

FORMING LAWYERS WHO CAN CONTRIBUTE TO EQUITABLE ACCESS TO JUSTICE IN SOUTH AFRICA

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ABSTRACT

Drawing on Amartya Sen, this paper proposes that clinical legal education and training should be evaluated in the light of contributions to wellbeing and agency freedoms, foregrounding people's capabilities as an appropriate metric for judging access to justice. The context is post-apartheid South Africa and aspirations towards transformative Constitutionalism which seeks to operationalize values of dignity, equality and freedom for all. The role the legal system, mediated by legal practitioners, should support Constitutional values and the public good as envisaged by the National Standards for university legal education. This challenge is explored in the article, drawing on a qualitative interview study. The researchers interviewed candidate attorneys across six University Law Clinics to identify the professional capabilities they valued for the purposes of contributing to enabling people to flourish in their everyday lives. Transformative Constitutionalism further suggests a set of capabilities which legal practice should enable. Through the

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perspectives and voices of practitioners, valued legal capabilities and the corresponding university education and training practices are also identified. The idea of legal capability is developed and broadened both conceptually and empirically, building on work both by Atkins and Habbig and Robeyns. The claim is made that legal education, lawyers' professional capabilities, and transformative Constitutionalism should be grounded normatively in a capabilities metric of justice and hence what matters for people's wellbeing and agency freedoms.

Key words: capability approach, South Africa, candidate attorneys, university law clinics, equitable access to justice

INTRODUCTION

The South African Constitution (RSA 1996) aspires, 'to improve the quality of life of all citizens and free the potential of each person'. In the light of this, we propose that equitable access to justice and hence legal education should be evaluated in the light of contributions to our wellbeing and agency freedoms (Sen 1999). As Nussbaum (2010, 432) argues, 'looking at what a nation has decided to protect through its system of constitutional law and judicial interpretation offers us useful information about what it thinks most central and most worth of protection'. Foregrounding people's capabilities (Sen 1999) constitutes an appropriate metric of access to justice based on the two normative claims set out by Robeyns (2017): that the freedom of persons to achieve wellbeing is of central moral importance, and that we understand

freedom to achieve wellbeing in terms of people's valuable capabilities. The South African Constitutional framework indicates broadly what counts as having wellbeing, enabling us to connect legal education, institutional arrangements of the law, and realizing entitlements to equality, dignity, freedom and rights.

What then is the role of legal practitioners and university education and training in operationalizing this aspiration in approaches, processes, and outcomes for everyday actions, and how can legal capabilities (Habbig and Robeyns 2022) which enable effective and equitable access to justice be fostered? As the Preamble to the 2015 National Standards (CHE 2015) for university legal education states: 'Law is central to creating a cohesive and successful society, it plays a significant role in facilitating economic development and most importantly, it is pivotal to entrenching the ethos and values of the country's constitutional democracy.... Therefore, legal education cannot be divorced from transformative constitutionalism'; legal education 'is a public good'. In the light of this, we wanted to find out what professional capabilities a group of trainee lawyers themselves value for transforming society, and how they can support Constitutional values and rights to enable people to flourish.

We also go beyond earlier conceptualisations to argue that any notion of legal capability must attend to broader social purposes, values and capabilities, as the legal education standards in South Africa envisage in evaluating equitable access to justice. We need then to have a normative view on which access to justice

capabilities matter (the guiding vision if you will) if we are to identify both which capabilities should be enabled through legal education and training, based both on the capabilities which legal practitioners themselves have reason to value and an access to justice capability set. The group we interviewed may well constitute a best case scenario and no doubt there will be varied views among legal practitioners regarding the value of the public or the private good (such as prioritising self-enrichment, see Walker and McLean 2013). But we are guided both by the aspiration for transformative Constitutionalism and by the required public-good standards in South Africa (CHE 2015) which suggest what legal education potentially could do - even if this is never guaranteed.

Turning to conceptualisations of legal capability, Atkins (2021) and Habbig and Robeyns (2022) have explained in some detail the origins of the notion of 'legal capability' and its undeveloped claim to arise from Sen's capability approach. Atkins (2021) explains that legal capability is understood as measuring or improving an individual's ability to deal with law-related problems in order to contribute to wellbeing. This applies to the broader population and is not necessarily specifically to legal practitioners. She points out that the concept lacks real theoretical grounding in the capabilities approach and calls for closer engagement with capabilities' literature; it is this that Habbig and Robeyns set out to rectify. Atkins (2021) further points out that in formulating a list of legal capabilities there is need to engage with the non-legal public as well. Suffice to note that she is critical of the

narrow framing of legal capability as embodying only knowledge, skills and attitudes, while Habbig and Robeyns (2022) add the focus narrowly on legal literacy. Habbig and Robeyns (2022) develop the conceptual underpinnings of legal capabilities beyond these narrower notions for an alignment with the capability approach whose aim is to foster human development by enlarging people's opportunities (their capabilities) and their agency (Sen 1999). They emphasize attention to both agency and structures in the framework; both determine people's real freedoms and flourishing. They draw on Martha Nussbaum's (2000) concept of 'combined capabilities' to emphasize the importance of external conditions of possibility in both forming and realizing people's capabilities. In light of this they define legal capabilities 'as the genuine or real opportunities someone has to get access to justice' (2022, 10). However, neither Atkins nor Habbig and Robeyns refer to the capability dimensions proposed by Wolff and De-Shalit (2007) which include two particularly relevant to legal capabilities: 1) living in a law-abiding fashion, that is the possibility of being able to live within the law; and 2) understanding the law. We think both these are important in our context.

We build on these accounts and the helpful capabilities-based definition of legal capabilities but, as we noted, we widen the scope beyond strictly legal capabilities in three ways: to consider the wider context and what capabilities should be advanced for equitable access to justice. Secondly, we introduce the empirical voices of practitioners, and we examine the role university education and training can play in

forming professionals who can enable justice access. We include experiences of working in a University Law Clinics (ULC) as part of this education and training. Thus we outline a normative access to a justice capability set for our Southern context of inequality, unemployment and widespread poverty in which people must navigate conditions of uncertainty and precarity on a daily basis. We think it may have relevance for other contexts where social and economic inequality and exclusions also feature.

