Chapter 1

Introduction:

The Research Setting

1.1 INTRODUCTION

The purpose of the initial chapter of this thesis is to introduce the reader to both the setting and the context within which this study has been nested.

Most western societies have been subjected to enormous change with resulting public controversy as interested parties such as governments, employing authorities, labor unions, schooling systems, parents, teachers, community action groups and professional support agencies have attempted to improve the nature, productivity, and quality of their functions, activities and contributions to their society-at-large. The diverse perspectives, values, beliefs and attitudes held or valued individually and collectively by society's members have caused communities to debate regularly both their expectations and systems for forming, declaring, implementing and reviewing these. As political, legal, economic, cultural and spiritual forces interplay, community leaders have to reassess the processes and outcomes of their general purposes, policies, priorities, programs and possible future directions. Consequently, policy makers and planners are continually attempting to address *What is?, How suitable?* as well as *How ought?* questions.

Educational enterprises and activities have not been immune from these debates. In Australia for example, attention has been focused on almost every aspect of lifelong education, training and learning. The aims of education and schooling, professionalisation of teaching, curriculum, required facilities, innovative scheduling, community involvement and support systems, nature and quality of learning, program scope and sequence, curriculum continuity, educational technologies, quality assurance, re- and up-skilling, desired outcomes and core competencies, to name but a few, have been the subject of intense and rigorous investigation and debate, even public ridicule. Educators have had to battle continually for their share of the power, priorities and finance available through both private and public sources for the resources which are necessary to conduct their operations. These processes have developed a state of healthy tension, the dynamics of which are ameliorated from time to time in various educational settings.

As Australian society appears to become more complicated in the waning years of the twentieth century, the interplay amongst the primary factors influencing societal change must be continually identified and reviewed. The more technocratic and centralised a society becomes, especially in a post-industrial era, the less that society seems to be able both to interrelate and to integrate the plethora of factors that are affecting them.

Traditionally, groups such as the philosophers and religious leaders have provided diverse and critically constructive discussion of a society's *world view*[1] presuppositions, premises and assumptions. Governmental leaders, social activists and, increasingly, the community-at-large have sought to examine the design, development and outcomes of policies and programs based on these implicit and/or explicit world views. The democratic processes at work in societies have attempted to ensure that governmental leaders are accountable to the people through processes such as regular popular elections. In Australian society, cultural, historical, political, religious, economic and legal conviction, for example, have played important roles in the development of our society. The processes of working through various propositions, proposals and policies that ought to be privately and publicly endorsed are complicated. It is beyond the scope of this study to embark upon such a discussion.

By adopting a developmental approach, it is possible for researchers to begin the task of undertaking investigations that may inform and advise the stakeholders involved in community processes. Insights into the contributions provided by participants through research studies can assist in the development of a society's understanding of the knowledge, frameworks and processes operating within selected settings.

Consequently, the main purpose of this research project has been to investigate the nature, conceptual framework, developmental processes and interrelationships amongst various conceptions of thinking legally. This legal frame or context has been chosen because of the powerful role that law plays in society through political and social, as well as personal and public, dimensions. While laws are explicitly declared through legislation, law is implicit in

[1] *This term is defined in some detail in* ***Chapter 2 - A Literature Review.***

society through its customs, traditions, values, mores, and daily operations. It is both tangible and operant.

As law pervades a society such as Australia so comprehensively, the scope of this research study has focused on one particular but, in Queensland terms in the late twentieth century, significant and powerful agent for change. The Senior Years of secondary schooling (Years 11 and 12) have been selected because of the innovative curriculum programs and practices that have been designed and implemented in almost all of the Australian States and Territories. One can surmise that social constructionist and critically reflective forces have been at work in Australian society to produce Legal and Law-related Education programs, often referred to as *Legal Studies*. These forces have been quite diverse yet they are derived from a number of key influences.

Firstly, there seems to have been an increasing tendency for western societies to diversify their legislative functions as governments of one form or another have sought to order and regulate their constituents. Secondly, the rapidly increasing influence of technology especially in the communications, entertainment and research fields has led to an explosion of not only the knowledge but also the systems for accessing it. For example, the current developments with micro-chips, micro-waves and optic fibres are causing dramatic and invasive change in Australian society. Thirdly, schooling is being seen as the primary agent of social and cultural education as the educative roles of parents, church and community appear to be becoming less influential. Fourthly, the curriculum choices for students, especially in Australian secondary schools, have undergone rapid change as society has sought to articulate its expectations and demands. Fifthly, social pressures have provided impetus for educational authorities to implement innovative programs that attempt to ameliorate the difficulties experienced by the community. Finally, as law pervades almost every aspect of modern Australian life, it is essential for students to be aware of their rights and responsibilities implicitly through family and explicitly through formal education programs such as Legal Studies in senior secondary schools. With the ever-increasing societal pressures on teenagers, they need to have access to diverse and meaningful personal knowledge to guide their present and future decisions.

These factors have been evidenced in Australian life through significant, though sometimes divisive, developments such as use of external powers provisions of the Constitution, Royal Commissions, Commissions of Inquiry, Discrimination Tribunals, Human Rights actions, Environmental Impact investigations, Law reform, and increasing litigation. Family life, personal privacy, genetic engineering, designer drugs, surrogacy, organ donations, tissue transplants, and intellectual property rights, for example, have been subjected also to close and rigorous scrutiny.

Schooling, in marked contrast to the perceived influence of the home, social clubs and Church, is being seen increasingly as the agency through which the Australian community seeks to influence its young people. With increasing social dislocation through factors such as family breakdown and as the Senior School (Years 11 and 12) are closest to the period of the *rites of passage* from childhood and adolescence to young adulthood, increasing social and community pressure is placed on schools to socialise and enculturate young people.

1.2 SOME TRADITIONS IN LEGAL THINKING

There are many clearly identifiable schools of thought in relation to legal thinking. Despite great divergence of opinion within each of these, it is possible to categorise them into two streams - *Mainstream* and *Reactionary* - that have their bases in certain philosophies, legal movements and problematic contexts. These two broad streams are not mutually exclusive but are in fact temporaneously and contextually dependent on each other, especially as law is so focused on the processes of argumentation.

Legal History books contain numerous examples of the various expressions of opinion that became welded into either legal frameworks or movements such as Naturalism, Conservatism, Formalism, Liberalism, Realism, Post-Modernism and the Critical Legal Studies (CLS) movement. These, and other frameworks and movements, have had their share of contention as participants in the legal processes of the times sought to identify and clarify their role, responsibilities and relationships. Simon (1989) for example, in contrasting conservative and liberal approaches to law, stresses that the conservative view:

> sees people as fundamentally cooperative, solidaristic creatures and sees social relations as expressing and fulfilling their basic needs. So long as these relations remain intact, there is little, if any, role for lawyering..... The conservative view requires that law practice be confined to the realm of manifest conflict and segregated from the realm of intact social relations. It relies on the rules prohibiting maintenance and solicitation to achieve this segregation. Simon (1989, 292-293)

Simon (1989), however, is quizzical about the proposition that the predominant view in professional discussion is not a Conservative one. He considers it to be more of a Liberal one. This Liberal view is focused on the premise that both the legal system and lawyering are intertwined inextricably firstly, with dispute-resolution, secondly, with dispute-generating regulatory intervention, and finally with 'the facilitation of transactions that are consensual but that would take place without legal intervention'. (Simon, 1989, 293)

Formalism, on the other hand, is an example of a theory which proposes that law is a logical process which is radically distinct from both moral and political controversy:

> As the American legal Realists in the 1920s and 1930s delighted in showing, however, there is no way of deducing an answer to a concrete legal problem from abstract concepts such as 'consideration'. On the contrary, the same form of reasoning can readily lead to the opposite result. (Frug, 1989, 45-46)

Frug (1989), for example, in his treatment of the doctrine of consideration, provides a detailed case study of the difficulties of attempting to address the question: What does this mean about the *nature of law*? He articulates principles of subjectivity, objectivity, philosophy, praxis and systemic processes, amongst others, however, his main focus is in relation to the role of CLS based on critical theory and the critique of the:

> notion that legal decision-making is subjective, as much as it is a critique of the notion that it is objective. Judges cannot decide our modification case in any way they want... The fact that they (Judges) inherit it means that their decisions cannot adequately be understood as subjective, and the fact that they construct it means that their decisions cannot adequately be understood as objective. The relationship between legal decision-making and the legal system is far too complex to be captured by either the concept of objectivity or subjectivity.

> In my opinion, we should abandon both objectivity and subjectivity as explanations for legal decision-making. (Frug, 1989, 52-53)

This leads authors such as Unger (1986, 1989), Kelman (1987), Gordon (1989) and others to propose not only the cataloguing of conventional arguments in legal reasoning, but also the pursuing of alternate courses of action and reflection. Of particular note, in CLS terms, is the need for explanation rather than risk the contentious position that law is only 'chaos full of plausible arguments for any side' (Gordon, 1989, 80). CLS has particularly argued that, for example, abstraction and individualism of traditional contract law are the legal forms that are 'most instrumentally serviceable to the economic arrangements of the late nineteenth century *laissez-faire* individualism, just as the relative particularism, informality and mild communitarianism of present day compacts of the regulatory welfare state' (Gordon, 1989, 81). CLS itself is not a unified school of thought yet its main emphasis has been to encourage critical analysis - whether informed by political, feminist, philosophical or literary theory. It assists legal practitioners and law students both to understand theoretical controversy and assume responsibility for their own positions on matters of social consequence.

Developments in legal history, such as those mentioned above, stem from the concerns of the legal Realists with their critiques of the Formalists' styles of legal reasoning. The Formalists had emphasised jurisprudential principles but 'there never was any such thing as 'purely deductive, logical formalism' or 'mechanical' or 'slot-machine jurisprudence'.' (Gordon, 1989, 60). The intensity of the disputations, contentions and bickering, as well as epistemological, professional and political manoeuvering for power and influence among various sectors representing legal thought, are evident from the work of authors such as Unger (1989):

> The implication of our attack upon formalism is to undermine the attempt to rescue doctrine through these several stratagems. It is to demonstrate that a doctrinal practice that puts its hope in the contrast of legal reasoning and ideology, philosophy, and political prophecy ends up as a collection of makeshift apologies. (Unger, 1989, 11)

The Realists, on the other hand, had emphasised the creative, constructive role of decision-making not only in 'hard cases' but in every case. They were fond of contextualising their

decision-making through situational variation. They inverted the Formalist method of assigning objects to categories. So instead of asking 'Is this an offer?', they would ask 'What would be the practical implications if we were to consider this as an offer?' The Realists also inverted the relationships between *rights* and *remedies*. In their view, the remedies available determined the scope of the right. Hence, the Realists fostered what might be in current parlance called the 'hermeneutics of suspicion'. This led to strategies such as the exposure of reactionary class prejudices, partial economic theories and obsolete social conditions. To some Realists, the concern with *function* led them to undertake complex studies into the 'law in action'.

During the 1950s and 1960s, Realism seemed to be pre-eminent in legal thinking, especially in Law School curricula. Its central aim was to show up the limited conceptualisations and reasoning used by the judges who were deciding most cases assigned to them. However, questioning of the role of authority and an analysis of case procedures led to disenchantment amongst law students because the great Socratic law teachers of the Realist and post-Realist generation never said what they actually thought. They never offered their own personal opinions because they we too focused on asking process questions. The personal integration of enlightened conclusions was apparently left for the law students to discover for themselves.

Another social dilemma is the apparent conflict between the *social ideal* developed in democratic societies through the political processes of policy formation, community debate with subsequent electoral endorsement and the *institutionalised program* of government once elected for their term of office. The democratic processes, often deemed to be continuous, seem to be subject to interruptions by the electoral processes and by governments who lose sight of the need to maintain social will and contact with the constituents who elected them to office. The democratic contract often seems interrupted rather than enhanced by the sporadic electoral processes. This tension is evident also in the strategies used by governments and their invented instrumentalities in order to pursue conformist, as compared with divergent, avenues of social reconstruction. The policy differentials between political parties in democratic societies ensure that there will be fluctuations in implementation of both the social initiatives and their associated programs. This created what Unger refers to as 'the

disproportion between our transformative goals and the established social peace' (Unger, 1989, 342). There is a contrast also between the scope of theoretical concerns and the relatively limited context within which to implement them. The contrasts between a society's intentions and the operating social setting limit also the ability of the political and legal machinery to make a real difference within the operating social construct.

The rapid rise of socio-critical approaches in society of forms such as modernism and post-modernism in the 1970s and 1980s has once again raised the *fact-interpretation-context* emphases of previous decades. Much of this debate relates to the *intention-outcomes* debate in what Unger (1989, 5), in relation to law teaching, describes as 'what it has actually come to teach rather than what law professors say it teaches'. These notions are further exacerbated by not only the Modernist conflict but also the tensions over the broad interrelationships of *freedom* and *structure*. The crucial premise of the arguments on these issues is that the social and mental worlds differ in both the manner and the extent to which they facilitate the enjoyment of both *freedom* and *structure*. It is in this context that one can understand the necessity for the integration of both 'mainstream' and 'reactionary' forms of social action.

The social dissonance created by a questioning of the political and legal state-of-the-art is both a necessary and an essential characteristic of the democratic processes. Consequently, there is an essential ingredient in the modern social, and consequently legal, processes for socially critical approaches that attempt to maintain the balance between conceptual couplets such as *freedom-structure, form-function, compliance-deviance, policy-program, public-private social well-being* and *conformation-reconstruction* (Simon, 1989, 298-301). Unger's (1986, 109-117) notion of *transformative action* provides a useful construct for maintaining healthy balances in aspects such as these.

