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# FROM LECTURE ROOM TO PRACTICE: ADDRESSING THE CHALLENGES OF RECONSTRUCTING AND REGULATING LEGAL EDUCATION AND LEGAL PRACTICE IN THE NEW SOUTH AFRICA

Philip F. Iya\*

## I. INTRODUCTION

South Africa's new constitutional dispensation has generated new concepts and terminologies which are not only unique but have also provoked much heated debate. They include words like: transformation, configuration, reconstruction, reparation and phrases like: African renaissance, affirmative action, and black empowerment. What makes these concepts and terminologies so significant and controversial is the peculiar South African context in which they have evolved and are currently understood and applied.

This paper seeks to interrogate the issue of reconstruction (used interchangeably with words like transformation and configuration) in the context of legal education and legal practice in South Africa.<sup>1</sup> This task of reconstructing and regulating the legal profession generally, and legal education and legal practice in particular, are currently taxing the minds of not only academics, practitioners, policy makers (especially within government) and the consumers of legal services (civil society). Various forums have frequently debated the multi-faceted issues of reconstructing the legal system and legal profession in South Africa. What this paper will attempt to achieve within the available but limited space is, therefore, only to highlight the main issues, trusting that the same will generate more details for greater debate. For that reason the argument herein will center on the following issues:

- A backdrop to the challenge of reconstructing and regulating further South Africa's legal profession;

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<sup>1</sup> Rather than engage in and limit these terms to strict definitional parameters, a simplistic approach is utilised for purposes of this discussion to ascribe to them a common denominator relating to "change" which is the subject matter of the discussion.

- Critical imperatives of the reconstruction and regulation process;
- Analysing the process of reconstructing the legal profession: legal education and legal practice as case studies;
- Specific gains and new emerging challenges; and
- Into the 21<sup>st</sup> Century: New initiatives to address the emerging challenges leading to the reconstruction and regulation of the profession.

These arguments arising from the above themes are not new to most South Africans. Those outside the country may not only find them informative but beneficial in formulating new arguments for broader discussion with comparative perspectives and emerging lessons for respective jurisdictions.

#### ***A. A Backdrop To The Challenge Of Reconstructing South Africa's Legal Profession***

The concept of reconstruction implies a construction or structure in need of change or configuration or transformation. The present discussion cannot proceed without first establishing the nature and character of that construction or structure and the need for further regulation by the state. In the context of South Africa generally and the legal profession in particular, it has correctly been observed that the change which is desired is that change which will improve the circumstances of the people of South Africa for a better life and which reflects the values enshrined in the Constitution of the new democratic state.<sup>2</sup> For the purpose of this discussion, the questions emerging are: How did South Africa come to be possessed with such a defective social and legal structure? What were and are their character demanding change? Any discussion on reconstruction has first to address those issues by answering the above questions.

#### ***B. Historical Perspectives***

It has been argued elsewhere that the context within which the prevailing socio-legal values in South Africa today need to be recognised has been defined by a variety of historical factors, notably colonialism, imperialism and the subsequent system of apartheid characterised by

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<sup>2</sup> Discussion Paper on Transformation of the Legal Profession (1999) Policy Unit of the Department of Justice, at 1.

conservatism, white domination, division and repression of the majority black population.<sup>3</sup> State policy for centuries sought to deny the same majority democratic and individual human rights, and to segregate its citizens by means of a battery of racially based legislation. This was complemented by a host of socio-political, economic and cultural deprivation by the use of oppressive and segregationist policies, laws and practices. The impact of this system on the legal profession has been documented; the legacies of which still linger on the present day.<sup>4</sup>

### *C. The Legal Profession*

#### **1. The Structure and Numbers in the Profession**

The structure of the profession and the statistics do not represent the diversity of South African society. For example, the number of black lawyers in private practice and in the public sector is comparatively very low, as is the number of women. A recent survey has shown that out of a black population of about thirty million, there are only some five hundred qualified black attorneys and less than fifty advocates. In contrast, for a white population of less than five million there are about six thousand white attorneys.<sup>5</sup> Black lawyers have been absent from the ranks of senior partners in large firms of attorneys, and can hardly be found as senior counsels at the Bar. They therefore could not be represented at the controlling bodies of the Bar Councils and Law Societies.

