teaching of law. According to another dean, the law school had *"succeeded to convince the regulator that law cannot effectively be taught in ways that produce graduates that address the problems that society is facing unless you have some clinical activities…It is*

621 ibid

622 Interview with D5 (n 606)

a method of teaching which is very effective in terms of skilling students and then enabling students to understand things in a contextual manner."[623]

Most deans who were interviewed emphasised skills such as arbitration and mediation which are currently integrated in most clinical programmes. As already mentioned, one law school has gone a step further by establishing a Dispute Resolution Centre that teaches and offers mediation services. One former dean was of the view that such specialist centres that are affiliated to university law schools can be a useful means of teaching other ADR skills such as negotiation.[624] One of the challenges for most African governments, however, is the lack of expertise by government lawyers who do not have the capacity to negotiate complex international agreements that often have an impact on local communities.[625] In many cases, they neither have expertise in negotiation nor sufficient knowledge of the cultural values and norms of local communities.[626] One lecturer noted:

> In Uganda the government displaced people from this indigenous forested area to mow down all the trees so they could use the trees for the telegraph poles for the road. And they brought in a whole lot of external contractors to do the work on the road and suddenly there's a spike in gender-based violence and rapes are spiking and sex workers are moving in. So, there was a whole mess of stuff. And you could go the route of demanding return of people to land or compensation for violation of rights but what the community wanted was something completely different. They wanted to have training and economic empowerment opportunities and ways to develop their livelihood. So, they wanted a completely different negotiated settlement. Something different from what the pure legal remedy would've sought…. [L8]

Based on these findings, it may be argued that without relevant negotiation skills, it is impossible for lawyers to protect the economic, social and cultural rights during the

623 Interview with D4 (n 554)

624 Interview with SKB Asante, Paramount Chief & Former Acting Dean (18 August 2015)

625 S.K.B. Asante, 'Negotiating with Transnationals: The Technical Assistance Programme of United Nations Centre on Transnational Corporations (UNCTC)' (1988) 16 Int'l Bus. Law. 425

626 S.K.B. Asante (ibid). See also Kwabena Mate, 'Communities, Civil Society Organisations and the Management of Mineral Wealth', Mining, Minerals and Sustainable Development Report (April 2002) No. 16

negotiations of international agreements, such as complex community share ownership trusts.[627] Also, the reviewed literature shows that courses in negotiation are critical to *"challenge students to reorganise the cognitive map of the legal world implanted by an education centred on the reading of appellate cases."*[628] It has been observed for instance, that the Zulu and Xhosa traditional negotiating practice of *Indaba* has been used successfully during major negotiations such as the Paris Climate Conference in Paris in 1995.[629] This is perhaps one of the strongest arguments for integrating and teaching customary law skills in the curriculum. One lecturer who teaches Street Law acknowledged that *"...it's more African to be sitting in a group and deliberating and hearing people's perspective and building a common understanding and a common picture."*[630]

To overcome the obstacles, some lecturers are using their experience from private and public practice to reorient legal education. For instance, in the South African context, academics from more privileged backgrounds talked about the need to *"turn off the freeway and drive into these rural communities"* using law clinics to address legal problems with elements of customary law *"where, for example, a husband is deceased and another wife turns up (and) all the benefits are paid to that wife."*[631] There is a recognition therefore, that certain legal situations may not be resolved by conventional approaches in legal education. Citing the benefits of Street Law, the same academic with a background in human rights activism noted:

627 Richard Saunders, 'Contestation and resource bargaining in Zimbabwe: The Minerals Sector', UNRISD Working Paper, No. 2017-13, p.48-50

628 Marc Galanter (n 191) 270

629 Akshati Rathi (n 197)

630 Interview with L8, LLB Lecturer (2 August 2018)

631 Interview with L8 (ibid)

> And instead of having for instance African Customary Law in the sense that we're teaching law and then there's this weird African Customary Law on the side; [students] recognise that as an equal source of law, how does that get integrated into our teaching of Family Law for instance and the Law of Persons? So, I think that is something that we're trying to get a handle on now and we're bringing that inquisitorial eye to content, method, source and process…And sometimes the court process might not generate the kind of response or result that the aggrieved person is seeking for. And I think lawyers sometimes get caught up in the cleverness of their legal argument and they want to win that case, but it may not produce the solution that the community is looking for…(L8)

As a result, there is the feeling that skills rooted in customary law, such as mediation, deserve to be explored as an integral part of the curriculum.

> …one thing that we've…been thinking and talking about: the issue of mediation - those skills are not learnt and taught and that I would say is an African Customary Law skill and process of mediation of disputes. Mediation doesn't create work for lawyers, right? Because if people resolve their problems themselves, then you don't need to hire a lawyer and go to court if you've mediated a dispute, and I think that's a whole space that needs to be interrogated. How can lawyers, again be useful to communities and societies that may not want to bloody go to court? And it may not be in a child's interest in a divorce matter for a court process that's prolonged and the lawyers are making lots of money and the families are falling apart, but instead apply a mediated process to protect rights and work out solutions that work for everyone. So that's a skill that's lacking from our teaching that I would say is a significant African Customary Law approach.

> I think we need to expose students to more so that we generate that sense that there's a whole broad world apart from just this very narrow niche of lawyers where you can be useful and dynamic and engaged in issues that impact on a whole broader range of people. Because what percentage of people can afford to come and see a lawyer and what percentage of those cases actually come through to court? It's tiny, tiny, tiny percentages. So where else can you be useful and engaged? And just that question that I faced as a 20-year-old: how can I use these skills and this body of knowledge to leverage something else? I think the more students we catch at a younger age and expose them to that I think the more passionate and inspired and useful they'll be. (L8)

The question here is whether lawyers should be exposed to skills associated with customary law even though they do not practice it *per se*? Based on the data in this study, lawyers routinely encounter conflict of law situations in practice (see paragraph 5.4.1). There is no doubt therefore that customary law and its practices should complement the doctrinal knowledge that lawyers generally learn as part of the law degree. In some cases, it may be necessary to be

knowledgeable about customary law in order to give practical advice. Most importantly, formal courts may require lawyers who are familiar with customary law to assist the courts to resolve disputes involving customary law.

6.3 [Data Sets 5 & 6] Findings from interviews with lecturers and class observations

6.3.1 Data analysis

Twenty-five law lecturers and others were interviewed to obtain the data that could answer the second research question: What teaching methods are used to teach skills in undergraduate legal education and to what extent do they reflect customary law and cultural approaches? Findings from face-to-face interviews and observations of classroom teaching at 7 of the 15 law schools corroborate much of what the deans and students said.

However, there are remarkable differences worth noting concerning the range of teaching methods and efforts to integrate some aspects of customary law and culture. Such differences are understandable given the gender, academic background, professional qualifications and age of the lecturers who were surveyed. One important point is that most of the lecturers were early career scholars who were flexible in their approaches. The data from interview transcripts and observation guides is presented in **Figure 6** and **Table 4**.

Figure 6 shows the data from interviews with 25 lecturers, including one professor with experience in teaching Tribal Law Practice in the US, and one US professor with teaching experience in African universities. It has already been stated in paragraph 4.3 that the sample of respondents is not statistically representative of the subject area as a whole. Cownie (2004) argues that such 'theoretical sampling' enables a researcher to draw some general conclusions

without overstating the case.[632] The interviews sought to determine whether lecturers (1) referred to African law or culture or both while teaching, (2) taught aspects of customary law or culture in their courses, (3) taught customary law or culture as part of another substantive course such as Family Law, Succession Law or Property/Land Law, and (4) taught customary law as an independent course.

Fig. 6 Findings showing integration of customary law and culture in the teaching of law

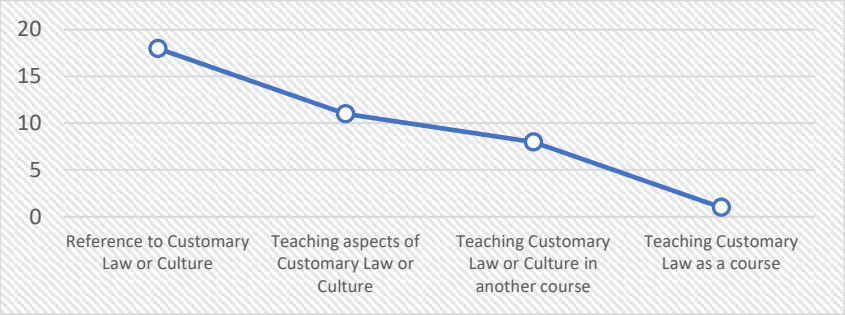


Table 4 Teaching methods based on data from observations

Institution	Group presentations	Debate	Clinical Legal Education	Lecture	Research Based Learning	Data Source
1	Yes	Yes	Yes (but no live-client clinical work)	Yes	Yes	Insider observations (during pilot study)
5	Yes (Family Law)	Yes (CLE)	Yes (with live-client work as an elective)	Yes	Yes	In-class observation + course outline
6	Yes	---	Yes (but no evidence of live-client clinical work)	Yes	Yes	In-class observation + course outline
8	---	Yes (Extracurricular/ club)	Yes (including student-led legal aid work)	Yes	Yes	In-class observation + course outlines
9	---	---	Yes (with live-client clinical work as an elective)	Yes	Yes	In-class observation + lecture notes
10	---	Yes	Yes (with both live-client clinical work & street law)	Yes	Yes	In-class observation + course outline

Key:

--- -: Not apparent

CLE: Clinical Legal Education. CLE includes mooting, problem-based learning, and live-client clinical work. Although almost all the universities used elements of CLE, not all of them had a live-client clinic on site.

632 See Cownie (n 4) 17

6.3.2 Findings

Interviews with lecturers revealed that many of them were inclined to teaching aspects of African customs and culture that are relevant to the LLB degree. The justification for this is that some areas of law such as Intellectual Property involve elements of culture and traditional knowledge. During the researcher's interaction with diverse legal professionals, it became clear that the conventional LLB degree does not include content on cultural mores and customs, and that there was a move towards the Africanisation of some aspects of the law.

6.3.2.1 Integrating cultural content

Many of the lecturers who were interviewed indicated that they referred to specific cultural customs to expose students to those skills associated with customary law. For instance, one lecturer mentioned that the Traditional Knowledge Act in Kenya (Botswana also has similar legislation) has made it possible for law students to learn about African culture and cultural expressions. The lecturer stated that it was important to stress 'cultural expression' as part of Intellectual Property Law because:

> …there's the (Maasai) community, which is now heavily, involved in IP issues around their culture. They're one of the most active around the world, maybe second only to the Maori in New Zealand in actively trying to protect or at least control the way that their images and their traditional culture and expressions and knowledge and all that is used by others.[633]

The lecturer justified the teaching of traditional knowledge because it is ground-breaking and is incredibly interesting from an academic point of view because the World Intellectual Property Organisation (WIPO), the biggest international body that deals with Intellectual

633 Interview with L11, LLB Lecturer (22 March 2018)

Property, is in the process of trying to get a model framework for traditional knowledge protection. The lecturer further remarked:

> Students get to something like IP law where you can talk about who's a Kikuyu and who is going to benefit from this new Act, Traditional Knowledge Act. They love it, and they think it's incredibly interesting, so we talk about these in the contexts of 'this is evolving law.' It's truly, truly evolving, and it's never been really tried in this way anywhere in the world. And we're actually being watched by other people to see how it works. So, it's important; it matters, and you the student actually have an opportunity to sort of shape some of this stuff because you're coming into law in that time of the evolution of this area.[634]

Some lecturers felt that there is need to reorient some areas of the law such as Intellectual Property whose teaching is still modelled on western approaches. As observed by one lecturer, the history of Intellectual Property in Africa is quite distinct:

> So, if traditional knowledge is taught by a lawyer trained in traditional IP, there will be a problem unless that lawyer also understands the culture and the social context. To sufficiently protect it, you must appreciate the cultural integrity of the community, the ecological integrity of the community and self-determination rights of these communities. Some of these aspects are not actually talked about within IP because IP looks at the economic gains of one and all. But within traditional or within communal notions of holding you don't talk of ownership because it's only an individual who can own. A community can hold, it can't own. (L14)

Some lecturers were therefore favourably disposed to integrating some aspects of African culture in the courses that they taught despite the existing rigidity of the LLB degree. According to one lecturer in International Law:

> In my International Law class, I'm now looking at the earliest trade agreements that existed before colonisation and sort of looking at the sources of that. And it's only recently that I've started, so it's very hard to do for someone to make the mind shift and to actually do the research and to do the extra work. (L18)

634 Interview with L11 (ibid)

In relation to trade agreements, ancient manuscripts are replete with information that suggest many pre-colonial communities, including Arab and Islamic traders, embraced arbitration for the settlement of commercial and investment disputes.[635] Such disputes were often settled by recourse to respected community elders or city merchants.[636] The findings from this study suggest that some lecturers identified gaps in traditional law courses that should be filled with appropriate elements of culture and customary law. This means that African lecturers are prepared to reconceptualise aspects of the courses they teach to include African culture. At the recent Southern African Law Teachers' Conference (2018) in Cape Town, several presenters spoke about their initiatives to infuse African cultural concepts in a range of courses. For instance, in company law, there was a presentation suggesting that shareholder relationships should be interpreted through the lens of *Ubuntu* especially in resolving disputes concerning shareholder oppression so that instead of shareholder interest, they should focus on stakeholder interest which mirrors the communal nature of the African society.[637] In the teaching of corporate social responsibility in particular, we should reflect the reality of doing business in African communities given that many global companies are entering into commercial agreements that often threaten customary land tenure and other cultural rights. Even in contract law, some academics argue that contractual justice can only be achieved if *Ubuntu* is invoked to validate those contracts that are currently in the realm of social etiquette such as the agreements between "the car-guard and the shopper at parking lots in African malls."[638]

635 Andrew Chukwuemerie (n 186)

636 Bernado M. Cremades, 'Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration' (1998) 14 Arbitration International 157, 159

637 Aubrey Sibanda, 'Shareholder Oppression as Conduct Repugnant to Public Policy: Infusing the Concept of Ubuntu in the Interpretation of s163 of the Companies Act 71 of 2008', paper presented at the Southern African Law Teachers' Conference (University of Cape Town (11-13 July 2018)

638 Sipho Nkosi, 'The Car-Guard, The Shopper, Ubuntu and the Law of Contract: An intriguing But Fascinating Relationship', paper presented at the Southern African Law Teachers' Conference (University of Cape Town (11-13 July 2018)

