FOUNDATIONS OF SOUTH AFRICAN LAW: 
TEACHING LEGAL HISTORY FROM A 
THEMATIC PERSPECTIVE

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1 Background

Since the introduction of the four-year undergraduate LLB degree in 1996, various factors, beside the need to implement curriculum reform in courses which existed previously as post-graduate courses, have demanded that legal educators review traditional approaches to their teaching.\(^1\) Some of these considerations include:

* the reality of dealing with first year students, straight out of an often deficient secondary school learning environment, which seems to encourage dependency on teachers;
* the changing demographics and profiles within the student population;
* problems of academic literacy in learners, not solely attributable to the presence of many multilingual students, many of whom now have English as a second or even third language;
* the students’ lack of a contextual framework in which to locate law courses, particularly evident when teaching a course about legal history to first year law students;
* undergraduate law students’ lack of exposure to varied ways of thinking that would have been acquired by exposure to studies in other academic disciplines.

Added to these factors, is the knowledge that demands for increased access for historically disadvantaged,\(^2\) mature, and part-time students are likely to increase,

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1 Ogunronbi "The challenges to legal studies in an era of transformation" 1998 SALJ 496; Motala "Legal education in South Africa: Moving beyond a couch potato model towards a lawyering skills approach: A case for a comprehensive course on legal research, writing and analysis" 1996 SALJ 695; Woolman, Watson & Smith "Toto, I’ve a feeling we’re not in Kansas anymore: A reply to Professor Motala and others on the transformation of legal education in South Africa" 1997 SALJ 36-41.

while improving academic preparedness for undergraduates can be most effectively achieved within the university and preferably within the specific disciplines.3

2 Redesigning the curriculum

2.1 Values and content

In redesigning the Foundations of South African Law module, a group of law lecturers at the Howard College School of Law at Natal University in Durban were convinced of the need to make the historical background of law relevant to the current context of post-apartheid society and to reflect the tremendous impact of the new South African Constitution. Fedler and Ockers’s comments, advocating a contextual approach to teaching legal history, have resonance here:

In regard to the law, therefore, the principle of invoking memory involves recalling the roots of modern legal practice for the purposes of examining the context within which the law came about, reflecting on its evolution over time, questioning whether it does (or should) continue to apply and considering its most appropriate application in line with substantive equality.4

We hoped too to attempt to inculcate social justice and ethical values in our first year students.5 Discussions initially were based on perceptions of student responses to traditional history courses, as well as the desire to explore universal themes of justice, connecting the ideals and principles of the past with the values underlying the new democratic dispensation, such as the right to equality and access to justice.6 We also saw an intellectual benefit in examining the relationship between past traditions of South African law and the substantive needs of the people as embodied in the sections of the Bill of Rights that establish the rights to healthcare, particularly in the light of the current HIV/AIDS pandemic facing our country.

6 Hartmann & Warren "Perspectives on a framework for curriculum development created for use in the Faculty of Social Science and Humanities at the University of Cape Town" 1994 SAAD Conference 250.
An important concern in selecting new materials was the need to identify the specific learning outcomes that we intended students to achieve for each section, in line with higher education policy imperatives. Clearly the knowledge outcomes would address the substantive factual content that was to be covered. Critical reading and legal writing skills, as well as the development of research and oral presentation skills, were generally identified as appropriate skills outcomes to embed within the materials design. In respect of the values outcomes, our central contention was that certain core constitutional values should underpin the choice of topics, and these in turn should cohere as a means of developing an overarching sense of the historical foundations of our law. In order to acquire the skills, which were considered as useful for the practice of law, students would have to wrestle with key questions relating to these values in the course of completing the various assignments in each section.

