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**Same game, new name?
The more things change in legal education
the more they stay the same**

PROFESSOR C NICHOLSON

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Caroline Nicholson was born in Scotland and lived briefly in England before coming to South Africa where she completed her schooling. She obtained the Bproc and LLB degrees from the University of the Witwatersrand, whereafter she completed her articles of Clerkship at the firm Chernin's in Hyde Park, Johannesburg. In 1986 she was admitted as an Attorney and Notary Public of the Supreme Court of South Africa. In that same year she joined the staff of the Department of Jurisprudence, Faculty of Law at the University of South Africa, where she remained until April 1999. In 1991 she completed a research LLM with a dissertation entitled The Role of Custom and Usage in the Banker-Customer Relationship, and in 1998 she completed her LLD thesis on the topic of the Hague Convention on Parental Child Abduction.

Professor Nicholson joined the Department of Legal History, Comparative Law and Legal Philosophy, Faculty of Law, University of Pretoria on 1 April 1999. On 1 January 2002 she was promoted to the rank of Associate Professor, on 1 September 2003 she was made Head of Department and, on 1 January 2004 was promoted to full Professor.

Professor Nicholson's research interests are diverse, although her focus is on Children's Rights, Comparative Law, and Legal Education. She has published a number of articles, contributed to a number of books and presented at international and national conferences and symposia.

Professor Nicholson is married to Robin and has three daughters.

Lyndon Johnson het gesê

"At the desk where I sit, I have learned one great truth. The answer for all our national problems – the answer for all the problems of the world comes to a single word. That word is "education".¹

Die regs fakulteit by die Universiteit van Pretoria is tans besig met 'n proses van self en eksterne evaluasie. Elke dosent word gevra om krities te reflekteer op die inhoud en waarde van dit wat aangebied word. Tot op datum het heirdie proses gelei tot die aanvaarding van belieds dokumente betreffende die assesering in beide die LLB en die kursuswerk LLM programme. Ondersoek was ook ingestel op die hoë uitval en druiop syfers, veral in hoë risiko modules. Van die duidelikste redes hiervoor is die ope toegangs beleid wat toegepas word, asook die aard van die studie materiaal in die LLB graad. Geen skool vak kan as grondslag vir regstudie gebruik word en die student hoef nie net die verandering van die skool tot die universities konteks te hanteer nie, soms in uters moeilike omstandighede, maar hulle word ook deur vreemde konsepte gekonfronteer wat hulle nooit voorheen tegeekom het nie.

Die skuif van 'n dosent gesentreerde benadering, waar studente volgens 'n kurrikulum gedoseer word wat deur hulle dosent ontwerp en ontwikkel was, na 'n uitkoms gebaseerde benadering wat student gesentreerd is, en waarvolgens die dosent 'n leer fasiliteerder word, het tot 'n mate van verwarring van role gelei.

Dit is in heirdie konteks dat ek besluit het om te praat oor:

Same game, new name? The more things change in legal education the more they stay the same.

The South African tertiary education system faces unique challenges. It is characterized by diversity that has the potential to alienate students from their study material, each other, and their educational institution. Such

alienation in turn spawns disinterest and under-performance.² Even students entering the study of law after a first degree, no longer a requisite for legal study in South Africa, have been observed to be uncertain. They are aware of the huge volume of work that faces them, and the application of Socratic method in theoretical terms, but when faced with the reality, spend weeks in a state of anxiety that has the potential to motivate or paralyze them.³

It is we, the learning facilitators who frame learner expectations. To this end the following have been proposed as apt commandments for learners embarking upon legal studies:⁴

Thou shalt be prepared for class. This entails that cases must be read more than once;

Thou shalt be punctual;

Thou shalt not be afraid to ask questions;

Thou shalt not be afraid to voice an opinion, even if it conflicts with that of the professor; As long as discussion is entered into respectfully, diversity of opinions enriches the class;

Thou shalt respect one another;

Thou shalt understand that there is method in the madness of Socratic teaching. It is vital that learner's appreciate that a mere memorization of the legal rules will not make a good lawyer. The key to being a good lawyer is to develop problem-solving skills. The Socratic method is designed to develop problem solving skills through the application of legal rules to solve problems. It thus enhances the reasoning ability;

Thou shalt tolerate the Professor's offbeat sense of humour, used to gain and hold students' attention, not to belittle;

Thou shalt visit the professor in his or her office whenever necessary, without fear or hesitation;

Thou shalt devoutly attend classes and tutorials; and

² Vernon S "Something old, something new. Confronting poor retention among first year law students by restructuring aspects of the teaching and learning experience" 2002 (36) *Law Teacher* 44.

³ McClurg A "The ten commandments of [the first-year course of your choice]" <http://law.gonzaga.edu/1st/PubsResources?Ideas/tencom.htm> (accessed 24-02-2004).

⁴ *Ibid.*

¹ Peter L. 5000 *gems of wit and wisdom* 1978 Treasure Press, London 175.

Thou shalt be prepared to work hard throughout the semester, with effect from the very first day.

In setting these expectations we must set ourselves the objective to equip learners to continue to educate themselves throughout their lives.

Despite radical changes to the theoretical framework relating to tertiary education in the last decade, the reality of what is being done in the lecture theatre has changed very little. This is particularly true in the field of legal education. The terminology surrounding legal education has developed extensively but, to a large extent, the shift in terminology has done little to fundamentally impact on the pedagogy of law. Changing the words used does not force a paradigm shift in the manner in which lecturers (learning facilitators) and students (learners) relate to one another.