The space of investigation is that of University Law Clinics (ULCs) in South Africa. These have their origins in the involvement of law students and academics in struggles for social justice, at the same time providing clinical legal education in the face of deep-seated social and economic inequalities (Mubangizi and McQuoid-Mason 2013). Their primary educational goal is 'training good future lawyers who can fulfill the promises of our progressive Constitution' (Mubangizi and McQuoid-Mason 2013, 63). From 1993 candidate attorneys were allowed to obtain practical training in approved legal community service organizations such as law clinics. This was followed in the early 2000s for provision by Legal Aid South Africa to fund ULCs with up to ten candidate attorney posts. Candidate attorneys undertake clinical training but may also work on projects funded by Legal Aid South Africa. The Legal Practice Act of 2014 (see <https://www.gov.za/documents/legal-practice-act>) prescribes that law graduates must undergo a compulsory practical vocational training as candidate attorneys before admission as an attorney. The Act regulates

Law Clinics, requiring registration as a non-profit organisation that provides free legal services. This differentiates the research participants from candidates in private practice who will not get the same exposure.

Nonetheless, ULCs still face the challenge of sufficient stable funding and may be undervalued by law faculties. In the challenging South African context candidate attorneys in ULCs need both to form their own effective (that is realizable) capabilities and their functionings as lawyers in order to contribute to realizing Constitutional values. Indeed, in the face of widespread poor service delivery there is considerable reliance on legal interventions around health, housing, education and environmental damage. However, important as landmark cases are and the significance of judgements secured, they do not directly address the everyday, granular realities of poor people struggling with evictions, divorce, contractual agreements, and such like. Both kinds of interventions – systemic judgements and improving everyday access - are needed for justice.

THE PROJECT METHODS: CONCEPTUAL AND EMPIRICAL

In our view, we need methods that pay attention to people's lived experiences in order to understand the effect of the law on their lives; as Sen (2009, 18) puts it, 'justice cannot be indifferent to the lives that people can actually lead'. We therefore undertook a qualitative case study in which we set out to understand the contribution of universities and especially ULCs to the formation of lawyers with the values and skills to contribute meaningfully to transforming South Africa. We first

did conceptual work to justify adopting the capability approach and then to think about which capabilities might enable equitable access to justice, drawing on our understanding of South Africa as the context and also on earlier research with students from low-income backgrounds as a proxy for what communities might want for better lives (Walker et al. 2022). From this we generated a cluster of three intersecting capabilities. Then, in 2022, after securing ethical approval, we contacted a sample of nine of the university law clinics in South Africa; participants volunteered from six of these. We interviewed 16 volunteers online between March and May 2022, 13 were candidate attorneys at six different ULCs, as well as the director and two practising attorneys at one of the clinics. All interviews and universities have been given pseudonyms. The clinics were situated at Karee, Mahogany, Marula, all mid ranked research and teaching universities, and Mopane, Baobab, Yellowwood all elite universities in the top five in South Africa and globally ranked. All six are historically advantaged (that is formerly white) universities. Two interviewees had studied at Forest and another at Fynbos, both historically disadvantaged (that is formerly black) universities.

We wanted to understand the contribution of university legal education as well as participation in a ULC to professional formation, and what the challenges and barriers are to realizing equitable access to justice and hence also social justice for the marginalized in South Africa. In the interviews we asked participants about the following: their thoughts on a good future for all in South Africa and challenges or

obstacles, why they chose law, the contribution of their university education to becoming and being the kind of lawyer they want to be, why they came to work in a ULC and their experiences and learning there, and their future career aspirations. Based on our interview data, we report on how this sample of young lawyers develop their own professional capabilities and functionings to enable the agency of their clients. This involved us interpreting carefully what was told to us across three levels: a capability set young lawyers had reason to value, their professional education and training experiences, and broader capabilities which would need to be enabled and activated for equitable access to justice.

Table 1: Participants

Name	ULC	Demographic	University where law degree completed
Sindiswa	Karee	Black, female	Forest
Nadine	Yellowwood	White, female	Yellowwood
Mkhize	Yellowwood	Black, female	Fynbos
Fundiswa	Yellowwood	Black, female	Fynbos
Dineo	Yellowwood	Black female	Yellowwood

Naledi	Karee	Black, female	Marula
Puleng	Karee	Black female	Forest
Alan	Karee	Mixed race, male, ULC director	Yellowwood
Nomzano	Karee	Black, female, qualified attorney	Forest
Michelle	Baobab	White, female	Baobab
Michael	Mahogany	Mixed race, male	Mahogany
Abongile	Mahogany	Female, black	Mahogany
Mamello	Mopane	Black, female	Mopane
Jennifer	Mahogany	White, female	Mahogany
Ntando	Marula	Black, male	Marula
Nick	Karee	White , male, qualified attorney	Karee

CONCEPTUAL WORK

1) Capabilities, functionings and agency

The capability approach (Sen 1999, 2009) provides the normative and conceptual basis for our study. The approach enables an informationally rich, people-centred analysis which can account for context and all relevant factors which shape people's opportunities for wellbeing. Briefly, capabilities are our opportunities and freedoms to be and to do in ways which we value so that wellbeing is understood as having and expanding a person's capabilities; the achievement of the richness of human life is the guiding norm for access to the law. Thus, a person's capability set is a set of real (actual) opportunities that they could use in one way or another; it indicates the possible pathways that lie open. Functionings are valuable beings and doings; these include a range of possible activities and imply that the person is actively involved in their life, not merely a passive bystander. Functionings might include basic capabilities such as being well-nourished, having shelter and adequate clothing, as well as more elaborate functionings such as having self-respect and going without shame in public. Income and public services are necessary for the realization of most of these functionings, but are only instrumentally important in the capability approach, not goals in themselves (Sen 1999). Connecting agency and structures, 'conversion factors' shape access to justice. These might be: 1) personal factors, such

as sex, disability, but also hard work, motivation etc.; 2) social factors deal with norms and values, the nature of institutions and cultural practices, relationships, and more; 3) environmental factors relate to the natural or created environment in which a person lives such as a rural village a long and costly distance from law courts compared to a large town, availability of a free law clinic, and language interpreters, but also wider factors such as the historical legacy of apartheid.

