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      - be published as it is;
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THE GROWING DISJUNCTION BETWEEN LEGAL EDUCATION AND LEGAL PRACTICE IN KENYA: A CASE FOR PEDAGOGICAL REFORM

*Augustus Mutemi Mbila**

Abstract

Professor Langdell's Case Method of legal education has dominated legal pedagogy since the early 1870s. There are certain competencies that lawyers must acquire to navigate the murky waters of legal practice. These competencies include legal research, negotiation, factual investigation, communication, legal analysis, and drafting. The Case Method and Socratic questioning methods cannot adequately impart these competencies to learners. This study sought to critically analyse Langdell's case Method and to recommend practical approaches to reforming legal education in Kenya to reduce the growing disjunction with legal practice. The article also analyses pedagogical approaches in Law Schools in Kenya and at the Kenya School of Law and establishes that the approaches are almost similar, yet, ideally, the Kenya School of Law is expected to teach legal practice while Law Schools are expected to teach the academic concept of Law. The article recommends practical, policy and regulatory solutions to addressing this problem.

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Keywords: *Legal Pedagogy; Case Method; Socratic Questioning; Legal Competencies; Experiential Learning; Practical Legal Education.*

1. INTRODUCTION

Voices of reason regarding the growing disjunction between legal education and legal practice in Kenya have grown louder in the recent past. There is reason to believe that teachers of the law, practitioners, judges and other members of the legal profession agree that legal training in Law Schools and the Advocates Training Programme at the Kenya School of Law does not impart the required competences for the practice of Law. But very few are providing solutions to this problem. Even fewer have recognised problem. Part of this growing disjunction is attributed to the legal pedagogy adopted by teachers of the law in these institutions. There is also a misconception that universities teach legal theory, and the Advocates Training Program at the Kenya School of Law teaches legal practice. This paper will demonstrate that this view is not supported by data.

Legal pedagogy in Kenya (and elsewhere) borrows heavily from Professor Christopher Columbus Langdell, who developed the Case Method of legal research and education in the 1870s. Langdell's approach requires students to learn the law by analysing appellate court decisions. Though novel when it was developed in the 1870s, there has been tremendous development in legal practice that renders this approach obsolete. Even the Socratic Method no longer meets the needs of the 21st-century legal practice. The danger of the continued reliance on Langdell's pedagogical model is that the 21st-century law student is taught

the same way the 1870s law student was taught, yet the legal environment has tremendously evolved.

The Taskforce on Legal Sector Reforms[1] which was set up by the then Attorney General of the Republic of Kenya, Professor Githu Muigai, identified several areas of practice of Law in Kenya and across the globe. These areas include private practice in all matters that law firms engage in, public interest practice, practice in government departments, judicial clerkship, business and industry, and academia. The task force also identified several factors that have impacted the practice of law in recent times. They include globalisation, demographics, technology, legal process outsourcing, law firm management, marketing and advertising. The Taskforce further noted that quality standards in legal training and apprenticeship continue deteriorating as a result of a lack of a system of continuous mentorship and/or a distortion of the mentorship structure.

But why would the standards not deteriorate when senior legal practitioners have abandoned their role in apprenticeship and academicians have stuck with a 1870 legal pedagogy?

Courts have also noted this growing disjunction between legal education and legal practice. In *National Land Commission v Johnson Okiro Misiga*,[2] Justice Patrick Kiage of the Court of Appeal rebuked two young advocates for filing a *response to a memorandum of appeal* in disregard of the Court of Appeal Rules, 2010. The

1 Republic of Kenya, Report of the Taskforce on Legal Sector Reforms, 2017. Available at http://cbgoumaadvocates.co.ke/wp-content/uploads/2018/11/5TH-DRAFT-TASKFORCE-REPORT.pdf, accessed on March 26, 2023.

2 [2021] eKLR.

judge was convinced that the two advocates had not read the Court of Appeal Rules on when and how to approach the Court and lamented as follows:

> The application before me, dated 16th September 2020, is yet another poignant and disturbing reminder that the craft of litigation in this country, and specifically appellate litigation, is fast sinking towards the nadir and calls for urgent and concerted efforts to arrest the slide towards a point of no return, beyond retrieval. I can only hope that Judges, law schools and senior practitioners see the lapses such as revealed in the motion before me as symptomatic of the broken window that, unchecked, can only be a harbinger of worse to come.[3]

For these reasons, the judge did not grant the motion, and ordered the cost of the suit to be born by the advocates as he did "not see the justice of the respondent himself being saddled with the costs arising from a completely unnecessary application presented by his advocates who, I fearfully hope, will invest in a copy of, and will take time to thoroughly acquaint themselves with the Rules of this Court."[4] Wasn't this supposed to be a "teachable moment" for the judge to mentor the young advocates on how to approach the Court and not to harshly rebuke them as he did? This paper will demonstrate that the legal profession is a continuous apprenticeship and that senior members of the profession should embrace this role.

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3 *Ibid*, page 1.

4 *Ibid*, last paragraph of the ruling.

This was not the only case where courts have taken issue with the disjunction between legal education and legal practice. In *Josphat Oginda Sasia v Wycliffe Wabwile Kiiya*,[5] Justice Fred Nyagaka was aggrieved by Counsel, citing authorities that the judge considered irrelevant. He ruled as follows:

> "…In my humble view, in regard to the Applicant's act of citing irrelevant provisions, particularly the ones on review of a judgment or order of the Court while he knew clearly that he did not pray for anything of the sort, this conduct exemplifies a classic example of poor drafting of pleadings, lack of due attention and poor professionalism […] Again, this goes to explain further why the Applicant's counsel included the meaningless phrase that I usually see many a learned counsel insert in applications: "all other enabling provisions of the law." This Court has advised before in other decisions and will continue to do so that inserting such a phrase in any application does not and will not assist the party in the determination the Court makes […] A lot of investment is made to teach law in law schools. Such enlightenment should be progressive rather than retrogressive. To lump up phrases that do not have anything before a Court exemplifies the latter and negates development of the legal profession […][6]

The judge also called upon "legal professionals to be perfect in their calling, as is expected of learned friends. The profession does not envisage mediocrity and carelessness."[7] In *D. Chandulal*

5 [2022] eKLR.
6 *Ibid*, paragraph 9 and 10 of the ruling.
7 At paragraph 12.

