THE WAY FORWARD FOR LEGAL EDUCATION REFORM IN GHANA

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INTRODUCTION

Ghana’s Chief Justice, Sophia Akuffo recently declared, amidst applause, that as long as she has something to do with it, she will not allow the “mass production” of lawyers in the country. She justified her call by referring to the model used by the medical profession and misconduct by some lawyers that could not be contemplated in the 1960s. She further added that, “any attempt to allow the production of lawyers without efficient control, checks and balances will be rejected irrespective of who is advocating it.”

Not long after her declaration, the General Legal Council (Council) announced that only 128 of the 1,820 LLB candidates passed the 2019 entrance examination. Of course, this “mass failure” rate is statistically anomalous, economically imprudent, legally problematic, ethically questionable and is proof beyond reasonable doubt that we have a classic case of regulatory failure. It is statistically anomalous because the Council failed to adjust the candidates' raw scores, which is a standard practice in such entrance examinations and was absolutely necessary because of the reported low raw scores. Under the Council's mechanical application of the passing criteria, no student would be admitted to the School if the highest score on the exam was 49.5. This, of course, is absurd to anyone who understands examination scores, standardizing, curving, and the rudiments of psychometrics.

It is economically imprudent because it represents a substantial underutilization of the capacity of the three campuses and the recently acquired capacity at the University of Professional Studies, Accra (UPSA) and other places. It is legally problematic because such mass failure is antithetical to the Council's core duty of providing opportunities to LLB candidates to pursue professional education at the School or other alternative institutions. It is ethically questionable because coming so soon after her ladyship’s declaration, it seems to be in furtherance of the preannounced agenda against the mass production of lawyers. It is a classic case of regulatory failure because we have a regulator, which runs a monopolist education provider, that also determines the production level, prices, etc., is unresponsive to market needs, has failed to innovate and seems eager to destroy value while legislators and the executive seem disinterested, wilfully blind and unconscionably silent.

Legal education has been embroiled in controversy since 2012 when the General Legal Council (Council) issued an administrative fiat that varied the
entry requirement to the Ghana School of Law (School). This fiat culminated in a lawsuit that declared the fiat unconstitutional, the passage of LI 2235 by a shocking “viva voce” vote (shocking, because the Nays seemed to outnumber the Yays), a 2018 illegal supplementary examination following an entrance exam leakage, a change in the duration of the qualifying program from two (2) years to one (1) year and back to two (2) years without reason or rhyme, massive failure of students in the qualifying examinations, and the introduction of the Legal Profession Amendment Bill, 2018. More important, over 5,000 LLB graduates have been denied a mere opportunity to enter the School, even though they are able to pay for the education and are otherwise qualified for admission.

The Ghana Center for Democratic Development (CDD-Ghana), to its credit, anticipated the 2019 problems and organized a roundtable to discuss the Bill. Such roundtables, and other vehicles for eliciting stakeholders' input, are important as we fashion a way forward for legal education that takes into account the extant increased demand for legal education and services, while maintaining quality and excellence. Such a participative process is important by giving voice to various stakeholders, thereby, allowing various perspectives to be considered and building acceptance for the ultimate outcome. Broad consultations have a higher likelihood of identifying a legal education model, which is responsive to the needs of the country, and that allows us to maintain the highest possible standard. Alas, the Council was a no show at the roundtable.

The proposed Amendment Bill extends the period of pupillage from six (6) months to one (1) year for persons who have satisfactorily completed the Post-Call Law course at the School. It also inserts a new sub-section that allocates admission quotas to Universities approved by the Council and provides statutory blessing for the requirements of an entrance examination and an interview before a person gains admission to the School. Lastly, it introduces an Independent Examination Committee (IEC) to administer examinations at the School, to provide for tenure of office of members of the Committee and to provide allowances for the members.

