

Interaction Between Different Areas of the Law and Engagement Between Academic Departments within the Faculty of Law

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Inaugural Address: 18 March 2009

1 Introduction

Mr Vice-Principal, Dean of the Faculty of Law, Deans of other faculties, members of the Bar and the Side Bar, Commissioners of the Commission for Conciliation, Mediation and Arbitration (hereinafter the 'CCMA'), colleagues from the University of Pretoria, colleagues from neighbouring and universities abroad, family and friends.

It is indeed an honour to be afforded the opportunity to address you tonight. I welcome all present and express my gratitude to those who supported me on the journey to this memorable evening. I wish to make special mention of my family, and in particular to Corné and our children, Ivan and Carmen, for making this day even more special.

I address you tonight on the topic 'Interaction between different areas of the law and engagement between academic departments within the Faculty of Law'.

Hierdie onderwerp het sy ontstaan te danke aan gesprekke op hoofbestuursvlak, en ander in die fakulteit waarby ek betrokke was, oor die aard van onderrig aan ons regstudente.¹ Die vraag ontstaan of die vertakkings van die reg en die bestaan van akademiese departemente in die Fakulteit Regsgeleerdheid tot gevolg het dat ons onderrig en navorsing in silo's plaasvind.

¹ Aan die einde van 2008 het Prof. Niek Grové, Registrateur van die Universiteit van Pretoria (UP), en die Departementshoofde van die Fakulteit Regsgeleerdheid gesprek gevoer oor die aard van onderrig aan ons regstudente. Gedagtes is saamgevat deur Grové in 'n dokument, getiteld 'Streef Ons Nog die Ideaal na wat die Onderbou van die Universiteitswese Vorm?' (2008) (ongepubliseerde gespreksdokument UP).

Soos wat dit uit my voordrag duidelik sal blyk, ondersteun ek die wisselwerking tussen verskillende vakgebiede, asook tussen teorie en praktyk, binne ons onderrigprogram. Dit behoort ons in staat te stel om meer afgeronde regsgeleerdes die samelewing in te stuur wat probleme op 'n breë front sal kan oplos.

Maar eers: wat is die verskillende vertakings van die reg en is daar enige sin in die behoud van hierdie indeling?

2 Classification of Law Into Different Branches

The Romans started a tradition of classifying the law into different branches.² South African jurists have broadly followed this distinction, as referred to in the *Digesta* of Justinian, and classified South Africa's positive law into two main branches, namely Private Law and Public Law.³

For the benefit of the non-lawyers in the audience, Private Law is that part of the law that involves the legal relations between persons. In particular, it concerns the rights and duties between both natural and juristic persons, and it includes subjects such as the Law of Contract, Family Law and the Law of Delict.

In contrast, Public Law involves the relations between the state and the general population, and the distribution of governmental authority.⁴ It includes subjects such as Constitutional Law, Administrative Law and Criminal Law.

² Kleyn and Viljoen *Beginner's Guide for Law Students* (2002) 96. On a higher level, we also recognise the distinction between national and international level. In Hahlo and Kahn *The South African Legal System and its Background* (1973) 111 and 115 it is mentioned that *international law* consists of the body of rules governing the relations between independent states in time of war and peace. *National law* means the law of a specific country and refers to the whole body of legal rules that apply in a country such as South Africa.

³ At D.1.1.1.2 it is stated: '*Huius studii duae sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.*'

⁴ Wiechers 'Sistematiek van die Administratiefreg' (unpublished LLD thesis, UP) 17–34.

Mercantile Law represents subjects falling within the commercial domain, and embodies a blend of Private and Public Law elements. This collective includes subjects such as Company Law, Insolvency Law, Labour Law and Tax Law.

Domains such as Procedural Law and Legal History, Comparative Law and Legal Philosophy underlie all areas of the law.

It has long been recognised that this classification is not watertight and that it has a limited influence on the day-to-day functioning of the law itself.⁵ One may, for example, ask why Tax Law is traditionally taught under Mercantile Law and not in Public Law. Surely this subject falls in the category of subjects in which 'relations between the state and the general population' are regulated.