K. Vora& Co. Ltd v Kenya Revenue Authority,[8] judges of the Court of Appeal, Justices Nambuye, Warsame and Makhandia had a different view where they held that "courts exist for the supreme purpose of deciding rights of the parties and not for the purposes of imposing discipline"[9] and that "the practice nowadays is to elevate substantial justice to the parties over and above the strictures of rules of procedure, which have been stated to be mere hand maidens of justice." Clearly, courts have divergent views on how to address this growing disjunction between legal education and legal practice. This article will examine Professor Langdell's Case Method and why this pedagogy is not fit enough for the 21st-century legal practitioner. The article will also evaluate legal pedagogy in Law Schools and at the ATP at the Kenya School of Law. While at it, the paper will propose the competences that the 21st century practitioner of Law must have, and which pedagogies can best impart these competences.

2. UNDERSTANDING PROFESSOR LANGDELL'S CASE METHOD

Langdell viewed Law as a science with its specimens being reported appellate decisions. In his address at Harvard Law School in 1886, he stated that "the work done in the library is what scientific men call original investigation. The library is to us what a laboratory is to the chemist or the physicist and what a museum is to the naturalist."[10] These are, with due respect to

8 [2017] eKLR.

9 While citing *Belinda Murai & 9 others v Amos Wainaina* [1978] eKLR.

10 Christopher C. Langdell, *Annual Report of the Dean of the Law School*, 1873-74, in Harvard University, Annual Reports of the President and Treasurer of Harvard College (1870-95), quoted in Bruce A. Kimball, The Inception of Modern Professional Education: C.C. Langdell, 1826-1906, at 100 (2009), at 349.

Professor Langdell, incomparable. Whereas the physicist or chemist collects original specimens from the sources and then takes them to the laboratory for scientific investigation, case reports in the law library are secondary sources. If Langdell wanted to propose Law as a science this way, then he should have proposed that law researchers should attend court sessions and collect first-hand data from the judges, advocates, litigants, clerks and others, but not to rely on case digests in the Law library.[11]

His choice of case law as the sole source of this "scientific data" is also controversial. Langdell disregards such other sources of law as the constitution, statute law, government policy and decisions, parliamentary motions, materials authored by academicians, and tribunal decisions. No wonder Holmes characterised Langdell as an amoral natural lawyer by stating that "…it became commonplace to call Langdell a "legal theologian" who believed that legal principles were eternally inscribed in some "heaven of concepts." This conclusion, in effect, turns Langdell into some sort of "amoral" natural lawyer…"[12] Langdell's dominant pedagogy involved asking his students not only to state the decision of each case but also the reason for the decision. In other words, students would get into the minds of the judge and how he reasoned.[13] He often accompanies the case method with the Socratic method of questioning, and would occasionally ask

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11 See President Eliot's Address, in Report of the Organisation and of The First General Meeting at Cambridge, November 5, 1886. The event was the inaugural meeting of the Harvard Law School (Alumni) Association commemorating the 250th anniversary of Harvard Law School. The keynote speaker was David Holmes.

12 Quoted in Anthony J. Sebok, "Misunderstanding Positivism", 93 *MICH. L. REV.* 2054, 2080 & 2081 n.112 (1995).

13 Robert Stevens, Two Cheers for 1870: The American Law School, in Readings in the History of the American Legal Profession 220 (Dennis Nolan ed., 1980).

his students: "Could you state the reason for the decision?"[14] One would genuinely wonder, how about the minds of the advocates and how they reasoned? Doesn't the case method focus too much on the judge and too little on the advocate, who is equally an important party to the development of the cases?

Proponents of the Case Method, which is invariably accompanied by the Socratic Questioning method, have argued that it is a better alternative to the normal lecture method, where the teacher pontificates content at the podium as an all-knowing dictator. Students can sharpen their diagnostic skills by applying earlier decisions to real-life scenarios of the moment and therefore stating how they would rule, basing their ruling on the earlier determined cases.[15] A study by professors Srikant Datar and David Garvin of the Harvard Business School found that students who were taught through the Case Method were able to better think about and recommend solutions to challenges faced by practising managers.[16] It also established that schools that adopted competing pedagogies produced students who were detached from the realities of the moment.

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14 William Schofield, 'Christopher Columbus Langdell', 55 *U. Pa. L. Rev.* 273 (1907). Available at: https://scholarship.law.upenn.edu/penn_law_review/vol55/iss5/1, accessed on March 26, 2023

15 Garvin, D. A. (2003). 'Making the Case: Professional Education for the World of Practice.' *Harvard Magazine*, 106 (1), 56-107.

16 Jackson, G. "Rethinking the Case Method", *Journal of Management Policy and Practice* vol. 12(5) 2011. Available at http://digitalcommons.www.na-businesspress.com/JMPP/Jackson_Final_Revised_Web.pdf, accessed on March 26, 2023. See also Andrew E. Taslitz, 'Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think', 43 *Hastings L.J.* 143 (1991). Available at: https://repository.uchastings.edu/hastings_law_journal/vol43/iss1/3. Accessed on March 26, 2023

One desirable justification for the continued use of the Case Method and the Socratic method is that they provide context for studying the Law. Langdell's students were instructed to read appellate decisions determined by appellate judges. This gave them context for learning the subject of the day. Contrasting this with the lecture method, where the professor pontificates all that they know while standing on the podium and leaving little or no room for the learner to contribute, or the reading of books in the library written by the same professors, the Case Method, no doubt, is preferable.[17] In the lecture method, the professor expresses their views regarding the decision of the court, while in the Case Method, students are asked about their views regarding the decision and how they would have determined the matter, given a different set of facts.

