Cheques and balances
- a way forward*

By Justice HCJ Flemming, former Deputy Judge President of the then Transvaal Provincial Division

A remark at page 10 in the April 2010 issue of *Advocate* was the final spark for this comment about the way forward for the legal professions. That remark did not point to a cheque. It, like a cheque, was related to the practice of law.

When last did you hold a brief in which a cheque was the cause of action? When last did you see a householder's certificate or a protest? No, not the toi-toi type!! The fact is that cheques are drifting out of our lives. Is it still unthinkable that a university will confer a proper law degree without a course on negotiable instruments? It is evident that what is important to practice has changed and will change. Remember the agrarian partiarian lease of less than a (long) human lifetime ago? The professor who could pose a nice question about where and when a contract is concluded by post, now teaches students who never see a postage stamp.

Secondly, practical skills differ. Typing is no longer a school course only for some pupils. Furthermore, the budding lawyer must be taught to do research on the internet. He or she needs to know how the classification of law comes together and what alternative concepts may have been used in judgments. Important material -and evidence- is in Afrikaans and sometimes Dutch, Latin and German and languages remain important.

Thirdly, the atmosphere in which lawyers work has changed. Not so long ago, at least from my vantage point, the accent was on principles, details being left for own research except in some selected areas where detail was attended to inter alia to develop analytical and other skills. Is teaching now too full of the detail or casuistry? Now modern legislation has made it fraught with danger to generalise or to attempt to fit law fully to principles. For those and other reasons, there appears to be a tendency to weakness on starting the considering of a problem by establishing what principle is involved. (By the way, when last did you refer to Voet or any other authority on underlying principles?) .

Fourthly, actual practising clearly suffers another form of change. Not only has much of the principle been overtaken by codification (normally with change) but the multiplicity of laws and the proliferation of their sources have made it impossible to stay abreast. These laws, sometimes really rulings by edict or discretion, are being formulated in a way that one often has to understand what is not there for you to read. Knowing the real limit of judicial law-making, sometimes under the euphemism of 'developing' the law, is a problem. For the practitioner *Wille's Principles* and other general books must stand back for thick tomes on specialised subjects. That is not frowned upon because the practitioner benefits from quick access to detail in a publication of a specialist. However, it is a state of affairs that underlines the complexity of modern law and that general training at a law faculty cannot bring any expertise to a student. That must be counteracted by more extensive and intensive studies.

What to do? The answer can be postponed until after referring to a different reality. On the level of requirements for admission to practise law, there is no such thing as training to be a 'divorce lawyer' or a 'personal injury' lawyer. That and the occupation of 'criminal lawyer' (in both senses of the name) – comes later and then only as a reputational matter. The reality is that specialisation in trade marks, or income tax or expropriation does arise. In advertisements attorneys often hold out only certain areas as their trade. Some do administration of estates and not debt collection; some do insurance claims but not criminal law. In the case of large firms the partner

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** Years ago some people seemed to think that standards are an unwanted obstacle for disadvantaged people; that anyone has potential to do any job. I do not share a view that any group of the population does not have enough people who can meet proper standards. I do believe that to try in addition to get those in who do not meet standards is unjustified and even counter-productive. Will you try a specific hospital if there is some information that some nurses are not competent and committed? Attorneys will try out an unknown barrister if they can be confident that the barrister has proficiency but will hardly entrust their client's affairs if they wonder whether the advocate is of trusted standard.*

that you know will not touch your problem about access to children because that is beyond his ken for decades. You will have to speak to a specific partner or assistant.

That specialisation accentuates the same two poles. On the one hand, the specialist will have been trained in lots of stuff that he or she did not and does not need and has to be substantially self-trained in what he or she uses. Training in computer law is of no use in maintenance matters; training in criminal law is of no use to the patent attorney. Secondly, the new practitioner is much of a jack of some (not necessarily relevant) trades but for sure the master of none. That does not help the practitioner, the client, the court or society. On the other hand there is a clear need that the majority of future lawyers and judicial officers need training on a broad front in which over-focused teaching is bad.

