

THE TIME AND SPACE OF CRITICAL LEGAL PEDAGOGY

Joel Modiri*
LLB (UP) DPhil candidate (UP)
Lecturer, Department of Jurisprudence, University of Pretoria

1 Introduction: thinking in time and space

If the shortcomings, inadequacies and failings (together dubbed the “crisis”¹) in legal education could be traced to one central problem, it would be the failure of law teachers and law faculties or schools to adapt to the present-day context - to recognise and respond to the complexity and character of living, knowing and doing in post-1994 South Africa. Following Achille Mbembe, we could say that South African legal education is trapped “at the centre of the knot”.² To be at the centre of the knot, as I understand Mbembe, is to be disconnected or unmoored from one’s contemporary reality and location; and it arises primarily out of a failure to grasp shifts in the structure and consciousness of a polity and transformations in the legal and political order as “conceptual events” that thereby call for a new imagination: new definitions, new categories, new lines of enquiry, new practices and new mindsets.³ It is to be without a sense of time and space, without an account of the world and society *today*, lacking in the tools and vision to apprehend the specificity of the present as a construction of particular histories, practices and discourses.⁴

That this is true for legal education at South African universities is evident in many respects.⁵ With some exceptions, the upper echelons of the legal academy (especially the professoriate) continue to be overpopulated by white middle-aged academics whose undergraduate and postgraduate legal training began as long ago as the 1970s-1980s. The conceptual implications of this demographic over-representation of older white and male academics trained in apartheid legal doctrine and culture, are evident in the fact that law schools and legal scholarship more generally tends to be grounded in an oddly

* An earlier draft of this article was presented first at a seminar on *Teaching Law in the Postcolony* which was part of the Harvard Law School IGLP Regional Africa Workshop and then later at the UCT Dean’s Conference on *Issues of Race and Transformation of Legal Education*. My thanks to David Kennedy and Penny Andrews respectively for inviting me to participate in these intellectually stimulating events. I wish to express my gratitude also to Yvonne Jooste, Alfred Moraka, Karin van Marle and Chris Gevers who read the paper and offered valuable comments. All errors and shortcomings are mine alone.

¹ See J Modiri “The Crises in Legal Education” (2014) 46 *Acta Academica* 1-24.

² A Mbembe “At the Centre of the Knot” (2012) 38 *Social Dynamics* 8-14.

³ 8.

⁴ W Brown *Edgework: Critical Essays on Knowledge and Politics* (2005) 1-16; J Butler & E Weed “Thinking in Time: An Epilogue on Ethics and Politics” in J Butler & E Weed (eds) *The Question of Gender: Joan W. Scott’s Critical Feminism* (2011) 312-318.

⁵ See A van der Walt “Legal Research and Legal Education 20 years after the Advent of Democracy” in J de Ville (eds) *Memory and Meaning: Lourens du Plessis and the Haunting of Justice* (2015) 203-219.

anachronistic view of law as a technical science, decidedly separate from morality and politics.⁶ Where scholars have departed from this formalist view of law, they have turned to equally dated traditions of liberalism or unreconstructed versions of critical legal studies that elide a clear focus on the social powers of gender, class and race.⁷ A possible nostalgia for a time that is no more may account for the fact that law schools, especially in “historically white universities” (“HWU’s”) continue to disregard the pedagogical significance, for their institutional and academic cultures, of the now radically heterogeneous nature of the student population in terms of race, ethnicity, language, religion, gender, sexuality, class background and worldviews.

As a result, law schools continue to produce disproportionate throughput rates due to abdicating their responsibility to address – without stigmatisation – learning impediments of students, particularly those from disadvantaged backgrounds.⁸ That fewer and fewer law graduates are entering the private legal profession – choosing instead fields like journalism, public service, public interest litigation and academia – has not, it seems, prompted a serious re-examination of the drive in law schools to cultivate a legalistic, technicist and corporate-minded sensibility in students. If that were not serious enough, law students generally continue to be subjected to an irrelevant, outmoded and monotonous curriculum and course structure – coursing through a formulaic textbook and learning by rote without serious reflection on the social, economic, ideological and cultural implications of the texts, cases, and legal problems discussed in class. Law schools are generally not up to date with contemporary political contestations, events and dynamics and very few lecturers reflect on the significance of critical political moments and upheavals in the country for the courses they teach and the research they conduct. I suspect that part of this lack of reflection may be consequent to a particularly problematic understanding of the discipline of law as neutral, perspectiveless and above politics. As a result, the (dis)connections between the new legal and constitutional order and the continuances and repetitions (the *afterlife*, as it were) of colonial and apartheid economic, cultural, spatial and social relations, are left unexamined by law teachers and students.⁹

Indeed it is a stark reflection of how tightly law schools and legal academics are “at the centre of the knot” that none of the major political currents

⁶ D Davis “Legal Transformation and Legal Education: Congruence or Conflict” in A Price & M Bishop (eds) *A Transformative Justice: Essays in Honour of Pius Langa* (2015) 172-188; J Modiri “Transformation, Tension and Transgression: Reflections on the Culture and Ideology of South African Legal Education” (2013) *Stell LR* 458-464.