However, despite the limitations inherent in the classification of the law, most of the larger universities in South Africa have organised their law faculties into academic departments that roughly resemble these branches. The Universities of Cape Town, Stellenbosch, South Africa and Pretoria serve as examples of such faculties. Because of its growth in size and for managerial purposes, the Faculty of Law at the University of Johannesburg has also for the first time introduced a departmental system in 2005. However, exceptions are to be found at universities such as the Witwatersrand, North-West and Rhodes. Furthermore, at international level universities such as Yale and Harvard do not have departments in their law schools.

In my view, there is no substance to the argument that the classification of the law into branches in itself leads to the segmentation of teaching and research. It is rather the content of our courses and how we as lecturers interact with others that determine whether we engage in compartmentalised teaching or not.

⁵ Hahlo and Kahn 116. See also Kleyn and Viljoen 96.

Over the past three to four years, arguably no other issue has caught the attention of Labour Law academics and practitioners to the same extent as the impact that other subjects have recently had on the development of Labour Law.⁶ In my discussion that follows, I will illustrate how the Law of Contract and Administrative Law have recently changed the character of the subject Labour Law. I will use this as support for my theme tonight, namely that there is merit in interdisciplinary teaching and research that seek to build bridges between different areas of the law.

3 Engagement of Subjects Beyond Departments

Commencing with the smaller building blocks, I consider for the moment whether the subject Labour Law has any claim to existence as an independent discipline within the broader context of the LLB programme.⁷ The balancing of rights, duties and social power between employers and employees emanates from multiple sources of law.⁸ These include the common law contract of employment, delict, Administrative Law, a network of labour statutes, the South African Constitution⁹ and international labour standards.¹⁰

⁶ Van Eck & Jordaan-Parkin 'Administrative, Labour and Constitutional Law: A Jurisdictional Labyrinth' (2006) *ILJ* 27 1987; Van Eck 'Labour Dispute Resolution in the Public Service: The Mystifying Complexity Continues' (2007) 28 *ILJ* 793; Cheadle 'Labour Law and the Constitution' Paper delivered at the SASLAW Conference, October 2007, Cape Town; Du Toit 'Through the Looking-Glass' Paper delivered at the SASLAW Annual Conference, October 2007, Cape Town, 3; Pretorius and Myburgh 'A Dual System of Dismissal Law: Comment on *Boxer Superstores Mthatha & Another v Mbenya* (2007) 28 *ILJ* 2290 (SCA)' (2007) 28 *ILJ* 2172 2174-5; Ngcukaitobi 'Life after *Chirwa*: Is there Scope for Harmony Between Public Sector Labour Law and Administrative Law?' (2008) 29 *ILJ* 841; Grogan 'Schizophrenic Courts: Does *Fredericks* Hold, or *Chirwa*' (2008) *EL* 11.

⁷ This questions is also considered and answered in the affirmative in Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work* (2008) 3.

⁸ Van Eck & Jordaan-Parkin (2006) *ILJ* Vol 27 1987.

⁹ 108 of 1996. In *Transnet Ltd v Chirwa* (2006) 27 *ILJ* 2294 (SCA) par 33 the court referred to the overlap of Administrative Law, the common law and Labour Law as a 'mystifying complexity'. See also Van Eck (2007) 28 *ILJ* 793.

¹⁰ South Africa is a member of the International Labour Organisation and has ratified a number of this organisation's key conventions.

Despite its varied foundations, Labour Law has, justifiably so, claimed the right to exist as an independent subject field since the 1980s. The former Industrial Court was established after the Wiehahn Commission¹¹ had made its recommendations. The CCMA and the labour courts (that is, the Labour Court and Labour Appeal Court) were founded by the post-constitutional Labour Relations Act during 1996.¹² A framework of labour legislation has been enacted that codifies most aspects pertaining to the employer–employee relationship and a significant body of labour-related jurisprudence has emerged.¹³ It is the study of precisely how the sources mentioned interact with one another¹⁴ to which Labour Law owes its existence. This subject currently fits comfortably within the organisational structure of the LLB programmes as taught at all South African universities.

Sound policy considerations underlie the management of labour disputes by these specialised dispute resolution institutions separately from the civil courts. The CCMA and the labour courts have been crafted with some radical features to attain these goals.¹⁵ So, for example, there is a 30-day prescription period in respect of unfair dismissal disputes and 90 days for unfair labour practice disputes. In addition to this, compulsory conciliation precedes arbitration and adjudication, and attorneys and advocates are excluded from most of the dispute resolution processes in the CCMA.¹⁶ In the first ten years of its existence more

¹¹ In 1977 the National Party government established the Wiehahn Commission, which published recommendations in 1979 that fundamentally changed labour laws in South Africa.