But there is a problem with the Case Method. The method proceeds on the assumption that case law unquestionably embodies universal principles and, to teach the law, the professor engages the learner through the Socratic Method to identify them. But the professor does not start by telling the learner what these principles are. It is the learner who identifies them. Some commentators have argued that this method breeds student confusion and despair because the answers to the questions posed during Socratic questioning are uncertain.[18] Yet there is so much more the Law has other than answers to questions about what the judge might have thought when delivering the judgment.

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17 See Letter from John Chipman Gray to the editors of Yale Law Journal (n.d.), reprinted in Methods of Legal Instruction, 1 *YALE L.J.* 139 (1892) (symposium).

18 Thomas F. Bergin, Jr., 'The Law Teacher: A Man Divided Against Himself', 54 *VA. L. REV.* 646, 648-49 (1968). See also Paul N. Savoy, 'Toward a New Politics of Legal Education', 79 *YALE L.J.* 444, 457-62 (1970).

If this is what teaches them legal reasoning, then what method teaches them about the art of drafting commercial transactions and pleadings? To ensure that the Socratic method achieves its Langdellian objective, professors can cast the net of questions wider to capture artistry in cross-examination of witnesses and other artistic competencies.[19] However, the drafting of documents, preparation of cases, filing and such other competences cannot be achieved through questioning.

The Socratic method, which accompanies the Case Method, has been criticised as one that intimidates learners. Professors may not prepare well for class, because all they need to do is to lump up questions for students for the entire session. Hence, professors end up as the "smart" ones while the student remains dumb. The Socratic questions posed to learners must be logical and must aim at achieving a learning outcome. But this is not always the case, as unprepared professors have used the method to intimidate learners. Part 4 of this paper will give some examples, but this is not new. It even happened during the time of Karl Llewelyn.[20]

In addition, the Case Method only exposes learners to how judges decide cases. It does not expose the learners to the problems and therefore trains them on how to solve them. While reading the cases, the decision has already been made, and there is no amount of questioning that will alter that decision. This is coupled by the

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19 Eleanor M. Fox, 'The Good Law School, The Good Curriculun and the Mind and the Heart', 39 *J. LEGAL Enuc.* 473, 478 (1989). See also Nancy L. Schultz, 'How Do Lawyers Really Think?', 42 *J. LEGAL EDuC* (1992).

20 See Llewellyn, 'On the Problem of Teaching "Private" Law', 54 *HARV. L. REV. 775, 778* (1941).

fact that some of the decisions are too old, and the circumstances under which they were made have changed. *Carlill v Carbolic Smoke Ball Co*,[21] for example, was decided in 1893, yet it remains the authority for the rule that an offer can be made to the whole world. The offer in this case was posted in a newspaper. There are new media today that include the internet and television. Likewise, *Donoghue v Stevenson*,[22] was decided in 1932, and it remains the authority for the tort rule that manufacturers will be held liable for negligence in manufactured products that are meant to reach the consumer in the same state as they were packaged if the final consumer is harmed after consuming those products. A lot has changed, including the enactment of statutes on consumer protection and product quality.[23] These Laws would be great fodder for new decisions on product liability.

Langdell's pedagogy was novel in its time, but now it is not. It was a perfect fit in the Middle Ages, the Industrial Revolution, and the Renaissance, when a lot of attention was given to thinking and being innovative.[24] Even more troubling is the fact that Langdell gave coherence to decisions that made good principles and disregarded those that did not. So how could this methodology impart skills needed for legal practice, management of law firms, advocate-client relationship, government lawyering and corporate lawyering? Had Langdell considered Law as a

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21 [1893] 1 QB 256.

22 [1932] UKHL 100.

23 For example, in Kenya there are several statutes of this nature: The Sale of Goods Act, Cap 31 Laws of Keya, the Consumer Protection Act, No 46 of 2012, the Standards Act, Cap 496 of the Laws of Kenya and the Anti-Counterfeit Act No.13 of 2008.

24 Edward Rubin, 'What's Wrong with Langdell's Method, and What to Do About it', Vanderbilt Law Review, Vol. 60:2:609, 2007.

social science, he would have proposed that learners be exposed to the transactional social problems that shape the practice of Law. Because the law serves society. Lawyers interact with society and help resolve societal problems. Hence, learners require social skills. But Langdell considered Law as a natural science whose laboratory is the library where cases are found in law reports.

3. COMPETENCES THAT ARE NEEDED FOR LEGAL PRACTICE AND HOW TO IMPART THEM TO LEARNERS

Kenya is currently implementing a Competency-based Curriculum (CBC), a hands-on curriculum that promotes learning through experiences, observation, and practical experimentation. The focal point of the learning process is the learner, rather than the instructor, as was the case previously, whether the instructor would deliver content to learners and expect them to process it.[25] the 21st century learner requires such skills as life and career skills, learning and innovation skills, information, media and technology skills, and effective communication skills.[26] To impart these skills on the 21st century learner, the 21st century teacher must be easily adaptable to changing situations, an effective communicator, a learner, visionary, a leader, a role model, and a collaborator.[27] The

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25 Amutabi, M. N. (2019). 'Competency Based Curriculum (CBC) and the end of an Era in Kenya's Education Sector and Implications for Development: Some Empirical Reflections'. *Journal of Popular Education in Africa*. 3(10), 45 – 66.

26 Sifuna, D. N & Obonyo, M. M. (2019). 'Competency Based Curriculum in Primary Schools in Kenya -Prospects and Challenges of Implementation.' *Journal of Popular Education in Africa*. 3(7), 39 –50.

27 Mohamed M., & Karuku S. (2017). 'Implementing a Competency-Based Curriculum in Science Education'. In: Otulaja F.S., Ogunniyi M.B. (eds) *The World of Science Education. Cultural and Historical Perpectives on Science Education: Handbooks*. Rotterdam: Sense Publishers.

curriculum seeks to impart such key competences as self-efficacy, learning to learn, digital literacy, citizenship, imagination and creativity, critical thinking and problem solving and communication and collaboration. The goal is to produce an engaged, empowered and ethical citizen.