#### **2. Provision of Legal Services**

The uneven distribution of lawyers in cities and rural areas was evidenced by the fact that most lawyers practiced in the cities and provided service to corporations, smaller companies and privileged white wealthy people. Those in the rural areas were typically white, male and Afrikaans speaking lawyers, providing legal services to white farmers and white local businessmen. For the majority of blacks, legal services were inaccessible. First, they were poor and could not afford to pay lawyers. Second, they live

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<sup>3</sup> P.F. Iya, *Reform of Legal Education in South Africa: Analysis of the New Challenge of Change*, 31 LAW TEACHER 310, 311-312 (1997). "Blacks" for this purpose includes Indians, coloureds and black South Africans.

<sup>4</sup> *Id.* See also P.F. Iya, *The Legal System and Legal Education in Southern Africa: Past Influences and Current Challenges*, 51 J. LEGAL EDUC. 355 (2001).

<sup>5</sup> Iya, *supra* note 3, at 312. In 1997 the figures expressed in percentages are: of the total number of lawyers in the country, 85% were white, 10% black and 15% others, including foreigners.

far away from the nearest center of legal services, and have very limited legal resources and facilities in their communities. Third, they can hardly read or write. Further, they are unaware about law and their fundamental human rights. Lastly, customary law which governed their lives were largely not even recognised as law. In addition, a divided profession, inherited from the colonial past continues, making legal services even more complicated and costly.

Practising lawyers were not sufficiently involved in the provision of legal aid services. To make matters worse the definition of legal practitioner was severely circumscribed. Paralegal practitioners and prosecutors were not licensed to practice law. Nor were lawyers employed by commercial corporations, government agencies and non-governmental agencies..

### 3. Legal Education

Until recently, apartheid ideology provided the framework of education generally and legal education in particular. In 1953, for example, the Bantu Education Act ensured that all education in South Africa was officially divided along racial lines to reinforce the dominance of white rule, by excluding blacks from quality academic education and technical training. The Extension of University Education Act of 1959, which established racially based universities, applied these ideologies to higher education. The result was that entry to the universities was formally restricted on the basis of race. For black people to be admitted to white universities, they had to get special ministerial permits certifying that no equivalent programmes were offered at black universities. The logical extension of this type of segregation culminated in the establishment in the early 1980s of several universities in the independent "homelands," to service the needs of separate development.

This discriminatory system of education filtered into the system of legal education. They featured in three broad areas:

#### a) Entry into the Profession

The extent of discrimination in legal education extended to entry into the profession in two important spheres. In the first place, disadvantaged law graduates, originating mostly from historically black universities, experienced severe difficulties in entering the profession and establishing themselves as successful legal practitioners. This was so because of the process (the "ladder system") of legal education, and the quality of their education which was characterised by lack of resources and facilities..

Second, the lack of equality within the profession was exacerbated by the qualification requirements for admission to legal practice. For example, admission to the attorneys' and advocates' profession were different. Attorneys could be admitted with an undergraduate B.Proc. degree; while advocates required an LL.B. postgraduate degree. Attorneys are also required by statute to undergo a two-year (eighteen months if they attend the Practical Training School) period of vocational training, whereas there is no such statutory vocational-training requirement for advocates. The only vocational training for advocates who wish to become members of the practicing Bar is six months or less.

### *b) Regulations of the Profession*

There are remarkable differences in the manner the various branches of the profession are regulated. For example, attorneys are obliged by statute to be members of a law society which exercises professional control over them,<sup>6</sup> whereas membership of the Societies of Advocates is voluntary, and many advocates practice without being subject to the control of any regulatory authority other than the High Courts. Besides, advocates may not accept instructions from a member of the public without instructions (briefs) from attorneys, irrespective of whether the advocate is a member of one of the Constituent Bars of the General Council of the Bar.<sup>7</sup>

It is therefore significant not only to highlight the above problems and anomalies but, more importantly, to be aware of the magnitude of their impact on the legal profession. The urgency of reconstructing and transforming the legal profession needs no explanation. The question, however, has always been: how?

Before addressing this question it is necessary to establish the values (referred to as "critical imperatives" in this discussion) that are required to guide that reconstruction process. I shall outline them in the paragraphs that follow.