¹² See Chapter VII of the Labour Relations Act 66 of 1995.

¹³ In *Van Niekerk et al.* 83 it is noted that the ‘most important source of labour-related obligation is legislation . . . Labour legislation extends to most aspects of the employment relationship.’

¹⁴ See *Van Niekerk et al.* 3.

¹⁵ It is to be noted that only those disputes that are specified in labour legislation are referred to the CCMA and labour courts. However, the civil courts have retained their jurisdiction to resolve labour disputes emanating from the common law contract of employment and Administrative Law. See *Fedlife Assurance v Wolfaardt* (2001) 22 ILJ 2407 (SCA); *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA).

¹⁶ S 188(1)(a)–(b), s 192 and Schedule 8 of the LRA, the Code of Good Practice: Dismissal.

than one million cases were referred to the CCMA, of which 80 per cent related to disputes involving unfair dismissal.¹⁷

The Constitution has played an influential role in the evolution of Labour Law and labour dispute resolution in particular. This is so because the common law must, when appropriate, be developed to give effect to the fundamental rights contained in the Constitution.¹⁸ There are also parallel rights, such as the fundamental right to fair labour practices¹⁹ and the right to just administrative action²⁰ that could potentially both apply to the same set of facts.

I shall discuss two instances that illustrate the interaction between subject fields that traditionally fall under different branches of the law:

The first concerns the overlap between the common law contract of employment and the statutory right to fair dismissal that is provided for in terms of the Labour Relations Act. In her inaugural address, Professor Marilize van Jaarsveld referred to this debate as a 'battle' between contract and statute.²¹ I see this as a gradual evolutionary process in terms of which the autonomy of Labour Law is being changed.

Before the enactment of the Constitution and the current labour laws in South Africa, employees harboured no hope of an implied common law right to a pre-dismissal enquiry based purely on the contract of employment.²² Today, the Labour Relations Act specifically embodies the right not to be unfairly

¹⁷ Benjamin 'Friend or Foe? The Impact of Judicial Decisions on the Operation of the CCMA' (2007) *ILJ* 28 1; CCMA *Annual Report 2006/2007* RP 93/2007 ISBN 978-0-621-37166-6 at 7 mentions that a total of 123 472 cases were recorded as new referrals during that year.

¹⁸ S 39(2) of the Constitution.

¹⁹ S 23(1) of the Constitution.

²⁰ S 33 of the Constitution.

²¹ Van Jaarsveld 'Battling Between Contract and Statute after Dismissal: Seeking Clarity Amidst Judicial Disparity' inaugural address University of South Africa (Unisa) on 27 November 2008.

²² See, for instance, *Mustapha v Receiver of Revenue* 1958 (3) SA 343 (A) and *Gründling v Beyers* 1967 (2) SA 131 (W). See also *Denel (Pty) Ltd v Vorster* [2005] 4 BLLR 313 (SCA).

dismissed.²³ This entails that every employee has the right to a fair hearing, and there must be a sound reason before such an employee may be dismissed. Also under this right, the onus of proving procedural and substantive fairness has been shifted from the employee to the employer.²⁴ Tailor-made statutory remedies have also been fashioned, which include reinstatement as the primary remedy and statutory compensation capped at 12 or 24 months' salary, depending on the case.²⁵ In terms of the common law, specific performance in the form of reinstatement is the exception to the rule²⁶ and until now there has been no claim for damages for want of procedural fairness prior to termination.²⁷

Subsequent to the enactment of the Constitution, the Supreme Court of Appeal confirmed in a cluster of cases, starting with *Fedlife Insurance v Wolfaardt*,²⁸ and culminating in the *Gumbi*²⁹ and *Boxer Superstores*³⁰ cases, that the common law contract of employment was developed to include a right to procedural fairness. This development was deemed necessary due to the influence of the constitutional right to fair labour practices³¹ on the common law contract of employment.

Stated differently, a disgruntled employee can, without reference to the Labour Relations Act, lodge an action in the High Court on grounds of wrongful breach of contract, based on the fact that the employer did not afford the employee a fair hearing prior to termination of the contract.

²³ Section 185 of the Labour Relations Act.

