

# TRANSFORMATION, TENSION AND TRANSGRESSION: REFLECTIONS ON THE CULTURE AND IDEOLOGY OF SOUTH AFRICAN LEGAL EDUCATION

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“What does it mean that law – the institutional embodiment of man’s highest ideals – has become a tool wielded by lawyers and their clients in the pursuit of strategic legal interests? How is it that law – the rational feeling, as Kant teaches, of man’s connection with the ideal of justice – has come to stand for obedience to rules? And what does it mean that this debasement of law into an instrument of politics and economics no longer shocks us?”<sup>1</sup>

“That life is complicated is a fact of great analytic importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths. Acknowledging, challenging, playing with these as rhetorical gestures is, it seems to me, necessary for any conception of justice.”<sup>2</sup>

“I celebrate teaching that enables transgressions – a movement against and beyond boundaries. It is that movement which makes education the practice of freedom.”<sup>3</sup>

## 1 Opening contemplations

This article is about legal education in the context of posts: *post*-modern, *post*-colonial, *post*-apartheid.<sup>4</sup> It is an article about how a certain approach to legal education correlates with, and is the expression of, a particular legal (and political) ideology and how this ideology, if left to appear as neutral, objective and apolitical, becomes hegemonic in our legal culture. Legal education is not merely a dispassionate exercise involving the explanation of neutral legal rules, and the imparting of certain general legal skills. When law teachers describe and evaluate a particular case and doctrine to students, they are not really (or rather, not only) teaching that case or doctrine; they are also teaching a way of reading legal texts and of perceiving “facts”, “reality” and “truth”, a style of interpreting, a way of viewing and understanding the social world. Thus law teachers not only teach “(the) law” but also a particular

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<sup>1</sup> R Berkowitz *The Gift of Science* (2005) ix

<sup>2</sup> P Williams *The Alchemy of Race and Rights: Diary of a Law Professor* (1991) 10

<sup>3</sup> b hooks *Teaching to Transgress: Education as the Practice of Freedom* (1994) 12

<sup>4</sup> See K van Marle “Art, Democracy and Resistance: A Response to Professor Heyns” (2005) 1 *Pulp Fictions* 15 (see also the back cover of all volumes of the *Pulp Fictions* publication). These reflections should be read partly as a continuation of the conversation initiated in K van Marle & J Modiri “What Does Changing the World Entail? Law, Critique and Legal Education in the Time of Post-apartheid” (2012) 129 *SALJ* 209-219

jurisprudence, a logic of legal thinking, a mode of reasoning. The coercive and ideological nature of legal education becomes problematic only when one enquires into the legal culture under which it takes place; into the nature of the jurisprudence and politics that it subliminally communicates, the ideology it endorses.

In South Africa, despite an explicit constitutional commitment to democracy, transformation, substantive equality, social reconciliation, plurality, horizontality, and purposive interpretation, we still experience a legal culture overwhelmingly dominated by formalism, legalism and liberalism – approaches to law which have been shown to be unsuited to the development of a post-formal constitutional jurisprudence and an active post-apartheid politics and ethics.<sup>5</sup> In this context, the work of traditional legal education (which I shall take to be the most dominant but certainly not the only paradigm of law teaching in South Africa)<sup>6</sup> has been to affirm and entrench these formalist, legalist and liberal understandings of law, thereby reducing law and rights discourse to the economical, instrumental and functional application of rules and enclosing reality into a set of fixed, self-evident axioms that prevent any possibility of questioning, resistance and transgression.<sup>7</sup> To the extent that there has never been anything neutral or apolitical about law, it is also the case that legal education does not take place from an objective standpoint devoid of politics or ideology.<sup>8</sup>

I thus proceed from the premise that teaching law is a performative and political act that has implications for transformation and democracy within the South African legal culture. Accordingly, I also contend that legal education is a site of struggle over the meaning, nature and purpose of law in society. The rationale of this article then is simple: if legal education works only to mirror legal culture, and the traditional South African legal culture constrains

<sup>5</sup> See K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 165; K van Marle “Revisiting the Politics of Post-apartheid Constitutional Interpretation” (2003) *TSAR* 549; DM Davis “Transformation: The Constitutional Promise and Reality” (2010) 26 *SAJHR* 85

<sup>6</sup> My propositions in this article may in some parts appear to be generalising and overstated. My suggestion is that what I am describing as traditional legal education is the dominant paradigm of legal education in the country. However, I accept that it is certainly not the only type of paradigm. My account of traditional legal education is not monolithic – in and between law schools, there will be variations and similarities, some aspects of traditional legal education may be present but not others; aspects unaccounted for here may also be present. I am employing “traditional legal education” as a basic conceptual model with which to analyse this dominant strain of legal education. I also do not care to deny the existence of the few law teachers who try to “push” a more critical agenda in terms of law teaching. I claim, however, that there is a clear nation-wide pattern of inadequacy and concern (see sources cited in nn 10, 15, 16, 30 and 114 below). To continually qualify the text – especially given the contested nature of this topic in the legal academy – would be awkward and space-consuming, so I simply note the existence – as in all cases in life and law – of exceptions, variations and nuances here.

<sup>7</sup> N Bohler-Muller “Western Legal Liberalism and its Discontents: A Perspective From Post-Apartheid South Africa” (2007) 3 *Socio-Legal Review* <<http://www.nls.ac.in/ojs-2.2.3/index.php/slr/article/view/28>> (accessed 07-10-2013)

<sup>8</sup> Certainly all of Duncan Kennedy’s writings on legal education have emphasised this point: D Kennedy “Liberal Values in Legal Education” (1986) 10 *Nova LJ* 603-604; “First Year Law Teaching as Political Action” (1980) 1 *Law and Social Problems* 47; “The Political Significance of the Structure of the Law School Curriculum” (1983) 14 *Seton Hall L Rev* 1-16; “The Responsibility of Lawyers for Justice of their Causes” (1987) *Texas Tech L Rev* 1158

or inhibits the project of legal, political and social transformation,<sup>9</sup> then legal education in itself needs to be critically considered.<sup>10</sup> My aim in this article is to illustrate more explicitly the relationship between legal education, legal culture and legal ideology. I will do this for two primary purposes: firstly to demonstrate the reproductive and stabilising role of legal education (the manner in which it serves to rationalise and legitimate the current order) and secondly to highlight the importance of legal education as an influential social institution (on this view, it must be stressed that law, legal practices, and the consciousness of lawyers and judges will not change if the dominant model of legal education does not change first).

Although I intend to broaden my reflections so as to speak to South African legal education in general, I cannot deny that my own experiences as a student, tutor and researcher at what I consider to be among the most conservative, untransformed, and ideologically right-wing universities and law faculties in the country have heavily influenced the thoughts expressed here. My concern is with problematising the link between our liberal-capitalist legal system, the conservative and formalistic legal culture and the traditional legal education that we experience in South Africa. In a “late modern capitalist, liberal and bureaucratic disciplinary social order”<sup>11</sup> such as the one we South Africans live in, the link between the three is highly problematic. Because our present context is proliferated with ongoing injustices, inequalities and exclusions which are ignored by our conservative legal culture, we need a legal education that goes beyond merely mirroring the legal culture as that would only maintain such injustices, inequalities and exclusions. Further, because of the role that law itself often plays in constructing and facilitating these injustices, inequalities and exclusions, we need a legal education that seeks to reform both the legal culture and the myriad ways in which law continues to function as an instrument of oppression and disempowerment. Hasn’t traditional legal education failed law students in the same way traditional legal theory has failed our transforming society? Is there still room among the plethora of law books that poison our hearts and minds to imagine something different? Could a more “critical” approach to legal education help to facilitate a transformative post-apartheid politics?

I struggle with these questions in this article which I have divided into two parts. In the first part (part 2) I begin by offering a conceptual description of traditional legal education with particular focus on its excessive focus on black-letter law, its elaboration of law as a science and its objective of teaching law students how to “think like a lawyer”. I thereafter broadly outline a critique of traditional legal education – focusing on its practical as

<sup>9</sup> See K Klare & D Davis “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *SAJHR* 403

<sup>10</sup> On the paucity of theoretical research on legal education in South Africa, see L Greenbaum “Current Issues in Legal Education: A Comparative Review” (2012) 23 *Stell LR* 16; G Quinot “Transformative Legal Education” (2012) 129 *SALJ* 411-433

<sup>11</sup> W Brown “Wounded Attachments” (1993) 21 *Political Theory* 390-390

well as political shortcomings.<sup>12</sup> There I argue, with reference to Duncan Kennedy and Michel Foucault, that traditional legal education legitimates the conservative legal culture centrally through producing law graduates who are intellectually, politically and morally docile. In the second part (part 3), I make the case for a (more) critical legal education. I begin by indicating what I mean by “critical” – linking it to critical thinking and critical legal theory – and what this implies for legal education. I then rely on bell hooks to support the claim that legal education – through an engaged and critical pedagogy – can also be a “practice of freedom”.<sup>13</sup>

Throughout this article, I pursue one central claim, namely that law students who are taught to be passive, uncritical consumers of legal materials as is the case with the current practice of (traditional) legal education in South Africa, will eventually become lawyers who also passively serve the *status quo* as functionaries of the dominant order. Conversely, if students are taught to be active participants in the law classroom, to be critical and socially aware, thinking people, they will eventually become activist, critical lawyers who will pose serious questions to those in power, pursue social transformation, and serve causes that are just and ethical. In the background of this article is the continual search for a post-apartheid jurisprudence, politics and ethics. What will make legal education truly *post*-apartheid, different to and beyond apartheid, is a concern with bringing something else (difference, ideality, imagination) other than law into the law classroom. Could such a post-apartheid legal education (im)possibly be the place where law and justice are finally reunited?