Legal education is not exempt from this competency-based approach to education. But the question is, what competencies does the 21st century lawyer need for legal practice? Langdell's Case Method and the Socratic method emphasise more on 'thinking like a lawyer'. Legal research is also based on this approach as legal research methodology is doctrinal, which involves analysing statutes, case law, policies and other sources of law, without 'interacting with the environment and the society' as is the case with non-doctrinal methods. It is true that legal reasoning is a skill that lawyers use regularly while representing their clients, but it is not the only skill that they need. Most of the preparatory work in chambers or with clients is done using other skills.

A 1992 study found that lawyers need several skills that are conceptual foundations for virtually all aspects of legal practice.[28] Problem-solving skills require identification and diagnosis of the problem, generating alternative solutions and strategies, developing a plan of action, implementing the plan, and keeping

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[28] American Bar Association., *Legal Education and Professional Development-An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (1992). Available at https://www.corteidh.or.cr/tablas/28961.pdf. Accessed on March 27, 2023.

the planning process open to new information and ideas.'[29] Legal analysis and reasoning skill requires identifying and formulating legal issues, formulating relevant legal theories, evaluating legal theories, and criticising and synthesising legal argumentation. Legal research skill requires knowledge of the nature of legal rules and institutions, knowledge of and ability to use the most fundamental tools of legal research and understanding the process of devising and implementing a coherent and effective research design.[30]

Factual investigation skills require the lawyer to determine whether factual investigation is needed, plan a factual investigation, implement the investigative strategy, organise information in an accessible form, decide whether to conclude the process of fact-gathering, and evaluate the information that has been gathered.[31] The skill of communication requires lawyers to effectively assess the perspective of the recipient of the communication and use effective methods of communication.[32] Counselling skills, on the other hand, require the lawyer to have

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29 Peter Hoffman, 'Teaching Theory v Practice: Are we Training Lawyers or Plumbers?' *Michigan State Law Review* Vol. 2012:625. See also pages 157-190 of the MacCrate Report, 1992.

30 See also Barnhizer, 'The Clinical Method of Legal Instruction: Its Theory and Implementation', 30 *J. LEGAL EDUC.* 67, 78 (1979); and Mudd & LaTrielle, 'Professional Competence: A Study of New Lawyers', 49 *MoNT. L. REV.* 11, 17 (1988).

31 See Binder, D. & Bergman, P., Fact Investigation: From Hypothesis to Proof 2-4 (1984). See also Baird, 'A Survey ojthe Relevance of Legal Training to Law School Graduates', 29 *J. LEGAL EDUC.* 264, 273, 281 (1978); and Schwartz, 'The Relative Importance of Skills Used by Attorneys,' 3 *GOLDEN GATE L. REV.* 321, 324-25 (1973).

32 See also Baird, 'A Survey of the Relevance of Legal Training to Law School Graduates', 29 *J. LEGAL EDUC.* 264, 273-74 (1978) and Mudd & LaTrielle, 'Professional Competence: A Study of New Lawyers', 49 *MONT. L. REV.* 11, 18-19 (1988).

an understanding of the proper nature and bounds of the lawyer's role in a counselling relationship, gathering information relevant to the decision to be made, analysing the decision to be made, counselling the client about the decision to be made, and ascertaining and implementing the client's decision.[33]

The skill of negotiation requires lawyers to prepare for negotiation effectively and conduct a negotiation session effectively. This skill is widely applied in alternative dispute resolution mechanisms, which also include mediation and arbitration and has been widely acknowledged in literature.[34] The skill of litigation and alternative dispute resolution procedures requires lawyers to have knowledge of the fundamentals of litigation at the trial court level and at the appellate level, and knowledge of the fundamentals of advocacy in administrative and executive forums and alternative dispute resolution forums.[35] The skill in organisation and management of legal work requires lawyers to formulate goals and principles for effective practice management, develop systems and procedures to ensure that work is performed and completed at the appropriate time, develop systems and procedures for effectively working with other people, and develop systems and procedures for effective administration of a law office.

The skill of recognising and resolving ethical dilemmas requires the lawyer to be familiar with the nature and sources of ethical

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33 MacCrate Report, page 184. See also 'Baird, A Survey of the Relevance of Legal Training to Law School Graduates', 29 *J. LEGAL EDUC.* 264, 273-74 (1978).

34 For example, Menkel-Meadow, 'Toward Another View of Legal Negotiation: The Structure of Problem Solving', 31 *U.C.L.A. L. REV.* 754 (1984).

35 MacCrate Report, page 190.

standards, familiar with the means by which the ethical standards are enforced, and familiar with the processes for recognising and resolving ethical dilemmas. In addition to the skills, the MacCrate Report identified such values of the legal profession as competent client representation, promoting justice, fairness and morality, and striving to improve the profession professional self-development.[36] These skills and values have been corroborated by a study by Bryant Garth and Joanne Martin on the skills that lawyers need for practice.[37]

Despite the presence of all these skills and competences that law students should be exposed to, most law school curricula are litigation-oriented and the most popular skill is 'thinking like a lawyer.'[38] The Law of Contract and Commercial Law could, for instance, be taught from a transactional perspective that involves drafting of agreements, negotiation with parties for terms, interpretation of the terms and so on.[39] Spending a whole semester teaching students of Law of Contract and Commercial Law what an offer is, rules of a valid offer, implied terms of a contract and so on does not impart any legal practice skills on those students. All this market-irrelevant content is taught at a very high cost. Most private law schools charge anything in the

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36 MacCrate Report, page 207.

37 See Bryant G. Garth & Joanne Martin, 'Law Schools and the Construction of Competence', 43 *J. LEGAL EDUC.* 469 (1993).

38 Lydia Nussbaum agrees, in her *Executive Summary, The Profession and the Academy: Addressing Major Changes in Law Practice* (May 27, 2010), available at https://www.albanylaw.edu/sites/default/files/media/user/celt/news/the_profession_and_the_academy_summary.pdf, accessed on March 27, 2023.