²⁴ S 188(1)(a)–(b), s 192 and Schedule 8 of the LRA, the Code of Good Practice: Dismissal.

²⁵ S 193 and 194 of the LRA.

²⁶ See *Schierhout v Minister of Justice* 1926 AD 99; *National Union of Textile Workers v Stag Packings (Pty) Ltd* (1982) 3 ILJ 285 (T) 292E.

²⁷ *Brassey, Cameron, Cheadle and Olivier* 4.

²⁸ (2001) 22 ILJ 2407 (SCA).

²⁹ *Old Mutual Life Assurance v Gumbi* [2007] 8 BLLR 699 (SCA).

³⁰ *Boxer Superstores Mthatha v Mbenya* [2007] 8 BLLR 693 (SCA).

³¹ S 23(1) of the Constitution provides that '[e]veryone has the right to fair labour practices.'

In my view, this development is conceptually misdirected.³² There is merit in the argument advanced by Professor Halton Cheadle³³ that there is no constitutional imperative to develop the common law in each and every instance when a litigant relies on a provision of the Bill of Rights. The Constitution is clear in section 8(3) where it provides that the courts, when giving effect to a right in the Bill, must develop the common law 'to the extent that legislation does not give effect to that right'.³⁴

This is exactly what the Labour Relations Act seeks to achieve. It was enacted to give effect to the constitutional right to fair labour practices, and the right to a hearing prior to the termination of a contract of employment is regulated in terms of this Act.³⁵

The Supreme Court of Appeal has now established a dual dispute resolution system which contains inconsistencies in respect of prescription periods, the onus of proof, legal representation and remedies to mention a few.³⁶ One of the consequences of this dual system may be that the Labour Appeal Court will be abolished once the Superior Court Bill³⁷ is enacted into law.

³² Van Eck 'The Right to a Pre-dismissal Hearing in Terms of the Common Law: Are the Civil Courts Misdirected?' (2008) Vol 29(3) 339–347.

³³ Cheadle 'Labour Law and the Constitution' Paper delivered at the SASLAW Conference, October 2007, Cape Town, 3–6. Added to this, s 39(2) of the Constitution provides that 'when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights' (emphasis added). The word 'when' is a clear indication that there is no obligation to develop the common law in every instance.

³⁴ See also *SA National Defence Union v Minister of Defence* [2007] 9 BLLR 785 (CC) at paras 51–52 where the Constitutional Court adopted the clear approach that where legislation has been promulgated to give effect to a right contained in the Constitution 'a litigant may not bypass that legislation and rely directly on the Constitution without challenging that the legislation is falling short of the constitutional standard'.

³⁵ S 1(a) of the Labour Relations Act.

³⁶ Pretorius and Myburgh (2007) 28 *ILJ* 2172 2174–5. In addition to this, such a dual system opens the door for the development of a class-based system. The litigant with the financial means to do so may elect to use the more expensive civil court system and the indigent dismissed employee is forced to make use of the more affordable CCMA. See in this regard Du Toit 'Through the Looking-Glass' Paper delivered at the SASLAW Annual Conference, October 2007, Cape Town, 3.

³⁷ The Superior Courts Bill [B-2003], which is currently under discussion, suggests that the labour courts will be disbanded and be incorporated into the civil court system. This, however, will not affect the continued functioning of the CCMA.

I prefer the point of view that has been adopted by the House of Lords in England. In *Eastwood v Magnox Electric*³⁸ it was held that:

[a] common law obligation having the effect that an employer will not dismiss an employee in an unfair way would be much more than a major development of the common law of this country . . . Crucially, it would cover the same ground as the statutory right not to be dismissed unfairly.

The second instance relates to the overlap between Labour Law and Administrative Law. Some one million employees render services in the South African public service and they fall within the scope of the protection afforded by the Labour Relations Act. Parallel to the right to fair labour practices as contained in section 23(1) of the Constitution, and the Labour Relations Act that seeks to give effect to it, section 33(1) guarantees the constitutional right to 'just administrative justice' and the Promotion of Administrative Justice Act³⁹ has been promulgated to give effect to this right.