## 2 The crisis of convention: traditional legal education and its discontents

“Teacher, don’t teach me nonsense”<sup>14</sup>

Most literature on the topic of legal education and skills training for law students in South Africa generally and consistently seems to accept that all is not well in legal education and hasn’t been so for a very long time.<sup>15</sup> In formulating my account of the problems of traditional legal education, I draw primarily from two broad critiques that I gather from all this literature: the first being that legal education (methods of teaching, training and assessment) fails to live up to its own stated objectives (of producing competent legal

<sup>12</sup> I should state again that this article is a conceptual/theoretical discussion of legal education. Reliance on the conceptual frames being developed here to make empirical, practical and context-specific observations is best left to researchers in the specific law schools themselves.

<sup>13</sup> P Freire *Education, The Practice of Freedom* (1976)

<sup>14</sup> Fela Kuti “Teacher, don’t Teach me Nonsense” from *Teacher Dont Teach me Nonsense* (1987) Album: MCA

<sup>15</sup> D Davis “Legal Education in South Africa: A Re-examination” (1978) 95 *SALJ* 424; Z Motlala “Legal Education in South Africa: Moving Beyond the Couch-potato Model Towards a Lawyering Skills Approach” (1996) 113 *SALJ* 695; H Botha “Civic Republicanism and Legal Education” (2000) *Codicillus* 23; T Madlingozi “Legal Academics and Progressive Politics in South Africa: Moving Beyond the Ivory Tower” (2006) 2 *Pulp Fictions* 3 17

professionals)<sup>16</sup> and the second being that legal education (the social practice of educating young minds) promotes an unjust and corrupt vision of social life.<sup>17</sup> But of course there is a connection here: A legal education that deprives students of the appropriate reading, analytical, interpretive and writing skills tends also to reinforce an outdated and possibly impoverished vision of law which is coterminous with the kind of docile mindset that hegemony would require for its reproduction.<sup>18</sup> In fact, I draw this connection precisely to show that the problem of traditional legal education is bigger than just not providing corporate law firms with a suitably qualified and skilled workforce but that it also produces thoughtless, uncritical young people with no sense of the social and political world around them and with no concern for values, justice, ethics and humanity.

Traditional legal education or “black-letter legal education”<sup>19</sup> can be identified by its emphasis on “law cramming” – that is, by its focus on rule-learning without any or sufficient reference to the wider social context in which legal rules operate.<sup>20</sup> Because of the value placed on comprehensively learning the actual rules of positive law, which tends to collapse into endless memorising of legislation and case law, the amount of work students are required to learn (and the number of law modules taught) tend to be unnecessarily voluminous and loaded. Its main form of presentation is often a textbook which reduces legal doctrines to a concise bullet-point summary of principles, rules and exceptions. As a result, Hunt notes, students are unable to “stand back and consider even the general course of development of legal doctrine, let alone to grapple with questions about the relations between doctrine and policy, between principles and rules, and the relationship between the law and the political, economic and social development of contemporary society”.<sup>21</sup> The typical questions asked to students boil down to what the current legal position is or what the exceptions to a certain legal rule are. The aim of traditional legal education is ultimately to get students to “think like lawyers”. It is undergirded by the faulty logic that if students are to think like lawyers and be good lawyers, they need to know offhand every single legal rule (which then justifies the emphasis on memory work).

The black-letter law style of traditional legal education is formulated in such a way as to also train students into the rhetoric, methods of reasoning

<sup>16</sup> See G Pickett *The LLB Curriculum Research Report* (November 2010) unpublished research report produced for the Advice and Monitoring Directorate of the Council on Higher Education (relaying research conducted in 2008 in seventeen universities offering the LLB degree indicating that judges, academics and practitioners believe that the state of legal education is now approaching crisis; raising concerns about the quality of law graduates in general)

<sup>17</sup> Botha (2000) *Codicillus* 17; Madlingozi (2006) *Pulp Fictions* 3; Van Marle & Modiri (2012) *SALJ* 209

<sup>18</sup> Read K O'Regan “Producing Competent Graduates: The Primary Social Responsibility of Law Schools” (2002) 119 *SALJ* 243 together with L Montjane “Toward a Discursive Legal Education” (2003) 7 *Education as Change* 88-102

<sup>19</sup> P Leighton & L Sheinman “Central Questions in Legal Education” (1986) 20 *The Law Teacher* 5 Traditional legal education as described here resonates strongly with what Costas Douzinas and Adam Geary (*Critical Jurisprudence: The Political Philosophy of Justice* (2005) 3-42) describe as a “restricted jurisprudence”

<sup>20</sup> Leighton & Sheinman (1986) *The Law Teacher* 4

<sup>21</sup> A Hunt “The Case for Critical Legal Education” (1986) 20 *The Law Teacher* 10

and strategies of argumentation that are the norm in the legal profession and induce them into a “repertoire of conventional, culturally approved rhetorical moves and counter-moves deployed by lawyers to create an appearance of legal necessity of the results which they contend”.<sup>22</sup> Presented in the form of practice arguments in moots and hypothetical cases, its aim is to familiarise students with the “professional sensibilities, habits of mind, and intellectual reflexes” that will make them recognisable to other lawyers.<sup>23</sup> As a form of assessment, students are often asked to “criticize” or “comment on” a certain aspect of a court case ruling – often by simply repeating the criticism stated in the textbook or taught in class.<sup>24</sup> The emphasis on reflexive repetition – the ability to rattle off information off the top of your head – is common. The idea is that the student will acquire a closed set of fixed and generalisable problem-solving and legal argumentation skills that can be repeated when a similar set of facts arises again and in the process, develop an appropriate “lawyer’s language”.

The educational objective of training law students to develop a cognitive mindset of “thinking like a lawyer” is informed by two problematic assumptions: firstly that the primary (even if not only) role of the law school is to produce law graduates who are capable of entering the private legal profession as attorneys or advocates and second, that marks are accurate, neutral determinants of a student’s future success in practice. This lawyer that traditional legal education imagines as its ideal product takes the figure of Andre van der Walt’s “modern lawyer”.<sup>25</sup> Van Der Walt’s use of the term “modern” is linked to modernity; that is, the idea of historical progress (that history itself is imbued with reason, direction and meaning) and the idea that Europe is the central locale for the emergence of the modern civilised world which is characterised by secular liberal democracy, industrialism and capitalism, rational thinking and science.<sup>26</sup> As a result, the modern lawyer assumes the possibility, and desirability, of clarity and stability in legal meaning.<sup>27</sup> The modern lawyer also believes that by relying on the legal tradition and the conventions current within the legal culture, rational and correct legal outcomes can be produced. As Van Der Walt points out, the modern lawyer exhibits such an overwhelming faith in the coherence of legal knowledge that even when changes in the morality and politics of a society expose contradictions within the legal tradition, the modern lawyer maintains the trust in that tradition as a source of meaningful and fair legal solutions. When doubts are raised over the reliability, neutrality and certainty

<sup>22</sup> K Klare “Teaching Local 1330 – Reflections on Critical Legal Pedagogy” (2011) 7 *UnBound: Harvard J of the Legal Left* 64

<sup>23</sup> Klare (1998) *SAJHR* 166

<sup>24</sup> Hunt (1986) *The Law Teacher* 12:

“[S]ince little or no time is devoted to examining the results and consequences of the operation and implementation of particular rules ... commonsense assumptions and taken-for-granted knowledge all too frequently provide the data for evaluation ”

<sup>25</sup> AJ van der Walt “Modernity, Normality and Meaning: The Struggle between Progress and Stability and the Politics of Interpretation (Part 2)” (2000) 11 *Stell LR* 226-273

<sup>26</sup> W Brown *Politics Out of History* (2001) 5-6

<sup>27</sup> Van Der Walt (2000) *Stell LR* 230

of knowledge and science, the modern lawyer simply responds by seeking to develop a better, more dependable legal science.<sup>28</sup>

Hunt shows us that this modernist understanding of law is reflected in the traditional approach to legal education which by its excessive focus on formal rules portrays law as, more or less, a stable and coherent body of legal rules.<sup>29</sup> By its exclusion of theories developed in other fields such as economics, politics, philosophy, literature, psychology, sociology, *et cetera*, it portrays law as an autonomous, neutral and apolitical mediator of social conflict. The purpose of this modernist and also positivist view of law that is reinforced by traditional legal education is to rationalise law into a scientific and unified system of rules. The practical implication of this is a kind of doctrinalism or conceptualism which results in legal education operating as a means of conveying to students how to read legal materials as a structured system of rules with their own internal logic and framework of reference from which solutions to legal problems can be logically determined and thereafter faultlessly applied.