## II. CRITICAL IMPERATIVES OF THE RECONSTRUCTION PROCESS

Critical imperatives relate to those guiding values and principles fundamental to South Africa in the quest for transformation. They include

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<sup>6</sup> The Attorneys Act No. 53 of 1979.

<sup>7</sup> For courts decision on these issues see *Society of Advocates of Natal V De Freitas and Another* 1997 (4) SA 1134 (N). See also *General Council of the Bar of South Africa V van der Spuy* 1999 (1) SA 577 (T).

general socio-economic values, constitutional principles and professional ethos, all of which combine to effectively propel the wheels of change so much needed in South Africa. The acknowledgment of these imperatives is buttressed upon the premise that the government, institution or individual placed at the driving seat of the vehicle of change in terms of societal transformation, must be absolutely clear and devotedly committed to social and institutional aspirations expressed in the form of the above values. It is imperative for those in leadership positions, and society at large, not only to be equipped with those values, but to ensure their adherence to, and implementation of, the same for purposes of achieving higher levels of sustainable social and institutional development. The knowledge and pursuit of these values are what this paper supports and would like to promote and strengthen.

#### *A. General socio-economic values*

As argued earlier, the general socio-economic values, and indeed all values subsequently discussed, find their basis and need to be redefined in the context of historical factors like colonialism, apartheid and resulting racism. Their persistence, particularly manifested in economic and social disparities undermine the principles of a just, democratic and equal society. The economic policies of the past have served to marginalise the majority black population, especially those in the rural areas, and have created a reservoir of poverty which has become a breeding ground of all social evils. This fact explains the prevailing demand not only by the black majority, but also by members of the legal profession, for the values of a just, democratic and equal society where policies and measures are taken (reconstruction) to reduce the disparities in wealth and adjusting to the world economic order. Addressing the problem of extreme poverty forms a critical measure of realizing those values.

#### *B. Constitutional Principles*

These broad values shaped the process of democratization both before and during the struggle that led to the enactment of the 1993 Constitution,<sup>8</sup> which ushered in a new order based on the supremacy of the Constitution. The result of this process is the embodiment in the current constitution of these treasured principles:

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<sup>8</sup> Act No. 200 of 1993.

- healing the division of the past and establishing a society based on democratic values, social justice and fundamental human rights;
- laying the foundation for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
- improving the quality of life of all citizens and freeing the potential of each person; and
- building a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.<sup>9</sup>

The focal point of the Constitution is the Bill of Rights, the cornerstone of democracy in South Africa.

The rights provided for include guarantees that everyone is equal before the law and has the right to equal protection and benefit of the law;<sup>10</sup> that “everyone has the right to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent tribunal or forum,”<sup>11</sup> and that “every accused person has the right to a fair trial, which includes the right . . . to have a legal practitioner assigned to (him or her) by the State and at State expense if substantial injustice would otherwise result.”<sup>12</sup> The Constitution also provides that the State “must respect, protect, promote and fulfill” these rights.<sup>13</sup>

### *C. Professional Ethos*

Every profession has its own standards, values, and ideals and principles. These, constitute the professional ethics, concerned with the rules of conduct and precepts which lawyers are required to adhere to in the course of practicing their profession, as well as extra-professionally, while

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<sup>9</sup> Preamble to the final Constitution, Act No. 108 of 1996.

<sup>10</sup> Section 9(1).

<sup>11</sup> Section 34.

<sup>12</sup> Section 35(3) (g).

<sup>13</sup> Section 7(2).

they promote the profession.<sup>14</sup> They provide the norms, principles and values in terms of which the ethical conduct of lawyers is judged in order to protect the public against professional misconduct. They also constitute its ideals and character and represent the behavioral practices of the profession.

