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2009

## Implementing the Social and Economic Promise of the Constitution: The Role of South African Legal Education

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### Recommended Citation

Susan R. Jones & Peggy Maisel, Implementing the Social and Economic Promise of the Constitution: The Role of South African Legal Education in *LAW AND RIGHTS: GLOBAL PERSPECTIVES ON CONSTITUTIONALISM AND GOVERNANCE* (Penelope E. Andrews, Susan Bazilli, eds., 2008).

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## CHAPTER 17

# IMPLEMENTING THE SOCIAL AND ECONOMIC PROMISE OF THE CONSTITUTION: THE ROLE OF SOUTH AFRICAN LEGAL EDUCATION

*Peggy Maisel and Susan R. Jones*

### Introduction

Currently, progress towards social and economic justice is South Africa's greatest challenge. This is complicated by an AIDS pandemic, a catastrophe that perpetuates the pain of poverty and economic inequality. The South African Constitution recognizes socio-economic rights as a necessary foundation for the enjoyment of civil and political rights. The challenge is translating these rights into opportunities for social and economic advancement by the vast majority of South Africans living in poverty.

The South African Constitution, one of the most progressive in the world, contains many important protections such as the rights to equality, housing and education.<sup>1</sup> The Broad-Based Black Economic Empowerment Law (BEE), discussed later in this chapter, was designed to address the economic inequities of apartheid.<sup>2</sup> South Africa's commitment to economic justice is also evidenced by the fact that it is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR) which recognizes the "right of everyone to an adequate standard of living for himself, and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."<sup>3</sup>

Lawyers are among the most highly educated professionals in every society and are needed to support and lead the transformation away from poverty and inequality by helping to actualize these constitutional provisions and international covenants.<sup>4</sup> For this to occur, however, law students must learn about how law can be used as a tool to promote, rather than inhibit, social and economic development, and they must gain the skills, values, and knowledge to assist.<sup>5</sup> Under apartheid, law schools educated lawyers to maintain a system of subordination, but even with governmental change, the economic system remains virtually the same.<sup>6</sup>

This chapter first identifies ways in which legal education must continue to change in order to educate lawyers who are able to assist with South Africa's development. Second, it analyzes the contributions of clinical legal education since apartheid and some of the obstacles to its growth. Third, the chapter discusses community economic development (CED) law school clinics in the United States and the ways they may provide new ideas for South African legal education. Finally, the chapter discusses specific CED opportunities that exist in South Africa. The article argues that legal education in contemporary Africa must relate to the development needs of the country. In fact, the South African clinical movement is advancing this perspective.

## Changes in Legal Education Post-Apartheid

A 1993 article suggests three needed substantive and procedural changes in legal education to support the new South African political democracy.<sup>7</sup> The first change is for the black majority to be demographically represented in law schools, and therefore eventually in the legal profession. The second need is for a radical change in pedagogy away from large lecture classes.<sup>8</sup> The third change is curriculum reform to teach law students to engage with constitutional rights and to know how to enforce them. The article agrees that law students must learn about human rights, particularly the rights of women, the disabled, homosexuals, children, the aged and the environment. These concepts as legal rights were new to most South Africans in 1993 and had not been taught in most law schools. In the past thirteen years, however, it has become clear that law students must also learn about the socio-economic rights and laws designed to promote economic justice if they are to contribute to the development of South African communities.

A 2002 critique of legal education in Africa further recognizes the problems created by a system of curriculum design, including pedagogy, that mirrors the British common law or European civil law educational systems developed in an entirely different socioeconomic cultural context.<sup>9</sup> In South Africa the received legal system is a combination of English and Roman-Dutch law. The law courses under apartheid did not reflect the development needs of the society, and the training of lawyers was based on teaching geared to an "adversary setting catering to litigation for the fortunate few at the cost of social injustice to the deprived many."<sup>10</sup>

There has been progress in changing legal education over the past ten years of constitutional rule but there is still a long way to go. Clinical legal education has been at the forefront of curriculum and pedagogical change. Law school clinics have also contributed to providing more opportunities for black students to obtain articles and thus be better represented in the profession.<sup>11</sup>

In its broadest definition, clinical legal education implies pedagogy which requires law students to think and act like lawyers.<sup>12</sup> It usually has a social justice focus, and includes in-house live client clinics, externships, community education projects, simulation courses, and other skills courses. All of these curriculum reforms exist to some degree at South African law schools. This chapter focuses on the opportunities provided by the university based law clinics, where final year law students work with clients, while enrolled in a course for credit. However, the other types of courses mentioned above are also important to preparing law students to contribute to socio-economic change.

For example, Street Law courses exist at many South African law schools, where law students teach about human rights, including socio-economic rights, at secondary schools, prisons and juvenile detention centers.<sup>13</sup> The Street Law students not only learn about these rights in their law school classrooms, but spread this knowledge through their teaching in the community.

The teaching of legal skills, such as legal analysis, problem solving, legal research and writing, is also critical in the first three years of law school.<sup>14</sup> This preparation is necessary before law students enroll in law clinics during their final year, otherwise clinical faculty are forced to teach these skills for the first time in the context of working on client cases.