As noted earlier, there are broadly two distinct but connected critiques of traditional legal education that can be identified: the first focusing on the practical aspect (seeking to show how legal education is pedagogically ineffective and fails to impart the key skills needed for successful legal practice) and the second focusing on the political aspect (seeking to expose how the fundamental organising concepts and practices of legal education reflect a culturally situated and ideological view of law that is fundamentally conservative and complicit in multiform injustices perpetuated and permitted by law). I will discuss each of these in turn.

## 2 1 The practical

The now trite complaint about traditional legal education lies in its practical failure to provide graduates with the necessary reading, writing, and numeracy skills to succeed in their later professional life. There has been much talk in the news recently about the call by the Law Society of South Africa to redesign the four-year LLB degree into a post-graduate qualification precisely for this reason.<sup>30</sup> Their complaint is that most law graduates lack the ability to critically reason, analyse and interpret information – let alone to synthesise and present disparate sources of information and legal materials into a clear, logical and coherent argument.<sup>31</sup> Because the emphasis is on learning the black-letter law off by heart, traditional legal education tends to position students as uncritical and passive consumers of legal information with law teaching largely

<sup>28</sup> 229

<sup>29</sup> Hunt (1986) *The Law Teacher* 11

<sup>30</sup> Sapa “Law Society Want LLB Redesign” (08-07-2012) *Times Live* <<http://www.timeslive.co.za/local/2012/07/08/law-society-want-llb-redesign>> (accessed 17-07-2012); L Jansen “Law Degree Does Not Measure Up” (05-07-2012) *The Mercury* <<http://www.iol.co.za/mercury/law-degree-does-not-measure-up-11334939>> (accessed 17-07-2012)

<sup>31</sup> S Woolman, P Watson & N Smith “Toto, I’ve a Feeling we’re Not in Kansas Anymore’: A Reply to Professor Motlala and Others on the Transformation of Legal Education in South Africa” (1997) 114 *SALJ* 30 30-31

operating in a routine, fixed and mechanical fashion.<sup>32</sup> Because students are so busy memorising the legal rules, there is little time left to consider the unexamined background presuppositions behind them. The utilisation of one-dimensional closed-book tests means that students' most intensive interaction with the legal materials (studying) requires only that they listen and remember not to think and analyse. Traditional legal education presents law in such a truncated fashion that it permits no entry for the inculcation of critical thinking skills and for writing and research opportunities.<sup>33</sup> Co-extensive with the truncation of legal information is the failure to clearly tease out the connections between theory and practice with the result that students often lack an appreciation of the broad framework in which law operates. Although I agree fully with this line of critique, it is unfortunate that it is often invoked to unduly privilege the concerns of law firms, the market and the State. I want to suggest, beyond these myopic capitalist concerns, that the inability of law students to think critically has serious implications for active citizenship, for the proper enjoyment of rights and freedoms, for legal development and for indigenous knowledge production.

Another version of this line of critique, however, concerns itself with the political consequences of a lack of practical legal skills (problem analysis, legal research, drafting of documents, extracting relevant legal principles and general writing). In other words, it looks at how traditional legal education, by endorsing a traditional approach to law, fails to instil in students an awareness of the historical, political, socio-economic and philosophical dimensions of law.<sup>34</sup> Henk Botha for example argues that students have an insufficient understanding of fundamental legal concepts and principles and are thus unable to make connections between and integrate knowledge across various areas of law. He cites a few common mistakes he identifies in his students' approach to a section 36 limitations analysis.<sup>35</sup> He notes firstly that the students tend to regard section 36 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") as a broad authorisation for the State to limit constitutional rights. Secondly, he notes that they fail to understand the notion of constitutional supremacy by equating constitutional rights with existing legislative and common-law principles. And thirdly, he mentions that the students view rights as absolute and reified entitlements that cannot be limited by public interest considerations. The common thread between all three errors, says Botha, is a failure to "tackle difficult social questions, to weigh up conflicting constitutional values (e.g. equality and freedom) against each other, and to address constitutional issues within a particular social context(s)".<sup>36</sup>

<sup>32</sup> Motala (1996) *SALJ* 695

<sup>33</sup> Cf D Woolfrey "Curriculum Development in Legal Education-Some Reflections" (1995) 112 *SALJ* 151

<sup>34</sup> N Witzleb & N Skead "A Bottom-up Approach to Developing LLB Course Outcomes and an Integrated Curriculum" (2009) 43 *The Law Teacher* 72

<sup>35</sup> Botha (2000) *Codicillus* 23

<sup>36</sup> 23-24



## 2.2 The political

Political critiques of legal education in South Africa, such as Botha's, are firmly premised on the view that the current methods and practices of legal education in South Africa are failing to respond to the specific demands of post-apartheid transformation and constitutionalism. It is argued that legal education in South Africa has to be animated by a renunciation of the apartheid legal culture (and the attendant legal theories on which it was based) and be concerned with living up to constitutional and other transformative ideals.<sup>37</sup> This means that democracy, ethics, social justice, the public interest/common good, as well as racial, sexual and cultural difference need to be integrated at all levels of law teaching. This integration of course has not happened and what we have is a legal education mostly divested of public-spiritedness,<sup>38</sup> law graduates who lack a substantive commitment to the eradication of marginalisation and subordination<sup>39</sup> and law faculties whose intellectual, knowledge-producing and thinking functions have been usurped by the demands of the corporate legal profession and by a functionalist preoccupation with "practical", "hard law", "real-world" issues and activities which are deemed more relevant than the "theoretical" or "soft-law" ones.

The core explanation for this state of affairs is of course the persistence of formalism and positivism as the jurisprudential guide in South African legal theory and practice (as discussed above) and the resultant complacency and conservatism that this engenders. Most law teachers in South Africa still train students to believe that the law is a neutral, normal and impartial institution. Flowing from this view, students are taught that their task is simply to discern a conclusive answer from the available materials by means of objective and neutral "interpretation". Lurking behind this belief is that there exists a determinate and self-evident answer just waiting to be discovered by the student. Law in this traditional conception is no more than a technical exercise in rule application and legal education is the site where these beliefs are iterated. This approach to law remains dominant despite compelling and severe criticisms of its failure to recognise the contingent nature of law and for overestimating the ability of legal rules to generate pure legal meaning.<sup>40</sup> But there is more. In the remainder of this section, I will try to show that this traditional legal education does more than just mislead students about the nature of law but that it actually co-opts their moral and political sensibilities in the service of maintaining the *status quo*.

<sup>37</sup> Some discomfort should be felt with an understanding of legal education (such as that argued for by Quinot (2012) *SALJ* 411-433) that ends with the embrace of the Constitution, and ultimately of liberal constitutionalism and moderate politics. In my view, legal education should go beyond a mere acceptance of constitutionalism to engage with much deeper conceptions of law and politics drawing in particular from more radical traditions within Left political philosophy, critical race theory, critical legal studies, poststructuralism and feminism.

<sup>38</sup> K van Marle "Universities as Heterogenous Public Spaces" (2000) *Codicillus* 32

<sup>39</sup> Madlingozi (2006) *Pulp Fictions* 17

<sup>40</sup> See generally Davis *Democracy and Deliberation* (1999)

### 2 3 Legal education as training for hierarchy

By far the most compelling political critique of Western liberal legal education has come from Duncan Kennedy in his claim that legal education functions as a form of “training for hierarchy”.<sup>41</sup> In short, Kennedy’s thesis is that law school consists of “ideological training for willing service in the hierarchies of the ... state”.<sup>42</sup> He discusses the film, *Paper Chase*,<sup>43</sup> to illustrate how, in the law classroom environment, the law teacher engages in a sustained effort to instil in students a sense of what constitutes relevant, objective, quotidian and “legal” criteria and what does not.<sup>44</sup> He notes that the intellectual core of traditional legal education is the separation of law from politics, policy and ethical concerns with the aim of drilling students into replacing their initial affective or policy-based reactions into more dispassionate “legal” reactions.<sup>45</sup> For Kennedy, this process is necessarily coercive, but it is also an exercise in false consciousness (or “bad faith” in the Satrean sense) in the way it gives the appearance and authority of stability and coherence to aspects of law that are really contingent, open-ended and indeterminate. He sees both the structure of the curriculum and the arrangement of relations within the faculty between professor-student and professor-secretary as being implicated in setting up the systematic indoctrination of students into willing participation in the specialised hierarchical roles of lawyers. As any lecturer who has had to entertain students’ questions about the relevance and usefulness of a course in legal philosophy will know, the common result of traditional legal education is also that students adopt a conservative, unschooled and apathetic attitude.

At this point, I seek to put a Foucauldian twist on Kennedy’s searing critique of the dominant paradigm of (traditional) legal education.