A second reason for using the approach is Sen's (1999) emphasis on agency as a central concept and also as a central normative concern - that we should be active choosers from our capability set with regard to the functionings and goals that matter to us. Thus, Habbig and Robeyns (2022, 14) prefer that access to justice should focus on the capability aspect rather than the functioning, 'since there might be reasons why a citizen would prefer not to exercise her freedom...we must protect the person's choice of whether or not (if so how) to get engaged in legal matters'. While we agree up to a point, in South Africa without looking at actual functionings it may be challenging to separate out why people do not access justice because of an active choice and why they do not access justice because of all the obstacles they face as poor and marginalized persons and communities. Thus in our context we think that both capabilities and functionings to access justice are important for wellbeing.

2) Capabilities for equitable access to justice

We first generated a cluster of intersecting capabilities which we regard as arising from the Constitution, normative theorizing and an ubuntu ethic and way of life. They are also evident in what the interviewees said to us directly or indirectly. They are important for the flourishing of clients, and in an unequal and stratified higher education system with multiple exclusions they are as important for students (see Walker et al. 2022).

2. 1. A normative African justice ethic: Ubuntu

We think an Ubuntu ethic ought to underpin equitable access to justice and provide ethical grip to legal and other capabilities and to higher education in our context. Ramose (1999, 37) explains that the saying *Motho ke motho ka batho* ('I am because you are', 'a person is person through other persons') encapsulates the idea that to be a human being 'is to affirm one's humanity by recognising the humanity of others and on that basis establish humane relations with them'. Thus, 'to denigrate and disrespect the other human being is in the first place to denigrate and disrespect oneself' (1999, 49). Forming the 'excellent' self cannot be achieved except through others; my wellbeing depends on others also having wellbeing. Thus, ethical, social and legal judgement of human worth and human conduct should be based on Ubuntu, Ramose argues. For Metz (2014, 6761) to exhibit Ubuntu is to be a person who is living a genuinely human way of life; the lack of Ubuntu is to lack human excellence or humanness. Further, says Metz (2014, 6764), community (harmony)

involves 'identifying with others and exhibiting solidarity with them'. Not to practice solidarity would show lack of concern for each other's flourishing or, 'worse, to exhibit ill will in the form of hostility and cruelty'. One displays human excellence through kindness, compassion, mercy, and similar values. Nelson Mandela (2002, 10) also affirmed this sub-Saharan ethic when he reminded us that, 'What counts in life is not the mere fact that we have lived. It is what difference we have made to the lives of others that will determine the significance of the life we lead'.

We do not think an ethic can be reduced to a capability, given that Ubuntu 'is a statement about being and cannot be reduced just to a methodology of doing something' (Matolino and Kwindigwi 2013, 200); it is a whole way of life. Maphosa and Nhlapo (2020, 30) suggest that Ubuntu, 'permeates the Constitution generally ... and specifically fundamental human rights'; Ubuntu thus animates transformative constitutionalism ethically and the advancement of community and social solidarity. It is this ethic which the working of the law and legal practitioners ought to uphold and to value in the South African context, challenging poverty, inequality and social exclusion. It underpins the capability set which we explain below.

2.2. A capability set

The first of the capabilities we identify is human dignity, which is architectonic in that it suffuses all other capabilities. It means being able to function and flourish and to be recognized as a dignified human being. A concern with human dignity 'is to

say something about the worth, stature or value of a human being' (Sulmasy 2013, 938). Sulmasy conceptualizes 'inflorescent dignity', that is 'the worth or value of a process that is conducive to human excellence' (938), it is 'the value that comes from flowering or flourishing' (938). People who are flourishing as human beings, are 'living lives that are consistent with and expressive of the intrinsic dignity of the human' (938). Nussbaum (2000, 79) notes the importance of being 'a dignified free being who shapes his or her life in cooperation and reciprocity with others, rather than being passively shaped or pushed around'. The role of the law and legal practitioners is thus to enable inflorescent dignity and for all human beings to develop a sense of themselves as persons of dignity and worth to whom justice is due. Inflorescent dignity then requires that legal practitioners honour the intrinsic dignity of clients and work to enable them to flourish. In turn, universities should honour the dignity of their (law) students and enable them to flourish in higher education.

We find support in the Constitution (1996, 10) which states that: 'Everyone has inherent dignity and the right to have their dignity respected and protected'. Justice O' Regan (quoted in Liebenberg 2005, 3) described the value of dignity in constituting post-apartheid society in this way: 'The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings'; dignity is a 'founding value of

our new Constitution' (quoted in Liebenberg 2005, 7). Similarly, in the Grootboom (right of access to housing) case, Yacoob asserted 'that account be taken [by the state] of the inherent dignity of human beings' (quoted in Liebenberg 2005, 3). Davis et al. (2005, 2.1 and 3.1) affirm that, 'the recognition of intrinsic dignity and worth of all human beings, informs, animates and directs all fundamental rights'. Opening up the importance of conversion factors, Liebenberg (2005, 12) explains that, 'If we are to constitute ourselves as a society that respects human dignity...we [must be] committed to redressing the social and economic conditions of those whose capacity for development and agency is stunted by poverty. By failing to do so, we undermine the very foundations of our new constitutional democracy'. As Liebenberg (2005, 31) further emphasizes, in our context of severe inequalities and widespread poverty we are 'most in peril of failing to value the human dignity of the poor'. Nussbaum (2000, 74) too, notes that without supportive social uptake conditions, dignity, 'is like a promissory note whose claims have not been met'.

