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Educational Problems and Legal Transformation in South Africa¹

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This contribution focuses on educational problems and legal transformation in South Africa. However, before dealing with the transformation of the legal profession in South Africa, a general overview will be given of educational problems in Africa as well as in South Africa.

The essential problem African universities are confronted by is that the quality of university education in the region has declined significantly as a result of dwindling resources during a period of growing enrolments. Other factors have also contributed to the crisis such as poor national economic performance, inappropriate governing structures, feeble national policies, political interference in many aspects of university endeavour, weak internal university management and campus instability².

In most African countries, with the notable exception of South Africa, the heads of universities (in some cases, even deans and department heads) are appointed by the government. Economic factors may be at the root of the current crisis in African universities, but a more creative management could have saved them from the deplorable decline which has taken place in so many countries. Many university managers simply blamed the government for the crisis, and looked to the government to solve their problems³.

¹ This article is a revised version of a lecture delivered in June 1999 at the Law Faculty of the University of Hamburg.

² See ADEA Newsletter Jan-March 1999 Volume 11 Number 1 "Higher Education in Africa: The way forward".

³ See CDE Round Table publication no. 2 1998 "The Future of South African Universities: What role for business?".

As subsidies declined, the first things to go were academic services; allocations for research were cut, followed by cuts to library acquisitions, staff development, teaching facilities, equipment, and infrastructural maintenance. Frustrated by the worsening academic environment, talented staff began to leave either to practice law for their own account or to go overseas, and the quality of instruction declined. As many governments became increasingly authoritarian and oppressive, they began to see universities as critics and adversaries to be mastered and controlled by a punitive reduction in funding. That, unfortunately, was the position in Africa.

In South Africa, prior to its transformation, the university educational system was a racially fragmented system. Gross distortions and inequities existed, including a lack of equity in the distribution of resources to institutions. Enormous disparities existed between historically black and historically white institutions. Historical white universities (HWU) are the established older universities, *e.g.* Cape Town and Stellenbosch where in terms of the apartheid policy only white students were initially allowed. Historical black universities (HBU) were created by the Government to bolster its grand apartheid policy by giving each ethnic group its own institution of higher learning. Problems encountered include a skewed distribution of the student population and disciplines, with no more than a handful of non-white students in fields such as the sciences, engineering, and technology; and governance characterised by fragmentation, inefficiency, and ineffectiveness. However, it must be stressed that, despite the negative consequences of the apartheid legacy, the university academic system as a whole is the most developed in Africa, with substantial resources.⁴

In the context of South Africa, the newly acquired dispensation has witnessed unprecedented tension in the academic field triggered by problems of resourcing institutions of higher education. Funding such institutions tops the list of problems mainly because upon funding depend other critical aspects of resources whether physical, human or technological. Acknowledging this fact, and in terms of the findings of the National Commission on Higher Education as reflected in the Education White Paper⁵ one notes that: "South Africa's present level of public expenditure on higher education is rather high by international standards and has been growing at somewhat faster rate than in many other countries. It is unlikely that the recent trend of public expenditure growth rates in this sector can be sustained over the next decade, given other pressing social needs."

There is a chronic mismatch between higher education's output and the needs of a modernising economy. In particular, there is a shortage of highly trained graduates in fields such as science, engineering, technology and commerce. Higher education has not succeeded in

⁴ See ADEA Newsletter, *op.cit.*, "The Transformation of Higher Education in South Africa."

⁵ See Education White Paper 3, August 1997.

laying the foundation of a critical civil society with a culture of tolerance, public debate and accommodation of differences and competing interests. Nor has it contributed significantly to a democratic ethos and a sense of citizenship perceived as commitment to a common good.

While South Africa's higher education can claim academic achievement of international renown, it is still characterised by teaching and research policies which favour academic insularity and closed-system disciplinary programmes. There is inadequate consideration of and response to the need of our society and insufficient attention to the problems and challenges of the broader African context⁶.

Black universities were more reliant than white universities on government subsidies and tuition fees as major sources of income. As the real values of these subsidies fell, black institutions had to raise tuition fees while having to enrol increasingly large numbers and proportions of financially disadvantaged students, despite not having adequate financial aid mechanisms in place. Consequently these black institutions had to deal increasingly with the problems of unpaid fees and, as a consequence, lower amounts were available to fund their educational operations. The obvious emerging question is how quality education could be maintained in these institutions under those conditions of financial support⁷.

The new Higher Education Act enacted by the South African Parliament in 1997 was the culmination of a process which began in January 1995. The President had then appointed a National Commission on Higher Education to provide the new government with a policy framework for the fundamental transformation of South Africa's higher education sector. Higher education institutions comprise the universities, technikons, and the nursing, agriculture, and teacher training colleges.

The Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), states in section 29(1) that:

"Every one has the right: To a basic education, including adult basic education. To further education which the state, through reasonable measures, must make progressively available and accessible."