An example of a strong skills curriculum is one developed by the University of Kwa-Zulu Natal (UKZN) law faculty in 2000 as part of its LLB degree.<sup>15</sup> The

students take at least one skills course each semester. In the first year there are two courses taught in small groups called Introduction to Law and Foundations of South African Law.<sup>16</sup> The latter course also introduces all first year students to critical constitutional issues with sections on the right to equality, access to justice, and HIV/AIDS. In the second year, the curriculum covers computer skills, legal research, numeracy and legal drafting.<sup>17</sup> Third year students learn interviewing, counseling, negotiation and transactional skills.<sup>18</sup> In the fourth year, the students choose between the Legal Clinic, Street Law, or a course called Teaching Legal Skills. In the latter course the final year students learn how to tutor the first year students in small groups on the legal skills taught in the Introduction and Foundation courses.<sup>19</sup>

One of the reasons given for the difficulty in changing pedagogy from the large classroom lecture method to smaller interactive classes is the shortage of law faculty.<sup>20</sup> The Teaching Legal Skills course and a companion legal education course for LLM students help to increase faculty resources for legal skills teaching.<sup>21</sup>

### **The Expansion of Law School Clinics**

The expansion of South African law school clinical programs has been an important step in educating law students about social justice issues and providing legal services to poor communities. The first law school clinic started at the University of Cape Town in 1971.<sup>22</sup> Under apartheid this clinic was a voluntary effort on the part of law students and lawyers to provide free legal services to the poor and not a part of the curriculum. Since the end of apartheid, law school clinics have been established at every law school with students participating for credit as part of final year coursework.<sup>23</sup>

The educational goals of clinics are, first, to add balance to the law school curriculum with the introduction of poverty and development law issues into a curriculum that has historically ignored these subjects in favor of commercial and middle class interests. Second, to improve legal education by taking students out of a passive classroom learning environment to instead actively engage with clients, learning the skills of lawyering such as interviewing, negotiating and performing legal analysis, while confronting the ethical issues that are raised in legal practice. Further, in legal clinics students receive individual and small group supervision that provides one to one learning. Finally, law school clinics expand the resources available to poor people and communities.

Because of the lack of Legal Aid Board (LAB), resources the South African law school clinics have primarily focused on civil cases where clients would otherwise be unrepresented.<sup>24</sup> These are issues vital to people's survival, and include public benefits, such as shelter, family matters and civil rights. As this chapter suggests, an important expansion to this work would be to introduce more clinics with a specific focus on community economic development.

### **Challenges to Implementing Curriculum Reform and Clinical Education**

There are still substantial barriers to the development of law school clinics and curriculum reform, in spite of a supportive government and the commitment of

some within the university. The biggest problem is that legal clinics are more expensive than classroom courses and clinics receive limited, if any, financial support from their universities.<sup>25</sup> Related is a lack of some faculties' understanding of clinical legal education as a vital component of a law school curriculum and what is required for its success. In addition, there is the need to build capacity within all law schools, but particularly those previously disadvantaged schools, so that clinical programs can provide high quality legal education and legal services. Finally, there is the pressing need for free legal services in South Africa, which makes it more difficult to control caseloads and achieve both the educational and service missions of the law school clinics.

When the Constitution was adopted, legal clinics existed at all twenty-one law schools. There was a great disparity in resources, however, between clinics at historically black universities (HBU's) and those at historically white universities privileged under apartheid.<sup>26</sup> Some clinics functioned with few resources, inexperienced directors, and limited support. In the past ten years, clinical law faculty and their supporters have successfully implemented several strategies to overcome these obstacles.

The most important strategy has been the formation and effective work of the Association of University Legal Aid Institutions (AULAI), whose members include all of the law school clinics.<sup>27</sup> AULAI was formed in the late 1980s, but became active in the mid 1990s when it ran a national conference on clinical education. Since then the organization has successfully raised funds, lobbied law schools and the government on legal aid policies and curriculum development, and provided program support and training at workshops twice a year. In 1998, AULAI established a separate Trust to help fund and support the development of clinical education throughout South Africa.<sup>28</sup> The Trust raises funds from donors to distribute among the twenty-one university based law clinics, on a basis determined by the Trust Board, that is composed of directors committed to clinical education, from academia, non-governmental organizations, the private sector and government. This Trust is a model that does not exist in any other country and has helped sustain and build the law clinics, by increasing their staff. Special attention has been paid by the Trust to the needs of clinics at the HBUs. Unfortunately, the Trust endowment has been almost completely spent and the problem remains how to sustain both the Trust itself and the clinics it supports. The stability and continued growth of law clinics is central to achieving the educational goals of preparing law students to promote constitutional rights and economic justice.

### **New Opportunities for Law School Clinics**

Law school clinical faculty have also worked to maximize the impact of the legal work of the clinics, and in the process teach students how to find solutions for some of South Africa's pressing social and economic justice issues. One effective strategy has been for law clinics to specialize in their legal work. For example, in 1996 the legal clinic at the University of Natal in Durban was a general practice clinic with a high caseload of divorces.<sup>29</sup> The new Director of the clinic led a strategic planning process in 1997, resulting in establishing three units focused on priority work: The Gender and Children's Rights Unit focused on domestic violence cases; the

Administrative Justice Unit focused on HIV/AIDS cases and police abuse; and the Development Law Unit on development issues.

The Development Law Unit has represented land claimants since 1997, enforcing rights under statutes passed pursuant to the new Constitution.<sup>30</sup> It has also engaged in assisting micro-businesses. One of the clinic's first cases was to represent 2,500 applicants who had been removed during apartheid from an area of prime real estate called Cato Manor.<sup>31</sup> This case is an example of how law students can learn about economic justice by engaging in development work. The Director of the Clinic described some of the case lessons learned, including the importance of interdisciplinary collaboration; a lesson which is usually missing from law courses.