### 2 4 Docile bodies

Following the innovative work of Australian legal scholar Matthew Ball,<sup>46</sup> I propose that we analyse the workings of legal education through the lens of Foucault’s theory of discipline, in particular his notion of docile bodies.<sup>47</sup> Here my interest lies in how the law school tradition of getting students to “think like lawyers” (through, among other things, (i) teaching a mainly positivist knowledge of law, (ii) a generally inflexible and non-participatory teaching style, (iii) methods of assessment based predominantly on memorising, (iv) encouraging the involvement of law firms in faculty activities, (v) the hierarchical structure of law schools/faculties, and (vi) mooted) systematically

<sup>41</sup> D Kennedy “Legal Education as Training for Hierarchy” (1982) 31 *J Legal Educ* 591

<sup>42</sup> 591

<sup>43</sup> J Bridges (director) *The Paper Chase* (1973) Film: Twentieth Century-Fox Film Corporation

<sup>44</sup> Kennedy (1982) *J Legal Educ* 594

<sup>45</sup> 596

<sup>46</sup> See M Ball “Power in Legal Education: A (New) Critical and Analytical Approach” (2012) 12 *QUT Law & Justice J* 157-177; “The Construction of the Legal Identity: ‘Governmentality’ in Australian Legal Education” (2007) 7 *QUT Law & Justice J* 444-463; “Governmentality and the Reflection of Legal Educators: Assessment Practices as Case Study” (2010) 44 *The Law Teacher* 267-282

<sup>47</sup> See S Ball (ed) *Foucault and Education: Disciplines and Knowledge* (1990)

aims – though not always succeeds or succeeds fully – to produce law students who are docile, passive and uncritical.<sup>48</sup>

Foucault begins his discussion of docile bodies by recalling the figure of the pre-modern soldier in the seventeenth century. Foucault notes that during this time, the soldier could be recognised by his natural characteristics and inherent qualities: “the natural signs of his strength and his courage, the marks, too, of his pride; his body was the blazon of his strength and valour”.<sup>49</sup> To be a soldier one had to already be in possession of the characteristics and qualities of a good, agile and strong fighter, honourable and brave, with an erect posture and a tough physique. But at the dawn of the eighteenth century, Foucault notes, the modern soldier became “something that can be made; out of formless clay, an inapt body, the required machine can be constructed; posture is generally corrected; a calculated constraint runs slowly through the body...”.<sup>50</sup> In other words, the modern soldier in contrast to the pre-modern soldier could be manufactured, produced and designed through rigorous training and the implementation of discipline. Foucault notes that at this historical juncture the body became in itself the target and object of power.<sup>51</sup> This rendered it manipulable and exploitable by what Foucault calls “the disciplines” for political and economic purposes.<sup>52</sup> In this conception of the docile body, control is achieved not through enslavement or violence but

<sup>48</sup> Space does not allow for a further discussion of the merits of Foucault’s theory of power-knowledge and discipline – suffice it to say that it fully, and for the most part, accurately describes how legal education functions as a form of power. However, for criticisms of Foucault’s theory and for arguments pointing out its potentially inadequate explication of the process of subject formation (that is, the modalities by which identities, including legal identities, are constructed), see V Bell & J Butler “On Speech, Race and Melancholia” (1999) 16 *Theory, Culture and Society* 163-174 (Foucault’s position in M Foucault *Discipline and Punish: Birth of a Prison* (1991) (where the effect of power is seen as totalising) is charged as being too “unilateral” and also questioned for not being able to account for the partial or unpredictable constitution of subjects; and also the failure of subject formation) and N Hartstock “Foucault on Power: A Theory For Women?” in L Nicholson (ed) *Feminism/Postmodernism* (1990) (questions how much room Foucault’s account of power as omnipresent leaves for agency and resistance) For other criticisms, see generally C Ramazanoglu (ed) *Up Against Foucault* (1993) and J Habermas *Philosophical Discourses of Modernity* (1990) In short, I do not agree with the claim that Foucault’s theory reduces individuals (in this case, law students) to docile, regulated, subjected bodies and views identities (such as the legal and professional identities of law students and teachers) as being merely the effects of power relations. Foucault’s consistent insistence on the interrelationship between power and resistance (See M Foucault *The History of Sexuality: An Introduction* (1978) 95 where he states that “[w]here there is power, there is resistance”) militates against such criticisms. There are better readings of Foucault’s work which pay attention to Foucault’s recognition of the fugitivity of life, and the immanence of resistance in every exercise of power (See for example W Brown *States of Injury: Power and Freedom in Late Modernity* (1995)) See also Foucault’s later work on ethics (practices of freedom) in M Foucault “The Ethic of Care for the Self as a Practice of Freedom” in J Bernauer & D Rasmussen (eds) *The Final Foucault* (1988) which explicitly addresses these issues. That power has as its central goal the production of docile bodies, does not mean freedom and resistance are foreclosed. I am arguing that the law school is centrally a disciplinary space while simultaneously acknowledging that students can, should and sometimes do construct their own legal identities in ways that resist (albeit sometimes partially or minimally) the law school’s attempts to govern, control and discipline. See M Ball “Foucault Goes to Law School: Using Foucault to Examine Australian Legal Education” paper presented at a conference on *Foucault: 25 Years On* hosted by the University of South Australia, Adelaide, 25-06-2009 <<http://w3.unisa.edu.au/hawkeinstitute/publications/foucault-25-years/ball.pdf>> (accessed 07-10-2013)

<sup>49</sup> Foucault *Discipline and Punish* 135

<sup>50</sup> 135

<sup>51</sup> 136

<sup>52</sup> See also Foucault’s formulation of the figures of “homo oeconomicus” and “homo juridicus” within neo-liberal governmentality in M Foucault *The Birth of Biopolitics: Lectures at the College de France 1978 – 1979* (2008) 267-316

through subtle operations of power by which the body is mastered, guided and directed. The aim is to maximise the population by organising bodies in a more efficient and productive fashion – an exercise that necessarily requires their submission and obedience. As Lisa Downing observes:

“The docile bodies of modernity are recognisable as the workforce of high capitalism, as well as prisoners, schoolchildren and soldiers, citizens trained and moulded in the operational factories of the schools and barracks.”<sup>53</sup>

My addition to this formulation would be to see the modern lawyer or the modern law student as also a product of the disciplinary shaping of the law-school-as-factory. In this case, the modality consists of a four-year regime in which the bodies and souls of law students are subjected subtly to an “uninterrupted, constant coercion ... supervising the process of the activity” of learning and teaching.<sup>54</sup> This method of discipline forms a relation with the body that seeks to make it more obedient and more “useful” through a “calculated manipulation of its elements, its gestures, its behaviours”.<sup>55</sup> That Foucault’s theory of “docile bodies” is based on the training of soldiers and perfecting of military forces (and applies also to prisons and schools) goes to the heart of my point that the current dominant model of legal education seeks only to “train” lawyers so they can serve the functional needs of our “late modern capitalist, liberal and bureaucratic disciplinary social order”.<sup>56</sup> This is why strictly speaking, there is no such thing as legal *education* in South Africa – only legal *training*.<sup>57</sup>

Seen from this view, traditional legal education (which teaches modernist liberal formalist legal ideology) is a form of discipline that constructs the consciousness of law students (who later become lawyers, judges, policy advisors, public servants, politicians, and legal academics) in such a way that they develop a statist, technocratic and establishment-minded approach to things. The purpose behind educating students in this manner is to dissolve all differences and produce model lawyers who will, more or less, think and act the same. Let me give a brief example of what I mean here. In my second year as a law student, I was struck by a particular moment in my law of contracts class, a moment which I am told is rehearsed every year, in which the lecturer advises students that should they get lost or confused during a tests and exams, they should bear in mind the two cardinal principles of contract. The first was “*if you are stupid, you must suffer*” and the second was “*Ag, shame doesn’t matter in the law*”. Although I had initially perceived such beliefs as being peculiar either to the lecturer in the course and perhaps also to the ideological character of my university, sustained conversation with friends and colleagues from most other universities in the country indicated that the communication

<sup>53</sup> L Downing *Cambridge Introduction to Michel Foucault* (2008) 79

<sup>54</sup> Foucault *Discipline and Punish* 137

<sup>55</sup> 181-182

<sup>56</sup> Brown (1993) *Political Theory* 309

<sup>57</sup> See K van Marle “Jurisprudence, Friendship and the University as Heterogeneous Public Space” (2010) 127 *SALJ* 628 629, 643-644 Recall Foucault *Discipline and Punish* 170:

“The chief function of the disciplinary power is to ‘train’...”

of these kind of heavily loaded messages was a general/common phenomenon in law lecture halls.<sup>58</sup>

