ON EQUALITY, JUSTICE, THE FUTURE OF SOUTH AFRICAN LAW SCHOOLS AND OTHER DREAMS

Paper 1
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1 INTRODUCTION

South Africa is changing irreversibly, although the final destination is by no means clear. One would like to see universities - and law schools in particular -playing a prominent role in this process and in the future.

In 1990 South Africa was populated by approximately 37,532,000 people, of whom 75.3% were 'African', or 'black'; 2.6% of Asian origin; 8.6% 'coloured' and 13.5% 'white'. Without the Transkei, Bophuthatswana, Venda and Ciskei, whites would represent 16.5% of the population. By the year 2000 11.4% of the population could be expected to be white.

Yet, of the more than 300,000 students registered at all South African universities (including the homelands) in 1989, 52% were white. Only 11.5% of students at the liberal English universities were African, 14.5% coloured or Asian and 74% white. On the campuses of Afrikaans universities 97% of students were white. All South African universities are officially open to all races.

Almost 69% of all law students at South African universities in 1989 were white; only 17% were African. Approximately 98% of law students at the University of Pretoria in 1991 were white. The situation at other Afrikaans universities is not substantially different, although it may have changed over the last two years.

As far as the academic staff are concerned, statistics seem to reflect a similar state of affairs. Black South Africans form only 12% of the more than 10 000 academics in South Africa. Their numbers are increasing by 1,3% a year, which means that it will take 30 years before blacks constitute 50% of the academic staff population. Approximately 88% of the members of the Society of University Law Teachers are white. Very few black South Africans hold full-time teaching positions in English language law schools, and until very recently no blacks have been teaching in Afrikaans law schools. (This may still be the case, possibly with a few very recent exceptions.) Only 29% of the national academic staff population are women. Whereas women form only 5% of professors, they form 61% of all junior lecturers!

In spite of allegations from the ranks of legal practitioners regarding an oversupply of qualified lawyers, it is well-known that the majority of South Africans have little or no access to the legal system. This situation contributes to the feelings of alienation, irresponsibility and aggression, the legitimacy crisis of the courts, civil unrest and crime. Between 8,000 and 9,000 legal practitioners serve more than 37 million people. Very few of these practitioners specialise in criminal work. Approximately 80% of all accused in criminal trials are undefended. More than 100,000 people are sentenced to jail sentences every year, without having been defended by lawyers. The bench of the South African Supreme Court is

occupied by white males, with one white woman and one male judge of Indian descent as the only exceptions. All of the Justices serving on the bench of the Appellate Division of the Supreme Court are white males.

Such a state of affairs is clearly untenable. It does not even remotely reflect the reality of the racial composition of Africa's and of South Africa's population, but rather the results of years of oppression and exploitation. No society in which such serious class differences and gross imbalances occur, could exist peacefully. Notwithstanding considerations such as equality, fairness, justice and the possibility of ongoing revolutionary pressure, any person who does not want to believe in the inherent or generic inferiority of women or certain ethnic groups, is necessarily devastated by the realisation of the amount of human potential which is being wasted as a result of the exclusivity of universities and certain occupations.

These facts obviously reflect only a small integrated part of the South African socio-economic crisis, in which population growth, poverty, exploitation, urbanisation and illiteracy are prominent factors. Problems of this kind occur in most countries, and in the Third World to a serious degree. In South Africa the devastation of apartheid has worsened and exacerbated them endlessly. This contribution attempts to offer a few thoughts on the recruitment and admission of students, the appointment of academic staff and the curricula of law schools, with the emphasis on Afrikaans law schools.

An argument for the admission of more black students, or the appointment of black law teachers, has to be realistic about existing facts and conditions. White South Africans are enjoying a tremendously advantaged position vis-à-vis the rest of the population, and particularly Africans, as far as financial resources and literacy are concerned. The crisis in black education is well-known. Many of the products of Bantu education could hardly be expected to compete with the graduates of white schools, at least as far as traditional or Euro-centric methods for testing academic standards are concerned. Many black students have to study under extremely difficult conditions, in the midst of poverty, political unrest, and violence, in households which barely offer sufficient living space, let alone educational toys, computers or libraries. In 1988/89 the state still spent more than four times as much money on the education of every white child, than on every black child. A decade earlier the per capita expenditure per black child was only 10% of that per white child. Furthermore, not nearly enough black lawyers are academically sufficiently qualified and experienced to be appointed as full-time professors on any basis which would proportionally represent the ethnic composition of the population. The architects and builders of apartheid spent much money and energy in order to enforce racial segregation in higher education, as a result of which a dearth of African scholars exists in South Africa, at a time when the majority of South Africans are on the threshold of playing a decisive role in the government of the country.

The issues could be approached from several different perspectives. One is the debate about the role and function of universities in liberation struggles and societies in transition, academic standards, research priorities, people's education, etc. Another is the concept of affirmative action ('herstellende optrede', 'regstellende optrede', 'herstellende programme', or 'regstellende programme' in Afrikaans). Affirmative action could be relevant as far as student selection and admission procedures, or academic appointments, are concerned, when white candidates are overlooked in favour of black candidates who may seem to have similar or weaker academic qualifications, or in the allocation of financial and other resources. The controversy around affirmative action mostly revolves around allegations that it

discriminates, or that it has not been proven to be effective in what its supporters have claimed to try to achieve.

2 ACADEMIC STANDARDS AND COMMUNITY INVOLVEMENT: EXCELLENCE OR PEOPLE'S EDUCATION?

A heated debate has taken place concerning the nature and role of universities. Should universities primarily or even exclusively strive for academic excellence and scientific eminence, or rather to reflect and serve the community as a whole? Should universities like Oxford and Cambridge serve as models, or more democratic examples instead? The traditional elitist approach primarily emphasised quality and academic excellence and supported a uniform system of admission requirements and evaluation procedures. The egalitarian approach primarily argued for the advancement of equal opportunities for all and the widest possible access to university education, and, in its most extreme form, for the abolition of virtually all admission criteria and unlimited access to tertiary education.

On both sides of this debate participants have sometimes used terminology aimed at strengthening the moral authority of their case and at embarrassing their opponents. On behalf of the establishment, it was argued that 'high standards' and 'academic quality' were not negotiable, thereby implying that those in favour of radical change did not revere these values. These arguments were presumably put forward not only by persons who were genuinely concerned about high academic standards, but also by some who clothed their desire to maintain the status quo in academically respectable sounding phrases. From the opposite side the academic establishment was given the 'ivory tower' label, and universities were called upon to provide 'peoples' education', by revolutionaries, by scholars who were genuinely concerned about academic standards while realising the need for change and community involvement, and by intellectuals who strived for political correctness. The dangers in this approach included the insistence on ideological conformity and thus the intolerance reflected in some statements and actions, as well as the sometimes stated or implied notion that a university should not regard itself as any better than the community and the reality around it.