We started by embarking on what was at first a desperate search for a historian who would paint a clearer picture for us and an urban planner who would understand the planning implications of the application.....We realized that we as lawyers were not going to be able to do this on our own. A technical legal approach would not work. It was clear that a holistic approach that included social processes, participation of clients and members of other disciplines was needed.<sup>32</sup>

A second effective strategy for increasing the impact of legal work has been for the law clinics to enter into cooperative agreements with the National Community Based Paralegal Association and with the Legal Aid Board. During apartheid, paralegals from rural communities and townships were the only source of legal assistance for many black South Africans.<sup>33</sup> In 1996 many of the 750 paralegals working in 250 advice offices formed the National Community Based Paralegal Association.<sup>34</sup> Law school clinics, which are geographically spread out across the country, have more recently entered into partnerships to provide back-up legal services to the advice offices. This is a wonderful opportunity for law students to assist with the development problems of poor rural and urban communities.

Another type of partnership educating law students has been cooperative agreements between law school clinics and the Legal Aid Board. The LAB, which is funded by the South African government to provide legal services to indigent people in both criminal and civil cases, has struggled to fulfill this mandate.<sup>35</sup> The constitutional imperatives and demands of the new democracy have created an increasing need for legal representation, but the LAB has prioritized representation in criminal over civil cases.<sup>36</sup> In recent years the LAB has opened a network of Justice Centres located throughout the country as a means of making legal services more available. The LAB has formed partnerships with law school clinics to do outreach, and provide legal services on civil matters in communities located in rural areas and townships that are not accessible to these Centres.<sup>37</sup> This provides more opportunities for students to engage in development work.

Development law clinics provide an opportunity for students to learn the tools and practice required to assist the economic growth and development needed in African countries. Professor Grady Jessup, while working in Ghana, suggested the implementation of a Development Law Clinic, but he cautioned that customary law and indigenous norms must be taught to insure a vital link to communities. He argued for a problem driven methodology where work could include legislative reform, infrastructure project development, law reform or demographic studies.<sup>38</sup>

Three South African law school clinics have specifically specialized in development work employing all of these strategies. As previously discussed, the University of Kwa-Zulu Natal clinic represented land claimants and has provided

legal assistance to some micro-enterprises. The law clinic at Rhodes University has provided legal assistance to the micro-lending industry and the University of Pretoria has a debt relief clinic.<sup>39</sup> These clinics are teaching law students about the new laws passed to encourage economic growth and redistribute land. They have pioneered in South Africa the type of community economic development work described in the next section.

### **Community Economic Development Clinics in the United States**

The U.S. experience with CED clinics may be helpful to South African law schools as this type of work grows and develops.<sup>40</sup> It is important to note that while South African clinical programs have been influenced by the American model of clinical legal education, the social and economic issues confronting South Africa are more complex and different from those in the U.S. At the same time, historically underserved minority communities in the U.S. have much in common with South Africa.<sup>41</sup>

In her book, *New News Out of Africa: Uncovering Africa's Renaissance*, journalist Charlayne Hunter-Gault compares South Africa's emerging democracy to the American civil rights movement.

A little over a decade into its new democracy, South Africa is in some ways where America was in 1968, when the country's inner cities erupted in flames sparked by rage. Back then, President Johnson's Kerner Commission reached a conclusion that took most Americans by surprise: America was in fact two societies, one white and prospering, one black and in decline. While there are no signs yet of such an explosion in South Africa, there are worries about poverty, still holding at some 45 percent, and unemployment, which was over 26 percent in 2005.<sup>42</sup>

Given the realities of the global economy,<sup>43</sup> the contemporary American civil rights movement must emphasize economic justice within the context of global human rights. Accordingly, within the legal profession, legal activists and public interest and human rights lawyers are examining ways to advance social and economic justice. The creation of CED and small business clinical programs is contributing to this effort.

Influenced by the international microfinance<sup>44</sup> and microcredit<sup>45</sup> movement, a social (and economic justice) perspective has been embraced in the U.S. clinical legal education movement. There are now at least 50 community economic development and/or small business clinical programs at American law schools.<sup>46</sup> While small business clinics were once considered an oxymoron, they are now representative of the "new public interest law".<sup>47</sup> CED and small business clinics are engaged in transactions rather than litigation. Second and third-year law students, enrolled in a law school course for academic credit, represent a myriad of clients. These students are engaged in improving the quality of life for low-income people in underserved communities.

Community Economic Development is a term of art that involves many kinds of strategies for revitalizing poor communities.<sup>48</sup> Historically, quite a few laws in the U.S. have supported community economic development. Examples include The Low Income Housing Tax Credit Program and most recently the New Market Tax Credit Program.<sup>49</sup>

CED facilitates the economic growth of communities through “business development jobs, affordable housing and affordable healthcare, childcare, environmental justice”, and “other necessities in a manner that enables community residents to improve the quality of their lives and exercise greater determination over the affairs that shape their daily existence.”<sup>50</sup> CED strategies include supporting economic independence through entrepreneurship, encouraging joint ventures between the private sector, government and local institutions, encouraging greater citizen participation in political, civil and social rights movements and translating, applying and challenging the various laws that impact CED.<sup>51</sup> CED lawyers typically represent nonprofit organizations such as nonprofit housing developers, health care and day care centers, business cooperatives and microbusinesses—very small businesses comprised of 1-5 people with less than \$35,000 in start up capital.<sup>52</sup>

In the late 1960s during the U.S. Civil Rights movement and the national “War on Poverty”, U.S. Legal Services attorneys recognized that the problems of the individual poor people they represented had to be seen from a broader perspective. They began to look for strategies to alleviate poverty. Clinical programs in domestic violence, HIV/AIDS, intellectual property, small business and community economic development emerged, in part, by responding to these social needs and funding opportunities. For example, small business clinics emerged in the late 1970s because of funding from the U.S. Small Business Administration to provide legal assistance to small business owners.<sup>53</sup>

One continuing strategy is to work with nonprofit community development corporations (CDCs) and other community-based organizations (CBOs) also known as Neighborhood-Based Organizations (NBOs). These are Non-Governmental Organizations (NGOs) or Private Voluntary Organizations (PVOs) in the South African and international context. In the U.S. local and national bar associations are recognizing the need to assist low income communities as part of a commitment to pro bono service.