Consequently, there is a great variation among hypotheses on the desired *role of law* in not only mainstream but also alternate society. There must be a rigorous respect from every side of the role-of-law debate if the social health of a democratic society is to be maintained. The tensions, for example between *conservative* and *progressive* forces in a society, should promote what Kelman (1987, 253) calls the *interpenetration of Law and Society*. Kelman uses

the concept of the 'omnipresence of contradiction' as a useful construct for his discussion of both appropriate strategies and tactics for the integration of *Law* and *Society*. These are similar to Unger's (1986, 52-56) concepts of the *reconceived* and the *reconstructed* in that both authors yearn for processes that would enable epistemological, professional and practical integration to occur in all aspects of the nature, structure, processes and applications of law in pluralist societies. However, these authors, while understanding the dissonance caused by current policies, processes and practices, are well aware that the very nature of law and its social applications are based on processes of disputation and argumentation.

It is within contexts, such as those mentioned above, that this study not only develops conceptions of thinking legally but also establishes relationships between community expectations and schooling. The study's research field is the community while the research needs are both the curriculum plans and educational programs.

1.3 A RESEARCH NEED: THE SENIOR YEARS OF SCHOOLING (Years 11 - 12)

In recent years, curriculum development, implementation and review effort has been expended in most Australian States on the Year 11 and 12 sector of secondary schooling. Evidence of this is included in the Blackburn Reports in Victoria, the Beasley Report in Western Australia and the Scott, Kennedy, Viviani, Hughes and Wiltshire Reports in Queensland, to name but a few. Of particular note have been the increasing participation and retention rates of students in these latter years of secondary schooling. This has resulted from a wide range of social phenomena. Some of these include rising parental expectations, labour-force restructuring, educational rationalisation in times of economic recession, mushrooming youth unemployment, curriculum modularisation, family breakdown, social dislocation and a questioning of quality schooling as a preparation for adult life especially in technocratic and economic terms. The focus, relevance, usefulness and life-education aspects of schooling have been highlighted as the Australian community has attempted to deal, during the 1980s and 1990s, with its various political, economic and social problems.

Communities have to deal in proactive ways with the pressures facing their members. As the influence of parenting in family life and the church in social life seem to be waning, governments and educational systems as social institutions and agents are having to play more diverse and active roles in attempting to resolve societies' difficulties. Pressure continues to be placed both on the educators and the educational systems to address these community issues and concerns.

As society becomes more regulated, the accepted or traditional roles, rights and responsibilities of social institutions are challenged. For example, the ever-increasing state of lawlessness and the increase of major crime, especially juvenile offences, mass murders and paedophilia in our Australian society, are of major concern. Royal Commissions, Police Corruption Investigations and Courts of Inquiry, leading to initiatives such as the Fitzgerald Inquiry in Queensland and the current Police Corruption Inquiry in New South Wales, are indicative of society's need to resolve its identified difficulties. These difficulties, if not adequately addressed, become the rallying point not only for intense community frustration but also for eventual conflict.

Communities have attempted to deal with many social questions and issues by developing educational policies and programs that are aimed at identified or potential target groups in their communities. Human relationships, road safety, consumer protection, defensive driving, drug and alcohol abuse, environmental degradation, sex education, credit control, pastoral care, religion, handwriting, literacy, numeracy, technology, communicable diseases, and the like, have been the focus of publicity and resulting educational programs in recent times in Australia. Schooling in communities, some would say, is the last remaining social institution capable of dealing in preventative ways with social questions such as those listed above.

One initiative of significant influence in Australian senior secondary education has been the design, development and implementation of Legal and Law-related programs. Many of these have focused on the development of students' knowledge, abilities, personal skills and attitudes to the operation of law in society in order to promote more effective citizenship in community members (Anderson, 1980; Newmann, 1990a).

Most of the Australian initiatives in this field are referred to as *Legal Studies* programs in the senior sector (Years 11 and 12) of schooling. Legal Studies courses are now part of the curriculum of all the Australian States and Territories. These programs have been marked by intense student, teacher, parent and community interest to the point where, in 1996 in Queensland, Year 11 and 12 student enrolment in Legal Studies programs was growing at a faster rate than almost all other senior secondary curriculum or subject areas (Board of Senior Secondary School Studies, 1996).

1.4 THE QUEENSLAND EXPERIENCE IN LEGAL AND LAW-RELATED EDUCATION - an overview

Until 1983, Queensland educators had relied upon the integration of selected aspects of Legal and Law-related education into other curriculum areas such as Social Studies for Year 1-7 students, and Business Education and Citizenship Education for Year 8-10 students. These programs are offered during the years of compulsory, but general, education (ages 5 to 15 years).

However, in 1982/3 the Queensland educational authority responsible for development, authorisation, accreditation and certification for secondary school curricula, the then Board of Secondary School Studies[2], approved a proposal developed by the Queensland Department of Education for the development of a Year 11 and 12 program of study in legal education. This Legal Studies program was developed as a Board, or matriculation, course of study for tertiary entrance purposes. This was intended to complement, through specialised studies in Years 11-12, the general legal and law-related learnings that were developed by preschool to Year 10 (P-10) students.

[2] *The Board of Secondary School Studies (BSSS) dealing with curriculum development, authorisation, accreditation and certification for Years 8-12 has since been restructured into the Board of Senior Secondary School Studies (BSSSS) dealing with Years 11-12. The April 1994 release of the Wiltshire Report recommended further changes to the organisation and management curriculum development in Queensland education. Since then, the 'Education Queensland' program has been planned and implemented by the Queensland Schools Curriculum Council (Q.S.C.C.) in association with schooling systems and employing authorities.*

The main players in this initiative were Curriculum Officers, Business Educators and Social Science educators in the State Department of Education (DOE); lecturers in Higher Education Institutions (HEI) in association with practising classroom teachers in State, private and independent secondary schools in Queensland. Representatives of the legal profession such as the Queensland Law Society (QLS) and the State Government's Justice and Attorney General Department (JAG) were also involved. Developmental work associated with the program was undertaken in 1983/4 by a sub-committee guided by both the Business Education Subject Advisory Committee and the Curriculum Committee of the BSSS.

A Legal Studies Syllabus was developed by a curriculum development committee and following its approval and authorisation in mid-1984, was introduced into Queensland secondary schools for the first time in 1985-6 on a trial basis. Some nineteen schools and 800 students participated in the two year project[3]. This trial was so successful that, in 1987, the Legal Studies program was further updated and extended into a pilot program which in 1988-89 involved 43 Queensland state, independent and private secondary schools and over 1900 students[4]. In 1991 an additional 37 state, independent and private secondary schools joined the program as the syllabus became available for general implementation by all interested secondary schools in Queensland. The growth in enrolments of students in Queensland Secondary Schools undertaking Legal Studies as a course of study in relation to the total Year 11 and 12 enrolment in Queensland Secondary Schools is indicated in Table 1.1.

[3] *An external evaluation of this trial was undertaken by Whelan (1987), Lecturer in Education at the Central Queensland University, Rockhampton, Queensland.*

[4] *An external evaluation of this pilot program was undertaken by Whelan (1990), Lecturer in Education at Central Queensland University, Rockhampton, Queensland.*

Table 1.1: Queensland Year 11 and 12 Legal Studies Enrolment Statistics 1985-1995.

Year	No. of Schools offering Legal Studies	Year 11 Students		Year 12 Students		Total Year 11 Enrolments	Total Year 11 Enrolments
		n	%	n	%		
1985	19	766	2.6	20	0.09	29 346	22 729
1986	19	782	2.5	653	2.6	31 447	24 837
1987	19	872	2.5	737	2.7	34 448	27 515
1988	n/a	n/a	n/a	n/a	n/a	n/a	n/a
1989	43	1 978	5.5	1 510	4.7	35 909	32 178
1990	41	1 856	5.0	1 686	5.2	37 304	32 443
1991	78	3 464	9.4	1 873	5.7	36 912	32 763
1992	119	5 055	13.0	3 348	9.3	38 907	36 083
1993	141	5 246	13.9	4 527	13.2	37 869	34 251
1994	149	5 281	14.2	4 590	13.7	37 255	33 572
1995	160	5 041	13.7	4 432	13.8	36 683	32 197
1996	175	5 060	13.9	4 438	14.5	36 310	30 437

(from BSSS and BSSSS *Statistics Bulletins*, 1985 - 1997)

1.5 EXPRESSED NEEDS OF TEACHERS

During these years of curriculum design, development and implementation, the Legal Studies sub-committee searched the available literature from around the world for appropriate courses, curriculum models, frameworks, resources and strategies for teaching legal and law-related educational programs, including Legal Studies. The results of this search served as both theoretical and practical bases for the development of appropriate approaches to teaching and learning methodologies for the Legal Studies teaching in Queensland secondary schools. The programs which were evaluated included the *New York Legal and Law-related Education Project*; the *Street Law Project*; the *Law in a Free Society Project*; the *Wisconsin Legal Education Project*; the *Maryland Law-related Education Project*; the *Colorado Legal Education Project* and the *North Carolina Legal Studies Project*.

Evaluations of the implementation of the trial and pilot Legal Studies Syllabus by Whelan (1987 and 1990), indicated: (i) the teacher and curriculum developer needs, (ii) the need for access to models and approaches to teaching Legal Studies, and (iii) the need in-service education concerning established conceptions of legal thinking. The teachers' needs for syntactical and substantive frameworks as bases for their teaching and learning methodologies in Legal Studies classrooms throughout Queensland were evident in Whelan's conclusions[5].

A search of the Victorian, Western Australian, South Australian, Northern Territory, Tasmanian and New South Wales literature on approaches and methodologies for teaching Legal Studies indicated a similar lack of appropriate conceptual frameworks, methodologies, teaching processes and learning strategies. In fact, at Australian conferences of Legal Studies teachers, the only publication that has been referred to in this regard is that by Sherry, Rowland, and Davison (1987, 3rd ed). This volume, however, was not developed with the specific needs of teachers of Legal and Law-related education in mind. Rather, it was prepared to address the general methodological needs of teachers of the Social Sciences subjects in secondary schools, particularly in Victoria.

To date, neither a well-designed or researched Legal Studies conceptual framework nor methodology has been identified. Consequently, the Legal Studies sub-committee of the Queensland Board of Senior Secondary School Studies has, in all its years of curriculum development activities, adapted Social Science conceptual frameworks and methodologies for teaching and learning processes in Legal Studies. Particular attention has been paid to those frameworks from socio-critical perspectives that are fostered by authors such as Kemmis, Cole and Suggett (1983). However, these seem to be limited in their nature, scope, effectiveness or usage in Legal and Law-related Education. This is because these approaches have not been developed from either the substance or the processes of educational practice in Legal Studies.

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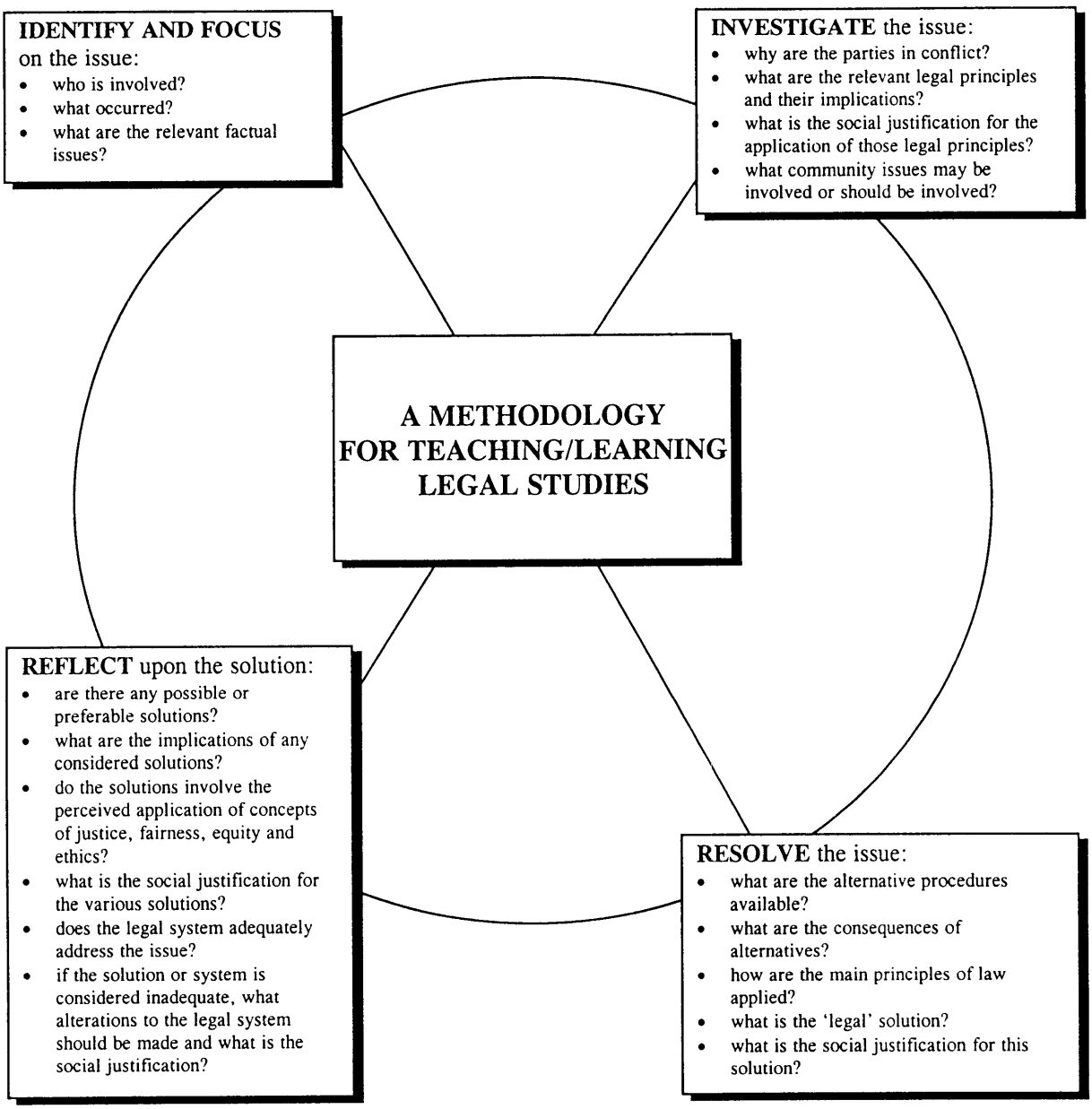
[5] *Some initial schemata identified in the literature searches associated with this doctoral study were shared with Legal Studies teachers at the State-wide Teachers Conferences held at the All Hallows School in July 1992 and at the Queensland University of Technology in 1995. These schemata are outlined and critiqued in* ***Chapter 2 - Theoretical Orientations of the Study*** *of this thesis.*