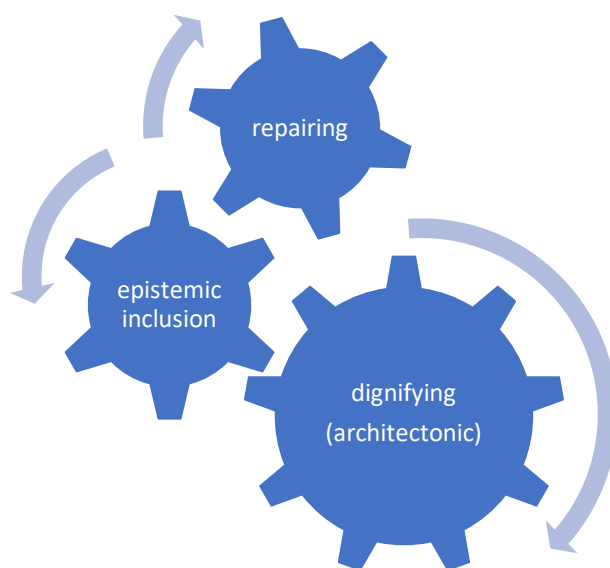
Second in our set, is the concept of repairing capabilities, which the Constitution (RSA 1996, 5) acknowledges in its Preamble when it enjoins us to: 'Recognise the injustices of our past'. We draw on Spelman (2002, 5) who writes that: 'To repair is to acknowledge and respond to the fracturability of the world in which we live in', and hence to carefully address past injustices in order to look to a future which is different, repairing past harms, and fostering flourishing. Past injustices should be dismantled for 'reparative futures' (Spriprakash et al 2020), which signal a

commitment to identify and recognize these injustices experienced by individuals and communities. Even when they appear over, past injustices will continue to endure in people's lives (economic exclusion and poverty for example) in material and affective ways unless they are carefully addressed. To this end, Spriprakash et al. (2020) highlight the importance of collective learning, of ethical listening, and of dialogue in producing enlarged understandings and practices, and of reciprocal relationships.

The third in our set are capabilities which foster and enable epistemic inclusion. Who can speak, who is heard and listened to, who is believed, who is credible, who can make themselves understood in the light of the available communicative resources, who has access to information about the law and information about their legal and human rights – all matter in making and sustaining a dignity-enhancing society. Fricker's (2015) conceptualization of epistemic injustice is helpful here. She argues that epistemic injustice occurs when someone is wronged specifically in their capacity as a knower, and that a central capability ought then to be each person's opportunity to be an epistemic contributor, both receiving and contributing epistemic materials to the common pool. Her two basic concepts for epistemic injustice (being excluded as an epistemic contributor) are: testimonial injustice when someone is not regarded as a credible knower because of identity prejudice (being black, or female, or working class, for example), such that a poor black client might not be listened to or regarded as credible. Hermeneutical injustice is structural, when

the knowledge resources of groups (of communities, of the poor, of indigenous peoples) are excluded or marginalized in the society's common knowledge pool. Here there would be inequitable access to the legal system or a legal system which is not oriented to the poor majority. Where there is epistemic injustice, epistemic relations and communication are distorted and hierarchized and people are denied their participation in a shared way of life. As Freire (1972) argues, dialogue is an existential necessity and can only truly exist where people have not been denied the right to speak. Epistemic inclusion is in place when everyone has the opportunity to have a legitimate, credible and dignified voice, to be believed and acknowledged and to have their meanings, experiences and contributions taken seriously.

Figure 1: Capabilities for equitable access to justice (not a blueprint but worth discussing)



Further, in identifying this capability set, we also extrapolated from what interviewees said was needed for a better future for South Africans as a proxy for transformation and justice. They spoke about all of these in thinking about the future and working towards a transformative legal system: spatial freedoms and safe mobility; access to quality education, healthcare, safe shelter, running water, electricity; the ability of people to make their own decisions about their lives; a life characterized by respect not stereotypes; narrowing the inequality gap; being able to trust government; equal access to opportunities; peace and harmony; seeing ourselves as a collective; being aware of each other's struggles and experiences as human beings; an end to endemic gender-based violence; and, a corruption-free future. Mamello summed it up well when she said: 'I think if everyone has human dignity and they're valued in society despite our differences, and our quality of life is good, just being given an equal chance in life, then I'd say, that's what a good future looks like'.

That this is not in place for many South Africans speaks to the formidable social and environmental conversion factors facing equitable access to justice. Nor is the law as it is practised necessarily enabling of dignity, repair and epistemic inclusion. As S'bu Zikode (2011, 2) of Abahlali baseMjondolo (Poor People's Movements) explains: 'the legal country is not the real country. The law may protect you against eviction or repression on paper but in reality, if you are poor, councillors, landlords and the police all treat you as if you are beneath the law – as if you don't count to the law.'

Poverty is treated as criminality, ignorance...the way life is lived beneath the law is very different to how the law looks in books'. Puleng in our study confirmed that, 'people say that if you don't have the money, the law will never speak for you'.

2.3. A capability set which legal practitioners' value

Having outlined an access to justice capability set which asks that all people are treated as dignified human beings; that injustices are acknowledged and repaired; and, that everyone is able to be an epistemic contributor we now turn to the capabilities that legal practitioners value for their own professional contributions to society, based on what was told to us. Watkins (2021, 23-24) has proposed a list of legal capabilities for a European context, drawing on literature rather than empirical data. Her suggestions as to what a 'legally capable person' (we think she means a legal practitioner) might actually be able to do and be are: knowledge/education (about the law); recognition (of the relevance of law to an issue or situation); research; assistance (to seek and secure assistance from others); reasoning; assessing (courses of action and aware of own limitations); planning; fortitude (pushing for a desired outcome); and, influence/ communication. These capabilities seem broadly 'neutral' in so far as they have no obvious normative underpinnings in terms of what actual justice might entail. We think they can be subsumed under our capability below of legal competence.