The reconstruction and development of our nation after decades of colonial and apartheid rule place many new and urgent requirements on our national education and training

⁶ See Green Paper on Higher Education and Transformation December 1996.

⁷ See *Prof. P. Iya*, "Maintaining quality in legal education with a diminishing resource". Unpublished paper presented at the Association of Law Teachers Conference 4-7 April 1998 Glasgow Caledonian University in Scotland.

system. These include redress of past discriminatory practices, the nurturing of a responsible citizenship grounded in our democratic Constitution and the development of the knowledge and skills base of the economy and society. When these are combined with the international cultures of Lifelong Learning and the Knowledge Society, the implications for the development of a new learning system, and in particular for curricula and qualifications, are dramatic.

Assessing the current state of higher education in South Africa against the yardstick of these four general purposes, the Ministry of Education found reason for concern and an imperative for transformation. Despite acknowledged achievements and strengths, the present system of higher education is limited in its ability to meet the moral, social and economic demands of the new South Africa. Its deficiencies according to the Ministry may be briefly summarised:

"The present system perpetuates an inequitable distribution of access and opportunity for students and staff along lines of race, gender, class and geographical discrimination. There are gross discrepancies in the participation rates of students from different populations groups and indefensible imbalances in the ratios of black and female staff compared to whites and males. There are equally untenable disparities between historically black and historically white institutions in terms of facilities and capacities."

Critics may say that this is too idealistic a view. Realists would like to point out that we pretend to have 21 universities when in fact we do not. Many graduates are excluded from consideration for jobs because they come from such poor quality institutions. It is totally unrealistic and extremely dangerous to assume that the same degree of excellence can be achieved in all 21 universities. The so called HBU's find it difficult to attract qualified staff due to the fact that they are situated mostly in rural areas, students are less prepared for university due to inferior schooling in many cases and libraries are poorly stocked. Government policy and funding has to reflect this reality. Education as a whole seems to be a sector which has not yet recognised the inescapable need for tough choices.

In South Africa educational problems especially at school level have a great impact on educational problems at university level. The state secondary school system is the grave-digger of black aspirations. Education results are poor and the standards of pupils in many schools rather inferior. From 1994 to 1997, the matric cohort grew by well over five percent per annum, but university entrance passes dropped from 88 000 to 69 000.

A huge bulge in potential university entrants was predicted in the early 1990s. This has not materialised. Overall student numbers are declining, particularly at historically black universities. The bulge has developed at the level of school-leavers who do not qualify for

university entrance. These young South Africans, with unfulfilled expectations, are likely to pose political problems.

A new financing system will be a major factor determining the future of our universities, but the formula has yet to be developed. The financial crisis in higher education is compounded by costly duplications and triplications of facilities reflecting the fragmentation of the apartheid era and large numbers of under-prepared students who often take six or seven years to complete a three-year degree.

University education in South Africa is not free. University fees as well as accommodation costs and books annually amount to approximately R30 000 per year for a student who wishes to study at a university. Many of the students come from financially disadvantaged backgrounds and find it extremely difficult to make ends meet. At many of the HBU's students owe millions of Rands to their universities. These huge students debts compound the difficulties of universities who are funded by the government by means of subsidies.

Government's transformation framework for higher education has been described as the most ambitious and comprehensive in the world. But the question remains whether there is sufficient capacity to carry it through and whether there are effective strategies to bring talented black people into the academic environment. With limited resources, this poses a huge financial challenge in providing student support and attracting and retaining academic staff. Education is no longer regarded as a noble profession, and academic salaries can't compete with those in the public or private sectors.

African students now comprise at least 25 percent of the intake at most historically white universities. At some of these institutions black students now outnumber whites. By contrast, some historically black institutions do not have a single white student; and others have very few. The question can be posed whether two different sets of universities are emerging: one group consisting of multiracial institutions, and another of single race institutions?

By contrast with the racial profile of the student population, a very high proportion of the staff at universities and technikons are white; even the historically black institutions, by and large, continue to be staffed by whites. The majority of permanent academic and professional staff remain white and male.

Excellent universities are not just the product of money. They require clear policies and great leadership. How many universities with internationally competitive standards can South Africa realistically aim to sustain? South Africa will be lucky if it can afford even a small number of world-class universities and find the people to lead them.

Universities are bedevilled by the problems and costs of slow through-put, with too many students taking too long to complete their degrees. Should all universities be expected to make good the school system's deficiencies? South African universities should continue to be vigilant in their defence of academic freedom. They must make the case that academic freedom is not only essential to their identity, but also vital to a democratic society. They should also demand institutional autonomy. Yet there are obvious limits to institutional autonomy. It is not an absolute right. If no man is an island entire of himself, then, equally, no university enjoys that kind of insularity. Universities – like any other institution – exist within society and within the body politics.