Figure 1.1 displays the 1995 schema being used by Legal Studies teachers in Queensland secondary schools for both planning and for teaching the Year 11 and 12 Legal Studies course. It was devised in order to design an illustrative conceptual framework that provided classroom teachers with an integrating device to address some of the epistemological and practical issues raised by authors such as Kelman (1987), Simon (1989) and Unger (1986 & 1989) mentioned earlier in this chapter. Another feature of this schema is its close relationship with *process approaches* (*socio-critical*) promoted by Stenhouse (1975), Skilbeck (1984), Slater (1982), Kemmis, Cole and Suggett (1983), and Kemmis and McTaggart (1988). These approaches are imbedded in each of the four phases of Queensland Year 11 and 12 Legal Studies methodology and may be sequenced in various ways when investigating course issues.

Figure 1.1: A Methodology for Teaching Legal Studies



From the **Senior Legal Studies Syllabus**, BSSSS, Brisbane, 1995, page 9.

1.6 THE NEED FOR RESEARCH AND ADVICE

The Legal Studies, including Legal and Law-related, programs in other educational settings, such as in Australia and the United States of America, suffer similar teacher complaints to those outlined in the previous section. These are:

(i) How should we teach the recommended Legal Studies content, processes, skills, attitudes, values and beliefs?

(ii) What approaches and methods are effective in Legal Studies teaching and learning?

(iii) Upon what research are these recommendations made?

There is little substantive evidence in the literature on Legal and Law-related Education which would shed light on how *thinking legally* will inform the processes for teachers to *teach legally*[6].

1.7 WHAT MIGHT BE DONE?

It is evident that research needs to be undertaken into conceptions of thinking legally as compared to what legal knowledge or law ought to be taught so that theoretical bases, conceptual frameworks, perspectives, approaches and methodologies can be identified. The approaches taken by the curriculum developers of the Year 11 and 12 Legal Studies programs in Australia have generally been along the *commentator approach* in contrast to the *practitioner approaches* adopted by those with more black-letter-law objectives in mind. The commentator approach derives its origins from the socio-critical orientation to curriculum which focuses on reconstructionist perspectives, processes and outcomes relating to community issues, questions and initiatives (Kemmis *et al.*, 1983).

Explicit concepts, conceptions and conceptualisations of appropriate developmental frameworks for legal thinking need to be researched and developed. These would then form the bases for the design, implementation and evaluation of teaching methodologies and approaches to promote student abilities for *learning legally*.

1.8 THE PURPOSE OF THIS STUDY

In curriculum development terms, Legal Studies is quite a recent phenomenon in Australian education. The first program commenced in Victoria in the late 1970s. Legal Studies curriculum writers are committed to providing educational programs, particularly in the Years 11 and 12 sectors of senior schooling, which are grounded in educational research and are reflective of best teaching and learning practices.

A review of the literature concerning Legal and Law-related Education and consultation of bibliographical references (such as the Australian Education Index, Bibliography of Educational Theses in Australia, ERIC and Moyes Catalogue System), and discussion with those involved in various sectors of Legal and Law-related Education, have revealed that a study such as this, which focuses on *conceptions of legal thinking*, has not yet been undertaken in Australia, or in any other educational setting. The researcher's involvement with the Queensland Legal Studies Syllabus has been as the founding and continuing convenor of the Board of Senior Secondary School Studies Legal Studies Sub-committee. This offers a unique opportunity for the design and implementation of a research study of this kind. Application of the research findings to the curriculum development processes and for experimentation with methodological implications for teaching approaches in Legal Studies in Queensland secondary schools would be a great advantage for curriculum designers and classroom practitioners alike. This research may also have implications for groups such as the staff of Law Schools in Australian Universities in relation to the approaches they adopt in the delivery of preservice legal practice courses and programs.

It was the task of this doctoral research project to :

- establish conceptions of *thinking legally,* held by legal professionals; academics, teachers and students in educational settings; and community members, involved in Legal and Law-related Education, by identifying the qualitatively different ways in which people experience, and make sense of, thinking legally;

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[6] ***Chapter 2 - Theoretical Orientation to the Study*** *deals in a substantive way with the details of this analysis.*

- describe and interpret these qualitative differences so as to develop a conceptual map, expressed in outcome space terms, of the interrelationships among these conceptions; and

- examine the implications of this research for the various stakeholders in Legal and Law-related Education in terms of the elements and interrelationships implied in the model outlined in Figure 2.5 of Chapter 2.

This research has prepared conceptual bases and conceptualisations that will guide curriculum writers and legal educators to *think legally*. Subsequent research should be initiated to relate the findings of this study to the approaches used by teachers of Legal and Law-related Educational programs to implement methodologies which enable them to *teach legally*.

1.9 ORGANISATION OF THE STUDY

Chapter One has introduced the setting, context, scope and general approach to be followed in this study. Chapter Two introduces the theoretical orientations of the study in terms of the foundational literature which has been accessed and evaluated. Chapter Three is concerned with the methodological considerations and implications of the conduct of this research.

The remaining chapters are devoted to addressing the data acquisition, analysis and synthesis issues that arise from both Chapters Two and Three. Chapter Four analyses both the data and the outcomes of the research study, while Chapter Five draws closure on the study through the use of synthetical approaches which lead to the research findings, conclusions and recommendations.

Chapter 2

Theoretical Orientations of the Study

2.1 INTRODUCTION

This chapter outlines the theoretical frameworks that have been used to analyse the issues which have been raised in Chapter One. These frameworks have been identified in the literature and relate both to *educational*, and more particularly, to *legal* thinking. This literature review raises substantive questions that are associated with approaches to *thinking legally*. Chapter Three deals further with these from methodological perspectives.

The frameworks which are identified in the literature have been critiqued in the light of historical, academic and practical considerations. While various authors have grappled with the conceptualisations and the conceptions of their tasks, these authors' views have been influenced by not only their *knowledge bases* but also their *experience bases* which are two of the most influential factors that are related to *learning* and *thinking*. However, before any indepth discussion of *learning* and *thinking* can be initiated, there is a range of contextual factors that must be addressed.

2.2 CONTEXTUAL CONSIDERATIONS

Throughout the centuries, there has been considerable public debate about educational questions such as:

> *What is the nature and purposes of education?*
> *Which are the best approaches to teaching? and*
> *What cultivates most productive learning outcomes for students and their society?*

There has also been debate about the factors and processes which hinder, promote or enhance these. Indeed, *What leads to a good education?* and *What is a good education?* are serious questions that continue to be debated but for which ready solutions are unlikely ever to be determined. This debate has raged in many quarters as attempts have been made to re-define and re-structure the ways in which individuals both establish and develop their knowledge and experience bases through educational processes.

Atkin (1990) argues the case for a consideration of a number of factors including the social and economic changes, recent educational research, developing understandings of

intelligence, the demise of *authoritianism* in society, greater emphasis on the need for human's abilities to develop new insights through technology, and research on the functioning of the human brain in her call for greater emphasis on *Learning How To Learn*:

> The *learning to learn* movement in education has its roots in attacks on *passive knowledge* and learning that does not further the ability of the individual to do, or to be. And it is closely allied to attempts to improve thinking skills.
> (Atkin, 1990, 195)

In the 1970s and 1980s Stenhouse (1975), Slater (1982), Skilbeck (1984), and many others promoted cognitive *process* as opposed to *product* (content acquisition) approaches to education, particularly in relation to curriculum design, development and implementation. Work such as that by Dunn and Dunn (1978), Edwards (1979), Cornett (1983), McCarthy (1987), Herrmann (1990), Van Brummelen (1988), Butler (1994), Edwards (1994), and Splitter and Sharp (1995) have greatly assisted educators to understand the relationships of brain dominance and hemispherity in teaching approaches and learning styles. However, these notions of teaching and learning have been further complicated in recent times by those understandings which are associated with learning context (Adams, 1981), task negotiation (Kemmis, Cole and Suggett, 1983), future goals and personal aspirations.

Developments, too numerous to cite here, have been initiated as governments, education systems, schools and teachers have endeavoured to implement effective and efficient strategies for promoting students' learning. Not only has the concept of, and strategies and plans for, education been the subject of continual review and modification, but the very nature, purposes, policies and procedures of education have been the subject of political, social, educational, fiscal and community-based scrutiny. In Queensland alone since the mid-1970s, the following major reports have made significant and far-reaching proposals about the nature, scope, sequence and style of schooling from Pre-school to Year 12:

> The Radford Report (1974);
> Review of School-based Assessment (1978);
> Parliamentary Select Committee on Education: Reports 1-6 (1979);
> Education 2000 (1983);
> P-10 Curriculum Framework Report (1987);
> The Kennedy Report (1989);
> The Viviani Report (1991);

The Hughes Report (1993); and
The Wiltshire Report (1994).

Each educational development, initiative or proposal is based on a particular set of values, aspirations and assumptions. These are commonly referred to as *world views*. A world view:

> ... consists of the ideas (presuppositions), convictions, and commitments that shape our outlook on life. Although it might seem that only professional scholars - those who make their living as researchers, teachers, and writers - think about things such as basic assumptions and presuppositions, everyone has a world view. Even though they rarely reflect self-consciously on their basic convictions, all people hold fundamental beliefs that contour every aspect of their lives - their thoughts, work, leisure activities, feelings, values and attitudes. (Hoffecker, 1988, *xi*)

Holmes (1983), Schaeffer (1990), Sire (1990) and Jones (1991), have developed a range of frameworks for the identification, analysis and development of world views. These frameworks, being philosophical, procedural, paradigmatic and\or presuppositional in nature, provide educators with meaningful tools for designing, planning, implementing and reviewing teaching and learning.

Particular attention must also be paid to the evaluations of contemporary learning theories, for it is in this context that world views most often manifest themselves. Edwards (1989, 87) in evaluating contemporary learning theories, compared *the science of learning with the art of teaching*. In doing so, he included an additional dimension to the *knowledge as cognitive process (strategy)* versus *knowledge as product (content acquisition)* debate when he proposed the inclusion of *knowledge as personal development* into the school curriculum. For too long, knowledge seems to have been perceived in terms such as *expert - novice*, *content - process* or *propositional - procedural* terms. Educational psychologists such as Case (1984), Demetriou & Efklides (1985), Halford (1982 & 1989), and Sternberg (1987) have focused heavily on cognitive development and information processing approaches to learning. This has led to the exclusion of other more comprehensive perspectives such as *personal learning* schema that were proposed by Edwards (1989).

It is within these contexts that the whole notion of thinking must be considered, for it is one's view(s) of *the learner*, one's view(s) of *knowledge*, and one's view(s) of the *learning*

processes that both influence and are influenced by one's *world view*. For example, if one views the learner as either body, mind, soul *or* spirit rather than body, mind, soul *and* spirit, one may be analysing the various aspects of humanity but not synthesising them in holistic terms. Educational psychologists have typically viewed the child from *hereditary* and *environmental* points of view but seem to have taken little account of what Biblical educators and christians would call *image bearer* perspectives. The record of Creation outlined in Genesis chapter 1: 26 & 27 (Holy Bible, New King James version) indicates that God made humanity in His own image. While some New Age proponents have taken this to mean that humans can become *gods*, the notion of spiritual dimensions of human life are an evident part of human existence (Van Brummelen, 1988). In many educational contexts, these have received little attention from educators except for those involved in religious education (Hill, 1982).

It is in relation to the epistemology of knowledge, axiology, ontology, psychology and philosophy that educators express their world views. While some such as Thorndike (1898), Watson (1925), Skinner (1954), Bandura (1977) and Gage (1978) viewed *knowledge as being infused from an external source*, others such as Piaget (1965) and Bruner (1966) viewed *knowledge as being devised from internal processes*, even if only in cognitive dimensions. Edwards (1989), however, argued for a radical reconceptualisation of education based on more holistic perspectives and personal learning considerations that also takes account not only of theological dimensions but also of one's world view.