2.2 The students

Many students at first year level express a sense of alienation or disinterest when dealing with a chronological presentation of factual material on the influence of Roman law, indigenous African customary law, Roman-Dutch law and English law in developing South African law. The vastly differing backgrounds and life experiences of incoming students, as well as their expectations of study at tertiary level, are obstacles that can impact upon engaging learners in a history course. Material that is "abstract and remote from the learner's experience ...(will) tend to reduce curiosity and learning".7 Thus we had to be mindful of exactly who our learners are, and set realistic expectations in relation to their abilities, interests and life experience. Finally, we began with an appreciation that students naturally have diverse talents and learning styles and therefore our assessments and approach should reflect and accommodate such variety.8

2.3 Methodology

We were persuaded by research findings and experience that traditional teaching methods, such as the transmission mode of teaching in the large class lecture, could also militate against effective student learning and meaningful engagement

7 Keller "Motivational design of instruction" in Reigeluth (ed) Instructional-design Theories and Models (1983) 404.
8 Australian Vice-Chancellor’s Committee: Guidelines for effective university teaching: April 1993: 1.2 Teaching: 1.2.1 Effective university teachers select from a range of teaching approaches and teaching media those which will help students to meet subject and their own learning objectives most effectively.
with the contents of the module. The students’ lack of a substantial conceptual framework of reference in law made it unlikely that they would become active learners, eager to appreciate the historical roots of doctrines, or the core values we were attempting to inculcate, unless we were attentive to the motivational value of actively involving them in their learning process. We addressed this by using only one large class lecture per week. Teaching in small group sessions, supporting student learning, guiding problem-solving and inquiry in a personal, student-centred environment was the preferred method chosen. Financial constraints relating to the cost and labour-intensive nature of such a choice were creatively overcome by using Masters students, participating in a Legal Education module, as well as selected final year student tutors, participating in a tutor-training, credit-bearing LLB course (Teaching Legal Skills), to assist with the interactive teaching groups. Lecturers and tutors who teach on the course are supplied with a Teacher’s Manual which includes explicit guidance on the seminars and tutorials, as well as providing marking grids, samples of assignments and teaching tips. An outline of each tutorial and weekly seminar is included in the course materials, while a weekly preparation session for each group of lecturers, tutors and graduate assistants is held to ensure quality and consistent delivery. Teaching issues, assignments, the marking and moderation of assignments, or problem areas are thoroughly canvassed. This has unexpectedly promoted reflective practice, developed a strong sense of camaraderie and a sharing of expertise amongst staff members.

2.4 Structure and assessment

Pedagogical theory, as well as lengthy consultations within the design task team, resulted in the decision to approach the subject matter thematically. A thematic approach would establish a contextualised framework for tracing the ideals and principles of equality, access to justice and the right to healthcare mentioned above, and it would, in turn, allow for more critical engagement on those topics. Learners would be empowered to make connections across the themes, such as linking the equality provisions in the Bill of Rights to provisions which prevent employers from discriminating against employees who are HIV positive.

11 Ramsden 119.
13 Hartmann & Warren 247.
Guiding principles in the design process were:

* sequential development in the selection of text and cases, tasks and workload;
* vertical integration, which involves the provision of continuity in the sense of recurring opportunities to practice and master the desired outcomes;
* horizontal integration, which affects conceptual coherence by creating linkages across the course and across the entire discipline.\(^{14}\)

Research confirms that deep learning is increased when frequent links are made between new abstract concepts and students’ existing knowledge, whether it be everyday understandings or specialized disciplinary learning.\(^ {15}\) We wished to avoid an emphasis on surface learning demands in our assessments, as these would have the effect of perpetuating superficial rote learning and undermine independent, thoughtful and deep learning that is appropriate at tertiary level.\(^ {16}\) Thus continuous assessment, covering a variety of different assignments both written and oral, was selected.\(^ {17}\) Explicit marking criteria are set out for each assignment and students submit a first draft and a final draft for major written assignments. Feedback, in the form of written comments and one-to-one individual conferences, is provided timeously on all written work. A "commenting workshop", offering guidance on appropriate critiquing comments, is held for participating lecturers and tutors at the beginning of the semester. This approach reflects our serious commitment to addressing the development of legal writing skills from the first year of law school. In this way too, an informal mentoring system between staff, tutors and students has been built into the course design and first year students benefit from the personal attention and close relationship with a staff member. The module embodies many of the seven principles of good undergraduate teaching practice outlined by Chickering and Gamson.\(^ {18}\)