We discussed with the interviewees their own experiences of studying law and their practical experiences at the ULCs. Because these are all university-based, we see them as an extension of the university education's contribution. Based on our interviews, the four broad capabilities we extrapolated, as told to us by practitioners, and which can be mapped over the three capability clusters outlined earlier are set out below. The set is multi-dimensional and intersecting. One capability cannot be extracted and evaluated absent the rest of the set.

Legal competence. This broad competence is acquired through university study and experientially through work in a ULC, with real clients: knowledge of the law (theoretical) and legal practice skills - including exposure to social justice challenges in communities, understanding how to use the law for redress and repair, understanding the limits of the law as a means of social redress, managing time, being well-prepared, preparing documentation carefully, communication skills, research skills, lifelong learning orientation, ethics, emotional balance and emotional intelligence. The capability includes being respected as someone with legal knowledge, as a lawyer, and being valued by clients. Alan commented that the candidate attorneys speak of valuing 'the huge sense of respect for what they are doing as attorneys'. As Michael said 'I feel very valuable, I feel a help to these people'. Emotional balance is important, when you are seen as 'a beacon of hope' (Nomzano), when 'the hardest thing is that there are certain things we cannot do' (Naledi), and, 'if you cannot help a client, they have nothing left' (Michael). Dineo

commented that, 'We get clients who are victims of domestic violence....if I were to carry that emotionally I would break'. The capability also involved being able to close the legal knowledge gap by communicating, educating, working with and empowering communities to enable their epistemic contributions. These all constitute elements of the capability of legal competence in South Africa.

Being multilingual. In a country with 11 official languages, this capability meant being able to speak more than one language (and especially an African language) in order to enable epistemic inclusion. As Nomzamo explained, 'I'm Xhosa speaking and the community there is Xhosa-speaking so I know that I can use isi-Xhosa'. Mkhize who did her law degree at Fynbos and then joined the Yellowwood law clinic commented on the clinic wanting people who were multilingual and she saw it as an opportunity 'to teach and educate people'. Beyond this, candidate attorneys also see themselves as translators of a client's narrative into legal processes and legal language into something their clients can understand.

Interconnectedness and solidarity. Here the focus is on people's humanness (their Ubuntu) as a way of living and being. The capability includes: being recognized and recognizing others dignity and humanity, taking responsibility for and showing care for a wider community beyond oneself and one's family, being able to develop inclusive relationships with clients, learning from clients what matters for their wellbeing, respect, patience, and being comfortable with diversity. As Michael explained, 'I've learned through the law clinic, the people that we deal with are real

people'. Jennifer emphasized humility in dealing with people. Ntando commented that you needed to be able to, 'put yourself in the shoes of anyone who comes before you and anyone who is passing across the street. Being willing to be considerate, not selfish. To be willing to live with other people and then be willing to assist where you can'. Naledi said that, 'be kind and understanding, just be patient'. Danielle thought it important not to be 'rude or abrupt as this is not conducive to people's situation.... it's going to frustrate them and me'. Michael explained further that, 'if you can listen to people in a way that makes them feel heard, that is the thing they care about'. This includes being 'a person to rely on'. All this in turn produces fulfilment which matters said Mamello, because 'If I'm going to be working long hours and the work is demanding, it should be something that fulfils me'.

Transformation. The law, said Mamello, 'needs agents of change'. All interviews valued learning how to make a difference by implementing the law in ways which are fair and empowering, by understanding current and past social and other injustices which bear on practising the law and working together with others in the Clinic. The capability includes: making a difference to families and grassroots communities who are vulnerable, a human rather than a money orientation, operationalizing human rights, and enabling agency by litigating with people rather than for them. Collective action was also important; Nomzano explained that, 'when voices are speaking collectively the impact is very big'. We find evidence for this capability also in why many decided to become lawyers - to help their families and

their communities. For example, Alan was motivated by his father's struggles with labour relations, with no one to assist him. Puleng observed that people in communities were badly served by the law, 'they get the runaround...I realized no-one can actually stand for these people, so if I can, maybe let's see how I can do it'. She added that she had grown up in a rural village where human rights and the law, 'was literally close to being a foreign concept....I thought maybe I should study something towards educating and taking it back to my community to let them know that there is the law in place'. Naledi had observed her mothers' struggles to get divorced, 'it took so long and I saw how much she was suffering, she used legal aid and the experience was not good'. This requires a 'non-egotistical, non-individualistic viewpoint of the world and ourselves', said Michael, not prizing status above the human reasons for being a lawyer. The importance of a commitment to transformation also comes through in criticism both of the legal profession and of law graduates for whom it is just a job. Thus, Michelle said that, 'if you do not want to make a difference...the law is not for you'.

Mamello commented that the law clinic not only provides a platform for access to law but also helping clients understand that, 'there's so much agency they have. I'm not now going to take all the decisions for you'. It was she said a 'partnership', one in which listening to people is crucial because clients 'are experts in their own lives'. Michael explained that, they should enable access to the law 'as well as [clients] getting educated about the law and opening the "bubble" to everyone'. He thinks

access to justice impacts on the wellbeing of whole families, commenting that, ‘You would see sometimes there’s a hopeless client, and then you do that one thing for them...They come with the assumption that it won’t be sorted out. So, when it’s sorted out, the value is not only in their lives but their children’s lives, that is something that will go on for very long time’. Finally, Alan confirmed the importance of, ‘having a real impact on someone’s life or a lot of people’s lives’.

We can map and compare legal capability clusters; the set identified above by ULC attorneys and candidate attorneys aligns well with dignity, repair and epistemic inclusion. There is less alignment with Watkins (2021), not surprisingly as the context is Europe. We think our set can incorporate Watkins, as well as Wolff and De Shalit’s (2007) two legal capabilities. Of course, the comparison is not really that neat as capabilities intersect and are multi-dimensional.