Pro bono business law is gaining momentum through the American Bar Association pro bono challenge and internal law firm pro bono requirements.<sup>54</sup> Indeed, a number of pro bono legal assistance programs have devoted attention to providing legal assistance to CBOs, and CDCs working to address affordable housing, small business development, health care, child care, environmental issues, juvenile delinquency, public safety and crime prevention.<sup>55</sup>

### Opportunities For CED Clinics

Civil society has been critical to the goal of realizing social and economic opportunities in the US and South Africa. Indeed, in the South African context, Chapter 2, Section 18 of the South African Constitution guarantees everyone the right to freedom of association.<sup>56</sup> Civil society groups have been instrumental in organizing the mass movements to advocate for socio-economic rights. Despite formal legal rights to equality in both South Africa and the United States, serious poverty and racism persist. The U.S. poverty rate is 12.7%.<sup>57</sup> The South African poverty rate is reported as high as 57%.<sup>58</sup> Even though there are vast differences socially, politically and economically between the two countries, there are also some



interesting parallels when it comes to examining opportunities for advancing social and economic opportunities.

For example, microenterprise development as a scheme for alleviating poverty is being vigorously pursued in both countries and other parts of the world. A pressing problem for South Africa is how to employ unemployed and unemployable citizens in the formal business sector.<sup>59</sup> Terreblanche reports in his book, *A History of Inequality in South Africa*, that

about 50% of African entrants to the job market could not find jobs in the formal sector. This lack of employment is a major reason for the poverty of 60% of the black population. This situation of structural unemployment and poverty has a compulsory character because it is beyond the control of the unemployed.<sup>60</sup>

Advances in technology and globalization have changed the nature of work creating more skilled and fewer unskilled jobs.

Globally, small businesses create most new jobs<sup>61</sup>, and China, for example, which is moving toward privatization and closing state owned enterprises, is looking to small and medium sized enterprises (SMEs) to employ former state-owned workers.<sup>62</sup> This means that SME development and the creation of opportunities for self-employment will be an important part of global economic development strategies. In his book, *Ending Global Poverty: A Guide to What Works*, economist Stephen Smith identifies the importance of assets, credit and market development as keys to ending global poverty. He points out that microfinance works, but poor families need assets and better market access as well.

While small businesses are creating most new jobs in America today, the nonprofit sector is also formidable.<sup>63</sup> South Africa, too, has a large and vibrant nonprofit sector.<sup>64</sup> Studies have found that "civil society is a significant economic sector...and that its civil society is as large in proportional terms and as vibrant as in all but a handful of advanced industrialized countries."<sup>65</sup> South African NGOs are concerned about the withdrawal of international aid to these groups and assert that aid is now being given to government.<sup>66</sup>

Another area for legal analysis is cooperation and coordination amongst government, the nonprofit and business sectors. The proliferation of legal clinics in small business and community development is introducing students to the idea that business law can help transform communities.<sup>67</sup> Concepts of social venture philanthropy, a model of charitable giving influenced by venture capital, social entrepreneurship, a blend of social, philanthropic and business values and social purpose business must be a core part of CED or development work. Neighborhood entrepreneurs often employ local residents and demonstrate to the community that starting a small business is indeed possible. By working to create community-based jobs and self-employment, the CED movements help to address the growing problem that "workers are far from potential jobs, a phenomenon researchers call "spatial mismatch".<sup>68</sup>

Given issues of economic, racial and gender disparity in the U.S. and South Africa, economic justice ought to be taught as part of the core law school curriculum.<sup>69</sup> Just as legislation in the U.S. has encouraged CED, The Broad Based Black Economic Empowerment Act of 2003 was enacted to address economic disparity in South Africa.<sup>70</sup> The purpose of the Act is to "establish a legislative framework for the promotion of black economic empowerment, to empower the

Minister to issue codes of good practice and to publish transformation charters, to establish the Black Economic Empowerment Advisory Council, and to provide for matters connected therewith."<sup>71</sup> The Preamble to the Act acknowledges that during apartheid "race was used to control access to South Africa's productive resources and access to skills"; that the "economy still excludes the vast majority of its people from ownership of productive assets and the possession of advanced skills," and that "that the economy performs below its potential because of the low level of income earned and generated by the majority of its people."<sup>72</sup> The Preamble recognizes that

unless further steps are taken to increase the effective participation of black people in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race.<sup>73</sup>

The BEE creates a score card to facilitate broad based economic development.<sup>74</sup> This score card increases capital to black owned businesses, and is intended to boost skills particularly among the black unemployed to levels that will enhance economic growth. Companies have to achieve BEE status which qualifies them for lucrative business opportunities. One way that corporations can achieve BEE status is through corporate social investment initiatives. The Black Economic Empowerment Commission created in 1998:

[e]xtends the definition of empowerment beyond transferal of ownership of companies, describing it as 'an integrated and coherent socio-economic process... which aims to redress past imbalances by transferring and conferring ownership, management, and control of South Africa's financial and economic resources to the majority of its citizens and ensure broader participation of black people in the economy in order to achieve sustainable development and prosperity.'<sup>75</sup>

The commission also reports that "continuing racism across all sectors of society acts as a social impediment," distorting the functioning of markets and reinforcing the marginalization of black South Africans.<sup>76</sup> There are also a number of other laws that work in tandem with the BEE.<sup>77</sup>

The BEE has been controversial and the subject of much debate. The need to build a broad-based middle class must be balanced against social values of "Ubuntu", an African humanist philosophy which says that people are people because of people. South African clinicians should consider engaging in a careful analysis and critique of the BEE to determine where there might be creative uses of NPO law. Legal research might be conducted to assess, for example, the use of BEE in the creation of worker owned cooperatives and other corporate legal entities for businesses that create work for unemployed persons.

## Conclusion

Changes in universities since the end of apartheid have resulted in law students now more closely representing the demographics of South Africa. The new law school curriculum and pedagogy recognize the importance of teaching students about the Constitution and legal skills needed for problem solving. The expansion of clinical legal education has been central to many of these law school reforms. However, more radical innovation in legal education is needed if South African

lawyers are to be adequately prepared to solve the pressing socio-economic problems in the country.

Development law clinics can help law students learn the tools necessary to promote economic justice and achieve the promise of the Constitution and related laws. This chapter considered the development of the South African clinical law movement and the importance of community economic development opportunities. It also surveyed the growth of community economic development clinics in the United States that may provide some new ideas and guidance if adapted to the South African context. Legal education that provides students with the skills to help implement the social and economic promise of the Constitution is the challenge for its second decade.

<sup>1</sup> See Chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>2</sup> See Broad-Based Black Economic Empowerment Act 53 of 2003 (S. Afr.) pmbl., available at <http://www.info.gov.za/gazette/acts/2003/a53-03.pdf> (last visited July 18 2006).

<sup>3</sup> International Covenant of Economic, Social and Cultural Rights art. 11, para. 1, Dec. 16, 1966. S. Treach Doc No 95-19 U.N.T.S. 4. South Africa became a signatory to the Covenant on Oct. 3, 1994 and has yet to ratify it.

<sup>4</sup> Historically black lawyers have led the struggle for equality in South Africa. See KENNETH S. BROWN, *BLACK LAWYERS, WHITE COURTS: THE SOUL OF SOUTH AFRICAN LAW* 235-43 (Ohio University Press 2000).

<sup>5</sup> Motivation to become a public interest lawyer either full-time or in pro bono work is also required. In the United States articles discuss how law students may lose their justice orientation during law school and graduate with a large debt that causes them to pursue legal careers with no public interest work. See Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 *Clinical L. Rev.* 425 (2005). These economic pressures also exist for African law students, particularly black law students who may be the first in their families to be able to attend university and have extended families to support.

<sup>6</sup> Blacks still control only 3% of the market value of companies listed on the Johannesburg stock market. Whites, who constitute 10% of the population, still hold 85% of all senior management posts. See Sharon LaFraniere, *South Africa's Shift Gradually Accelerates*, N.Y. Times, June 8, 2004.

<sup>7</sup> See Joanne Fedler, *Legal Education in South Africa*, 72 *Oregon L. Rev.* 999 (1993).

<sup>8</sup> Previously, large lectures, extensive reading, and exams, particularly oral ones, created a huge burden for black students, whose first language was usually not English. *Id.* at 1002.

<sup>9</sup> Grady Jessup, *Symbiotic Relations: Clinical Methodology—Fostering New Paradigms In African Legal Education*, 8 *Clinical L. Rev.* 377, 387 (2002).

<sup>10</sup> *Id.*

<sup>11</sup> The Attorney's Act 53 of 1979 (1979) was amended by Act 115 of 1993 (1993) to allow candidate attorneys to perform their articles at legal aid organizations such as law school clinics. Historically, many black lawyers were excluded from the profession by their difficulty in obtaining articles. See Lisa R. Pruitt, *No Black Names on the Letterhead? Efficient Discrimination and the South African Legal Profession*, 23 *MICH. J. INT'L L.* 545, 573 (2002).

<sup>12</sup> See Adam Babich, *The Apolitical Law School Clinic*, 11 *Clinical L. Rev.* 447, 452 (2005); Michael Jordan, *Law Teachers and the Educational Continuum*, 5 *S. Cal. Interdisc. L.J.* 41, 46 (1996).

<sup>13</sup> See Tony Axam Jr., *A Model for Learning and Teaching – Rights and Responsibilities in the New Legal Order*, 17 *S. Afr. J. on Hum. Rights* 3 (2001).

<sup>14</sup> Previously, five years were required for an LLB degree. This was changed in 1997 so that black students, who could not afford five years of university education, could compete with white students who had previously graduated with LLB degrees. See Thuli Mhlungu, *Educating and Licensing Attorneys in South Africa*, 20 *Ga. St. U. L. Rev.* 1005, 1005-22 (2004).

<sup>15</sup> In adopting the four year LLB degree, the law school Deans agreed that skills courses should be introduced into the curriculum. The law faculty at UKZN decided to create new courses for the first three years of the curriculum and add Teaching Legal Skills as a final year elective.