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\(^{14}\) Tyler Basic Principles of Curriculum and Instruction (1949) 63-64.
\(^{15}\) Sheppard & Gilbert "Course design, teaching method and student epistemology" 1991 Higher Education 237.
\(^{16}\) Hartman & Warren 248.
\(^{17}\) Currie "Validity and reliability" in Lloyd-Jones & Bray (eds) Assessment: From Principles to Action (1986); Australian Vice-Chancellor’s Committee Note 7: 1.2.2 Effective university teachers select from a range of assessment methods for each subject, a combination of methods which meets the criteria of validity, fairness, and appropriateness for subject goals and specify these clearly and unambiguously.
3  The Foundations of South African Law module

The first section of the module was designed as a broad historical overview, introducing learners to the sources of the law and providing a foundation for the comparisons and analyses which follow. The approach adopted is to highlight the relevance and significance of the historical sources and to emphasise their ongoing contribution to our current understandings and legal principles.

Each subsection begins with a hypothetical, contemporary legal problem which is based on a legal doctrine that has its roots in one of our historical sources of law. For example, in order to introduce indigenous or African customary law as a historical and legal source, the clash of legal pluralism inherent in cases such as *Mtembu v Letsela*, where the customary law of intestate succession comes into direct conflict with the constitutional value of equality, specifically gender equality, is the starting point. This theme resonates through both the subsequent equality and access to justice sections. Students are immediately drawn into the contemporary debate, and then the process of elaborating upon the origins of the current rule retains their interest.

The chapter on Roman law begins with a hypothetical problem in which a purchaser at a local flea market buys homemade pickles that have been unhygienically bottled. This defect constitutes a latent defect, resulting in consequential loss, in the form of medical expenses, to the buyer. Liability for latent defects and the liability of a manufacturer for loss suffered is a means to engage students in tracing the origins of Aedilitian remedies in the Roman market place. Roman-Dutch law is accessed through a discussion in which flatmates become embroiled in a problem relating to the *huur gaat voor koop*-doctrine in lease. The influence of English law on our legal system is considered by examining how the reliance theory in contract became incorporated into South African law by means of a dictum from *Smith v Hughes*. A problem, in which a student is sent a letter, offering him employment, which the employer subsequently wishes to withdraw on the basis that it was sent in error, evokes contractual rules that originate in English law.
The assessment for this section requires each learner to select a case from a suggested list and to prepare an oral presentation for his or her small group. Each student must explain the facts of the selected case, discuss the historical sources relied on in the judgment and then evaluate the current value and applicability of such a rule according to specified marking criteria. In this way, students independently study a case, gain an appreciation of how sources contribute to the development of the law, develop critical judgment on a policy issue, as well as practise their skills of oral presentation.

Students have a complete set of written materials in the form of our course textbook. The hypothetical problems are discussed and related to their historical origins during the weekly tutorial class. In the double seminar class each week, lecturers facilitate the debates on the historical theme, analyse cases related to the materials and guide the problem solving, whilst extending students’ intellectual appreciation of the richness of our legal heritage.21

Following upon this introductory section, learners progress through a series of themes that have significant relevance in the present and have a correspondingly meaningful past. The theme of equality provides a powerful vehicle for whetting students’ appetites for a study of constitutional and philosophical issues. The section begins with an overview of South Africa’s history of inequality and emphasises the pivotal position of the Constitution22 in restoring the values of dignity and equality, while also aiming to bring about substantive equality through socio-economic and other rights. A digression into the history of equality, tracing its ancient Greek and Roman roots, through to the great philosophers of the Renaissance, the Reformation and the Age of Enlightenment follows.23 Revolutions, and the move toward declarations of human rights, including the Freedom Charter, and finally the repressive legislation of the apartheid era which undermined visions of equality, conclude the sweep of background material.