The ongoing debate concerning the relative merits of both *nature* and *nurture* has continued for decades. In this, learning as a development of environmental conditioning is contrasted with learning as a development of innate internal processes. Consequently, learning is viewed often in classical conditioning, social learning, operant conditioning, learning style or information processing terms or points of view.

Another orientation advocated by Christian educators from Biblical perspectives relates to the integrity of the human personality and life where humans are considered as:

> ... not mind or body, flesh or spirit, but as a unified being who is an *image bearer of His Creator*. That the learning process enables both physical and nonphysical dimensions of that process is not a priority for revelation, however, a model of mind informed solely by reaction to external stimuli correlates poorly with man's creation bearing the image of a self-existent God. Scriptural references to teaching and training imply gradual development: several passages emphasise progressive capacity to learn and profit from instruction (e.g. Deuteronomy. 6:5-8, Luke 2:52; and I Corinthians 13:11). Finally we recognise the legitimate role of reward and punishment in training, a role that Proverbs makes fundamental to effective discipline and training.
> (Edwards, 1989, 97-98 emphasis added)

As the various learning theories alluded to above have no special claim to orthodoxy, the Christian educator must be aware of the various contributions of learning theory to the science and art of learning and so be discerning in relation to Biblical principles, especially those related to the whole person (body, mind, soul and spirit).

It is within contexts such as these that learning and thinking relate also to *thinking legally,* and are considered in this study.

2.3 SOME PERSPECTIVES ON LEARNING

Researchers have attempted to identify, describe, explain and predict the factors, processes and outcomes that are associated with learning. Some have given attention to the behavioural aspects of this issue, while others have been more interested in cognitive or metacognitive matters.

Behaviourists such as Thorndike (1898), Watson (1925), Skinner (1954), Bandura (1977) and Gage (1978) have been unable either to explain or to predict, having been emeshed in the processes of identification and description. On the other hand, cognitive psychologists such as Piaget (1965) and Bruner (1966) and educational researchers, especially those associated with artificial intelligence, such as Halford (1982 & 1989), Case (1984), Demetriou & Efklides (1985), and Sternberg (1987), have sought to undertake empirical studies that have focused on both personal knowledge perspectives and human information processing systems. Yates and Chandler (1991), for example, cite a number of studies into intelligence, automaticity, learning, schemata activation, analogical progressing, problem solving, reading and cognitive development. They took notice particularly of the learner's prior knowledge when attempting

learning tasks. This prior knowledge has been found not only to facilitate learning but also either to impede or to interrupt the learning process, especially via strategies such as misconception, assumption and know-it-all effects. Through analysing these studies, Yates and Chandler (1991) attempted to account for the dilemma faced by teachers of balancing *declarative* and *procedural* approaches (Yates and Chandler, 1991, 133).

Shuell (1986), on the other hand, attempted to establish links between both the behavioural and the cognitive approaches to learning studies. Learning is, in his opinion:

> ... viewed as being active, constructive, cumulative and goal oriented. ... Thus the more traditional principles of learning may be appropriate for certain types of learning while new principles need to be forged for other types of learning, especially those more complex forms of learning in which the desired outcomes involve the understanding of relationships among many separate pieces of information. (Shuell, 1986, 430-431)

Le Francois (1988) and Bereiter (1990) place more emphasis on the information processing approaches to learning particularly those of generative versus reproductive memory, metacognition and cognitive strategies. It is these metacognitive abilities and cognitive strategies that, in their opinion, enable *expert* as compared to *novice* learners to achieve what Weinstein and Mayer describe as the 'products of learning' and the 'processes of learning goals' (Weinstein and Mayer, 1986, 315).

The search for knowledge, both product (content acquisition) and cognitive process, together with the development of the personal abilities to continue to enhance knowledge both intrinsically and extrinsically, seems to be an unending struggle for educational psychologists. Bereiter (1990) expressed concern that while cognitive research has brought to light many problems of students' strategies and understandings, educational learning theories should not lose sight of:

> ... the level of analysis that has brought about the recent advances in understanding human cognition. The advantages of contextual modules as units for analysis are that they are initially constituted of familiar cognitive units, that their development can be accounted for by reasonably well understood processes such as chunking and compilation, and that they have emergent properties of greater human and social significance that are embodied in their original constituents. (Bereiter, 1990, 619)

Sternberg (1987) critiqued some of the neo-Piagetian theories of cognitive development such as those proposed by Pascual-Leone (1970), Fischer (1980), Halford (1982), Case (1984), and Demetriou & Efklides (1985). In analysing their assumptions and propositions for structure, process, novelty and automatisation, context and mechanisms of development, he concluded that:

> Perhaps cooperation among rather than competition between jockeys will eventually result in a theory that satisfies all of the criteria.
> (Sternberg, 1987, 528).

Sternberg (1987) is doubtful that the current state-of-the-art of cognitive psychology, especially in neo-Piagetian forms, has reached a stage of either functionalism, usefulness or coherence in terms of providing comprehensive schemata and dynamic principles to inform teaching and learning.

While so-called *expert* students have been found to be better able to monitor their own thinking and problem solving than are their less experienced and novice colleagues, much still needs to be done both to identify and to define different strategies that are used in particular contexts such as those related to thinking legally. Learning by doing, learning how to learn, strategic learning and the like, need to take seriously the Bransford and Vye 'goal of helping students transform declarative, factual knowledge into procedural, conditioned knowledge' (Bransford and Vye, 1989, 199).

Halford is equally sceptical of the learnings gained from Piagetian propositions when he suggests that:

> ... there is no evidence clearly confirming the existence of Piaget's cognitive structures in explicit form. Consequently, neo-Piagetian theories have proliferated, in an attempt to conceptualise the increasing powerful cognitive systems that have been observed to develop with age. Research on the object concept indicates that children have knowledge and skills that would not have been predicted by the Piagetian proposition, but that children progressively develop an integrated conception of space that is consistent with some of Piaget's basic tenets. (Halford, 1989, 325)

Biggs (1988) provided some direction for developmental research when he argued that a more appropriate model for student learning was one that emphasised metacognitive processes. In these, students must be aware of motives, task demands, their own cognitive knowledge base and their abilities to manage the strategies that are appropriate for handling the set tasks. The *gaining of meaning* was of ultimate interest to Biggs. He indicated that student learning may be enhanced in three main ways:

> 1. *Discouraging a surface approach*: Certain practices, relating particularly but not exclusively to assessment and workload, induce students to bargain for minimal involvement, thereby committing themselves to a surface approach. Teachers seem frequently unaware of this effect: it invites self-exploration by teachers individually and in in-service workshops.
>
> 2. *Encouraging a deep approach:* There are techniques that imaginative teachers can use within their subject areas, which encourage constructive metalearning and a deep approach: for example, promoting guided self-questioning, using the teacher as a model, deriving heuristics to suit the task, and by using other students as a resource, principally in small group activities.
>
> 3. *Developing an achieving approach:* The present results show that teaching study skills can be fruitful as long as it is done in a metacognitive context. The target is the achieving approach, with self-management of students' learning and study contexts, while alerting students towards a meaning orientation. (Biggs, 1988, 135-136)

An alternative approach in recent times has been the developments, in qualitative research in education, proposed by phenomenologists, and phenomenographers such as Marton and Svensson (1979); Saljo (1979); Pramling (1983); Marton, Hounsell and Entwistle (1984); and Marton, Dall'Alba & Beaty (1993). Some of their work has focused on the conceptions of learning, particularly from the learner's perspective. They have attempted to describe:

> the qualitatively different ways in which people experience and conceptualize various phenomena in the world around them. (Marton, Dall'Alba & Beaty, 1993, 278)

This Marton, Dall'Alba & Beaty (1993) work built on Saljo's (1979) research on conceptions of learning. He identified five distinctly different conceptions of learning. These were:

1. the increase of knowledge;
2. memorizing;
3. acquisition of facts and the like, which can be retained and/or utilised in practice;
4. abstraction of meaning; and
5. an interpretative process aimed at the understanding of reality.

Following research with students from the Open University in the United Kingdom over a six year period, Marton, Dall'Alba & Beaty (1993) posed six qualitatively different conceptions of learning as:

1. increasing one's knowledge;
2. memorizing and reproducing;
3. applying;
4. understanding;
5. seeing something in a different way; and
6. changing as a person. (Marton, Dall'Alba & Beaty, 1993, 277-300)

It is this sixth conception of learning that takes up the call made by Edwards (1989) for educators also to view learning as *personal development*.

While it is clearly understood that educational research has important implications for instructing, perceiving, thinking, learning, critically reflecting and metacognating, a great deal of work still needs to be completed if educators are to be able to integrate the process, product and personal development approaches that are outlined in this chapter. It is the understanding of each of these dimensions together with the facilitation and orchestration of teaching and learning activities to promote the integration of knowledge, skills, processes, affective aspects and spiritual dimensions, that is expected to enable students to make meaning both of and through all areas of learning.

Account must also be taken of the interactions between learning and thinking. While there are some common attributes to these, learning must be considered always as the superordinate concept, while thinking is the subordinate one. If both thinking and cognition are given too high a place in learning priorities, learning associated with ethics, values, attitudes, sensitivities and emotions (the affective domain), the psychomotor domain, the experiential, the procedural and the personal may not be as holistic as they should be. There must be a

balanced integration of the cognitive *process*, *product* and *personal development* approaches to learning.

2.4 SOURCES OF LEGAL KNOWLEDGE, SKILLS, PROCESSES AND CONCEPTS

A major focus in both the legal literature and in the University Law School courses, such as the Queensland University of Technology Law School's LWB305 *Jurisprudence* course, has been to examine the sources, development, forms and processes of legal thought. Particular attention is focused usually upon historical background to theories of law. These are categorised often in various ways, but usually relate to:

1. *theories of limited or unlimited government power* such as natural law and types of reasoning; social contract, positivitism, parliamentary sovereignty and the rule of law, and civil rights;

2. *theories of the recognition of valid laws and legal systems*, especially in relation to modern positivitism;

3. *sociological explanations of the law and its functions* in various communities, social structures or social institutions;

4. *theories of legal reasoning* particularly those associated with logic, positivitism and realism; and

5. *theories of the purposes or functions of law* often expressed in the form of philosophical discussion of justice, dominant theories, law and utilitarianism, and theories of legal criticism such as Rawl's Hypothetical Social Contract.

The legal literature on these topics is very extensive, especially in relation to Natural Law, Social Contract, Natural Rights, Positivitism, Realism, Liberalism, Modern Positivitism, Utilitarianism, and Civil Rights. It is not the intention of this section to undertake a serious review of this literature. The purpose of making reference to these sources is to allude to the breadth, scope and complexity of perspectives that must be taken into account if valid attempts are to be made both to understand and to use these learnings. Because of the focus of this research study, the researcher is alluding to sources and references in this literature rather than undertaking a detailed and thorough analysis of them.

In various studies of reasoning, especially of the philosophical and legal kind, attempts have been made to distinguish between valid and invalid reasoning and to identify either the processes or the schemata for the categorisation of human thought. Kelsen (1973), Copi (1979) and Allwood *et al.* (1977) together with many other writers, judges and legal educators (such as Pyke, 1988, 59-66) have provided some categorisations of legal reasoning which include:

1. *Descriptive Reasoning* based on scientific, descriptive, theoretical, and positive perspectives where statements are based on the verb *is* (e.g. The law on topic A is so-an-so).

2. *Normative reasoning* where moral, prescriptive or practical perspectives are made in relation to expectations such as Kelsen's *If someone does B then an official ought to punish him/her.*

3. *Deductive reasoning* usually in predicate, propositional or logical relations forms through which logical conclusions are derived from, or prescribed by, certain given propositions and premises. Logicians such as Copi (1979) have provided formal structures and principles for the use of deductive logic. They have also examined the limitations of such processes.

4. *Inductive approaches* where reasoning is usually associated with deriving meaning from *the particular* in order to *generalise*. However, these approaches are apt to produce conflicting conclusions because of the inability to standardise propositions, assumptions, premises, inferences, contexts, samples and degrees of closure required in varying social situations or settings.

5. *Rhetorical approaches.* Authors such as Toulmin (1958) outlined strategies where persuasion and impression provide compelling argument especially those related to *argumentum a pari* (by analogy), *argumentum a contrari* (by distinguishing), *argumentum a fortiori* (more substantial and compelling), *argumentum absurdum or reductio ad absurdum* (apagogical arguments which lead to contradiction or absurdity), *argumentum ad hominem* (directed by known prejudices or sympathies of the hearer), *argumentum ad personam* (attacking the person who presented the idea rather than the idea itself), *argumentum ad crumenam* (affecting the *hip-pocket nerve*), and *argumentum ad captandum* (unsound or spurious argument).

6. *Moral reasoning,* which is often used to distinguish *rationalistic* from *intuitionistic* forms of reasoning particularly related to social and cultural norms and ethical thinking.
(Kelsen, 1973, 228-251).