Although it is difficult to prove in any quantifiable way, it would seem that this kind of cavalier “get real” lawyer-talk is well-known to most, if not all, law students.<sup>59</sup> I suspect that some law teachers appeal to these crude generalisations and cynical statements in order to convince students to “get over” any idealism or progressive political stance they may have about law and “face up” to the “fact” that in the “real world” of law, people get “screwed over” regularly. To put this in a more jurisprudential register, I suspect many law teachers do this to induce in students an exaggerated sense of the constraining power of legal rules and thus also, a sense of powerlessness about their (and law’s) capacity for social change.<sup>60</sup> Following Foucault, one could describe this as a process of professional socialisation by which students are coerced into adopting a specific legal persona suited to the kind of “product” that will best serve prevailing systems of power. A crucial effect of the process of rendering law students docile is the loss of an individual moral or ethical perspective and the adoption of a professional identity that favours consistency, rationality and rules over ambiguity, attuned emotion, context and narrative – discursively identifying the latter as traits unsuitable for a lawyer.<sup>61</sup> Another effect is that “being a lawyer” becomes associated solely with ruthlessness, careerism and self-interest so that “winning” – prizes, arguments, competitions, cases, scholarships, clerkship positions, *et cetera* – becomes the main motivation of any “good” lawyer. Ethics in this conception of legal education is reduced to codes of professional conduct, not stealing money from clients, avoiding conflicts of interest and disclosing knowledge of precedent that discredits one’s case.<sup>62</sup> Feminist and critical race perspectives would add here that the silencing necessary in the handling of the docile law student works especially harshly against students whose social experiences, cultural worldview and political identities place them outside of the liberal secular white male middle-class heterosexual mainstream.<sup>63</sup>

For the disciplining process to be truly successful has required that law teachers – through relying on an orthodox approach to law – narrate to students a romanticised and depoliticised story of law while diminishing if not completely ignoring significant aspects of the South African legal system: colonial apartheid, the exclusion of women and homosexuals, the devaluation of African legal knowledge systems and the role of rights discourse in

<sup>58</sup> See also the opening dialogue between the characters Marty and Jack in G Hoblit (director) *Primal Fear* (1996) Film: Paramount Pictures

<sup>59</sup> For an illustration of how the ideology of Reason as employed in legal discourses reinforces the professional power and authority of legal practitioners and legal academics, see P Schlag *The Enchantment of Reason* (1998) 24-25

<sup>60</sup> Klare (2011) *UnBound: Harvard J of the Legal Left* 58

<sup>61</sup> See R Magee “Legal Education and the Formation of Professional Identity: A Critical Spirituo-humanistic – ‘Humanity Consciousness’ – Perspective” (2007) *NYU Rev L & Soc Change* 467-468

<sup>62</sup> See JR Elkins “The Pedagogy of Ethics” (1985) 10 *J of Legal Profession* 37

<sup>63</sup> See the essay “Crimes without Passion” in Williams *The Alchemy of Race and Rights* 80-98

constructing poverty to name a few examples.<sup>64</sup> The more automatically a student accepts this story of law, the more they are said to be “thinking like a lawyer”. For if law is a science that is capable of logically commanding correct legal outcomes, as students are often told, reference to political, historical and moral considerations is seen as both unnecessary and naive but also as something bad and unprofessional – “un-lawyerly” even.

Foucault enumerates the four techniques of disciplinary practice by which the body is subjugated, ordered and made docile. First, he discusses the “art of distributions”<sup>65</sup> (spatial distribution of docile body subjects) which includes techniques of *enclosure* (such as confining law students in a faculty building for most of their time) and *ranking* (arranging students hierarchically in terms of classes, groups, marks, *et cetera*). Secondly, he discusses “control of activity”<sup>66</sup> which is a temporal rather than spatial means of discipline and regulation. Among the techniques for the “control of activity” Foucault includes (i) *the timetable* (a schedule of when classes and consultations with lecturers take place designed to “establish rhythms, impose particular occupations, regulate the cycles of repetition”); (ii) the *correlation of the body and the gesture* and (iii) the *body-object articulation* (this would include the protocols observed during moots, emulating the hand gestures used and the bodily expressions communicated by lawyers in court); and (iv) *exhaustive use* (giving students a voluminous amount of cases/texts to read and scheduling tests close to one other with the aim of expending their energy so that they are constantly and deeply immersed in or preoccupied with law, legalism and legal rules).

The third process of managing docility, “the organisation of geneses”,<sup>67</sup> involves a complex process of sorting, managing and judging *capabilities* of students (this involves offering bursaries and scholarships only to “talented” law students, subjecting them to the supervision of a mentoring attorney or partner in a law firm, organising the curriculum in terms of years that students gradually pass through as a sign of slowly working towards “becoming lawyers”). Even tests and exams for Foucault are part of the apparatus (or *dispositif*) of disciplinary power because they offer a “normalising gaze”.<sup>68</sup> In it, students are transformed into objects of knowledge, available for inspection, correction and comparison thereby making it easier for them to be governed, and for the process of docility-instruction to be monitored for its coherence.<sup>69</sup> A hierarchy is also created between the knowing and the not-knowing, the sharp and the weak, the clever and the dim, thus organising and classifying students into a pecking order of those deserving to be rewarded and those due

<sup>64</sup> Certainly, this is far more prevalent in the teaching of non-jurisprudential and non-public law subjects – but even in subjects such as constitutional law, human rights and jurisprudence, elements of such depoliticisation can and do occur

<sup>65</sup> Foucault *Discipline and Punish* 141-149

<sup>66</sup> 149-156

<sup>67</sup> 156-162

<sup>68</sup> 184

<sup>69</sup> See also Kennedy (1982) *J Legal Educ* 600 for the view that the practice of grading and ordering students based on academic performance “is largely irrelevant to what students will do as lawyers. Most of the process of differentiating students into bad, better and good could simply be done away with, without affecting the quality of legal services”

to be punished (by for example being failed, excluded from opportunities or made to repeat the course).<sup>70</sup>

Finally, the fourth process Foucault names is “composition of forces”<sup>71</sup> (to achieve an efficient machine and build an effective army). This process polishes up the bodies in anticipation of composing them all into a combined force to be sent out into society as functionaries to perpetuate the dominant ideology. One aspect of this process when related to legal education is that it involves law students learning a code of signals, or protocols to which they can respond immediately (this is transmitted to students through the elaboration of law as a science; a perfect and seamless set of rules organised neatly and conceptually identifiable). Examples here would be: the five elements of a delict, the *essentialia* of a contract, the factors for what constitutes valid administrative action, the definition of a “thing” in the law of property, and so on. Here the student need not understand the nature or context of the concepts but should be able to perceive them as “signals” and react immediately. In other words, the lawyerly mindset must always be on alert at all times. These signals would also include conventionalised phraseology which upon further inspection actually corresponds to the traditional view of law being etched into the minds of law students through the disciplinary norms of traditional legal education.

Karin van Marle for instance questions the popular use of the phrase “the court” when referring to judicial decisions – a convention that is second nature to almost all law students. For Van Marle, this phrase falsely creates the image of a unified judiciary absent of any disagreement or dissent – which subliminally communicates to students the legal formalist understanding of judges as merely applying the law.<sup>72</sup> In a similar vein, Patrick Lenta criticises the use of the phrase “it is submitted that” which students are taught to use in heads of argument, moots and in long questions/essays.<sup>73</sup> For Lenta, this reflects “the passive voice” and also evidences a student’s quest for objectivity. By removing herself from the text, the student-writer effaces her-*self* (personality, creativity, viewpoint) from the texts in the same way the phrase “the court” eliminates the personality and interpretive role of the judges from the judicial outcome. He writes that “[a]ttempts by students to remove themselves from the text reflect the pressure on them... to be deferential – to ‘submit’ to the hierarchical power structures of the law”.<sup>74</sup>

Indeed the emphasis on deference and avoidance is central to the making of the docile lawyer. After all, as Foucault would tell us, the body and soul of law students are made docile so that it “may be subjected, used, transformed and improved”.<sup>75</sup> I read this as saying something about the desire of traditional legal education to produce conformist law students who are so in love with the law and adhere so tightly to the values of established doctrine that they can be

<sup>70</sup> Montjane (2003) *Education as Change* 89-90

<sup>71</sup> Foucault *Discipline and Punish* 162-167

<sup>72</sup> Van Marle (2003) *TSAR* 550

<sup>73</sup> P Lenta “Is There a Class in this Text? Law and Literature in Legal Education” (2002) 119 *SALJ* 841 848

<sup>74</sup> 848

<sup>75</sup> Foucault *Discipline and Punish* 136

economically useful in propping up and maintaining the conservative nature of the legal culture and the pro-business interests of the legal profession. On this aspect the hierarchical and disciplinary legal education being described here resembles what Hannah Arendt called “totalitarian education” whose function is not (and has never been) to instil certain convictions in law students “but to destroy [their] capacity to form any”.<sup>76</sup>

