

# **TRAINING FOR LEGAL PRACTICE – TOWARDS EFFECTIVE TEACHING METHODOLOGIES FOR PROCEDURAL LAW MODULES**

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## **SUMMARY**

Procedural laws play an important role in legal practice through their use in the enforcement of the substantive rights of members of the public. Civil procedure, criminal procedure, and the law of evidence are the building blocks whereby matters are presented in court. Legal representatives, representing members of the public, should therefore be skilled and professionally trained in procedural laws. Due to their importance, students should not only have a thorough and foundational theoretical knowledge of procedural laws, but also the necessary practical skills in applying their knowledge to practical scenarios, which should be instilled as part of the teaching of procedural modules. The inherent methodological content of conventional teaching methodologies applied when teaching procedural law modules, i.e., the Socratic and case dialogue methodologies, however, prove to be inadequate in transferring the required skills and practical training. Several constituent parties in the legal profession, including academics, legal practitioners, and presiding officers, have remarked that law students, upon graduation, lack the necessary skills, ingenuity, and practical knowledge to make a good start in legal practice. It furthermore appears that university law faculties are generally not willing to train law students for practice. There is also the necessity for the development of identified essential skills required of competent legal practitioners. The continuous development of these skills in the teaching and practical application of procedural laws afford students the ability to advance future client representation professionally and confidently. Cultural, social and human elements should form part of the teaching and learning of procedural law modules, which will create an important awareness among students that, when working with clients in legal practice, they are attending to the rights and interests of human beings who may be of different races and cultures. This will further develop students' identities and values as professionals which include not only being responsible to individual clients, but also contributing services to the community. In developing the required identified skills, students will not only be able to apply technical legal procedures, but also learn how to assist clients more cost-effectively. By employing the Clinical Legal Education methodology in tandem with conventional

lecture methodologies, students are introduced to the practical application of procedural laws, honing both their practical and intellectual skills. Application suggestions include tutorial sessions, mock trials, and reflective assignments. This article evaluates the efficacy of the current teaching methodologies applied in teaching procedural laws toward imparting students with the required practical skills. It recommends the development of procedural law modules by introducing applied practical skills to enable students to enter legal practice after graduation as more rounded and skilled future legal practitioners.

## 1 INTRODUCTION

Procedural law modules aim to present students with the required knowledge of how to enforce rights such as rights forming part of the substantive law.<sup>1</sup> Procedural laws, as advanced building blocks in the study of law, should therefore be central to the legal education of students. The laws of civil procedure, criminal procedure, and evidence are described in context as the law in action,<sup>2</sup> indicating the necessity of these laws to breathe life into the law curricula.<sup>3</sup>

Current methods by which law schools present procedural laws, namely the Socratic and case dialogue methodologies, are probed. The needs of the primary constituencies of law graduates are considered in reviewing the effectiveness of these methodologies in the teaching of procedural laws.

It is indicated that legal education neglects the teaching and application of practical skills in procedural courses. These deficiencies are contemplated towards finding a remedy to prepare law students for the practice of law as members of a client-centred public profession.<sup>4</sup>

## 2 THE LAWS OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, AND EVIDENCE

Procedural law modules aim to present students with the required knowledge of how to enforce rights, which rights form part of substantive law.<sup>5</sup> These rights include the right of one individual to institute legal action against another individual, or the right of the State to prosecute an individual for a crime allegedly committed by such individual. A group, or class, of individuals may also institute legal action against another individual or group

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<sup>1</sup> See Van Loggerenberg "Civil Justice in South Africa" 2016 3(4) *BRICS Law Journal* 125 126 in this regard.

<sup>2</sup> McQuoid-Mason "Methods of Teaching Civil Procedure" 1982 *Journal for Juridical Science* 160 160. It is, however, doubtful whether students, in Civil Procedure, are taught the ability to handle and analyse these facts – McQuoid-Mason 1982 *Journal for Juridical Science* 161.

<sup>3</sup> Pete, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Civil Procedure – A Practical Guide* (2017) 2.

<sup>4</sup> Stuckey, Barry, Dinerstein, Dubin, Engler, Elson, Hammer, Hertz, Joy, Kaas, Merton, Munro, Ogilvy, Scarneccchia and Schwartz *Best Practices for Legal Education: A Vision and a Road Map* (2007) 8.

<sup>5</sup> See Van Loggerenberg 2016 *BRICS Law Journal* 126 in this regard.

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of individuals – the so-called “class action”.<sup>6</sup> Substantive rights, therefore, stem from both private and criminal law. Adjectival law, the procedures by way of which substantive legal principles are enforced in a court of law,<sup>7</sup> include the rules relating to the admissibility of evidence to be applied when substantive rights are enforced.

Procedural laws are advanced building blocks in the study of law. For students to understand and appreciate procedural laws, they should have a fundamental understanding of the substantive laws they studied in the preceding years. Building on that, they should know the substantive aspects of the procedural laws, which, when applied, will serve as vehicles to give effect to their rights as they pertain to the applicable substantive law. Procedural law modules should therefore be central to the legal education of students.

Civil procedure concerns the enforcement of private law claims.<sup>8</sup> In, for example, a damages claim, students should know and apply the specific principles of substantive law relating to damages, namely the law of delict.<sup>9</sup> The law of civil procedure will be the legal mechanism to give effect to the damages claim.<sup>10</sup> McQuoid-Mason correctly states, “[c]ivil procedure breathes life into substantive law – it is the law in action. The teaching of civil procedure should likewise breathe life into the law curricula.”<sup>11</sup> It was indicated that civil procedure lies at the heart of the law, and it is clear why: it is a procedure that can yield reasonably reliable conclusions by analysing frequently confusing sets of facts.<sup>12</sup>

Criminal procedural rules commence after the commission of a crime when the report of the same has been made to the SAPS.<sup>13</sup> It is important for students to be familiar with both the substantive and adjectival law principles applicable to criminal procedure.<sup>14</sup>

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<sup>6</sup> Pete et al *Civil Procedure* 36; s 38(c) of the Constitution of the Republic of South Africa, 1996.

<sup>7</sup> US Legal “Adjective Law and Legal Definition” (undated) <https://definitions.uslegal.com/a/adjective-law/> (accessed 2019-11-25). Adjectival law can be defined as the section of the law that deals with the rules governing evidence, procedure and practice. Procedural law is however a term that is used by most jurists nowadays.

<sup>8</sup> Pete et al *Civil Procedure* 2; McQuoid-Mason 1982 *Journal for Juridical Science* 160; Van Loggerenberg 2016 *BRICS Law Journal* 126.

<sup>9</sup> Pete et al *Civil Procedure* 2; Neethling, Potgieter and Visser *Law of Delict* 2ed (1994) 21.

<sup>10</sup> See Pete et al *Civil Procedure* 2 in this regard.

<sup>11</sup> *Ibid.*

<sup>12</sup> McQuoid-Mason 1982 *Journal for Juridical Science* 160 160. It is, however, doubtful whether students, in Civil Procedure, are taught the ability to handle and analyse these facts – McQuoid-Mason 1982 *Journal for Juridical Science* 161.

<sup>13</sup> See Joubert (ed) *Criminal Procedure Handbook* 11ed (2014) 5, 6 and 65 for the duties and powers of criminal courts, prosecuting authorities and the South African Police Service. Also, regarding the regulation of the rights of suspects and arrested persons, pre-trial procedures, bail, charge sheets and indictments, pleading, trial rights of the prosecution and the accused, the verdict, sentencing appeal or review proceedings, as well as mercy, indemnification and free pardon. Also see Pete et al *Civil Procedure* 1.

<sup>14</sup> See Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe and Van Rooyen *Criminal Procedure Handbook* (1998) 5 in this regard. These include the basic principles of criminal law in order to be familiar with the various types of crimes. The fundamental principles of criminal procedure are important in order for them to know which

The Law of Evidence concerns evidence, which concept can be defined as “[a]ny information that a court has formally admitted in civil or criminal proceedings, or at administrative or quasi-judicial hearings.”<sup>15</sup> The South African legal system, relating to evidence, contains legal principles relating to evidence and how it should be applied.<sup>16</sup> In every legal matter, the law of evidence plays an important role. In South Africa, an adversarial or accusatorial litigation system is followed. In terms of this system, the parties engage with each other,<sup>17</sup> attempting to discharge or rebut a burden of proof by way of adducing evidence to the court in support of their respective arguments. The law of evidence involves the consideration of both substantive law principles and procedural law principles.<sup>18</sup> Substantive law principles are relevant to determine the rights, duties, and liabilities in a particular branch of the law.<sup>19</sup> Procedural law principles determine the way in which evidence relating to such elements must be presented to a court.<sup>20</sup> The interrelatedness between the law of evidence and criminal procedure is particularly significant in determining whether the evidence, obtained under certain conditions, is admissible in court.<sup>21</sup> Criminal procedure prescribes the guidelines as to how evidence must be obtained in certain situations.<sup>22</sup>

### 3 HOW DO WE TEACH PROCEDURAL LAWS?

#### 3.1 Introduction

The teaching of the law of evidence, for example, is particularly important. At university, students study the law of evidence as far as basic substantive principles are concerned, but nothing more. There is no practical application of the principles to actual exhibits as they would manifest in a courtroom. Students, therefore, enter legal practice without any experience in interpreting evidence, the actual procedures used to gather and preserve such evidence, as well as how to consider all evidence in a particular case from a holistic perspective instead of piecemeal.<sup>23</sup> They risk developing into

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procedures are available to both the State and to accused persons in case of commission of crimes.

<sup>15</sup> Bellengere, Palmer, Theophilopoulos, Whitcher, Roberts, Melville, Picarra, Illsley, Nkutha, Naude, Van der Merwe and Reddy *The Law of Evidence in South Africa – Basic Principles* (2016) 3.

<sup>16</sup> Zeffertt and Paizes *The South African Law of Evidence* (2017) 31; Schmidt *Bewysreg* (1993) 1; *Tregea v Godart* 1939 AD 16 30–31.

<sup>17</sup> These parties refer to the Plaintiff and Defendant, Applicant and Respondent and State and Accused.

<sup>18</sup> Schwikkard, Van der Merwe, Collier, De Vos, Skeen and Van der Berg *Principles of Evidence* (2005) 1.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Bekker *et al* *Criminal Procedure Handbook* 6.