Cardinal among those values is principle of equality, which the Constitution refers to as the cornerstone of South Africa's society. It is critical that all lawyers are accorded equality of status and opportunity within the profession, and that legal services are available to all who need them. It has been duly noted that,

"The object of the quest for equality is not to reduce the standards for the profession to the lowest common denominator . . . but rather to ensure that all legal practitioners attain a high standard of competence, are treated with dignity and serve (society) with dignity, no matter which branch of the profession they belong"<sup>15</sup>

To attain those high standards of competence and serve society with dignity, lawyers must adhere to other professional values aimed at:<sup>16</sup>

- protecting the public against professional misconduct;
- maintaining the honour and dignity of the profession;
- promoting the highest standards of justice;
- securing the culture of friendly cooperation by treating professional colleagues with utmost courtesy and fairness;
- establishing honourable and fair dealings with clients irrespective of the nature and caliber of those clients; and
- ensuring that members of the profession discharge their responsibilities to the community in general.

The process of reconstruction of the administration of justice must not compromise standards. Members of the profession must not only comply

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<sup>14</sup> E.A.L. LEWIS, *LEGAL ETHICS: A GUIDE TO PROFESSIONAL CONDUCT FOR SOUTH AFRICAN ATTORNEYS* 1 (1982).

<sup>15</sup> Discussion Paper on Transformation of the legal profession *supra* note 2, at 5.

<sup>16</sup> See *THE INTERNATIONAL CODE OF PROFESSIONAL ETHICS*, Oslo, 25<sup>th</sup> July 1956. See especially paragraphs 2, 3, 4, 6, 9, and 10.

with ethical values, but should be believed to be doing so by all who come into contact with them, whether in their professional or private life. The interest in public service and status as an officer of the court require that members of the profession not only avoid evil but also the appearance of evil.

All values referred to above can neither be adhered to nor promoted in a society where social, economic and legal disparities undermine the principles of a just, democratic and equal society. The commitment to reconstruction of the legal profession generally, and legal education and legal practice in particular, cannot lose sight of these cardinal values which must of necessity be the driving force behind the process.

### III. ANALYSING THE PROCESS OF RECONSTRUCTING AND REGULATING THE LEGAL PROFESSION: LEGAL EDUCATION AND LEGAL PRACTICE AS CASE STUDIES

Against the background of the historical factors influencing the current status and role of the legal profession and the critical imperatives of a value-loaded need for change, one now needs to consider the processes that have been unfolding in the quest towards reconstructing and regulating South Africa's legal profession generally, and legal education and legal practice in particular. A clearer perspective of such an analysis can be achieved by first considering the formative stage of the process, followed by the consolidation stage, from both of which one can easily proceed to assess what has been achieved and what remains as emerging challenges.

The formative stage in positive and constructive terms started in 1991 when a conference was organised by the Department of Justice to discuss the thorny issues relating access to justice. In attendance were various representatives like university law Deans, attorneys and advocates on behalf of the private practitioner, and staff of the Department of justice. The significance of this conference was not so much the gathering of the different branches of the profession, but rather the issues at hand for discussion, namely:

- the acknowledgment of the fallacy of the previous system of justice which not only excluded the majority of the people from democratic participation but also denied them the enjoyment of basic human rights; and
- the quest for equality and human dignity.

In so far as legal education was concerned, the conference provided the opportunity for participants to question for the first time in the new

dispensation the entire system of legal education, with particular emphasis on the legal qualifications for the practice of law within the broader context of access to justice. This interrogation had serious impact on the practice of law because issues of entry into the profession, distribution of legal practitioners along racial, gender and geographical terms, control and regulations all came to the fore for serious debate. Besides, the forum was a clear demonstration of the need for consultation with all stakeholders on such critical matters affecting the profession generally, and in particular legal education and legal practice in South Africa.

The consolidation stage between 1994 to 1999 was characterised by three important processes, the first of which was the continuation of the consultation process from both inclusive and exclusive perspectives. From an inclusive point of view, the Department of Justice, through organising several National Consultative forums attended by all branches of the profession,<sup>17</sup> and the Law Society of South Africa through its Regional and National Liaison Committee Meetings also attended by most stakeholders in the profession,<sup>18</sup> drove the process forward. Exclusive meetings have been those held by each branch of the profession. The academic branch, for example holds congresses for teachers of law in Southern Africa every eighteen months with the respective Deans of Law meeting whenever so required.<sup>19</sup>

The second aspect of the consolidation is the narrowing of issues for transforming the legal profession and putting in place a clear roadmap to effect that objective. In that respect the consultations referred to above played a crucial role, and *Justice Vision 2000* was one of the most important results of that process. Its importance remains, in the words of the then Minister of Justice, that it

describes the vision of a new system of justice for South Africa. . . (and) sets out the policy guidelines and provides a framework for managing the transformation of the justice system and all the institutions that deliver legal and legislative services to the public and the state departments.