Are dismissed public service employees at liberty to continue to apply Administrative Law principles in the High Court, by lodging review applications for the setting aside of unfair dismissals, despite the fact that the Labour Relations Act covers the same ground?⁴⁰

This question has sharply divided the Labour Court, the High Court and the Supreme Court of Appeal.⁴¹

³⁸ [2004] UK HL 35 par 12–13. Here, the court followed *Johnson v Unisys Ltd* [2001] UK HL 31 at para 80 where it was held that 'the creation of a statutory right [against unfair dismissal] has made any such development of the common law both unnecessary and undesirable . . . the co-existence of two systems, overlapping but varying in matters of detail and heard by different tribunals, would be a recipe for chaos. All coherence in our employment laws would be lost.'

³⁹ 3 of 2000.

⁴⁰ In *Administrator, Transvaal v Zenzile* (1991) 12 ILJ 259 (A) the former Appellate Division removed all doubt that public servants could have employer decisions set aside on Administrative Law grounds emanating from the common law. See also *Administrator of the Transvaal v Traub* (1989) 10 ILJ 823 (A); *Administrator, Natal v Sibiyi* 1992 (4) SA 532 (A).

⁴¹ See Van Eck & Jordaan (2006) 27 ILJ 1987 and Van Eck (2007) 28 ILJ 793. In *POPCRU v Minister of Correctional Services* (2006) 27 ILJ 555 (E) Plasket J held that '[t]here is nothing incongruous about . . . more than one fundamental right applying to one act, or of more than one branch of law applying to the same set of facts . . . [I]n my view the protections afforded by Labour Law and Administrative Law are

The recent Constitutional Court judgement, *Chirwa v Transnet*,⁴² is the strongest indication yet that the Constitutional Court will maintain the divide between Labour Law and Administrative Law. Ngcobo J, writing for the majority of the court,⁴³ held that the structure of the Constitution draws a distinction between labour relations, on the one hand, and administrative action, on the other. The court confirmed that even though Transnet was a creature of statute, the dismissal of an employee constituted the exercise of a contractual power and it did not constitute administrative action.⁴⁴ It follows that the Promotion of Administrative Justice Act does not apply to the dismissal of public service employees, and that such disputes must be referred to the CCMA and labour courts in terms of the Labour Relations Act and not to the civil courts.

This, however, is not the end of the debate.⁴⁵ Although the Constitutional Court has suggested as much, it did not close the door for public service employees to pursue a contractual claim based on breach of contract for lack of unfair procedures prior to dismissal. Two months ago, van Niekerk J of the Labour Court in *Mogothle v Premier of the North West Province*⁴⁶ confirmed that a public

complementary and cumulative, not destructive of each other.’ A similar approach was followed in *Marcus v Minister of Correctional Services & Others* (2005) 26 ILJ 745 (SE); *Louw v SA Rail Commuter Corporation Ltd & Another* (2005) 26 ILJ 1960 (W); *United National Public Servants Association of SA v Digomo NO & Others* (2005) 26 ILJ 1957 (SCA); *Nell v Minister of Justice & Constitutional Development & Another* (2006) 27 ILJ 2063 (T). However, it is to be noted that a contrary view (corresponding with that of the Labour Court) was adopted by the High Court in *Greyvenstein v Kommissaris van die SA Inkomste Diens* (2005) ILJ 1395 (T); *Jones & another v Telkom SA Ltd & Others* (2006) 27 ILJ 911 (T).

⁴² [2008] 2 BLLR 97 (CC).

⁴³ See *Public Servants Association on Behalf of Haschke v MEC for Agriculture & Others* (2004) 25 ILJ 1750 (LC); *SA Police Union & Another v National Commissioner of the SA Police Service & Another* (2005) 26 ILJ 2403 (LC); *Hlope & Others v Minister of Safety & Security & Others* (2006) 27 ILJ 1003 (LC).

⁴⁴ At para 142.

⁴⁵ Against the background of the position that the Constitutional Court had adopted previously in *Fredericks v MEC for Education & Training, Eastern Cape* [2002] 2 BLLR 119 (CC) the correctness of the *Chirwa* decision has been placed in question. See Grogan ‘Schizophrenic Courts: Does *Fredericks* hold, or *Chirwa*’ (2008) *EL* 11. See also *Nonzamo Cleaning Services v Appie* [2008] 9 BLLR 901 (Ck); *Nakin v MEC, Department of Education, Eastern Cape Province* [2008] 5 BLLR 489 (Ck); *Mkumatela v Nelson Mandela Metropolitan Municipality* [2008] JOL 216686 (SE). Although the majority of the court in *Makambi v MEC Department of Education, Eastern Cape* [2008] 8 BLLR 711 (SCA) followed the *Chirwa* decision, see the critical minority judgment by Nugent JA at para 23–24.