Even though these views about *Ubuntu* sound as if they are clichés, the decision in *State v Makwanyane*[639] confirms that practising lawyers may be able to resolve a range of legal problems by adopting skills rooted in *Ubuntu*: communality, humaneness, social justice, fairness, group solidarity, compassion and conciliation. While some African scholars have questioned the efficacy of *Ubuntu* as a legal notion, they acknowledge however the need for further discourse "to gain insight into its multifaceted character and the polycentric effect it has on implementation."[640] As a result, some of those who were interviewed felt that researching such issues is warranted. As the literature has confirmed, *Ubuntu* is not only confined to law but also other aspects of life such as mining, land tenure, commerce, trade, politics, marriage, fishing rights, hunting and a host of other practices that affect humanity. The following tale is instructive:

> I looked at the research and I looked at myself and I said, I studied agriculture for twelve years…No one ever taught me of any form of traditional, African knowledge of cultivation, of harvesting, of anything that will work in modern times and actually succeed where something imported from the West would struggle to succeed. That was when I knew the challenge of Africa's curricula and I first began my work to dedicate my life's work to studying and conducting research on Africa's own knowledge system and being able to advocate for its mainstreaming in education, in research, policy and across sectors and industries.[641]

The above quote suggests that law teachers are becoming more open-minded and prepared to experiment with new and creative approaches to teaching that emphasise African conceptions of law. To avoid the political connotations associated with "decolonisation", one lecturer

639 supra (n 588)

640 Chuma Himonga et al, 'Reflections on Judicial Views of Ubuntu', PELJ 2013(16) 5

641 Chika Ezeanya-Esiobu (n 252)

referred to this as "recalculation" which essentially involves revising the content in textbooks as part of curriculum and pedagogical reform in order to reflect African perspectives:[642]

> I think it's going to be progressive in terms of the way it's going to be done but remember, let me make (sic) an example. You'd remember when the Constitutional Court declared the death penalty unconstitutional in South Africa? They didn't do that on the basis of what other people thought; they just said it's against our traditional values and those values of 'Ubuntu' do not permit us to do this. They could've as well said that 'Well, we will follow whatever jurisdiction, and this is what judge so and so said and we think we agree with them.' But that's what we want to see. We want to see judgments reflecting us (and) we want to see education reflecting us and everything. It's not like we want to change the legal system as such but let the principles that we have agreed upon be interpreted in our own way - the way we see them, through our lens. Not somebody else's. (L9)

Some lecturers therefore bemoaned the lack of adequate material on local law which impacts the teaching of law in universities. According to one dean:

> Part of what we are doing is actually getting standard textbooks produced in a couple of years because we don't have. Well, we have one textbook on Contract. But I find that I don't know of any other decent textbook on any aspect of local law to be honest with you. There is (sic) a lot of things written but they are not comprehensive enough. The one on Contract, very comprehensive. But for all the other areas, forget it. Nothing on Constitutional Law. Nothing on Land Law. Nothing on Equity & Succession. There is something available on this, but it's so outdated from the1970s." (D7)

The findings show that at some law schools, the "decolonisation" debate was responsible for transforming the content of the law degree and teaching approaches resulting in the integration of methods that transcend western approaches. In this respect, skills related to African customary law have become even more important as part of the curriculum. As noted by one South African lecturer:

642 Interview with L9, LLB Lecturer (4 August 2018).

> For South Africans at least, it's very important because like I said to the extent that a person would be regarded as sort of "westernised" they're really not. You have to understand how people work here. But other than that, if you can go to the records and just check or even ask people, you'll see that even if…let's take the question of marriage for instance, South Africans will marry under the civil law style and then the next day they do a customary marriage. Now for a law student that is absolutely critical…I can give you a list of cases where that was discussed, and it became a huge problem. If there's a dispute at a later stage on what kind of marriage they've concluded, students should understand how to deal with that. If a student lacks skills or knowledge or education of one system, they're not going to be able to resolve that case. (L9)

Such views are in line with the literature which shows that even though many Africans are westernised, they remain largely "tribalised."[643]

The findings show that in South Africa, cultural diversity and pressure from students who are getting more conscious about their African identity is responsible for the "transformation" of the curriculum. In the words of an educational consultant interviewed during this study:

> …students are now saying, there has to be transformation taking place. And transformation, not only about the staff that stands in front of them, that would either be predominantly white, not only about practice within the institution, but as well as what they're supposed to be taught, what they are learning. Why is it that the content is only European based? When we talk of the history, e.g., Roman Law and so on, especially then I'm referring to law specifically, what about our own history? Why is it not informing our practices? (L22)

As mentioned in Chapter 5 (paragraph 5.2.3.2), some law schools have internal policies to address issues concerning the decolonisation of pedagogy, including the curriculum. In an interview, the same educational consultant hits the nail on the head when she says:

643 See Gower (n 57) 3

> You have to look at your—in educational terms—epistemological direction, in terms of changing your curriculum. Besides changing your ways of facilitating, it's also about the books that you use, the references that you refer students to. We have to meet our students where they're at in terms of the history, the knowledge that we give to them, it cannot just be something that is foreign. (L22)

Some lecturers conceded that integrating cultural values in the curriculum meant that they had to reconsider their teaching approach, especially because the methods used to teach doctrinal courses are not appropriate. The findings show that undergraduate courses as they are currently taught in Anglophone African law schools are predominantly premised on a rule-based paradigm which is characteristic of Western legal systems. As argued by Twining, *"Our discipline has not been very good at penetrating behind the official texts and doctrine to find out how they operate in practice in given contexts."*[644] Thus, *"we cannot but work largely within our received tradition and law is a practical subject that on the whole require particularistic detailed local knowledge."*[645] That local knowledge must be rooted in skills that are based on a processual paradigm which views dispute settlement processes as *"a conceptual and organisational framework for competitive bargaining, transaction, and compromise"*[646] is irrefutable. This view is consistent with Lord Dennings' 1961 'Report of the Committee on Legal Education for Students from Africa' which recommended that African countries should not admit lawyers to local practice merely on the basis of British qualifications but should require additional practical training in the local law and procedure.

The findings from the interviews with lecturers, professors and deans confirm that the current LLB degree does not satisfy Lord Denning's recommendation because it is still based on the British model that has traditionally maintained the dichotomy between theory and practice,

644 William Twining 'Implications of "Globalisation" for Law as a Discipline', in A. Halpin and V. Roeben (eds), Theorising the Global Legal Order, (Oxford: Hart, 2009), 39-60

645 William Twining (ibid)

646 Comaroff and Roberts (n 14) 15

with very little consideration for skills associated with African customary law and culture. Interestingly, data from an interview with William Twining suggests that there were disagreements between Ugandans and Kenyans about the place of customary law in the plans for the establishment of the East African Law School.[647]

As noted by many lecturers, because students encounter cases involving customary law and culture[648], there is justification for teaching the skills associated with the norms and values which are not presently taught in the traditional curriculum. Even traditional core courses such as contract law need to be reviewed. According to one Assistant Professor:

> Some academics are starting to look at Contract Law in the townships and business relationships in the townships - how that's being done and what's the concept of Contract in those townships and the idea of 'my word is my bond'; you know, 'if I've given you my word that there's a contract.' How does that operate in that context? How is it enforced? Because often these things don't end up in court. How are those business deals taken care of in a township sense? You know, opening it up…. And again, that's not the Contract I was taught. (L15)

The oral nature of customary law also goes beyond contracts. For instance, there is the problematic issue of oral wills such as *"Samansiw"* in Ghana, which is made orally as a death bed ritual in which a person facing imminent death gives directions for the disposition of his or her estate.[649] According to case law, such oral dispositions must have been made in the presence of witnesses, who must include family members of the deceased, followed by acceptance in the giving of drinks.[650] The issue that needs to be addressed are the skills required to prove such evidence and how those elements can be taught. Perhaps this is where storytelling

647 Interview with William Twining, Emeritus Professor at UCL (London 13 October 2015)

648 For instance, L17 noted as follows: "You have someone calling you from practice, maybe a former colleague or a former classmate asking you to do research for them. Someone who's been practising (says), 'You know I need this and this for Customary Law. Do you know where I can find it?'"

649 Martha Arde-Acquah et al., 'A Critical Examination and Comparison of the Legal Regimes Governing Testamentary Dispositions and Customary Law Wills in Ghana.' (LLB research paper, Wisconsin International University College, Ghana 2019)

650 Summey v Yohuno [1960] GLR 68 (Ghana) and Akele v Cofie [1961] GLR 334 (Ghana)

and fieldwork may be useful, as well as simulations and role-plays as discussed in section 6.3.2.2 below. As already noted, such issues are currently being discussed at conferences by some academics.[651] Some scholars have even drawn parallels between principles of Roman law and African customary law in the law of contract especially the general emphasis on orality.[652] While such debates are very intense in the South African context because of the fixation on 'decolonisation', the findings show that lecturers at other African law schools feel equally concerned about the need to develop African law as an academic discipline, and the skills that are inherent in it.

In this study, the findings show that many lecturers are concerned that teaching law doctrinally inhibits them from effectively teaching skills that are necessary for applying customary law in practice. The problem is that African customary law evolves as opposed to the rigidity of English common law as one lecturer observed:

> …if we're in the system of only applying the law doctrinally, without thinking of a human face, then that could be the ultimate result where we make judgements and then they have this very undesirable effect on someone. There has to be some form of field study that's also involved. I think maybe that could be an approach, but obviously to emphasise that unlike with your other previous modules, your primary legal sources will not always get you or will not always give you the right answers.
>
> Because students see customary law as an isolated aspect or area of the law which you can only consult if you want to. So, they don't really see it as a law which has strong legal force like your other case law and so forth. (L17)

651 See Sibanda (n 637) and Nkosi (n 638)

652 Gardiol Nierkerk 'Orality in African Customary and Roman Law of Contract: A comparative Perspective (2011) 44 De Jure 364

This suggests that the teaching of customary law is problematic because the data showed that lecturers felt that it could not be taught as any conventional doctrinal course. Describing her experience of studying African customary law at university, one professor stated:

> …The basic rules were a problem because customary law was divorced from the culture and that you can't do. The moment you have customary law it has to be integrated in the culture. So, I found it hard to study because it wasn't. Then one of my friends said to me later when I said that I found it so difficult to do this, my friend who is African said to me - because he had the same course with me: 'It was because they didn't give us a cultural context. You would've understood much more closely if there was this broad societal context.' (L18)

Some law schools have attempted to address some of these concerns by focusing on pedagogy. One law school in particular offers a course whose content is described as "Theory and practice on teaching in a multi-cultural class, teaching methodology and small group facilitation…" [653] Scholars such as Professor McQuoid-Mason appear to be motivating such initiatives based on his work in clinical legal education, especially Street Law.[654] The data showed that such an exposure to clinical legal education appeared to have influenced teaching approaches at other university law schools. One lecturer who was studying for a PhD said:

653 College Handbook (2018) 200

654 Interview with David McQuoid-Mason (n 576)

> I stumbled upon this PhD in higher education. So, a different discipline but luckily, we ran the programme as a co-opt so we met every…well six times a year…And you were required then to do presentations and bring your concept to the table and actually present it to others and they must then critique it, So I initially had an idea in mind of how to couple legal education and with a specific focus on teaching legal skills because I would have coupled that with the practical legal training schools that we have around the country and that is a 5 and a half month programme that you do after your primary degree. And they call it practical legal training, however I've been teaching there since 1997- the unfortunate thing is there's still too much reliance on theory, but the original idea was to add a component and that would focus specifically on practical legal skills. That would, for example (involve) taking a student to court (where) they must observe court proceedings, they must then critically reflect, and they must then give a reflection of what they not only observe but what they learnt through that particular experience.[655]

In this context, some academics raised issues concerning the limitations of analytical positivism, a methodological approach they singled out as responsible for failing to portray customary law in its right perspective.[656] They also mentioned pressures of globalisation in their research agendas, especially the role of NGOs and global financial institutions that require approaches inconsistent with the essence of African culture.[657] For instance, in an interview with William Twining[658], he remarked that during his work in Uganda, the World Bank at one point wanted the solicitors to be business oriented, an unfortunate misconception based on the assumption that the practice of law is predominantly transactional. In the words of Thomas and Mungham (1972), *"Much of legal education theory and practice proceeds on the basis of certain dominant assumptions, hidden or only half-articulated, concerning the nature of law and the role of the lawyer in society."*[659]

The point is that the politics of legal education, which is still influenced by Western approaches and ideals, is responsible for relegating African customary law and culture to the fringes of the

655 Interview with L10, LLB Lecturer and Principal Attorney, Law Clinic (3 August 2018)

656 Interview with L6, LLB Senior Lecturer (22 March 2018)

657 Interview with L6 (ibid)

658 Interview with William Twining (n 647)

659 Philip A. Thomas and Geoff M. Mungham, 'English Legal Education: A Commentary on the Ormrod Report' (1972) 7 Val. U. L. Rev. 87, 94

LLB curriculum. As a result, some lecturers were concerned that research and teaching that focused on approaches other than those aligned with mainstream legal studies may be viewed as being inconsistent with the fabric of legal education and practice.[660] One lecturer noted:

> But also (there's) the question that how is the industry modelled? Will it be receptive to the African content? Because if I'm teaching African content and the industry is not receptive to the African content, how will that be received? (L16)

Yet evidence exists at some institutions that suggests efforts are being made to modify the British model of training lawyers. At one law school for instance, legal skills which used to be an independent module, are now being taught as part of Jurisprudence.[661] Could this help change the philosophical orientation of training students to "think like a lawyer" and expose them to cultural realities in the context of African Jurisprudence as discussed in the literature review in Chapter 2 (paragraph 2.4.2)? This is because the module has both a theoretical and skills component to show the relationships between law and society, law and history, law and politics, law and language. According to the educational consultant at that university, local cases such as *Mazibuko v City of Johannesburg*[662] in some courses including Jurisprudence, have been used to expose students to legal issues arising from the cultural practice of non-payment of water bills as part of the resistance to apartheid. In that case, the court started by acknowledging that *"Cultures in all parts of the world acknowledge the importance of water."* As we have already seen, some lecturers who were interviewed were nostalgic about the natural human community wisdom that characterises traditional Africa which can be harnessed to resolve some legal disputes.[663] Based on this evidence, it can be argued that such nostalgia for traditional dispute resolution approaches is an indication of the epistemological crisis that has

660 Interview with L16, LLB Lecturer (28 March 2018), D5 (20 March 2018) and L8, LLB Lecturer (2 August 2018)

661 2017/2018 Faculty of Law Brochure 4

662 Mazibuko v City of Johannesburg [2009] ZACC 28 (South Africa)

663 Interview with L6 (n 656)

been caused by the conflict between Western approaches in African legal education and the realities of African culture.