39 See for example Gillian K. Hadfield, 'Equipping the Garage Guys in Law', 70 *MD. L. REV.* 484 (2011). See also Robert J. Rhee, On Legal Education and Reform: One View Formed from Diverse Perspectives, 70 Md. L. Rev. 310 (2011), available at http://scholarship.law.ufl.edu/facultypub/479 accessed on March 27, 2023.

region of Kshs. 350,000/- and Kshs 500,000/-for the 4-year LL.B. course, while the ATP Program at the Kenya School of Law charges approximately Kshs 200,000/- for a year of training. Still, the leaner will attend a 6-month apprenticeship at their own cost. All these costs do not include accommodation, travel expenses, printing and photocopying of materials and other contingencies.

The 21st century lawyer needs to be creative. An innovator. The digital age has introduced several digital tools that have made work easier. The study of law in this century must take advantage of these digital tools to prepare a digitally literate lawyer. For example, the Ministry of Lands in Kenya recently launched *Ardhi Sasa,* an online platform that allows Citizens, other stakeholders and interested parties to interact with land information held and processes undertaken by the Government.[40] Professors teaching Land Law, Property Law and Conveyancing cannot continue teaching the same outdated conveyancing tools that have been used before. They will not be training the Conveyancing Lawyer of the 21st century. Likewise, registration of companies and related services is now available on the e-citizen[41] and the Business Registration Service[42] platforms. Students taking Company Law, Commercial Law and such other subjects must be introduced to these tools; otherwise, their teacher will not be achieving the objectives of 21st century legal practice. Innovative

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40 Ardhisasa, available at https://ardhisasa.lands.go.ke/home. Accessed on March 27, 2023.

41 See e-citizen, available at https://www.ecitizen.go.ke/. Accessed on March 27, 2023.

42 See Business Registration Service, available at https://brs.go.ke/. Accessed on March 27, 2023.

ways of fighting climate change, the rate of inflation, governance, and renewable energy are other modern problems that require modern legal solutions. The 21st century lawyer must be introduced to these problems. Case Method and Socratic questioning might not be the right pedagogies to achieve this objective.

4. PEDAGOGICAL APPROACHES IN LAW SCHOOLS IN KENYA AND TANZANIA

Law schools in Kenyan universities have used Langdell's Case Method and Socratic questioning without any criticism. In fact, most teachers of the law in Kenyan universities use the lecture method, where the teacher is all-knowing, and the learner only chips in by asking questions and requests for clarification. There are even teachers who dictate notes to their students for the three-hour session. This part of the paper will examine the teaching pedagogies adopted by some teachers of the law in selected Kenyan universities and compare them with the University of Dar es Salaam School of Law. The School of Law of the University of Nairobi will be at the focal point. The reason for this is that this school was the first law school in Kenya and has trained many lawyers in Kenya. Most importantly, the author studied his LL.B. in this school from 2011 to 2015, and therefore, the information is first-hand and experiential. He has also been doing his Ph.D. at this university, since 2023. The University of Dar es Salaam will be used for the same reason. The author graduated with his LL.M.. degree from this university and therefore the information is first-hand and experiential too. The author graduated with his LL.M. from this university in 2017. University of Bayreuth in Germany would also have been used, as

the author also has a qualification from that university (2018, Certificate of Introduction to German Law), but the focus is the University of Nairobi Faculty of Law and the University of Dar es Salaam School of Law. Private law schools in Kenya, where the author has taught the Law, will also not be used.

The School of Law of the University of Nairobi ("The School") boasts of a combined academic staff strength of over 70 professors, senior lecturers, and lecturers, spread across three departments, namely, the Commercial Law Department, the Private Law Department and the Public Law Department.[43] The School offers Bachelor of Laws (LL.B.), Master of Laws (LL.M..) and Doctor of Philosophy in Laws (Ph.D.) degrees. The School is the kitchen where most of the legal minds in the country, most of whom have served in critical resource areas, have been prepared. On pedagogy, the School concedes that most law studies at the undergraduate level have been theoretical, but in recent times there has been an emphasis on "experiential learning through simulation and activity participation in class, mock trials and international moot court competition."[44] There is also a clinical program where students are attached for their judicial attachment in courts and other organisations with legal departments.

The present author did not have the occasion to be taught by Retired Chief Justice (Prof) Willy Mutunga, who is now an Adjunct Professor at Kabarak Law School, but he has become an

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43 "About School of Law", available at https://law-school.uonbi.ac.ke/index.php/basic-page/about-school-law, accessed on March 27, 2023.

44 *Ibid* .

ardent reader of his publications.[45] Mutunga taught Law at the School in the 1970s and 80s, and his methodology is clearly Socratic. He captures his teaching methodology in his Inaugural Lecture at Kabarak Law School as follows:

> I allowed students to interrupt me and ask questions during lectures. My thought process was not interrupted as conservative lecturers invariably say to avoid exposing their intellectual laziness and arrogance. When I did not have answers, I said so and went to do research on the issue and gave my answers. When students critiqued me, I welcomed the criticism and debates ensued. The participation by students enriched our collective intellect in the study of the law. I believe I wrote my think pieces with a lot of input from the students[46]

Mutunga is famous for his 'radical legal education' where he questioned different laws and decisions made by the State at the time. At the School, he abhorred certain methodologies adopted by his colleagues at the time, stating that "there was a clear tension between the liberal American system and the pulpit British system, where the professor pontificated for 50 minutes without interruption, warning students that questions would only be discussed in tutorials. This latter methodology encouraged

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45 For example, Mutunga, W. 'The demystification of the Kenya Law of Hire-Purchase', *Eastern Africa Law Journal*, vol. xi, No. 2 (1975); 'Commercial law and development in Kenya', *International Journal of the Sociology of Law*, vol. 8, 1 (1980), and 'The role of law in development', *Nairobi Law Journal*, no. 1 (1976).

46 Mutunga, W., "In search and defence of radical legal education: A personal footnote", *Inaugural Lecture by Willy Mutunga, Adjunct Professor of Public Law, Kabarak University*. Available at https://www.kabarak.ac.ke/images/schools/sol/kls_ops_1_1_mutunga_inaugural_lecture.pdf, accessed on March 27, 2023. Page 19.

what we then called 'academic terrorism devoid of democratic teaching'. Needless to say, there was resistance to it."[47] sadly, this "pontification" still exists today, not just in the School, but in most Law Schools in Kenya.