⁴⁶ Unreported case no J 2622/08, dated 5 January 2009.

servant is not entitled to rely on the provisions of the Promotion of Administrative Justice Act to set an unfair suspension aside. However, such an employee could still rely on an employee's right to a hearing based on the development of the contract of employment.

As mentioned previously, I do not agree with the view that the contract of employment should have been developed to include the implied right to a hearing and I hope that the Constitutional Court bring an end to this debate. If it were true that the common law contract of employment had taken over the principles in respect of unfair dismissal and unfair labour practices already contained in the Labour Relations Act, why is it still necessary to have these provisions on the statute book and why should the labour dispute resolution forums be retained?

I draw a number of inferences from the cases discussed earlier:

- The Constitution has served as catalyst for the increased interaction of subject fields beyond the boundaries of departments.
- We must weave this into our course content irrespective of the fact that the overlapping subjects are taught in other departments.
- These overlaps present us with new areas of research that can be conducted with colleagues working in different fields.

In his book, *The Medici Effect*, Frans Johansson⁴⁷ wrote about the intersection of ideas that occurred during the time of the Renaissance in Italy. During the fifteenth century, the Medici family brought sculptors, scientists, philosophers and architects together in Florence. In his book Johansson comments that:

[w]hen you step into an intersection of fields, disciplines or cultures, you can combine existing concepts into a large number of extraordinary ideas . . . We too can ignite this explosion of extraordinary ideas.

⁴⁷ Johansson *The Medici Effect* (2006) 2–3.

I now consider to what extent these developments could possibly influence the goals that we as law lecturers may have in respect of the teaching of our students.

4 The Goals We Seek to Achieve with Our Education

Professor Niek Grové, die Registrateur van die Universiteit van Pretoria, en die Departementshoofde van die Fakulteit Regsgeleerdheid het aan die einde van 2008 gepraat oor die vraag: wat is die onderbou van die onderrigtaak wat ons by die universiteit verrig?⁴⁸

Daar is tydens dié gesprek uitgewys dat dit geen nuwe vraagstuk is nie. Ongeveer 350 jaar voor die geboorte van Christus het die Griekse filosoof Aristoteles reeds met die onderliggende doel van onderrig geworstel.⁴⁹ Vir hom was dit 'n uitgemaakte saak dat daar 'n plig op die staat rus om openbare onderrig aan die samelewing beskikbaar te stel. Die vraag was egter steeds of die klem bloot op praktiese en funksionele opleiding behoort te val en of daar ook aandag gegee moet word aan die breër opvoeding van studente wat insluit die oordra van waardes en 'n weier visie van menswees in die algemeen?

After the South African elections in 1994, the Ministry of Justice convened several legal forums to debate legal education with stakeholders in South Africa. In 1997, pursuant to these discussions the majority of the law deans agreed to the suggestion that the postgraduate LLB degree be modified to a four-year

⁴⁸ Grové 'Streef Ons Nog die Ideaal na wat die Onderbou van die Universiteitswese Vorm?' (2008) 2 (ongepubliseerde gespreksdokument UP).

⁴⁹ Aristotle *The Politics* (translated by C Lord) (1984), Book 8, Chapter 2. At 230 of the translated version it is stated: 'Investigation on the basis of the education that is current yields confusion, and is not at all clear whether one should have training in things useful for life, things to virtue, or extraordinary things; for all of these have obtained some judges [willing to decide in their favour]. Concerning the things relating to virtue, nothing is agreed.'

undergraduate programme. Goals were set for the then new LLB and Professor David McQuoid-Mason writes that:⁵⁰

[t]he four-year LLB recognised for the first time the need for an integrated approach to legal education rather than the traditional approach that separated the theory of law from practice . . . [I]t is not enough to provide students with knowledge of the law without . . . including the values necessary for the practice of law in a democratic environment.