<sup>22</sup> For example, during identification parades and suspect interrogation sessions. See Bekker *et al* *Criminal Procedure Handbook* 6. For a comprehensive discussion on whether or not evidence had been obtained in accordance with the provisions of the Constitution, see Steyler *Constitutional Criminal Procedure* (1998) 35–40, Bellengere *et al* *The Law of Evidence* 234–245 and Zeffertt *et al* *The South African Law of Evidence* 16–28.

<sup>23</sup> See Uphoff, Clark and Monahan “Preparing the New Law Graduate to Practice Law: A View from the Trenches” 1997 65 *University of Cincinnati Law Review* 381 392 in this regard.

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legal practitioners, even presiding officers, who struggle to apply the rules of evidence.<sup>24</sup> This unfortunate situation has another side effect: legal practitioners, who attempt to learn the principles of evidence and application thereof while practising, may blindly follow the application methods of the aforementioned practitioners and presiding officers.<sup>25</sup> Consequently, they do not know when certain pieces of evidence should be permitted or excluded, as they do not understand the principles of the law of evidence adequately.<sup>26</sup>

When teaching procedural laws, including the law of evidence, dedicated practical application of the substantive rules is largely absent. The courses are generally taught in a classroom setup by employing the Socratic teaching method, the case dialogue method, or a combination of both. Consequently, students only study the theory, where discussion forms the foundation of a lecture, relating to the substantive and procedural law principles, with very little or no application to simulated-, or real-life scenarios. This approach implies that these modules are not presently taught in a practical way that involves sufficient practical elements. Students should learn these procedural laws in a way that ensures that they will be able to apply the legal procedures involved in legal practice.

Despite a plea in this article for a more practical upbringing of law students as far as procedural law modules are concerned, the teaching of theory is also important. Krieger states that the “[b]asic knowledge of substantive legal doctrine is a necessary prerequisite to learning effective legal practice.”<sup>27</sup> Therefore, apart from students having to have a firm knowledge of the substantive law principles, it is desirable that they need to practise these application routes.

It is submitted that there are certain limitations to what can be required from universities in respect of student training. With the teaching of procedural law modules, the focus should be to equip students with a strong foundation upon which they can build confidently and professionally when entering practice as candidate legal practitioners. Such a focus will also assist students in performing practical work at a university law clinic in the final academic year, where they will be exposed to legal practice for the first time as far as their academic legal studies are concerned. To suggest appropriate teaching methods, the current methods used need to be reviewed.

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<sup>24</sup> Law graduates have described the theoretical study of the law of evidence to be “cold” and “abstract”, not knowing where such rules must be applied. Hands-on experience would be of significant assistance, and it would make the learning and understanding of the principles of evidence easier.

<sup>25</sup> Uphoff *et al* 1997 *University of Cincinnati Law Review* 392.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>27</sup> Krieger “Domain Knowledge and the Teaching of Creative Legal Problem Solving” 2004 11 *Clinical Law Review* 149 149; Hall and Kerrigan “Clinic and the Wider Law Curriculum” 2011 *International Journal of Clinical Legal Education* 25 27.

### 3 2 Socratic teaching methodology

Although it was said that the Socratic method may be effective for the training of attorneys,<sup>28</sup> it is submitted that this would ring true as far as learning the basic rules or the substantive aspects of procedural laws. Since the second half of the 19<sup>th</sup> century,<sup>29</sup> universities globally apply the Socratic method as an inexpensive form of professional education,<sup>30</sup> particularly where it pertains to courses with high student numbers.<sup>31</sup> The focus is on classroom lectures, involving very little or no practical training at all. Students are referred to a textbook, legislation, and, on occasion, actual legal documents, or extracts thereof, in order to make some of the theory more concrete. Lectures also involve questions, answers, and discussions of topics that are being dealt with at a specific stage of a course.<sup>32</sup> The Carnegie Foundation for the Advancement of Teaching<sup>33</sup> views the Socratic method as the signature pedagogy for law.<sup>34</sup> The method requires lecturers to formulate and structure questions and their responses to students' questions, as a guide to students towards the solution, by enabling them to eliminate all unjustified possibilities and intuitions that have no bases.<sup>35</sup> This is viewed as a process by which students arrive at the answer to the questions themselves,<sup>36</sup> as guided by lecturers' responses. Although proponents of a purely theoretical and traditional Socratic pedagogy may view this methodology as participatory,<sup>37</sup> opining that it enables students to think critically and to effectively present ideas and answers to the applicable

<sup>28</sup> Cambridge Dictionary "Socratic" (undated) <https://dictionary.cambridge.org/dictionary/english/socratic?q=Socratic> (accessed 2018-08-01). Also see Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the Profession of Law: Summary* (2007) The Carnegie Foundation for the Advancement of Teaching 4 in this regard.

<sup>29</sup> Regassa "Legal Education in the New Ethiopian Millennium: Towards a Law Teacher's Wish List" 2009 2(2) *Ethiopian Journal of Legal Education* 53 56.

<sup>30</sup> Regassa 2009 *Ethiopian Journal of Legal Education* 56.

<sup>31</sup> Barnhizer "The Clinical Method of Legal Instruction: Its Theory and Implementation" 1979 30 *Journal of Legal Education* 67 96; Wizner "The Law School Clinic: Legal Education in the Interests of Justice" 2002 70(5) *Fordham Law Review* 1929 1931.

<sup>32</sup> Regassa 2009 *Ethiopian Journal of Legal Education* 56; Wizner 2002 *Fordham Law Review* 1931.

<sup>33</sup> See Silverthorn "Carnegie Report 10 Years Later: Live Like a Lawyer" (26 August 2016) <https://www.2civility.org/carnegie-report-live-like-lawyer/> (accessed 2019-01-23) with regards to the Carnegie Report and its importance, which is summarised as follows: "Almost ten years ago, a group of non-profit educators released what's come to be known as the law school 'Carnegie Report'. The report, actually titled 'Educating Lawyers Preparation for the Profession of Law', was part of a series of professional education reform reports produced by the Carnegie Foundation for the Advancement of Teaching. In all its reports, Carnegie broke down professional education into three apprenticeships – cognitive ..., practical ... and identity ... A successfully integrated curriculum combines all three apprenticeships, intellectual, practical and professional. And that last, the professional identity part, is crucial."

<sup>34</sup> Dickinson "Understanding the Socratic Teaching Method in Law School After the Carnegie Foundation's Educating Lawyers" 2009 31(1) *Western New England Law Review* 99.

<sup>35</sup> Dickinson 2009 *Western New England Law Review* 105.

<sup>36</sup> McQuoid-Mason 1982 *Journal for Juridical Science* 162.

<sup>37</sup> *Ibid.*

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question,<sup>38</sup> this method deprives students of valuable practical training in procedural courses.

The Socratic teaching method has also been criticised as having a destructive psychological effect on students, in that students develop a feeling of inferiority to lecturers as far as skills and abilities are concerned.<sup>39</sup> This may result in students doubting their own intelligence and personal worth.<sup>40</sup> Post-Carnegie, there were proposals for the inclusion of practical skills training.<sup>41</sup> It is submitted that procedural law modules serve as optimum vehicles for the practical application of theory and skills development.

### 3.3 Case dialogue teaching methodology

The case dialogue method,<sup>42</sup> also referred to as the Langdellian method,<sup>43</sup> is student-centred, focusing on critical thinking, communication, and interpersonal skills.<sup>44</sup> This methodology combines two elements, namely the studying and discussion of appellate court decisions and legislative rules,<sup>45</sup> affording students the opportunity to engage with complex real-world problems, necessitating them to take action by applying their theoretical knowledge to the problem at hand as featured in the particular case.<sup>46</sup>

In studying cases, students must identify and evaluate the best option(s) in the circumstances of the case, as well as predict the outcome of the application of such option(s).<sup>47</sup> Students develop a sense of how legal arguments lead to an acceptable solution to the problem at hand and how to defend certain ideas and choices.<sup>48</sup> This method, described as “learning-by-doing”, facilitates students to “think like lawyers”,<sup>49</sup> appreciating the lawyer’s

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<sup>38</sup> *Ibid.*

<sup>39</sup> McQuoid-Mason 1982 *Journal for Juridical Science* 164.

<sup>40</sup> *Ibid.*

<sup>41</sup> Dickinson 2009 *Western New England Law Review* 97 98.

<sup>42</sup> Also see McQuoid-Mason 1982 *Journal for Juridical Science* 161 164–165 in this regard.

<sup>43</sup> The method was developed in the previous century by Professor Christopher Columbus Langdell of the Harvard Law School faculty with the goal of revolutionising American legal education. Wizner 2002 *Fordham Law Review* 1930.

<sup>44</sup> Schwartz “Teaching Methods for Case Studies” (2014) <https://www.ryerson.ca/content/dam/learning-teaching/teaching-resources/teach-a-course/case-method.pdf> (accessed 2019-07-08).

<sup>45</sup> Pedagogy in Action “What is Teaching with the Case Method?” <https://serc.carleton.edu/sp/library/cases/what.html> (accessed 2019-07-08).

<sup>46</sup> Dickinson 2009 *Western New England Law Review* 99; Pedagogy in Action <https://serc.carleton.edu/sp/library/cases/what.html>; University of Denver <https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method>. Students get the opportunity to apply the law to factual scenarios, although such scenarios have been edited to some extent.

<sup>47</sup> Pedagogy in Action <https://serc.carleton.edu/sp/library/cases/what.html>.

<sup>48</sup> Dickinson 2009 *Western New England Law Review* 106.

<sup>49</sup> See Dickinson 2009 *Western New England Law Review* 102, more specifically the response of a student, Ann Marie Pedersen, with regards to the Socratic teaching method, in this regard; University of Denver <https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method>; Silverthorn <https://www.2civility.org/carnegie-report-live-like-lawyer/>.

role in a dialogue-based setting and learning to understand the law.<sup>50</sup> In applying this method, research is required in sourcing adequate information towards problem solving.<sup>51</sup> These student assignments generally involve collaboration, time management, communication, and writing skills.<sup>52</sup> As is indicated later, these are some of the skills that practising lawyers are looking for in the context of client representation.<sup>53</sup> This method may serve as an attempt to bridge the gap between theory and practice.<sup>54</sup> The case dialogue method, therefore, appears to be an improvement on the Socratic teaching method, as it encourages active participation by the students,<sup>55</sup> thus removing the notion of inferiority and self-doubt by students *vis-à-vis* their lecturers.