More specifically in legal circles, the question whether law faculties should educate scholars and philosophers, or rather train practitioners and para-legals, has often been debated. (Here, ironically, the 'ivory tower' accusation has been invoked by conservatives,or crude and naive legal positivists, who attacked academic legal education for being too theoretical and who preferred law students not to indulge in too much critical thought, but to concentrate on the legal profession as a merciless arena where only the strong survive.)

The academic excellence versus peoples' education debate may have come of age, and the theoretical differences may not be as sharp as some years ago. For the purposes of this discussion, I offer only a basic and over-simplified credo, hopefully without the trimmings of either academic pomp, or revolutionary jargon. Obviously a university must continuously strive towards scientific progress, academic excellence and free rational discourse and thought, in order to legitimately claim to be a university. Therefore, it has to be, in some ways, ahead of and even above the community within which it functions. If researchers and students were forced to accept that the earth was flat, because the government, or the church, believed that to be the case, or because the majority of the members of their community was ignorant enough to regard them as traitors or witches if they thought otherwise, no progress towards knowledge would have been made. It has been argued on South African campuses

that freedom of expression should not exist on campus, because it was repressed off campus, of that civilised standards could not be maintained by a university in an uncivilised society. The frustration, anger and other impulses that motivated such feelings are understandable, but the arguments unconvincing. A university may not and does not have to suffer from the same pathology as the society.

However, a university should remain closely in touch with the community within which it functions, and which it claims to serve. It must be sensitive to the community's composition, needs and problems. Otherwise it would become so estranged from the community that it would not only be irrelevant, but would also lose the support and even be rejected or destroyed by the community. Although any contribution to human knowledge is surely valuable, irrespective of where or by whom it is brought forth, a university in a Third World country ravaged by famine, would hardly be able to spend the largest part of its available resources on researching space travel or yacht racing techniques. Similarly, no university in a diverse community would be able to educate only privileged minority groups. Moreover, it would be foolish to ignore the research opportunities and challenges offered by problematic socio-economic situations.

Universities and law faculties should therefore reflect and serve the communities within which they function, but as far as possible without being trapped or shackled by those communities' ignorance, disputes or underdevelopment. Excellence and progress should be encouraged and rewarded, but equal opportunities should be created, and the cultural and other prejudices of a specific group may not be allowed to dominate university policy. There is obviously some contradiction in this thesis, but a dialectic tension between reality and ideals, between progress and consolidation, is probably unavoidable in all intellectual efforts.

Furthermore, the question whether universities and scholars should commit themselves to traditional notions of academic autonomy, or to a political movement or organisation, has been discussed. Autonomy is certainly extremely important, but it does not equal an attempt to be politically and ideologically untouched, unattached or uninterested, or to function 'above' the political struggles of the day. Such an attempt or attitude is nothing but a political and ideological position. A university should be committed to liberate its community from oppression, poverty and exploitation, above all by liberating people from ignorance, backwardness and limitations on the activities of the human spirit. It has to set people's minds free. In this commitment the policies or actions of a government or specific political parties may of course be effectively criticised or supported. It is also natural that scholars and students may sometimes wish to work with others who share similar beliefs, or that some may feel more at home in certain surroundings than in others. So, it is likely that different kinds of universities may develop in South Africa. But non-critical partisan loyalty could not benefit an academic institution. This has been illustrated by, for example, the fate of universities in Nazi Germany and communist Eastern Europe as well as by the apartheid experience.

3 AFFIRMATIVE ACTION

3.1 Some South African viewpoints

The concept of affirmative action has very much become part of the South African debate. In Article 3 of the draft Bill of Human Rights of the South African Law Commission, the right to equality before the law is recognised, prohibiting discrimination on grounds of, inter alia,

race, colour, language, gender or ethnicity. This right is qualified by allowing the supreme legislature to implement programmes and to make funding available which may be reasonably necessary to ensure that, through education and training, financing and employment, all citizens have equal opportunities to develop and exercise their natural talents and potential. The Law Commission is sceptical about the success of affirmative action programmes and does not want to allow for too wide an application thereof. However, the Commission envisages the application of funds for the benefit of disadvantaged citizens, for example by spending more per capita on education or housing for black people than for whites. Thus the constitutionally entrenched right to equality could not be used to block affirmative action programmes of this kind.

The approach of the African National Congress (ANC), as formulated in the draft Bill of Rights of the Constitutional Committee is stronger and more comprehensive and wide sweeping. In Article 13 it is stated that nothing in the Constitution 'shall prevent the enactment of legislation, or the adoption by any public or private body of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination'. Furthermore, '[n]o provision of the Bill of Rights shall be construed as derogating from or limiting in any way the general provisions of this Article'. It is understandable that the ANC insists on drastic programmes on behalf of millions of victims of discrimination. However, these sections of the draft Bill of Rights may be open to criticism, for apparently aiming at exempting a wide range of possible practices from constitutional control.

From the political right affirmative action is often attacked for amounting to reverse discrimination. It has been questioned from the left as well. Klug, for example, states quite emphatically that in the United States affirmative action has failed to remedy the country's long and tragic history of racism. He then attempts to develop a concept of affirmative action which could be successful in South Africa as an important tool in the struggle against fundamental inequality.

Sharp differences on affirmative action will certainly emerge during the constitutional negotiation process, but political manipulation, compromises and trade-offs will play a role, depending upon the power relationships at a particular time. The government, or National Party, may, for example, concede the necessity and acceptability of the principle of affirmative action, partly in exchange for guarantees from the ANC and others that officials in the civil service and elsewhere will not lose their jobs.

At some South African universities affirmative action is (at least formally) official policy. In contrast, the Principal and Vice-Chancellor of the University of Pretoria has been quoted as strongly opposed to affirmative action, and unwilling to refuse admission to white students who meet formal requirements in favour of others, because it would be unfair, because he could not change history and because affirmative action failed elsewhere.

3.2 The present debate in the USA

Although affirmative action programmes have been implemented in India, Malaysia, Australia and elsewhere, the concept as such is most often associated with the United States, where it has long been the subject of philosophical, constitutional and political controversy.

Several recent events, including the publication of some interesting books, have once again raised numerous questions in connection with affirmative action. One of these events was the appointment of Justice Clarence Thomas in the Supreme Court. Thomas, who was known to be conservative and not in favour of affirmative action, attributed his personal rags-to-fame success story to hard work and held it up as an example for others. His success was, however, regarded by many as a result of affirmative action, from his admission to the highly respected Yale Law School, to his nomination by President Bush. Ironically, a conservative president nominated Thomas to replace the only black judge in the Supreme court, Thurgood Marshall, on his retirement. Bush maintained that Thomas, regardless of racial considerations, had been nominated purely on merit because he was the best person for the job. The President even added that he would not discriminate against Thomas just because he is black! Few authorities on the American legal scene would agree with this evaluation, apart from their dissatisfaction with Thomas' legal philosophy or lack thereof. Some observers thought that precisely this cynical statement by Bush created the climate for the accusations, denials and lies which followed during the appointment procedure and turned it into what many regarded as a circus. When Justice Marshall was nominated by President Johnson in 1967, the President proudly made it clear that he thought that it was the right time to appoint a black judge to the Supreme Court bench. Most Americans, including conservatives, would probably agree with the moral rightness and necessity of having an African-American on the Supreme Court. However, Bush's opposition to minority hiring quotas constrained him from being honest and frank; a rigid policy position made it impossible for him to simply do what would have made good sense.