I have chosen to use the terms “learning facilitator” and “learner” in order to illustrate clearly the roles that each party to the learning process play in the new educational paradigm. Clearly the learner is regarded as an active participant in his or her own educational experience. An acceptance of this role of the learner requires of the facilitator to permit and encourage the learner to participate in the structuring of the learning environment. The underlying rationale appears to be that such participation on the part of the learner will lead to a more productive and satisfying outcome for both learner and facilitator.

The introduction of the four-year LLB in South African law schools in 1998 afforded an opportunity for legal academics to evaluate what they were doing and how they were doing it. The need to revise the curriculum to be multicultural, socially relevant, and internationally competitive was identified.⁵ Language policies at tertiary institutions remain a heated topic

⁵ Greenbaum LA “Foundations of South African law: Teaching legal history from a thematic perspective” 2003 (9) *Fundamina* 94 at 95; LeRoux W “The de-romanisation of legal history courses at South African Universities” 2000 (6) *Fundamina* 129 at 129-130; Ogunronbi S “The challenges to legal studies in an era of transformation” 1998 (115) *SALJ* 493 at 499-500.

for debate, especially in light of current constitutional protections.⁶ Teaching outcomes were redefined to include reading, writing, verbal and research skills alongside transfer of knowledge.

The following quotation clearly illustrates the current challenges facing legal academics worldwide:⁷

“The student cohort will be ethnically diverse, and though multiculturalism is a profoundly rich and positive context for legal education, both in terms of the curriculum and the student experience, it brings challenges around cross-cultural teaching and learning issues such as the curriculum, learning styles, the use of language, and to the dynamics of personal and tutorial relationships.”

In law, however, there has been considerable resistance to the shift in educational thinking. Outcomes based education (OBE), designed as the vehicle for delivery of this new learning paradigm has attracted criticism and negative comment. The shift to OBE coincided with the demand that education become learner-centered. In terms of this approach the learner would embark upon a controlled voyage of self-discovery and his or her learning facilitator would facilitate the process by acting as a tour guide. The advantage that the learner-centered approach was designed to offer over its precursors was an individualization of the learning experience, permitting learners to realize their individual potential.⁸

OBE has been regarded as a failure in many countries worldwide. This lack of regard for OBE as a teaching and learning paradigm encouraged legal academics in their position that there is little reason to depart from the teaching methods that were employed when they were students. Most legal academics see no compelling reason to depart from systems that, in their opinion, have worked for centuries and, continue to do so. The question that begs is, **does** the present system work? All the evidence is to the contrary. Another question that must be posed is, does the fault for the failure of OBE

⁶ Ogunronbi *idem* 501-503.

⁷ Vernon *supra* n 2 at 48.

⁸ Goh B C “Some approaches to student-centered learning in legal education” 1994(28) *The Law Teacher* 159; Prince S and Dunne E “Group development: The integration of skills into law” 1998 (32) *Law Teacher* 64.

in countries where it has been abandoned, lie with the inherent nature of OBE or with the manner of its implementation? Certainly there can be little doubt that many institutions, at various educational levels, pay nothing more than lip-service to OBE, by changing their terminology in the classroom or in their study material to accord with the terminology of OBE but, they have not examined, understood or applied the fundamentals of the OBE philosophy.

Today's reality is that learning facilitators involved in imparting legal knowledge at a tertiary level are required to impart that knowledge, together with "lawyering" skills, to numerically large learner groups who are characterized by cultural, educational and other diversity.⁹ Most of the learners lack critical thinking skills and an acceptable work ethic. The challenges posed by these constraints are exacerbated by the fact that demands for increased access to tertiary education, and the need for the demographics of student bodies to reflect the demographics of the broader community are flooding tertiary institutions with educationally under-prepared learners who require special support in achieving their objectives.

Initiatives directed towards supporting the educationally under-prepared are generally resource greedy. Budgetary constraints hinder delivery of such initiatives and compel facilitators to find alternative means to support learners alongside their mainstream activities.

The objective of Law Faculties and Schools is to produce graduates suited to the role of legal professionals. They have an obligation therefore, not only to meet the needs and expectations of their learners but of the profession too. For this reason it is essential that legal academics be aware of what learners want and need, and marry that with the wants and needs of the profession.

Most learners have as their primary objective to pass their examinations. This need on the part of the learner must be married to the very real need for

⁹ Motlala Z. "Legal education in South Africa: Moving beyond the couch potato model towards a lawyering-skills approach" 1996(113) *SALJ* 695.

a deep understanding of the core content of the study material and the "lawyering" skills that are required in applying that knowledge, on the part of the profession. For this reason, learning facilitators in tertiary institutions should set themselves the objective of instilling in the learner deep learning rather than the surface learning that current assessment mechanisms encourage. To this end there has been a dramatic shift in teaching methods over the last two decades, to facilitate deep rather than surface learning.¹⁰

What, you may well ask, is meant by deep learning? Deep learning is where the learner abandons the quest for memorization of information in favor of a quest to gain personal understanding from the completion of assigned tasks. A deep learning approach is fundamental to OBE as it results in desirable learning outcomes. Furthermore, it is an inescapable truth that a deep learning approach is essential to legal education. A simple memorization of legal rules with no appreciation of the context within which such rules are applied is inadequate in the preparation of learners for a future in legal practice.¹¹ A deep understanding of the doctrinal underpinning of the legal rules and their practical application is essential.¹²

It has been stated that deep learning enables users to "conceptualize approaches, seek interconnections between concepts and data, and be reflective"¹³ This deep learning approach can be contrasted with the surface learning approach which requires the learner to complete tasks with minimum effort, to meet certain prerequisites. A surface learning approach nowhere requires the learner to meaningfully engage with the study material, while a deep approach stresses the fundamental importance of this engagement. Deep learning thus demands the use of the higher order

¹⁰ Baron P. "Deep and surface learning: Can teachers really control student approaches to learning in law?" 2002 (36) *Law Teacher* 123.