It is impossible to strike a perfect balance between those opposite considerations. But deliberate bridges and acceptable shortcuts *can* be developed. Increased specialised tuition *should* be developed to cater for the needs of different sections of the community. The law qualification is not only for people with private practices. Secondly, bridges should be developed, as is to some extent now done with diplomas, for those who want to further develop into specialised work. More intensive training should, thirdly, be done as a way to raise standards. Lastly, it should be done in order to open up the professions and give better service to the public.

So attention is necessary to what universities do. That is not for its own sake but to suggest that it is feasible for universities to cope with the diversity that may seemingly arise on a changed future for the practising in law. The comments are no basis for criticising universities. Universities can only adjust and will no doubt adjust according to the legal requirements for admission to practice. It is for the legislature.

It must be explained that in attempting to show how much is feasible, the suggestion is that a *caput selectum* may be a course that is currently offered for diplomas so that no new course is necessarily to be created. It must also be explained that the suggestion that I make does not call for people to be trained as if technicians at law. The person who only shapes mouthpieces may be a good orthodontic technician but he or she is nowhere in terms of dental service to the client. On the contrary, it will be to the advantage of all if prospective practitioners are first developed as persons. Maybe even a year of languages and other subjects before the legal courses start coming into the syllabus. After a broadening year the student is not only more mature but will catch up the 'lost' law time readily. The scholar takes four years at school to study Latin but the first-year student covers the same field and more within one year after matriculating. What is manageable in terms of broadening the person, is beyond the scope of this note.

For any change to be objectively considered, it is necessary to put aside all prejudices, assumptions, politics, aspirations and other emotions. The issue is what will best serve society. That excludes desires to control the practice of law absolutely or by dominance.

And look at what? The issue if one with some intangible elements. Thus if I had to mention the most competent ten attorneys of my period in practice, those without degrees outnumbered those with degrees. If that was coincidental, it nevertheless leaves a strong view of the potential quality of people without an LLB. (Interestingly it is from the non-degreed attorneys that a strong push came for requiring LLB for attorneys, for the expressed reason that the attorney's profession is not second-rated to that of advocates.) The potential of less-than-LLB is in line with a statement that will attract no debate if made in respect of other tasks. A person can be a better brick-layer than his or her architect. The point is that that truth does hold potential as a key for the better of all in law. That truth, held within proper limits for such a sociological task as practising in law, comes in the setting that the overall consensus is that the current system (of four year study) for admission-to-practice-degrees produces far too many rather useless newcomers. Even articles of clerkship often adds little, the principal not being a general practitioner. And other post-degree practical training warrants reservations.

An implied view is that the period of pupillage at the Bar is excessive, perhaps to some extent justified by trying to make up for deficiencies in university education, in particular if government is to nationalise a year's capacity and income. The situation demands a five-year study course into which the months of present post-degree training (pupillage) is telescoped.

The suggestion is accordingly that consideration be given to the following:

1 Criminal and civil law go separate ways despite some common ground. Practising in criminal courts is a different profession to those mentioned later herein. (It will cut down on a judge having contact with civil law only for half the time or less.)

2 Being an attorney is no longer a hurdle to becoming a conveyancer but a 'parallel' specialty. [This may also be the key to a solving the query why it costs so much to change registration of ownership of a home compared with a change in registration of shares of equal value.] Maybe also family lawyers and tax lawyers and labour lawyers may enter on specialised basis. They will have only limited areas of practice and either limited or no right of High court or Magistrate's court appearance.

How then can the needs of companies for secretaries be married to the needs of the son who will inherit a liquidation practice?

a The profession of 'defender' ('lawyer in criminal law') and those in the other 'general' legal professions undergo practical work (including some real 'practising') as part of their final year of training. Professionals supervise. That means that youngsters are not left on their own in the bundu. They do so not as a post-graduate burden and not in effect as an additional obstacle to practising.

b There are several 'civil' professions [with varying degrees of commonality in training] with distinct regulatory bodies. These are:

3.1 Conveyancer

3.2 General lawyer (attorney)

3.3 Hearings lawyer (advocate).

Conveyancer has a shorter and narrower academic study but more than that of the typists who do the routine work and as such the major portion of modern conveyancing. The other two professions diverge in the third or fourth year of studies.