In *On Law and Justice,* however, Freund (1968, 110-115) outlined a vastly different schema for modes of thought that *are almost inescapably called for in legal reasoning*. These were:

1. *Dialectical Thinking:* the processes of logical debate about a proposition or issue;

2. *Contextual Thinking:* analysing particular events, their causes and the appropriate laws to apply;

3. *Ethical Thinking:* deciding what is just, fair or equitable;

4. *Genetic Thinking:* analysing the origin of an idea (for example, tracing the development of laws on privacy);

5. *Associative Thinking:* the process of reasoning by example, of drawing conclusions about a case by comparing it with other similar cases and precedents, argument by analogy;

6. *Institutional Thinking:* applying rules of procedure and practice; and

7. *Self-critical Thinking:* reflecting on one's actions and decisions, and identifying where changes are needed. (Freund, 1968, 110-115)

Schemata such as these have provided legal educators with mechanisms for categorising various modes of legal thinking. The logical development of these forms of legal thinking in the cognitive domain were complemented by Freund's 1973 proposals for the inclusion of moral reasoning in such discussions. Indeed, Freund (1973), in an address to Legal and Law-related Educators at the Annual Conference of the Law in a Free Society Association in 1972, argued that moral reasoning should be the first goal of any Law-in-Schools program.

Hart (1967), a contemporary of Freund, outlined similar perspectives when he stated that:

> ... although logic in the sense of deductive and inductive reasoning plays little part (*in the processes of legal adjudication*), there are other processes of legal reasoning or rational criteria which courts do and should follow in deciding cases. (Hart, 1967, 268)

To Hart's (1967) mind these were:

1. deductive reasoning;
2. inductive reasoning;
3. descriptive and prescriptive processes;
4. discovery and appraisal;
5. clear cases;
6. indeterminate rules; and
7. using rules of evidence.

This Hart (1967) schema is similar both in structure and in form to that of Freund, though it is nowhere near as comprehensive in either its scope or its ability to deal with the diverse categorisations of legal thinking. Freund's conceptualisations were far more powerful in their abilities to cater for a more diverse range of categorisations of legal thinking.

Berman (1980) saw *legal reasoning* as a means for an attack on the Cartesian dichotomies of *object* and *subject*, *reality* and *value*, *reason* and *passions*. He:

> ... contended that there is a logic of ends, and not only a logic of means, but that it is a dialectical logic, not a formal logic. It is the logic of rhetoric in the ancient sense: the sense of reasoned discourse, of argumentation, of justification of choices. And it finds its most important manifestation in law. Indeed, it is no accident that the law in the West was once studied as a branch of rhetoric... Legal reasoning is to rhetoric what mathematics is to logic. (Berman, 1980, ix)

Peczenik (1989), in dealing with the analytical aspects of the study of law, uses the European terms of *legal dogmatics* (the German word is *Rechtsdogmatik*) and *legal science* as well as legal and other judicial decision-making in order to outline the following specific methods of legal reasoning:

1. *construction of statutes in 'hard' cases* (classificatory construction and creative construction);

2. *reasoning by norms* (for example, by prima-facie, existence, justifiability, coherence and function);

3. *logical, literal and systematic interpretation*;

4. *reduction, restrictive interpretation, extensive interpretation and the creation of new norms*;

5. *conclusion by analogy*;

6. *teleological construction of statutes* (subjective, objective and radical interpretations (for example, E. Kelof); and

7. *solution of collisions between norms*. (Peczenik, 1989, 17-46)

While these proposals are helpful, they are criticised as being too narrow both in their structure and schema to cater successfully for diverse categorisations within an overall framework for thinking legally.

Dias (1985) sought to analyse both the contextual and the social factors that were associated with legal thinking including:

1. *individual interests* concerning personality, domestic relationships and interests of substance;

2. *public interests* of the state as a juristic person and as a guardian of social interests; and

3. *social interests* in relation to general security, social institutions, general morals, conservation of social resources, general progress and individual life. (Dias, 1985, 431-433)

Roy and Howe (1990), on the other hand, have developed the following schema for socio-legal thinking :

1. *Heteronomous - socionomic perception of legal transgression.* [Do you think it is wrong or all right (sic), for example, to steal? Why?]

2. *Legal absolutism - non-absolutism* (Tapp & Kohlberg 1979). [Is it always right or always wrong to, for example, steal or is it sometimes permissible? Why?]

3. *Recognition of legal transgression consequences* (Lickona 1976). [Should people with different intentions for, for example stealing, be punished the same way? Why?]

4. *Perceptions of laws as immutable - mutable* (Tapp & Kohlberg 1977). [If they wanted to, could people change a law against, for example, stealing in some way? How?]. (Roy and Howe, 1990, 241-252)

They justified their approach on this basis:

> ... research on processes of change in both the socio-legal and other domains needs to include a treatment of the language displayed in the social situation.
> (Roy and Howe, 1990, 250)

They believed that:

> This concurs with Piaget's (1947) contention that social interaction and individual cognitive structure are mutually dependent.
> (Roy and Howe, 1990, 250)

Both the Dias, and Roy and Howe schemata outlined above introduce additional factors, especially sociological perspectives that are so necessary in the development of any overall schema. However, they fall far short of the development of a conceptual framework that is robust, diverse and all-encompassing. They focused on various social aspects of legal thinking rather than on a more comprehensive framework for *thinking legally.* Their scope was limited by this focus on social applications. This leads to a conclusion that their schemata are part of an overall framework of *thinking legally*.

Another approach to the description and definition of legal reasoning is that taken by Morris, Cook, Creyke and Geddes (1988) when they analysed aspects of legal decision-making. Their propositions included:

1. ascertaining the facts;
2. analysing the facts;
3. identifying the legal issues raised by the facts;
4. discovering and concisely stating the relevant laws;
5. applying the laws to the facts; and
6. drawing conclusion(s).

(Morris, G., Cook, C., Creyke, R., Geddes, R., 1988, 19-22)

This schema is quite developmental in terms of its ability to provide a useful framework for issues focused on particular cases, but it, too, falls far short of the development of a comprehensive conceptual framework about thinking legally.

Several authors, such as Jenkins (1990), have made analyses of the criteria, logic and reasoning processes that have been used by judges in an attempt to identify the strategies or schemata that assist in the development of legal thinking and reasoning. These are:

1. Facts: What are the important facts of this case? What is the major problem(s)? Who are the sides or parties in this case?

2. Laws: What laws (such as constitutional principles, statutes, rules) might apply to this case?

3. Arguments: What arguments would you make for each side in the case?

4. Decisions: If you were the judge in this case, what would you decide and why? Would you agree with one side or would you seek a different solution? Why?

5. Hypotheticals: What circumstances would cause your solution to be different? What about the ...? What if ...? What should have been done ...? How could this problem have been avoided?

6. Alternative Solutions: Are there any other ways of solving this conflict? Why? How? (Jenkins, 1990, 31-39)

Caully and Dowdy (1986), on the other hand, have attempted to develop a schema to assist individuals both to analyse and to criticise the reasoning that is used by the courts. They indicate some factors which need to be taken into account, including: 'Judges' opinions, logical reasoning, policy application, evaluating supporting evidence, use of persuasion, precedential effects, application of legal principles, achievement of social or economic goals' (Caully and Dowdy, 1986, 63-75).

Both the Jenkins, and Caully and Dowdy schemata provide some insights into the processes of thinking legally in the American Court system, but they fail to provide either a comprehensive or holistic framework about *thinking legally*.

Investigations of the use of prototypes as compared with criteria in jurors' verdict Selection processes led Smith (1991) to conclude that some jurors have:

1. *naive concepts* that included legally incorrect information,

2. *category prototypes* that influenced subjects' verdict choices, and

3. been *Influenced by Judges' instructions on category prototypes.* (Smith, 1991, 857-872)

This work, while complementing that of Caully and Dowdy (1986) and Jenkins (1990), provides neither a comprehensive nor a developmental framework that is related to thinking legally. What is needed is an integration of the schemata of Kelson, Freund, Hart, Peczenik, Dias, Roy and Howe, Morris *et al.*, Jenkins, Caully and Dowdy, and Smith if an adequate framework is to be developed for thinking legally.

Anderson (1980) took a completely different approach when she provided guidelines (see Figure 2.1) for the development of what she termed *social cognition* and *the promotion of responsible citizenship*.

Figure 2.1: Anderson's Continuum for Promoting Responsible Citizenship

Children moved away from: ----->	-----> *:Children moved toward*
• *perceiving law as restrictive, punitive, immutable and beyond the control and understanding of the people affected*	• *perceiving law as promotive, facilitative, comprehensible, and alterable*
• *perceiving people as powerless before the law and other socio-civic institutions*	• *perceiving people as having potential to control and contribute to the social order*
• *perceiving issues of right and wrong as incomprehensible to ordinary people*	• *perceiving right and wrong as issues that all citizens can and should address*
• *perceiving social issues as unproblematic*	• *perceiving dilemmas inherent in social issues*
• *being impulsive decision makers and problem solvers who make unreflective commitments*	• *being reflective decision makers and problem solvers who make grounded commitments*
• *being inarticulate about commitments made or positions taken*	• *being able to give reasoned explanations about commitments made and positions taken*
• *being able to manage conflict in other than a coercive or destructive manner*	• *being socially responsible conflict managers*
• *being uncritically defiant of authority*	• *being critically responsive to legitimate authority*
• *being illiterate about legal issues and the legal system*	• *being knowledgeable about the law, the legal system and related issues*
• *being egocentric, self-centred, and indifferent to others*	• *being empathetic, socially responsible, and considerate of others*
• *being morally immature in responding to ethical problems*	• *being able to make mature judgments in dealing with ethical and moral problems*

(Anderson, 1980, 385)

In using social cognition, Anderson (1980) is referring to students' cognitive ability to identify, process and evaluate either alternate propositions or courses of action together with the likely consequences of responsible social action. The process implies also the development of an ability to select the appropriate course of personal action.

Anderson (1980) aimed to assist citizens and school communities, especially through educational programs, to design courses such as those that are termed *Active Citizenship* to process cognitively the issues, alternatives, consequences and preferred options to particular issues and the resultant desired courses of action. Through studies such as these, it would be possible for students to transfer their learning to their real situations as active citizens in their communities. This would, in Anderson's terms, empower students for their learning of, and involvement in, processes of responsible citizenship. While Anderson's work in the early 1980s provided some perspective on the issue of social cognition, little effort seems to have been expended on relating this to information-processing models of cognitive development which were involved with the teaching-learning processes.

Similar considerations to these were developed by Naylor (1990) when investigating the roles of values education, ethical reasoning and participatory activities in aiding law-related education, citizenship education and social studies. Newmann (1990) referred also to these citizenship or social action abilities as *Higher-Order Thinking* [see also Atkin (1994), Hager (1994), Marland (1994), and Walkerdine (1994)], while McKee (1988) defined *critical thinking* as:

> ... a dynamic process of questioning and reasoning; active inquiry as opposed to passive accumulation of knowledge. To think critically is to question definitions, actions, and beliefs; it is to consider what might have been and what may yet be. (McKee, 1988, 444)

There were some difficulties with McKee's (1988) work, however, in that practitioners viewed 'critical thinking as separate skills (for example, comprehension and summary) isolated from course content' (McKee, 1988, 445) while the university staff involved in the project 'defined critical thinking as essentially raising and pursuing questions about the ideas one encounters' (McKee, 1988, 445). The work of Anderson (1980), McKee (1988), Naylor (1990), and Newman (1990) can be criticised in that social cognition is viewed from

practitioner points of view, rather than from more holistic perspectives that could provide empowering principles for citizenship action along the lines of the definitions of university staff involved in McKee's (1988) project.

Demetriou and Charitides (1986) undertook research similar to Anderson (1980) when they attempted to define the various criteria and factors which related to *social cognition*. Through instrumentation, development and research, they investigated Year 8, 10 and 12 students' understandings of six major conceptual areas. The data obtained from the research project led to a definition of four major levels of social-cognitive understanding referred to as naive realism, integrated realism, inquisitive thought, and intersystemic thought. This work, outlined in Figure 2.2, furthers Anderson's (1980) work in that it prescribes some of the parameters that must be taken into account in the design, development, implementation and review of programs to promote responsible citizenship. It is in the area of conceptual development that powerful enabling devices were generated in order to empower students for active, informed and responsible citizenship.

Figure 2.2: Levels of Social-Cognitive Understanding

	Naive Realism	*Integrated Realism*	*Inquisitive Thought*	*Inter-systemic Thought*
(i) Structure of Justice				
(ii) Social Control on Justice				
(iii) Sources of the Authority of Justice				
(iv) Safeguards of Objectivity				
(v) Responsibility of the Accused				
(vi) Evaluation of the Verdict				

(Demetriou and Charitides, 1986, 333-353)

One aspect of this work which has received particular attention is the relationship between intention and action amongst school students. In analysing data obtained from a study of Year

8, 10 and 12 students' abilities to undertake formal reasoning tasks and a questionnaire tapping juridical understanding, Demetriou and Charitides (1986) indicated that juridical understanding: (i) was partially dependent on cognitive development, (ii) depends on experimental more than rational abilities, and (iii) does not differ by sex.