However, since the case method can be time-consuming,<sup>56</sup> as well as leave students with a big responsibility to study the majority of the work on their own,<sup>57</sup> the methodology is seldom applied appropriately. Lecturers may, in referring students to a particular case, highlight how relevant legal principles were applied, relieving students of their responsibilities to find and apply the law. By merely allowing for questions by students in clarification, lecturers decrease the risks that some important topics will go untaught,<sup>58</sup> furthermore ensuring that the maximum amount of time is directed towards covering a large amount of content in the respective modules.

To ensure the successful application of the case method, there must be a true dialogue between the lecturer and students in the sense that discussions and conversations take place.<sup>59</sup> Students must come to realise that they have a role in the process of and conversation about the law.<sup>60</sup> With this method, however, rather than applying legal principles to hypothetical factual scenarios, there are no practical exercises that form part of this teaching methodology.

### 3 4 Application of a combination of these methods

The Socratic teaching method can sometimes appear to be integrated with the case dialogue method. In applying the case dialogue method, a lecturer may direct certain questions to the students based on their analysis and research concerning a particular court case. The answer from the students may be met with further questions and answers, which, in effect, reflect the

<sup>50</sup> Dickinson 2009 *Western New England Law Review* 111.

<sup>51</sup> Dickinson 2009 *Western New England Law Review* 99.

<sup>52</sup> Dickinson 2009 *Western New England Law Review* 99; Pedagogy in Action <https://serc.carleton.edu/sp/library/cases/what.html>.

<sup>53</sup> Dickinson 2009 *Western New England Law Review* 100.

<sup>54</sup> Schwartz <https://www.ryerson.ca/content/dam/learning-teaching/teaching-resources/teach-a-course/case-method.pdf>; Dickinson 2009 *Western New England Law Review* 99.

<sup>55</sup> McQuoid-Mason 1982 *Journal for Juridical Science* 165; University of Denver <https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method>.

<sup>56</sup> Pedagogy in Action <https://serc.carleton.edu/sp/library/cases/what.html>.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> Dickinson 2009 *Western New England Law Review* 109–110.

<sup>60</sup> Dickinson 2009 *Western New England Law Review* 112.

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Socratic methodology.<sup>61</sup> The significance hereof is that there is a constant exchange of information between lecturer and student. Theoretically speaking,<sup>62</sup> the Socratic and case dialogue methods however remain two different phenomena. As is indicated below, despite using a combination of these two methods, they remain ineffective in providing students with skills training in procedural law modules. In pursuing the appropriate method of teaching procedural laws, it is important to explore the needs of the constituencies of law graduates.

#### 4      WHAT DO CONSTITUENCIES WANT?

Greenbaum calls for collaboration between the legal profession, which regulates the post-degree vocational training phase, and the academy, which controls the foundational education phase.<sup>63</sup> Before the effectiveness of teaching procedural modules to law students according to the Socratic and case dialogue methods can thus be evaluated, one needs to appraise the needs of the primary constituencies of law graduates.<sup>64</sup>

Not all law students will pursue a career in litigation after the completion of their LLB studies. The mere fact that they are legally trained may nonetheless place most of them in careers where they will be associated with litigious practices, such as legal advisers or corporate lawyers who will serve as their employers' point of contact with practising attorneys or advocates. Training in civil and criminal litigation processes and the production and admissibility of evidence are therefore required.

Schultz indicates that an educator's primary obligation is to consider what lawyers, as members of a privileged profession, should know.<sup>65</sup> The legal practice called for improvement in law graduates' procedural skills.<sup>66</sup> Chaskalson states that

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<sup>61</sup> McQuoid-Mason 1982 *Journal for Juridical Science* 164.

<sup>62</sup> University of Denver <https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method>.

<sup>63</sup> Greenbaum "Current Issues in Legal Education: A Comparative Review" 2012 23(1) *South African Law Journal* 16 26.

<sup>64</sup> Potential constituencies identified during a study include the public served, students, employers of law graduates, law schools, applicants for admission, taxpayers, alumni, courts, all the role players in the legal profession and the university. See Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* (2016) 17.

<sup>65</sup> He theorises this as more important than heeding the demands of legal practice councils. Schultz "Teaching 'Lawyering' to First-Year Law Students: An Experiment in Constructing Legal Competence" 1996 52(5) *Washington and Lee Law Review* 1643 1662.

<sup>66</sup> In this regard, see Vukovich "Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" 1971 23 *Case Western Reserve Law Review* 140 140; Redding "The Counterintuitive Costs and Benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 55; Holmquist "Challenging Carnegie" 2012 61(3) *Journal of Legal Education* 353 353; Du Plessis "Designing an Appropriate and Assessable Curriculum for Clinical Legal Education" 2016 49(1) *De Jure* 1 1; Greenbaum "Re-Visioning Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with the Challenges of our Educational Legacy" (undated) <http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Greenbaum.pdf> (accessed 2019-05-28) 10; Biggs and Hurter "Rethinking Legal Skills Education in an LLB Curriculum" 2014 39(1) *Journal for Juridical Science* 1 2, 3; Engler "The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow" 2001 8 *Clinical Law Review* 109 115. This is not only a concern as far as the legal profession is

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“[I]aw graduates emerge from the university with a theoretical training, but without any basic knowledge of, or practical training directed specifically to, the practice of law.”<sup>67</sup>

At the LLB Summit of 2013,<sup>68</sup> it was indicated that law faculties are not producing law graduates who can further a justice and rights culture.<sup>69</sup> Members of the bench, practitioners, and some educators noted that newly graduated law students lack the necessary practical knowledge, skill, and ingenuity required of a practising attorney.<sup>70</sup> Inadequate cross-examination skills, lamented by the court as disturbing,<sup>71</sup> troubling and the rendering of questionable legal services, further informs the need for meticulous training. The court criticised the legal representative for conducting the trial “[w]ith no

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concerned, but also in other fields and professions – see Griesel and Parker “Graduate Attributes: A Baseline Study on South African Graduates from the Perspective of Employers” 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 in this regard.

<sup>67</sup> Chaskalson “Responsibility for Practical Legal Training” 1985 (March) *De Rebus* 116 116.

<sup>68</sup> Whitear-Nel and Freedman “A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics” 2015 21(2) *Fundamina* 237. Also see 239 in this regard, where the role of higher education, with regards to societal development and transformation, is discussed. It is stated that, at a 2010 summit, held by the Department of Higher Education and Training, it was agreed that it was the duty of higher education to produce socially responsible graduates who are well aware of their roles in society. They must further be made aware that they are leaders of economic development and social transformation. It was further agreed that the curricula of universities should therefore endorse social relevance, as well as enable and motivate students to become socially engaged leaders and citizens. It is submitted that experiential learning, especially at law clinics, can significantly enhance the teaching and learning of law students in this regard.

<sup>69</sup> It must be made clear that the aim of this article is not to discredit the competency of law schools in any way. In this regard, also see Kennedy “How the Law School Fails: A Polemic” 1971 1(1) *Yale Review of Law and Social Action* 71 71. He states the following: “Let me begin with a brief statement of the values to which I appeal. First, I am very glad to be a member of the community of the Law School; my motives in writing are anything but destructive. I would like to do something to improve our lives as people living together; if the critique is at times bitter, it is with that hope. It would not have occurred to me to write this paper if I did not think I could appeal to the sense of moral obligation which underlies the concepts of ‘teacher’ and ‘lawyer,’ and to the urge for craftsmanlike ‘effectiveness’ combined with social responsibility which brings most students here.”

<sup>70</sup> Vukovich 1971 *Case Western Reserve Law Review* 140; Snyman-Van Deventer and Swanepoel “The Need for a Legal-Writing Course in the South African LLB Curriculum” 2012 33(1) *Obiter* 121 121; Manyathi “South African LLB Degree Under Investigation” 2010 (April) *De Rebus* 8 8; Chamorro-Premuzic and Frankiewicz “Does Higher Education Still Prepare People for Jobs?” (7 January 2019, revised 14 January 2019) <https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs> (accessed 2020-02-13); SASSETA Research Department “SASSETA Research Report: Assessment of Learning Conditions of Candidate Attorneys During a Transformation Attempt” (March 2019) <https://www.sassetta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf> (accessed 2020-01-14) 30–31. SASSETA specifically commented on the “very sloppy” work and initiative of some candidate attorneys. In this regard, it must be kept in mind that most candidate attorneys just came from university law school training and therefore, this may reflect on the training received while at university.

<sup>71</sup> *Motsagki v S* (2013/ A5043) [2014] ZAGPJHC 260 (14 October 2014) <http://www.saflii.org/za/cases/ZAGPJHC/2014/260.html> (accessed 2019-11-27).

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plan or objective and was either blind to or inattentive to several material or potentially material details.”<sup>72</sup>

It is submitted that these inadequacies can be addressed by inculcating with students the core values that every competent lawyer must embrace, which include the following:

- (a) the provision of competent representation;
- (b) striving to promote justice, fairness, and morality;
- (c) striving to improve the profession;
- (d) professional and self-development;
- (e) judgment;
- (f) professionalism;
- (g) civility; and
- (h) conservation of the resources of the justice system.<sup>73</sup>

Holmquist,<sup>74</sup> in response to the Carnegie Report,<sup>75</sup> conducted a survey among legal practitioners, judges, and mediators in the USA, questioning “[w]hat lawyering skills don’t law schools teach that we should?”<sup>76</sup> The following were in main suggested by the participants:

- (a) law students must learn to recognise the complexity and desired outcomes of their clients’ stories;<sup>77</sup>
- (b) law students must have a broad historical and contemporary knowledge about the roles of legal practitioners in relation to their clients, different institutions, and society;<sup>78</sup> and
- (c) law students must develop the necessary confidence and judgment emanating from experience.<sup>79</sup>

In law school, students are taught to “think like lawyers”,<sup>80</sup> but are not necessarily instilled with the competency to execute their knowledge in practical situations. Wizner observes

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<sup>72</sup> Par 65.

<sup>73</sup> See Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 38, who conducted research across multiple jurisdictions to identify core values for application in South Africa.

<sup>74</sup> Holmquist 2012 *Journal of Legal Education* 353 353.

<sup>75</sup> See Silverthorn <https://www.2civility.org/carnegie-report-live-like-lawyer/> with regards to the Carnegie Report and its importance, which is summarised as follows: “Almost ten years ago, a group of non-profit educators released what’s come to be known as the law school ‘Carnegie Report’. The report, actually titled ‘Educating Lawyers Preparation for the Profession of Law’, was part of a series of professional education reform reports produced by the Carnegie Foundation for the Advancement of Teaching. In all its reports, Carnegie broke down professional education into three apprenticeships – cognitive ..., practical ... and identity ... A successfully integrated curriculum combines all three apprenticeships, intellectual, practical and professional. And that last, the professional identity part, is crucial.”