The Late Retired Justice (Prof) O.K. Mutungi was a modern-day Socrates. He taught me the Law of Sale of Goods and Agency. He would question the relevance of every section of the Kenyan Sale of Goods Act,[48] whilst asking his students to explain what the drafters would have thought when drafting that statute. He was famous for his statement "A First Year Law Student could draft a better statute than this one." He never dictated notes and would engage in Socratic questioning for all the 3 hours of the session. That was the first time the present author experienced the Socratic questioning methodology.

Professor Francis Situma teaches Public International Law, which is offered in the 3rd Year. The professor leads the session by dictating notes to his students and occasionally entertaining contributions from his students, who must form discussion groups at the beginning of the semester. In his 25-page Course Outline, he states as follows: "Class attendance and participation are expected, and I will take the liberty to call upon students to contribute to class discussions. Participation in class discussions will count towards the final grade. It is therefore essential that reading assignments be completed in time. Due to the volume of readings that serve the function of letting the students know what international lawyers are worrying about today, students are

47 *Ibid*, page 14.
48 Cap 31 Laws of Kenya.

encouraged to form study groups that help in the discussion of the assigned readings and the accompanying questions before the lecture hour." Prof Situma is partly a Langdell and partly a Socrates, although his readings are not case law, as is the case with Professor Langdell.

Professor Sihanya teaches Constitutional Law, Law and Development and Intellectual Property Law. He is a Socrates. He provides comprehensive notes for each class and engages his students in discussion about the notes in class. His students also have access to his journal articles and books. He is a renowned researcher and writer. He runs a mentoring firm known as Innovative Lawyering and Sihanya Mentoring with a view to exposing young legal researchers to "research, practice, training, publishing, consulting and mentoring in Intellectual Property (including Trade Related Aspects of Intellectual Property) & Innovation, Education, Training, Research and Mentoring (ETRM) Law, Constitutionalism and Governance, Communications Law as well as Trade and Corporate Governance Law in Kenya specifically and Africa generally."[49] Although there are no practical activities that take place in his class, like group presentations, mooting, and role play, the materials he shares with his students are quite informative and are an opportunity for his students to "read his mind".

Professor Patricia Kameri-Mbote teaches Property Law. She is widely researched in legal aspects of land, gender relations,

[49] See Innovative Lawyering and Sihanya Mentoring, available at https://profiles.uonbi.ac.ke/sihanya/links/innovative-lawyering-and-sihanya-mentoring accessed on March 27, 2023.

environmental protection and law, science and technology. She obtained her Higher Doctorate Degree in Law at the University of Nairobi in 2019, making her among the first few women to obtain that fete in East and Central Africa. She leads her lectures, with well-designed PowerPoint slides. Her students are required to participate during her lectures and class participates accounts for 10% of the final grade. Those who do not participate in her class do not get these marks. She is a Socrates of sorts. She also invites guest lecturers, some of whom could be her fellow professors at the university. The only part that misses in her classes is the practical aspect. While teaching Property Law, there are several Land Law instruments that her students could have drafted, for example, transfer instruments, title documents, and charges.

Professor Kiarie Mwaura teaches Constitutional Law, Corporate Governance, Company Law, and Human Rights. He is widely researched and consulted. He is a modern-day Socrates, but also engages his students in practical activities. He taught me Constitutional Law. He is the first lecturer to have engaged students of the present author in a moot session. We were allocated a moot question and asked to allocate tasks amongst ourselves so that we have advocates representing the parties in the hypothetical question, a bench of three judges, a court clerk and any other responsibility that was needed in that assignment. In addition to acquiring legal reasoning skills, we also acquired such other skills that the MacCrate Report documents as legal research skills, negotiation skills, factual investigation and problem solving.

Professor Migai Akech teaches Administrative Law. He is a typical lecturer. He leads the discussion and dominates everything that happens in his class. He doesn't use PowerPoint slides or any projected material. There are no student-led activities that take place in his class. He once told our class that his duty is to lecture, and the students must generate their own notes based on what they have understood from the lecture.

Dr. Muthomi Thiankolu taught the author the Law of Evidence. He is very practical in his legal training. He prefers giving examples of cases that he has handled in his law firm to emphasise on selected aspects of evidence. He also supplements this approach with detailed PowerPoint slides that he projects in class while teaching. His questions are very practical and require the learner to apply the lessons covered in class. He has recently publicly aired his views about the declining standards of legal education in Kenya on his Facebook Account and how to address the shortcomings. He opines that, for example, law students should be taught by practising advocates, whether such advocates have postgraduate qualifications like Master of Laws or Ph.D. in Law or not. For him, what matters most is their practical experience. He also opines that not all law students want to pursue a career in academia and therefore they should not be compelled to write dissertations.

Other lectures who have taught me are Prof. Njaramba Gichuki, a Socrates who teaches Banking Law and Social Foundations of Law and demands that students must participate in his class and allocates them tasks to present in class, Dr. Jackson Bett whose classes involve lively discussions and debates with his students on

Law of Contract, Dr. Jacob Gakeri (current High Court Judge) who leads the discussions as a typical lecturer, and Mr. William Musyoka (current High Court Judge) who prepares well-researched notes on Criminal Law, shares them with students before the class and engages the students in lively discussions during the session.

At the University of Dar es Salaam, legal pedagogy is taken very seriously, and Retired Chief Justice Mutunga has captured this as follows:

> In some courses, particularly Contracts and Criminal Law, the two American professors, William Whitford and Robert Siedman, used the Socratic method that I loved. Since we had the materials, the professors simply assigned readings that were to be the basis of discussion. The lectures were study groups where the professor moderated the discussion. Every student had to read these materials because the professors randomly picked students to start off and to continue the discussion. It was my first encounter with collective intellect that shunned individualism and competition for marks. In these two courses we had open-book examinations. There was no need to cram case law or provisions of statutes. All a student needed to do was to refer to their notes and materials. This methodology requires serious reading of the materials to be able to navigate through them for references in an examination that was three hours long[50].