Table 2: Aligning and comparing capabilities

Capability set for access to justice	Capability set identified by South African ULC candidate attorneys & attorneys	Watkins (2021), Europe	Wolff and De Shalit (2007), UK and Israel interviewees
Dignity	Transformation		Living in a law-abiding fashion; Understanding

			the law
Repair	Legal competence, including professional recognition	Knowledge/Education; Reasoning; Research; Planning; Assessing; Fortitude; Influence/communication.	Living in a law-abiding fashion; Understanding the law
Epistemic Inclusion	Interconnectedness and solidarity; Multilingual	Recognition	Living in a law-abiding fashion; Understanding the law

What then have are four ‘thick’ capability dimensions (column two) which our interviewees have reason to value for making a professional contribution to transforming society. They align well with the broad capability set (column one), as we show in table two above.

2.4. The contributions of university legal education and training

In the light of these two capability sets identified thus far, what do universities (and ULCs) provide in forming and fostering these professionally-focused capabilities and the legal education standard of producing ‘critical thinkers and enlightened citizens with a profound understanding of the impact of the Constitution on the

development of the law' (CHE 2015)? We looked at this across intersecting spaces of classroom, campus and community (McCowan 2022).

Classroom space

All interviewees had gained a legal qualification and the valued functioning of being able to practice law after their candidature. For many from working class backgrounds, it was the ULC which enabled their candidature place after a period of being unemployed. Across the different universities, there was considerable variation in what they had gained from their law degree. In some cases, lecturers had made the links to the Constitution and transformation but not in all cases or all the universities and generally not transversally across subjects. Similarly, an ethos oriented to transformation was uneven and seemed strongest at Mahogany and Forest but was also emergent at Marula and Mopane. On the other hand, classroom (and campus) spaces enabled meeting diverse people so that, 'people you meet in studies are the very people that create the practitioner that you will be, the moral compass you will hold' (Michael). Some had had the opportunity to reflect on their own middle-class privileges. For example, Jennifer explained that, 'being white I grew up in a certain way where I was very shielded from what was going on, the inequalities there are. Coming into university was a kind of culture shock...I learned that my story is not the only story there is, and my reality is not necessarily the reality of others. My one friend said that we always thought that we're all in the same boat for the same storm but in fact we're in the same storm with different

boats. Basically, what I took away is not to take for granted what I have. But also, not to expect others to be as privileged as I am'. Abongile commented that, 'being at university you get to see the injustices of how unequal the society is. It's more in your face in the university space...I was very naïve about that at high school, it was mostly at university that I realized how unequal our society is'.

For some, their university experiences were shaped by whether or not they felt they belonged; this is more challenging for young people from low-income homes (Walker et al. 2022). For example, Fundiswa who had studied at Baobab said she had felt like a 'refugee' during her studies, while Sindiswe struggled through her degree at Karee and just 'kept her head down'. The most engaging teaching adopted discussion methods and critical thinking, such as in jurisprudence and customary law. For example, Nick who teaches part-time in the Karee Law Faculty, described discussing legal cases with students such as the strictures around civil and customary marriage law: 'You challenge them, You tell them the law says this and you can see that they don't agree, and you can see them start to think about it...I think exposing them to these cases and having conversations, creating a space for dialogue is important....why does the law work this way'. Such opportunities for class discussions were uneven but welcomed, so that you could 'learn to think on your feet' (Jennifer). A number of interviewees were studying for masters degrees in law and finding the experience rather different from their undergraduate study. Puleng explained that there is more participation and engagement and they are

learning how to do research. In her case she always looks forward to her classes, however tired she is after a day at the ULC. Michelle had done her masters abroad and was initially seriously shocked by the challenges of learning independently compared to her degree. For many, the teaching had been dull, the lecturer, 'just read what is in the textbook until the hour had elapsed' (Puleng). This is not to say that learning content through lecture-based methods was not valued or uniformly dull and some of the interviewees spoke favourably about lecturers who 'know their stuff', who communicate legal knowledge, or who practice themselves. Good lecturers made even dryer subjects like Insolvency Law interesting at Mahogany, drawing on real life examples such as the collapse of South African Airways.

Overall, access to legal knowledge was understood as necessary. Jennifer explained that, 'it's good to have the theoretical background, to have the knowledge and an idea of where to start'. Some valued an orientation to lifelong learning. Thus, Mamello commented that, 'what my law degree taught me is how to continuously learn. It was clear to me very early on at Mopane that I've committed myself to a journey of lifelong learning'. It was also important to understand or learn how legal theory works out in practice, bridging the theory-practice gap which everyone mentioned, including enabling a client to understand the legal process. Both Nick and Michelle commented on this, that, 'this is the law, but this is how it actually gets done in actual lives'. As Michael explained, when we lose sight of the process, 'we forget about the human'.

Decolonizing or expanding the law curriculum to take on issues such as epistemological diversity or LGBTQI+ spaces was very uneven and surprisingly limited. At Mopane, Mamello felt introducing these debates, 'it just opened me up to different kind of consciousness'. This was not everyone's experience. Others felt the curriculum was too fragmented, with subjects not connecting to each other, for example commercial law not addressing transformative constitutionalism. Very little was said about decolonizing the curriculum apart from Mopane introducing epistemological diversity, and Mahogany teaching critical race theory debates.

The educational obstacles raised for a transformative legal education were numerous, as told to us: a crowded curriculum; a lack of attention to developing critical skills; law faculties that operate as silos not connecting with the social sciences or humanities; and the gap between theory and practice. For Nick the 'detachment' of a silo-ed field is also 'a detachment between the effect of the law on a person... you don't learn the tools to sit with a traumatized person', while many interviewees mentioned that transformative constitutionalism was not evident across all subjects.

Overall, the classroom space was uneven in contributing to quality in legal competence, interconnectedness, multilingualism (all teaching was in English except at Yellowwood where it was also in Afrikaans), and transformation capabilities and also public values.