Also in 1991 in an in-depth study by Michael Rosenfeld of the Cardozo Law School in New York, Affirmative Action and Justice, A Philosophical and Constitutional Enquiry, was published, as was A Conflict of Rights. The Supreme Court and Affirmative Action, a dramatic and human account by Melvin Urofsky of the Virginia Commonwealth University. However, the most academic and popular attention was attracted by a partly-autobiographical work of Stephen M Carter, a former clerk of Justice Marshall and the first African-American to be awarded tenure as a professor in the Yale Law School, Reflections of an Affirmative Action Baby. Carter not only criticises affirmative action as it is currently being implemented, but also shows how difficult it is to discuss the topic rationally and scientifically, in the midst of racial prejudices and political pressures. The first chapter of the book commences with the sentence: 'I got into law school because I am black.'

The current economic recession, resulting in large-scale unemployment and other serious socio-economic problems, emphasised the disempowered and alienated position of minority groups. In the search for reasons and remedies, affirmative action has been sharply criticised. It is argued, by some, that the peaceful civil rights struggle, which attempted to make blacks full participants in the American political and economic way of life, failed because of its moderacy and that a radical political, social and economic revolution may have achieved more. It is also criticised as being divisive to the work force and some companies are struggling to distance themselves from old affirmative action programmes and to opt for new terms, such as 'managing for diversity' or 'a balanced work force'.

Affirmative action is controversial. Yet, few argue with the need to continue pursuing the goal of racial and sexual equality, and affirmative action remains a firmly entrenched institution and practice in the United States. Many observers maintain that, by and large, the country is far better off than it would have been without affirmative action. In over 30 years it has come to dominate business life like no other government employment policy. It has also

been a policy staple for Democrats. Yale, an 'Ivy League' university, is officially committed to 'the principles of non-discrimination, affirmative action and fair treatment of all members of our community', as well as to 'equal opportunity without regard to race, sex, age, religion, ethnic background, disability, sexual orientation, or political beliefs'. Equal opportunities and affirmative action are regarded as 'shared constitutional goals'. In order to implement this policy, a number of structures have been created, including a permanent 'Affirmative Action Office'.

3.3 Some arguments regarding affirmative action

International law reveres the principle of equality, but it also expressly recognises affirmative action as special measures taken for the sole purpose of securing adequate advancement of certain individuals, or racial or ethnic groups, who require such protection as may be deemed necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms.

It is often required, for affirmative action to be implemented legitimately, that discrimination against the relevant groups in the past, during the present, or in future must be proven, as well as that the programmes are temporary, in other words, that they should not continue when no longer necessary. Affirmative action is not supposed to be punishment or retribution, and is also not aimed at compensation for persons whose parents or other ancestry have suffered unjust treatment.

In the United States, affirmative action has been implemented in various ways. It normally revolved around selection, appointment or promotion of individuals who are regarded as victims of discrimination, or as members of disadvantaged minority groups, at the cost of the expectations of 'innocent' persons who may be equally well or better qualified. Special recruitment and training programmes are often available for disadvantaged groups. The fact that a person may be a member of a group against whom discrimination has occurred may be regarded as a 'plus factor' which is being taken into consideration when such a person competes against others. Affirmative action also finds expression in time tables and hiring or admission quotas, which may, for example, be aimed at appointing or allowing a certain minimum percentage of women or members of a minority group within a particular period of time. Affirmative action programmes could be voluntarily implemented by employers, or as a result of an order of a court after having found that unlawful discrimination has been practised. Businesses wishing to enter into contracts with the Federal Government often have to formulate and implement such programmes, in terms of the Civil Rights Act, and are being supervised by the Department of Labour and the Office of Federal Contract Compliance Programs.

The moral and constitutional dispute about affirmative action is often centred around the concepts of justice and fairness and the right to equal treatment. Affirmative action is controversial, because it seeks to remedy inequalities by means of unequal treatment. Numerous philosophical and ethical perspectives have been researched and invoked in the ongoing discourse. In his above-mentioned Affirmative Action and Justice, for example, Rosenfeld analyzes the issue from the perspectives of liberal political philosophy and constitutional equality and then attempts to formulate an integrated philosophical and constitutional justification of affirmative action. he works with several conceptions of justice, such as 'justice as reversibility', 'reciprocity' and 'the right to be different', in order to overcome the limitations of the major liberal philosophical concepts, such as those of the

libertarian position, the egalitarian position, the utilitarian position, and the contractarian position. He concludes that in the context of justice as reversible reciprocity, the constitutionality of affirmative action can only be determined in relation to criteria of substantive equality by judges willing to undertake the dialogical task of harmonising a chorus of genuine but antagonistic clamouring voices. When the complexities surrounding the concept of equality are properly accounted for, both philosophy and the US Constitution justify affirmative action to remedy systematic deprivations of equality of opportunity for which the government can be held accountable. He points out that affirmative action appears to be radical because it departs from the ideal of equality of opportunity, and then adds:

Strictly speaking, however, affirmative action is conservative insofar as it is designed to eradicate the effects of first-order discrimination without undermining any overall educational or employment scheme that operates in accordance with the principle of equality of opportunity. Indeed, where formal equality of opportunity would merely perpetuate the effect of first-order discrimination and fair equality of opportunity would provide too slow a remedy to satisfy justice as reversible reciprocity, affirmative action becomes necessary to insure the fair and prompt restoration of a system based on genuine equality of opportunity. Ironically, the sooner affirmative action is allowed to complete its mission, the sooner the need for it will altogether disappear.