The findings further show that some lecturers think that the LLB programme has too many modules which prevent the effective teaching of those skills that students need in the practice of customary law and other areas of legal practice. As noted by one lecturer:

> So, you find that the student has a lot of workload and they study to pass the exam but not study to actually get the skills that they need. So, I think emphasis should be on the skills which we want our law graduates to have as attorneys."[664]

If more lawyering skills were to be taught, then it is not unreasonable to argue that skills should reflect what lawyers encounter in real practice, which is mostly customary law related cases. Most of the lecturers interviewed admitted that there is now an "influx of customary law cases" in the courts.[665] As already shown, most of the cases involve the status of customary marriage[666], intestate succession[667], interests in land and chieftainship disputes[668] that cannot be determined by analytical positivism.[669] For instance, one lecturer referred to the decision in *Mavimbela v Minister of Home Affairs*[670] to argue that the effect of the doctrinal approach of interpretation of the relevant legislation resulted in an injustice because the court relied on a precedent and declared that even though the couple had been married for ten years under customary law, such a relationship was invalid.[671] Such scenarios raise the following questions: Can African law be

664 Interview with L17 (n 501)

665 Interview with L17 (ibid) and L9 (n 642)

666 Yaotey v. Quaye 76 G.L.R. 573 (Ghana), 578-579 and South African cases of Robert Tsambo vs. Lerato Rubeta Sengadi SCA (Bloemfontein) SCA Case No. 244/2019 (South Africa); Mavimbela v Minister of Home Affairs (49613/14) [2016] ZAGPPHC 889 (30 May 2016) (South Africa); Mabuza v Mbatha (1939/01) [2002] ZAWCHC 11 (South Africa); and Essilfie and Another v Quarcoo (1992) 80 2 GLR 180 (Ghana)

667 Mthembu v Letsela and Another (71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000) (South Africa)

668 Shibulana and Others v Nwamitwa]2007] (2) SA 432 (SCA), [2009] (2) SA 66 (South Africa), Mphephu and Another v Mphephu, Ramabulana & Others (773/2012) [2017] ZALMPTHC 1 (30 January 2017) (South Africa)

669 Interview with L9 (n 642)

670 [2016] ZAGPPHC 889 (30 May 2016)

671 Interview with L9 (n 642)

described as comprising an interpretation of social contexts as opposed to legal texts? Is the traditional doctrinal methodology suitable for ascertaining the applicability of customary law? How can evidential challenges be addressed since Africa is arguably described as a system hugely characterised by orality?

Interviews with some lecturers revealed a deep resentment of misconceptions about the nature and practice of customary law. Justifying the importance of customary law and culture in the curriculum, one female senior lecturer made the following claim:

> …the reason why I like classical philosophy is that it's very close to that kind of natural human community wisdom that characterised traditional Africa. When I read Plato, I hear the old men of my village. When I read Aristotle, it's almost as if I'm reading St. Paul in the New Testament but those are people...the level of rationality… the dialogues of Plato...well, I make my students read The Republic...some sections of The Republic, this discussion between Socrates and Glaucon…these guys speak like the old men in my village. So, I think that the sense of community, the sense of being a team, honour, the sense of solidarity, that's at the core of the concept of common good in moral philosophy is very close to the African society…because the African society is not individualistic, urban Africa is individualistic today, but Africa is not individualistic. (L6)

As discussed in the literature review in Chapter 2, the wisdom of the elders is central to gerontocracy associated with most indigenous societies.[672] Hence, legal decisions made by elders are respected because they are based on reason and for the greater good of the community. In relation to the Lozi kings, for instance, Max Gluckman found them to *"have a true genius in law…and the elaboration of their political constitution would have gratified Dicey."*[673] In the application of customary law, however, the distinction between Western and African approaches is the formalism of recording judgements and justice. Once recorded, it

672 Peter O. Onyoyo (n 164)

673 Max Gluckman (n 19) 6

creates a rigid system of law so that it becomes more difficult to adapt to context and particular communities.

This may explain why some of the lecturers considered it their responsibility to avoid the mischaracterisation of customary law, including traditional dispute resolution mechanisms, which have become too formalised. One lecturer (L14) spoke about using his experience from conducting mediations, negotiations and arbitrations. His expertise is useful in this context because he suggested that teaching African Dispute Resolution Mechanisms does not work because ADR is a western concept which is too formal and inconsistent with customary law.[674] He noted:

> …that concept of "alternative" is a Western concept, because we have made arguments even from a scholarly perspective (as to) why are (sic) you calling it "alternative"? Alternative to what? It should be the first point of call whenever a dispute arises. But you see, because of these Western imported or exported ways of looking at justice - you look at justice from a very formalistic perspective, but justice cannot be obtained in formal courts, (that is) the courts we imported, or we got from Britain in our context. But the main way in which disputes were resolved in Africa, even today in the rural areas, is using these informal customary or traditional ways of resolving disputes, and that's why for me, I find it hard to categorise those customary (and) those traditional mechanisms within the alternative dispute resolution spectrum. Even though our Constitution actually tries to lump them up together in one provision, my view is that the operation of the customary systems is actually outside the operation of the alternative dispute (resolution). And there is a reason - ADR has been popularised for the sole reason of expediting justice within the commercial world but in the African context, amongst the people in the rural areas, customary justice systems can be used in a variety of contexts. Actually, our courts recently have used customary justice systems even in resolving murder cases, in resolving employment disputes, (and) in resolving land disputes.[675]

He then explained that because the Kenyan constitution enjoins judges to use traditional dispute resolution mechanisms, it was inevitable for lecturers to teach skills of negotiation, mediation, reconciliation, and arbitration. As noted by the lecturer, courts have implemented this in a range

674 See in this context, Chukwuemerie (n 186)

675 Interview with L14, LLB Lecturer (28 March 2018)

of scenarios, including criminal cases involving murder such as the case of *Republic v Mohamed*[676] where the court accepted the Somali custom of blood-money settlement to resolve the case. He also referred to the fact that the Kenyan government had used similar traditional mechanisms to resolve boundary disputes between counties by involving elders.

6.3.2.2 Teaching methods and skills in African customary law and culture

Many lecturers were able to describe specific teaching methods supported by learning theories and pedagogy, including clinical approaches. One lecturer referred to Bloom's Taxonomy which states that there is a hierarchy of knowledge ranging from memory, comprehension, application, analysis, synthesis to creation.[677] At least five lecturers, including some deans, had some experience in pedagogy. One of them stated that his experience as a trained secondary school teacher enabled him to apply clinical methods in his teaching because pedagogy is inherent in education.[678] The findings also show that those law schools with structured clinical programmes also had qualified clinicians. The interview and observation data reveal that lecturers used a range of clinical methods including role plays[679], simulations[680], problem-based learning[681], street law[682],games such as amazing race[683] and crossword puzzles[684] as well as academic outreach/visits (**Table 3,** paragraph 6.2.1).

There was evidence that some of the clinical methods were helpful in teaching aspects of African culture such as *Ubuntu*, whose focus on communalism was demonstrated through

676 Supra (n 51)
677 Interview with L13, LLB Lecturer (20 March 2018)
678 Interview with L19, LLB Lecturer (26 February 2018
679 Lesson Plan dated 6 September 2013, Law Clinic & Mooting Programme (on file with researcher)
680 Interview with L20, Post Doc Fellow (24 July 2018) and L21, Visiting Lecturer & Clinician (24 July 2018)
681 Observation of Media Law class and Interview with L17 (n 501)
682 Observation of Street Law class and Interview with L8, Senior Lecturer (2 August 2018)
683 Interview with D5 (n 606)
684 Interview with L22, Educational Consultant (26 July 2018)

group work and assignments given to students during the learning process. Justifying such group work as a teaching method, one lecturer stated:

> …as groups they get to share what they found most interesting…And it is from those most interesting experiences that we get to delve into dealing with the law and the practise. In the African setting we are a community…there is the idea of first of all recognising that a person is a person and then respecting the abilities of the person. So, the use of these methods, first of all, are meant to grow the individual, but the individual cannot grow independent of other individuals and persons, and that is why a majority of these methods call for group work and teamwork. We are a community; you cannot act independent (sic). And even as we teach the content, interestingly we always try to go back to the community and relate it to a social justice need that may arise in the community such that the law does not remain abstract to the student.[685]

Such group work mirrors the traditional negotiating strategy, *Indaba*, used by the Zulu and Xhosa tribes of Southern Africa which is used to resolve disputes involving many parties in a community and international negotiation.[686] Whether students appreciate it as a legal skill in negotiation is still debatable because there was no evidence that it was directly taught as a skill in any of the law courses analysed in this study. Interestingly, some lecturers who also practiced law in Kenya acknowledged that the knowledge of *Indaba* as a skill is useful in intestate succession because courts generally encourage settlement negotiations among beneficiaries to avoid protracted litigation that characterises most disputes in such cases. In relation to this, one practising lawyer in Nairobi spoke about the need for "consensus building" in such cases. As a negotiating strategy, the practitioner stated that he often used traditional chiefs who acted as mediators in such matters to assist parties to reach consensus in inheritance and family law cases. Such "collaborative negotiation" is the theme of the acclaimed work by Roger Fisher and William Ury titled *Getting to Yes–Negotiating Agreement Without Giving In* published by

685 Interview with L9 (n 642)

686 See Rathi (n 197). See also Bennett (n 105)

Penguin Books in 2011. Also in Kenya, there is evidence of court-approved resources to encourage such approaches.[687] Conversations with practitioners showed that such methods became even more useful at the height of the pandemic because courts could not hear disputes during COVID-19 lockdowns.

Other cultural approaches identified from the qualitative study included the use of poetry in lectures,[688] which were suggested in an interview with one professor and former dean (L3). Storytelling was also mentioned as a method of teaching doctrine and skills of critical thinking and analysis, as discussed in some of the literature.[689] The reference to storytelling and poetry as a teaching method is consistent with the oral tradition of African culture and customary law that are largely unwritten.[690] According to one lecturer, this unwritten knowledge represents the richness of African knowledge and culture:

> Gone are the days when there was a rich jurisprudence from the council of elders and people who passed down knowledge from one generation to another - unwritten. I wonder what will (sic) have happened if they were written! (L16)

Mindful of the oral nature of customary law and culture, some lecturers talked about using videos to teach specific skills in some aspects of the law such as contract law. One lecturer (L9) who taught African customary law (Legal Pluralism) explained that he used videos of betrothal and customary law negotiations to teach negotiating skills in customary law marriages. Following such "negotiations", he would then require students to draft terms of the

687 Simplified Resource Tool on Inheritance and Related Family Law Practice in Kenya, Family Division of the High Court of Kenya (2018)

688 Poetry and music, including hip hop music are now integrated as part of the curriculum in some American universities because of their cultural significance among African Americans. See also Emiri (n 323);

See also, Ashley Young and Michel Martin, 'After Rapping His Dissertation, A.D. Carson Is UVa's New Hip-Hop Professor' <https://www.npr.org/2017/07/15/537274235/after-rapping-his-dissertation-a-d-carson-is-uvas-new-hip-hop-professor> accessed 19 April 2021; A.D. Carson, 'Hip-hop professor looks to open doors with world's first peer-reviewed rap album' <https://theconversation.com/hip-hop-professor-looks-to-open-doors-with-worlds-first-peer-reviewed-rap-album-153761> accessed 19 April 2021

689 See Emiri (n 323)

690 See Nierkerk (n 652)

agreement. According to the lecturer, this approach enabled him to contextually teach negotiation that is part of the legal process in customary law marriages. In South Africa, even the late Zulu King Goodwill Zwelithini ka-Bhekuzulu had to adhere to this traditional practice during his high-profile marriages. As the literature shows, the interpretation of such marriage contracts often causes problems for the courts[691] because they do not fall into the realm of traditional transactional drafting that forms part of traditional legal writing and drafting courses. As the lecturer (L9) demonstrated, using videos to illustrate this cultural phenomenon, accompanied by relevant writing exercises, is an effective way of imparting skills required to advise parties about the intricacies of African customary marriages.[692]

Although observations at several other law schools showed that many lecturers used videos as a method of teaching skills, most of those skills were not necessarily associated with African customary law and culture. Be that as it may, the use of videos and films is endorsed in the book, *Reel Justice*.[693]

The use of videos seems to provide a means to maintain the orality of customary law because some lecturers expressed the concern that when some elements of culture and customary law are written for ease of teaching or research, it may result in unintended distortions.[694] In the view of some lecturers, law as it is currently taught in African universities is a foreign discipline whose teaching methods are unsuitable for the teaching of skills that are found in customary

691 See Akamba and Tufour (n 245)

692 Yaotey v. Quaye 76 G.L.R. 573 (Ghana), 578-579 and South African cases of Robert Tsambo vs. Lerato Rubeta Sengadi SCA (Bloemfontein) SCA Case No. 244/2019 (South Africa), Mavimbela v Minister of Home Affairs (49613/14) [2016] ZAGPPHC 889 (30 May 2016) (South Africa), Yaotey v Quaye (1961) 76 GLR 573 (Ghana) and Essilfie and Another v Quarcoo (1992) 80 2 GLR 180 (Ghana)

693 See Bergman & Asimow (n 324). The book, by two UCLA professors, shows that videos and films about law are now considered an important tool for the provocative analysis of legal issues and cultural messages encoded in the movies.

694 Interview with L17 (n 501)

law and culture. One lecturer illustrated this by referring to a conversation with an old man in her village when he heard that she was going to study law:

> I'm hearing that you went to study law… "I said yes." … But the practice is so useless...because in our community we carry law in the blood… No, it wasn't just law. It was justice. Justice in the blood. Do you have any doubt about that? Do you need to go to study that? (L6)

Such views help to illustrate the difficulties of teaching customary law because, as discussed in the literature review in Chapter 2, formal customary law is not always consistent with living customary law so that citing it as an authority in legal disputes may be problematic. Furthermore, to satisfy the English common law approach to resolving legal issues becomes more complicated when invoking customary law, which constitutes evolving complex bodies of norms that have varying degrees of mandatory force,[695] as opposed to developing legal arguments based on a cohesive set of legal rules.