A lot has changed since Mutunga left Dar. The professors have moved away from the Socratic Method to more practical

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50 Mutunga, W., *Supra*, note 46.

methodologies of training lawyers. Two professors come to mind. Professor Hamudi Ismail Majamba has been Dean of the School of Law for three (3) consecutive terms and teaches Advanced Graduate Research Seminar at the Master of Laws (LL.M..) level. His methodology is very practical: He allocates his students several readings on a weekly basis, and each one of them must determine how those readings relate to the Dissertation Proposal they are writing. His philosophy is straightforward: the dissertation must address an evident societal, environmental, economic, or political problem. He also utilises elements of the Socratic Method because his students must contribute to his class by answering questions based on the readings assigned to them.

Professor Khoti Kamanga teaches Public International Law and Regional Integration Law. He teaches through seminar sessions with his students. He introduced me to the use of statistical information in legal research. He abhors doctrinal legal analysis where the research simply analyses what statutes and case law provide. He believes that the law has to be backed up by data from the society, environment, governance, economy and so on, as the case may be, to make sense. I first heard about the term "jurimetrics" from him, which means the use of quantitative methods and measurable data in the study of law. This is in line with competency-based legal education.

5. PEDAGOGICAL APPROACHES AT THE ATP PROGRAM AT THE KENYA SCHOOL OF LAW

Ideally, the Advocates Training Program at the Kenya School of Law is supposed to teach Legal Practice,[51] while universities teach legal theory. However, this is not the case in practice. This part will demonstrate that the pedagogical approaches at this school do not greatly differ from those used by law schools in universities offering the Law Degree. Examination is carried out in three parts: project work, which accounts for 20%, oral examination, which accounts for 20% and final written examination, which accounts for 60% of the final grade. The Taskforce on Legal Sector Reforms recommended that project work and oral examination should be expunged from the examination, as it was not clear what learning outcomes it sought to achieve.[52] Similarly, the Taskforce recommended that the final exam should be conducted after students have completed their pupillage in Law Firms. These recommendations have not yet been implemented. It should be noted that project work is like the Dissertations that most Law Students write under the supervision of their lecturers in Law Schools at the university.

For the 2023/24 academic year, Trial Advocacy is being taught through firm presentations arising from questions sent to the firms by the course instructors. The content of the course, as can be seen from the course outline, is very theoretical and includes:

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51 Kenya School of Law: "About Us". Available at https://www.ksl.ac.ke/mission-vision-and-mandate/ accessed on March 31, 2023. The Mission of the School is stated as: To offer *practical training for the professional development of lawyers and other professionals,* and to undertake research and consultancy in the public and private sectors for promotion of the rule of law and good governance (Emphasis added).

52 Taskforce on Legal Sector Reforms, *supra*, note 1.

the qualities of a good trial lawyer, ethical duties of trial lawyers, court etiquette, dimensions, rules and psychology of advocacy, among others. The fact that students carry out firm presentations arising from their findings from research makes this approach no different from the group work that Bachelor of Laws students conduct in law schools. The course instructors refer to this approach in their course outline as "experiential learning of law from a skills-oriented perspective."[53] This approach would have been more effective if the students engaged in practical advocacy and trial in a 'moot court', other than presenting their descriptive findings about the content.

The Criminal Litigation course instructors administer their content through lectures. Individual students and firms are allocated questions beforehand to facilitate effective class participation. Course content includes jurisdiction and structure of courts, arrests, identification parades, complaint and charge, plea and plea bargain, bail and bond, the trial process and post-sentencing procedures. This is not different from what lecturers in Law Schools teach in the subject of Criminal Procedure. In fact, they do much more. Mr Seth Ojienda's students, for example, usually draft charge sheets, search warrants, applications for bail and bond, and judgments in Criminal Procedure, the subject he teaches at Mount Kenya University School of Law. They also moot on assigned questions at the School's Moot Court. Mr Washington Ombis has a similar approach at Riara Law School.

53 See Trial Advocacy Course Outline, page 1. Available in hard copy.

In Legal Writing and Drafting, the instructor presents a lecture in class and at the end of the lecture gives individual assignments on the topic discussed. In their course outline, the instructors state as follows: "Instructions will be conveyed in two methods. The Socratic method of teaching will be used to introduce concepts in each topic covered. Thereafter, the experiential method of learning (learning by doing) will be utilised to build on the skill set necessary for effective legal writing and drafting." Course content includes the process of effective writing, paragraphing, sentences and voice in legal writing, transitions, and case analysis. These topics are done in Term One. In Term Two, students are introduced to drafting, where they draft letters and other correspondence, demand letters, legal opinions, and legislative drafting. This is very practical and meets the objectives of the course.

Legal Practice Management is taught through a normal lecture. Instructors give lectures in class while entertaining questions from students, and then any unanswered questions are referred to firms for discussion. Course content includes office administration and management, human resource planning and management, and the conceptual framework of accounting. Practical aspects of this course should have included visiting selected Law Firms to familiarise with aspects of practice and management, inviting guest lecturers sourced from law practitioners, and setting up a dummy firm to last through the Term, during which these aspects of legal practice and management would be canvassed.

Conveyancing is taught through normal lectures. Instructors assign students tasks beforehand to facilitate effective class participation. Course content includes historical and current legal framework on conveyancing, contracts for the sale of land, the conventional agreement for sale, completion documents, and tenancies, licences, and charges. Some Law Schools offer this subject, and a close look at their methodologies does not show any difference from what is done at the Kenya School of Law. Ms Joy Asiema of the University of Nairobi has taught this subject for a long time and usually asks her students to visit law firms to source for such conveyancing documents as charges, transfers, title deeds and leases. These documents would then be the tools for discussion in class. Students would also be given assignments to draft some of these documents.

Probate and Administration is taught through normal lectures. The instructors then randomly assign individuals some tasks to research and facilitate effective class participation in the next class. Course content includes the historical background on the Law of Succession Act, legal framework on the Law of Succession in Kenya, testate and intestate succession, proof of wills, and jurisdiction on matters of succession. There is clearly no difference between what Law Schools teach in the Law of Succession. This subject is offered by all Law Schools covered by this study, and a close look shows that some of the lecturers who teach the subject require their students to draft wills and engage in critical discussions about their validity.