In the South African context, arguments against affirmative action based on the allegations that it is reverse discrimination, could appear rather strange, or even hypocritical or cynical, especially when coming from those who have never been associated with noticeable public resistance to apartheid and its effects on tertiary education. This alone does not offer sufficient grounds to summarily reject this concern, of course. Individuals certainly do often seem to be discriminated against, under such programmes. But, in simple language, it is not at all clear that affirmative action could be regarded as reverse discrimination. The interests of individuals and groups may be sacrificed for the greater community or the public interest, but clarity as to the rights that are at stake, is needed. No person has, for example, a right to receive tertiary education, especially in a country like South Africa, where this is probably a privilege. Every person does indeed have the right to equal treatment, but where does one find this equal treatment in apartheid and post-apartheid South Africa and how does one apply it? South Africans of all races are simply not in an equal position. They also won't be after the abolition of all apartheid laws, or under a new constitution which guarantees equality, just as the abolition of slavery could not overnight enable African-Americans to compete with their former owners and masters on an equal level. Racing a professionally coached athlete against a person who has had one of his or her legs amputated, and placing them on the same starting line, may be a way to determine who can run the fastest, but does not exactly reflect fairness or equal treatment or opportunities. If the race takes place in order to determine the allocation of future opportunities or privileges, it is questionable whether the athlete has a right to compete on this basis. Naturally no adjustment to the starting line could change or undo history and give back the disabled person's leg. But it could contribute to reducing or controlling the effects of history.

The criteria which are applied to achieve fairness of choice at a particular point in time are also often the result of inequality and not necessarily fair, flawless, or the best. Against the background of the crisis in black education in South Africa, it would, for example, seem almost absurd to use matriculation results as the only selection criterion as far as the admission of students is concerned, for such results clearly do not reflect the true academic potential. Factors which cause disadvantages, such as earlier educational opportunities or the

lack thereof, poverty, or an isolated rural background, could be highly relevant. Bursaries are indeed often awarded to poorer students, thereby 'discriminating' against people with an average income, in order to provide opportunities for the development of potential. Even the influence which a person may have on a particular community, in terms of spreading knowledge and creating opportunities for others, after completing his or her education, may be a relevant factor. In a situation, such as the South African one, where a wide variety of differences and obstacles to development exists, it is difficult to determine a single most reliable list or yardstick. The accurate identification and testing of relevant factors are not easy. If one is concerned about equal treatment, however, sensitivity is essential as a starting point. One does not necessarily have to support the concept of affirmative action to realise this; it follows from common sense and an awareness of basic fairness and the prevailing facts.

A related argument against those who maintain that affirmative action is reverse discrimination, points out that many who seem to be prejudiced by affirmative programmes, may never have been in a position to compete, if they had not benefitted from previous discrimination against others in the first place.

In the South African context, the reverse discrimination point may thus be the weakest of all possible arguments against affirmative action. As the Law Commission found, affirmative action is a well-recognised method to create equal opportunities in societies where the ideal of equality has been violated by discrimination, or where disadvantaged people have to compete with others who are better educated. The issue is not only equality. In most societies certain inequalities may be accepted, because they are perceived as just. Sacrificing certain individual interests to ensure the security of or harmony in a society, or other greater interests, is also not unknown to social politics and to law. Military service and war, the recognition of necessity as a defence excluding unlawfulness in criminal law, and punishment for the sake of crime prevention, are but a few examples. The ethical justification for such policies, namely utilitarianism, has certain serious limitations and could be dangerous, if abused, as has been shown by several of the gross injustices and crimes against humanity committed by political rulers, such as Nazism, terrorism and apartheid. The Kantian attack on utilitarianism, namely that it fails to adequately recognise and protect the inherent dignity of the individual, is well-known. Therefore it has to be dealt with cautiously. However, some of the earlier mentioned arguments regarding equality may reduce the necessity to rely on utilitarianism as a justification.

Against the argument that affirmative action creates equality of opportunity, it is sometimes submitted that by and large it has not benefitted the disadvantaged groups in whose interest it was implemented. It allegedly only benefitted a relatively small number of individuals and thereby created the illusion that discrimination was being dismantled, as a result of which the masses became increasingly forgotten and even further excluded from real opportunities. Carter argues that affirmative action, as it is currently practised, not only fails to promote racial equality, but also allows the American nation to escape inexpensively from its moral obligation to undo the legacy of slavery. Many African-Americans still believe that they are deliberately being restrained by a white 'conspiracy' or deeply ingrained prejudices. Affirmative action must rather address the institutional and other basic causes of inequality and aim to provide educational opportunities for those who might not otherwise have them. Thereafter the beneficiaries must be held to the same standards as anyone else.

Affirmative action is also about special impact. It could have important symbolic value. The presence of, for example, blacks or women in certain positions, from which they are normally largely excluded, could stimulate the perception that such positions are not reserved for a privileged elite or power group, but that they are theoretically achievable by all. It could thus serve to motivate people and furthermore enhance the status of groups that are disadvantaged or discriminated against, through the visibility of specific persons.

Similarly, it could contribute to breaking down negative stereotypes. Those who end up in certain positions can help to convince both the privileged group and members of their own group that the perceived differences are fictitious. On the other hand, however, it is also argued that it could reinforce racist or sexist stereotypes by promoting the idea that a black professional cannot aspire to be anything more than being 'the best black', or that a woman can only be recognised as 'not bad for a woman'. Suspicions and perceptions of inferiority are thus enhanced, in spite of personal achievements. When persons who have been appointed as a result of such programmes make mistakes or disappoint, more resentment and conflict are stimulated.

Along the same lines it is argued that affirmative action reinforces group thinking in situations where the object is to move away from it, and that it fuels polarisation. However, the injustices of apartheid which profoundly influenced all spheres of South African society, has been built over a long period of time on rigid group thinking. It is impossible to dismantle the apartheid structure without taking the relative positions of groups into account. Any alternative to affirmative action would probably have to do the same. In view of recent global events it is clear that the challenge is not to ignore the differences between groups, but to address it realistically while working towards an inclusive democratic society. Furthermore, the implementation of affirmative action programmes need not necessarily be based on the identification, description, or delimitation of race groups. In particular instances the relevant group could, for example, be the inhabitants of a certain area. The coloured or even white residents of another town or region, although black South Africans are generally the most severely discriminated against group. One could not generalise by singling out certain groups for across-the-board affirmative action. Women, for example, may be severely under-represented in specific professions, such as the legal profession, but not at all in others, like teaching.

Each situation has its own history and complexity.

It is sometimes argued, especially in South Africa, that standards may drop because of the admission or appointment of lesser qualified persons. The achievement and maintenance of the highest possible level of research and education is indeed very important. Therefore universities should continuously aim at doing so, in spite of the tensions caused by limited resources and competing needs. However, like the ideal of equality, the question of standards is not uncomplicated and has to be viewed contextually.

As to affirmative action in the South African situation, a few concluding thoughts are briefly submitted. Because of the strong likelihood that affirmative action will be expressly recognised in a new constitution, South Africans will probably be able to avoid many of the complicated legal and philosophical arguments through which American courts, theorists and politicians have had to struggle, in order to reconcile affirmative action with the right to equal treatment.