THE CORE PROBLEM
In my opinion, neither the Chief Justice's commentary nor the proposed amendment addresses the core problem that has plagued legal education in Ghana. The core problem that has triggered the aforementioned controversies is the increasing demand for access to professional education at the School occasioned by a growth in the population, demand for legal services, and an increase in the number of Law Faculties. When the School was set up in 1958 to offer professional legal education, only the then University College of Gold Coast offered the LLB. Today, there are over 11 universities offering the LLB and the problem is about trying to fit thousands of qualified students in a School that has a capacity to hold only hundreds of students. In other words, the problem is all about whether to retain the School, as the sole provider of professional legal education, or to look for alternative models.

It is the Council's inexplicable desire to retain the School, as the sole provider of professional legal education, that has led to the proposed screening mechanisms, including interviews, entrance examinations, quotas, increase in the number of Post-Call candidates driven by excluded LLB degree holders who return to the country after enrolling in other jurisdictions. A secondary problem is how to examine students who are admitted to the School, considering the role of the School in the legal education value chain.
Thus, framed, it becomes apparent that the problem is not about the mass production of lawyers. In fact, the country suffers from anaemic production of lawyers. The problem is not about the production of lawyers without efficient control, checks and balances. No serious person believes that should happen in any production system, let alone training of professionals. The problem is not about lawyers' misconduct, which can and should be handled by the disciplinary committee. Nor is the problem about asking lawyers to be produced in a manner that differs from how doctors or accountants are produced. In fact, as it will become obvious, those who are calling for reforms in legal education are rather asking the regulators adopt the model in these other professions.

Rather, the problem lies in the needless distinction between academic and professional education, the adoption of a centralized mechanism (i.e., the School) for delivering professional education, and failure to consider alternative mechanisms of delivering legal education that improves access to so called professional education while maintaining excellence and quality.

ORIGINS AND PROBLEMS WITH BIFURCATED MODEL

The current approach to training lawyers relies on a bifurcated model that comprises of an academic component at the Faculties followed by a professional component at the School. The School was set up in 1958 to offer a program of evening instructions geared to Parts I and II of the English Bar Examinations. Then Attorney General, Geoffrey Bing, justified its setting up by arguing that Ghana quickly needed a number of legally trained persons, not necessarily of University quality, who could play important roles in national development through both Government service and private practice; there are a large number of able people, both interested in and qualified for the study of law, who lacked the financial resources for study in Britain. The existing Bar was economically and politically conservative and targeted at diluting the existing British-trained Bar by a large influx of locally produced lawyers. This seemed to offer substantial political advantages.

Independently, the Council of the University College of the Gold Coast had in 1956 decided to establish a department of Law, which accepted its first group of students in October 1959. The International Advisory Committee to examine legal education and to facilitate the implementation of the decision to establish a department of law proposed that persons taking the LLB should be admitted to practice after completing a one-year, full time practical Course at the School. Contemporaneously, the Denning Committee, appointed by the Lord Chancellor of Great Britain to examine legal education in Africa, reached a similar conclusion regarding the bifurcation of legal education – “In some parts of the world, a university degree in law is considered by itself a qualification to practice. We do not take this view. ... After a man has taken his degree at the university, he should have a period of one-year practical training at a school of law where he can be taught such things as the drawing of pleadings, trust accounts and bookkeeping, practical conveyancing, etiquette and professional conduct.”
In 1960, the Legislature delegated the duty of establishing a system of legal education, which affords students opportunities to read and to obtain practical experience in the law and to qualify as lawyers, to the General Legal Council (ACT 32). To afford students this opportunity, the Council is duty-bound to make arrangements for legal education in such manner as it thinks fit and, in particular, either through a school of law set up by the Council or through any educational institution. In sum, the LLB was never conceptualized as a terminal degree. Rather, its possession created a vested and non-severable interest to take practical courses at the School, or other alternative institutions, prior to enrolment at the Bar. In a sense, the School was always considered as a “finishing school”—a de facto institute of the University existing to offer “practicals” to LLB degree holders.

The Bifurcated model is therefore, an accident of history. There is nothing inherent in the study of law that requires that some courses be taken at the Universities and others be taken at a Professional School. Considering modern trends in legal education, the distinction between academic and professional education, first drawn in 1959, is no longer relevant or useful. Currently, the School offers courses in Civil Procedure, Criminal Procedure, Law of Evidence, Advocacy and Legal Ethics, Law of Taxation, Interpretation of Deeds and Statutes, Company and Commercial Law Practice, Alternative Dispute Resolution, Conveyancing and Drafting, Family Law and Practice, Law Practice Management and Legal Accountancy.