The usefulness of combining Kennedy’s Marxian-inspired critique of the role of legal education in “legitimation” and “false consciousness” with Foucault’s theory of discipline and power-knowledge is to show how the dominant ideology and the modalities of power are directly reinforced by the regime of diverse practices that constitute, and impact upon, legal education. As Goodrich has argued, legal education imposes a standardised rhetoric of legal thinking that prepares students for bureaucracy, conformity and defeat.<sup>77</sup> Legitimation here is achieved through teaching students to accept authority and legal governance without justification.<sup>78</sup> Because legitimation leads to an acceptance by populations, communities, and individuals of the laws and norms that govern them (what Foucault would call “governmentality”), it has to be seen against the backdrop of the level of social discontent and the imbalances that prevail in a given context to reveal how much of law’s legitimacy is grounded on consensus and popular will and how much in discipline, coercion and domination. Because our context is one of existing racial, gender and class hierarchies, our legal culture (as transmitted, in part, through the apparatus of legal education) tends to co-operate with and serve as an instrument of domination which causes a profound sense of alienation of the kind described by Peter Gabel and Paul Harris:

“The nature of this alienation is best described as the inability of people to achieve the genuine power and freedom that can only come from the sustained experience of authentic and egalitarian social connection. The predominance of hierarchy in both public and private life leads to a profound loss of this sense of social connection because it breaks down any possibility of real community, and forces people into a life-long series of isolating roles and routines within which they are unable to fully recognize one another in an empowering and mutually confirming way.”<sup>79</sup>

Gabel and Harris point out the role a legal system/legal culture plays in maintaining these social hierarchies and the means by which it operates. For our purposes, it is crucial to note that it is the docile law graduate who is expected to normalise and further this system/culture, to represent and speak for it. They write:

“The principal role of the legal system within these societies is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement. The need for this legitimation arises because people will not accede to the subjugation of their souls through the deployment of force alone. They must be persuaded, even if it is only a ‘pseudo-persuasion,’ that the existing order is both just and fair, and that they themselves desire it. In

<sup>76</sup> H Arendt *The Origins of Totalitarianism* (1951) 466 For Arendt’s insight that thoughtlessness and lack of judgment rather than inherent and wilful wickedness are the condition for evil and atrocity, see H Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963)

<sup>77</sup> P Goodrich *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (1996) 196

<sup>78</sup> See P Langa “Transformative Constitutionalism” (2006) 17 *Stell LR* 351

<sup>79</sup> P Gabel & P Harris “Building Power, Breaking Images: Critical Legal Theory and the Practice of Law” (1983) *NYU Rev L & Soc Change* 369 371



particular, there must be a way of managing the intense interpersonal and intrapsychic conflict that a social order founded upon alienation and collective powerlessness repeatedly produces. ‘Democratic consent’ to an inhumane social order can be fashioned only by finding ways to keep people in a state of passive compliance with the status quo, and this requires both the pacification of conflict and the provision of fantasy images of community that can compensate for the lack of real community that people experience in their everyday lives.’<sup>80</sup>

I end this section by noting that for Foucault, discipline (either in the form of punishment, incarceration, knowledge, institutionalisation) does not only operate on the bodies of its subjects but also their “souls” (their ways of thinking, value systems, unconscious identifications) so that the very artefact of the self is figured, refigured and disfigured by it. There is much cause for concern in this point because legal education not only affects the *legal* mindset (in the sense of what kind of lawyer a student later becomes) but the mindset in general (what kind of person the student will become in the long run).

### 3 Tensions and transgressions: teaching law critically

“But I do think that we have been taught to think, to codify information in certain old ways, to learn, to understand in certain ways. The possible shapes of what has not been before exist only in that back place, where we keep those unnamed, untamed longings for something different and beyond what is now called possible, and to which our understanding can only build roads. But we have been taught to deny those fruitful areas of ourselves.”<sup>81</sup>

In this section, I will connect calls for a critical legal education with bell hooks’ notion of education as a practice of freedom in response to the disciplinary and regulatory effects of orthodox forms of legal education. (Here once again, I am noting as Foucault does the possibility of resistance against discipline and wish to highlight the possibility of students and teachers constructing alternative, more critical legal identities). My starting point is the claim that every mode of reasoning used by lawyers, every application of legal principles to a specific scenario and every method of argumentation based on legal materials involves a normative and contestable vision of law and social and political life.<sup>82</sup> My view is that legal education should infuse the teaching of positive law with the ability to identify the theoretical/political/philosophical position about law, politics, morality or society that is invoked by any legal argument, judicial decision, or proposition – including those of lecturers and fellow students.

There are two senses in which I am using the term “critical”. In the first sense, I am using it to refer to critical thinking which involves the use of reading and writing skills to analyse arguments down to their basic elements, to be able to integrate information, to organise ideas from different sources and subject areas into new interpretations, to make judgments about the value of certain information and the ability to examine the strengths and weaknesses of particular arguments.<sup>83</sup> I consider the ability to think critically a minimum

<sup>80</sup> 372

<sup>81</sup> A Lorde *Sister Outsider: Essays and Speeches* (1984) 101

<sup>82</sup> G Frug “A Critical Theory of Law” (1989) 1 *Legal Educ Rev* 43

<sup>83</sup> M Beachbord & J Beachbord “Critical-Thinking Pedagogy and Student Perceptions of University Contributions to Their Academic Development” (2010) *Informing Science* 63

objective of law school education in particular and university education in general. The second version of my use of the term “critical” is in direct reference to critical legal theory.<sup>84</sup> Thinking differently about law, and indeed knowing that there are multiple and different vantage points from which to think about, engage with and live under the law is important for a progressive and democratic legal education.

Contrary to the impression created by traditional legal education, law does not exist within a vacuum. It operates within a context. And in South Africa, that context is a political and ethical imperative to transform society and redress past and present injustices, a legal system based on the pre-eminence of human rights and constitutional values, a social order still influenced by the effects of “white supremacist imperialist capitalist patriarchy”,<sup>85</sup> and a diverse society struggling to make sense of its past, present and future. This context should be central, not secondary, to legal education in post-apartheid South Africa where far too much focus remains on the “text”. Of course, just as traditional legal education does not take place from a distant objective standpoint, neither does critical legal education. The difference is that the latter does not pretend to, whereas the former does. Critical Legal Studies (“CLS”), from its inception and in all its manifestations, is explicitly committed to a Left political stance on law.<sup>86</sup> Its political goal is to overcome domination and hierarchy in society and its method is to think through the deep perplexities and contradictions that underlie law and legal theory.<sup>87</sup> That thinking through of legal problems takes the form of an attack on aspects of liberal jurisprudence and legal formalism that are internally (fundamentally) contradictory and incoherent but also which externally generate inequalitarian and undemocratic social outcomes.<sup>88</sup> Within the CLS tradition, the law is not seen as fixed and pre-given but as being open to deconstruction and change.

### 3 1 Critical legal education

Many years ago, two US critical legal scholars, Hunt and Feinman wrote – in separate works – compellingly about the need to reform the practices and policies of contemporary legal education and to draw from CLS for theorising an alternative, more critical approach to legal education.<sup>89</sup> Both authors highlight some general aspects of what a critical legal education would look like that are relevant here. I briefly outline the main aspects:

<sup>84</sup> Van Marle & Modiri (2012) *SALJ* 216

<sup>85</sup> I take this term from bell hooks (*Outlaw Culture: Resisting Representations* (1994) 116; *The Will to Change: Men, Masculinity and Love* (2003) 17) and also use it to describe the interlocking systems of domination that permeate life and law in South Africa

<sup>86</sup> See A Hutchinson & P Monahan “Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought” (1984) 36 *Stan L Rev* 199-245

<sup>87</sup> A Hunt “The Critique of Law: What is Critical about Critical Legal Theory” (1987) 14 *J Law & Soc* 5 6, 11; “The Theory of Critical Legal Studies” (1986) 6 *OJLS* 1

<sup>88</sup> For US CLS (“law is politics”), see D Kairys (ed) *The Politics of Law: A Progressive Critique* (1982) For Euro-Brit CLS (“law and the political”), see M Stone, I Wall & C Douzinas (eds) *New Critical Legal Thinking: Law and the Political* (2012)

<sup>89</sup> See also RW Gordon “Critical Legal Studies as a Teaching Method” (1989) 35 *Loy L Rev* 383

- (i) *Critique*. The first general feature of a critical legal education would be based on a method of critique that engages with the underlying assumptions of formalism and legalism.<sup>90</sup> One example would be to constantly challenge the formalist assumption that law is determinate and that legal choice is strictly limited. The critical law teacher would have to show students the constructive and creative nature of legal interpretation and reasoning in part by demonstrating that legal texts do not so completely compel our choices as to render moral and political judgment unnecessary.<sup>91</sup> This could allow for a better understanding of different (the conventional and alternative) methods of argumentation and reasoning available to students in answering legal questions and analysing case-law. Students should be taught to see that the process of translating a general norm or rule to a particular case or set of facts involves judgments and choices that call upon one's moral and political sensibilities and social background.<sup>92</sup>
- (ii) *Theory*. As we have seen, traditional legal education pretends to be atheoretical and apolitical while actually being based on a powerful implicit theory. The idea of grounding legal education in theory is not to privilege one theoretical perspective over another but for each subject/module to incorporate a theoretical framework into its study of legal doctrine.<sup>93</sup> As examples, courses on family law and child law could draw from relevant work in sociology and psychology; corporate law subjects can also involve learning different economic theories and models of economic planning and public law subjects could integrate perspectives from political philosophy and public administration. The aim here would be interdisciplinary: to position law as a complex social phenomenon and to move on from there.
- (iii) *History*. The centrality of attentiveness to history in the legal curriculum would correlate with an engagement with law in its specific social context. History here is broader than just "legal history" or the internal development of a particular field of law<sup>94</sup> – it would also include a general history of society as it intersects with and influences law and legal culture over time. South African history alone is replete with examples of how social and political contexts have radically altered law from the outside.
- (iv) *Legal Doctrine*. Even in its critical form, legal education should be concerned with legal doctrine – and not just the impact and societal consequences of law. The grounding of legal education in theory and history is not to abandon doctrine but to facilitate an examination of that doctrine in a way that goes beyond the formalist view of law and legal theory as being exclusively the product of legal institutions which are