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<sup>17</sup> After 1991 other Consultative forums were held in November 1994 in Cape Town, in November 1996 at the University of the Witwatersrand; in April 1998 in Durban; in November 1998 in Johannesburg and in November 1999 at UNISA in Pretoria.

<sup>18</sup> Regional and National Liaison Committee meetings are held every year.

<sup>19</sup> The last Law Deans meeting coincided with the National Liaison Committee meeting of the Law Society of South Africa both of which were held from 9-10 October 2000 in Pretoria.

It maps out the concrete steps that will be taken to make the vision come true. It outlines the ways in which progress will be evaluated and how the system will be made accountable to the public.<sup>20</sup>

Within this broad five year national strategy for transforming the administration of justice, specific projects were being formulated to reconstruct the legal profession generally and legal education and legal practice in particular.

The final aspects of the consolidation were the specific proposals with regard to academic qualifications (a new LLB curriculum and degree); practical experience as part of the new LLB (its control, management, assessment and funding); vocational training (whether community service forms an integral part); admission examinations; foreign qualifications and continuing legal education. These are critical issues affecting legal education and legal practice. The preparation of the White Paper on the same issues to generate more discussions was, therefore a significant part of this consolidation process.

#### IV. SPECIFIC GAINS AND NEW EMERGING CHALLENGES FOR LEGAL EDUCATION AND LEGAL PRACTICE

##### *A. Gains for Legal Education*

The greatest gain of the above process so far for legal education in South Africa is the realisation of the vision of equality in the qualification for entry into the legal profession. As satisfactorily observed, the first step of the reconstruction in that direction is the introduction of a single qualifying degree for admission to legal practice. This was effected by the Qualifications of Legal Practitioners Amendment Act<sup>21</sup> which amended the Admission of Advocates Act<sup>22</sup> and the Attorneys Act.<sup>23</sup> It introduced a four-year undergraduate LL.B degree as the minimum academic qualification for admission to practice either as an advocate or as an

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<sup>20</sup> Omar, A M (Dr), then Minister of Justice: Foreword to JUSTICE VISION 2000 (1997) Department of Justice p(iii).

<sup>21</sup> No.50 of 1997.

<sup>22</sup> No.74 of 1964

<sup>23</sup> No.53 of 1979.

attorney.<sup>24</sup> This important gain must be appreciated against the following background that:

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 practice in the private sector or the public service, will have to obtain an LL.B degree.<sup>25</sup>

The issue of “levelling the playing field” therefore to achieve equality relating to the number of years of study, content of curriculum, nature of the degree, recognition by SAQA and other related issues have been concluded with relative ease.

The other important aspect of the gain is the success on the part of the Department of Justice to not only bring together the various and differing branches of the profession but to successfully encourage joint debates and eventually obtain some consensus, considering the intensity of their different and opposing views and the complexity of the issues involved.

### ***B. Gains for Legal Practice***

A notable gain for legal practice was the effort on the part of the Department of Justice to use the process of consultation effectively in order to deal comprehensively with all issues of legal practice, instead of a piecemeal approach (which was suggested by some in other quarters). The arguments for a holistic review and reform of all policies, laws and practices prevailed. The approach employed by the Department of Justice so far: a mechanism of research by task teams, consultations and discussions in national forums point to the right direction.

An example of that success is the Legal Practice Bill which is currently being debated by all stakeholders. This Bill is comprehensive; it continuously seeks to consolidate into one piece of legislation what up to now are separate statutes regulating the different branches of the profession. It's primary aim is to regulate, in the public interest, the standards of education and training for legal practice; qualification for admission to the

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<sup>24</sup> The 1999 Discussion Paper on Transformation of the Legal Profession *supra* note 2 ,at 5.