The inequality and deep cleavages, together with the ignorance and prejudices between races and classes in South Africa are so massive, that many of the points of criticism which may carry significant weight in the United States, seem to be almost irrelevant. Carefully practised affirmative action could, for example, hardly worsen the situation as far as group thinking and negative stereotyping are concerned. The potential damage thereof is likely to be outweighed by the elimination of ignorance which may be achieved through integration on the campus and in the workplace. Negative stereotyping is so strong in certain circles, that almost any exposure to other groups can only improve the state of affairs.

Obviously the appointment of a few, or even several, black law professors and the admission of more black students to law schools could not solve the South African dilemma. The fundamental causes of the problems have to be addressed. A major restructuring of society may be called for. Obstacles in the way of black South Africans have to be systematically removed and proper education opportunities have to be opened up and created from the grass-roots level. Policy decisions have to be made on the allocation and distribution of finances and other resources. Within the context of affirmative action funds will have to be made available to enable citizens who are experiencing disadvantages as a result of discrimination to catch up, which could in effect mean that more money per capita will be allocated for education, housing, or health services, for certain ethnic or income groups or in certain regions. Affirmative action should not be aimed at replacing social reconstruction, but at specific targets which could be addressed thereby.

Power and numerical relations in South Africa will differ vastly from those in the United States, where affirmative action has been implemented by the majority, against themselves, to benefit minorities, who have no or little direct political or even economic power, and to legitimise the political system in terms of which the majority rules. Perhaps for this reason the establishment could endeavour to improve the situation through relatively inexpensive programmes, which do not substantially touch the basic institutional structures of American society. Furthermore, the courts had to attend to the protection of minority interests, by interpreting the bill of rights. In South Africa, the majority is the disadvantaged victims of discrimination. In a new democratic dispensation the majority should hold political power, which could go a long way to enable them to implement drastic affirmative action programmes, and any government will be under strong pressure to act decisively. The role of the courts will be to test and control such programmes in the light of the constitution and more specifically, the bill of rights. But the courts could not afford to be viewed by the majority as a new obstacle in the way of reform, democratically decided on by the majority of the people. Therefore both the Law Commission's and the ANC's earlier mentioned constitutional formulations of affirmative action are aimed at allowing for the implementation of such programmes, without violating the guaranteed right to equal treatment. The ANC's draft bill of rights furthermore imposes a duty on all organs of the state at the national, regional and local levels to pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices. This should not be necessary in a democratic political dispensation. The relevant clauses are probably aimed at a strong symbolic recognition of the necessity of such programmes within the context of human rights protection, as well as the possibility that a future government might still be inclined to ignore the needs of the majority, because of the seductiveness of elitism.

Apart from majority political decisions and drastic economic programmes, a measure of affirmative action at universities is now already necessary, even though it may not be sufficient, in view of the need to improve the present situation as quickly as possible. On this

level affirmative action will have to play a role, at least as a short-term or intermediate measure. Drew Days, an American law professor and recently nominated Solicitor-General, refers to affirmative action as 'a palliative and stopgap response to profound societal problems'. In South Africa affirmative action does not seem to be a perfect solution, but it is an historical necessity.

It will have to be implemented with prudence and sensitivity, however, to limit its potentially harmful effects. Simply appointing a clearly unqualified or inexperienced person in a certain position, exposing him or her to enormous pressure without an adequate support system, is unfair to the person, unproductive and conducive to greater conflict. With the necessary attention and effort, such situations could be avoided, without abandoning the concept or goal of affirmative action.

To rely solely on quota systems seems neither wise nor necessary under the prevailing South African circumstances. The most obvious use of quotas is to identify problem areas and to set concrete goals. If, for example, blacks comprise 10% of a population, but represent only 2% of a particular profession, the situation clearly deserves attention and present or past discrimination may well be the reason behind it. South African statistics, however, are overwhelmingly indicative of gross disparities. To require that approximately 87% of all positions should be filled by blacks within a very short period of time, helps to emphasise the seriousness of the problem, but does not necessarily set a realistic short term goal or offer much of a practical solution. Furthermore, quotas sometimes tend to become ceilings.

In summary, affirmative action will necessarily have to take place on the macro-level of allocating and distributing finances and other resources. In addition to this, programmes that could be regarded as affirmative action are necessary in the area of student admission and faculty appointments, although it does not necessarily present perfect or final solutions. Particularly the last mentioned must not be practised cosmetically, or be allowed to serve as an excuse to ignore fundamental problems. It is also transparently dishonest, however, to use the complexity or controversial nature of affirmative action as a reason to maintain the status quo. Only when prejudices and fears have been moved out of the way, lawyers and scholars can start to scientifically investigate the morality and effectiveness of affirmative action, as well as alternative possibilities, and to pursue dynamic strategies, which is their responsibility and task. As indicated by the above-mentioned dilemma of President Bush, a political position, rigid principles, or stubbornness should not be allowed to stand in the way of common sense. In the South African situation, some steps seem so obviously necessary, that one is tempted to conclude that the invocation of the moral and legal complexity around the concept of affirmative action is hardly necessary. The value of affirmative action is perhaps not, in the first place, to be found in an analysis of concepts such as justice and fairness, but in its social impact. As a conservative policy, which leaves institutional structures intact, it at least changes the composition of elites. Thus it should not be ignored, especially by universities that would like to educate the elite and produce future leaders.

4 EXCELLENCE AND DIVERSITY

As stated earlier, the achievement and maintenance of the highest possible standards in education and in the legal profession is obviously essential. But before the essential quest for academic and professional excellence and high standards is too seriously held up as an argument against necessary change, some objective and honest reflection on the contextual meaning of these concepts is necessary.

Firstly - leaving the race and discrimination issue aside for a moment - although any society or group depends on outstanding and fast-moving people for its progress, those very people (sadly) often have to reduce their speed and wait for the other members of their society or group, for the sake of the co-existence and survival of all. That is, if the group is viewed as an organic being, the peaceful existence of which is important to all, the front-runners as well as the disadvantaged. The strongest and fastest climber in a group of mountaineers has to wait for those behind him, if they are tied to the same rope and dependant on the same equipment, for his own survival. Excellence is extremely important, but it is not everything under all circumstances. The coherence of an institution within a social context is also relevant.

Secondly, the present standard of South African law students, as far as enthusiasm, responsibility, general knowledge, academic initiative, work ethic and maturity are concerned, can not be regarded as extremely high. The privileged position of white students and their knowledge thus far that they are unlikely to experience great difficulty in the job market, regardless of their academic record, has not served to stimulate a strong sense of competition or an urge to achieve outstanding grades. Some black students often display remarkable enthusiasm, political skills and general knowledge, in spite of the disadvantages in terms of literacy and other conventional academic skills of some of them. By the same token, not all legal scholars who currently occupy chairs and other academic positions are internationally or even nationally recognised as phenomenal experts in their fields, who would have achieved the same measure of success, regardless of their race, language or cultural background. As to the gender discrimination debate, it is well known that women are often expected to be exceptionally good, in order to deserve recognition, whereas it is very clear that many men currently occupying senior positions could hardly claim to be anything more than very mediocre.