<sup>76</sup> Holmquist 2012 *Journal of Legal Education* 353.

<sup>77</sup> *Ibid.*

<sup>78</sup> Holmquist 2012 *Journal of Legal Education* 354.

<sup>79</sup> *Ibid.*

<sup>80</sup> Boon “Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus” 2002 5(1 & 2) *Legal Ethics* 34; Sullivan *et al* *Educating Lawyers* 5. Sullivan *et al* *Educating Lawyers* 6, states that “[m]ost law schools give only casual attention to

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“[I]earning to think like a lawyer is only part of what a law student needs to learn in order to be a well-educated lawyer.”<sup>81</sup>

Boon refers to a Law Society proposal that

“ethics, together with knowledge and skills, should form the core elements of the legal education and training of solicitors ‘from the cradle to the grave’”.<sup>82</sup>

Legal practitioners have remarked that law students, upon exiting law school, lack the basic practical skills that would enable them to make a good start in practice. In the South African landscape, O'Regan stated that the lives of law graduates

“[a]re determined in a real sense by the skills and habits that they have acquired at law school”

and that

“much of the test of what constitutes a competent lawyer is skills-based rather than content-based”.<sup>83</sup>

Legal education may become aimless, in furthering the legal profession as a whole, when law schools neglect to introduce students to practical skills, particularly concerning procedural modules.<sup>84</sup> Some practical aspects, such as drafting and consultation, are occasionally employed in selected doctrinal courses, generally as stand-alone courses at most universities.<sup>85</sup> There is thus no general integration of practical aspects into all doctrinal modules and consequently no opportunity for the students to observe and experience the law in action during the greatest part of their legal studies. Law faculties, therefore, produce law graduates who lack the required practical skills in order to practise as competent legal practitioners.<sup>86</sup>

As it was indicated that law faculties are generally not committed to preparing law students for legal practice,<sup>87</sup> the LLB curriculum needs to be developed in order to accommodate the more adequate and professional preparation of law students for legal practice. The procedural law modules

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teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.” In the same context, it is stated that “[I]aw school's typically unbalanced emphasis on the one perspective can create problems as the students move into practice.” The case dialogue method also contributes to the students' abilities to “think like lawyers” – see University of Denver <https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method>.

<sup>81</sup> Wizner 2002 *Fordham Law Review* 1931.

<sup>82</sup> Boon 2002 *Legal Ethics* 34 34.

<sup>83</sup> O'Regan 2002 “Producing Competent Graduates: The Primary Social Responsibility of Law Schools” 2002 *South African Law Journal* 242 247.

<sup>84</sup> Stuckey *et al* *Best Practices for Legal Education* vii.

<sup>85</sup> Holmquist 2012 *Journal of Legal Education* 356.

<sup>86</sup> Vukovich 1971 *Case Western Reserve Law Review* 141; Holmquist 2012 *Journal of Legal Education* 356.

<sup>87</sup> *Ibid.*

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are at the heart of legal practice and should be the focus of such development.<sup>88</sup> After evaluating the effectiveness of the Socratic and case dialogue teaching methodologies, it is indicated below that the curricular development will be effected by the introduction of required practical skills in procedural courses.

## 5 EFFECTIVENESS OF THE SOCRATIC AND CASE DIALOGUE TEACHING METHODOLOGIES RELATING TO PROCEDURAL LAW MODULES

The discussion above clearly indicates that legal education neglects the teaching and application of practical skills in procedural courses. The question is whether law schools, by using the Socratic and/or case dialogue methodologies, are training law graduates in such a manner that will enable them to enter the legal profession with the required legal knowledge, professional mindset, and appropriate practical skills?

An academic, who remains anonymous, has commented that the current law curriculum, where these methodologies are mainly utilised, is producing “legal barbarians” who might be trained in law, but who are not equipped to appreciate the true functioning of a lawyer with regards to society and the existing power dynamics.<sup>89</sup> Wade agrees, stating that emphasis on these teaching methodologies results in the

“[o]ld Langdellian model of a law school – segregated physically, lost in rarefied appellate casebooks, with little knowledge, skill, resources or desires to achieve multiple levels of competency in students.”<sup>90</sup>

Wizner correctly states that reliance cannot be placed on the case dialogue methodology, as students are constantly referred to past cases in order to predict what may happen in the future, instead of being taught the underlying methods and principles of legal thought that bring about legal decisions.<sup>91</sup> This is especially important because the law does not remain static but is constantly changing and evolving in ways that cannot be predicted by studying appellate decisions of the past.<sup>92</sup> Graduates are, as a result, left without proper practical knowledge of how to communicate with clients,<sup>93</sup>

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<sup>88</sup> In this regard, see McQuoid-Mason 1982 *Journal for Juridical Science* 160, where he states that “[c]ivil procedure is said to lie at the heart of the law.” The same can be said about Criminal Procedure and the Law of Evidence. In any litigious case, procedure and evidence play a central role.

<sup>89</sup> Du Plessis 2016 *De Jure* 2.

<sup>90</sup> Wade “Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges” 1994 5(2) *Legal Education Review* 173 182. The term “Langdellian” refers to Professor Christopher Columbus Langdell.

<sup>91</sup> Wizner 2002 *Fordham Law Review* 1931.

<sup>92</sup> *Ibid.*

<sup>93</sup> Stuckey states that most law graduates are not competent to provide legal services or to perform work expected of them in law firms. These legal services would include communication and drafting. See Stuckey *et al* *Best Practices for Legal Education* 26, stating “[t]oday there is much less tolerance for a lack of client and communications skills; ...”

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how to draft, or even what to draft, as well as when to draft it.<sup>94</sup> Drafting is an important part of client representation, as it is a form of communication between the legal representatives of clients.

From the above discussion, it is clear that although real and complex problems are used in the case dialogue method, and although lecturers discuss topics with students during classroom sessions by way of the Socratic method, these methods of teaching remain mainly theoretical. It is submitted that the answer to the question posed above is negative. By primarily utilising these methodologies, the needs of constituencies remain unmet. The Carnegie Foundation also proposed significant curricular and pedagogical changes to American legal education, for this reason, aiming primarily at more real-world training, skills training, and more effective teaching methodologies.<sup>95</sup>

## 6 CONTEMPLATING DEFICIENCIES TOWARDS A REMEDY

In order to remedy the shortcomings identified in law schools' teaching methods by way of the Socratic and case dialogue teaching methodologies, specifically pertaining to the presentation of the procedural law modules, what is taught and especially how it is taught requires some reflection.<sup>96</sup>

It is submitted that law schools cannot teach students everything that they need to know about the law and legal practice.<sup>97</sup> However, law schools can lay a proper foundation on which legal practice can build after the student's exit from university, which should include having a broader insight of what it would mean to represent clients. Stuckey identifies this foundation as including "[a]n integrated combination of substantive law, skills, and market knowledge ...",<sup>98</sup> further remarking that "[l]egal education is to prepare law students for the practice of law as members of a client-centered public profession."<sup>99</sup> In this context, law schools should consider the following approach:

"A more adequate and properly formative legal education requires a better balance among the cognitive, practical and ethical-social apprenticeships. To achieve this balance, legal education will have to do more than shuffle the existing pieces. It demands their careful rethinking of both the existing curriculum and the pedagogies law schools employ to produce a more coherent and integrated initiation into a life in the law."<sup>100</sup>

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<sup>94</sup> See Vukowich 1971 *Case Western Reserve Law Review* 140 152, as well as Stuckey *et al* *Best Practices for Legal Education* 26 in this regard. Vukowich states that, if law graduates do not get practical experience, such graduates will be "[i]ll-equipped to artistically skillfully represent ... clients."

<sup>95</sup> Klaasen "From Theoretician to Practitioner: Can Clinical Legal Education Equip Students with the Essential Professional Skills Needed in Practice?" 2012 2(19) *International Journal of Humanities and Social Science* 306.

<sup>96</sup> Also see Boon 2002 *Legal Ethics* 35 in this regard.

<sup>97</sup> Also see Stuckey *et al* *Best Practices for Legal Education* 7.

<sup>98</sup> Stuckey *et al* *Best Practices for Legal Education* viii. Also see Sullivan *et al* *Educating Lawyers* 8 in this regard.

<sup>99</sup> *Ibid.*

<sup>100</sup> Stuckey *et al* *Best Practices for Legal Education* 4.

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The law, as well as procedure, should not be taught in a vacuum consisting only of substantive rules, but in close connection to human experience in everyday life.<sup>101</sup> Hyams opines that law schools have not been very successful in integrating knowledge of substantive law, as well as skills, with subsequent stages of a practitioner's professional career.<sup>102</sup> Kennedy highlights this much-needed social contextual tuition when he states:<sup>103</sup>

"I would like to improve our lives as people living together; if critique is at times bitter, it is with that hope. It would not have occurred to me to write this paper if I did not think I could appeal to the sense of moral obligation which underlies the concepts of "teacher" and "lawyer", and to the urge for craftsmanlike "effectiveness" combined with social responsibility which brings most students here."

It, however, appears that the desired outcomes of legal education, at the university level, are not fully appreciated. There could be many reasons for this, including the following:

- (a) law schools do not have staff members who are experienced in training students for legal practice;<sup>104</sup>
- (b) law schools do not include skills training, legal ethics, and legal professionalism in their curricula, but focus solely on instilling substantive law with the students;<sup>105</sup> and
- (c) law schools have practical programmes, which include basic elements of skills training, ethics, and legal professionalism, in their curricula, but these programmes are presented too late during the years of study and only for a short duration.<sup>106</sup>

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<sup>101</sup> See Hyams "On Teaching Students to 'Act Like Lawyer': What Sort of a Lawyer?" 2008 *Journal of Clinical Legal Education* 22 in this regard. CLE excels in this regard, as students have the opportunity to experience interactions with clients, their emotions and their perceptions of their own matters, as well as the outcomes they would want to see in such matters. This is in sharp contradiction with the case dialogue method, that is discussed in 3 3, as the facts of clients' cases are almost never neatly arranged and presented as such to students.

<sup>102</sup> Hyams 2008 *Journal of Clinical Legal Education* 25.