Perceptions of consequences seem to play a particularly significant role in students' abilities to develop understandings such as those investigated by Demetriou and Charitides (1986). Guerra (1989) takes up this point further when indicating that:

> Within the social problem-solving literature, consequential thinking generally has been defined as an information-processing skill reflecting an individual's ability to generate a variety of consequences of responses to problematic social situations. (Guerra, 1989, 441)

In examining this issue, Guerra (1989) investigated (a) the importance of consequences, (b) the probability of consequences, and (c) the perceived severity of consequences (legal, social and moral):

> The present study provides some support for directing efforts toward the assessment of relevant beliefs about consequences, yet it is clear that antisocial and delinquent behaviour is not a result of any one particular cognitive deficit or bias but rather is related to a range of possibly interrelated cognitive factors. Further application of a social-cognitive model to the study of delinquent behavior requires attention to these various aspects of social cognition, including both underlying structural competencies and functional skills related to how information is processed, as well as the individual's beliefs. By focusing on the structure, function and processes of thought, we may identify specific patterns of cognition characteristic of antisocial and delinquent youth and develop specific preventive and interventive efforts accordingly. (Guerra, 1989, 452)

This amplifies some of the work of Hart (1967), Freund (1968, 1973), Anderson (1980), and others, in that it identifies process approaches that may be compared with product approaches in the conceptualisations that are associated with thinking legally. Little emphasis seems, however, to have been placed on the perspectives of Edwards (1989) and Marton, Dall'Alba & Beaty (1993), suggesting the need for diverse and dynamic approaches to personal development.

Another perspective to social cognition is what Nathanson (1989) sees as the need for legal and law-related education, especially in terms of Professional Legal Education (PLE) for the professional lawyer. In his terms, PLE needs to be more focused on *creative and decision-orientations* of teaching and learning rather than *on teaching of simple transactional procedures as they might be performed in a law office* (Nathanson, 1989, 122). In making suggestions about the possible curriculum implications of such PLE proposals, he concludes that:

> The answer to this dilemma may be to design a curriculum with a unifying theme using, perhaps, a common legal skill as its basis. This common legal skill would serve to bind the whole curriculum, with all its debate about educational goals, together. Because of the key role it would play in unifying the curriculum this common legal skill ought to be one that pervades, and is much valued in, legal practice. The skill which may suit this role is *problem-solving*. (Nathanson, 1989, 122)

He sought to provide a frame of reference (Figure 2.3) for the dimensions of these problem-solving proposals.

Figure 2.3: Stages of the Problem-Solving Process

STAGES OF THE PROBLEM-SOLVING PROCESS	*PLAYING - OUT - CONFLICT* DECISIONS	*CONFLICT - BLOCKING* DECISIONS
1. Problem and Goal Orientation		
2. Fact Investigation		
3. Legal-Issue Identification and Assessment		
4. Option-Identification and Decision-Making		
5. Planning and Implementation		

(Developed from Nathanson, 1989, 123-124)

Playing-out-conflict decisions can be identified in litigation, negotiation, and various forms of dispute-resolution such as conciliation, arbitration and mediation, while conflict-blocking

decisions relate to client work focused on designing and using procedures and documents that attempt to minimise legal risk by both constraining and blocking both the identified or the potential conflict. Though he conceives all legal problems as *client goals impeded by obstacles* (Nathanson, 1989, 123), the problem-solving processes are seen as 'a linear process of stages as well as a fluid process - either as a process of continual renewal as new problems arise, or as one requiring modifications as one moves through the stages' (Nathanson, 1989, 136):

> Legal problem-solving is at the heart of what lawyers do. A theory of legal problem-solving is simply a way of giving form to the skill of legal problem-solving. It offers the student a useable framework for solving problems. The framework has both a linear aspect which can guide students in a step-by-step approach to problem-solving, and a fluidity aspect which, if skilfully taught, can encourage students to solve problems creatively. (Nathanson, 1989, 136)

Nathanson's (1989) framework focuses narrowly on the legal profession. He makes no attempt to extrapolate this model into either other contexts or other groups of individuals involved in, for example, what might be termed community-based legal and law-related education, for example, legal and law-related education of a non-professional kind.

The literature which has been accessed in this section provides educators and researchers with a wide range of frameworks and schemata which provide very useful and systematised approaches to understanding some of the essential elements of legal thinking and legal reasoning. Most of these approaches, however, are expressed in either content or knowledge terms. Schemata, such as Nathanson's (1989), promote the strategy, process and skill dimensions that ought to be so central to the teaching and learning approaches that are used by legal and law-related teachers not only in Queensland and Australian primary and secondary schools but also in tertiary universities and colleges. Few authors seem to have taken up the call for the inclusion of personal development education in their frameworks related to legal thinking.

The dilemma for legal and law-related educators, in relation to the literature cited in this section, is that it falls far short of the development of conceptual, structural or procedural frameworks about *thinking legally* which are holistic, robust and diverse. Some of the

schemata, for example, those of Freund (1963), Anderson (1980), Morris *et al.* (1988), and Peczenik (1989) provide substantial frameworks on various aspects of the topic yet none is either suitably comprehensive or flexible to act as an integrating framework of thinking legally.

2.5 LEGAL COMPETENCE: MORE THAN JUST PROFESSIONAL KNOWLEDGE, DECISION-MAKING AND SKILLS TRAINING

A great deal of attention has been given in this chapter to the educational relationships among: (i) knowledge as product or content, (ii) knowledge as process, (iii) knowledge as personal development. However, little attention has been paid in this chapter so far to knowledge as personal development and/or professional ability.

All professionals have a great deal of knowledge but, it is not the mastery of content or information alone that is the hallmark of a competent practitioner. In legal settings:

> ... knowing how to put the terms of a particular legal rule into one's own words is not sufficient knowledge for the purpose of law practice. A lawyer must be able to apply the rule to new and different fact patterns, compare it to other legal statements, and make a predictive judgement as to its applicability to specific circumstances. (Gold, 1983, 1-2)

The question of legal competence has taken on new meanings as societies throughout the world have tended to become more litigant. Gold (1983) indicated that this question was the subject of a major conference on *Quality of Legal Services,* in October 1978, in relation to the British Columbian Professional Legal Training Program. The conference adopted the following definitions:

> The Conference accepts the definition of *competence* as the state of having the ability or qualities which are requisite or adequate for performing legal services undertaken, and it accepts the definition of *incompetence* as the state of lacking the ability or qualities which are requisite or adequate for performing legal services. A lawyer is competent if he (sic) has demonstrated capacity to provide a quality of legal service at least equal to that which lawyers generally would reasonably expect of a lawyer providing the service in question. (Gold, 1983, 1)

To those involved in the Professional Legal Training Program in British Columbia, the expectation was that professional abilities (such as those developed in pre-professional programs in University Law Schools and professional programs such as seminars and conferences), academic and practical skills (such as social, intellectual, practical and experiential), professional attitudes (such as professional conduct, personal ethics, and the like, particularly in the affective domain), and personal abilities and qualities are necessary requirements for professional competence.

At the International Conference on *Skills Development for Tomorrow's Lawyers: Needs and Strategies*, Gold (1996), in the abstract of his Keynote Address entitled *Tomorrow's Legal Services: Facilitating Change to Secure the Future,* added that:

> Lawyers do, however, have fine intellectual skills that may be adapted to societal and individual needs. These must be supplemented by operational legal skills, and placed within a new vision of the pro-active, responsive, adaptive, and creative lawyer. The paradigm shift that will open the opportunities for lawyers to serve more responsively is readily available, and is contained within the rubric of interest-based bargaining. (Gold, 1996, 1 - abstract)

These qualities and abilities referred to above were considered by Nash (1983) to include:

1. a broad understanding of the basic principles of the common law;
2. an awareness of the existence of any statute law which may prove to be relevant;
3. the capacity to interpret a statute and to read cases;
4. the capacity to analyse logically both statute law and case law and to weave them into a composite logical whole, whether for the purposes of advice or of argument;
5. the capacity to use a law library and/or a computer based retrieval system to find the law relevant to the problem;
6. the capacity to draft documents in a precise, clear and unambiguous fashion;
7. the ability to communicate with a client and, more importantly, the ability to have the client communicate clearly with him (sic);
8. the capacity to negotiate, whether with public authorities or with other lawyers;
9. sufficient judgment to know what facts are relevant to advising his (sic) client or presenting a client's case, i.e. the capacity to prune irrelevant facts from the relevant;
10. the skill to keep adequate file notes and diary notes of all relevant matters;

11. the capacity to present evidence before a tribunal of fact whether judge or jury in a simple straightforward fashion no matter how complex the facts;
12. the capacity to present a logical, well ordered, argument both in relation to law and facts to a judicial tribunal;
13. the capacity to operate an office system in such a way that deadlines are not missed and crises can be handled; and
14. the capacity to cope with a number of problems at a time and to switch his (sic) mind from one file to another. (Nash, 1983, 94-95)

There has been some dispute in the literature concerning Nash's (1983) checklist approach. This was due to its inherent inability to be comprehensive, as well as its limited ability to be applied to the complex and diverse roles that judges, lawyers, and legal personnel, for example, perform. Crampton, for example, (as quoted by Nash) indicates that the most important feature of truly competent lawyers is a professional attitude in relation to knowing the extent of their own competence, what they can handle alone and when they require assistance from others. Thus:

> a competent lawyer, we can say, possesses knowledge as demonstrated by a certain level of skill and an habitual attitude of critical detachment about his (sic) work. (Ayling and Constanzo, 1984, 95)

In terms of competence in legal knowledge, Ayling and Constanzo (1984) refer to:

1. *Directional Law* - The skeleton of relevant concepts, principles and rules in a wide range of subject areas which enables a lawyer to classify the facts thrown up by a client problem into legal categories and sub-categories.

2. *Answering Law* - That detailed body of relevant principles and rules which enables a practitioner to propose legal solutions to a client in which broad legal issues have been classified previously and to predict the likely outcome of any proposed solution.

3. *Accomplishing Law* - That body of relevant rules (often contained in statutory rules) prescribed procedures and professional conventions which make up the step-by-step procedures required to put the particular solution in train.

4. *Facilitating Law* - That body of statutory regulations, prescribed procedures and unofficial practices including procedures of courts, governments and semi-government authorities (including hours and days of opening and fees charges) by which accomplishing law is administered. (Ayling and Constanzo, 1984, 96-97)

However, this approach relies more on the acquired and used body of knowledge and information than on the skills, processes and attitudes that are required for professional competence. Ayling and Constanzo (1984) view competence in knowledge acquisition terms whereas competence, in the perspective of Gold (1983) and Nash (1983), seems to imply an ability to either perform or process a range of tasks to an agreed professional and community standard.

Others such as Lee and Fox (1991) have argued that the learning of legal skills should include aspects such as:

1. *Black Letter Formalism* - reasoning to determine the correct rules, facts and results in particular cases;

2. *Interstitial Legislation* - judges' rulings on *hard* cases;

3. *Consensus* - the need for judges' decisions to be based on some societal or popular consensus;

4. *Principled Models* based on Dworkin's Principled Theory of Adjudication - Law does not simply consist of rules, but contains both principles and policies which underlie the legal rules and provide a justification for them;

5. *Legal Realism* - development of a realistic view of law which not only accepts that rules can and do run out but also even questions whether law really consists of rules at all, and whether legal rules are ever binding. This process leaves judges with virtually unfettered discretion to decide cases as they please;

6. *Political Analysis* - the need to investigate the political influences on the law and legal processes; and

7. *Philosophic Analysis* - of the underlying theories and philosophies of mainstream legal and political thought such as Marxism, Semiotics, Feminism, Post-modernism and Critical Theory. (Lee and Fox, 1991, 120 - 129)

The problem with this proposal is that it consists of a shopping list of proposed requirements rather than of a fully integrated conceptual, structural and procedural framework. The processes used by the authors have left them searching for integrating devices that provide the

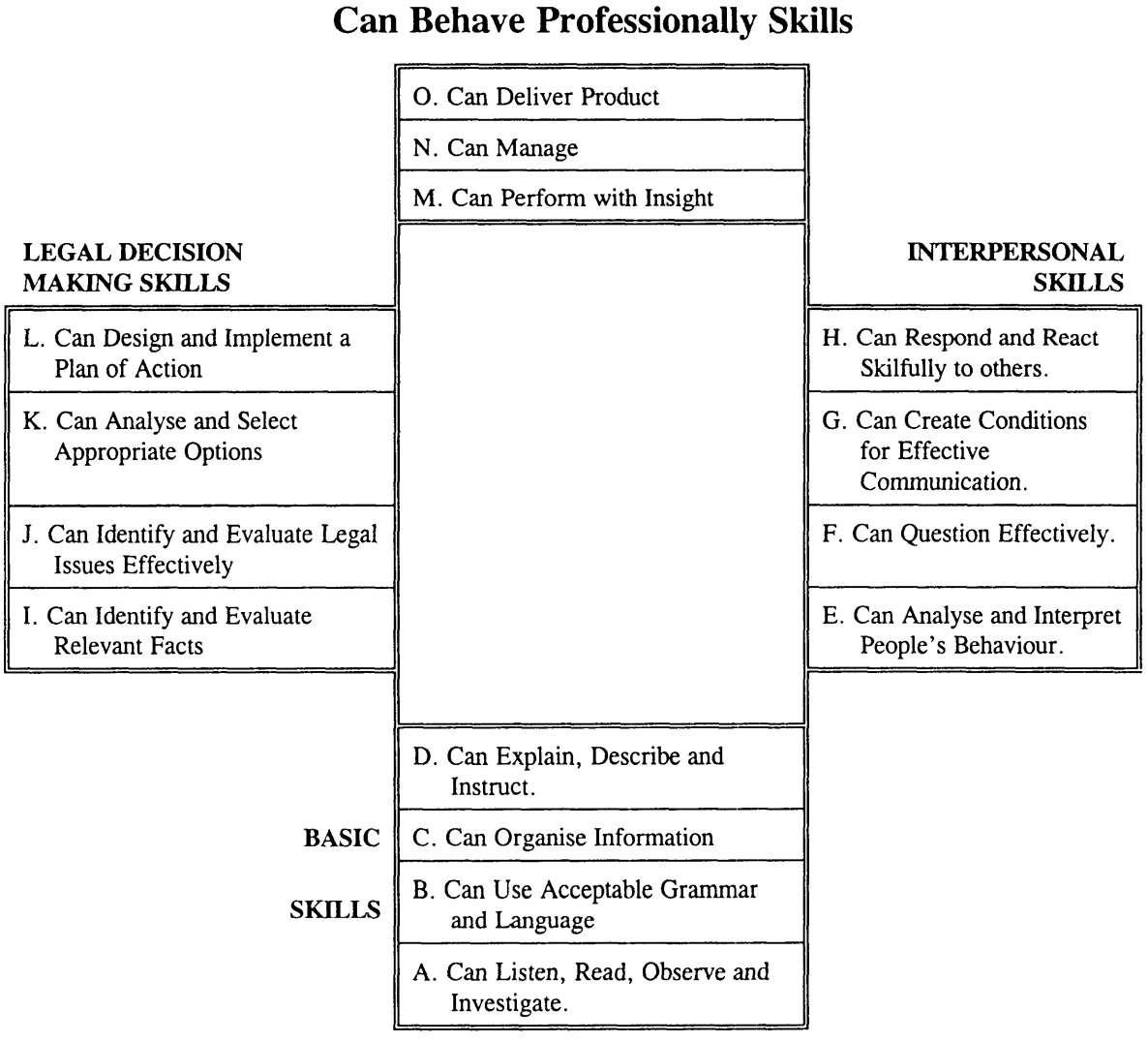
linkages amongst all the factors that are listed. Consequently, the Lee and Fox (1991) approach is an inappropriate one for the development of a schema related to thinking legally.