⁷ See F Cownie *Legal Academics: Culture and Identities* (2004) 36; D Roithmayr “A Dangerous Supplement” (2005) 55 *J Legal Educ* 80-93; K van Marle “Reflections on Post-apartheid Being and Becoming in the Aftermath of Amnesty: Du Toit v Minister of Safety and Security” (2010) 3 *CCR* 348.

⁸ See Task Team on Undergraduate Curriculum Structure *A Proposal for Undergraduate Curriculum Reform in South Africa: the Case for a Flexible Curriculum Structure* (August 2013) Report for the Council for Higher Education 17 which documents high levels of failure and dropout in universities and notes that throughput rates in South African universities “continue to be racially skewed, with white completing rates being on average 50% higher than African rates”.

⁹ See Modiri (2014) *Acta Academica* 1-24 and K van Marle “Reflections on Legacy, Complicity and Legal Education” (2014) 46 *Acta Academica* 198.

dominating the social sciences and humanities and public discourse have led to a meaningful revision of how we teach law and how we structure the LLB curriculum. These include the rise of social movements and their rejection of neoliberal government policies; service delivery protests across the country highlighting the falsity of the liberal constitutional promise and the quotidian indignity experienced by the majority of South Africans; increasingly vocal irruptions against the obscenity of unequal property ownership; private wealth and exploitation of workers; student protests over colonial-apartheid symbols and unaffordable higher education tuition fees; sexual violence and gender stereotyping; the Eurocentrism and whiteness of knowledge and cultural production in South Africa; government corruption and disillusionment with the African National Congress (“ANC”) and hence with the “post-apartheid” dispensation; to name but a few.

Against this depressing and layered background, this article restates the case for a critical legal education, this time focusing on the extent to which a more critical approach to law may bring into view what is currently unseen and unknown, and thereby respond to the conceptual, political and practical disorientation – the lack of direction – that in my view currently plagues South African legal education. The sense of the critical or critique being invoked here follows from what Wendy Brown calls “untimely critique”.¹⁰ As Brown puts it, critique “must know what time it is ... ” which is to say “it must grasp the age”.¹¹ Untimely critique further entails a “profound reading of the times” and it is also a “technique for blowing up historical time” through its insistence on “alternative possibilities and perspectives in a seemingly closed political and epistemological universe”.¹² This view of critique is suggestive of my argument that a critical legal education, and more generally a critical jurisprudence, must be closely attuned to the times and spaces that structure our present realities if we are to fashion an emancipatory and socially-relevant pedagogy of law.

To realise a critical legal education – one that would produce graduates who are technically skilled and competent as well as socially and politically conscious, thoughtful and critically literate – involves attending to three problematics, which I shall delineate in the section that follows. These are: firstly, adopting a *subversive* orientation towards the history, practice and theory of law; secondly, problematising constitutional fetishism; and lastly, decolonising and transforming the LLB curriculum. After tracing these three impression points as part of an agenda for critical legal teaching, I shall reflect on the tradition of critical pedagogy as primarily elaborated in the work of Paulo Freire and the paths it could disclose for expanded, critical and robust notions of reading and writing and of ethics that could inform legal education and legal study. Before the concluding remarks, I bring the preceding theoretical discussion to bear in a brief analysis of the current review of the

¹⁰ Brown *Edgework* 14.

¹¹ 14.

¹² 14.

LLB curriculum that has been mandated by the Council for Higher Education (“CHE”).

This article reaffirms once more “the dream of liberating education”,¹³ the belief that education should be geared towards the development of educated, democratic subjects and not merely “self-investing human capital”.¹⁴ Knowledge, theory, literature, ideas and debate within a community of scholars remain ideals worth fighting for even in the presently exhausting climate of the neoliberal configuration of the university. This is thus an argument for a critical legal education along the lines of what Cornel West has defended as “*paideia*”¹⁵ – an ancient Greek term denoting “a deep education” and entailing a profound connection to the world. As West tells us:

“*Paideia* concerns the cultivation of self, the ways you engage your own history, your own memories, your own mortality, your own sense of what it means to be alive as a critical, loving, aware human being.”¹⁶

2 An agenda for law teachers in three snapshots

Below I set out three interrelated and overlapping conceptual and intellectual problematics around which the development of a critical legal education orbits. There are probably many others, however I will touch on these three only, highlighting in what ways they are particularly pressing in the context of South African legal education as well as offering some tentative thoughts on how they could be navigated.