Professional Ethics is taught through weekly lectures. Instructors send reading materials beforehand to students to interact with

them and to facilitate effective class participation. The instructors state as follows in the Course Outline: "…The course is taught as a series of interactive lectures, seminars and tutorials. Most of the material will be presented using Power-point presentation slides. For effective discussion, case law and relevant readings (statutes, journal articles etc.) will be discussed under guidance from the course instructor. As such, prior reading is advised in preparation for a class. For some topics, guest lecturers will be brought to teach alongside the course instructor. All the students will be required to participate actively in group discussions and class presentations." This is clearly the Socratic method, and it doesn't differ in any way from the pedagogies adopted by Law Schools in similar subjects.

Civil Litigation is taught through normal lectures. Instructors then assign students readings at the end of the class to prepare them to participate in the next class. The Course Instructors state as follows in their Course Outline: "A variety of teaching methods including formal oral and written instruction, demonstrations, interactive group discussions, moots and other experiential learning exercises and assignments will be utilised to assist students develop efficiency in all skill areas." Course content includes jurisdiction of courts, the overriding objective in civil litigation, parties to a suit, commencement of suits, and interlocutory applications. The pedagogical approach does not differ from what Law Schools offer in Civil Procedure. In fact, Richard Kariuki of the University of Nairobi has more practical approaches like asking students to draft plaints, statements of defence, notice of appeal and such other documents required in

civil cases. Ms Wanjiru Kiniti and Mr Seth Ojienda also have a similar approach at Mount Kenya University.

Same for a few subjects; therefore, the pedagogies adopted by instructors at the Kenya School of Law are not different from those adopted by lecturers in Law Schools, yet the Kenya School of Law is designed to offer practical legal education.

6. CONCLUSION AND RECOMMENDATIONS

Some of the recommendations might be brutal, and may need a change of law, but they are practical. From the discussion above, they would be the only way to reform legal education in Kenya and to address the theory-practice dichotomy.

6.1 Recommendation 1: Devolve The Kenya School of Law to Universities

This study has demonstrated that what students at the Kenya School of Law do is just an extension of the university Law School. The pedagogy is the same. They sit for long hours listening to instructors as they pontificate and profess content the same way they listen to their professors in Law Schools. Practical legal education is an oxymoron. One way of avoiding this extended pontification is to devolve the ATP program to Law Schools. Law Schools will then be required to drop the Langdellian and Socratic methods in favour of practical legal education. One year can be added on top of the 4 years of LL.B. There need not be any separation between LL.B. and ATP. Students should acquire these competencies right from First Year of Law School, especially now that the Competency Based Curriculum is being implemented.

6.2 Recommendation 2: Make the ATP Program an Apprenticeship Course

Students at the Kenya School of Law pay a whopping Kshs 145,000/- to be trained on practical legal education. This study has demonstrated that practical legal education at the Kenya School of Law is an oxymoron. They further pay Kshs 45,000/- for exams, which they still fail and are asked to pay for remarking and supplementary exams. They are not exams for learning. They are exams for punishment. If these students were to be posted in Law Firms, courts, Attorney General Chambers, Office of the DPP, and in legal departments of companies after completing their LL.B., they would learn a lot as they would be learning practically. This Kshs 145,000/- that the students pay to the Kenya School of Law for the extended theoretical legal education can be sent to these apprenticeship bodies as stipend. It would be a win-win scenario.

6.3 Recommendation 3: Adopt CBC Straightaway in Law Schools

This study has demonstrated that there are many competencies that law students need to acquire to prepare them for practice. They include negotiation skills (with clients), legal research skills, communication skills, drafting skills, professional ethics and values, problem-solving skills, factual investigation skills, and legal analysis skills. These skills cannot be imparted on the learner through the lecturer method or even the Case or the Socratic Method. Learners must learn through experience. The more practical and authentic the problems posed to them for practice, the better it is for them to acquire these skills.

6.4 Recommendation 4: Streamline Legal Education Through Deregulation

Legal Education in Kenya is overregulated, and this breeds a lot of confusion and conflict. First, there is the Legal Education Act which establishes the Council of Legal Education (CLE) whose mandate is, among others, to regulate legal education in Kenya offered by legal education providers, to licence and to supervise legal education providers.[54] Secondly, there is the Universities Act which establishes the Commission for University Education (CUE).[55] The mandate of CUE is stated at section 5 as promoting the objectives of university education and accrediting and inspecting university education programs, among others.[56] The 2016 amendment of this Act gave CUE the sole mandate of accrediting and approving all academic programmes offered by universities. Law is one of those programs. Thirdly, there is the Kenya School of Law Act,[57] which establishes the Kenya School of Law as a corporate entity with capacity to sue and be sued, among other corporate personalities. The mandate of the school is to train persons to be advocates under the Advocates Act,[58] among other duties.

On April 8, 2022, the Kenya School of Law (Amendment) Bill, 2022 was gazetted. It proposes an amendment to section 16 of the Principal Act to empower CLE to be the body to set standards and requirements to be fulfilled by person intending to be admitted at the Kenya School of Law. The school has been

54 Legal Education Act, No 27 of 2012, section 8(1).
55 Universities Act, No 42 of 2012.
56 *Ibid*, section 5(1).
57 No. 26 of 2012.
58 Cap 16, Laws of Kenya.

setting these standards previously. On the same day, April 8, 2022, the Legal Education (Amendment) Bill, 2022 was gazetted. The Bill seeks to amend section 8 of the Principal Act to confer upon the CLE the power to accredit legal education providers to offer the Advocates Training Program. If approved by the National Assembly, universities offering Bachelor of Laws would be accredited, upon applying and satisfying the set criteria, to offer the ATP Program. At the time of conducting this study, these two Bills are yet to be passed by the National Assembly.

There is an urgent need to fast-track the enactment of these amendments as they will streamline legal education provision in the country.