<sup>25</sup> *Id.*

profession; license to practice; discipline in respect of improper conduct; public indemnity in respect of the misappropriation of funds; and statutory authority to control all these various aspects of legal practice for the whole profession.<sup>26</sup> In a notice to the public to respond to the draft Bill, it was observed, that the Bill's publication is part of the consultative process, and in particular, of the National Legal Forum on Legal Practice, during which consensus was reached on a number of important issues to legal practice.<sup>27</sup>

To reflect those concerns the Bill is subdivided into six parts, each dealing with;

- establishment of the South African Legal Practice Council;
- regulation of legal practice, including qualification for legal practice;
- the legal practitioners' fidelity fund;
- establishment and management of trust accounts;
- disciplinary structures; and
- complaints of misconduct on the part of legal practitioners.

The success of the process of transforming legal practice through comprehensive legislation was acknowledged and approved at the last National Liaison Committee organised by the Law Society of South Africa to which all branches of the profession were invited.<sup>28</sup> What also emerged from this meeting were certain provisions of the Bill over which, as expected, no consensus could be reached. A task team was accordingly appointed to consider those thorny issues and make recommendations. As we consider the emerging issues to be serious future challenges, it thus becomes important to analyse them under a separate heading.

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<sup>26</sup> The 1999 Discussion Paper on Transformation of the Legal Profession *supra* note 2, at 8-9.

<sup>27</sup> The Notice attached to the Bill was issued by Mr. P Naidoo of the Directorate of Parliamentary Legislation, an arm of the Department of Justice.

<sup>28</sup> Held in Pretoria on 10 October 2000. The present writer had the benefit of participating in the discussions of this important meeting.

### C. *New Emerging Challenges*

The *Justice Vision 2000* which the 1999 Discussion Paper on Transformation of the Legal Profession summarises, and the present Legal Practice Bill which attempts to implement it, have raised issues about the reconstruction of the legal profession, legal education and legal practice. This has provoked heated debates among legal academics and practitioners. While some consensus and gains have been achieved, as mentioned earlier, serious concerns have been voiced from different quarters, suggesting that the process of transformation is far from over. The most serious criticisms of the new process of reconstruction and regulation of the system of legal education and legal practice, are their degree of success in the achieving the “levelling of the playing field” so that discrimination can be eradicated in the profession. In the case of legal education, for example, critics argue that the inferiority of the education which has and continues to be offered to black students in segregated universities (generally referred to as Historically Black Universities, (HBUs) continues to be a major factor contributing to a serious imbalance in the profession. In the same vein, critics of the new Bill also argue that the provisions of the draft Legal Practice Bill would adversely affect the independence of the legal profession and the judiciary, thus prejudicing the administration of justice.<sup>29</sup>

Such concerns unquestionably pose tremendous challenges, the nature and details of which need not only to be analysed but immediately addressed in order to take the process forward. Crucial among the new emerging challenges are the following:

- One of the causes of the problem of inequality in legal education system has been traced back to the education and training offered by HBUs which lack the necessary institutional resources and infrastructure to provide and maintain quality education. In that respect the reconstruction of tertiary institutions generally and HBUs in particular, has and will continue to be a major challenge, as indeed illustrated by the current debate on the size and shape of higher institutions of learning.<sup>30</sup>

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<sup>29</sup> For details read: Gauntlett, J: *What's Bad for the Bar Bodes Ill for the Bench*, SUNDAY TIMES, 7 January 2001, at 2. See also Maduna, P., *Aim of the Lawyers Bill is to Protect the Public Interest*, SUNDAY TIMES, 28 January 2001, at 20.

<sup>30</sup> For some debates on quality education in HBUs see P. Iya, *Maintaining Quality in Legal Education with a Diminishing Resource - Experiences of Historically Black Universities in South Africa*, 2 STELLENBOSCH L. REV. 244 (2000).

- Language has been cited, on many occasions, as an impediment in the legal profession. The translation of the Constitution into the eleven official languages for meaningful and practical use by the profession will continue to pose further challenges.
- The continued denial of entry to the legal profession by certain legislative provisions that regulate such entry contravene constitutional provisions on freedom of trade, occupation and profession. The emerging challenge, therefore, is how to ensure that every South African has the opportunity to exercise their right to such freedom and that no legislation remains in place which upholds standards in the legal profession at the expense of disadvantaged groups.
- With particular reference to legal education and legal practice, it is desirable that the Legal Practice Bill should provide for some minimum course-work including practical training as part of a one-year postgraduate practical vocational training requirement for admission to legal practice. This is to ensure that all graduates are exposed to some practical skills development.