A closer look at these courses reveals that they are no more professional or less academic than those offered at the approved Universities. All the courses offered at the School can and should be offered by the Universities approved by the Council. The Universities, with their inter-disciplinary approach and emphasis on research, are better equipped to teach these courses than the School. The School has no comparative advantage in teaching these courses. Equally important, the course sequencing detracts from, rather than enhances, the understanding of law. For instance, there is no pedagogical reason for civil procedure to be taught in the fifth year, when students take many early courses that assume familiarity, if not good grasp of the subject. The same is true for criminal procedure and evidence. Conveyancing needs not be divorced from property law. This illogical sequencing exists largely, if not solely, because of the maintained, but superfluous, distinction between academic and professional education.

Further, the distinction amplifies the myth that there are discontinuities in academic and professional legal education, with the former being theoretical and the latter being practical in outlook. In fact, the two cannot be meaningfully disentangled without impoverishing both. Legal education, in all its facets should train lawyers to think. Students must not just be exposed to the positive law but must be allowed to explore the law as a transformative tool. In this regard, legal education must not be evaluated in terms of how well it serves the expectations of the judiciary but rather how it contributes to a jurisprudence that facilitates the legal, economic, social and political transformation of the country. This transformative training can better be offered by the Law Faculties, whose core mission is to train well-rounded lawyers and thinkers. On the other hand, so called professional education at the School focuses too much on the
positive law and meeting the expectations of the judiciary. The erratic and frequent shifts in the duration of the professional program provide further evidence of the Council’s comparative disadvantage in offering legal education.

Third, the current bifurcated model leads to the unusual situation where passing the professional courses offered at the School of Law becomes the basis for ultimate enrolment at the Bar. As important as these professional courses are, I believe passing examinations in the usual common law courses must be the acid test of Bar enrolment. This is also another way to ensure quality control by requiring students to integrate and synthesize core legal principles they have learnt since matriculating at the Law Faculty. The Bar examination must evaluate candidates’ proficiency in the understanding and application of core law courses. Admission to the Bar must be based on demonstrated competence in constitutional law, contracts, criminal law, etc. not on whether candidates can pass an accounting examination or answer questions, such as “In 3 very short paragraphs, outline 3 of the theories of management that has evolved since Frederick Taylor (March 20, 1856 – March 21, 1915) propounded his management theory.” This is not to deny the enrichment value of accounting and scientific management in the study of law but merely to say that they are not core law courses that must determine whether law candidates are enrolled at the Bar. Nor should students be required to draft a writ of summons, as happened in a recent civil procedure examination.

Fourth, even if the Ghana School of Law is maintained to offer these so-called professional courses, Act 32 is emphatic that there must be room for LLB degree holders to take these courses from alternative institutions. This suggests that as far back as 1960, the legislature anticipated that circumstances might require that other institutions be enlisted to offer these courses. Increased population, increased number of geographically dispersed Law Faculties, the corresponding increase in the number of students seeking legal education, and increased demand for legal services are examples of such circumstances. Thus, the notion that there is a facilities shortage at the School of Law that calls for curtailing the legal education of so many qualified students is entirely unwarranted. As suggested below, the approved Law Faculties must focus on delivering legal education while a newly created regulatory agency to succeed the Council must focus on implementing rules relating to Bar admissions, including the administration of a semi-annual Bar examination.

Fifth, as a practical matter, the distinction must fall due to the (i) increased demand for legal services, (ii) growth in the population of students seeking legal education, (iii) technology advancements, (iv) the establishment of well-resourced moot courts at the Faculties, and (v) a variety of other factors. There is no good reason in 2019 for a student seeking to study law to relocate to Accra. Thus, the historical distinction between academic and professional programs is both a mirage and dysfunctional as an academic matter and is no longer relevant or desirable.