In 2008, ten years after the introduction of the four-year LLB, the South African Law Deans' Association (SALDA) conducted a poll among role players in the legal fraternity on the current state of legal education in the country.⁵¹ Among other aspects, the appropriateness of the current four-year LLB degree was considered.⁵²

The findings of the 2008 report indicate that there are realistic concerns about the decline in the quality of legal education in South Africa. One of the main contributory factors in this regard is the reduction of the LLB degree to a four-year undergraduate programme and the majority of stakeholders were in favour of the extension of the four-year LLB to a five-year programme.⁵³

I support the view that it would be ideal for our students to take more formative subjects as part of their tertiary education that go beyond the core of our compulsory fields of study. These could include subjects such as Financial Accounting, Entrepreneurship, Sociology, Philosophy, History and Political Science. The Faculty of Law at Pretoria University has recently adopted a policy

⁵⁰ McQuoid-Mason 'The Four-Year LLB Programme and the Expectations of Law Students at the University of KwaZulu-Natal and the Nelson Mandela Metropolitan University: Some Preliminary Results from a Survey' (2006) *Obiter* 166 at 167.

⁵¹ Unpublished document titled 'Poll of Stakeholders on the Current State of Legal Education and Vocational Training' (2008) 1, circulated among the deans of the faculties of law.

⁵² *Ibid* at 1. With reference to the goals of our legal training, the report makes reference to the ideal LLB graduate and states that a person with a legal education should have 'a sound theoretical knowledge of the law, be capable of critical thinking and problem solving, know the ethics of legal practice and have good oral and written communication skills'.

⁵³ *Ibid* at 2

to channel more students through its BCom (Law) and BA (Law) programmes. This will bring us closer to the goal of providing our students with a broader and more rounded education as part of a five-year programme rather than merely focusing on what is useful to become an effective legal practitioner.

We can distil a number of commendable goals that have been set in respect of legal education by the deans who designed our current four-year LLB programme.

We should, in my view,

- strive to integrate skills and theoretical training to improve our students' ability to solve problems; and
- make an effort to focus on the broader notion of education rather than mere training, and to instil the ethics and values necessary for the practice of law in our modern society.

To these goals, I suggest that we can add an endeavour to provide students with sound intersecting theoretical knowledge of the subjects that we teach.

5 Are We Succeeding in Reaching Our Goals?

On a practical level, it can be asked to what degree are we currently succeeding in attaining the mentioned goals.

Evaluating the situation in the Faculty of Law at the University of Pretoria, one will find that there have always been strong linkages between subject fields and our departments. Lecturers have been presenting classes across departmental borders for a number of years and in some instances members have also been transferred from one department to another. Faculty committees, such as the LLB Committee, the LLM Committee and the Research Committee, comprise representatives of all of the different departments. Members working in different

disciplines regularly publish together. To mention only a few that come to mind, subjects such as Legal Skills, the Legal Aid Clinic's Practical Law, Alternative Dispute Resolution, Civil and Criminal Procedure, Third Party Compensation Law, Fundamental Labour Law and Medical Law build bridges between practice and academia. I also view the departmental research discussions where members of each department present their ongoing research to their peers as a useful tool for the cross-pollination of ideas. Invitations are extended across the faculty and we encourage attendance among those who have an interest in the issues being discussed.

In addition to this, the faculty has recently introduced a pilot project for the introduction of an Integrated Legal Problem-Solving Exercise which can possibly be developed into a formal subject on our LLB programme. Students will be given the opportunity to apply their acquired knowledge to a hypothetical set of facts in a way that will integrate a number of subjects. Practitioners will be approached to discuss the students' suggested memorandums of advice with them. It is our aim that this will contribute towards strengthening existing bridges between different subjects, and between practice and academia.

Is there any merit in the point of view that the functioning of the Faculty of Law with its departmental system fosters segmentation in our teaching and research programmes? There are strong arguments that this is not the case and that our current departmental structures must be maintained. Why do I say this?

Firstly, there can be no effective interdisciplinary engagement if this is not launched from strong platforms of specialisation. It is laudable that law lecturers specialise in particular fields rather than work as generalists on a superficial level across the full spectrum of the law.⁵⁴ The faculty draws the specialists together where they interact as part of the broader LLB programme.

⁵⁴ This approach of specialisation is supported by the National Research Foundation (NRF), which is responsible for the evaluation and rating of South African researchers.

Secondly, and in my view the most compelling argument for the retention of academic departments, is the fact that departmental structures establish practical decentralised managerial units.⁵⁵ Should the decision be made to remove departmental structures, the managerial model will merely have to be replaced with an alternative model of which there are no indications that this will bring about any greater interaction within the faculty.