However, a number of challenges in that regard remain unaddressed, namely:

- during the vocational training, what period should be allocated to coursework and how should this period be measured,
- what should be the content of the coursework and how should it be evaluated;
- who should control, finance, and accredit practical training and on what basis;
- should a uniform community service for legal practitioners be included in the university curriculum as part of obtaining the four-year LL.B degree, and also as part of the post-graduate vocational training programme. Should this be compulsory or voluntary and if so for how long?

The current Minister for Justice, while affirming his commitment “to ensure access to justice for all South Africans so that the fundamental rights which are guaranteed to all citizens by the Constitution are made

meaningful”, added his voice to the new emerging challenges by raising the following concerns:<sup>31</sup>

- the need to create a truly non-racial , non-sexist legal profession which will strive to rid itself of its apartheid-based past;
- a lack of unity in the profession, preventing it to be fully self-regulating;
- the delivery of legal services to the public at an affordable cost;
- the general paucity of experienced-based skills especially among black and female legal practitioners;
- the failure to create a sufficient pool of legal skills from which fit and proper people for the Bench may be selected;
- the need to devise court management and case management systems which will ensure maximum utilisation of court resources; and
- the enforced perpetuation of the split profession requiring a litigant to use two lawyers when one would be sufficient.

The issues raised above are thorny challenges which have not been adequately addressed thus far. Even the Legal Practice Bill currently for debate fails to respond to some or all of the issues – hence the need for new initiatives.

#### V. INTO THE 21ST CENTURY: NEW INITIATIVES TO ADDRESS EMERGING CHALLENGES

The Department of Justice ought to be commended for publication of *Justice Vision 2000*, which outlines the five year national strategic plan for transforming and controlling the legal profession, for providing some detailed strategies in the reconstruction of legal education and legal practice particularly in the Bill and the Discussion Paper preceding it. However, the debate in the submissions to these documents need to be exposed further.

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<sup>31</sup> The concerns were raised in his speech, TRANSFORMATION OF THE JUSTICE SYSTEM, delivered to the Pretoria Press Club on 30 August 1999.

### ***A. Commitment and Dedication To Change for a Better Life***

It is one thing to accept the evils of the past and acknowledge the need for change in the profession. It is yet another to commit to ensuring that transformation is effected and sustained. There are those conservative branches of the profession who have insisted on no change or little change to the existing rules and procedure. The progressive forces, on the other hand, argue that such a position does nothing but perpetuate the evils of the past. A new initiative has to be designed to ensure each branch of the profession identifies itself fully with the values, aspirations and challenges presented by the new democracy, and by the constitutional imperatives which guarantee that access to justice for all is implemented to give the fundamental human rights a meaningful effect.

It is argued that some of these attitudinal resistance to change have their roots in the legacy of apartheid. For that reason the question of initiating new programmes of a national dialogue to combat racism be extended and intensified so as to engage all sectors of the society, including the various branches of the legal profession.<sup>32</sup>

### ***B. More Effective Communication and Closer Cooperation***

New initiatives must also be directed towards more effective communication and closer cooperation on issues of general concerns to the profession generally and legal education and legal practice in particular. In this regard it is being advocated here that the organisation of periodic conferences, seminars and workshops which not only provide opportunities for advocacy and dialogue between different branches of the profession but also ensure that all presentations, the involvement of participants and the outcome of such activities focus on the collective vision and mission of the profession. In addition, aggressive information dissemination, management of information, exchange system and collaborative research projects and outreach programmes involving the pooling of skills and resources are all integral part of the kind of new initiatives contemplated for and by the members of the profession.