Others, including Ayling and Constanzo (1984), have argued that skills, especially those related to ensuring that a lawyer's knowledge 'works for the client' (Ayling and Constanzo, 1984, 97), play an important role in professional competence, while Gold (1982) considered that:

> knowledge required of the effective lawyer is therefore the well orchestrated co-ordination of information and intellectual skills. Knowledge (*knowing what*) on its own is rarely, if ever, powerful; knowledge must be coupled with *know-how*. (Gold, 1982, 2)

In this regard, Gold in 1982 undertook a research project to investigate eight study courses from the Practical Legal Training Program in British Columbia. He attempted to identify what he referred to as *Master Skills*. These were arranged in a hierarchy showing a web of skills, from basic skills to interpersonal skills as well as to those associated with legal resaoning and decision-making. Ayling and Constanzo (1984) critiqued this Canadian Master Skills List and in Figure 2.4 have added additional elements.

Figure 2.4: A Master Skills List



(Adapted from Ayling and Constanzo, 1984, 100)

Nathanson (1987) had critiqued also the Gold (1982) and Ayling and Constanzo (1984) *Master Skills Hierarchy,* particularly in relation to the transfer of learning, on the basis that some learning does not transfer for one context to another. Nathanson saw the need for the development of a set of conceptualisations of the generic skills and practices necessary for the competent lawyer:

> Since generic skills are transferable but transactional information is not, the conclusion is inescapable that to put skills and transactions together, we must design instruction to promote the transfer of generic skills from one transaction to another. Techniques for accomplishing this are available and, with careful

> application, they can work to create effective professional legal training courses. (Nathanson, 1987, 195)

Twining (1986) was critical of this whole debate. His concerns were that:

> ... what is involved in teaching, learning and assessing individual professional skills is under-theorised and under-researched. The result is that almost everyone involved in the general debates about professional competency and professional training in the United States, the United Kingdom, and the Commonwealth do not really know what they are talking about, because there is almost no systematic and developed body of knowledge on the subject, despite some individual studies, including admirable work sponsored by the American Bar Foundation such as that of Zemans and Rosenblum.
> (Twining, 1986, 1)

Gold (1987, 64-71) further elaborated on these concerns when he supported the proposed establishment of a Commonwealth Institute for Legal Education and Training. The works by Mackie (1987) and Bradney (1987) illustrated the immensity of this developmental task following their analysis of the place and effectiveness of Professional Skills Training in Universities in the United Kingdom. However, their main question concerning the appropriateness and viability of the whole enterprise related more to the question of *What skills?* and *Which competencies?* Bradney (1987, 132) questioned 'the lack of knowledge about what professional legal skills are'.

Winsor (1984), Cooper (1985), Jackling (1986), Goldring (1987), and Finlay (1989) raised also a number of issues that were relevant to professional legal education. These included the false dichotomy between academic knowledge and professional abilities in legal education, the cost-benefits of PLE, appropriate delivery strategies for PLE programs, curriculum design for PLE programs, the gap between intellectual competencies and those that are required for practising law, the costs of PLE and the formation of professional attitudes.

There are other authors, however, who are not content with professional competence being expressed only in terms of knowledge, information, strategy or skill. Johnson (1980) indicated that professional attitudes, i.e. personal development, were:

> ... a combination of concepts, information and emotions that result in a predisposition to respond favourably or unfavourably towards particular people, groups, ideas, events or objects. The affective component of attitudes consists of the evaluation, liking or emotional response. The conceptual and informational components of attitude consist of the frame of reference and the information the person has about the target or the attitude. (Johnson, 1980, 59)

Each professional has an obligation for self-enhancement, interest, concern, motive and acceptance. Ayling and Constanzo (1984) asserted that:

> ... it is professional attitude in the demonstration of skills and knowledge which is the linchpin of a fully qualified professional's entitlement to practice for his (sic) own financial gain relatively free from the daily supervision of his (sic) peers or detailed government regulation. (Ayling and Constanzo, 1984, 101)

Mudd and La Trielle (1988) undertook a comparative study, for the University of Montana's School of Law. In this, the judgments of respondent lawyers' judgments, on 149 items of the level of competence, related to whether: (i) a lawyer should demonstrate in order to perform in a professionally competent manner, and (ii) the level of competence observed in first-year lawyers. Many of the outcomes of this study related to the apparent agreement on the importance of both the personal qualities and the attributes of lawyers. They concluded that:

> Any serious attempt to examine a law school's program must include, whether implicitly or explicitly, an assumption of the abilities the program intends to develop in its graduates. (Mudd and La Trielle, 1988)

Moss's (1990) attempt to apply a competency-based model of continuing legal education to the training needs of law firms is an example of the lengths to which some authors seem prepared to go in attempts to deal with the question of developing professionalism. Moss (1990) fails to address: (i) the relationships among personal development, content acquisition, professional abilities, academic and practical skills, and cognitive processes; (ii) the distinctions between education and training; and (iii) similarities and differences among notions of profession, professionalism and the professionalisation of the legal industry. Consequently, Moss (1990) appears to have emphasised a narrow instrumentalist view of competence.

All the authors that have been cited here seem to have missed a very important facet of this debate, namely the integration of the key elements of legal and law-related education. Ayling and Constanzo (1984, 101) and Cruickshank (1985, 121) have argued for an *integration* of skills, content, cognitive processes, personal development and professional responsibility. It is the combination of knowledge, information, skills, strategies and the affective domain which enables the skilled person to be professionally competent. Competence in either only one or some of these areas should not be considered acceptable by both the employing authorities and the professional associations for full professional competence.

Downs (1989), in addressing this question of professional legal training (PLE) advocated the use of experiential approaches. His thesis concluded that too much learning was done in isolation from the context within which the knowledge, information, skills, strategies, attitudes and personal abilities were to be used. These perspectives supported the proposition of Edwards (1989) and Marton, Dall'Alba & Beaty (1993) of the need for approaches to personal development, especially those that are well grounded in practice and experience-based learning.

The notion of *know-how* by Gold (1982, 2) and Cruickshank (1985, 119) plays a vital role in these processes. Ultimately, this is the legal commodity that is saleable to a client. Gold (1986, 19) continued this theme when he proposed that professionalism was more than a mere amalgam of attributes. In his opinion:

> the study of law is now less a study of laws and more a study of a complex, multi-textured and multi-layered discipline. (Gold, 1986, 22)

Armytage (1996), as a result of his study of the Specialist Accreditation Program for the Law Society of New South Wales (Australia), concluded:

> This study demonstrates the need to provide specialist practitioners with assistance in developing broader competencies in delivering services to clients. Indeed, it would appear likely that these deficiencies in client service extend beyond the group of exemplary practitioners to the broad body of practitioners generally. While the theoretical importance of these skills has been acknowledged in practical legal training courses and also in the specialist accreditation process itself; (sic) the practical reality however is that either existing levels of training or assessment procedures are insufficient. Most

> appropriately, considerations should be given by the profession to introducing additional training to redress identified performance deficits in the related areas of *inter-personal skills* and *client management techniques*. This training should be client focused, rather than transaction focused; it should train practitioners to recognise that client needs are not confined to attaining objective outcomes; and it should help lawyers to listen to clients more attentively, diagnose their various levels of needs and demonstrate empathy. This training should equip lawyers to operate more effectively with the people who are invariably their clients. Ultimately, the message from clients about service is quite simple. Clients trust practitioners who care. (Armytage,1996, 366)

Consequently, professional lawyers have turned to professional legal education and training programs to assist them to be both more goal-oriented and job-oriented as well as to be more competent, in the full sense of that term. In fact, Gold (1986) argued that lawyers should go beyond competence to professionalism, since:

> gifted amateurism which has led continuing legal education to the brink of professionalism must be replaced by a system which is more capable of continued professionalism. (Gold, 1986, 23)

Gold's (1986) search for perspectives that would *integrate competence and professionalism* is a common voice that is echoed in legal circles to this day. He advocated the implementation of procedures and programs that would require lawyers to participate in professional development activities rather than for these to remain optional.

These considerations, which are analysed in some detail in the following section, are of particular relevance to, and have particular implications for, Legal Practice Training.

2.6 LEGAL PRACTICE TRAINING

Legal practice training is one of the major strategies used by University Law Schools for preparing the beginning legal professional. It includes the vocational and professional preparation deemed to be essential for the professional registration of practising lawyers and is most often implemented as a bridging program following the completion of undergraduate law studies.

In view of the demand that legal professionals be able to meet the diverse needs of their clients, Winsor (1984) contrasted *needs-based* approaches with more *sociological* ones. In

these terms, he was proposing that a community perspective must be used as a basis for the determination and provision of legal advice services. Through these community perspectives, Winsor (1984) believed that better needs-based provision of services could be given to the clients. These approaches had been developed because of the inability of purely academic law studies to provide adequate understandings, skills and acceptable practices to influence directly the quality and range of professional practices and services within specific community contexts. The Winsor (1984) proposals indicated the depth of the dilemma being faced by the legal profession in its attempts to pursue appropriate roles, functions, competencies and professionalism, as well as incorporating various alternate modes of practical legal training into its operations. It often seemed impossible to integrate successfully law studies with quality legal practice training.

Cooper (1985) and Jackling (1985) voiced similar concerns, but offered a solution when they expressed the need to:

> ... balance two competing sets of objectives, those related to academic training and those related to admission to practice. (Jackling, 1985, 1)

However, Cooper and Jackling viewed this later as a rather simplistic interpretation of the issue in that academic training, vocational training, inservice education and continuing legal education should be a never ending theme if lifelong legal education is to be required of every legal professional. They posed an additional question related to the appropriate specification, definition, articulation and contribution of each of these aspects to lifelong legal education for practising professionals (Cooper, 1985, 22-25 and Jackling, 1985, 3-5).

In criticising the Jackling scenario, Goldring (1987) believed that false dichotomies or dualisms had seemingly been set up in order to dissociate *academic* from *professional* and *know-what* from *know-how*. He called for the integration of theory and practice of law in modern legal education (Goldring, 1987, 106). Consequently, it was not a *know-how* versus *know-what* debate, but rather an integrative *both/and* solution that was being proposed.

Twining (1986) had proposed similar conclusions to those of Goldring (1987) following his analysis of the American Legal Realist Movement. In a similar manner, Goldring (1987) had

been encouraged following Jackling's (1985) questions related to the better design the learning materials and the promotion of student-centred approaches to learning, so as to improve the quality of whatever was being learned within the contexts of legal practice training (Goldring, 1987, 112).

One important observation from this debate has been the minimal attention given to programs focussing on the affective domain incorporating attitudes, values, ethics, morals, sensitivities and feelings. Finlay (1989, 72) was concerned that 'professionalism is broader than a mere adherence to an accepted code of ethics and is truly an ideological concept'. He advocated that, not only should existing professional attitudes be modified, but also that new ones should be created (Finlay, 1989, 73):

> ... *professionalism* constitutes a complex set of attitudes and that professional behaviour is behaviour which is oriented towards community rather than self-interest and is based on a possession of a unique, specialised body of knowledge. (Finlay, 1989, 80)

Consequently, these authors see legal practice training as one of the *bridges* that can assist the profession to be truly professional in the context of the professionalisation of its pre-service legal education initiatives.

Many Law Faculties in universities have incorporated these notions now into their pre-service law programs through their establishment of Law Practice courses and facilities. The call from both the profession and the community for the integration of all segments of the lifelong legal education processes, outlined earlier in this section, has been both heard and acted upon, especially in terms of pre-admission education and training. However, strategies and initiatives for the specification, definition, articulation and contribution of academic training, vocational training, preservice and inservice education, and continuing legal education of all legal professionals remains an ongoing need.