<sup>103</sup> Kennedy 1971 *Yale Review of Law and Social Action* 71 71. At the time of writing this article, Duncan Kennedy was a student at the Yale Law School.

<sup>104</sup> In this regard, see Vukovich 1971 *Case Western Reserve Law Review* 143, where it is stated that "[l]egal educators are persons who – though they possess the credentials to practice law – have decided that law practice is not their "cup of tea." One could thus assume that they see more merit in the intellectual than in the practical. Among most law school faculties, professional experience ranks relatively low among the qualifications for faculty employment. Consequently, many legal educators have little practical experience themselves and are unable or disinclined to teach practical matters. Since the materials which are emphasised in any curriculum are those which the educators are best able or most eager to teach, the faculty's paucity of interest and experience in practice is a prime cause for the lack of any meaningful practical training in law school." Also see Marson, Wilson and Van Hoorebeek "The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective" 2005 *Journal for Clinical Legal Education* 29 30 in this regard.

<sup>105</sup> Kruse "Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice" 2013 45 *McGeorge Law Review* 8.

<sup>106</sup> These "practical programs" refer mainly to CLE. At NMU, North-West University, University of Johannesburg and the University of Pretoria, CLE is presented in the final academic year and involves *inter alia* practical sessions at the university law clinic. See Nelson Mandela

Accordingly, the end result of a successfully completed LLB degree is a graduate who does not possess a proper understanding of real-life factual situations or how to interact with them.<sup>107</sup> Although law lecturers are good at utilising the casebook method and conventional doctrinal lecture methods, they do not teach students how to engage with the daily activities of a legal practitioner,<sup>108</sup> including engagement with civil procedure, criminal procedure, and aspects of evidence in a practical way. The case dialogue methodology emphasises neatly edited cases but excludes complicated and confusing human facts that legal practitioners so often have to deal with.<sup>109</sup> The work is therefore compartmentalised into "neat and artificial categories" for students.<sup>110</sup> This is very different from practice, where facts must be collected, collated, analysed, verified, and expressed in various forms, including by way of correspondence and as part of arguments during litigation.<sup>111</sup>

These deficiencies affect students significantly when pursuing their careers after graduation.

## 7 STUDENT PERSPECTIVE

Civil procedure has been described by students as being tough,<sup>112</sup> as well as "[t]he most mystifying, frustrating, and difficult course ...".<sup>113</sup> At university, students study procedural laws as far as basic substantive principles are concerned, but nothing more. In the teaching of the law of evidence, for example, there is no practical application of the principles to actual exhibits, as it would pertain to actual courtroom scenarios. Students, therefore, enter legal practice without any experience in interpreting evidence, the actual procedures used to gather and preserve such evidence, as well as how to consider all evidence in a particular case from a holistic perspective, instead of piecemeal.<sup>114</sup> The risk in neglecting the practical application during teaching is that students may develop into legal practitioners, and even presiding officers, who struggle to apply the rules of evidence.<sup>115</sup> This unfortunate situation has another side effect: legal practitioners, who attempt

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University LLB curriculum (2019) <https://www.mandela.ac.za/academic/Courses-on-offer/Qualification-Details.aspx?appqual=LL&qual=54100&faculty=1500&ot=A1&cid=72> (accessed 2019-01-22), North West University LLB curriculum (undated) <http://law.nwu.ac.za/sites/law.nwu.ac.za/files/files/Law/The%20LLB%20curriculum.pdf> (accessed 2019-01-22); University of Pretoria LLB-curriculum "Undergraduate Faculty Brochure 2019/2020" (2019) [https://www.up.ac.za/media/shared/10/ZP\\_Files/fb-law-2019-2020.zp165426.pdf](https://www.up.ac.za/media/shared/10/ZP_Files/fb-law-2019-2020.zp165426.pdf) (accessed 2019-01-22) in this regard. Some programmes may only be for a semester, but even where it is for a year, it does not present sufficient time in which students can acquire sufficient practical skills.

<sup>107</sup> Vukovich 1971 *Case Western Reserve Law Review* 140–141.

<sup>108</sup> Holmquist 2012 *Journal of Legal Education* 355.

<sup>109</sup> Holmquist 2012 *Journal of Legal Education* 357.

<sup>110</sup> McQuoid-Mason 1982 *Journal for Juridical Science* 161.

<sup>111</sup> *Ibid.*

<sup>112</sup> Oppenheimer "Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution" 2016 6(1) *Journal of Legal Education* 817 817.

<sup>113</sup> *Ibid.*

<sup>114</sup> See Uphoff *et al* 1997 *University of Cincinnati Law Review* 381 392 in this regard.

<sup>115</sup> Uphoff *et al* *University of Cincinnati Law Review* 392.

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to learn the principles of evidence and application thereof whilst practising, may blindly follow the application thereof by the mentioned practitioners and presiding officers.<sup>116</sup> Consequently, they do not know when certain pieces of evidence should be permitted or excluded, as they do not adequately understand the principles of the law of evidence.<sup>117</sup>

It is therefore critical to consider appropriate skills training in procedural courses.

## 8 SKILLS TRAINING

How should law graduates be trained to enter legal practice with adequate knowledge and practical skills? A possible point of departure is the realisation that the skills and values of competent legal practitioners are developed continuously. It commences before entry into law school<sup>118</sup> and continues for the duration of the legal practitioner's professional career, with its most critical and formative stage in the course of the law school years.<sup>119</sup> Therefore, the training provided at the university level should be of such a nature that it shapes the student into a competent and professional thinking legal practitioner who can render quality legal services to the public.<sup>120</sup> Kruse shares this point of view, stating that “[t]he basic program of legal education needs to be restructured to move students in an orderly way through the acquisition of basic legal knowledge, essential lawyering skills, and underlying professional values.”<sup>121</sup> This aligns with Stuckey's question:

“Have we really tried in law school to determine what skills, what attitudes, what character traits, what quality of mind are required of lawyers? Are we adequately educating students through the content and methodology of our present law school curriculums to perform effectively as lawyers after graduation?”<sup>122</sup>

It is submitted that the substantive part of procedural courses can be presented by using a combination of the Socratic and case dialogue methodologies. These must, however, be combined with practical applications where students will develop the required practical application skills.

In most instances, the basic skills of procedural law in practice are only instilled with prospective legal practitioners when they enter legal practice

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<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> Wizner 2002 *Fordham Law Review* 1929 1931. In this regard, the author probably refers to whether or not a particular person possesses traits of professionalism in very early stages of his or her life. Such traits are then developed during his or years of legal studies and during the years of legal practice.

<sup>119</sup> Stuckey *et al* *Best Practices for Legal Education* vii.

<sup>120</sup> See Lamparello “The Integrated Law School Curriculum” 2015 *SSRN Electronic Journal* 1 4. He suggests that “[t]he curriculum should effectively integrate doctrinal, practical skills, and clinical instruction to create a competency-based curriculum in which students practice like lawyers.”

<sup>121</sup> Kruse 2013 45 *McGeorge Law Review* 8.

<sup>122</sup> Stuckey *et al* *Best Practices for Legal Education* vii.

after graduating from university.<sup>123</sup> This means that a newly registered candidate legal professional will not have any experience in executing even the most basic courtroom procedures when required to do so. The principal of a candidate legal practitioner, as well as other staff members at the firm where the candidate legal practitioner is employed, or staff of the particular court, will have to provide guidance throughout such proceedings. Skills training should therefore be presented throughout the course of legal studies at the tertiary level.

A research study across multiple international jurisdictions identified essential skills that law graduates should have or would need when entering the legal profession.<sup>124</sup> The study further details the skills that are, or should be, taught in South African CLE programmes.<sup>125</sup> Skills required, integral to litigation practice,<sup>126</sup> will include language, communication, writing, and legal reasoning.<sup>127</sup>

Without skills training, it is questionable as to whether universities are contributing toward producing graduates who are reasonably fit for practice and litigation. In this regard, Gravett states that “[i]f university law schools fail to contribute to establishing a substantial body of competent trial lawyers, our failure will ultimately take its toll on our system of justice.”<sup>128</sup>

Identified skills, as they can be developed through the teaching of procedural laws, will be discussed below. The importance of cultural, social,

<sup>123</sup> It is acknowledged that some such skills may be acquired when students are trained in clinical courses by observing their clinicians. However, due to the students' lack of rights of court appearance, these will only be by way of observation, which may be limited, as students' university timetables may prevent them from attending court appearances in cases that they worked on in the clinic – see Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 23.

<sup>124</sup> Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 44–53. These are ethics; practice management; case management; interviewing skills; the capacity to deal sensitively and effectively with clients, colleagues and others from a range of social, economic and ethnic backgrounds and disabilities; effective communication techniques; recognition of clients' financial, commercial and personal constraints and priorities; effective problem-solving; to be able to use current technologies; legal research; time management and billing; to manage risk; to recognise personal strengths and weaknesses and to develop strategies to enhance personal performance; to manage personal workload and the number of client matters (clinicians must set the example – if you are a teacher, then limit client intake to teach efficiently); work as part of a team (pairing of students or to do some activities in a group in the clinic are therefore valuable); problem solving; legal analysis and reasoning; factual investigation; counselling (to establish a counselling relationship with a client); negotiation; and the skills applicable to litigation and alternative dispute resolution procedure, i.e., trial advocacy.

<sup>125</sup> These skills can be summarised as: professional and ethical conduct, consultation skills, file and case management, numeracy skills, practice management, legal research, alternative dispute resolution and trial advocacy. The following drafting skills are included – letters, pleadings, notices and applications, wills and contracts. For full details of the summary provided here, see Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools*.

<sup>126</sup> The so-called “vocational skills”.

<sup>127</sup> Whitear-Nel and Freedman 2015 *Fundamina* 234 243. For a more circumspective discussion of thinking and logical reasoning, see Palmer and Crocker *Becoming a Lawyer – Fundamental Skills for Law Students* 2ed (2007) 9–18.

<sup>128</sup> Gravett “Pericles Should Learn to Fix a Leaky Pipe – Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 2) 2017 21 *Potchefstroom Electronic Law Journal* 1 1.

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and human elements is however of the utmost importance throughout the application of the various skills.

## 9 THE IMPORTANCE OF CULTURAL, SOCIAL, AND HUMAN ELEMENTS IN THE CONTEXT OF PROCEDURAL LAW MODULES

Students study countless legal doctrines and legislation by reading textbooks and other relevant material. However, the law does not exist in the abstract and should be understood in its relationship with individual people, as well as society.<sup>129</sup> Van Marle and Modiri state the following:<sup>130</sup>

“South African law schools need a decidedly dynamic and radically different curriculum which does not lock students into a teaching style based on traditional modes of analysis and ill-defined learning outcomes, but rather opens them up to a diversity of approaches and places an emphasis on certain social and ethical commitments that underlie any democratic legal system.”