The findings suggested that many of the lecturers and deans preferred field studies as a teaching or research method. The rationale of using this approach is that students are likely to master the skills associated with African customary law and culture through observation and participation in community work. As noted in paragraph 6.2.2, the data shows that several law schools required students to visit communities and traditional courts as part of their clinical programmes to expose them to practical dimensions of customary law in action. Such community outreach is also used in some American law schools. For instance, Antioch Law School (now University of the District of Columbia David A. Clarke School of Law) used to require its students to spend their first eight weeks at the school living with families in

695 Woodman (n 335)

Washington D.C.'s slums to familiarise them with the legal needs of those communities.[696] In the African context, such community outreach may be the best way for lecturers to expose students to living customary law which is not always consistent with formal customary law. Other lecturers noted that too much reliance on formal "textbook" customary law causes contradictions because what is taught in law schools does not always reflect customary law as it is practised in the communities. As noted by one lecturer, in the African context, knowledge and skills have always been transmitted through the community:

> You're teaching a foreign discipline (and) even the idea of a university is foreign. The very idea (of it) because Africans would be getting their knowledge (and skills) through communities, isn't it? The community - the (grand) father, aunty (senga?). (L13)

Another method identified in interviews with some lecturers was 'News of the Week'[697] exercises to make students aware of the real legal problems in communities instead of referring to case law only that tends to be abstract. As one lecturer pointed out, many cases are unreported, especially those with elements of customary law.[698] In South Africa, many high-profile cases involving customary law marriages are routinely reported in the newspapers. Describing the benefits of such 'newspaper exercises', William Twining argues that they help with "consciousness-raising", that the study of law is *"fascinating, dynamic, and concerned with issues that are truly important for ordinary people"* and *"that real life situations do not come neatly parcelled in legal categories and that "reading a newspaper in this way illustrates the point that legal lenses are essential to understanding society as much as non-legal lenses are necessary to understanding law."*[699] This was supported by one lecturer (L19) who spoke

696 See Antioch School of Law, Wikipedia <https://en.wikipedia.org/wiki/Antioch_School_of_Law > accessed 26 May 2021

697 Interview with L11 (n 633)

698 Interview with L9 (n 642)

699 See Twining (n 20) 210-213

about the 'Quick Write' teaching method which is the equivalent of what David McQuoid-Mason referred to as the "ask-then-tell approach to teaching"[700]:

> …at the beginning of a lecture where you want to draw on people's experiences in relation to a particular content you're going to teach. What knowledge do they have? What attitudes do they have? What feelings do they have? What experience do they have in relation to that particular knowledge? And then they of course have opportunity to share as groups before the groups get to share what they found most interesting or most out of place. And it is from those most interesting experiences that we get to delve into dealing with the law and the practise.[701]

In the view of many lecturers, such methods help students to learn more than the doctrinal law in case law because they are involved in practical issues in their communities, which is a perfect opportunity to also teach skills grounded in customary law. In such contexts, students do not view law as "fustian, esoteric, drily technical, and tedious."[702] Hence, one lecturer noted:

> And a lot of legal historians want to use past cases and principles, but they don't update it with what is very current. Whereas I would prefer it if you started from a point of what even the students understand right now. This is what's current and this is what they understand, and then fill in the gaps from the historical perspective. That's the first thing.[703]

Such views are an acknowledgement by some lecturers that being specialists in their disciplines does not mean that they are able to teach law.[704] As pointed out in some of the literature, this is not always true:

> Legal educators and the legal academy have long made the mistaken assumption that new teachers have an intuitive grasp of teaching methodology based on their experiences as students, and that therefore they can begin and continue teaching throughout their careers without any understanding of teaching methodology.[705]

700 Interview with David McQuoid-Mason (n 576)

701 Interview with L19 (n 678)

702 See Twining (n 20) 212

703 Interview with L12, LLB Lecturer (23 March 2018)

704 Interview with L22 (n 684)

705 Wallace J. Mlyniec, 'Where to Begin? Training New teachers in the Art of Clinical Pedagogy' (2012) 18 Clinical L. Review 505

It must be mentioned here that the researcher's academic visit to the United States yielded very useful data on teaching methods. It was also an opportunity to obtain data about the acclaimed Clinical Pedagogy Course at Georgetown University. Most importantly, the interaction with some American scholars and experts on American Tribal Law enabled the researcher to answer the second research question. What the data shows, though, is that the fluid nature of indigenous law requires a different teaching and research approach. To illustrate the difficulties in customary law, David McQuoid-Mason's view of Zulu customs is very useful:

> Zulu laws said only males can inherit if you don't make a will and there were these two young girls in Cape Town whose father died without a son and so according to customary law, his brother would've inherited but there was no brother, so the grandfather inherited. The grandfather then comes and throws them all out of the house – "the house is mine, so you guys get out." So, the two girls then said hang on, according to customary law only males can inherit but we've got an equality clause in the Constitution, and this is a violation. This goes all the way to the Constitutional Court and the Constitutional Court said customary law is not written in stone. It has to change with its values, and we've got to now infuse equality into customary law where it's relevant and that is what is done but the lawyers need to know this. The lawyers need to know what the customary law implications are.[706]

He then rationalised the decision of the South African Constitutional Court that he cited by referring to the evolving nature of customary law.

> The best example is where King Shaka and his advisers abolished circumcision to enlist young men in the military. However, more than two hundred years later, the king discovers that circumcision reduces HIV infection by 60% (so) he says all Zulus will now be circumcised. Although he calls it medical circumcision, it also exposes people to the Zulu customs as well. So, they're really bringing it under cultural (practice). So, they've reintroduced the culture that existed. So indigenous law is relevant because you will get this clash and when the clash comes…if someone is unhappy with the chief's decision, they can start again in the Magistrate's court - they can start in the formal courts. So, you need to know what the customary law situation was and how do you deal with that when you get this conflict between common law system and the customary law system.[707]

706 Interview with David McQuoid-Mason (n 576)

707 Interview with David McQuoid-Mason (ibid)

What David McQuoid-Mason is saying here also reflects how communal justice systems in England evolved from the *witenagemot* into the common law which applied across the jurisdiction. In the same way, the constitution, being the supreme law of the state, is designed to reflect the overall values of a democratic state. It reacts to changes in culture by ensuring that fundamental human rights, principles of justice and fairness are not abrogated in the practice and implementation of customary law. An important point here is that while legal institutions in England progressed organically, the same cannot be said about African traditional institutions which were not allowed to develop without Western interference. One professor and former dean referred to the fictitious Kingdom of Wakanda in the blockbuster movie, 'Black Panther' to illustrate that Africa would have equally developed in terms of its legal institutions without colonisation. As a result, she thought that Africa is now suffering from an "identity crisis".

> What is African? There's no such thing. But having said that, as people living in this geographical space called Africa, which the colonialists mapped out as Africa - as a continent, we share certain common historical and cultural values and commonalities. Almost the whole continent apart from Ethiopia, we were colonised and that experience of colonisation brings us together in terms of our experience in the world because the legacies of colonialism are real and we're still living with them. So, you cannot overlook that. Talking about law, that we can see very, very clearly in both the influence of Common law (and) Civil law which really was literally exported wholesale from those Metropolis to the continent. The irony is that in those countries where those laws came from, they've changed (and) they've been transformed to almost non-recognition. Here, in the colonies we are still holding onto many of these laws jealously. It's really ironical.[708]

Such views suggest that it is not possible to appreciate fully the essence of African ideals and culture that are entrenched in customary law, even though some academics conceded that some of the western approaches can still be "Africanised." But the striking issue is that *"we are*

708 Interview with L3 (n 522)

focusing too much on concepts and principles that emanated from the West and totally ignoring our own values, our own concepts. (Also) there's a lot of misreporting about what is African or what is un-African."[709]

Based on such views, it appears that experiential legal education appears to be the best way to integrate indigenous customary law approaches and cultural mores in a predominantly common law system. A good example is the women's law clinic at the University of Ibadan in Nigeria that uses customary arbitration in child maintenance cases.[710]

6.3.2.3 Difficulties of teaching skills

What the findings show is that most Anglophone African university law schools have generally struggled to integrate legal skills in their curriculum. In some cases, lecturers are required to teach skills which they are not competent to teach. At one law school, Legal Writing and Research was being taught by an instructor who was not a law faculty instructor. Then there are issues concerning pedagogical capacity and the quality of teaching. One professor elaborated this point with an assuring chuckle:

> The problem is once again you need to be qualified to be teaching [reading and writing skills] which I don't think all people [lecturers] are because if I look at some people's [lecturers] reading and writing skills, they are equally bad. They are as bad as the students - the staff. (L18)

709 Interview with L3 (ibid)

710 See Adewumi and Ojuade (n 298)

Another lecturer also conceded rhetorically: *"So the question is that do we have the capacity to really teach skills? I say no. We assume that we have. We don't. Why? I mean, specialisation is key. If it were up to me, I'd just have specialised lecturers who will not take any other unit."*[711]

Such deficiencies were evident to one Fulbright scholar, a Legal Writing Professor from the United States who previously taught in Africa. After observing her class, she argued that despite the orality of customary law and culture, it is still imperative for students to be proficient in legal writing to enable them to harness their analytical and advocacy skills in clinical work which is predominantly document driven. After taking instructions, they must analyse the documents and conduct research to identify legal solutions for the client. The question is, are the students able to communicate in writing the advice if it is based on cultural norms, given the fact that students are used to legal reasoning based on the doctrine of *stare decisis* that places emphasis on case law or "authority" according to Kahn Freund?[712]

The fundamental problem is that many law teachers often find it difficult to integrate skills related to African customary law in a clinical setting as observed by one lecturer:

> …how do you expect a person that has not had any practical experience to teach legal skills? So that is the unfortunate situation, I think we are facing. It's that you have a person that has got a pure academic background and now you require him to teach legal skills. (L10)

There are, however, two separate issues: the ability to teach skills and the ability to teach skills based on customary law. Whatever view one takes concerning the two issues, Wallace Mlyniec of Georgetown Law Center argues in his academic article: it all boils down to teaching

711 Interview with L16, LLB Lecturer (28 March 2018)

712 See Kahn Freund (n 308)

methodology.[713] As one law clinic director remarked: *"there's no higher education or diplomas or anything behind my skills teaching. It was 'see what works and go with that' for more than a decade."*[714]

However, those who claim that their university is a research-intensive institution maintain that knowing how to teach is not necessarily important. According to the same law clinic director:

> So, the message that lecturers are getting is 'focus on your research, get your articles out (and) get your publications out.' The subtext is, get by with the teaching. Just don't get into trouble with your teaching but don't focus on your teaching. That's the message; I think it's the wrong message. I think in this country, given our socio-economic inequalities, I think it is our duty to produce good graduates to grow the economy (and) to have a healthy country. And if you think law is important (and) if you think rule of law is important then you need good lawyers and you don't just do the minimum on training. You put all your resources into teaching, making sure when they leave in four- or five-year's time they are as best (a) lawyer as you could possibly do in those four years, not move all your resources into research (but rather) move it to teaching. (L7)

As discussed in the literature review, this excuse is no longer valid in some countries such as the UK because of the Teaching Excellence and Student Outcomes Framework (TEF) that seeks to elevate teaching excellence to the same level of importance as research excellence. Of course, there is still a major question about whether this works in practice everywhere. Also, as noted by the educational consultant interviewed for this study, even in those African universities that are research-oriented, it is in the best interest of the lecturers to improve their teaching:

713 See Mlyniec (n 705)

714 Interview with L7 (n 538)

> …the fact that teaching is now recognised for anyone to apply for promotion, or be appointed on a permanent basis, you have to produce a portfolio. And that portfolio must have your involvement in teaching philosophy; what informs your teaching, as well as your actual practice, your study guides, and in most cases, that's when they then come to me. And in most cases, what my observation is, after people who have either engaged with me around teaching matters, and or attended, one of the courses that we offer, they keep coming back, it changes their way of thinking about their roles as lecturers, or teachers, or academics. (L22)

In this context, making educational consultants part of the faculty to provide "epistemological direction" and an awareness of developing a pedagogical approach seems an effective way of improving teaching methods in some universities.[715] Hence, apart from clinical approaches at some law schools, some lecturers are utilising problem-based learning techniques in their courses.[716] But there are still those who find it difficult to modify their teaching approach to contextualise legal knowledge and skills. For example, in a lecture observed at one law school, the lecturer used the HBO hit series, 'Game of Thrones' to illustrate artistic/literary works during an Intellectual Property lecture. In this example, he was attempting to illustrate that the original material was adapted into a screenplay which became a different literary work from the book. The question is, how relatable was this illustration in a class with students from different backgrounds? Was there no relatable example using local knowledge that would have been relevant to this subject? Is this different from using "the man on the Clapham omnibus" as a standard of reasonableness to an African millennial in a contract law class? This implies that there can be methodological hiccups in teaching some legal concepts, and context is important.

In the interview with the educational consultant (L22), the consultant suggested that there is the need for lecturers to consider context in their teaching.

715 Interview with L22 (n 684)

716 Based on observation notes at one law school on 23 July 2018 (on file with researcher)

> Our frames of references as black students are different. Most of us come from homes where higher education, you're the first one to come into higher education (1), (2) The home language doesn't necessarily align itself to academic language; academic discourses and so the background that we come with into higher education limits us as black students. (L22)

As noted in the literature review, some African academics are championing the use of indigenous knowledge not only as part of decolonisation, but also to reconcile learners' reality with the formal education they receive in the schools they attend. This helps to avoid an identity crisis which makes some learners despise their African reality and ancestry.[717] One African academic vividly illustrates this point:

> As I grew up and I advanced academically, my reality was further separated from my education. In history I was taught that the Scottish explorer, Mungo Park, discovered the Niger River. And so, it bothered me - my great, great grandparents grew up quite close to the edge of the Niger River and it took someone to travel thousands of miles from Europe to discover a river right under their nose? What did they do with their time? Playing board games? Roasting fresh yams? Fighting tribal wars? I mean, I just knew my education was preparing me to just go somewhere else and practise and give to another environment that it belonged to. It was not for my environment - where and when I grew up and this philosophy under-guarded my studies all through the time I studied in Africa.[718]

6.4 Conclusion

The gist of the findings is that the approach to the teaching of legal skills is largely influenced by the philosophy of the dean and the broad pedagogical goals of the university. Also, each country's regulatory framework on legal education plays a role, especially in those common law jurisdictions where skills are considered an integral part of professional legal training. The findings further suggest that many deans and lecturers were aware that the teaching of skills is necessary for the enrichment of the LLB degree programme, even where skills were not

717 Chika Ezeanya-Esiobu (n 252)

718 Chika Ezeanya-Esiobu (ibid)

expressly integrated in the curriculum. As a result, some lecturers used a variety of teaching techniques to develop the students' practical skills such as simulations, role plays, mooting and community outreach.