¹¹ Motlala *supra* n 9 at 696.

¹² Baron *supra* n 10 at 124; Schlegel "More theory, more practice" 1988 (13) *Legal Services Bulletin* 71.

¹³ Rosie A. "'Deep learning': A dialectic approach drawing on tutor-led web-resources" 2000(1) *Active Learning in Higher Education* 45.

cognitive skills. It must, of course be remembered that deep learning cannot take place in the absence of knowledge.¹⁴

One of the primary difficulties facing legal academics is the sheer volume of core content knowledge that students must master before any form of deep learning can be of value. This core content consists of statutes, cases, legal rules and principles, etcetera. The volume of information to be imparted often leads to the encouragement of a purely surface learning approach, sometimes to the exclusion of deep learning. Learners are required to memorize information and are assessed on their ability to reproduce that information in an examination or test.¹⁵ The learner's response to this approach to teaching is to concentrate on passing examinations and tests and to ignore or even avoid opportunities to explore the material with the objective of developing and broadening his or her knowledge. For many learners a surface learning approach is a comfortable one. They understand clearly what the requirements are to pass a course, module or programme, and their primary objective to avoid failure is easily met. Learners want to know what the right answer is. They avoid discussion on moot points and hesitate to express opinions. The academic too, is comfortable in the role of teacher rather than learning facilitator.

Many, if not all of the University of Pretoria, Faculty of Law study guides, indicate to learners embarking upon their studies, that surface learning is not the objective of their studies. Deeper learning is the desired outcome. This sounds very good, but the reality is that with a core content of information that is essential to the successful understanding and application of many law subjects, there is simply no time left for the learning facilitator to actively teach the learner to think. On the whole our first-year learners come from school environments where rote learning was tested and deeper understanding was incidental. The consequence of this is that learners are pre-programmed to apply a surface-learning approach. Learning facilitators attempt to

give clear indications of their expectations in their study guides and lectures but often these does not filter through to the learner until he or she has achieved a failing grade. The learning facilitator is thus required to think and act creatively in order to assist the learner in achieving success through the development of thinking skills and deeper learning. This task is almost unattainable in an environment typified by lack of time, low motivation and a culture of reading for the immediate task.¹⁶

No change in the educational paradigm is possible without the commitment of both parties to the relationship. If a shift to deeper learning is to be made successfully, then a paradigm shift on the part of both learner and learning facilitator is required. The learning facilitator may attempt to force a shift in the learning context to encourage deeper learning, but this requires a leap of faith on his or her part,¹⁷ coupled with a willingness to deal with the inevitable resistance to the process which will be encountered from some learners, who will persist in the application of a surface learning approach.¹⁸ Deep learning cannot take place without the participation of the learner,¹⁹ but the approach can be influenced by the manner in which the facilitator structures the learning environment.

Learners who use a deep learning approach are generally curious and will attempt to integrate their knowledge and to test it against their past experiences. This level of involvement and engagement of the learner with the study material is not perceived amongst surface learners who seek only to do the minimum required to pass without any effort to gain understanding.²⁰

Ah, but surely all learners need to memorize some information, you may argue. Yes, indeed memorizing remains an important part of deep learning but, however, with deep learning memorization forms the

¹⁶ Rosie *supra* n 13 at 56.

¹⁷ Baron *supra* n 10 125.

¹⁸ *Ibid.*

¹⁹ *Idem* at 128-129.

²⁰ *Idem* at 127.

¹⁴ *Idem* at 46.

¹⁵ Motlala *supra* n 9 695.

foundation upon which understanding is built and is not an objective in and of itself.

Factors that discourage deeper learning include an unreasonably heavy workload and a heavy emphasis on recall in assessment. This said, a learner cannot be forced to adopt a particular approach to learning. Many will continue to follow a surface learning approach despite opportunities for open learning. Others may use a deep learning approach in inappropriate circumstances.²¹

Assessment plays an important role in promoting deep learning. Assessment can be a valuable learning tool that should be developed alongside the teaching method. For example, continuous assessment and portfolio assessment are important tools in giving learners feedback and highlighting individual progress. Good teaching requires good assessment.²² Any shift in teaching approach demands a shift in assessment too, to ensure that assessment is appropriate.²³ Bennett stresses that while learners may escape the effects of poor teaching they cannot escape poor assessment, Assessment that measures what a learner has achieved is often summative in nature, while formative assessment is directed at assisting the learner to achieve. Formative assessment emphasises feedback, and feedback has been identified by learners as the key purpose of assessment. Most assessment displays both summative and formative elements.²⁴

The increase in learners at tertiary institutions, coupled with an increase in assessment opportunities has resulted in a shift towards more summative assessment. Modularisation and semesterisation have forced the learning facilitator to have almost constant formal assessment, eliminating time for analysis and reflection.²⁵ Surface learners thrive in this environment while the learning facilitator becomes little more

than an assessor who is consequently alienated from the learners.²⁶ Learners become strategic learners. Their behaviour of studying for marks has been compared to the behaviour of sea lions who perform for fish. If there is no fish then the sea lions will not perform and so too, learners are developing a culture of studying only when there are marks to be gained.²⁷ They pay more attention to the mark awarded than to the comments made, losing the benefits of the feedback contained in such comments. Learners will concentrate their efforts on courses that have heavy assessment demands. Assessment strategies are needed to promote independent learning and reflection amongst learners.