Thirdly, as mentioned earlier, traditional or prevailing standards and perceptions as to excellence, success and high standards are often the result of unequal treatment, privileges or ignorance, or at least of one-sided perspectives or sectional interests, and not as fair or objective as some would like to believe. One must be careful not to equate or confuse fixed traditions, old habits and conveniently concretised criteria, from which it is no doubt difficult to depart, with truly high standards and non-negotiable qualifications. More recognition must be given to the value of diversity as such, as an ingredient in the academic process, but also as a valid educational aim and tool, especially in a situation where a non-racial or multi-racial democracy is being strived for. Together with 'pure academic merits', diversity should be taken into account as far as admission or appointment procedures are concerned. People from different backgrounds may sometimes have different contributions to make. Thus one could concentrate on people's strengths and abilities, and partly avoid the possibility of negative stereotyping often associated with affirmative action.

Diversity could be regarded as essential for the achievement of academic excellence. It exposes researchers and students to different needs, views and approaches, which serve to counter stagnation, widen horizons, stimulate open thinking, offer challenges and discover interesting research areas. Famous universities in relatively homogenous societies often recruit and appoint persons from diverse backgrounds to academic positions. Almost like democracy, intellectual discourse can only meaningfully operate where different viewpoints could meet, contradict and challenge one another. The dialectic process could only produce syntheses and progress from conflict between opposing notions and arguments. However, like democracy, academic discourse can more successfully produce solutions and progress where the differences and conflicts between opposing views and aspirations are not so

immensely serious that it causes the process to break down. Universities, and more specifically law schools where 'objective reasoning' is being encouraged, could be an appropriate site to bring different viewpoints into contact with one another in order to teach and facilitate national debate and decision-making. Leaders, as well as opinion and policy-makers are often educated here, after all. Various types of diversity could be relevant. As far as the composition of a student body is concerned, ethnic and cultural diversity immediately come to mind. Diversity as to political viewpoints is essential for lively and innovative student politics and class discussions. Furthermore, the equal participation of men and women is important. Diversity of religious convictions and sexual orientation may enhance knowledge, appreciation and tolerance, as would the presence on the campus of students from urban and rural areas, athletes, nerds, disabled persons, and so forth.

Regarding the appointment of faculty members, age diversity, diversity between teachers and scholars, diversity of orientation as between theory and practice, subject matter diversity, diversity in theory of law and approach to law, personal characteristic diversity (including ethnic, religious, gender and sexual orientation) and ideological diversity are relevant. Not all of these forms of diversity deserve equal weight, some may overlap and careful consideration should be given to the way in which they may be taken into account.

Over the last year or more a big row has been raging in Harvard law School, partly about faculty hiring and the civersity issue. What has been called 'a battle of egos and ideology' which has 'escalated into a full-scale war' and transformed Harvard Law School into 'the Beirut of legal education' emerged from a long rift between adherents of the Critical Legal Studies movement, and traditionalists and was fuelled by the murder of feminist lawyer Mary-Joe Frug and subsequent events. To a large extent the dispute revolved around Harvard's alleged inability to find or unwillingness to appoint black women. Celebrity jurists such as Lawrence Tribe and Alan Dershowitz took sides. On the issue of diversity, Derschowitz told radicals that they didn't really want diversity; if they did, they would have called for the appointment of conservative supporters of capital punishment and religious fundamentals too. He alleged that they merely wanted women or blacks with the same ideas as their own. This remark raises a question which is relevant for South Africa too. Should a real believer in diversity, on the left, appoint conservative white males, for the sake of diversity. The practical realities of our situation render the question somewhat invalid though. Seeing that most law professors are presently conservative white males, no one needs to call for more such appointments for the sake of diversity. Once the playing field is level - to use a cliché - the situation could be different. The same probably applies to Harvard.

Black students at Afrikaans language universities often feel inhibited and not at home. Black teachers in senior positions could help them to feel more at ease and to encourage them to more actively constructive and loyal participation in academic and student life. Black professors could serve as role models for black students, as well as to destroy negative stereotypes on the part of white students. The image of Afrikaans universities from the perspective of the majority of the population has to change.

Diversity as to different universities and law schools, each developing its own character, traditions and strengths, is likely to develop in a country like South Africa. This could be beneficial for scientific and educational development, subject to the minimum ideals and requirements, which have been mentioned above.

5 SOME SUGGESTIONS

The minimum responsibility of academics is to study the consequences of apartheid, the process of change and future policy options, and to make the results of their work available. Reform options must also be implemented in practice, however. This has to be done in the midst of and notwithstanding the complexity of the relevant possibilities, and uncertainty regarding several political variables. In a process of political, social and economic transformation, numerous competing claims and expectations simultaneously and urgently come to the fore. Success obviously also depends upon political and economic factors and cannot be guaranteed. Perhaps education is indeed one of the impossible professions - as stated by Sigmund Freud - in which one can be sure beforehand of achieving unsatisfying results. Nevertheless, a few brief suggestions are being offered. Many of these may be regarded as quite obvious, but relatively little action has yet been launched.

5.1 Student Admission

Very many more opportunities have to be created for black students. Rather than seriously lowering admission requirements, or making exceptions in an arbitrary way, the entire situation has to be addressed. Selection methods aimed at determining true academic potential by taking all relevant factors into account, rather than solely relying on matriculation results have to be developed as scientifically as possible. This could be extremely expensive, of course. The experience of the University of the Western Cape and other institutions who have taken the initiative in this regard should be taken into account and the organised legal profession, as well as organisations such as the National Association of Democratic Lawyers (NADEL), the Black Lawyers Association (BLA), the Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR) should be invited to provide their input. In the meantime, much could probably be achieved with a degree of goodwill, common sense and commitment, as well as some caution to avoid mere window-dressing.

5.2 Student Recruitment

Law faculties cannot eliminate the consequences of the crisis in black education and the numerous other factors that impede potentially successful students, by being formally 'open' and through certain selection and admission procedures.
Students have to be recruited pro-actively. Talented high school students have to be identified, encouraged and supported. Negative perceptions in the black community regarding white and particularly Afrikaans universities have to be taken seriously. Trained and politically sensitive recruitment officers and faculty members should move into black townships and other living areas, as elsewhere in the larger community, supplemented by on-campus seminars.

Poverty is probably the most serious obstacle in the way of many potential students. Bursaries thus have to be established through fund-raising campaigns. While foreign funding for human rights litigation seems to be drying up, potential funders still seem willing, or even eager, to support educational programmes, especially within the context of constitutional and democratic development.