<sup>16</sup> See PEGGY MAISEL AND LESLEY GREENBAUM, *INTRODUCTION TO LAW AND LEGAL SKILLS*, (Butterworths 2001) (and accompanying Teacher's Manual); and PEGGY MAISEL AND LESLEY GREENBAUM, *FOUNDATIONS OF SOUTH AFRICAN LAW, CRITICAL ISSUES FOR LAW STUDENTS*, (Butterworths 2002). These are the textbooks for the first year courses.

<sup>17</sup> See ROBIN W. PALMER, A. CROCKER & M. KIDD, *BECOMING A LAWYER; FUNDAMENTAL SKILLS FOR LAW STUDENTS* (LexisNexis Butterworths 2003)

<sup>18</sup> This course has been taught to all third year law students by faculty from the law clinic. They use simulations and the course helps to prepare the students to practice in the law clinic during the following year.

<sup>19</sup> See Lesley A. Greenbaum, *Teaching Legal Writing At South African Law Faculties: A Review Of The Current Position and Suggestions For The Incorporation Of A Model Based On New Theoretical Perspectives*, 15 *Stellenbosch L. Rev.* 1, 18 (2004).

<sup>20</sup> See Fedler, *supra* note 7, at 1003.

<sup>21</sup> In the LLM course, graduate students lecture small sections of first year students while learning an approach to teaching legal skills.

<sup>22</sup> See DAVID J. MCQUOID-MASON, *AN OUTLINE OF LEGAL AID IN SOUTH AFRICA* 27 (Butterworth & Co. (SA) 1982).

<sup>23</sup> See BODENSTEIN, BONIFACE, DE KLERK, HAUPT, KOK, MAHOMED, STEENHUISEN, STILWELL, WIMPEY, *CLINICAL LAW IN SOUTH AFRICA 2* (LexisNexis Butterworths 2004).

<sup>24</sup> See David J. McQuoid-Mason, *The Delivery of Civil Legal Aid Services in South Africa*, 24 *FORDHAM INT'L L.J.* S120 (2000). See also *infra* note 35 and accompanying text.

<sup>25</sup> In 2000, one of the authors of this chapter conducted a survey of the twenty-one university based law clinics in South Africa to obtain information about the then current state of the law clinics. See Peggy Maisel, *The Position of Clinicians in South African Law Schools*, (July 2000) (unpublished paper on file with the author).

<sup>26</sup> See M. Shanara Gilbert, *Report on the Status of University Law Clinics in South Africa 1-2* (Nov. 15, 1993) (prepared for the South Africa-Nambia office, The Ford Foundation) (on file with author).

<sup>27</sup> Schalk Meyer, President of AULAI, at the First All African Clinical Legal Education Colloquium, Durban South Africa: Legal Service Delivery through University Law Clinics at South African Universities (2003) (on file with author).

<sup>28</sup> *Id.*

<sup>29</sup> In 2005, the University of Natal merged with the University of Durban – Westville, a university designated under apartheid for students of Indian origin. The university is now called the University of Kwa-Zulu Natal. The merger was mandated by the national government to rationalize spending and as one of the methods of overcoming the educational legacies of apartheid.

<sup>30</sup> See The Restitution of Land Rights Act 22 of 1994, The Land Reform (Labour Tenants) Act 3 of 1996, and the Extension of Security of Tenure Act 62 of 1997.

<sup>31</sup> See Asha Ramgobin, *Reflections on the Challenges Facing Public Interest Lawyers in Post-Apartheid South Africa*, 7 *Wash. U. J.L. & Pol'y* 77, 82 (2001).

<sup>32</sup> *Id.* At 88. She also noted that “The law students involved in the project still talk about how meaningful the experience was for them because for once they were doing something that actually had a direct impact on both the life of the claimants and on the political and historical development of land reform in the country.” *Id.* at 87.

<sup>33</sup> McQuoid-Mason, *supra* note 24, at S125.

<sup>34</sup> See Asha Ramgobin, *Justice For All? Law Clinics in South Africa. And in Sweden?* 39. (2004). (Unpublished Thesis for LLM degree from Lund University). (On file with author).

<sup>35</sup> Legal Aid Act 22 of 1969 (1969) (S. Afr.), as amended by Legal Aid Amendment Act 20 of 1996 (1996) (S. Afr.). See Peggy Maisel, *An Alternative Model to United States Bar Examinations: The South African Community Service Experience in Licensing Attorneys*, 20 *Ga. St. U. L. Rev.* 977, 986 (2004).

<sup>36</sup> *Id.* Maisel at 986, 987.

<sup>37</sup> *Supra*, Note 35 at 55.

<sup>38</sup> See Jessup *supra* note 9, at 401.

<sup>39</sup> Information from presentation by Thuli Mhlongu, “Advancing Social and Economic Opportunity: Perspectives from Law and Society” at the Comparative Constitutionalism and Rights: Global Perspectives Conference, University of KwaZulu Natal, Durban South Africa, December 10-13, 2005.

<sup>40</sup> The U.S. clinics also have much to learn from the South African experience of working more closely with groups and social movements, such as land claimants. See *supra* note 31.

<sup>41</sup> Some of the common issues include violence, unemployment, community safety, drug and alcohol abuse, and teen pregnancy. For example, statistics show that in New York City 50% of black men are unemployed, and one national study found that “[b]y 2002, one of every four black men in the U.S. was idle all year long.” Susan R. Jones, *Dr. Martin Luther King, Jr.’s Legacy: An Economic Justice Imperative*, 19 *WASH. U. J.L. & POL’Y*, 39, 44 (2005) [hereinafter *King’s Legacy*] (citing Janny Scott, *Nearly Half of Black Men Found Jobless*, *N.Y. TIMES*, Feb 28, 2004, at B1, Bob Herbert, *An Emerging Catastrophe*, *N.Y. TIMES*, July 19, 2004, at A17 (noting a study by Andrew Sum, Director of the Center for Labor Market Studies at Northeastern University in Boston); see U.S. Dep’t of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, available at <http://www.bls.gov/cps/home.htm> (last visited July 25, 2006)).