The most notable finding is perhaps the recognition by some lecturers, especially those who practice law, of the importance of customary law and culture in legal education. However, many lecturers were constrained by the traditional curriculum from emphasising practical skills required in customary law and culture. Surprisingly, though, many lecturers, deans and consultants were favourably disposed to an Afro-centric approach to dispute resolution involving cultural values and norms as shown by their profound responses concerning customary law and culture and how it can be harnessed to enhance the study and practice of law in an African context.

7.1 Significance of the study

The findings of this study have shown that most students, lecturers, professors and deans in Anglophone Africa who were interviewed prefer a skills-based and practical approach to studying law, which is consistent with African culture and values embodied in *Ubuntu*. Paul Maharg's (2019) observation is that students at UK universities also prefer experiential learning and clinical education.[719] Even more interesting is the fact that students in the UK also dislike closed-book exams and lectures, a grievance also echoed by students interviewed in this study.[720] The findings suggest that students even prefer experiential learning within the more conventional curriculum. Such a preference is consistent with Donald Schön's concept of the "reflective practitioner", who learns from thinking about what they and others are doing.[721] Students' responses in this study raise the critical question of whether legal education needs both a theoretical foundation and a practical orientation. It has already been argued by Andrew Goldsmith and David Bamford (2010) that to open up the academic legal curriculum to more practice-oriented skills does not mean vocational legal education or a shift away from a liberal model of legal education.[722] In fact, LCB Gower, whose model of legal education is currently used in common law jurisdictions in some parts of Africa, acknowledges that African universities are capable of teaching practical skills; but such an approach is unfamiliar to the traditional English-style university.[723] Despite this, there are signs that the nature of English

719 Paul Maharg, "Revisiting 'Pressing Problems in the Law: What is the Law School for?' 20 years on", Legal Education and Professional Skills Research Group and Nottingham Law Schools Centre for Legal Education Seminar <http://paulmaharg.com/2019/06/17/revisiting-pressing-problems-in-the-law-what-is-the-law-school-for-20-years-on/> accessed 24 August 2021

720 LLB Graduate, Focus Group 1 (n 574)

721 Sherr (n 85)

722 Andrew Goldsmith and David Bamford, 'The Value of Practice in Legal Education', in Cownie (n 6) 157

723 LCB Gower (n 57) 120

legal training is evolving following the Legal Education Training Review (2013) in England. The findings of this study have shown that integrating skills in undergraduate courses reinforces theoretical learning. To this extent, integrating skills in the curriculum minimises the likelihood that law students will perceive law as being a mere intellectual exercise devoid of practical work. As one Australian academic notes:

> To design a course which takes no real account of the practice of the law is to design a course which develops in the student a total misapprehension of that for which he [or she] is being educated.[724]

Even those who are still concerned about maintaining the educational rather than vocational objectives of the LLB degree acknowledge that skills-based methods can be used to develop theoretical perspectives and that the characterisation of education as either theoretical or practical reflects a false dichotomy.[725] The reality of the situation is much more complex than this characterisation. The significance of this study is that most informants recognised that skills are an essential part of the study of law and that to disregard them is to provide students with an unrealistic view of the areas they are studying. The findings also raise questions about the underpinning philosophy of the current LLB degree: whether there is need to reform the curriculum in order to rectify its inadequacies or whether we should maintain the status quo. When it comes to African legal education, the data suggests that students who are involved in experiential learning are less likely to think that law is mostly adversarial. It is for this reason that widening the scope of teaching skills to involve customary law and customary process through experiential learning is necessary in Anglophone African jurisdictions. As the data has shown, such experiential learning involving skills in customary law is the best way of exposing students to dispute resolution that transcends the adversarial model on which the current system

724 See Martin (n 38) 47

725 Nigel Duncan, 'Why Legal Skills – Whither Legal Education' (1991) 25 The Law Teacher 142, 146-147

of legal education is based. What the findings show, however, is that integrating skills in the curriculum does not turn an academic programme into a "trade school" course; instead, it ensures that the content of the undergraduate law programme does not become too abstract.

Previous studies on legal education have failed to address students' concerns because of what Paul Maharg calls "a lack of student perspectives and student agency."[726] As shown in the literature, students are an important stakeholder in legal education research because they are "a co-producer of their learning."[727] Indeed, the negative impact of neo-liberal practices on legal education is the portrayal of students as consumers and the characterisation of knowledge and learning as mere market products. The significance of this study is that it opens up discourse on the need to reconceptualise the approach to African legal education by integrating skills ingrained in customary law that have long been neglected because of the misconception that they do not form part of the skillset of an African lawyer.

The findings have further demonstrated that there are practical methods that can be used to teach African law and culture in the LLB law degree. Specific skills that have been identified in interviews with both students and lecturers include: negotiation, mediation, language skills, giving practical advice and understanding the needs of others[728] to show *Ubuntu* and consensus-building based on the practice of *Indaba*, a skill that can be used for decision-making premised on collaboration, communitarianism and compromise rather than adversarial techniques used in conventional legal training based on the British system of training lawyers. The value of skills is that they can be inclusive of much more than the application of doctrinal law because

726 Paul Maharg, 'Pressing problems MLR seminar, final thoughts' Legal Education and Professional Skills Research Group and Nottingham Law Schools Centre for Legal Education Seminar (17 June 2019) <http://paulmaharg.com/2019/07/09/pressing-problems-mlr-seminar-final-thoughts/> accessed 24 August 2021

727 Andrew Boon and Avis Whyte, 'Will there be Blood? Students as Stakeholders in the Legal Academy' in Cownie (n 6) 185

728 See 'The Future of Universities in a new Global Context' (n 329)

the existence of customary law means that some situations result in a conflict of laws which requires the use of different legal skills. A survey of LLB graduates in this study showed that practising lawyers generally felt that they would have benefitted more from learning some of the skills as part of the law degree as opposed to learning them at professional legal training schools. While the primary objective of a law degree is not simply to produce a lawyer, it is impossible to separate an understanding of the practice of law from its doctrinal elements which also prepares students who do not wish to practise law.[729]

In the circumstances, integrating skills in the undergraduate curriculum can enhance students' understanding of the law and how it works in practice, especially given the pluralistic nature of legal problems in Anglophone Africa.

7.2 Implications

One of the main implications of this study is that it questions the existing structure of legal education in Anglophone African countries. The question is: is it necessary to have both the university law school and the professional school of law? The data in this study suggests that many lecturers are hamstrung by a rigid system of legal training that separates legal education from professional legal training. The question then is: what are law schools for? This question still dominates seminars and conferences on legal education twenty-five years after Peter Birks' book on the same question.[730] On this contentious issue, Paul Maharg notes:

729 Martin (n 38) 47

730 Peter Birks (ed), Pressing Problems in the Law: Volume 2: What are Law Schools For? (OUP, Oxford 1996); William Twining also seeks answers to the same question in The Blackstone Tower: The English Law School (Sweet & Maxwell, London 1994), 49

> One way of understanding the question is to go meta-(sic), and to see it as asking, 'how do we interpret law schools? This is a question of hermeneutics, and goes beyond texts: the question involves practices, relationships and understandings that are bound by culture, history and epistemology.[731]

The reference to culture, history and epistemology is important because it leads to another fundamental question concerning African legal education: what constitutes knowledge in the African context and how should it be taught in law schools? This study has relied on the views of various stakeholders including students, graduates, academics, practitioners, a cultural studies expert and educational consultants whose perceptions and insights have questioned the existing epistemology of African education. As the literature review has shown[732], knowledge should not be characterised in ways that suggest it is the antithesis of skills, an issue that was raised by students who preferred legal training to be more practical. This approach has led some African academics to accept the concept of the unity of knowledge in legal education that integrates knowledge which establishes congruence between theory and practice.[733] If these arguments have substance, and the data in this study appears to confirm agreement with this approach, then the separation of academic and professional training is unnecessary and ineffective. What this means is that there should be a re-evaluation of the existing regulatory policy in Anglophone African countries which currently requires a separation between the university law school and a professional school of law. The evidence from this study has shown that some university law schools in common law jurisdictions offer an integrated LLB degree that incorporates both academic and professional elements of legal training. In Roman-Dutch law jurisdictions such as Botswana and Zimbabwe, there is no longer a separation between academic and vocational stages of legal training. The implication, therefore, is that the role of

731 Paul Maharg, 'Complicitous and contestatory": The hermeneutics of legal education', Legal Education and Professional Skills Research Group and Nottingham Law Schools Centre for Legal Education Seminar (17 June 2019)

732 McFarlane (n 68) 298

733 Kankindi and Chimbwanda (n 317) 156

existing professional law schools can be reconsidered in order to have a simpler structure, perhaps with some existing professional schools of law ending up being examination centres that administer Bar Exams.

7.3 Limitations

A study of this nature is bound to have limitations. One of the shortcomings is that the study started with general questions about the teaching of skills in the LLB degree programme. Consequently, initially there were fewer questions relating to skills in customary law and culture. Alan Bryman notes that some grounded theory practitioners begin with a 'blank slate' so that theoretical issues can emerge from the data.[734] For this reason, the fact that data pertaining to skills in customary law and culture emerged in the course of the study may be considered a strength rather than a limitation. This is because it is common for qualitative researchers to begin with generalities and later move on to specifics.[735]

Another limitation is that it was not possible to conduct interviews and observations at all selected law schools because in some cases, access was not granted. There were also financial and logistical constraints that prevented visits to some universities. As a result, it was not possible to cover as wide a range of respondents as had been anticipated. Even where access was granted, sometimes the timing was not convenient to conduct interviews and observations. To overcome this problem, data was obtained from documentary sources, sometimes with the help of insiders. In exceptional cases, there were some participants who agreed to be interviewed on condition of anonymity.

734 Bryman (n 349) 407

735 Bryman (ibid)

While it was not possible to conduct observations of the teaching of customary law, there was, however, sufficient data from documentary sources and interviews that provided useful information about the nature of customary law in Anglophone African law schools.

For those steeped in quantitative research, the findings of this qualitative study may seem reliant on the researcher's interpretation of the data yielded. However, the growing certainty of the accumulated findings as the research progressed, including the agreement of those who were studied, and those who read the findings, raises and confirms the trustworthiness of those findings. The use of multiple data sources, otherwise known as triangulation, enabled a more complete understanding of the research phenomena as well as cross-checking the validity and reliability of the findings.

7.4 Recommendations

In the first chapter of the thesis, which defined the research problem, the researcher noted that there is no common understanding of what skills entail in the LLB degree programme because of the dichotomy between theory and skills. The findings have shown that most participants felt that skills could be integrated into the LLB programme through the adoption of a broad range of educational approaches that enhance the quality of the LLB degree.

Regarding African customary law, there are specific questions that emerged from the findings. One such critical question is about the degree of emphasis of skills, given the fact that lawyers do not necessarily 'practice' customary law. Because lawyers deal on a daily basis with cases that involve customary matters such as the payment of dowry, marriage, divorce, inheritance, rape, land disputes, grazing rights and so forth, it is recommended that legal education should include the study of African law and culture in order to understand the role of *Ubuntu* and other cultural norms in dispute resolution, restitution and arbitration. Having established that there

is a conflict of laws between English and Roman-Dutch law with African customary law and culture, the question that arises is the extent to which lawyers are expected to know customary law and values. Because of such conflict of laws, it is recommended that, of necessity, the LLB degree should be strengthened so that learners can understand the intricacies of customary law. As has been shown in this study, while customary law is recognised, its different facets require further investigation so that practising lawyers can interpret it correctly and be able to advise clients in particular situations. The other recommendation that arises from the findings is that since formal courts deal with cases involving customary law, it is necessary to have lawyers who are competent in customary law. Inevitably, customary law must be included in the mainstream programme for training them.

Since there is a paucity of information about the detail of customary law in each jurisdiction or area, further research is necessary so that it can become part of the mainstream LLB degree. Similarly, research should be conducted on the type of skills that should be integrated in the undergraduate law curriculum and the appropriate teaching methods. The unfortunate part of this study is that even though lawyers regularly encounter cases involving customary law, the law curriculum does not sufficiently cater for it. This issue may be redressed in two ways. Firstly, a course on customary law and culture should be compulsory so that students can be exposed to the nature and characteristics of customary law to debunk the notion that it is not important in the practice of law. African customary law could also be offered as a specialist elective for those who intend to specialise in customary law. Thirdly, elements of customary law should be integrated in other courses beyond those that it is traditionally associated with such as family law, property law, succession law and others to dispel the myth that it is limited to those areas of law. As the findings have shown, there are many elements of customary law that are pervasive in law.

More importantly, the findings of this study have shown that there is need to make much more of experiential learning which Judith McNamara (2009) refers to as 'work integrated learning'.[736] Data from this study as well as evidence from the literature[737] suggests that work integrated learning models includes legal clinics, as well as externships, internships, and work placements. The attractiveness of some of the other approaches is that they help universities to avoid the sustainability problems associated with legal clinics because such methods do not usually require funding. Students may obtain many of the same benefits without the cost associated with live-client clinic work, but only if administered appropriately. The main advantage of such other learning models is that the academic supervisor does not have to be present when a student is doing practical work because s/he will be guided by a uniform learning agenda designed by the university.[738]

The findings have also shown that both students and teaching staff value field trips and academic visits which involve visiting prisons, state and customary law courts, community engagement and street law programmes. David McQuoid-Mason has been involved in setting up such programmes which use a wide range of student-centred activities including role-plays, simulations, games, small-group discussions, opinion polls, mock trials, debates and street theatre.[739] The value of such experiential learning is that "students obtain valuable insights into social justice issues in the communities they serve as well as a personal understanding of themselves as potential lawyers. This type of pedagogy should be the norm in experiential learning because law is based on the social realities of the time, which enables students to see for themselves that law cannot be taught in a vacuum."[740] As the literature has shown,

736 Judith McNamara, 'Internships: Effective Work Integrated Learning for Law Students' (2009) 10 (3) Asia Pacific Journal of Cooperative Education, 229

737 Kotonya (n 296)

738 McNamara (n 736)

739 McQuoid-Mason (n 484) 30

740 McQuoid-Mason (n 484) 48

experiential learning presents the best opportunity to expose students to customary law because street law focuses on problems affecting the communities in which students live. By immersing themselves in their communities, students will not merely learn black-letter law, but will gain knowledge about the work of the law and how the different legal institutions work, which is a valuable lesson in legal realism.