5.3 Student Development and Participation

The financial dimension is also important with regard to the support which is essential during the years of legal study. Financial aid does not only mean the raising and payment of money. A book loan scheme, in terms of which students pay a deposit, and borrow books which they

give back at the end of the year for the use of others, presents an interesting possibility. Urgent attention should be given to student accommodation. One of the most serious problems facing black students, is the inconvenience and financial implications of having to commute between townships and campuses, because of a lack of suitable accommodation. Opportunities for part-time employment on campus could be opened up to students in libraries, the administration, or the technical department. Although academic merits and experience may sometimes be essential or useful for research assistants, this is certainly not always the case. If such posts are regarded as bursaries or fellowships, the financial needs of applicants should at least in some cases be highly relevant. Especially legal aid clinics, run by law faculties and operating in townships, could surely use the services of black students who are acquainted with the language, needs and attitudes of potential clients.

Academic support, bridging or development programmes have to be implemented in a way which as far as possible avoids the reinforcement of suspicions of inferiority, thereby being dangerously counter-productive. There can be no doubt that difficult times are awaiting all South African universities. Unrest will repeatedly occur. Political factors have to be taken into account with sensitivity, in order to enable students to adapt successfully. This implies, amongst other things, that teachers and officials must consciously try to identify with all students - and thus with the majority of South Africans - in order to begin to appreciate their frustrations and aspirations. Academic and other managers have to take the lead in this. Only then can discipline be enforced with some degree of confidence. Afrikaans universities in particular have done very little in this area. The main reason why they have not yet experienced the serious problems which have been encountered on English campuses, is of course not the fact that they have designed efficient ways to deal with those problems, but because their history has prevented them from even arriving at the point of encountering and fully appreciating all the difficulties. Furthermore, considerable sums of money will be needed for the necessary support and development programmes, to appoint and train tutors, to establish study facilities, to provide bursaries and loans, etc. In view of competing claims and needs, not much could be expected from the state. Substantial financial support from foreign aid agencies is also unlikely to go to Afrikaans universities, who are not viewed as victims of apartheid, or as representative of the needs of the oppressed majority, but rather as the beneficiaries of the apartheid system. Funds will thus have to be generated by drawing on their own existing resources and their traditional support in the white community. The support and development of students will have to be weighed against, for example, the perfect maintenance of luxurious sports facilities, such as, in one case, more than 20 rugby fields and 25 tennis courts per university, when determining priorities.

Significant democratisation could also be achieved by actively involving students in university decision-making structures, in a reasonable way. The presence of student representatives on faculty councils, senates, or even university councils, often only with observer status, is not uncommon nowadays. Such involvement has to be meaningful, however, which does not seem to be the case on some campuses, where students are the products of an education which has not encouraged democratic participation and where children have been taught to be 'seen, but not heard'. To have powerless and disinterested students sitting in as observers on sometimes bitter and petty academic infighting, is merely embarrassing. The students participating in these structures have to be democratically elected and truly representative of the student body. On campuses where ethnic, cultural, or class minorities are experiencing specific problems, the representation of such groups is essential. Student representatives must be able to play a more active role than merely observing

proceedings and must bear responsibility for their participation. This does not have to mean that student politics or passions should be allowed to dominate academic freedom.

5.4 Academic Appointments

Serious and urgent attention has to be given to the recruitment and appointment of teachers and researchers (as well as administrative and technical managers) from the ranks of those outside the white community. Together with formal academic qualifications, other relevant factors should be taken into account in order to determine merits and potential, and more emphasis could be placed on the specific contributions someone can make. Apart from the above-mentioned arguments regarding statistics, affirmative action and diversity, black researchers and teachers could be particularly valuable in certain subjects. Naturally, colour or race could not be allowed to be a pre-requisite for the recognition of expertise in certain areas, and the racist implications of such an approach should be avoided. However, a person's knowledge of, for example, African languages, or experience of particular cultural and political circumstances, could in some cases be most useful. On the other hand, racial and political stereotyping should not be reinforced by appointing blacks mainly in fields such as indigenous or African customary law, or human rights.

Any progressive appointments policy, (like policies regarding student recruitment and admission) could not be implemented in a vacuum, and correlative factors have to be taken into account. Firstly, the pool from which qualified persons cold be appointed, has to be enlarged. Doctoral and other post-graduate students have to be actively recruited. Attention must be given to personnel development and the formulation of a proper promotion policy, in order to treat all persons who are appointed as fairly as possible and to enable them to integrate fully. As long as South Africa is experiencing a dearth of highly qualified black legal scholars, the appointment of experienced experts from elsewhere in Africa deserves serious consideration, especially with regard to subjects where comparative or international perspectives are of particular importance. Naturally this option has to be weighed also in terms of its consequences for the job market in South Africa.

5.5 Curricula

It is self-evident that legal curricula have to be critically evaluated and adapted on an ongoing basis, not only as a formal exercise, but in order to address present and future needs and challenges. Therefore an integrated approach is called for.
Compulsory courses should be limited to absolutely essential subjects. The range of elective courses should be broadened even more, in order to enable students to prepare themselves for a diversity of careers in different areas of law and different communities. (Some universities have so far shown more initiative in this than others who have stayed on a conservative path.) Academic managers, like deans and heads of department, carry the responsibility of ensuring that decent academic standards are maintained throughout, in order to prevent students from exercising a choice on the grounds of convenience and laziness.

The debate concerning Latin cannot be analyzed and addressed here. Suffice it to say that it seems unthinkable that persons who could play a much needed and important role in the community, be kept out of law schools, or certain branches of the legal profession, because of the requirement to pass Latin. On the other hand, those who are interested in careers where Latin may be necessary or useful, ought to be encouraged and should have the opportunity to develop their interests and skills. The time and energy of teachers of Latin could be spent

more productively on the education of a small group of serious enthusiasts, at one or more universities, than in a hopeless effort to drag hundreds of unwilling people through virtually useless minimum standards, in compliance with statutory requirements and subsidy formulas.

If a new constitutional dispensation is successfully negotiated, and if a future legal system is to be based on constitutionalism and a bill of human rights, the importance of constitutional law, administrative law and human rights will increase drastically, also for private law areas, along with statutory interpretation, jurisprudence and comparative law. Courses currently being offered on these subjects have to be presented with future condition and needs firmly in mind.

Also African customary law will play an important role. At some universities this subject is still taught in a sterile and outdated way, with reliance on definitions of 'blacks' in legislation from the 1920's, and with much emphasis on sensational cultural peculiarities and cattle disputes and with little sensitivity. Black as well as white students often find such courses strange, boring and irrelevant. The role of African customary law in a future South African legal order poses one of the most exciting challenges which researchers and students could hope for. Such a course could be extremely stimulating and creative, if presented dynamically and with awareness of the social and political context thereof, as part of the debate about a new constitution, human rights, legal cultures, cultural legitimacy, hybrid legal systems, court structures and the position of women. One of Africa's most crucial question is why constitutions and bills of rights have not yet been sufficiently respected and honoured and how the situation could be improved. A philosophical and cross-cultural comparative study of customary law could contribute to the identification and formulation of future solutions.