Students must come to realise that lawyers are human beings with human identities and that their life experiences, including their values and sense of ethics in their private lives, inform their actions.<sup>131</sup> This may cause personal tension when a lawyer argues the law on behalf of a client where his/her personal values contrast with the position (s)he is arguing.<sup>132</sup> Students, in appreciating the importance of social and human elements in legal practice, are faced with a theoretical debate where they must choose “whether the best question to ask is ‘what, as lawyers, are we morally required to do’, or ‘what kind of lawyer should we be?’”<sup>133</sup>

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<sup>129</sup> Bon “Examining the Crossroads of Law, Ethics, And Education Leadership” 2012 22 *Journal of School Leadership* 285 293; Kahn “Freedom, Autonomy, and the Cultural Study of Law” 2001 13 *Yale Journal of Law and the Humanities* 141 141. Kahn states that “[t]he rule of law ... is not just a set of rules to be applied to an otherwise independent social order. Rather, law is, in part, constitutive of the self-understanding of individuals and communities.”

<sup>130</sup> Van Marle and Modiri 2012 *South African Law Journal* 212. Also see Modiri “The Crises in Legal Education” 46(3) 2014 *Acta Academica* 1 1 in this regard, where it is stated that “[t]he value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and judiciary, but rather how it contributes to a new jurisprudence suited to the legal, *social* [own emphasis] and political transformation of South Africa.” Although the author’s point of view relating to the legal profession and judiciary is not acceptable for purposes of this treatise, it is submitted that he is correct as far as social transformation is concerned.

<sup>131</sup> Webb “Conduct, Ethics and Experience in Vocational Legal Education” in *Ethical Challenges to Legal Education and Conduct* (1990) quoted in Kerrigan “How Do You Feel About This Client? A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students” 2007 *International Journal of Clinical Legal Education* 136; Mnyongani “Whose Morality? Towards A Legal Profession with An Ethical Content That Is African” 2009 *SA Public Law* 131, indicates “the code of professional ethics regulates the life of a lawyer only in his or her professional life”, but does not equate to cultural norms, turning lawyers into moral schizophrenics attempting to integrate the ethics in their professional and private lives.

<sup>132</sup> For a full discussion, see Parker and Evans *Inside Lawyers Ethics* 3ed (2018).

<sup>133</sup> Webb in Kerrigan “How Do You Feel About This Client? A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students” 2007 *International Journal of Clinical Legal Education* 130. Also see 141–142 for a discussion on what it means to be an

Western philosophy compartmentalises knowledge,<sup>134</sup> distinguishing between a lawyer's professional and private life. In practice, lawyers follow the guidelines of their professional codes, but they follow their cultural ethos in their private lives.<sup>135</sup> Mnyongani suggests that Western philosophy embraces individual autonomy, whereas African philosophy focuses on reality overall.<sup>136</sup> These two different views have an effect on students entering the profession, as all may not easily embrace Western norms.<sup>137</sup> As culture is not immutable, but rather dynamic and flexible,<sup>138</sup> language and culture play a large role in preparing students to enter the profession.<sup>139</sup> Acknowledging the role of culture in informing someone's sense of morality and ethics,<sup>140</sup> Mnyongani suggests that the profession "embark on a journey of 'decolonising' their minds", by debating what it means to be African in a profession with a Western approach, ethos, and orientation.<sup>141</sup> Such a journey should already start during the study of procedural laws.

Webb correctly calls the treatment of everyone as "universally the same" a travesty of responsibility.<sup>142</sup> An authentic ethic of responsibility means that a lawyer must be primarily sensitive to the needs and situations of a specific person.<sup>143</sup> In agreement with the Carnegie Report's discussion on "professional formation toward a moral core of service to and responsibility for others",<sup>144</sup> Cody holds that a lawyer's professional identity includes not only being responsible to individual clients, but to also contribute services to the community.<sup>145</sup> The inclusion of responsibility to the community means

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ethical human being, suggesting three connected commitments, namely authenticity, responsibility and choice. He further indicates that an authentic ethic of responsibility requires us to be fully responsible for the entirety of our representation, not just to our clients, but also others who may be affected by the representation.

<sup>134</sup> Menkel-Meadow "Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law" 1987 42(1) *University of Miami Law Review* 29 31.

<sup>135</sup> Menkel-Meadow 1987 *University of Miami Law Review* 31.

<sup>136</sup> Mnyongani 2009 SA *Public Law* 125.

<sup>137</sup> *Ibid.*

<sup>138</sup> Smith and Tivaringe "From Afro-Centrism to Decolonial Humanism and Afro-Plurality. A Response to Simphiwe Sesanti" 2018 62 *New Agenda* 41 42.

<sup>139</sup> Mnyongani 2009 SA *Public Law* 125.

<sup>140</sup> Fataar "Decolonising Education in South Africa: Perspectives and Debates" 2018 7 (Special edition June) *Educational Research for Social Change* i vii.

<sup>141</sup> Mnyongani 2009 SA *Public Law* 133–134. Indigenous law was relegated to a subordinate role with the imposition of Roman Law, Roman-Dutch Law and English Law into South African Law. See Van Niekerk "The Status of Indigenous Law in the South African Legal Order: A New Paradigm for the Common Law?" 2002 *Codicillus* 5–6.

<sup>142</sup> Webb in Kerrigan "How Do You Feel About This Client? A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students" 2007 *International Journal of Clinical Legal Education* 148.

<sup>143</sup> *Ibid.*

<sup>144</sup> The Carnegie Foundation for the Advancement of Teaching. See Hamilton and Monson "Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)" 2012 *University of St Thomas Law Journal* 332.

<sup>145</sup> Cody "What Does Legal Ethics Teaching Gain, If Anything, From Including a Clinical Component?" 2015 *International Journal of Clinical Legal Education* 4; Hyams 2008 *International Journal of Clinical Legal Education* 21 confirms this understanding that all professionals have an obligation to contribute to the community in some form. In South Africa duties towards the poor in the form of access to justice, forms part of the

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that lawyers' sense of who they are, and what it means to them to be a lawyer, will form part of their professional values.<sup>146</sup>

Studies on legal education identify embedding cultural literacy in students as a core skill,<sup>147</sup> where different perspectives can also serve to reduce feelings of marginalisation among students with diverse backgrounds.<sup>148</sup>

Holmquist summarises this section accurately when she states the following:

"If, as these literatures assert, law is a manifestation of more general social and cultural forces, and lawyering is but a version of human problem solving and persuasion, then thinking like a lawyer is far more multi-faceted and content-laden than the doctrinal analysis and application most first-year law students master ..."

The concepts of Africanisation and decolonisation of the law of procedure and evidence do not form part of the conventional curriculum.<sup>149</sup> As these may affect cases, leading to potential changes to the law, a study of these concepts should be included in procedural curricula.<sup>150</sup>

A plea for social elements, to be introduced in the law curriculum was advanced by Kahn-Freund during the 1960s,<sup>151</sup> criticising the inherent educational dangers of employing the case method where students will read cases that are typically about very serious issues, but where very little is stated about the economic, social, and cultural life of the parties involved.<sup>152</sup> Students may view the reality of the law in a "distorted mirror",<sup>153</sup> expected to know the intricacies of the law without appreciating the basic principles of

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requirements of professional and ethical conduct – see De Klerk (ed) *Clinical Law in South Africa* (2006) 50–52.

<sup>146</sup> Cody 2015 *International Journal of Clinical Legal Education* 9. For a full discussion see Webb in Kerrigan "How Do You Feel About This Client? A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students" 2007 *International Journal of Clinical Legal Education*; also see Klein, Wortham and Blaustone "Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals" 2012 *International Journal of Clinical Legal Education* 105 105–147.

<sup>147</sup> Polistina "Cultural Literacy. Understanding and Respect for the Cultural Aspects of Sustainability" (2009) [http://arts.brighton.ac.uk/\\_data/assets/pdf\\_file/0006/5982/Cultural-Literacy.pdf](http://arts.brighton.ac.uk/_data/assets/pdf_file/0006/5982/Cultural-Literacy.pdf) (accessed 2022-06-25) 1–6. Polistina identifies four key cultural literacy skills namely: (1) cross-cultural awareness which includes the ability to examine other cultures critically; (2) local cultural awareness, the ability to accept and respect knowledge within local cultures and communities; and (3) critical reflective thinking, a dialogue between students and clinicians on aspects of cultural or social discourse, where the experiences of the group as a whole are considered. For a discussion on cultural literacy in view of globalisation see Shliakhovchuk "After Cultural Literacy: New Models of Intercultural Competency for Life and Work in a VUCA World" 2019 *Educational Review* 1–33.

<sup>148</sup> Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 126. Many clinical teachers have recognised the importance of teaching diversity issues in the clinic.

<sup>149</sup> Also see McQuoid-Mason 1982 *Journal for Juridical Science* 160 161 in this regard.

<sup>150</sup> For a discussion on how cross-cultural skills can be introduced, see Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 125–128.

<sup>151</sup> Kahn-Freund "Reflections on legal education" 1966 29(2) *The Modern Law Review* 121 127–128.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

human life and existence, which have the potential to lead to solutions to simple legal problems.<sup>154</sup>

Identified skills, as they can be developed through the teaching of procedural laws, will be discussed.

## **10 IDENTIFIED ESSENTIAL SKILLS FOR DEVELOPMENT IN PROCEDURAL LAW MODULES**

### **10 1 General**

Although law schools invest effort in teaching students logic, analytical skills as well as reasoning in an attempt to chisel their intellectual skills,<sup>155</sup> such training remains unconvincing.<sup>156</sup> Essential skills should be developed for practical application within the procedural laws' curricula.

It is submitted that the following essential skills can be developed through the teaching of procedural laws: professionalism and ethical conduct; social justice; legal principles, and legal research; analytical argument; legal interviewing and counselling; cultural, social, and human awareness; settlement negotiations and mediation; counselling; legal drafting; reflection; communication; and the administration of justice. Students will develop the ability to recognise their clients' financial, commercial, and personal constraints in order to effectively advocate a case on behalf of a client, and recognise the effects of their actions on society at large, as well as the general performance and reputation of the legal profession.