<sup>90</sup> Hunt (1986) *The Law Teacher* 17; JM Feinman "The Failure of Legal Education and the Promise of Critical Legal Studies" (1985) 6 *Cardozo L Rev* 739 757

<sup>91</sup> D Kennedy "Freedom and Constraint in Adjudication: A Critical Phenomenology" (1986) 36 *J Legal Educ* 518

<sup>92</sup> Klare (2011) *UnBound: Harvard J of the Legal Left* 65

<sup>93</sup> Hunt (1986) *The Law Teacher* 17-18

<sup>94</sup> 18; Feinman (1985) *Cardozo L Rev* 762

portrayed as isolated, self-sustaining and functioning mechanically.<sup>95</sup> Case law, legislation and other sources of law should not be displaced; just deconstructed and read in context.

- (v) *Integration*. At some point (perhaps in subjects such as legal practice and legal skills which have hitherto been discredited and underutilised), students need to encounter law in a manner that is not fragmented and compartmentalised into a set of rigid classifications as is the case with the structure of the law school curriculum.<sup>96</sup> Because law in “reality” is not separated into, say, family law and insolvency law (in the case of a sequestration of a solvent spouse’s estate) a constant feature of a critical legal education should be bringing to light the cross-cutting and conflicting nature of these classificatory schemes.

I fully take on board the words of caution raised by Woolman et al on the actual dynamics of South African education that make it difficult to actualise such an education.<sup>97</sup> One major example of this is the crisis of primary and secondary schooling in South Africa which continues to produce matriculants who are under-skilled and unprepared for university. To add to this, students come to their law studies with a Matric and not with an undergraduate degree as their American counterparts do and once in the university, other problems arise: full classrooms, under-staffed faculties, resource constraints, overwhelming social pressures and communication problems for second or third-language English speakers. This is a difficulty which shows that the problem is more complex but not that the project of a more critical legal education is impossible *even under current conditions*. To minimise some of these problems, other options can be (and are being) considered: open-book assessments, effective use of tutorials, less focus on coverage (ie teaching everything) and more on actual research and analysis skills, inter-faculty co-operation and discontinuing certain subjects altogether. That this will, practically speaking, require drastic changes to the LLB degree as many have suggested is almost inevitable. But here my concern relates to the substantive political and ideological content of legal education – concerns on which the “practical challenges” mentioned above have little bearing.

The central outcome of a critical legal education would be to undo the lie of necessity taught in traditional legal education which claims that the law *as it is* is normal, necessary and fair, which has had the effect of curtailing the legal and political imagination of students and shutting them out from the view of law as it ought to be. It would instil in students an awareness that things can and must be different.<sup>98</sup> The imagined “ideal lawyer” of critical legal education would be the opposite of a docile and passive law student precisely because it opens up the space for dissent and transformation. Out of critical legal education should emerge an active, thinking participant in our legal culture; one who constantly seeks to resist old and new forms of illegitimate

<sup>95</sup> Hunt (1986) *The Law Teacher* 18; Feinman (1985) *Cardozo L Rev* 759

<sup>96</sup> Hunt (1986) *The Law Teacher* 19

<sup>97</sup> Woolman et al (1997) *SALJ* 36-43

<sup>98</sup> Feinman (1985) *Cardozo L Rev* 758-760

power, to challenge the *status quo*, to transgress. In this way a critical legal education, by constantly pushing against the doctrinal boundaries of law, acts as a practice of freedom. Enter bell hooks.

### 3.2 Engaged, transgressive and critical pedagogy

Cultural critic, literature professor and Black feminist writer bell hooks has written extensively on the question of education as central to the struggle against hegemony.<sup>99</sup> By drawing from the critical pedagogy of the Brazilian thinker, Paulo Freire, and the spiritual teachings of Vietnamese Buddhist monk, Thich Nhat Hanh, she puts forward a political, transgressive and utopian conception of education that is suggestive for my argument for a critical legal education.<sup>100</sup> It is also suggestive because I understand law to be part of the humanities<sup>101</sup> – the discipline from which hooks teaches and writes and for which her argument has the strongest relevance.

“To educate as the practice of freedom is a way of teaching that anyone can learn. That learning process comes easiest to those of us who teach who also believe that there is an aspect of our vocation that is sacred; who believe that our work is not merely to share information but to share in the intellectual and spiritual growth of our students. To teach in a manner that respects and cares for the souls of our students is essential if we are to provide the necessary conditions where learning can most deeply and intimately begin.”<sup>102</sup>

hooks begins her elaboration of the “art” – not science – of engaged pedagogy by urging educators to transgress the boundaries which confine students to a rote, assembly-line approach to learning.<sup>103</sup> She cites Freire who refers to this approach as the “banking concept of education” (otherwise known as the transmission approach) “in which the scope of action allowed to the students extends only as far as receiving, filing, and storing”.<sup>104</sup> In the banking model of education, the teacher is figured as the “Subject” – the bearer of all knowledge – while the student is the “object” – a mere receptacle.<sup>105</sup> hooks rejects this style of education because it replicates and resembles the systems of domination that exist in society. She argues instead for an engaged pedagogy that is centred on conscientization, that is, on students developing a critical awareness and engagement with the world around them.<sup>106</sup> For this to be possible, says hooks, students need to be active participants in the learning process and teachers need to create enabling and stimulating environments where learning can take place.

hooks’ theory of pedagogy has both political and ethical dimensions to it. It is political as it involves students combining *praxis* and reflection with the aim

<sup>99</sup> See also bell hooks *Teaching Community: A Pedagogy of Love* (2003) and *Teaching Critical Thinking: Practical Wisdom* (2010)

<sup>100</sup> See D Kennedy “Politicising the Classroom” (1995) 4 *Rev of Law and Women’s Studies* 81

<sup>101</sup> See A Sarat “Traditions and Trajectories in Law and Humanities Scholarship” (1998) 10 *Yale JL & Human* 401 and closer to our context, K van Marle “Regstudie, die Geesteswetenskappe en Enkele Gedagtes Rondom Geregtigheid” (2012) 52 *Tydskrif vir Geesteswetenskappe* 749-760

<sup>102</sup> hooks *Teaching to Transgress* 13

<sup>103</sup> 13

<sup>104</sup> P Freire *Pedagogy of the Oppressed* (1970) 72

<sup>105</sup> 73

<sup>106</sup> hooks *Teaching to Transgress* 14

of “creating a new language, rupturing disciplinary boundaries, decentering authority, and rewriting the institutional and discursive borderlands in which politics becomes a condition for reasserting the relationship between agency, power, and struggle”.<sup>107</sup> It is ethical in the sense that it argues for a holistic approach to education whereby students and teachers regard one another as whole human beings – striving not just for technical knowledge but “knowledge about how to live in the world”.<sup>108</sup> Her concern is that current educational practices (the equivalent to what I have called traditional legal education) reinforce the Western metaphysical split of mind, body and spirit.<sup>109</sup> In most classroom environments, teaching takes place as though only the mind is present. Quite similar to traditional legal education’s drive towards neutrality and scientific rationality, both teacher and student in the classroom relate to each other as spiritless disembodied minds. As we know, the danger of this absence of body and spirit is that it functions to suppress difference and prevent the questioning of culturally accepted assumptions. *Another important observation that hooks makes is that even teachers who approach their courses from a politically progressive standpoint still follow these conservative pedagogical practices that she decries.*<sup>110</sup> This, she says, stems from a clear failure to see the innate connection between content being taught and the pedagogical medium. To experience education as the practice of freedom, progressive and critical educators must explore new pedagogical strategies both in terms of content and style of teaching.