Alternative or appropriate dispute resolution mechanisms ought to be researched and taught, with attention to concepts such as people's courts, neighbourhood courts, mediation and negotiation. No modern legal system functions only in formal courts, especially in heterogenous societies.

Courses and seminars regarding access to justice, legal aid and other legal implications of poverty, illiteracy, homelessness, etc should be available, possibly connected to street law, legal aid clinics and community service. If prestigious law schools such as Yale and Harvard can offer courses on, for example, 'advocacy for disabled people', 'housing and community development', 'shelter for the homeless', 'race and the law', 'anti-discrimination law', 'mediation and negotiation', there seems to be little reason why it should be regarded as below the academic level of South African law faculties.

This is not intended to mean that subjects like commercial law, private law and legal history should be treated as less important or relevant, as might have been implied by accusations that law faculties 'worship antiquity' or teach 'rich people's law'. A contextually relevant faculty does not have to be a 'banana' faculty. It is essential that law students of all races and backgrounds be exposed to and offered the opportunity to grasp market mechanisms in order to practise in commercial firms and the business world. However, the socio-economic implications of, for example, the law of persons and the family, property law, delict and tax law, with regard to equality, perceptions of democracy, redistribution claims, land claims, family structures and women's rights have to be emphasised.

Suggestions with regard to special degrees or diplomas in criminal law, inter alia aimed at a future system of public defenders, have been made and deserve attention, but are not discussed here.

If South Africa successfully moves away from white minority rule, it will probably play a prominent political and economic role in Southern Africa, and as a consequence possibly also in Africa and the world. Lawyers have to be prepared to operate in areas such as public and private international law (preferably in a closer relationship with one another), as well as regional and international politics, human rights enforcement and arbitration.

In view of economic constraints and competing claims, all law faculties do not necessarily have to offer all these possibilities, or all of them at the same time, or to specialise in all relevant areas. Co-ordination, co-operation and the simultaneous appointments of experts in more than one faculty could be considered.

In addition to the above, which is directed at the education of lawyers, law faculties have a responsibility to educate or inform the community directly and indirectly, especially with regard to democracy and the political process, consumer protection and on using the legal process.

5.6 Language Policy

Almost all of the above are related to policies as to language of instruction. Underestimating the emotional and thus political weight of the language issue, would be foolish. But the facts have to be faced. The overall South African situation does not justify the existence of five relatively large purely Afrikaans universities.
Preserving something like the 'Afrikaans character' of a university, could be legitimate and morally acceptable, depending on the meaning attached to this phrase. The Afrikaans language and culture could be an important, valuable and even proud ingredient of the South African mosaic, and the study and enhancement thereof should be welcomed. For academic purposes, Afrikaans is useful in that it provides access to Dutch and German. In the light of recent global developments, the prominence of German is likely to increase, at least in Europe, and according to some indications, this is already happening. It would be short-sighted to ignore the possibilities which Afrikaans offers. However, the retention of Afrikaans for the maintenance of exclusivity and privileges would be nothing but apartheid, without the moral foundation that outspoken supporters of segregation and partition claim to have.

The formulation of a realistic and accommodating language policy deserves urgent attention. To rigidly cling to Afrikaans as the only language of instruction, discriminates against non-Afrikaans-speaking students, and particularly African students, for whom English is already a second language, who may find themselves in the absurd position that they are recruited and enticed to go to a particular university, where their registration fees are being paid, and where they receive bursaries while the university receives subsidies, where their presence may be exhibited to illustrate the university's 'open' status, but where they are unable to follow their lectures or communicate with unsympathetic teachers. A rigid language policy also deters potential students, who may either go elsewhere at great expense, or simply decide to do without university education.

The academic disadvantages of such a policy are equally serious. It isolates and insulates a university, not only from international influences, but from a substantial part of the richness of ideas and information offered by the diverse South African situation. English is not only an international language, but also the language in which most South Africans communicate at academic conferences, political negotiations and in the business world. Much could be done to promote Afrikaans, without using it as a 'laager' or scarecrow. At universities that feel strongly about Afrikaans, it could be studied intensively in specific departments and centres. (Some of the most prominent Afrikaans authors and literary experts have worked from English universities.) Courses and other programmes could be offered on campuses and in the community to make Afrikaans more attractive. Bursaries and other forms of financial support may well be available from Belgium and The Netherlands, for the promotion of Afrikaans studies in a democratic environment. The quest for freedom in Afrikaans literature and history could be brought out and emphasised, rather than the confrontation between Afrikanerdom and the rest of the human race as has often been done in the past. In law faculties many courses could, in the meantime, be presented in English, or at least some lectures, especially where duplication for large groups of students is necessary anyway. Afrikaans students will also be interested in this, because many of them proceed to work for English law firms or to study abroad.

6 IN CONCLUSION

These arguments and suggestions are not aimed at giving up the autonomy of universities, and particularly Afrikaans law faculties (which has often been violated in the past, without much protest), but rather the retention thereof. The initiative has to be taken immediately, however.

Much of the above is related to and will depend on the larger debate about the future of South Africa as a country, its universities and the legal profession, which cannot be addressed adequately in this piece. Suffice it to say that if reasonable peace and stability could be achieved in the country, diversity will probably develop as to the nature and functions of universities, colleges and professional schools, not entirely unlike the situation in the United States and elsewhere. Whereas some institutions may indeed thrive on a measure of elitist status (hopefully with a racial composition radically different from the present situation), others may provide for different needs and attract students and researchers for that reason. As far as the legal profession is concerned, it could be expected that formal barriers (for example between the bar and side bar) will be abolished, but that diversity and specialisation will exist in practice. Some of my proposals may look like mild reform measures, whereas the statistics presented (in the Introduction) rather suggest the necessity for a radical transformation. However problems that came into being over several generations, cannot be solved overnight, even by strong measures. Dreams and ideals of equality, justice and excellence are also not accomplished in a day, or even a lifetime. But one has to begin and to continue.

It is, after all, in the words of John F Kennedy,
' ... the fate of this generation ... to live with a struggle we did not start, in a world we did not make.'

NOTE:
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version was published in De Jure 1992 vol 1 p 213 under the title 'Oor Gelykheid, Geregtigheid, die Toekoms van Regsfakulteite en Ander Drome'.

This article has been referred to on a number of occasions, inter alia, by Justice John Trengove, retired judge of the Appellate Division (in an address to the Law Faculty of the University of Pretoria in October 1991), and by Professor André van der Walt (in a paper entitled 'Reflections on the Teaching of Property Law in Future' read at the Congress of the Society of University Teachers of Law in January 1993 in Stellenbosch), who both based their arguments on it and further developed some of the ideas expressed in it. A slightly revised version is now made available in English. Very recent developments, including appointments and changes in curricula, have not been included, though.

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