Thirdly, the law cannot be taught to students as a single incoherent mass of principles without providing some logical categorisation. Academic departments play a positive role in maintaining some of this coherent structure without establishing impenetrable boundaries.

I submit that it is not appropriate to compare our departments or the subjects that we teach to the metaphor of silos. It is more appropriate to compare the functioning of the Faculty of Law to the composition of a city within the global context. The different subjects that we teach represent the homesteads that we design and maintain; the neighbourhoods depict the departments; the city symbolises the faculty; and the university is represented by a metropolis. There are no border posts between the neighbourhoods, and homes are connected to one another through power, water and telephone networks. The neighbourhood, city and the metropolis are linked to national and international centres by means of road, rail and air networks. Yes, we can always improve and upgrade our connecting systems and some lecturers travel more than others, but to compare departmental structures with concrete cylinders is inappropriate.

6 Conclusion

⁵⁵ The warning by O'Regan 'Producing Competent Graduates: The Primary Responsibility of Law Schools' (2002) *SALJ* 242 at 248 should, however, be heeded where she states that 'curriculum redesign is . . . often hijacked by institutional politics. Law schools need to be aware of this structural constraint and seek to approach curriculum redesign in a way which focuses on the best method of producing competent law graduates rather than internal process and empire building.'

There is no doubt in my mind that the Department of Mercantile Law is perfectly positioned to fulfil the goals that I have alluded to in my address. The department comprises eighteen full-time lecturing staff members and two secretaries. Apart from the 1 700 undergraduate law students that we teach in the Faculty of Law, we also present service courses to more than 3 000 students from the Faculty of Economic and Management Sciences, and the Faculty of Engineering, the Built Environment and Information Technology. Our department has close ties with the Faculty of Economic and Management Sciences and forms part of their Faculty Board and Heads of Department meetings.

Many of our members of staff are recognised nationally and internationally as excellent teachers and researchers. Some are authors of eminent books, chair editorial boards of accredited law journals and serve on legislative bodies, and a healthy percentage of our members are qualified attorneys and advocates.

Ground-breaking developments have occurred in the field of Mercantile Law of late and, in my view, we are working at the cutting-edge in many new areas of the law. So, for example, the National Credit Act⁵⁶ came into force during 2007 and the Consumer Protection Bill⁵⁷ is on the verge of being finalised as an Act. The Companies Bill⁵⁸ is also on the brink of being signed into law. Added to this, significant growth has occurred in fields such as statutory Competition Law and Cyber Law. Members of the department who specialise in these fields have made tremendous efforts to include the new developments in their teaching programmes. As testimony to the Department of Mercantile Law's relevance, our elective courses and our LLM degrees are popular, and our classes are filled to capacity.

We are also involved in exciting new projects where we endeavour to engage our students with subjects on a practical level. In 2009 we placed our first intern at

⁵⁶ 34 of 2005.

⁵⁷ [B 19D-2008].

⁵⁸ [61D-2008].

the Johannesburg Stock Exchange and we have also entered two teams in the JSE/Liberty Life Investment Challenge. We have also been involved, in conjunction with the Legal Aid Clinic, in the International Cyber Law Moot Court Competition and we are currently exploring the possibilities of placing interns at the Competition Tribunal.

Six new staff members who have tremendous potential joined the department at the beginning of 2009. I have faith in the ability of all members of the department to play a positive role, together with the rest of the faculty, in providing sustained quality education to our law students.

Unfortunately, the department has lost the experience of a number of senior academics over the past two to three years through retirement, emigration and resignation. Special recognition must be given to the former Head of Department, Professor Fanie van Jaarsveld, who retired from the University after 43 years of service; 33 years of which he was Head of Department. He played a significant role in the development of the department's proud teaching and research tradition.

I am honoured and humbled to have been appointed as Head of the Department of Mercantile Law. I wish to thank the management of the University of Pretoria for the trust that they have placed in me, and I am excited at the prospect of pouring my energy and guidance into expanding the existing strengths of the department.

In conclusion, I also wish to extend a special word of thanks to Ms Hetta de Beer who has done sterling work in assisting with tonight's arrangements and to Union Caterers for the refreshments that they will be serving after these proceedings.

Ladies and gentlemen, I thank you.