3.4 Tax lawyer

3.5 Financial lawyer

3.6 Labour lawyer

3.7 Family lawyer

3.2 and 3.3 will be allowed to work in the fields within the areas of study of 3.4 to 3.7 and in criminal law, but may not hold themselves out as such specialist lawyers unless they have passed the studies for the appropriate type. The specialisation of 3.4 to 3.6 can also, as at present with diplomas, be acquired by someone with the qualifications for 3.2 and 3.3.

As an indication of how the divergence in studies may come

in, the following scheme is suggested. In all cases the content of a course may be either adapted or be identical with a course with same name of a different occupational direction.

First year studies for all professions:

Two languages and one further law-extraneous subject

Law of persons

Law of succession

Law of things

Interpretation (of contracts, laws) principles

Second year:

2.1 Criminal lawyer – possibly studies to be two and a half years

Criminal law. Principles and common law crimes and statutory crimes

Criminal procedure - specialised, including appeals and reviews

Law of evidence specialised for criminal law

Constitutional law, relevant detail

Operation of legal aid and other aid systems

Course in ethics, court appearances and practical tutorials about cross-examination.

Trust moneys handling for criminal cases.

2.2: Conveyancers:

Law of contract

Trust monies

Servitudes and specialised law of things, like water law

Deeds office practice including fiscal and revenue laws

Study of applicable legislation (laws beyond direct conveyancing regulations, eg town planning; mining rights; subdivision of agricultural land.)

2.3 Attorneys and advocates

Research (lectures and tasks) and typing and
information technology (user functions)

Criminal law principles

Law of evidence

Law of contract

Labour law

At least one *caput selectum*

3 Third year: Advocates and attorneys:

Criminal law specific crimes - including asset attachments, etc

Law of delict including law of privacy

Information Technology as it concerns other fields, eg law of evidence

Criminal procedure

Administrative law

Two other *capita selecta*

Research tasks

4 Fourth year and fifth year

Attorneys:

Trust monies and bookkeeping

Administration of estates

Town planning and other property-related special aspects

Ethics

Court appearances and etiquette

(including criminal defence and civil default appearances.)

Income tax and other revenue legislation

Constitutional law outside what affects other courses

Prescribed *capita selecta* from legislation, eg Consumer Protection Act; legal position of trusts; water law; law of contracts; personality law

Voluntary *caput selectum*: one course from the specialised professions, eg from family law

Civil procedure

Advocates:

As for attorneys excluding the first three items. Study of appearances are to specialise on civil court appearances. *Capita selecta* differ?

Roman Dutch law, history and perspective

Latin - stems and declensions

Administrative law including specialised appeals and reviews and statutes

Some *capita selecta* prescribed.

Capita selecta of choice: So much of the content of the specialised professions' curriculum as academics decide can be coped with, eg the full spectrum for banking law or part thereof. Subjects may coincide with that in diploma courses currently offered?

Finance lawyer

Exchange control

Trusts

Bills of exchange

Banking law

Unit trusts

Insurance and pensions

(Note: I understand that banks are affected by about 156 statutes plus regulations.)

Tax lawyer

The basis and application of provincial, governmental and municipal taxes including customs duty

Specialised interpretation of laws and Practice Notes

Tax implications related to exchange control, corporate actions, etc.

Labour lawyer. Not here expanded upon

Family lawyer (divorce lawyer)

Specialised family and child law

Sociology

Psychology

Law of evidence

Legislation about adoption, children in need of care,

International private law and governmental Treaties

NOTE: Examples of voluntary *capita selecta* would be maritime law; building law, educational law, sports law, depending on the university concerned.

It should be emphasised that the schedule of subjects is not even a proposal. It serves to illustrate the line of thinking and exposes a potential - and it shows up that it is not possible to cover everything unless standards are low. A debate about the actual curricula will shift the focus away from fresh thinking and away from ascertainment of what the community needs - in particular good training and easier access to practice.

One fears that if such a scheme or something similar is not considered before the Legal Practice Bill becomes a force, it will take another generation before something more realistic is done. Hopefully the past emotions can be taken out and original thinking be given a chance to an extent that self-interest does not weigh so heavily.