Of vital importance to significant learning is the relationship between the learner and the facilitator. This relationship is often even more important than the facilitator's knowledge or teaching skills. This relationship depends upon the attitudes of both parties.²⁸ Learning facilitators develop sound relationships with their learners through the application of an honest, empathetic, and flexible approach to the learning environment. Rigid learning plans and an unwillingness or inability to empathise, engender distrust, resentment or even hostility that is not conducive to learning and undermines the learning environment. In fact, research conducted in relation to retention of students in Higher Education in England,²⁹ revealed that student alienation from the study material and the learning facilitator were primary factors influencing learners' decisions to quit their studies. The causes of such alienation ranged from a clash of cultures in culturally diverse groups to fundamental differences in the life experiences within a group.³⁰

²¹ *Idem* at 130-134.

²² Greenbaum *supra* n 5 at 98 & Bennett M "Assessment to promote learning" 2000 (34) *Law Teacher*

167. More about assessment below.

²³ Bennett *supra* n 22 at 167.

²⁴ *Idem* at 167-168.

²⁵ *Idem* at 173-174.

²⁶ Bennett *idem* 170-171; Sherr A "Legal education, legal competence and Little Bo-peep" 1997 (32) *Law Teacher* 32.

²⁷ Bennett *idem* at 171.

²⁸ Rogers C *Freedom to learn* 1969 105-6 Columbus, Ohio Charles E Merrill Publishing Co in Baron *idem* at 136& Vernon *supra* n 2 at 45.

²⁹ Vernon *idem* at 44ff.

³⁰ *idem* at 45.

A collaborative approach to learning encourages a healthy relationship between learner and facilitator, that will be characterized by increased participation and active engagement with the study material.

It was against this background that a move to problem-based learning (PBL) was proposed some considerable time ago. This learning model, which has been popularized in such disciplines as medicine, engineering and architecture, comprises of more than simply a new teaching technique. It requires that the learning facilitator **preface** all teaching and learning opportunities with the presentation of a problem, or problems, to the learner. The problem will manifest an infinite number of problems and issues which learners will then explore and attempt to deal with during the course of their studies. The problem will be contextualised, and learners will be referred to associated literature. Problems may be, and often are, interdisciplinary in nature and may require the learner to integrate his or her knowledge of more than one subject area. The problem acts as a learning catalyst and precedes any didactic sessions in which the issues are dealt with.³¹

The objective of PBL is to equip law graduates to strategically and efficiently address client problems.³² PBL is thus characterized by a professional rather than an academic approach to the teaching of law. This approach differs radically from the traditional approaches to the study of law that focused predominantly on the acquisition of knowledge and its reproduction, justified to some degree by views that regard theory as the better part of law.³³

³¹Boud D & Felletti G (eds) 1991 *The challenge of problem-based learning* Kogan Page, London at 14 as cited by Tzannes M "Problem based learning in legal education: Intentionally overlooked or merely misunderstood?" 1997 (31) *Law Teacher* 180 at 182.

³² Tzannes *idem* at 185.

³³ Woolman S, Watson P & Smith N "'Toto, I've a feeling we're not in Kansas any more': A reply to Professor Motala and others on the transformation of legal education in South Africa" 1997(114) *SALJ* 30 at 34 (Woolman *et al.*).

Traditional legal education makes extensive use of hypotheticals and case-based discussions. Didactic sessions are often characterized by the use of the Socratic method which is designed to introduce a measure of interactivity and participation. What the traditional approach lacks is an adequate skills component that is integral to every substantive law course. Academics such as Motala call for legal education to be skills-based and for the elimination of rote learning within the programme. He calls upon legal academics to teach their learners to think like lawyers.³⁴ In his opinion, the focus of legal education should be on teaching learners where to find the law and how to use it to solve a problem. He is particularly scathing in his assessment of the South African legal education system's failure to equip graduates with the skills needed to adequately research a legal problem and to write a legal opinion.

This is not to say that efforts have not been made in the last decade to achieve the objectives of imbuing learners with research and writing skills. Courses in legal skills and legal practice abound,³⁵ but they have been relatively unsuccessful in attaining the goal of preparing students for the practice of law, a goal, that Motala vociferously maintains, can be achieved by implementing a shift to a skills-based approach to legal education. Such an approach should include skills training in legal research, analysis and writing. The need for skilled graduates capable of teamwork was identified by the profession, *inter alia*, in the United Kingdom, and educational institutions must fit graduates for the workplace. Despite this, in the United Kingdom, as in South Africa, there was resistance to integrating skills training into substantive law courses, and dedicated skills courses were preferred.³⁶

³⁴ Motala *supra* n 9 at 696.

³⁵ Prince & Dunne *supra* n 8 explored the integration of a legal skills course into the first year program at Exeter University; Woolman *supra* n 33 at 39.

³⁶ Prince & Dunne *idem* at 64 n 4.

Motala advocates strongly for the adoption of a problem-based approach to legal education, using small-group teaching and condemns the confrontation of learners with the facilitator's analysis or solution to a legal problem.³⁷

Motala's attack on the South African legal education system did not remain unchallenged. The veracity of his many criticisms were tested by empirical research conducted by South African legal academics who found most of them to be, if not entirely unfounded, at the very least exaggerated.³⁸ This said, his comments were not entirely without merit.