At present, most captains of industry are likely to express deep concern about what they see in the university sector. They see crises; a lack of clarity about funding; duplication and look-alikes where there should be differentiation playing to local opportunities and particular strengths; they see a shambles in governance, and they are worried. Confidence has to be restored.

South Africa is a moderately-sized developing country in the midst of a complex political and economic transition. We cannot afford nor implement grand and heroic state policies or programmes. Over-ambitious policies will never be implemented because our society does not have the capacity to do so.

The higher education system has grown, in terms of head count enrolments, by 98 000 between 1993 and 1997, *i.e.* just under twenty percent. It is projected to grow, based on the institutional plans, by a further 91 000 between 1997 and 2001, *i.e.* fifteen percent. There is a trend which indicates that black students are: decreasing in the historically Black Universities, increasing in the historically Afrikaans Universities and remaining steady in the historically English Universities.

The growth of black enrolments in the historical Afrikaans Universities suggests that the role of language as a barrier to access be successfully addressed. In most cases, the historical Afrikaans Universities have adopted a combination of a dual and parallel-medium language policy.

The demographic composition of student body is undergoing major changes and is beginning to more closely resemble the demographic realities of the broader society. In the universities, the proportion of black students has increased from 56 % in 1993 to 64 % in 1997 and is projected to be 69 % in 2001. The growth in black students numbers has been accompanied by a decline in white students enrolments which have fallen from 229,000 to 187,000 in 1997 and will fall marginally to 186,000 in 2001. It seems that white students, influenced by perceptions of increased instability and falling standards, are moving into private higher education institutions. In addition this decrease may also be attributed to

emigration. This has implications for the financial stability of the higher education system as white students represent a stable core of fee-paying students⁸.

The transformation of the legal profession in South Africa will now be discussed. An examination of the legal profession as it has been in the past and as it still exists reveals a number of problems and anomalies.

The legal profession does not represent the diversity of South African society. The number of black lawyers in private practice and in the public service sector is comparatively low, as is the number of women. Black people and women are almost entirely absent from the ranks of senior partners in large firms of attorneys and senior counsel at the Bar⁹.

The distribution of practising lawyers who deliver legal services to the public is skewed. Most lawyers practise in cities and they service corporations and wealthy people. Rural attorneys tend to be white, male and Afrikaans speaking. The average member of the public, although not indigent, is not able to afford the fees which lawyers charge.

Disadvantaged law graduates experience difficulty in entering the legal profession and establishing themselves as successful legal practitioners due to the fact that many find it difficult to obtain articles. Articles in South Africa is a prerequisite to become a lawyer and involves practical training with a legal firm or other legal institution. Graduates of historically black law schools are at a distinct disadvantage when compared with other law schools in the country. Their quality are viewed with suspicion both by the practising profession and the private business sector based on one or more of the following factors: The legacy of apartheid, the history of unequal distribution of resources, lack of lecturer-student commitment, lack of discipline, general lack of culture of teaching and learning, lack of interest by parents, reluctance to participate by stakeholders, especially the private sector and maladministration in some institutions.

Until recently the academic qualifications for admission to the attorneys and advocates professions were different in that attorneys could be admitted with an undergraduate B.Proc. degree, while advocates required an LL.B. which, was offered only as a second degree. Until recently South Africa had a divided bar with advocates on one side and attorneys on the other side. This distinction is the same which exists between barristers and solicitors in England.

⁸ See Higher Education Institutional Plans: An overview of the first planning phase – 1999/2001, published by the Department of Education.

⁹ See Issue Paper – "Transformation of the Legal Profession" prepared by the Policy Unit of the Department of Justice.

Attorneys are required by statute to undergo a two year (twelve months if they attend the Practical Training School) period of vocational training, whereas there is no statutory vocational training requirement for advocates and the vocational training period for advocates who want to become members of the constituent Bars of the General Council of the Bar is six months or less.

Attorneys are obliged by statute to pass an admission exam before they can be admitted to practise, whereas advocates can be admitted to practise without subjecting themselves to an admission exam and are required to pass the bar exam only if they want to be a member of one of the constituent Bars of the General Council of the Bar.

Until recently attorneys were precluded from appearing in the High Court and still have to apply for such right of appearance and judicial offices was reserved almost exclusively to advocates and is still not considered by most attorneys to be a career option.

These problems and anomalies need to be addressed because they are prejudicial to large sections of the population and to sections of the profession and they contribute to perceptions of inequality, which may or may not be correct. Equality is a cornerstone of our new democracy. We must ensure that all lawyers are accorded equality of status and opportunity within the profession and that legal professional services are available to all who need them.