Campus space

Like the classroom, campus space experiences were uneven. Not all of the interviewees had involved themselves in campus activities: they did not realize the opportunities were there, or they could not afford them, or coming from low quality schools, they felt they needed to focus on their studies. Thus, Puleng said, 'I didn't know about a lot of things that could be done while doing the law degree. I just came here to get my degree and then I had to work my way up again to start learning how things actually work'. For some societies students had to pay to join and this was not affordable for all of them. Where they do this or where conversion factors work such that opportunities can be taken up, they seem to gain a great deal, such as at Mopane. For example, Mamello appreciated the diverse student culture at her university, with specific opportunities for activities such as being chief justice of the students' constitutional tribunal located under Student Affairs, 'just seeing how students got really engaged, opened my mind to realizing that we are young adults going into the working world and we are the ones that are going to be shaping this country....I'm fortunate to have gone to Mopane because there was really good and robust organized student life and governance'. Also at Mopane, Michelle mentioned how the legal society organized 'transformative talks' and 'controversial conversations' (for example, legal issues around the 2012 police shooting of striking miners at the Marikana mine (see <https://www.sahistory.org.za/article/marikana-massacre-16-august-2012>)). In her studies at Mopane, Dineo participated in what

students called the 'legal shebeen [drinking tavern]', not obviously a shebeen for drinking but held every Friday for students and staff to discuss topics of significance, such as sexual assault. She also took part in Students for Law and Social Justice which provided an opportunity to have conversations about the law, 'and to question the law with people who could actually make a difference, for example the government department for Justice and Constitutional Development'.

Community space

In this space, experiential and continuing learning are especially important, and the ULCs do an important job. Typically, the clinics deal with evictions, contracts (e.g. insurance), marriage and divorce, mediation, and for some, refugees. Of course, not everyone chooses this route, so it then becomes important to include community-based learning in the degree as well. For example, Karee now has a Street Law module for undergraduate law students. Nick explained how this works: 'that experience of connecting with someone or sitting across from someone. Going into a community and being greeted as an old friend even though they've never met you before, significantly changes the way you view that community. Especially if you never been, besides driving past or reading about it. Even the students who come from those communities, and already have that impetus to change things, you see them come into their own'. He also spoke about how community-based learning also allows students some control over their learning in that they can organize their own community service with an NGO, which, 'empowers this student to make a

difference in the field they want and not just feel like an observer fulfilling a pre-decided course requirement’.

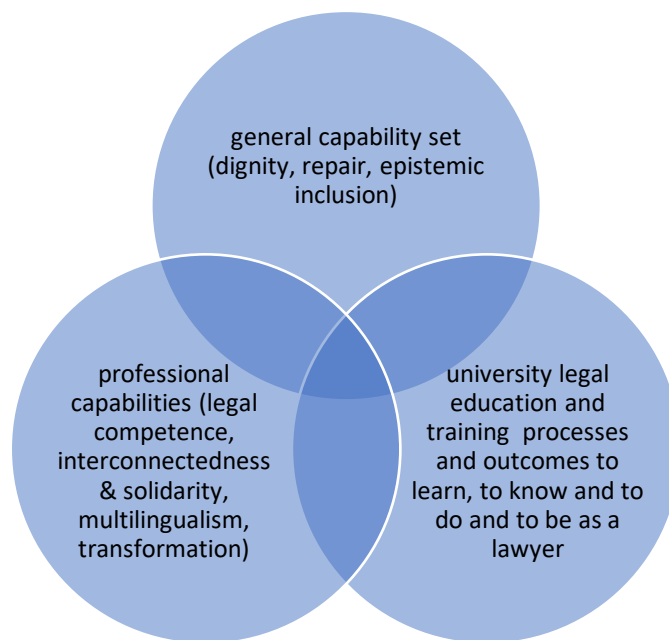
As candidate attorneys in the ULC, there is the opportunity to make mistakes and to be supported throughout by a supervising attorney, to learn how to be a lawyer and how to do as a lawyer. This community learning space fosters Ubuntu, you learn, ‘how to acknowledge other’s humanity....how to treat people very respectfully’ (Jennifer). Dineo commented that the clinic ‘is shaping me to become the lawyer that I think my grandmother would be proud of’.

From our interviews we thus found that interviewees valued being able to learn and to know the law and to be and to do as lawyers in operationalizing the professional capabilities they valued as a contribution to equitable access to justice. As we explained, this occurred across intersecting rather than stand-alone spaces of classroom (formal learning), campus (student associations, extra-curricular activities, life on campus. etc.), and community (service learning, community-based learning and projects, working in a ULC, working in and with communities, etc.). While this was uneven across different universities and for diverse students during their degree studies, experiences of working in ULCs was uniformly positive and empowering for candidate attorneys where they experienced being recognized as legal professionals and as the bearers of knowledge about the law.

Together, classroom-campus-community spaces can –if they work well - transform the students who come to university. For example, Michael explained how for him,

university, 'created the person you see before you...because of the circumstances of my life, I was very heated....law made me realize that you need to be disciplined....I grew into my studies'. We can also see how these education processes and practices can help realize the valued capabilities for lawyers, which emerged in our interviews: transformation, interconnectedness and solidarity, multilingualism, and legal competence. Professional capabilities and education can potentially contribute to forming the general capabilities of others (dignity, repair, epistemic inclusion) for equitable access of justice. This should be underpinned by the African ethic of justice of Ubuntu, contributing to the public good as envisaged by the Standards for Law Degrees (CHE 2015), and to operationalizing transformative constitutionalism (figure two).

Figure 2: Intersecting capability sets and education processes



The conversion factors (and see Walker and McLean 2013, Walker et al 2022) which emerge objectively and subjectively across society and higher education and which may be enabling or constraining for forming all these capabilities and exercising functionings, are quite severe: the legacy of colonialism and apartheid, materialism, poverty, inequality, and unemployment all get in the way. At the university level, quality of degree (curriculum, pedagogies, ethos), campus opportunities and community spaces for learning can work in disabling or enabling ways. What came out in our interviews are the gaps in the processes, practices and processes of university law degrees, notwithstanding the major contribution to professional learning and knowledge by the ULCs. The Constitution and the Standards ought to be and can be enabling factors. Still, the task is not easy.