Research revealed that in the 1990's lectures still predominated as the mode of teaching, however, for the most part didactic sessions were prefaced by prior reading to be conducted by learners, independently of the learning facilitator. The readings then formed the basis of discussions that often took the form of a question and answer session.³⁹ Many learning facilitators were shown to encourage interactivity in the classroom and to avoid the dictation of notes, implied by Motala to be their chosen method of presentation.

The majority of law schools, aware of the limitations of lectures as a sole mode of delivery of knowledge, make use of tutorial sessions as a supplement to their lectures. Legal academics did not view their role as one of educating for the sole purpose of passing examinations, but embraced the responsibility to teach reading and writing skills, examination skills, and analytical skills.⁴⁰ Class preparation, tutorials, collaborative learning opportunities, problem-solving sessions, moots and role-plays are all employed in an ongoing endeavour to increase learner participation.

Where Motala's attack on the South African legal education system was found to have veracity, was as regards the failure to integrate the theoretical and practical components of legal education, and the absence of a systematic approach to teaching legal research, analysis and writing.⁴¹ Proof of the failure of the system in this regard

is to be found in the inability of learners to successfully complete a research assignment culminating in a dissertation.

Many Faculties and schools mistake the case-based approach for a problem-based approach to teaching.⁴² PBL presents the learner with a problem similar to the type of problem with which a client may confront a lawyer. The learner is required to apply reason to the solution of the problem. As a first stage in the sequence by which the learner will arrive at a solution the learner must apply his or her limited knowledge to the problem to identify areas in which he or she requires further knowledge, prompting his or her further study. This study will produce further knowledge which, when applied to the problem, prompts learning. The study experience and acquisition of knowledge thus become individual to the learner who is an active participant in his or her learning. He or she plans, directs, organizes and evaluates his or her own learning, managing, assimilating and dealing with information in a manner appropriate to the resolution of the problem.⁴³

Clearly the PBL approach demands a measure of independent work on the part of the learner. Didactic sessions follow on the problem and thus the curriculum design and development is also influenced by the problem. Lectures and seminars lose importance and are substituted by design and activity as the primary focus of the learning facilitator.

A vital aspect of the PBL approach is the formulation of the problem or problems to underpin the curriculum. It has been suggested that a learner may be presented with information in the same form as that that a lawyer may be confronted with in an interview with a client. Although the problem may be presented in written form, it should relate to a novel area of the law and, the information conveyed to the learner should be disordered and incomplete. The learner is then required to organize the material so as to identify:

The issues raised and to characterise them as factual or legal in nature; what information is relevant and what is irrelevant; and

³⁷ Motala *supra* n 9 at 697.

³⁸ Woolman *et al supra* n 33.

³⁹ *Idem* at 37.

⁴⁰ *Idem* at 38 n 14.

⁴¹ *Idem* at 39.

⁴² *Idem* at 41.

⁴³ Tzannes *supra* n 31 at 183.

what information is needed before he or she, or in a collaborative context, they, can proceed to research.

The objective is for the learner to attempt to acquire the knowledge needed to resolve the issues. In the process the learner acquires knowledge relevant to the area of law, analyses it and applies it. Not only has the learner acquired subject knowledge but also reasoning skills and problem-solving skills.

PBL teaches learners to use problem solving skills to identify legal and factual issues arising from a problem. In addition, in instances of group work, learners learn how to organize and allocate tasks and to build teams. All PBL opportunities culminate with an opportunity to reflect on what was done, how it was done and what could have been done better.⁴⁴

The PBL approach is well-suited to post-graduate and in-house legal training within firms. Its value in the undergraduate environment has, however been questioned. No doubt learners could be presented with a problem or problems to be analysed during lecture and tutorial sessions, using a Socratic approach. In this manner learners will gradually learn to think like lawyers, however the problems will, of needs, be more limited in scope and ambit, and the independent research be more limited than in the case of post-graduate learners and young professional graduates.⁴⁵

The University of Maastricht is the leading example of a PBL approach to legal studies, however it is not the only one. A PBL approach has also been used, *inter alia*, in some legal programmes at the Temasek Polytechnic in Singapore, which trains paralegals.⁴⁶ The PBL approach was implemented at Temasek in an attempt to impress upon learners the fact that law is not independent from other areas of experience and that consequently the solutions to legal problems are often non-legal in nature. In addition, while law is traditionally taught in neat blocks that are assessed independently of each other by way of tests and examinations, PBL stresses the realities of practice. Problems are often ill-defined and interdisciplinary in nature. It prepares learners to formulate knowledge in the form of opinions, affidavits,

⁴⁴ *Idem* at 185-186.

⁴⁵ *Idem* at 186-187.

⁴⁶ Wong YJ "Harnessing the potential of problem-based learning in legal education" 2003 (37) *Law Teacher* 157

contracts, etcetera and to meet the demands of a stressful, deadline driven environment. The objectives of PBL are met through teaching learners how to learn the law, thus equipping them for life-long learning, a prerequisite for success in a constantly changing legal environment.⁴⁷ These objectives are supported by a shift from traditional summative assessment techniques to more formative assessment designed to support and encourage learning. Assessment must gauge not only levels of knowledge but acquisition of core legal skills and generic process skills.