The first step in the transformation of the legal profession has already taken place with the introduction of a single qualifying degree for admission to legal practice. The Qualification of Legal Practitioners Amendment Act 1997 amended the Admission of Advocates Act, 1964 and the Attorneys Act, 1979 by introducing a four-year undergraduate LL.B. degree as the minimum academic qualification for admission to practise either as an advocate or an attorney. All but two of the twenty-one law schools in the country introduced this degree in January 1998. All law schools offered this degree by 1999.

The principal motivation for the introduction of a single academic qualification was the desire to move away from a situation in which there are perceived to be different classes of practising lawyers and some are perceived to be better qualified than others. In future all aspirant lawyers, whether they intend to practise in the private sector or the public service, will have to obtain an LL.B. degree. This change has been brought about as a result of an extensive consultative process which produced consensus between attorneys, advocates, teachers of law and the Department of Justice.

It has also been suggested that all aspirant legal practitioners should be required to do a period of community service. Various options are being investigated:

- A uniform period of community service for all aspirant legal practitioners which takes the place of articles and pupilage.
- A uniform period of community services for all aspirant legal practitioners plus a period of vocational training specific to the branch of the profession which the candidate intends entering (not necessarily in that order);
- The option to do a uniform period of community service and/or specific vocational training.

Admission exams are probably the most thorny issue still to be dealt with. Both the Law Societies and the Bar Councils insist that they must continue to administer their own admission exams, while organisations representing lawyers who were marginalised under the apartheid regime are adamant that these exams present a barrier to entry to the profession and must go. One of the issues is whether these exams should be prescribed by statute as a qualification for admission to the profession.

Consensus has not yet been reached with regard to practical vocational legal training and admission exams. Stark differences between the admission requirements of the two branches of the private practising profession existed in the past. Little more than a decade ago advocates were not required to do pupilage or write an admission exam. Attorneys, on the other hand, were required to do two years of articles and pass a notoriously difficult exam. Certain changes have taken place in recent years which make the differences in the requirements for admission to the two branches of the profession less stark. Advocates who wish to join a Bar must now do pupilage (4-6 months) and write a bar exam. The attorneys profession recognised that inability to obtain articles prevented a high percentage of law graduates from becoming attorneys and, in response, set up practical training schools and created alternative routes into the profession.

Consideration needs to be given to the introduction of a uniform requirement for the period of practical vocational training which lawyers are required to complete before being allowed to be admitted to practise for their own account. It has been suggested that all aspirant legal practitioners should do at least one year of vocational training before being admitted to practice. It has also been suggested that all aspirant legal practitioners should be required to do a period of community service.

The only justifiable reason for regulating entry into a profession is probably protection of the public interest. If the public interest requires this regulation, then a way must be found to ensure that all aspirant legal practitioners meet minimum standards of proficiency. There is some doubt as to whether the present Law Society and Bar Exams test only minimum standards of proficiency or whether they set some higher standards of proficiency.

Each year the law graduates being produced by the universities become more representative of South African society, but many of these graduates are unable to gain access to the profession, or their chosen branch of the profession. If they do gain access, many find themselves practising in circumstances which set them up for failure. This applies particularly to graduates from disadvantaged groups and, more particularly, to graduates of the historically black universities (Historical Black Universities), which were a product of the apartheid regime. The Historical Black Universities always have been, and still are, severely lacking in financial, material and human resources, which means that their graduates, almost all of whom are black, suffer a serious inherent disadvantage. Building capacity in these law schools is one of the most important challenges which we face.

The goal of transformation must be a legal profession which represents the diversity of South African society in all branches and at all levels. To achieve this we must ensure that disadvantaged graduates have the same opportunities to become successful as do advantaged graduates. We must ensure that they are set up for success.

The task of ensuring quality education cannot be left to the state alone. It is a shared responsibility. The state's job is to steer the process and ensure a positive policy environment. Where it has failed to do so, it must be held accountable. But quality education especially in Historical Black Universities depends ultimately on the commitment of all parents, teachers / lecturers, students stakeholders, and the wider community with particular reference to resourcing.

The following strategies should be considered: Capacity building in the Historical Black Universities by, *inter alia*:

- Encouraging good legal academics to teach in these institutions;
- Providing training and support programmes for staff at these institutions;
- Dramatically increasing library and other research resources;
- Arranging lecturer and student exchange schemes;
- Encouraging joint programmes with well established law schools;
- Encouraging well established law schools to share resources.

Universities must become more efficient centres of teaching and learning. The disjuncture between what secondary schools are producing and what is needed in the universities can only be addressed by more effective teaching, better curricula, and the effective use of technology.

The enormous problems of numbers, access, quality and funding are not unique. These challenges face universities the world over. There are no quick solutions. Our problems are sharpened by the apartheid past but do not stem wholly from it¹⁰.

¹⁰ See in general *D. Dowling*, "The policy of equity and redress and the problem of quality in research", in: Bulletin Vol. 5 no. 2 March 1999.