2.7 LEGAL LITERACY in Communities and Societies

Educational institutions, especially schools, are responsible to their local, State and National communities for developing appropriate levels of literacy, numeracy, oracy, and the like in

children, especially during the compulsory years of general education. In recent times communities have broadened the basic core curriculum to include the economic, social, political, cultural (Hirst, 1987, 2) and legal literacy, which Bolton defines as:

> ... the background information stored in one's mind that enables them (sic) to take up a legal document, read an article in the newspaper on a law-related event, with an adequate level of comprehension, getting the point, grasping the implications, relating what they read to the unstated text which alone gives meaning to what they read. (Bolton, 1989, 14)

Legal literacy relates to Hirst's (1987) broad framework of cultural literacy in both the cognitive and affective domains. Students, in Bolton's opinion:

> need a broad understanding of basic legal concepts, both substantive and procedural, as well as an appreciation of the rights and responsibilities of citizenship. This understanding fosters positive attitudes crucial for true legal literacy. (Bolton, 1989, 16)

In Bolton's (1989) opinion, legal and law-related education (in the United States of America) seeks to develop:

1. broad understanding of basic legal concepts, principles, and the valued ideals of constitutional democracy;

2. awareness and increased understanding of the rights and responsibilities of citizenship;

3. growing respect and appreciation for legal processes and rational legitimate authority; and

4. the knowledge, skills and attitudes that promote citizenship participation. (Bolton, 1989, 16)

Much of the legal and law-related education in primary and secondary schools in the United States of America is predicated on premises, rationales and aims such as these. Sample teaching and learning activities to promote legal literacy in a law-related education, such as those by Jacobs (1988), Rinaldo (1988), Toler (1988) Bjorklun (1989), Croddy (1989), Greenberg (1989), Poppenfus (1989), Richardson (1989), Crockett (1990), Dreyfuss (1990), Hickey (1990), Roach (1990), and Walton (1990), are illustrative of the range of approaches that can be taken to achieve Bolton's (1989) aims.

2.8 TOWARDS A *LEGAL KNOWLEDGE* FRAMEWORK

As has been outlined earlier in this chapter, attempts have been made by law professors, scholars, researchers, practitioners and writers to define schemata and frameworks that are interactive and representative in terms of the diverse elements associated with professional preparation, continuing in-service and life-long education. However, it would seem, from the literature reviewed here, that an holistic framework for thinking legally has never been developed previously. This has arisen mainly because the developers of each schema or framework have undertaken their tasks from particular foci rather than from either holistic or integrated perspectives. Consequently, many of both the frameworks and models, discussed earlier, are myopic rather than synoptic in their attempts to provide legal personnel, law-related educators, practitioners, community members, clients and students with workable schemata. This has occurred because of not only rationalist but also reductionistic approaches used by these authors in developing their frameworks. The literature which has been reviewed suggests that the essential aspects of human experience cannot be reduced to a list of attributes externally related to the work in question. The various components must be integrated in order to form a coherent whole.

A broad definition of *knowledge* must be adopted so as to cater for the diverse, detailed, yet holistic perspectives which are being addressed here. Earlier sections of this chapter have outlined various views related to *knowing about the law, legal thinking, legal reasoning, moral reasoning, legal dogmatics, legal science, and legal problem-solving*. Despite this extensive palette of views, none of these either provides a comprehensive or integrated schema or framework for thinking legally. Consequently, there is a need for the elaboration of an alternative approach to developing a framework which is related to *thinking legally*.

Using the approach of Sandberg (1994, 22-24), a systems model (see Figure 2.5) of thinking legally has been developed. It is based on the literature which has been reviewed in this chapter. It consists of the following elements: (i) knowledge as content acquisition; (ii) knowledge as cognitive processes; (iii) knowledge as academic and practical skills; (iv) knowledge as professional abilities; (v) knowledge as personal development; and (vi) conceptions of thinking legally:

(i) *Knowledge as content acquisition:*
This refers to the factual and conceptual bodies of propositional information which are of intellectual and descriptive character. *Know-what* includes facts, concepts, generalisations, theories, laws, rules, paradigms, and the like;

(ii) *Knowledge as cognitive processing:*
This form of knowledge is often referred to as *know-how* and includes the higher order cognitive abilities [Biggs (1988) and Newmann (1990)], procedural knowledge and strategic thinking;

(iii) *Knowledge as using academic and practical skills:*
This form of knowledge comprises two main aspects. One of these refers to practical skills which consist of regular sequences of co-ordinated and learned behaviour as well as Polanyi's (1967) *tacit knowledge*. The other aspect refers to the learned skills used by academics such as literature searching, data collection and analysis, technical report and paper writing, and researching.

(iv) *Knowledge as professional abilities:*
This refers to the prescribed or pre-requisite vocational competencies and abilities needed for admission to various registrable vocational or community groups such as business managers, accountants, teachers, police, solicitors, barristers, and justices of the peace.

(v) *Knowledge as personal development:*
The social, personality and character qualities of an individual are the raw materials with which personal relationships are developed. This knowledge referred to sometimes in the popular press as *street knowledge* or *social knowledge,* is what Edwards (1989) and Marton, Dall'Alba and Beaty (1993) refer to as *personal development*.

(vi) *Conceptions of Thinking Legally:*
Within the research literature, this study has identified *conceptions of learning*, and consequently *thinking*, within the research approach called phenomenography (Marton 1981). Phenomenography is a research approach for describing the qualitatively different ways in which people experience or make sense of a particular aspect of their world. The notion of conceptions in phenomenography provides a more elaborated concept of capturing this aspect of *thinking legally* and is associated with a method of identifying, describing and explaining it. Consequently, this aspect of the model is seen as an integrating device.

The six elements outlined above are interrelated in many complex ways. These are represented in Figure 2.5 below.

Figure 2.5: A *Legal Knowledge* Framework

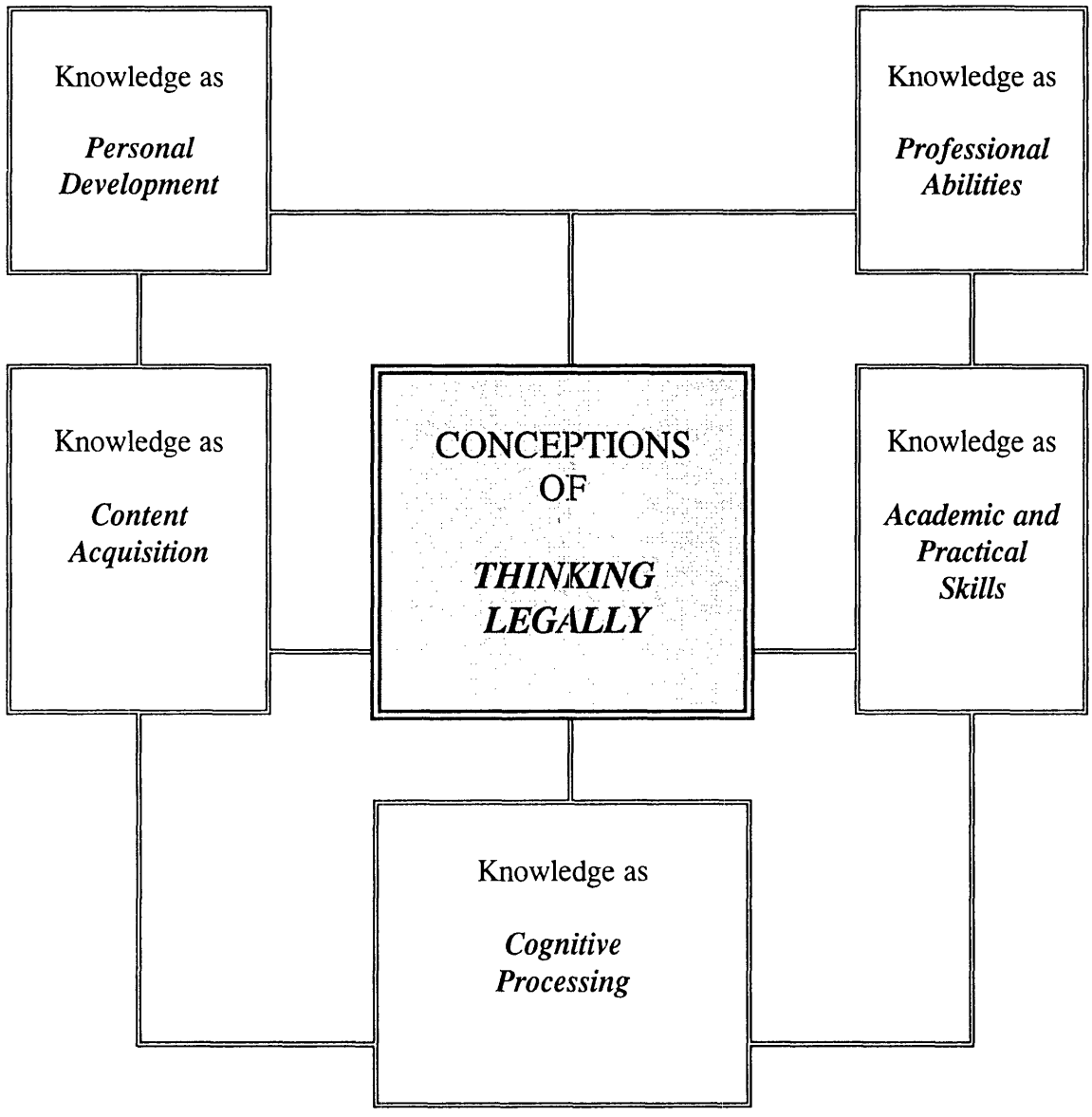


Figure 2.5: A *Legal Knowledge* Framework provides a model which this researcher believes will enable a more holistic representation of the considerations which should be taken into account if dualistic epistemologies and ontologies are to be overcome. The model differs from all the rationalistic frameworks which were outlined earlier in this chapter, in that it caters for the various ways in which conceptions of thinking legally might be construed. Rather than being based on any one particular set of premises, assumptions, concepts or values stances, it is an attempt to provide a holistic, dynamically interacting yet integrated framework within

which all of the various contributions of the literature might be located. This addresses some of the concerns of Hawkins' (1983) argument that:

> ... we have only a very imperfect understanding of the ways in which legal discretion is exercised, and this is substantially due to poverty of research in method and conception. (Hawkins, 1983, 7); and
>
> ... it is certainly time that efforts were made to refine our theoretical conceptions, and certainly time that the foundations for this were laid with further ethnographic analyses of the contexts and processes involved in segments of legal activity. In such a way will the mosaic of legal life slowly be uncovered. (Hawkins, 1983, 22)

Elements (i) to (v) of the model outlined in Figure 2.5 provide the structural aspects for the framework while the conceptions, as identified in Chapter 5, provide potential syntactical strategies with which to view interactions among the elements of the model in holistic rather than dualistic ways.

One of the intentions of this study is to take up some of the concerns of Gadamer (1989) in relation to the reduction of knowledge and life when rationalistic methodological epistemologies dominate. In his view, methodological epistemology is based on the world view of the humanistic Enlightenment with its ideals of autonomy, objectivity and rationalism. His argument relates to the view that the autonomous and objectivist idea of knowledge is based on the Enlightenment's prejudice about prejudices. Instead, he sees human reason as a participant in play and conversation, not as an autonomous dictator of truth.

Shin (1994) takes up this issue further:

> The significance and the potential contribution of Gadamer's hermeneutics for the formation of postmodern culture lies mainly in his project of recovering the *philosophical* foundations of life. Gadamer proposes a transformation of philosophy as a remedy for the cultural crisis effected by the collapse of objectivist methodological foundationalism and the subsequent rise of relativism. (Shin, 1994, 19)

Gadamer (1989) proposed that philosophical rationality, whether it be theoretical, methodological or practical reason, is inherently unable to provide the foundations consisting of universal norms, laws, or rules of knowledge. His alternate propositions relate to his

'theoretical ideals of life', the 'paradigm of being' or what others refer to as universals, norms or the Christian reference to 'logos'. Shin (1994, 20) has proposed that Gadamer's (1989) hermeneutical-ontological thinking provides the appearance to some critics 'as more similar to theology than philosophy'.

The framework outlined in Figure 2.5 must be viewed in holistic integrated Hebrew worldview ideals of 'knowledge as being' rather than in dualistic, reductionistic Greek perspectives of 'knowledge as cognition' which are somehow divorced from life, experience and practice. Indeed, a study of the whole is more than a study of the sum of the parts. For example, the Hebrew idea of 'wisdom' includes a perspective on life which is fundamentally different from that of classical Greek philosophy. An holistic and interacting schema is conceivable if the structural and syntactical elements of one's framework are integrated.

2.9 CHAPTER CONCLUSION

It is the task of this research study to:

- establish conceptions of *thinking legally,* held by legal professionals; academics, teachers and students in educational settings; and community members, involved in Legal and Law-related Education, by identifying the qualitatively differently ways in which people experience or make sense of thinking legally;

- describe and interpret these qualitative differences so as to develop a conceptual map, expressed in outcome space terms, of the interrelationships among these conceptions; and

- examine the implications of this research for the various stakeholders in Legal and Law-related Education in terms of the elements and interrelationships implied in the model outlined in Figure 2.5 of this Chapter.

Chapter 3 of this thesis outlines the research approach and procedures used in this study. It discusses also the assumptions underlying phenomenographic research.