The process to be followed in a typical PBL problem is: Problem inquiry; establishment of learning issues and goals; research discovery and analysis; peer sharing and discussion; solution development; and reflection, refining and debriefing. The process skills fostered include critical thinking skills, analytical skills, evaluation skills, and problem solving skills.⁴⁸

PBL presupposes a shift in responsibility for the learner's learning to the learner him or herself. It stresses the facilitative function of the learning facilitator and emphasises the importance of collaborative learning or group work. There are personal and social benefits to learners who use a collaborative approach to learning.⁴⁹ Group work can be used effectively to teach academic learning and skills to small groups of learners. Learners are more willing to discuss their knowledge and test their skills in the non-threatening environment created by small groups.⁵⁰ The challenges to the use of such an approach include, convincing teachers that a shift in educational approach is needed, and familiarising facilitators, who are accustomed to a didactic educational background, with the interactive approach encouraged by collaborative learning and PBL. Facilitators, whether learning facilitator, or tutor, require training in methods designed to encourage participation of all members of a group.⁵¹ This training is expensive and a drain on limited resources.⁵²

⁴⁷ For a discussion of the application of PBL to the Criminal Law programme at Temasek Polytechnic in Singapore see Wong *idem* at 160ff. Susan Bailey has conducted a similar review of PBL as applied to the Company Law programme at Southampton Institute: Bailey S "Using problem-based learning to teach Company Law" www.ukcle.ac.za (accessed 28/04/2004).

⁴⁸ Wong *idem* at 166-167.

⁴⁹ Prince & Dunne *supra* n 8 69ff.

⁵⁰ Exeter University has replaced the traditional didactic model to a system of small group workshops. These have proved to be effective. Prince & Dunne *idem* at 65-66.

⁵¹ *Idem* 74-75.

⁵² *Idem* 76.

The PBL approach has much to offer but has enjoyed limited implementation. This limited implementation has been attributed, in many instances, to a failure to distinguish PBL from the use of hypotheticals in a Socratic teaching environment. The problem is thus relegated to the role of an exercise based upon a lecture. In addition, as was indicated above, academics remain unconvinced of the need to change. Fear of that which is unfamiliar, coupled with a difficulty in departing from the didactic method to which they were exposed as students and teachers, conspire to bind them to the known. The fact that the PBL approach relegates the teacher to the role of facilitator, is perceived to disempower the educator while empowering the learner. Furthermore, the potential of PBL to utilize an interdisciplinary approach challenges the traditional discipline boundaries and threatens entrenched interests.⁵³

PBL appears to be resource intensive and to suit a small group teaching environment only. Assessing skills acquisition in a group context remains a challenge, and assessment of teamwork remains both difficult and controversial. Finally, and possibly the most compelling reason that PBL has not been widely adopted is the fear that course coverage will be sacrificed on the altar of skills.

If PBL is to be successfully implemented all of the challenges need to be overcome. Educators must apply problem solving skills to create solutions to deal with the problems of implementing PBL. Certainly a PBL system cannot be implemented overnight and both prior and ongoing training and orientation are a prerequisite. It is possible that change agents may be needed to ease the change in institutional culture and to deal with inevitable resentments and concerns.⁵⁴ Adequate resources to fund the model are an imperative. These resources will exceed those required by existing teaching models.

PBL is certainly well suited to postgraduate legal education and there appears to be little or no reason that it cannot be implemented immediately. There are, however considerable objections to its implementation in the undergraduate context. PBL in its pure form may not be ideal for undergraduate law students but there are aspects of the

underlying PBL philosophy that support other educational approaches, perhaps better suited to the needs of undergraduates.

Large classes are the enemy of effective learning.⁵⁵ Small groups can be used to promote interactive learning but these are costly to implement. Using senior learners to assist in teaching small groups is one possibility which has been widely accepted by most South African universities. A tutoring system is common to most, if not all, law faculties in South Africa.

Supplemental Instruction (SI) is yet another form of peer tutoring and has been the subject of much recent literature in the field of education.⁵⁶ SI is a student academic development programme that operates within the framework of mainstream academic activity. It is not a remedial programme. The SI programme was developed at the University of Missouri Kansas City in 1972. In 1993 it was brought back to South Africa and implemented at the University of Port Elizabeth (UPE). UPE is now the National SI Centre. The purpose of SI is student support, and its techniques foster independent, facilitated learning. SI leaders, like tutors, deal with the study material in small groups. Their role differs from that of the traditional tutor insofar as the tutor may often work with learners and supply answers. The role of an SI leader is to find innovative ways of forcing learners to find the answers for themselves. SI leaders are thus actively engaged in teaching learners important learning and thinking skills whilst allowing them to integrate with a small group of learners, lessening their sense of alienation in a new and sometimes overwhelming environment. SI sessions foster interactive learning and meta-cognition. SI is of benefit, not only to the learners but to the SI leader too. He or she gains self-confidence and a deep understanding of both the content and the relevance of the study material. SI leaders are required to attend all lectures in the module they support and must, like the learners, complete all the tasks and readings assigned.⁵⁷

SI sessions deal with the course content as dealt with in the lectures, whilst developing learner ability to process, study and understand the content. The process

⁵³ *Tzannes supra* n 31 at 189-192.

⁵⁴ *Idem* 192-194.

⁵⁶ Smuis KB "The role of student leaders in supplemental instruction" *South African Journal of Higher Education* 2002 (16) 225 (The role of student leaders).