<sup>42</sup> CHARLAYNE HUNTER-GAULT, *NEW NEWS OUT OF AFRICA: UNCOVERING AFRICA’S RENAISSANCE* 57-58 (Oxford University Press 2006) (quoting South African Labour and Development Research Unit, University of Cape Town, October Household Survey (OHS) and Labour Force Survey (LFS), data from Statistical Releases of Statistics South Africa, available at <http://www.saldru.uct.ac.za> (last visited July 18, 2006)).

<sup>43</sup> For more information on the global economy see, WAYNE ELLWOOD AND JOHN MCMURTY, NO NONSENSE GUIDE TO GLOBALIZATION, (Verso 2001), THOMAS FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (Farrar, Straus and Giroux 2005).

<sup>44</sup> Microfinance, Microcredit and Microlending are used interchangeably. Microfinance, generally, "refers to a broader array of financial services used by microenterprise programs, including assistance with credit repair, microloans, asset development activities . . . or access to credit through credit unions or other community development financial institutions . . ." SUSAN R. JONES, LEGAL GUIDE TO MICROENTERPRISE DEVELOPMENT, (American Bar Association 2004) at 6 [hereinafter *Microenterprise Development*].

<sup>45</sup> "Microcredit is often used by international practitioners and is preferred by some over microfinance." *Id.*

<sup>46</sup> See Lawbus Listserv Directory maintained by Prof. Thomas Morsch, Northwestern University School of Law, lawbus@listserv.it.northwestern.edu, [on file with the author]. For a comprehensive discussion of small business and community economic development clinics, see Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L.REV. 195 (1997) [hereinafter *Small Business*]. It is important to note that not all of these programs have an explicit social and economic justice mission.

<sup>47</sup> *Id.* at 204.

<sup>48</sup> There is no established legal definition for CDCs. The National Congress for Community Economic Development, the service organization for an estimated 3,600 CDCs across America, described them as having community-based leadership and working primarily on job creation and housing production. These organizations are formed by local stakeholders – community residents, faith-based congregations, and small business owners. They often provide social services and help to create jobs through commercial development projects and small and micro business loans. Funded from public and private sources, CDCs are notorious for producing private sector jobs (774,000 in 2005) and substantial units (1,252,000 in 2005) of affordable housing. See National Congress for Community Economic Development's 5<sup>th</sup> National Community Development Census – *Reaching New Heights: Trends and Achievements of Community-Based Development Organizations* (2005) (unpublished report, available at <http://www.ncced.org/documents/NCCEDCensus2005FINALReport.pdf>, last visited July 25, 2006).

<sup>49</sup> See Scott L. Cummings & Benjamin S. Beach, *The Federal Role in Community Economic Development*, CLEARINGHOUSE REV. J.L. & POL'Y., May-June 2006, 89; Peter Edelman, *The War on Poverty and Subsequent Federal Programs: What Worked, What Didn't Work and Why? Lessons for Future Programs*, CLEARINGHOUSE REV. J.L. & POL'Y., May-June 2006, 7; James D. Weill, *The Federal Government – the Indispensable Player in Redressing Poverty*, CLEARINGHOUSE REV. J.L. & POL'Y., May-June 2006, 19.

<sup>50</sup> Jones, *Small Business*, *supra* note 46, at 199 (citing National Economic Development and Law Center, *A Lawyers Manual on Community-Based Economic Development*, 1-3 (revised 1994)).

<sup>51</sup> *Id.* See also Brian Glick & Matthew Rossman, *Neighborhood Legal Services as House Counsel to Community-Based Efforts to Achieve Economic Justice: The East Brooklyn Experience*, 23 N.Y.U. REV. L. & SOC. CHANGE 105, 107-08 (1997).

<sup>52</sup> See JONES, *Microenterprise Development*, *supra* note 44. See also Susan R. Jones, *Promoting Social and Economic Justice Through Interdisciplinary Work in Transactional Law*, 14 WASH. U. J.L. & POL'Y., 249 (2004).

<sup>53</sup> Jones, *Small Business*, *supra* note 46 at 206..

<sup>54</sup> James L. Baillie, *Fulfilling the promise of Business Law Pro Bono*, 28 WM. MITCHELL L. REV. 1548.

<sup>55</sup> It is noteworthy that both the U.S. and South Africa have legal regimes that enable the nonprofit sector. Section 21 of the Nonprofit Organizations Act of 1997 provides for the registration of NPOs including companies, trusts, religious institutions, trade unions, or co-operatives. Nonprofit Organizations Act 71 of 1997 (S. Afr) § 21. The Minister of Welfare can also prescribe benefits or allowances for registered NPOs. *Id.* § 11. In the U.S., nonprofit corporations are generally established under state corporate charters, apply for federal and state tax exemption and comply with regulatory charitable solicitation laws.

<sup>56</sup> S. AFR. CONST., § 18 *supra* note 1.

<sup>57</sup> See Carmen DeNavas-Walt, Bernadette D. Proctor, & Cheryl Hill Lee, U.S. Census Bureau, *Current Population Survey, P60-229, Income, Poverty and Health Insurance Coverage in the United States: 2004* (2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf> (last visited July 18, 2006).