In countries where community law clinics exist, students can gain valuable experience especially in countries such as Ghana where existing regulations do not permit law schools to offer 'legal services' in live-client clinics. It is suggested that for law schools that are constrained by such regulations, they need to lobby their regulatory bodies to start relevant reforms. For instance, one law school in this study successfully lobbied the regulatory body to sanction the use of clinical activities involving live clients as part of the curriculum.[741] In some cases, law faculties should take advantage of the fact that they do not require the approval of regulatory bodies by introducing new programmes that incorporate clinical methods. Using clinical methods enables students to realise that law can promote social justice given the communal nature of African societies. Field studies and academic visits similarly enable students to observe and experience directly 'living' customary law and the learning of indigenous language skills that are useful in court proceedings. Making such experiential learning mandatory ensures that all students are able to acquire relevant skills.[742] For those universities that have live-client clinics, it is recommended that they should also have a

741 Interview with D4 (n 607)

742 Misganaw Gashaw, 'Enforcing 'Externship' in the Ethiopian Legal Education: A Critique touching the Simulation' (2005) The International Journal of Humanities & Social Studies, Vol 3 (Issue 9) 61; Lawrence Donnelly, 'Tamanaha and His Critics: Transatlantic Reflections on the "Crisis" in Legal Education', (2015) 16 German L.J. 821, 840

customary law clinic along the lines of the women's law clinic at the University of Ibadan which uses customary arbitration in child maintenance cases in Nigeria.[743]

One needs to stress the fact that the provision of services as part of experiential learning must be preceded by a mastery of the pedagogical theories underpinning teaching of the practice of law. This should include components of substantive doctrine, skills, ethics, and values of law practice that should be taught by lecturers who know the students' casework well enough to integrate experience into clinical work. Such clinical pedagogy similarly enables law lecturers "to be aware of the students' cultural understanding in ways that are different from and more immediate than those usually encountered by classroom teachers."[744] In teaching skills, we should not lose sight of the fact that the goal of live-client work should not only be to provide an efficient legal service but to provide an opportunity for students to reflect on their practical experience. As noted by Richard J. Wilson, *"the service-education tension is the single greatest factor contributing to whatever shortcomings exist in clinical legal education in developing and transitional parts of the world."*[745]

It is suggested that the use of such clinical methods should also be replicated in the classroom using problem-based learning techniques, simulations, role plays, mock trials, mooting and observations through video-based instruction. As the data in this study has shown, there is evidence to suggest that students exposed to clinical methods perform better than those taught using traditional methods. The data has also shown that these methods are widely used by some universities with integrated LLB law programmes in both Roman-Dutch and common law

743 Adewumi and Ojuade (n 298)

744 Mlyniec (n 705) 103

745 Richard J. Wilson, 'Training for Justice: The Global Reach of Clinical Legal Education, (2004) Vol. 22: No. 3 Penn State International Law Review 421, 424

jurisdictions in Africa. We have also seen that some of these methods are consistent with learning approaches in African culture that stress practice, observation, and group work such as deliberation, collaboration and consensus-building that are emblematic of most African cultures. It is through such methods that students can learn African dispute resolution skills including conciliation, negotiation, compromise, and arbitration, which are all embodied in *Ubuntu*. It is when such approaches are integrated in the law curriculum that we can begin the process of Africanising legal education that includes cultural experiences in the learning and teaching of law.

What this means is that university law schools should refine their teaching approaches to provide every lecturer with epistemological and pedagogical direction.[746] Where universities do not have the capacity to do this, they can collaborate with institutions that have the expertise to do so. As noted by Steven Vaughan *et al* in *Reimagining Clinical Legal Education* (2018), the clinical legal education movement relies on partnerships with those outside of the university to achieve positive outcomes for clients and students alike.[747] Such a collaboration helps to build the teaching capacity of universities. For instance, in 2018 two institutions that were used as case studies for this study in East Africa[748] and Southern Africa[749] ran training workshops conducted by experienced clinicians affiliated with external institutions for their faculty staff on how to reform the legal curriculum using clinical legal education approaches. These workshops were conducted by experienced clinicians from South Africa, including David McQuoid-Mason. Evidence from one law school in Ghana showed that in two successive semesters, there were two visiting scholars who mentored faculty staff on experiential learning.

746 Interview with L22 (n 684)

747 Steven Vaughan et al., 'Clinical Legal Education Reimagined' in Linden Thomas et al (eds), Reimagining Clinical Legal Education (Hart 2018)

748 Interview with D4 (n 554)

749 Interview with David McQuoid-Mason (n 576)

It is also suggested that students from other parts of the world who are required to do externships as part of their clinical education should be encouraged to visit African universities to share their experience by participating in community legal clinics such as the Legal Resources Centre in Accra, Ghana.[750] Such collaborations have the added benefit of creating opportunities for further research that can provide answers to some of the questions raised by this study. There are also opportunities to engage with organisations such as the Global Alliance for Justice Education (GAJE) and Network of University Legal Aid Institutions in Nigeria (NULAI)[751] that run training programmes for those academics interested in clinical legal education although their work focuses on access to justice issues. More importantly, universities need to elevate teaching to the same level as research as has happened in the UK since the introduction of the Teaching Excellence Framework which, although unpopular with academic staff, seeks to incentivise those academics who devote their time to teaching inasmuch as they do to research. In law schools, this may mean emphasising the importance of clinical teaching.[752] However, there is still the concern that an ability to teach skills does not automatically result in one being able to teach customary law skills. As the data has shown, establishing specialist centres to promote ADR may help the teaching staff to sharpen their teaching methods, including the holding of seminars and conferences focusing on customary law.[753]

750 Interview with D7 (n 593)

751 An example is the 'International Clinical Legal Education Teacher Training Workshop' held at Enugu, Nigeria on 12-15 October 2012 (details on file with researcher)

752 Kotonya (n 296) and Bryan L. Adamson et al., 'The Status of Clinical Faculty in the Legal Academy: Report of the Task Force on the Status of Clinicians and the Legal Academy' (2012) The Journal of the Legal Profession' Vol. 36, 353

753 Interview with L3 (n 522). The Centre for African Legal Studies at the University of Professional Studies in Ghana recently held a virtual African Customary Law Conference whose theme was 'Customary Law in a Changing Africa' (Accra 28-29 January 2021) <https://dailygistgh.com/2020/09/21/upsa-call-for-papers-african-customary-law-conference/> accessed 29 August 2021

7.5 Summary and conclusion

The researcher conducted this study for five years, with two years dedicated to fieldwork and data analysis. The researcher was able to collect diverse views about undergraduate legal education from different stakeholders including students, law graduates, teaching staff, deans, and consultants whose views helped to answer the research questions. The study also entailed an analysis of the literature on African legal education and the teaching of skills in customary law. The objective was to understand not only prevailing perceptions on skills, but also their relevance to the teaching of law and how it is practised in Anglophone African jurisdictions.

What emerges from this study is that in Anglophone African countries, undergraduate legal education is complicated by legal pluralism which requires a different approach. The fact that customary law is a recognised source of law poses significant challenges for the profession because, while lawyers do not necessarily practise it, they often encounter legal problems that require knowledge of customary law, culture, norms and values. The findings suggest that many legal practitioners do not have the necessary skills to be able to deal with matters involving African customs and traditions because they did not learn such skills in their LLB degree programme. Furthermore, the findings suggest that many legal practitioners have little or no knowledge about African cultural mores, values, traditional justice, and customary law. The fact that customary law is flexible, often requiring specific skills to interpret and apply it in relevant legal situations, compounds the problem. The findings have also shown that while the undergraduate law curriculum does not necessarily focus on skills, there are some universities that have found ways of integrating skills in the LLB degree programme. However, the incorporated skills often do not necessarily cohere with the existing structure of the law degree curriculum whose content is dominated by formalistic and adversarial approaches associated with Western legal systems. Quite discomforting is the fact that only a few law

schools teach skills that are embodied in African customary law and culture. Where such skills are taught, the clinical legal method appears to be the only method used for teaching such skills. The data from interviews with students and lecturers suggest that the best method of teaching skills is to involve students in various kinds of practical work.

In the final analysis, the information yielded in this study suggests that customary law is critical to the discipline and practice of law without which many legal practitioners would struggle to be effective in an African community whose laws are bound by unique practices such as *Ubuntu*. Most gratifying is that African academics are now not only conscious of their culture but are also vigorously championing the integration of cultural values in legal studies. The study itself makes no absolute claims because in studying the real lives of people, there is the danger of overemphasising a research phenomenon. Also, a study of this nature whose findings depended on what individual interviewees were prepared to 'offer' from the protected boundaries of their lives, will always leave room for different interpretations. However, it is hoped that, despite the virgin areas of African law and culture that still need to be investigated, this study has contributed, in some measure, to the widening of our knowledge in the discipline.

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APPENDIX 1

Dear Sir/Madam

RE: Invitation to be involved in a study of Legal Education in Africa – Mr Victor Chimbwanda (Doctoral Student No: 1442953)

I would like to introduce Mr Victor Chimbwanda, a doctoral student at the University of London, Institute of Advanced Legal Studies; whose research I am supervising. Mr Chimbwanda is conducting a study of skills education in African university law schools. I would be grateful if you could provide him with details of the law programme at your institution and, if you agree, to permit him to research further into your renowned law programme. He will be investigating teaching approaches at selected African law schools, including your institution, which I hope will be an excellent case study. This would involve some questionnaires, some interviews and, if circumstances permit, observations. The study considers how useful "skills" education is found to be in the undergraduate law curriculum in Anglophone African law schools, and to whether such skills have any bearing on African customary law and culture.

The value of this research depends on the co-operation of as many law schools as possible. I would be grateful for any information you could provide him on the law programme and an understanding of what your views are on the subject. Mr Chimbwanda's study at this stage is seeking the answer to one preliminary enquiry: **does your law programme have any skills content, and are any of suck skills based on African customary law and culture?** If your answer is yes, will you briefly describe what skills are taught on your programme and what the teaching methods are?

Information relating to these questions will enable Mr Chimbwanda to identify which law schools are experimenting in this field and I would appreciate your co-operation.

I can confirm that relevant ethical clearance has been obtained for this research from the Research Ethics Committee at the School of Advanced Study in the University of London. If you wish to contact them kindly e-mail any queries to research@sas.ac.uk.

Yours sincerely,

APPENDIX 2

TOPIC GUIDE FOR INTERVIEWS WITH STUDENTS/LLB GRADUATES

Preliminaries

Introduce self and background

Introduce research project – *This is a set of questions to find out your views about legal education in African university law schools. Your responses will feed into my research project and any useful insights you provide may be used as data in my thesis.*

Duration of interview – *This discussion will not take more than 60 minutes. There is a possibility that you may be contacted with follow-up questions via e-mail. There will be an opportunity to ask questions or offer feedback at the end of the discussion.*

Obtain consent and assure confidentiality

Topic guide

1. What aspect of participants' experience at university was most important or relevant to them? Why?
2. In addition to knowledge acquired, did participants learn the ability to act / behave or perform certain operations associated with the discipline of law (i.e., legal skills)?
3. If so, what legal skills did participants learn?
4. Were those skills taught as part of specific courses or separately as independent courses? Please give examples.
5. What was the main mode of instruction?
6. Were participants involved in any other activities/projects beyond classroom learning as part of the curriculum? Please provide details
7. What were participants' general impression of how law is taught at university?
8. Do participants think legal skills should be part of the curriculum at university? Why?
9. In participants' view, at what stage would it be appropriate to learn skills and why?
10. Do participants consider that the content and method of teaching law is appropriate for the African context?
11. Were there any elements of African customary law as both theory and skill that participants learnt? Participants to give examples.
12. In the light of participants' experiences at law school, what suggestions do they have concerning legal education?
13. Do participants have any other comments or points for discussion?
14. Are there any other questions participants think I should have asked?

APPENDIX 3

INTERVIEW GUIDE FOR LECTURERS

Before we begin, I would like to thank you most sincerely for sparing your time to talk to me about the teaching of law at this institution. Let me assure you that whatever we discuss will be used solely for this study. I will not mention your name in reporting my findings, and neither will I send your views to your superiors, except that my findings may be read globally. So, feel free to speak your mind.

1. Preliminaries
2. Background
    - Qualifications and experience
    - Status in the Law Faculty – courses/areas of law taught/specialisms
3. When and where did you do your LLB?
4. What courses are you responsible for in the law school?
5. What approach do you use to teach each of these courses?
6. Do you teach any skills during your teaching? If so, what skills? How do you teach/impart those skills?
7. To what extent are the skills that you teach, if any, based on African customary law and culture?
8. Do you consider that there is a broad philosophy in the way the LLB Programme is offered at your institution?
9. Describe your own experience studying law at the institution you qualified, both undergraduate and professional? Do you consider the approach at such institutions influences your approach?
10. Would you say you learnt any skills during your own legal training? If so, in what courses? How were those courses taught?
11. Based on your own experience during your own legal training, is there anything that you are doing, or you have done, to enhance the law school experience, especially in relation to skills education?

APPENDIX 4

INTERVIEW GUIDE FOR DEANS

Before we begin, I would like to thank you most sincerely for sparing your time to talk to me about the teaching of law at this institution. Let me assure you that whatever we discuss will be used solely for this study. I will not mention your name in reporting my findings, except that my findings may be read globally. So, feel free to speak your mind.

1. Please state your academic and professional background
2. How long have you been the Dean at this law school?
3. Are there any other roles related to legal education that you hold/have held?
4. Do you consider that your background has informed your approach to legal education? If so, how? If not, why?
5. Do you have any broad philosophical approach regarding how legal education is offered at this law school?
6. To what extent is that philosophy consistent with the current regulatory framework on legal education?
7. Are there any challenges in the implementation of that approach at this institution?
8. What is the current approach to teaching law at this law school?
9. How are the teachers/students responding to that approach?
10. Is there any provision for skills in the curriculum? If so, to what extent do such skills reflect approaches in African customary law and culture?
11. Based on your own experience during your own legal training, is there anything that you are doing, or you have done, to enhance the law school experience, especially in relation to skills education?