Once it is recognized and acknowledged that the distinction between professional and academic legal education is vacuous and that the Law Faculties are best equipped to teach all law courses, the facilities shortage argument wither away and open the door to more modern solutions.
The Council is currently comprised of the four (4) most senior members of the Supreme Court. This is problematic, especially since disputes between the Council and plaintiffs often find their way to the Court. It does not augur well, at least for the appearance of independence, when plaintiff faces a Court, whose most senior members have made decisions that she is challenging. I faced the Court in Asare v AG [2017, unreported] and found the situation to be both uncomfortable and untenable. I imagine that the panel also may have felt similar emotions. For if they find that the GLC has erred, they must then find the best way to tell 4 of their most senior colleagues that they erred as a matter of law. It does not simplify matters if the Chief Justice, who is the head of the Council, also chooses the members to sit on the panel. As I write, I know of a few disputes that are before the courts, challenging the mode of delivering legal education. This is another reason why the Chief Justice's commentary is not only clearly unfortunate but could also be potentially prejudicial.

We need to move to a new era where Supreme Court Justices do not participate in agency decisions that they can be called upon to adjudicate later, being a Supreme Court Justice is a full-time job that must not be made more difficult by requiring them to serve on other agencies.

Then also is the untenable situation of a regulator, here GLC, that controls the monopolist professional education provider, here GSL, as well as the Bar examiner, here Independent Examination Council (IEC), and is responsible for determining curriculum, price, passing grades, location, duration of study, and even dress code. This is in addition to the regulator’s duty to accredit and monitor quality of legal education in the Faculties. Predictably, the regulator has become unresponsive to demand, charges excessive prices and cares very little about quality beyond the lip service. Without competition, the GSL has no incentive to innovate. This is an arrangement that guarantees regulatory failure.

Another problem with the composition of the GLC is that the University of Ghana is represented but other Universities are not. Of course, when Act 32 was passed, the University of Ghana was the only game for law education in town. But times have changed! In fairness to all LLB granting Universities, they must have a chance of being represented on the Council or a new regulatory body.

It does not help matters that the GLC adopts an opaque process in formulating regulations. The general public has no input in formulating these regulations and there is no evidence on how the regulations are drafted or how the Council members vote on them. It does not inspire confidence in the Council when the Chief Justice publicly declares that she alone can stop reform. As regulations can only be varied by a supermajority of parliamentarians, an opaque process is inherently unfair and capricious.

Regrettably, the GLC and the IEC have lost credibility as a result of being involved in a
plethora of disputes, illegalities, arbitrariness and examination leakages over the last few years. These unfavourable events are well documented and have played out in the media and the courtrooms starting from 2012 till now. The cumulative effect of these negative activities has been devastating for legal education and, I dare say, the legal profession as a whole. The country needs a regulatory body with credibility to regulate the legal profession.

COMPARATIVE ADVANTAGE OF LAW FACULTIES
In today’s education landscape, the Law Faculties and other disciplines across the University campuses are fully able to offer courses in pleadings, accounting, conveyancing, taxation, company law, professional responsibilities and other professional courses that are currently offered at the School.

Law Faculties are best able to experiment with and design curriculum, course materials, legal writing programs, clinical education, etc. They also have more flexibility to adapt class sizes and physical architecture to provide the experiential learning that today’s lawyers need. To be successful, students must move beyond adjudication and the courtroom and acquire broader forms of knowledge and skills. I believe the Faculties are in the best position to meet this need as their interdisciplinary and research environments allow them to offer courses on problem solving skills, negotiation, policy and transactional work.

The insistence on pupillage requirements is another example of lack of innovation in methods for legal training. I suggest that a good Law Faculty can through clinics and trial practice courses simulate the practice of law, obviating the need for pupillage.

These clinics can and should afford students the opportunity to regularly engage in legislative efforts, policy analysis, transactional work, public education and should be the hub of structural-reform litigation. The School is not similarly equipped to offer such rich experiential learning. Education in the 21st century is not professional merely because it is taught at the School of Law.