<sup>58</sup> See *Human Sciences Research Council Fact Sheet: Poverty in South Africa: 2004*, available at [http://www.sarprn.org.za/documents/d0000990/P1096-Fact\\_Sheet\\_No\\_1\\_Poverty.pdf](http://www.sarprn.org.za/documents/d0000990/P1096-Fact_Sheet_No_1_Poverty.pdf) (last visited July 18, 2006).

<sup>59</sup> FLICK ASVAT, LET US DO THIS THING: WHERE BUSINESS, GOVERNMENT AND SOCIAL TRANSFORMATION MEET, 19 (Colette Braudo ed., *Altered Attitudes* 2004).

<sup>60</sup> HUNTER-GAULT, *supra* note 4, at 57 (quoting SAMPJE TERREBLANCHE, *A HISTORY OF INEQUALITY IN SOUTH AFRICA* 13-14 (Pietermaritzburg: University of Natal Press 2002)).

<sup>61</sup> See STEPHEN C. SMITH, *ENDING GLOBAL POVERTY: A GUIDE TO WHAT WORKS* (Palgrave Macmillan 2005).

<sup>62</sup> Professor Jones served as a foreign expert to GTZ, a German based NGO, on China's SME law. See Susan R. Jones, *Comments on Chapter II, Articles 7-11, 19, Direct Public Subsidies – Annotations from the American Perspective*, in *THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON THE PROMOTION OF SMALL AND MEDIUM-SIZED ENTERPRISES, PART ONE: MATERIALS ON THE DRAFTING PROCESS* 715 (Immanuel Gebhardt & Zhu Shaoping eds., Citic 2004), *Id. Articles 12-18, Facilitating Loans – Annotations from the American Perspective* at 723, *Id. Chapter III, Technology Innovation – Annotations from the American Perspective* at 734, *Id. Chapter IV, Market Development – Annotations from the American Perspective* at 743. See also Susan R. Jones, *The Second Draft – Annotations on Chapter IV from the American Perspective*, in *id. PART TWO* at 391, *id. Chapter V* at 392, *id. Chapter VI* at 412.

<sup>63</sup> In the U.S. it is reported that there are more than 1.8 million tax exempt organizations, although the actual number is much higher. These organizations generate in excess of 1.2 trillion dollars annually and their assets have a total value of at least 3.7 trillion. Tax exempt organizations account for 12% of the U.S. gross domestic product. Charitable giving totaled \$241 billion in 2003. Bruce R. Hopkins, Professional Education Systems Institute, LLC, Seventh Annual, *The Law of Tax Exempt Organizations Conference materials page 2* [on file with the Prof. Susan Jones].

<sup>64</sup> There are 98,920 nonprofit organizations in South Africa. Fifty-three percent (53%) of these are less formalized and do not receive large amounts of aid. See ASVAT, *supra* note 59, at 39-40.

<sup>65</sup> A.E. Rippon, *A Strategic Approach for Not-For-Profit Organisations 21*(Oct. 2002) (unpublished report, on file with the author).

<sup>66</sup> HUNTER-GAULT, *Supra*, Note 42 at 30.

<sup>67</sup> "[T]here are examples of fresh new economic justice initiatives in the progressive corporate world. Greyston Bakery is a social experiment started more than twenty years ago by Bernie Glassman. Greyston Bakery was established with the goal of employing the chronically unemployed. Profits from the bakery, a \$5 million a year business that sells to businesses such as Ben and Jerry's Ice Cream, are used to fund day care centers, health clinics and counseling services. Greyston makes cakes in order to hire people, and currently employs some sixty-five workers, including former drug dealers and homeless people. These examples show us that the opportunities for creating good jobs as part of a larger mission to end homelessness and poverty are truly possible, and lawyers play a critical role in the process of nonprofit and for-profit business development." Jones, *King's Legacy*, *supra* note 6, at 63. Greyston Bakery, *The Greyston Bakery Story*, available at <http://www.greystonbakery.com> (last visited July 18, 2006).

<sup>68</sup> Susan R. Jones, *Self-Employment: Possibilities and Problems*, in *HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA* 76, 82 (Joel F. Handler & Lucie White eds., M.E. Sharpe 1999).

<sup>69</sup> See for example, EMMA C. JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (Foundation Press 2005). Courses on community economic development, race and the law, poverty law, and international human rights courses and clinics also provide opportunities to teach about economic justice.

<sup>70</sup> Broad-Based Black Economic Empowerment Act, *supra* note 2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Broad-based includes women, workers, youth, people with disabilities and people living in rural areas.

<sup>75</sup> DUMA GQUBULE & ANDREA BROWN, *BLACK ECONOMIC EMPOWERMENT COMMISSION REPORT* (Skotaville Press 2001), available at <http://www.capegateway.gov.za/text/2004/5/beecomreport.pdf> (last visited July 20, 2006).

<sup>76</sup> *Id.*

<sup>77</sup> They include the Qualifications Authority Act 58 of 1995; the National Small Business Act 1901 of 1996; and the Employment Equity Act 55 of 1998. The Skills Development Act 97 of 1998, and the

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Skills Development and Employment Equity Acts of 1998 are designed to address disparities in the workplace and train the country's workforce. The Skills Development Levies Act of 1998 provides for funds for companies to develop human capital to achieve employment equity and creates the basis for a National Skills Development Strategy. A skills levy has been instituted on corporate South Africa and 24 Education and Training Authorities (SEATS) were created by the Skills Development Act.