Students are challenged to solve problems related to equality issues in various historical periods. They will, for example, be asked to consider the position of an Indian advocate seeking to lease chambers in a "white area" during the sixties, and comparing this to the situation today of an Indian factory owner who is required, in

21 Hyams "The teaching of legal skills: Rebuilding — not just tinkering around the edges" 1995 J Professional Legal Education 65 confirms that students participating actively in discussion learn to form and articulate their own ideas and learn reciprocally from hearing others’ opinions.
23 Maisel & Greenbaum 91-98.
terms of the Employment Equity Act,\footnote{24} to have a representative work force, not composed entirely of members of his own community.\footnote{25} The Roman law concept of a slave as a piece of property is investigated in a hypothetical problem where a female slave in the year 1832 is raped by her owner, whom she then murders while he is sleeping. Her defence is based on the fact that a piece of property cannot commit murder, or alternately, that she acted in self-defence, based on the disparity in strength between herself and her rapist — thereby introducing an interesting gender-related twist.\footnote{26}

The focal point of this section is the legal opinion which students are required to write. The legal issue concerns an unsuccessful application by an Indian matriculant for admission to the Medical School of the University of Natal. She is refused a place, based on a policy of affirmative action, which restricts the number of Indian students who are admitted. Students must discuss and apply the jurisprudential interpretations concerning section 9, the equality clause,\footnote{27} which have emanated from the Constitutional Court, and thereby gain a practical understanding of past and current equality provisions.

The next theme considers the important right of access to justice. Students participate in an experiential learning exercise in which they visit their local district magistrate’s court and observe, record and reflect on the proceedings in a field research report.\footnote{28} They are further required to interview three of the court personnel and three community members, at least one of whom must be a woman, in order to identify obstacles experienced in accessing the justice system. Differences between the information supplied by men and women must be analysed, and suggestions made for improving access, as well as acknowledging impediments that could hamper the implementation of such improvements. It is a powerful exercise that students thoroughly enjoy and perhaps learn more from than any other section of the entire module.

The ensuing chapters trace the history of the legal profession, the courts and the provision of legal aid to persons who cannot afford representation from Roman times up to current debates about the divided bar.\footnote{29} A history of the particular

\begin{itemize}
\item \footnote{24}{Act 55 of 1998.}
\item \footnote{25}{Maisel & Greenbaum 99-100.}
\item \footnote{26}{Maisel & Greenbaum 101.}
\item \footnote{27}{S 9 of Act 108 of 1996.}
\item \footnote{28}{Maisel & Greenbaum 199-202.}
\item \footnote{29}{Maisel & Greenbaum 203-223.}
\end{itemize}
difficulties that women suffer in accessing justice\textsuperscript{30} ties in with the equality section and finally a section on the right to counsel in criminal proceedings provides an appropriate opportunity for students to participate in a simulated appellate argument where the accused was not provided with legal representation.\textsuperscript{31}

The final theme, included only in the previous two years, reviews the right to health care, and although not as much focus is placed on the historical background, we believed it was a critical issue that would consolidate many of our intended learning outcomes. Students discuss current legal provisions relating to HIV/AIDS. This includes criminal law, civil law, employment law and intellectual property law consequences. Recent cases concerning discrimination, the right to dignity and equal treatment for persons who are HIV positive, as well as the Treatment Action Campaign’s challenge to the state, are studied.\textsuperscript{32} A comparison is made with civil disobedience, and students solve problems relating to work-place discrimination and treatment of HIV positive employees. The theme is a fitting vehicle for bringing the module to a coherent end in that it unites many threads across the sections; it has enormous current relevance and it communicates important information to our students, while honing the skills they have acquired throughout the module. Most significantly, it is aimed at developing their emerging sense of social justice and heightening their awareness of ethical behaviour through a study of themes that highlight the historical origins which lay the foundations of our law.

Students and staff alike have expressed their enthusiasm for the thematically directed teaching and learning exchange that occurs throughout this meaningful module. It presents a challenge to all the participants, but the sense of stimulation and intellectual satisfaction gained from the experience has been encouraging.

\textsuperscript{30} Maisel & Greenbaum 227-244.
\textsuperscript{31} Maiser & Greenbaum 244-262.
\textsuperscript{32} Hoffmann v South African Airways 2000 21 ILJ 891(W) and 2357 (CC); Jansen van Vuuren v Kruger 1993 4 SA 842 (A); C v Minister of Correctional Services 1996 4 SA 292 (T); N v Minister of Defence 21 ILJ 999 (Namibian Labour Court); Treatment Action Campaign v Minister of Health (11/03/2002); Minister of Health v Treatment Action Campaign (CC) (5/07/2002).