Consistent with the preceding arguments, I suggest that curriculum development and delivery should be entrusted in their entirety to the Law Faculties. Given their interdisciplinary orientation, I believe the Universities, therefore the Law Faculties, are best equipped to prepare students to “think like lawyers” in the socio-economic environment in which they will occupy. Thinking like a lawyer transcends practicing and litigating. It should also embrace problem solving and leadership. That requires a team-oriented problem-solving education experience that incorporates diverse perspectives. That requires students to learn not only from law professors but also from some of the best professors in an interdisciplinary university environment.

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THE WAY FORWARD

I propose that a new body, perhaps named as the Council for Legal Education and Practice (CLEP), be created to succeed the Council. I also propose that CLEP be made up of 15 members, comprising of three (3) representatives appointed by the Supreme Court (but not Supreme Court Justices). The Attorney General must also nominate a representative. The Ghana Bar Association (GBA) and the Universities approved by the Council must each elect four (4) members with demonstrated interest in and excellence in legal education. Lastly, there must be three (3) public members with experience in areas such as educational testing, statistical analysis, accounting, psychology, medicine or related sciences that could be valuable to CLEP. These public members must be sought and appointed by the Public Service Commission. Each member should serve a 5-year renewable term. The CLEP should elect its own Chairman. The membership of CLEP should comprise of persons with demonstrable scholarly attainments and an affirmative interest in legal education and requirements for admission to the Bar.

The new CLEP should focus on setting and enforcing standards relating to:

- Licensing, monitoring and accrediting Law Faculties
- Determining facility and technology requirements for the Law Faculties (e.g., class sizes, faculty to student ratio, minimum technology resources enabling access to cases; etc.)
- Determining core curricula that students need before they can be called (enrolled) to the Bar

The requirements for admission to the Bar:

- Administering the Bar Examination (I recommend twice a year)
- Collecting, analyzing and publishing information relating to legal education and training by the Faculties
- Carrying out regular visits and inspections of Law Faculties
- Continuing Legal Education (CLE) to practicing lawyers
- Ethical and Quality Control practices

The CLEP must specify core courses that must be covered at the Faculties and that will be tested on the Bar Examination. I expect the courses to be tested on the Bar examination to include (1) Constitutional Law; (2) Torts; (3) Contract; (4) Criminal law; (5) Property; (6) Evidence; (7) Civil and Criminal Procedure; (8) Administrative Law; (9) Estate Law; and (10) Business Associations, including Corporations. In addition, students must pass an exam on Professional Responsibilities. This reflects the importance of ethics and professionalism in the legal profession.
This practice of delegating education to the universities whose products take common examination is hardly novel and is used by the Institute of Chartered Accountants of Ghana as well as Ghana’s Medical and Dental Council. As the Chief Justice seems to like the production model of the medical school, she should welcome this reform. Very few will suggest that there is mass production of accountants and doctors merely because these professions allow universities to handle education and admit people based on a common examination.

The CLEP must meet no less than four (4) times a year and must adopt an open process to issuing regulations. That is, any proposed regulations must start in the form of an exposure draft eliciting public input, be subject to public hearings with a recorded vote of its members (with members desiring to state a rationale for their decisions allowed to memorialize that). Consistent with the right to information, CLEP must maintain a website that makes information about these exposure drafts and their activities available to the public. The information must include the public notice of their meetings, list of participants, written comments or other material provided by participants, and meeting reports or minutes, and transcripts if made.

I also propose that there be two (2) paths to acquiring the LLB and therefore becoming eligible to take the Bar Examination. Students with a first degree in a non-Law area can enter the Law Faculty where they are required to take 90 credits of classes, at least 90% of which have to be Law Courses. A full-time student should be able to complete these requirements in approximately three (3) years. Students may also opt for a joint undergraduate degree and Law Program (BS/LLB or BA/LLB). In this case, they are required to take 180 credits, at least 90 of which must be in law courses. The Law Faculties must be allowed to work with other University Departments, such as College of Business, Department of Political Science, College of Engineering, etc. to develop such Joint Programs. It is expected that such a program will be completed in approximately six (6) years.

Law Faculties should operate clinics that offer pro bono services, initiate public interest and structural-reform litigation as well as engage in policy debates, including making submissions to and appearing before parliamentary sub-committees to offer testimony. Students should be allowed to take increasing responsibilities under the supervision of faculty. Such clinics should be offered at all levels for interested students.