⁵⁷ *Idem* at 226.

recognises the importance that non-academic factors can play in a learner's success or failure. In addition it recognises that study skills cannot be taught in a vacuum and need to be acquired alongside course content.⁵⁸

The focus of SI is small group, learner-centred instruction, within a structured process. It is aimed at assisting learners to master content while acquiring study skills with a view to increasing graduation rates, decreasing attrition rates and improving exam marks. The underlying approach in the United States of America (USA), where SI was first introduced, is that "...there is a need for increased emphasis on student retention, particularly for first generation and economically-disadvantaged students. American society cannot afford the economic and social cost of college drop outs who are not able to fulfil their potential."⁵⁹ In the USA the SI programme has been proven to increase learner performance and retention through deep learning.⁶⁰ SI improves upon the tutor system and differs from other support programmes in that it targets "at risk" courses rather than "at risk" learners.⁶¹ It makes use only of senior learners who have completed the course successfully. These learners then undergo extensive training in small-group facilitation and study skills.⁶²

Integral to the SI system is the close monitoring of SI leader performance. To this end there are SI supervisors responsible for selection of courses in which SI might meaningfully be implemented, the training of SI leaders, and the monitoring and evaluation of the system. The system can only work in close co-operation with the member of academic staff responsible for the presentation of the course. This staff member, the SI leader, and the participating learners are vital members of what is a collaborative exercise that requires the co-operation of all participants. Attendance is voluntary and the agenda for each session is learner-centred.

SI is not available in all law faculties or schools countrywide. The University of Natal, Durban have implemented an SI system in terms of which senior learners, who

⁵⁸ Koch E & Mallon P "Evaluation of supplemental instruction: a performance assessment approach" 1998(12) *SAJHE* 173 at 174.

⁵⁹ Naidoo N A "Supplemental Instruction Supervisor Training Programme SI National Training Centre UPE 15-17 July 2002 Participant's Report 1 at 3.

⁶⁰ *Idem* at 1.

⁶¹ Smuts *supra* n 56 at 225.

⁶² *Idem* at 226-228.

act as SI leaders, are credited with a course in teaching legal skills.⁶³ The SI method is closely monitored and has proven to be beneficial to the modules in which it is employed. SI forces the learning facilitator to be self-critical and to work collaboratively in order to resolve difficulties associated with the implementation of the SI model. The University of Natal has founded its new educational approach on thematic teaching where carefully structured themes are developed to fit together like puzzle pieces, integrating study material both horizontally and vertically, in order to create a cohesive unit within the module.⁶⁴

SI is not yet available at the University of Pretoria, although in September 1993 the University of Pretoria launched an initiative to investigate the assignment of tutors.⁶⁵ This resulted in the implementation of a tutor system in 1994, which system draws upon senior learners to tutor more junior learners who are at risk. This tutor system was the subject of a report in 2002 that contained recommendations regarding training of tutors and their co-ordinators. As a result of this report, representatives of the University, selected from amongst the education consultants, underwent training in SI at the UPE National SI Centre. The objective was to equip such trainees to improve upon the tutor system as it exists, and to maximise its value to the learners. These consultants were so impressed by what they had been exposed to at UPE that a number of academics were offered an opportunity to undergo the training in 2003. These academics, myself included, found the principles and underlying ethos of SI to be extremely valuable and determined to implement at least some of the SI principles in their teaching and tutorial groups.

SI principles can be integrated into teaching even in big groups.⁶⁶ SI has not only been evaluated on the basis of its contribution to increased academic performance and retention in high risk courses, but also on its quality, effectiveness and efficiency.⁶⁷ It provides valuable learning opportunities outside of the classroom. As it is voluntary and targets courses rather than learners, the environment is non-threatening and non-judgemental. Sessions often resemble an informal study group where learners

⁶³ Greenbaum *supra* n5 at 97.

⁶⁴ For further discussion of thematic teaching in law see Greenbaum *idem* at 99ff.

⁶⁵ Rt 466/93.

⁶⁶ The SI programme has been running successfully for nearly 30 years in 11 countries. Naidoo *supra* n 59 at 4.

⁶⁷ Koch & Mallon *supra* n 58.

congregate to try to make sense of something they don't understand, although SI adds the advantage of an experienced senior learner who has succeeded with the work; a clear structure and form that lend the process credibility, and a name that identifies it.⁶⁸

SI is not, however, problem free. Apathy amongst students remains a problem with those who most need support not making use of the sessions.⁶⁹ Unmotivated students with a poor work ethic are unlikely to avail themselves of voluntary sessions that require them to work. The sessions are thus of benefit to those who are motivated and fail to reach those who are actually the target. Furthermore, students who were surveyed regarding SI indicated that they preferred a more structured approach to sessions than was offered by SI.⁷⁰ The voluntary nature of the sessions makes the system vulnerable to abuse by learners seeking last minute revision. Such learners disrupt groups and are a source of frustration to regular attendees.⁷¹ Why, you may well ask, are some of these difficulties not eliminated by the simple process of making SI compulsory? Quite simply because the key to SI's success lies in its voluntary and informal nature. The sessions, although structured and prepared, are typified by sufficient flexibility to allow learners to set the agenda for the session, thus allowing them to identify their problems themselves and to have them addressed by the group.⁷²

SI leaders need training in facilitation skills and require a sound knowledge and understanding of the course content. To this end the learning facilitator's co-operation is essential. For SI to work it must be an integral part of the programme.⁷³ Academics must encourage their learners to avail themselves of all learning opportunities both inside and outside of the classroom. Learners need to be more involved in their studies and require to invest more energy in them.

⁶⁸ Smuts KB "Supplemental instruction in law: A case study in peer tutoring" 2003 (17) *SAJHE* 166 at 167 (Smuts SI in law).

⁶⁹ Smuts The role of student leaders *supra* n 56 at 228.

⁷⁰ Koch & Mallon *supra* n 58 at 176.

⁷¹ Smuts The role of student leaders *supra* n 56 at 227.

⁷² *Idem* at 229.

⁷³ Koch & Mallon *supra* n 58 at 177.