APPENDIX 5

OBSERVATION SCHEDULE USED AT-----FACULTY/SCHOOL OF LAW, UNIVERSITY OF -----

DATE: _____

a) Objective(s)

- *To investigate approaches being used and to what extent they stress skills during the learning process*
- *To determine the cultural relevance / significance of the above (contextualisation)*

b) Questions

1. Does instructor introduce a clear topic?
   - ☐ Yes
   - ☐ No

2. Does instructor clearly state outcomes?
   a) knowledge
      - ☐ Yes
      - ☐ No

   b) skills
      - ☐ Yes
      - ☐ No

3. Does the instructor clearly stress any specific skills?
   - ☐ Yes
   - ☐ No

   Details:

4. Do the skills embody/reflect customary law/cultural approaches?
   - ☐ Yes
   - ☐ No

Details/Evidence

5. Classroom techniques used during the session
   e.g.

   a) role-play
   b) problem-based learning
   c) gaming
   d) demonstration or video
   e) case work discussion
   f) other debate
   g) Direct teaching in how to carry out a legal skill

   Any other technique

6. What has been the most successful part of the session? (Based on observation of levels of, student participation, both 'coerced' and spontaneous and general lesson structure)

   Details:

9. Any other comments

APPENDIX 6

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
S1 (LLB Student)	1	Case analysis and briefing	Legal Writing & Study Skills	Case method, drafting and writing exercises in groups or as individuals	References to dispute resolution but no evidence it was taught as part of any courses	*"Internships helped me to get better practical knowledge. Mooting is litigation oriented, must involve other dispute resolution mechanisms"* (S1 interested in pursuing career in Construction Law)
		Mooting	Extracurricular (as member of a club/society	Mooting		
		Drafting	Commercial Law	Drafting exercises, e.g. power of attorney		
S2 (LLB Student)	1	Legal Writing & Drafting	Equity & Succession and Law Clinic & Mooting	Drafting aspects of conveyancing documents, drafting memorials and written argumets	Mediation (during prison visits – negotiating with police officers for bail/sureties. *"it made me realise that practicing law is not all about going to court everyday… because of the Law Clinic class and the workshop [that] was (sic) on ADR…that at times you just have to go outside the "law" so-called, to look at what is the root cause. Probably it's not legal as you see it but might be something entirely social… why go for litigation when there is an alternative solution."*	*"My idea of law, the way the practice is, and everything is that it should be much more practical and not too much theory-based. Clinical work made me feel like we were being shaped to become lawyers though we were not yet lawyers."*
		Advocacy (oral and written)	Law Clinic & Mooting	Mooting		
		Interviewing	Law Clinic & Mooting	Simulations, clinical work via externship with an NGO (CHRI), Workshops, prison visits		
S3 (LLB Student)	8	Oral Advocacy	Public Int'l Law	Amazing Race (game in Karura forest), Mooting and other extracurricularclubs	Aspects of customary law taught in substantive courses, e.g. Constitutional Law, Property (Land) Law (Community Land Act) but is <u>subordinate</u> to formal laws. Also, *"customary law must be practised by only <u>a</u> community as opposed*	*"We did our attachments in court and you will see for example in practice what you learnt in theory in class as regards say, prosecution (of) the cases (that) the State Prosecutor brings to those courts."*
		Legal Writing & Drafting	Civil & Criminal Procedure	Drafting exercises		
		Presentation Skills	Legal Practice Management	Group presentations		

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
					to… written law that is subject to the whole country."	
S4 (LLB Student)	8	Thinking on one's feet (in oral assessments), research skills, writing skills, advocacy & presentation skills	Public Int'l Law	Lectures + research-based learning and presentations	Customary law important in matters of land, family and succession. *"Some of the issues that we face must be handled according to African tradition for effective dispute settlement."* BUT must not be repugnant to rules of fairness and justice	*"Substantive law and the learning of the skills cannot be… separated because if you have the substantive law but you don't know how to apply it, it doesn't make sense and you (also) can't apply it if you don't know what it is. So, …there's a meeting point where there's a balance of both."*
		Drafting (e.g. Wills and Conveyancing documents, e.g. transfer)	Legal Writing & Research	Drafting exercises + Simulations + Role-Plays		
S5 (LLB Student)	8	Critical thinking, interpersonal skills (from oral assessments), critical thinking, communication skills (written e.g. emails & oral)	Public Int'l Law	Problem Based Learning (in Human Rights & Philosophy) + Guest Lecturers (mostly Practitioners) + Videos + academic visits (for context) + internships and attachments	Customary law teaches cultural awareness, e.g. basis of feminism, tribalism	*"When you go for attachments like legal attachments (and) community attachments, they teach you other skills, e.g. community attachment was (focusing on) how to interact with other people i.e. communication skills. Legal attachments [teach] how to act in front of other lawyers."*
			Human Rights Law			
			Philosophy (comprising Critical Thinking, Principles of Philosophical Anthropology, Principles of Ethics, Social & Political Foundation of Law			
S6 (LLB Student)	8	Legal Writing, Critical Thinking	Sports & Entertainment law	Predominantly Socratic method + moots & debates + 200 hr community-based attachment, judicial & legal attachments + other extracurricular activities + social media (Sports & Ent Law) + Research-Based Learning + Simulations (during drafting exercises in groups)	African culture and tradition emphasised in Property and Family Law. Other elements of African law were taught in Public Int'l Law (e.g. war crimes prosecution at ICC. **BUT no reference to Customary law in all other courses even Conflict of Laws.** Tradition and culture were stressed in a non-	*I feel like moot is for someone with a particular personality, it's not for everyone* *Critical thinking came in per se mostly with a lot of the small essay-writing that I did*
		Same	Competition Law			
		Same	Media & Law			
		Drafting (e.g. completion documents)	Conveyancing			
		Drafting (e.g. charge sheet)	Criminal Procedure			
		Drafting, Data Collection	Attachments and other Extracurricular activities			

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
					traditional course: International Economic Law where the lecturer "*applied the TWAIL [Third World Approaches to Int'l Law] understanding."*	*Not emphasising customary law is a disservice to the rural folk.* *[my experience taught me that] legal education is useful for other things. This was evident in [the] curricula (and) in all the activities that we've been doing outside… community-based attachment, our legal attachment, our judicial attachment (or) the academic trip*
S7 (LLB Graduate)	9 (2010-2013)	Counselling, Interviewing, Drafting, Legal Writing Case analysis (Where & How to find the law) Applying the law, developing legal arguments, problem-solving Legal Research, Drafting & Writing	Law Clinic (Live Client) Legal Skills	Clinical (live-client), lectures, (Research-based Learning - assignment and essay writing)	*"There is not enough African content in the LLB. Even Legal Pluralism did not fully teach indigenous African Customary Law"* *"Customary Law as taught is not always reflective of African culture. It is not taught by people who appreciate African customs, and it is ever evolving and varies from community to community"* *"Although Ubuntu is taught as a dispute resolution mechanism, it has been westernised."*	LLB courses don't cohere. They should be designed to enable specialisation at the end of the LLB. Too many courses result in learning by cramming *"Apart from Human Rights, Legal Pluralism, Constitutional Law and Succession, law modules didn't seem relevant to an African context"*
S8 (LLB Student)	8	Mooting Drafting (e.g. memos) Communication and Advocacy	Mooting (extracurricular) Civil Procedure Clubs, prison visits & other extracurricular	Guest lectureships + prison visits + attachments + academic visits + seminars + other extracurricular activities, e.g. moots	But we learnt elements of customary law in Succession and family	Extracurricular activities, equip you for life after the LLB (e.g. in the Strathmore Extractive Industry Centre where I

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
					law because most marriages are customary *I've learnt dispute resolution mechanisms indirectly in Family Law* There is no need to teach Customary Law as an independent unit. Society has moved on so customary law and culture need not be part of legal education. Also, material on customary law is now westernised.	did research and coordinated events) There are some skills that you don't learn in class. "*There're some things that you just pick up on your own."* *Most things… are not taught in law school (but) you're taught in life. You're an African, you have to embrace your culture. but this shouldn't necessarily be taught in law school*.
S9 (LLB Graduate)	7 (2012-2015)	**Case analysis**: "arrangement of issues as a skill"		Lectures + Presentations + Socratic methods + externship (out of semester attachments at court)	Arbitration clauses in contracts are evidence of African dispute resolution methods Some property and boundary disputes in Africa require African	Legislative Drafting should be taught as part of LLB to expose students to conflict of law issues arising from legal transplants. *"we have those conflicts because sometimes we pick something because it is*

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
		Drafting, legal research & interpretation	Legal Research & Writing		ADR because such disputes often have a cultural context **Nyumbakumi:** a new concept coined to foster community cohesion and harmony especially following anti-terrorism legislation (evidence of aculturation or contexualisation of anti-terrorism laws in communities.)	*appealing [or] is interesting and is picked from somewhere without necessarily looking too much into the local context."* Class sizes are getting bigger and its affecting how law is taught. Legal education is now rewarding regurgitation. Law should be taught as a post-graduate course. Latter part of LLB should be devoted to specialisation. Some skill-based courses ought to be taught at university because faculties have more capacity than professional law schools Legal education should be more practical by reducing class time to give students practical experience to prepare for industry. Law is not only about litigation
S10 (LLB Student)	8	Analytical skills: to read & dissect complex material	Legal Writing & Research	Clinical work (but as extracurricular) + other curricular activities, e.g. "The Heart" Club + 300 hrs of community-based attachment + 10 weeks court-based attachment + 10 weeks attachment in a law firm	ADR module teaches mediation, negotiation, and other forms of ADR **Mediation** is the main means of settling disputes in the community. This involves sensitising citizens about their rights and informing the police about their duties. Bringing people in this informal setting helped	*"Through the group called "The Heart" we would debate issues and… although its not part of the curriculum, it's a good environment to sharpen our debating skills."* *"In Constitutional Law I've learnt issues relating to African concepts because we are learning how to develop African conceptual frameworks*
		Advocacy (oral skills) + Mediation	Law Clinic			
		Research & writing	Law Clinic			
		Interviewing, report writing	Law Clinic			

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
					resolve some problems in the Law Clinic	*(e.g. Mahmood Mamdani's Citizen & Subject)."* *"Although we learn about the theoretical underpinnings of the courses we take, we are reminded to learn the African realities, the African history, esp. the colonial history and how it is manifested today."*
S11 (LLB Graduate)	7 (1998-2002)	Opening files + Filing motions (preparing for litigation, e.g. what's the Plaintiff's/Defendant's case? How can it be presented?	Civil Procedure	Lectures – (students preferred dictation of notes to lectures)		It's important to be clear what the purpose of the law school is. Perhaps that will help determine the structure and approach to legal education. That should help the lecturer to structure the course. It will also help us determine what elements to stress, e.g. theory or skills. Since the LLB is the foundation for a legal career, there is need to stress some basic skills such as analysis, structuring arguments. It's important to also learn how different students learn. Need to try different things, e.g. group work, interactive teaching, etc.
		Practical skills	Law Clinic (extracurricular and student led)	Clinical work		
		Generally, there was very little teaching as most teachers were not available for lectures. Most lecturers were also practising or working in other places. One lecturer taught a two-semester course in two weeks. Students were more concerned about passing exams Started a law clinic with a lecturer as a patron. That's how we started learning things practically.				
FG1 (LLB Graduates)	1 & 2	Legal writing, research, advocacy, interviewing, drafting	Law Clinic & Mooting	Clinical methods (simulations, role plays & mooting +	References to ADR methods (e.g. mediation) used during clinical legal education via workshops	Lecturers don't teach skills because they don't have
		Legal writing, research & analysis	Legal Writing & Study Skills			

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
		Legal writing, research & analysis	Research Paper	Externships (court/prison visits/outreach) – all at KNUST Legon – mooting as curricular activity + drafting exercises	with ADR experts as part of externship Culture emphasises learning by doing BUT legal education is divorced from the African context	time… they're also practising (B.B.) There's a big disconnect between what you're being taught and the reality on the ground (S.N.) *"The way I learned from home is not by being sat down and [told] "you … do this and this is how we do it." It's…a doing process"* (P.L.A.) *"In our very short experience with our internships…you realise that memory really is the least skill you need* (P.L.A) *"Well, for the skills that I learned, I think I picked them up more passively rather than actively"* (B.B.) *"I don't think the skills are taught. Well, you're encouraged to pick them up but they are not taught per se"* (S.N.) *"The extra-curricular activities that we call - they are not "extra-curricular activities" properly so-called. They should be a part of the legal education*
		Drafting (power of attorney, agency agreement	Commercial Law			

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
						programme. But sadly, it's not like that…" (S.N.) *"[The LLB] should not only involve the acquisition of knowledge [but] the ability to be able to practise that knowledge."* (S.N.) *"[The] things that can actually solve problems, I learnt during the CHRI programme* (i.e. externship & outreach programme) (Y.T.)
FG2 (LLB Students)	5	Research, Interviewing, Mediating, Legal Writing, Counselling, Drafting (e.g. legal opinions)	Clinical Legal Education	Socratic method, clinical methods (live-client clinic), externships/internships (placements, including Street Law, e.g. Prison visits), and direct teaching of drafting skills	***Mediation*** in the Community Law & Mobile Clinic. "I have to do interviewing and mediation but also cases that are actually going to court." ***Mato oput*** (conception of justice in Northern Uganda: There are some conceptions of African justice which can still apply to us because we have many customary communities, even in ICC cases (*The Prosecutor v Dominic Ongwen)* (M.K.)	*[Externships (as part of CLE)] exposes you to what is really happening in practice. It is a different experience from (the) classroom*. (C.N.) *"…when you actually meet the people behind the set of facts and you've interacted with them in all the different circumstances, you realise that you cannot apply the law in such a direct, in such a plain, in such a very much removed kind of way."* (M.I.V.) *"…if it is Criminal Law and you're in first year, when they give you that substance what about following it up with a small mock trial so that it can expose you now to a*