The CLEP must give the Faculties some flexibility to offer other courses, legal and otherwise, taking into accounts development in law and in society. Higher quality Faculties who have innovative program and curricula are expected to produce students who have a higher likelihood of passing the Bar examination, thereby creating additional incentives for Law Faculties to innovate.
The CLEP must set and enforce standards relating to continuing legal education. In this regard, the CLEP must approve organizations that host a broad spectrum of legal training events, including CLE, conferences, seminars, in-company courses, other professional development and legal education programs for all kinds of lawyers in all fields of law.

As a transition matter, I strongly recommend that students who have been unlawfully excluded from qualifying as lawyers should be given an opportunity to qualify. They should be given a chance to take their professional courses at schools of their choice, including private tutoring entities, and take the Bar examination as specified above. At the Ghana School of Law level, I also suggest a mandatory regrading of all failed papers handled by the IEC. The CLEP must stand by the law and must be seen to do justice to all at all times. In my opinion, even the slightest hint that the CLEP endorses injustice does substantial harm to its credibility.

In effect, I believe that the current legal education model is outmoded and kept afloat by entrenched stakeholders and regulators who oppose change and who have woefully failed to deploy technology to promote more efficient delivery of so-called professional education. Cost of legal education, students’ attrition rates, duration of legal education, and stakeholder dissatisfaction are unacceptably high for the very simple reason that the regulators have failed to adapt to a changed marketplace.

By the CJ’s own admission, the current bifurcated model that denies thousands of qualified graduates an opportunity to complete their legal studies has failed to produce quality lawyers. What then is the rational case for holding on to this failed model? On the other hand, if the problem is quality of lawyers, the solution is a common Bar examination opened to all LLB graduates that focuses on testing an applicant’s ability to identify legal issues in a statement of facts, such as may be encountered in the practice of law; to engage in reasoned analysis of the issues; and to arrive at a logical solution by the application of fundamental legal principles, in a manner that demonstrates thorough understanding of the principles.

To sum up, I am proposing that:

- A new 15-person regulatory body be set up to succeed the GLC
- The membership should comprise of persons with scholarly attainments and an affirmative interest in legal education and requirements for admission to the Bar
- While the Supreme Court should nominate representatives to this body, justices of the Court must not serve on the regulatory body
- For the avoidance of doubt, the body must not be chaired by the Chief Justice
- The new regulatory body should focus on accrediting Law Faculties, setting quality control standards, administering the Bar examination, approving state of the art and market-driven continuing legal education programs, and setting and enforcing ethical standards
- Legal education must be entrusted to the Law Faculties
Legal education must be increasingly and permanently migrated to a post baccalaureate professional degree. That is, it must be offered to students with the Bachelor degree.

All students who successfully complete their post baccalaureate law degree must have the opportunity to take the Bar examination.

The Bar examination must focus on testing an applicant's ability to identify and analyze legal issues in a statement of facts and the application of fundamental legal principles to address these issues.

The Bar examination questions should be based on the basic and fundamental subjects that are regularly taught in law schools, including constitutional law, contracts, torts, property, criminal law, evidence, procedure, administrative law, business associations, estate law, equity, agency law and professional responsibilities. New courses can be added from time to time by CLEP, provided that reasonable notice of the subject matter to be covered by the examination should be made available to the law schools and the applicants.

The sole purpose of the Bar examination must be to protect the public from unqualified practitioners, not to limit the number of lawyers admitted to the Bar.

The Post-Call one-year class and one-year pupillage requirement must be replaced by examinations in Ghana Legal Systems and Constitutional Law.

The exorbitant Post-Call fee must be significantly reduced.

The new framework must dispense with pupillage and emphasize more clinics and courses in Trial Practice.

The clinics must allow students to have increased responsibilities. It must afford them the opportunity to not only initiate and complete important public interest litigation but also to engage in structural-reform litigation and policy debates.

Parliament and interested stakeholders must embrace this opportunity to reform legal education and not allow those who have supervised its obsolescence to stifle the debate and reform.

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