It is difficult to measure the effectiveness of SI as academic performance may be influenced by any number of variables.⁷⁴ Irrespective of the success or otherwise of SI, SI alone will not be sufficient to deal with the problems of under-prepared learners. If we accept that the object of teaching, irrespective of the area of study, is to assist the learner to make a transition from the reception of knowledge to its application, then we need to implement processes that maximise the retention of knowledge. This entails a move towards active, participative learning and away from simple information transfer.

What then is the answer? The challenge to legal academics is to identifying solutions to address the problems associated with teaching law in a tertiary institution in South Africa today. The only true mistake that we can make is to sit back and do nothing.

First-year law students are lacking in basic thinking skills. De Bono defines thinking as "the operating skill through which intelligence acts upon experience."⁷⁵ To approach law in any meaningful way requires that the learner and learning facilitator are able to think about the content that is being conveyed. The ability to take a balanced approach to knowledge is of fundamental importance to any person entering the law.

Thinking is not an inherent skill and can and should be taught. De Bono compares learning to think properly to learning to touch type. He stresses that a person who types with two fingers will, with practice, become a skilled two-finger typist, not a touch typist. So too someone who is a poor thinker may, over time, become a skilled poor thinker.⁷⁶ There is thus a need to address the method of thinking in order to prepare learners for the study of law. Teaching knowledge is not enough. Information alone is insufficient. Legal academics teach learners information and how to sort and analyse it, and present argument around it. What they do not do is teach them to think properly about it.

⁷⁴ *Idem* at 174-175.

⁷⁵ De Bono E (1982) *De Bono's thinking course* BBC Books, London at 11.

⁷⁶ *Idem* at 13.

Once a learner has mastered basic thinking skills he or she may move on to creative and critical thinking which entails identifying and implementing better ways of doing things. We would do our learners a disservice were we to fail to teach them the basics of creative thinking. "The future needs better thinking and part of this better thinking is going to demand creativity".⁷⁷ Critical thinking can be extremely valuable. If one has a hypothesis and one looks at it critically with a view to improving it this may result in a positive outcome. This said, however it is impossible to be critical before one has a hypothesis.

Learners need to be equipped with tools that are fundamental to legal thinking. They must learn to approach information in a non-judgemental manner so as to take a balanced approach to its assessment.⁷⁸ They need to use their intelligence to explore a topic rather than to support a prejudice. Prejudices prevent a thorough exploration of alternatives. These alternatives may offer up possibilities that may otherwise go undetected.

If learners embark upon legal studies with some understanding of how to think properly, this will eliminate many of the difficulties they experience. Academic support in terms of which tutors offer advice on academic planning and progress may be of benefit, as will University language and learning programmes, welfare services and counselling, and financial support. A reduction in the use of summative testing of first-year learners and an increased use of technology may impact positively on the learning environment. Finally, core skills must be taught as an integral part of all substantive law subjects.

Induction and orientation programmes may be meaningfully applied to help first year learners to integrate both socially and academically, and a personalised approach to teaching and support is necessary.⁷⁹ If the relationship between the learner and facilitator is as profoundly important as has been proposed, it is vital that learning facilitators get to know their learners and stress upon them their ability to empathise with them. Regular assignments and tutorials can be used for this purpose as can

⁷⁷De Bono E (1996) *Serious creativity - Using the power of lateral thinking to create new ideas* Harper Collins Business, London at Introduction.

⁷⁸De Bono (1982) *supra* n 75 at 18-24.

⁷⁹Vernon *supra* n 2 at 56.

technology in the form of, inter alia, e-mail and discussion groups. A move from the traditional lecture approach to a smaller group model would be ideal. Lectures are not necessary for the delivery of lecture material. It can be distributed in many ways, ranging from the Internet to the written word. However, whatever the mode of delivery, the material should be interactive and clearly state desired outcomes.

Assessment should be used for learning. Written work should be submitted by learners at regular intervals as such work is an essential vehicle for learning that can be used both for assessment and feedback. Written work can be used to build a portfolio, make an early skills assessment or as the basis for discussions in tutorial sessions. Engagement of learners can be monitored by the regularity with which they submit written tasks.

The greatest problem facing tertiary legal education today is resources. Resources are unlikely to increase, however, a shift in resource allocation might meaningfully impact upon the learning environment.⁸⁰ Teaching and learning resources should target the first year which is currently where the least experienced teachers and post graduate students are assigned to teach. First-year learners, in the process of making the transition from the secondary to the higher education environment, with its demands for independent study, are in the most need of experienced learning facilitators.

Increased courses available within the law curriculum are overcrowding it, increasing the pressure on facilitators to transfer knowledge. Law schools must seriously reconsider their ability to provide adequate coverage of all such courses. It may well be preferable to teach learners how to find the knowledge they need to act professionally in a new area of law, or when faced with new legislation, than to attempt to provide coverage of the whole spectrum of law courses.⁸¹

In conclusion, it is true that "The art of teaching is the art of assisting discovery".⁸² Certainly South African law schools and faculties face intakes of educationally under-prepared students whose potential cannot be lost. Academic development programmes

⁸⁰ *Idem* at 60-61

⁸¹ Tzannes *supra* n 31 at 187.

⁸² Van Doren M in Peter *supra* n 1 at 464

to assist and support these students are vital if they are to achieve success without exit standards being lowered. That cost of such initiatives must be weighed against the cost to the economy of such students failing to complete their studies. The objective of making education freely available will not have been met until a means is found to support the under-prepared learner to successfully complete his or her programme of study.