The development of these skills will be illustrated by way of application in context, as indicated below.

### **10 2 The importance of the identified essential skills illustrated**

Skills training in professionalism and ethical conduct were indicated as minimum practice requirements,<sup>157</sup> as is the duty of lawyers to become

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<sup>154</sup> *Ibid.*

<sup>155</sup> Hyams 2008 *Journal of Clinical Legal Education* 22; Stuckey *et al* *Best Practices for Legal Education* 79.

<sup>156</sup> Hyams 2008 *Journal of Clinical Legal Education* 22. Also see Stuckey *et al* *Best Practices for Legal Education* 79 in this regard. Students, graduating from law schools, have not always been exposed to basic important skills relating to legal practice. Also see Kennedy "Legal Education As Training For Hierarchy" (2014) <https://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20HierarchyPolitics%20of%20Law.pdf> (accessed 2019-01-23) where it is stated that "[L]aw schools are intensely political places despite the fact that they seem intellectually unpretentious, *barren of ambition or practical vision of what social life might be* [own emphasis]."

<sup>157</sup> Hyams 2008 *Journal of Clinical Legal Education* 22, in referring to Noone and Dickson describing a professionally responsible person as *inter alia* someone who is competent to perform the work that they should, as well as someone who does not encourage the use of the law to bring about injustice, oppression or discrimination.

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involved in social justice issues in society,<sup>158</sup> skills, and values that can be incorporated into the teaching of substantive and procedural law.<sup>159</sup> However, Schneider states that the traditional way of teaching procedural courses neglects the social and human contexts.<sup>160</sup> It is submitted that these skills can be inculcated effectively as part of the teaching of procedural law modules.

Legal principles governing human interaction must be instilled in students.<sup>161</sup> Interviewing and consultation skills form the basis of all clients' cases.<sup>162</sup> It was indicated that

"In synergy [with interviewing skills], are the identified skills of ethics, the capacity to deal sensitively and effectively with clients from a range of social, economic and ethnic backgrounds and disabilities, effective communication techniques, recognition of clients' financial, commercial and personal constraints and priorities, effective problem-solving, legal research, time and risk management, to recognise personal strengths and weaknesses, legal analysis and reasoning, factual investigation and counseling skills".<sup>163</sup>

Students must therefore be taught to be mindful of their prospective clients' interests in order to ensure that proper legal advice and guidance are given in accordance with what the client really wants.<sup>164</sup> Generally, the assumption would probably be that a practitioner should consult with a client, listen closely to his or her account of events, and thereafter suggest legal remedies in order to solve the client's dilemma. However, such an assumption requires thoroughly honed skills in legal interviewing and counselling. There must be no assumptions about a client's knowledge or the emotional impact the case may have, that the client will be willing to accept certain risks, or even that the case is capable of a legal resolution. Possible stereotypical views such as the effects of race, class, and gender must be heeded.<sup>165</sup> By applying a client-centred approach, treating clients as persons and not just as legal problems, by showing empathy, will reflect a lawyer's social justice values and clients' rights to dignity.<sup>166</sup> Once the interviewing process is completed, appropriate steps toward resolving the case can be taken. In advising clients, counselling skills are honed when a lawyer talks to clients about their concerns, goals, and values, remembering that the legal work impacts other people, organisations, and companies. The process of advising will include the skills of legal analysis and strategy,<sup>167</sup>

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<sup>158</sup> McQuoid-Mason "The Four-Year LLB Programme and the Expectations of Law Students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: Some Preliminary Results from a Survey" 2006 27(1) *Obiter* 166 169.

<sup>159</sup> McQuoid-Mason 2006 *Obiter* 169.

<sup>160</sup> Schneider "Rethinking the Teaching of Civil Procedure" 1987 37(1) *Journal of Legal Education* 42.

<sup>161</sup> Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 355–356.

<sup>162</sup> Du Plessis "Clinical Legal Education: Interviewing Skills" 2018 *De Jure* 140 140–162.

<sup>163</sup> Du Plessis 2018 *De Jure* 143.

<sup>164</sup> For a full discussion on interviewing and counselling, see Du Plessis *Effective Legal Interviewing and Counselling* (2019).

<sup>165</sup> Du Plessis 2018 *De Jure* 147.

<sup>166</sup> Du Plessis 2018 *De Jure* 154.

<sup>167</sup> Du Plessis 2018 *De Jure* 157.

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and the sourcing of potential solutions, which may include legal and non-legal options.<sup>168</sup> This will further develop the skill of analytical argument.<sup>169</sup>

When these instructions do not form part of the teaching of procedural law modules, the implication is that students are brought under the impression that lawyers are only involved in litigation, whereas there is a lot more involved, such as settlement negotiations and mediation.<sup>170</sup>

Students should be instructed that when a divorce summons is served on a client, the practitioner should discuss the possibility of a settlement, honing consultation skills, before immediately defending the matter and proceeding with the usual subsequent pleadings, namely a Plea and Counterclaim. If so, settlement negotiations can be entered into with the other party or his legal representative, honing negotiation skills. Drafting skills become relevant when the deed of settlement is drafted. This process may result in stress and emotional relief, as well as cost-saving for the client, thereby addressing human elements directly. Settlement negotiations may also lead to a mediation process, a further practical skill that can be instilled with students.

Proper training in this regard will inculcate ethical professionalism in students, involving an altruistic commitment toward helping people in need, as well as treating them in an engaged, sensitive, and empathetic manner.<sup>171</sup> This directly involves legal ethics and professionalism in the teaching and practical upbringing of the students.

Active and experiential learning can yield positive results in this regard.<sup>172</sup> Simulations will enable students to view the crises of clients from their respective sides and may develop empathy with the situation in which a client may find himself.<sup>173</sup>

Civil procedure should therefore not be restricted to technical questions relating to the most effective way of dealing with and solving disputes, but should also include considerations of what a party wants to achieve in society.<sup>174</sup> Students must therefore be taught that, although the law provides for it, litigation is not the only route that a client may want to follow in a particular case. The rules of civil procedure will, however, play an important role in respect of how the case must be brought to court, should the client instruct a legal practitioner to proceed with litigation.

Seeking alternative routes to litigation in addressing clients' problems will equip students with, *inter alia*, the skills to communicate more effectively with clients and other interested parties; recognise their clients' financial, commercial, and personal constraints and priorities; and effectively advocate

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<sup>168</sup> Du Plessis 2018 *De Jure* 158.

<sup>169</sup> Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 355–356.

<sup>170</sup> *Ibid.*

<sup>171</sup> Nicholson "Education, Education, Education: Legal, Moral and Clinical" 2008 42(2) *Law Teacher* 145 146.

<sup>172</sup> Nicholson 2008 *Law Teacher* 160.

<sup>173</sup> *Ibid.*

<sup>174</sup> Hurter 2011 *Comparative and International Law Journal of Southern Africa* 409.

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a case on behalf of a client.<sup>175</sup> Students are subsequently placed in a position where they are able to consider the effects of their actions on society at large, the administration of justice, as well as the general performance and reputation of the legal profession.<sup>176</sup> Thus, they should be taught not only how to conduct trials, but also why they need to do so, as well as what the result of such an action would be.<sup>177</sup>

Appropriate interviewing and consultation skills are key in the application of criminal procedure, where a client (who was arrested for a criminal offence) consults with a legal practitioner. For example, in a case where a plea in terms of section 112(2) of the Criminal Procedure Act<sup>178</sup> is suggested, students must know that a legal practitioner will have to interview his client in order to be fully informed with regards to the facts of the case. There must be no ambiguities or uncertainties between the practitioner and the client. In addition to this, the practitioner needs to be clear about the legal basis of the case. In other words, in terms of the law relating to the specific crime, do the facts of the case point in the direction of the guilt or innocence of the client?

It is also desirable that graduates should have adequate knowledge about how to read police dockets, as well as evaluate the evidence therein as far as the relevance and admissibility thereof is concerned.<sup>179</sup> Legal research will often be required.

The need to inculcate students with drafting skills becomes apparent during the teaching of procedural law modules. In litigation practice, there is a sequence of documentary procedural steps that need to be completed before court proceedings can be embarked upon. With civil proceedings, practitioners must draft processes and pleadings. These are issued by the clerk or registrar of the court, served by the sheriff of the court, and ultimately filed at court on the court file.<sup>180</sup>

Criminal proceedings do not require such exhaustive pleadings, but often require the drafting of pleas of guilty<sup>181</sup> or not guilty,<sup>182</sup> affidavits, and heads of argument. The drafting of letters is generally required such as to the clerk or registrar to obtain copies of the content of a police docket to prepare for a trial, or to a detention facility to arrange for a consultation with a detained person. These drafting skills however remain neglected during the teaching

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<sup>175</sup> See Stuckey *et al* *Best Practices for Legal Education* 77 in this regard. It is submitted that creating an awareness among students regarding social and human elements in the context of the law will equip them with professional skills required by legal practice.

<sup>176</sup> Stuckey *et al* *Best Practices for Legal Education* 77; Silverthorn <https://www.2civility.org/carnegie-report-live-like-lawyer/>.

<sup>177</sup> Gravett 2017 *Potchefstroom Electronic Law Journal* 1; Silverthorn <https://www.2civility.org/carnegie-report-live-like-lawyer/>. Students should never be brought under the impression that these aspects fall outside the legal sphere of a matter, as they can conclude that these aspects are “[s]econdary to what really counts for success in law school – and in legal practice.”

<sup>178</sup> 51 of 1977.

<sup>179</sup> Klaasen 2012 *International Journal of Humanities and Social Science* 303.

<sup>180</sup> Pete *et al* *Civil Procedure* 132, 133; Rule 5 of the Magistrates' Court Act 32 of 1944; Rule 17 of the Superior Courts Act 10 of 2013.

<sup>181</sup> In terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA).

<sup>182</sup> In terms of s 115 of the CPA.

of procedural law modules at the university level.<sup>183</sup> Although graduates will acquire these skills during their articles, procedural courses are positioned to impart a foundation.

## 11 SUGGESTIONS FOR PRACTICAL APPLICATION

### 11.1 General

Students indicated that they find procedural courses to be tough and voiced their frustration, as they do not have sufficient opportunities to view course material in a context that makes it appear to be real. Furthermore, course presenters do not engage with students by way of active learning when presenting the course.<sup>184</sup>

The theoretical and practical components should not be separated when teaching procedural courses, as both the theoretical and practical components, in tandem, contribute to the students' knowledge and understanding of the principles and application thereof.