Nonetheless the intersecting dimensions above might be used as an informationally rich, justice-facing lens for higher education and training, a tool to develop and evaluate change, and an aspirational architecture for transformed education and training and practice. They might be used as the basis for debate and dialogue across stakeholders where the purpose is to form lawyers who can work to enable equitable access to justice. Such work must always take account of conversion factors which shape conditions of what is possible, of basic capabilities of access to housing, health care, food and water, and schooling, while always keeping in view the architectonic importance of realising human dignity in and for a society undergoing post-apartheid and post-colonialism transformation struggles. They may be relevant to nations facing similar challenges.

CONCLUSION

What repair and reparative futures specifically ask us to do is to look to the future, futures which can be more just than the present, and to work individually and collectively to bring about this alternative future, even though as Nick said, the law 'is often backwards looking...it's very difficult for the law to be forward-looking'. Michael put it well when he explained that, 'we need to try and look into the future, before we are there, in ways that can change the law'. He explained the idea of reparative futures well: 'We can't go back but we can start from the moment we are in and then in doing so create better future that will create a learned [about] past and more extrapolated lessons from those past injustices to make our daily life and our

future life better'. For him the law provides 'tools and mechanisms' for equitable access to justice over time as more as more people are given justice, while the Constitution provides the framing values.

We think our capability sets provide a metric for equitable access to justice and the basis for dialogue about the corresponding contributions of higher education and training and of the lawyers who graduate from universities. As Habbig and Robeyns (2022) argue, legal capabilities can potentially play an important role and take into account whether people have a genuine opportunity to access justice. We think our normative general capability set grounded in Constitutional values and South Africa's history provides depth to this claim by suggesting professional capabilities and the capabilities legal practitioners need to develop themselves to secure equitable access to justice, while also revealing the educational and social obstacles that stand in the way and which we need to work to remove. Working together, these capability sets for legal practitioners and university education and training might generate new transformation pathways as a contribution to dismantling existing inequalities, historical exclusions and injustices. As the Standards for Law Degrees (CHE 2015) envisage, graduates should be equipped with the capabilities and values to be able to take on the responsibility of working towards achieving social justice for everyone, with the responsibility to act on behalf of those who do not get the opportunity to enjoy rights and freedoms.

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REFERENCES

Atkins, D. (2021) Reimagining the relationship between Legal Capability and the Capabilities Approach. *International Journal of Public Legal Education*, 5 (1) 1-33

Council on Higher Education [CHE] (2015) *2015 Legal Education Qualification Standards*. Available online at <https://www.che.ac.za/sites/default/files/Draft%20Standards%20for%20LLB%20v8final%20Ready%20for%20Public%20Comment%2020150807.pdf>

Davis, D., Cheadle, H. and Haysom N. (2005) *South African Constitutional Law: Bill of Rights*, 2nd Edition. South Africa: LexisNexis Butterworths

Freire, P. (1970) *Education as a Practice of Freedom*. Montevideo: New Earth

Fricker M (2015) Epistemic contribution as a central human capability. In: G Hull (ed.) *The equal society*. Cape Town: UCT Press. pp. 73–90

Habbig, A-K and Robeyns, I. (2022) Legal Capabilities, *Journal of Human Development and Capabilities*, DOI: 10.1080/19452829.2022.2082392

McCowan, T. (2022) Teaching Climate Change in the University, *Transforming Universities for a Changing Climate, Working Paper Series No. 8*

Mandela, N. (2002). Nelson Mandela speech at the 90th birthday celebrations of Walter Sisulu. Johannesburg. Online at

http://www.mandela.gov.za/mandela_speeches/2002/020518_sisulu.htm

Maphosa, R. and Nhlapo, N. (2020) Transformative Legal Education in the South African Context. *Pretoria Student Law Review* 14 (1), 12-30

Matolino, B. and Kwindingwi, W. (2013) The end of ubuntu. *South African Journal of Philosophy*, 32 (2): 197-205

Metz, T. (2014). Ubuntu: The good life. In *Encyclopedia of quality of life and well-being research* (pp. 6761–6765). Springer+Business Media

Mubangizi, J.C. and McQuoid-Mason, D.J. (2013) The role of university law clinics in public interest litigation, with specific reference to South Africa. *Journal for Juridical Science* 38(1):47-66

Nussbaum, M. (2000) *Women and Human Development*. Cambridge: Cambridge University Press

Nussbaum, M. (2010) *Not for profit: Why democracy needs the humanities*. Princeton NJ: Princeton University Press

Ramose, M. B. (1999). *Globalisation and Ubuntu*. In *African philosophy through Ubuntu* (pp. 160–165). Mond Books

Republic of South Africa [RSA] (1996) *RSA Constitution*. Online at <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>

[Sen](#)
[1990](#)

Robeyns, I. (2017) *Wellbeing, freedom and social justice: The capability approach re-examined*. Cambridge: Open Book Publishers

Zikode, S. (2011) *Poor People's Movement and the Law*. Online at <http://abahlali.org/node/8551/>

Sen, A. (1999) *Development As Freedom*. Oxford: Oxford University Press

Sen, A. (2009) *The idea of justice*. London: Allen Lane

Spelman, E. (2002) *Repair; The Impulse to Restore in a Fragile World*. Beacon Press: Boston

Spriprakash, A., Nally, D., Myers, K., and Ramos-Pinto, P. (2020) *Learning with the Past: Racism, Education and Reparative Futures*. Paper commissioned for the UNESCO Futures of Education Report

Sulmasy, D. (2013) The varieties of human dignity: a logical and conceptual analysis. *Medical Health Care and Philosophy* 16, 937–944

Walker, M. and McLean, M. (2013) *Professional Education, Capabilities and the Public Good: The Role of Universities in Promoting Human Development*. London and New York: Routledge

Reviewed Article

Walker, M., McLean, M., Mathebula, M. and Mukwambo, P. (2022) *Low-Income Students, and Higher Education in South Africa: Opportunities, obstacles and outcomes*. Stellenbosch: African Minds

Wolff, J. and De-Shalit, A. (2007) *Disadvantage*. Oxford: Oxford University Press