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<sup>32</sup> One such example of position taking and "digging in" relates to the issue of "fusing" the profession on which the General Council of the Bar is totally opposed (see their paper: "Discussion Paper on Transformation of the Legal Profession - Response by GCB at pp 16 - 20)

### *C. Meaningful Reduction of Disparities*

Although the question for compensation for the nations and peoples who have suffered as a result of slavery, imperialism and colonialism over many centuries is being considered at an international level, new national initiatives must also be embarked upon aimed at addressing speedily the question of provisions of reparations for victims of apartheid. The proposed national programme of action on racism highlighting such initiatives should also be extended to include disparities encountered in the legal profession as a result of apartheid. Initiatives aimed at reducing the disparities in wealth, including land and tenure reform, access to capital, skills and training for the poor will produce the important positive impact on access to justice for all consumers of legal services. In this respect the "Declaration of Commitment by White South Africans" has to be commended as a new initiative especially as it is aimed at establishing a Development and Reconciliation Fund.<sup>33</sup>

### *D. Decolonizing the Legal Profession*

Issues relating to decolonizing the eurocentric nature of South Africa's laws, legal systems and the legal profession, and replacing them with afrocentric systems and structures are seldom discussed. They should be a critical part of reconstructing our legal systems structures and institutions. Initiatives should therefore be taken to ensure that any reform in the law and procedures relating to the legal profession does not ignore such an important topic. Future review of law curriculum in universities to address this issue would be a necessary step towards the desired goal.

### *E. Emphasis on More Empirical Research*

That South Africa is in a transition of major proportions is not in issue. What is really at issue is that in the area of legal education and legal practice, this process of change will involve the provision of legal services and attainment of justice for all according to the rule of law and the support for reforms aimed at achieving those goals. It will certainly be difficult to achieve those reforms without the required empirical research to meet the new social demands and aspirations. Not only is the proper direction to that change important, but serious commitment to empirical research is equally

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<sup>33</sup> For details see M. Burton, and C. Niehaus, *Whites Invited to Apologise for Past*, THE SOWETAN, 15 December 2000, at 17; C. Bauer, *Who is Afraid of Commitment?* THE SUNDAY TIMES, 17 December, 2000, at 17; J. Seepe, *Mixed Reaction to "Apology"* THE SOWETAN, 18 December 2000, at 7.

crucial. New initiatives towards such approach open new avenues of development-oriented legal education and legal practice by analysing new sources of problems and their magnitude. They also examine the social context in which the profession operates and by exploring all factors, legal and non-legal, which limit legal education and legal practice to meet the needs of society. They assist by developing competent lawyers necessary for a just and democratic society.

## VI. CONCLUSION

This paper has highlighted the issues of reconstruction of legal education and legal practice in South Africa. It has noted that South Africa has emerged from a protracted era of colonialism, imperialism and apartheid to a new dispensation characterised by the constitutional principles entrenched in the interim Constitution and in the preamble of the final Constitution. The values derived from these and other principles have been identified as critical imperatives to drive the process of the reconstruction of the country generally and the legal profession in particular. This paper has not only established that the devastating consequences of apartheid have continued to cast a dark and threatening shadow over the new-found and hard-fought democracy which have posed several challenges to legal education and legal practice. This paper argues that while some gains have been achieved, there still remain some hurdles to be overcome during the 21st century.

In acknowledging emerging strategies and exploring the initiatives for effective reconstruction and regulation of the profession, constraints should be expected, and remedies which are more concerned with suppressing rather than removing causes should be avoided. As rightly observed:

The crisis (of reconstruction) consists precisely in the fact that the old is dying and the new cannot be born; in this interregnum a great variety of morbid symptoms appear.<sup>34</sup>

In the case of the legal profession, the problems infesting it are symptomatic of the state in which apartheid has, to a large extent, plunged South Africa to a deep end. In attempting to find solutions through the process of reconstruction and state regulation, nothing can be worse than an approach, whether in terms of policy law or practices, which succeeds in blocking safety valves and alarm signals while leaving unchanged the

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<sup>34</sup> KABURISE J B: THE OLD IS DYING AND THE NEW CANNOT BE BORN - THE DILEMMA FACING LAW SCHOOLS IN SOUTH AFRICA, paper presented at the University of Fort Hare Faculty of Law Transformation Workshop held from 18 - 20 July 1996 at Fort Hare, at 1.

conditions which have built up pressures to the point of explosion. The suggestions listed are therefore aimed at addressing squarely the causes of the problems rather than their morbid symptoms. By so doing, it is hoped that this analysis of the effective reconstruction of legal education and legal practice has successfully been discharged.