The importance of such an engaged and enabling pedagogy to a critical study of law is significant in many respects. First, it will teach students to take responsibility for the manner and purpose for which they use knowledge to make choices and decisions. Law graduates coming through this education will no longer be able to hide behind the formal veil of law and will have to recognise the role that political and moral judgment plays in every area of law and legal practice. Secondly, through relating learning to life, the practice and teaching of law will be humanised and opened up as a site of reconciliation and resolution of the many diverse interests and needs of South Africans. This would show students that law is not an abstract, technical science that looks down on the people; but an active part of the social arrangements in society. Thirdly, by seeking to connect to students in ways that are enriching rather than alienating, it will seek to instil in them sensitivity to justice, difference, equality and dignity. An engaged pedagogy values student expression and recognises the often liberating feeling that comes with seeing the world differently. Fourthly, an engaged pedagogy transgresses limits and boundaries by challenging dominant discourse and uncovering and reclaiming subjugated knowledges. In this way, students can lay claim also to alternative histories and alternative futures by recognising the plural nature of the legal system. Fifthly,

<sup>107</sup> H Giroux & P McLaren (eds) *Between Borders: Pedagogy and the Politics of Cultural Studies* (1994) ix cited in hooks *Teaching to Transgress* 129

<sup>108</sup> hooks *Teaching to Transgress* 14-15

<sup>109</sup> 191 See also MN Slabbert & K van Marle “Die Afwesige Gees in die Regswetenskap” (2012) 52 *Tydskrif vir Geesteswetenskappe* 68-84

<sup>110</sup> hooks *Teaching to Transgress* 16

and perhaps most urgently, it requires the law teacher to be self-reflective and candid about her teaching practices and the politics of law that she advocates.

At the heart of an engaged, attuned pedagogy lies the transformative potential of critical thinking. hooks argues that the inability to think critically forecloses a transformed future and stunts growth and dialogue.<sup>111</sup> Critical thinking as a relationship to knowledge (including legal knowledge) enacts a disruption of power by refusing to be disciplined into docility and silence. Education as the practice of freedom evokes life, thought/thinking, dissent and becoming. It is here that critical thinking connects to Freire's insistence that education must involve "the capacity to begin always anew, to make, to reconstruct, and to not spoil, to refuse to bureaucratize the mind, to understand and to live life as a process – to live to become..."<sup>112</sup>

Another reason for why I turned to bell hooks' critical pedagogy is because of the overwhelming feeling that many of the practices that make up traditional legal education are, bluntly put, pointless and boring. I support the argument made by Feinman that critical legal teaching ought to embody a connection between the substantive content being conveyed and the form of pedagogy.<sup>113</sup> It is not just the message that must be transformative but also the style of teaching. And if critical legal teaching effects the convergence of content and style properly, it holds the potential of going beyond a mere reactive criticism of the establishment to actually remedying the failure of law schools to prepare law graduates.<sup>114</sup> As Feinman writes:

"Critical teaching is better teaching. Critical theory presents a more accurate picture of the substance and process of law, and critical teaching conveys that body of knowledge more effectively to students. It prepares students to learn as lawyers learn. Thus, it is the critics of traditional legal education, not its defenders, who can better do the job that legal education is supposed to be."<sup>115</sup>

Just as there is risk entailed in the new constitutional order urging judges, lawyers and legal academics to abandon a business-as-usual approach to law, so too is there risk in teaching law against the grain.<sup>116</sup> There is risk, yes. But also possibility and freedom:

"The academy is not paradise. But learning is a place where paradise can be created. The classroom, with all its limitations, remains a location of possibility. In that field of possibility we have the opportunity to labor for freedom, to demand of ourselves and our comrades, an openness of mind and heart that allows us to face reality even as we collectively imagine ways to move beyond boundaries, to transgress. This is education as the practice of freedom."<sup>117</sup>

<sup>111</sup> 202

<sup>112</sup> P Freire *Pedagogy of the City* (1993) 98

<sup>113</sup> 762

<sup>114</sup> The Law Society speaks of an "alarming deficiency" in law graduates' skills N Nair "Law Graduates: Heat on Varsities" (09-07-2012) *Times Live* <<http://m.thetimes.co.za/?name=timeslive&i=11263/1/0&artid=32935>> (accessed 17-07-2012)

<sup>115</sup> Feinman (1985) *Cardozo L Rev* 764

<sup>116</sup> K van Marle "Refusal, Risk, Liminality" in K van Marle (ed) *Refusal, Transition and Post-apartheid Law* (2009) 1 1-13

<sup>117</sup> hooks *Teaching to Transgress* 207

#### 4 Closing reflections

In an article on social justice lawyering, Angela Harris argues for a legal education that teaches in the tensions and embraces *aporia*.<sup>118</sup> She argues that below the technical work of teaching, there is a “secret conversation”, an “unofficial curriculum” that also needs to be articulated. Rather than seeing legal education as a tug-of-war between a conservative/liberal approach to law and a critical/radical one, Harris implores law teachers to “teach the conflicts” between different understandings of law and the tensions between conflicting legal rules, standards and policies.<sup>119</sup> She also argues that to teach law students to embrace social justice values involves teaching the contradictions and violence embedded in law. She wants law students and teachers to be attentive to – to “see” and “feel” – the difference between their particular professional and personal commitments and a genuinely egalitarian and just society.<sup>120</sup> This way they will be able to acknowledge and take responsibility for the extent of their investment in the current order. For her, critical legal education should not be seen as nihilist. By exposing the contradictions in law and the impossibility of justice-as-*aporia*, the aim is not to make students and teachers feel guilt or defeat, it is in fact to energise them to re-align their commitments to substantive social change through law.<sup>121</sup> But she adds though that “[t]o make this possible, in turn, we must go beyond the intellectual practices taught in law school and bring something else into the room”.<sup>122</sup>

This article has been an attempt to work through the dangers of a legal education that implicitly projects certain ideas about society that maintain power relations and hegemonic practices rather than alter them. I described this as traditional legal education and spent some time considering both its practical and political effects. Traditional legal education not only produces law graduates who cannot read, write and count adequately but it also blinds students to the social and historical context of law, thereby rendering them docile and silent in the face of injustice, suffering, misery, cruelty and inequality. With Kennedy and Foucault, I sought to expose the role of legal education as a form of ideological legitimation of social hierarchy and as a disciplinary technology coercing law students into compliance with hegemony, injustice and illegitimate power. I did this to emphasise the substantive importance of legal education as a site for either the preservation or transformation of our conservative, bureaucratic liberal legal culture.

I then moved on to briefly sketch out an alternative, more critical, direction for legal education. Such a legal education would prioritise the teaching of critical thinking skills and would draw from critical legal theory in formulating the account of law to be conveyed to students. Linking this to pedagogy, I briefly drew on bell hooks’ reading of Paulo Freire’s liberatory pedagogy to think about what it might mean for legal education to strive

<sup>118</sup> A Harris “Teaching the Tensions” (2010) 54 *St Louis U LJ* 739

<sup>119</sup> 742

<sup>120</sup> 749

<sup>121</sup> 750

<sup>122</sup> 750



to push boundaries in order to achieve freedom. My aim was to show that critical legal teaching embodies a politics and ethics that is more faithful to the massive demands of our transforming society. Indeed, if a major question for post-apartheid South Africa is what kind of jurisprudence do we need, then it is an equally important question to ask what kind of legal education we need as well. Yet, having said all this, still I continue to believe that legal education should always be one step ahead of a legal culture, keeping open the horizon of the not-yet where justice escapes its collapse into law.<sup>123</sup> It should be the place where students and teachers “continue to dream”<sup>124</sup> and “invite new worlds”.<sup>125</sup>

“O’ my body, make of me always a man [or woman] who questions.”<sup>126</sup>

## SUMMARY

This article enquires into and joins the critique of the current state of legal education in South Africa against the backdrop of a post-modern, post-colonial and post-apartheid context. In response to current debates on the state of legal education and the quality of the graduates it produces, the author argues that the problem goes beyond the failure to provide corporate law firms with appropriately skilled and qualified graduates but also has implications for substantive democracy, active political citizenship, transformation, freedom, justice, and ethics. Through a survey of select legal education literature in South Africa and abroad, the author identifies the central problem as being the reliance by most South African law teachers on the dominant paradigm of traditional (or black-letter) legal education. Following the writings of Duncan Kennedy and Michel Foucault, this paradigm of traditional education is shown as being not only pedagogically ineffective but also politically corrupt and ideologically conservative. While failing to impart critical thinking skills to law students, it also works to co-opt them into the service of hierarchy and hegemony and functions to discipline them into docility, thereby legitimating the conservative legal culture. As an alternative, the author proposes the turn towards a more critical, engaged approach to legal education, drawing in particular from critical legal studies (“CLS”) and from the critical liberatory pedagogy of Paulo Freire and bell hooks. By following a more critical direction, and by enabling students to think critically about law, to question and to transgress, legal education can serve as a practice of freedom. The broad aim of the article then is to put forward a set of ideas contemplating a legal education that is otherwise, that brings something else into the law classroom such that it might serve as the meeting point between law and justice.

<sup>123</sup> D Cornell “Time, Deconstruction and the Challenge to Legal Positivism” (1990) 2 *Yale JL & Human* 267 268

<sup>124</sup> D Cornell *Transformations: Recollective Imagination and Sexual Difference* (1993) 44

<sup>125</sup> R Cover “Foreword: Nomos and Narrative” (1983) 97 *Harv L Rev* 68

<sup>126</sup> F Fanon *Black Skin, White Masks* (1986) 181 (emphasis added)