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
		Advocacy	Mooting (extracurricular)		*"In Family Law, we recognise the extended nature of African families; we recognise the **Ubuntu** aspects of African communities; even the cultural justices - **mato oput**..., the **Gacaca** courts in Rwanda- you cannot completely say that we do not have an element of African culture- it is there."* (C.N.) ***Mailo land in*** Land Law: *"recognises usufructuary rights. The tenants on land have certain security of occupancy. These are all things that come from our customary law and they are being emphasised; e.g. a landlord cannot wake up one day and chase his tenants on his land away and as long as it affects the personal lives of people (and) as long as it has an effect on their well-being, those cultural values should be emphasised."*	*real problem (or) a moot problem?"* (M.K.) *"The rest of skills…like mooting (and) writing are out there because of student initiatives, e.g. the mooting society (or) the Makerere Law Journal or the Makerere Law Society. It takes an extra effort and it's just from the student himself to go out and maybe moot or write in a journal…and it's not that everyone who goes through Makerere Law School who will get these skills and that's where the problem is."* (C.N.) *"So, if you really want to be the best lawyer, I think you should take the initiative yourself to go out there and actually develop skills that will make you a lawyer… it's a personal initiative"* (L.A)
		Interviewing	Community Law & Mobile Clinic (part of Public Interest Law Clinic)			
		Research & legal writing	Civil Procedure			
FG3 (LLB Graduates & (Candidate Attorneys)	10	Research skills		Research-based learning, Clinical Law + Street Law), writing & drafting activities (letters and agreements), PBL in Professional Training (mooting + simulations)	*"And we have a lot of these things where culture says one thing and the law is something else and people want to enforce their culture"* (K.P.) *Many difficulties in the legal system because the*	There is insufficient oral skills despite mooting (only one instance of mooting: "[*you*] *speak for 5 or 10 minutes each and it's done. And whether it's done well or not, they get a mark and that's the end*
		Legal writing skills	Professional Training			
		Consulting skills, drafting and legal writing skills, writing notes	Clinical Law			

Participant	Institution	Evidence of Skills	Mode of Provision/Course	Pedagogical Approach e.g., Lecture, Simulation	Skills from African tradition	Perception
					law conflicts with culture. Very little taught about mediation, negotiation YET African communities are 'community-based' – No-one sits down and listens (M.L.) *"this Westernised law is very much litigation-centred and it's very autonomous, individual-centred. The undergrad law degree teaches you very little by way of mediation, negotiation and that kind of thing and the African law- or South African law certainly, is far more community-based. Far more, find a resolution rather than find a punishment."* (M.L.)	*of that*), insufficient critical reflection (K.P.) Law not sufficiently contextualised to prepare for conflict of law situations: Approach to law is "A round peg in a square hole". (M.L.) *"And a law degree has got to accommodate our local context…*" *"but if there had been some sort of community service where [we're] exposed to a wide range of problems, then I think [we]…would've learnt a lot better some interpersonal skills, interviewing skills, writing skills, note-taking, court-skills (and) all that kind of thing. I think it would be really useful*. (M.L.) I think with the clinical law, you do kind of learn some skills, but I think the bulk of the skills come from afterwards when you actually have to practise. (K.P.)

APPENDIX 7

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
1	Legal Writing	Legal English, legal writing style, writing legal correspondence & other documents, case analysis	Legal Writing & Study Skills (Core)	Online Faculty of Law Course Structure, Course Outlines and Examination Questions, Observations	**Finding and presenting sources of customary law** (Legal System & Method II Yr. 1 (Core))
	Advocacy & Drafting	Oral and written arguments, drafting memorials	Law Clinic & Mooting (Core)		
	Drafting	Drafting power of attorney, Drafting agency agreement	Commercial Law (Core)		
	Legal Research	Legal research, writing, research methods and analysis	Research Paper (Elective)		
	Interviewing, ADR skills	Interviewing, ADR skills in mediation	Law Clinic & Mooting (Core) esp. via outreach/externships		
2	Communication	English language skills for lawyers, legal reasoning	English for Law Students (Core), Logic for Law Students (Core)	Handbook for the bachelor's degree course descriptions for Programmes in the Humanities (Vol. 2, September 2017)	Immovable Property/**Customary Land Law** (Yr. 1, Post-Degree LLB) (Core); Yr. 2, LLB Regular)
	ADR skills	ADR approaches incl. negotiation, mediation, arbitration	ADR		Law of Succession (**Brief Outline of Customary Aspect**) (Yr. 4) (Core)
	Legal research	Legal research, writing and analysis	Long essay		
3	Legal Writing	Legal English, legal writing style, writing legal correspondence & other documents, case analysis	Legal Writing & Study Skills (Core)	Faculty of Law Handbook, Course Outlines, Exam Papers, Faculty Board Minutes, Observations	
	Advocacy & Drafting	Oral and written arguments, drafting memorials	Law Clinic & Mooting (Core)		
	Legal research	Legal research, writing and analysis	Long essay		
4	Legal Research & Communication	Legal research, legal writing	Legal Research & Communication (Core)	LLB Handbook	

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
	Practical skills	Legal skills training via internships, moots and community outreach	Professional Development (Yr. 1-3) Core (Yr. 1, non-scoring) coordinated by Dpt. of Community Engagement and Law Clinic		
5	Practical skills	Legal practice skills incl. interviewing, counselling, negotiation, trial practice & advocacy, ADR, drafting	Clinical Legal Education (Elective) esp. via outreach and community engagement, Field Attachment (Core), Land Transactions (Core)	LLB Handbook, Law Clinic Brochure, LLB Pre-Entry Exam Questions, Final Report of The Committee on Legal Education, Training & Accreditation in Uganda (1995), observations	**Legal Methods (Core) includes customary law**
	Legal Research & Writing	Legal research & writing, research methods and analysis	Legal Methods (Core), Social Research Methods (Core), Research Paper (Elective)		
6	Legal Research & Writing	Legal research skills, analysis, case briefing, ethics of writing,	Legal Research & Writing (core), Dissertation (Core)	LLB Programme Reviewed Curriculum (Version 2, Jan 2016)	**Customary Law in Kenya** (Yr. 2) (Core)
	Communication	Finding, evaluating, analysing, referencing, oral and public speaking skills, legal reasoning	Communication Skills (Core), Creative & Critical Thinking (Core)		ADR (Yr. 2) (Core) **Traditional Dispute Resolution Mechanisms** (TDRM) and the role of social context and cultural settings in TDRM
	ADR skills	ADR methods, traditional dispute resolution methods, negotiation, mediation and conciliation processes; court-annexed ADR	ADR (Core), Int'l Dispute Resolution (Elective)		
	Advocacy	Drafting memorials, written and oral arguments, legal research, practice related skills	Mooting (Core), Clinical Legal Education (Core) comprising - Clinical Externship, Public Interest Law & Practice, Mooting		
	Drafting	Components of legal documents, practical skills in	Legal & Legislative Drafting (Elective)		

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
		drafting legal documents and legislation			
	Practical skills	Advocacy, practical legal skills	Public Interest Law & Practice I & II (Core), Judicial Attachment (Core), Clinical Seminar (Core), Clinical Externship (Core)		
	Other soft skills	Negotiating, advocacy skills; using social media, accounting	Entrepreneurship Skills for Lawyers (Core)		
7	Legal Research & Writing	Legal research & writing	Legal Research & Writing (Core), Research Paper (Core)	School of Law LLB Program	
	Communication		Communication Skills for Lawyers (Core)		
	ADR		ADR (Core)		
8	Legal Research & Writing	Research and writing	Legal Research & Writing (Core), Advanced Legal Research & writing (Core), Research Paper (core)	LLB Course Structure, observation (Public Int'l Law oral exams)	**Law & Restorative Justice** (Yr. 4) (Elective)
	Communication		Communication Skills (Core)		
	Advocacy	Oral presentation, legal analysis and reasoning	Public Int'l Law (Core)		
	ADR		ADR (Core)		
	Practical skills	Legal practice management, accounting, case management, drafting specific conveyancing documents	Legal Practice Management (Elective), Conveyancing Law & Practice (Core)		
9	Legal research, drafting & writing	Legal research & writing, drafting simple contract, case analysis	Jurisprudence (Core) Essay & Seminar (Core)	2017/2018 LLB Faculty Brochure, Law Faculty Teaching & Assessment Policy (2010), Workstream on Curriculum Transformation (2016), Legal	**Legal Pluralism** (Yr. 2) (Core) Indigenous culture groups, their culture, and the definition of "legal pluralism",

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
				Skills Course Description (2009-2010)	
	Practical skills	Practice management, taking of instructions, book-keeping, aspects of trial advocacy, research skills, writing skills (letter of advice to client, memorandum, heads of argument), consultations with clients, drafting pleadings, attendance at trials	Legal Practice (Core) Practical Law/Law Clinic (Two Electives)		**Research Methodology** (Yr. 3) (Core) [Generic Research Skills and other legal research methods including methods Legal Pluralism, Legal Historical Research, Socio-Legal approaches]
	Research methodology	Generic research skills, other legal research methods	Research Methodology (Core)		**Law and Transformation** (Yr. 4) (Elective) Introductory debate on the universality and cultural specificity of human rights, historical overview of human rights in Africa, the African Union and human rights, an overview and analysis of the African Charter on Human and Peoples' Rights, and a comparative analysis of human rights situations in African countries.
	Advocacy	Mooting skills for students participating in regional & int'l mooting competitions	Moot Court (Elective)		
	Drafting	Practical drafting of deeds and notarial documents	Deeds & Notarial Practice (Elective)		
10	Legal research & writing	Process of legal research, topic analysis, logical reasoning, critical reasoning, approach to answering legal problems, legal writing, electronic and print resources	Legal Research Writing & Reasoning (Yr. 2) Core Research Project (Yr. 4)	Handbook 2018	**Basic IsiZulu Language** (Yr. 1) [Basic grammar, history and culture of the amaZulu]

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
	Practical skills	Field research and interviewing skills, Taking instructions, demand, general principles of legal drafting, legal correspondence, drafting agreements, drafting memoranda to counsel, client counselling, client interviewing, knowledge, skills and values appropriate for professional practice. Focus on specific skills such as appellate advocacy; and the drafting of more complex legal documents	Foundations of SA Law (Yr. 1) Core Training 1 & II (Yr. 3/4) Core		**Legal Diversity** Yr. 3 (Core) Legal Diversity in South Africa, internal conflicts of laws; African Customary Law including traditional leadership and democracy under the 1996 constitution, customary marriages, inheritance and succession, Religious Legal Systems in South Africa; including general introduction, foundations, family law and law of inheritance and succession of the Islamic law, Hindu law and Jewish Law legal systems.
	Interviewing & counselling	Interviewing & counselling skills, legal research, legal writing, legal ethics, legal issues of special relevance in the South African legal NGO/ legal aid/ public interest law environment.	Clinical Law (Yr. 4) Elective		
11	Communication skills	Academic and professional communication	Communication and Academic Literacy Skills (Social Sciences) (Yr.1) Core Academic and Professional Communication (Yr.1) Core	Online LLB Programme	**Customary Law** (Yr. 1) Core
	Legal Research skills	Legal and social research	Law and Social Research Methods (Yr. 1) Core		

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
	Practical and advocacy skills	live-client work, moot/mock trial	Clinical Legal Education I, II, III (Core) comprising seminars, assignments, live-client work, moot/mock trial, internship International Moot (Yr. 5) (Elective)		
12	Advocacy		Clinical and Practical Skills Training Yr. 4 (Core) Advocacy (Elective)	Online LLB Honours Programme	**Customary Law** (Core)
	ADR		ADR (Elective)		
	Research		Dissertation (Core)		
13	Drafting	Drafting documents such as Deeds of Transfer, Mortgage Bonds, Power of Attorney	Conveyancing (Core) Notarial Practice (Elective)	Online LLB Honours Programme	**Customary Law** Elective [integrates colonial laws and indigenous legal systems… principles of African customary law. Discusses various versions of the traditional and modern Zimbabwean customary law such as family law, marriage, property, succession, delict, contract, comparative analysis of post-colonial societies in Southern Africa, comparison between customary law and Roman-Dutch Private Law
	Communication		Basics of Communication Skills		

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
	ADR	dispute resolution incl. negotiations, mediations, arbitration, minitrials	ADR (Elective)		
	Practical skills	Negotiating, legal drafting, advocacy, office management and practice skills	Clinical & Practical Skills Training (Yr. 5) Core Work Related Learning (Yr. 4) [10 months placement (6 months at magistrate courts + 4 months in law firm/private sector]		
	Research		Dissertation (Core)		
	Advocacy	Knowledge, skills and values in procedural law and practice, applying research, argumentation, writing skills and using practical evidence in specific areas of substantive law	Advocacy (Yr. 5) (Core)		
14	Legal Research, Writing and Reasoning	Legal research, writing, legal reasoning, research methods	Legal Research, Writing and Reasoning (Yr. 1) Core Introduction to Research Methods and Statistics (Yr. 3 Dissertation (Yr. 5)	Academic Guidelines for Programmes offered in the Law School (2017)	**Introduction to Zimbabwean History** (Yr. 1) (Elective) **African Philosophy and Thought** (Yr. 1) (Elective) **Customary Law** (Yr. 1) (Elective) **Introduction to Zimbabwean Culture and Heritage** (Yr. 1) (Core)

Institution	Skills	Elements emphasised	Mode of Provision/Course	Data Source	Elements of African customary law and/or culture
	Communication		Academic and Professional Communication (Core)		
	Practical skills	Live-client work, advocacy through participation in moots and mock trials	Clinical Legal Education I, II & III (Yr. 2, 4 & 5) Core Legal Ethics and Professional Training (Yr. 3) Work Related Placement (Yr. 4) [10 months – 5 months Public Sector + 5 months Private Sector]		
	ADR		ADR (Elective)		
15	Practical skills	Legal research, file management, live-client clinical work incl. counselling, interviewing, case management, ADR, trial advocacy, provision of legal services,	Clinical Legal Education I, II, III (Yr. 1 & 4) attachments/externships, prison visits, mock trials, moots, courts visits, and legal aid to local communities	Proposal for LLB (Honours) Programme, May 2017	**Customary Law** (Yr. 3) (Core) [Focus is on the student's skills to work with customary law and legal rules in a plurality of national and international laws… understand and utilise, essential structures, processes, and utility of customary law in a changing world]
	Legal research	Legal research and writing	Legal Research (Yr. 4) (Core) Dissertation I & II (Yr. 4) Core		
	Drafting	Drafting and redrafting of documents individually and in groups	Drafting (Yr. 4) Core		