University law clinics do require students to draft certain pleadings and other documents to afford them an opportunity to practise these skills.<sup>185</sup> The CLE curriculum generally also provides trial advocacy exercises. However, the CLE methodology does not permeate throughout the LLB curriculum. Clinical courses are limited to a year, or a semester, depending on the particular university.<sup>186</sup> Schneider posits that the CLE methodology influences the way legal scholars think about and teach civil procedure.<sup>187</sup> De Klerk strongly motivates for the introduction of the CLE methodology earlier in the LLB curriculum.<sup>188</sup> Professional drafting and practical legal procedures however remain peripheral in law schools, leaving graduates unprepared when entering practice.<sup>189</sup> Lecturers in procedural courses

<sup>183</sup> See Kruse 2013 *McGeorge Law Review* 7 10. In this regard, she states that law schools "views the traditional case method of instruction in legal education as teaching 'doctrine' and lumps together all other kinds of instruction – legal writing, simulations, clinics, and externships – as teaching 'skills'. It aligns the teaching of doctrine with theory and the teaching of skills with practice."

<sup>184</sup> Oppenheimer 2016 *Journal of Legal Education* 817.

<sup>185</sup> See Schneider 1987 *Journal of Legal Education* 41 41 in this regard. She states "[a] variety of movement within legal education, clinical legal education ... is both directly and subtly influencing the way legal scholars think about and teach civil procedure." This substantiates the important role of law clinics and CLE in teaching procedural modules.

<sup>186</sup> Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 40–44.

<sup>187</sup> Schneider 1987 *Journal of Legal Education* 41 41.

<sup>188</sup> See De Klerk "Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model" 2006 39(2) *De Jure* 244–251 in this regard.

<sup>189</sup> See Vukovich 1971 *Case Western Reserve Law Review* 140 152, as well as Stuckey *et al* *Best Practices for Legal Education* 26 in this regard. Although the learned authors refer to practical legal experience in general, it is submitted that communication and drafting is included herewith. Vukovich states that, if law graduates do not get practical experience, such graduates will be "[i]ll-equipped to artistically skillfully represent ... clients." Drafting is of course an important part of client representation, as it is a form of communication between the legal representatives of clients. Stuckey states that most law graduates are not competent to provide legal services or to perform work expected of them in law firms. Again, although he refers to legal services in general, communication and drafting are undoubtedly

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therefore need to apply the CLE methodology in innovative ways in their respective courses in order to ensure that students gain some practical foundation.

## 11 2 Tutorial sessions

The CLE methodology provides structured tutorial sessions. Tutorial sessions are well suited to accommodate simulations and drafting exercises.<sup>190</sup> Students can be required to draft pleadings and other legal documents in simulated scenarios, such as a simulated client interview, which incorporates the required skills discussed above.<sup>191</sup> These may be assessed, as an assignment, towards a percentage of students' year marks for the course, as a prescribed assessment method.<sup>192</sup>

## 11 3 Mock trials

The CLE methodology provides for mock trials or trial advocacy exercises.<sup>193</sup> Mock trials are also well suited to incorporate the case dialogue method with practical application. Research of previous cases is required to argue precedent during the mock trials. Dedicated time within the lecturing schedule may be devoted to mock trials, verbal arguments, and the production of evidence.<sup>194</sup> Mock trials may take the form of quick class exercises, or during a dedicated time, with reference to a particular scenario pertaining to a civil case. Different roles can be allocated to students, which can be rotated for multiple class exercises. The application of civil procedure rules will require students to prepare in advance.

As is the case with civil procedure, it will be beneficial to students to undergo practical training with regard to some of the principles and procedures in criminal cases. These may include identifying proper arrest procedures, conducting simple bail applications, drafting pleas in terms of sections 112(2) and 115 of the Criminal Procedure Act,<sup>195</sup> and evaluating the admissibility of evidence procured by way of a search and seizure conducted in a particular way. All of these exercises can be done by way of simulations during mock trials.

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included therein. He also specifically states that, as far as hiring legal practitioners are concerned, "[t]oday there is much less tolerance for a lack of client and communications skills; ...".

<sup>190</sup> See McQuoid-Mason 1982 *Journal for Juridical Science* 161, 163 in this regard.

<sup>191</sup> It will be ideal if students can participate in law clinic-activities, where they can be involved with the perusing and drafting of actual pleadings and other legal documents. The reality however often shows that, mainly due to having already accommodating large student numbers enrolled in clinical courses, clinics are generally unable to accommodate additional students – see Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 109.

<sup>192</sup> Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 65–91.

<sup>193</sup> Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 87–90.

<sup>194</sup> *Ibid*, for examples of how such mock trials can be structured.

<sup>195</sup> See Taslitz *Strategies and Techniques for Teaching Criminal Law* 29–31 with regards to the importance of drafting documents.

During exercises focusing on both civil procedure and criminal procedure respectively, the law of evidence will be applicable. Knowing the substantive rules of evidence, and applying such rules to a practical scenario, differ from one another; therefore, students should be learning these rules by applying them.<sup>196</sup> Hearsay evidence serves as an example in this regard: the concept can be easily defined, but the proper application is not always clear to students.<sup>197</sup> A more practical way of teaching the concept of evidence will enhance the true significance and meaning thereof in the context of a trial.<sup>198</sup>

For example, use two students as role-players: student A will “testify” during a “trial” about what student B has “stated” or “done” on a previous occasion. For the sake of completeness, student B can say or do something to concretise this action. This demonstration will make it clear to students that if A testifies about B’s words and/or acts or omissions, it will generally constitute inadmissible hearsay evidence if B will not later confirm such testimony under oath at the same “trial”.<sup>199</sup> This may appear to be a simple exercise, but it is submitted that it will go a long way in ensuring a better comprehension by students regarding the concept of hearsay evidence. If students correctly understand this foundation of hearsay evidence, it is further submitted that they will have a better appreciation for the inherent dangers in allowing hearsay evidence, as well as the various statutory criteria that should be considered before allowing it.<sup>200</sup> Consequently, what is required is a teaching method that can enable students to analyse facts and evaluate an entire case by applying the various rules of evidence.<sup>201</sup>

The above discussions show that a more practical teaching methodology will prepare students better for entering practice, as they will be able to practise interviewing, drafting, and verbal skills. Students will further be presented with the opportunity to become aware of human and social elements integral in every client’s case and that they must be sensitive to the needs of clients.

## 11 4 Assignments

Reflection was indicated as an essential skill.<sup>202</sup> Students may be required to reflect on mock trials. This reflection may take the form of an assignment,<sup>203</sup> which may be assessed toward a percentage of students’ year marks for the course.

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<sup>196</sup> Gravett 2017 *Potchefstroom Electronic Law Journal* 8.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> Bellengere *et al* *The Law of Evidence* 293, 295, 297.

<sup>200</sup> The concept of hearsay evidence is governed by s 3 of the Law of Evidence Amendment Act 45 of 1988.

<sup>201</sup> Murphy 2001 *Journal of Legal Education* 571.

<sup>202</sup> Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 74–77.

<sup>203</sup> Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 69–70.

## 12 CONCLUSION

Procedural law modules, as advanced building blocks in the study of law, present students with the required knowledge of how to enforce rights. The primary constituencies of law graduates however indicated that students lack the necessary practical knowledge, skill, and ingenuity required to enter practice.<sup>204</sup> It was shown that teaching according to the Socratic and case dialogue teaching methodologies does not allow for dedicated practical application of the substantive rules, leaving students ill-prepared for the practice of law as members of a client-centred public profession, which includes a much-needed social contextual tuition.<sup>205</sup> These deficiencies affect students significantly when pursuing their careers after graduation. Procedural law modules should be developed within the LLB curriculum to accommodate the adequate and professional preparation of law students for legal practice. The introduction of the required practical skills is therefore critical.

This article also illustrated the application of essential skills required for law graduates as identified across multiple international jurisdictions, by employing the CLE methodology in tandem with conventional lecture methodologies. Culture literacy, as a core skill,<sup>206</sup> accentuated the importance of cultural, social, and human elements in the application of the various skills in order to further develop the students' identities and values as professionals which include not only being responsible to individual clients, but to also contribute services to the community.<sup>207</sup> Suggestions for practical application through the CLE methodology included tutorial sessions, mock trials, and reflective assignments. It is submitted that continued focus on the development of skills and values in the teaching of procedural law modules will add significant value to educating students towards budding competent legal practitioners.

<sup>204</sup> Vukovich 1971 *Case Western Reserve Law Review* 140; Snyman-Van Deventer and Swanepoel 2012 *Obiter* 121 121; Manyathi 2010 *De Rebus* 8 8; Chamorro-Premuzic and Frankiewicz <https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs>; SASSETA Research Department [https://www.sassetra.org.za/download/91/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf](https://www.sassetra.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf) 30–31.

<sup>205</sup> Kennedy 1971 *Yale Review of Law and Social Action* 71 71. At the time of writing this article, Duncan Kennedy was a student at the Yale Law School.

<sup>206</sup> Polistina [http://arts.brighton.ac.uk/\\_data/assets/pdf\\_file/0006/5982/Cultural-Literacy.pdf](http://arts.brighton.ac.uk/_data/assets/pdf_file/0006/5982/Cultural-Literacy.pdf) 1–6. Polistina identifies four key cultural literacy skills namely: 1) cross-cultural awareness which includes the ability to examine other cultures critically; 2) local cultural awareness, the ability to accept and respect knowledge within local cultures and communities; 3) critical reflective thinking, a dialogue between students and clinicians on aspects of cultural or social discourse, where the experiences of the group as a whole is considered. For a discussion on cultural literacy in view of globalisation see Shliakhovchuk [https://www.researchgate.net/publication/331453186\\_After\\_cultural\\_literacy\\_newmodels\\_of\\_intercultural\\_competency\\_for\\_life\\_and\\_work\\_in\\_a\\_VUCA\\_world](https://www.researchgate.net/publication/331453186_After_cultural_literacy_newmodels_of_intercultural_competency_for_life_and_work_in_a_VUCA_world).

<sup>207</sup> Cody 2015 *International Journal of Clinical Legal Education* 4; Hyams 2008 *International Journal of Clinical Legal Education* 21 confirms this understanding that all professionals have an obligation to contribute to the community in some form. In South Africa duties towards the poor in the form of access to justice, forms part of the requirements of professional and ethical conduct – see De Klerk *et al* *Clinical Law in South Africa* 50–52.