2.1 Subversive legal identities

In a still generative 1989 piece entitled “The Legal Historian as Subversive”, Danie Visser broadly sketched out the contours of a subversive approach to law, legal education and jurisprudence in general.¹⁷ Visser, focusing on South African private law, argues for a *subversive* approach to legal history: a history that would be composed not only of kings and popes (lawmakers and political elites) but also of “peasants and classes” (the marginalised). Such an approach to law would stand in radical contrast to some earlier approaches that relied on the “internal logic of law”,¹⁸ assumed the existence of “transcendental, objective truth[s]”¹⁹ and were primarily concerned with providing justification for present legal arrangements and currently accepted notions.²⁰ Instead, a different, more subversive, approach is one that would “corrode the perceived certainties of the legal system” and “reveal alternative structures and ideas” with the aim of relating law to the material conditions in society. As Visser writes, the aim of this more subversive approach would be:

¹³ I Shor & P Freire *A Pedagogy for Liberation* (1987) 1.

¹⁴ W Brown *Undoing the Demos: Neoliberalism's Stealth Revolution* (2015) 175-200.

¹⁵ C West *Brother West: Living and Loving out Loud - A Memoir* (2009) 22.

¹⁶ 30.

¹⁷ D Visser “The Legal Historian as Subversive (or Killing the Capitoline Geese)” in D Visser (ed) *Essays on the History of Law* (1989) 1-29.

¹⁸ 18.

¹⁹ 6.

²⁰ 19-20.

“To show that the principles of law do not function only in the intellectual world of textbooks in which they were created, but that they have an effect on real people; to show that they are created by real people for a bewildering variety of reasons; to show that the law need not necessarily be what it is.”²¹

In developing what I read as an argument for a subversive orientation towards (the) law and legal culture, Visser refers explicitly to Critical Legal Studies (“CLS”), and in particular the work of Roberto Unger, and outlines some aspects of what the subversion of law would entail. For Visser, a subversive approach to law is one that would recognise the disharmonies in the law; that is, the competing values, interests and principles that underlie law and legal rules. This would not only work to denaturalise legal outcomes, it would also highlight the economic and ideological motivations behind certain legal developments thereby bringing more clearly into view the distributive and cultural role of law – that is, law’s role in determining economic power relations and shape human consciousness.

This subversive legal method, transpiring both at the level of the doctrinal content of law and the broader legal tradition, could potentially reshape both legal education and legal scholarship. As method, a subversive approach to law aims to “destabilize current certainties by reimagining notions and structures of the legal system in terms of the categories of other times and other interpretive communities.”²² This means that hegemonic legal concepts, classifications and interpretations (reasonableness, ownership, freedom or individual autonomy, legal subjectivity, the public or private dichotomy, and even “law” itself) come to be challenged and exposed for their faulty, violent or contingent foundations.

Yet another formulation of a “subversive” approach to law and legal education comes from Upendra Baxi who, in the context of Indian legal education, criticised the overly doctrinal and rule-based nature of legal education.²³ Baxi takes issue with such an approach for being asocial and for privileging the “technical” law over the “ideal” law.²⁴ Like most critical legal educators, Baxi recognises the importance of teaching legal doctrine and the foundational concepts in any particular area of law; so rather than denouncing doctrine, he calls instead for doctrine to be taught in a socially-engaged, historically conscious and culturally sensitive manner. He calls this “interpretive insurgency”:²⁵ a way of conveying the history, structure and rules of the law to students in a way that recognises the oppressive social orders, exclusionary Eurocentric cultural norms and patriarchal sexual practices justified and maintained by some doctrinal approaches and legal traditions. Such insurgency, enabled by law teachers’ adoption of a “rebellious pedagogy”, constantly aims to resist what Baxi calls “closures of legal thought” or “disablements of the imagination”, by which he means the

²¹ 29.

²² 20.

²³ U Baxi “Enculturing Law? Some Unphilosophic Remarks” in M John & S Kakarala (eds) *Enculturing Law: New Agendas for Legal Pedagogy/Ethics* (2007) 2-21.

²⁴ 4.

²⁵ 5.

tendency to insist on a fixed, predictable and narrow set of legal possibilities in a way that *a priori* precludes social change or more egalitarian outcomes.²⁶

I take the notions of “subversion” and “insurgency” briefly related above to be central to a critical legal education in the present South African context. As some students and scholars lament, South African law schools are struggling to counter the prevailing traditional, doctrinal and black-letter style of pre-1994 legal education where cases and legislation are examined as the sole source of understanding law, thereby entrenching the idea of law as a closed, self-referential system.²⁷ From my view, the two most pernicious features of this traditional legal education that could be disrupted by the turn to a more critical legal education are first, its compulsive reproduction of the fiction that there exists only one self-evident, purely legal “right answer” and secondly, its drive to interpellate students into “thinking like a lawyer”, which translates into the adoption of an objective, rational, dispassionate, legalistic, formal and stoic demeanour, sensibility and vocabulary.²⁸

Notwithstanding the obviously fabricated and impossible character of this “lawyer” and notwithstanding as well the unethical Machiavellianism it represents, it is worth stating that the subjectivity of this idealised lawyer remains historically Western-oriented, English-speaking, white, middle-upper class, male and heterosexual.²⁹ Given that the majority of students we teach fall more and more outside of this false ideal, what violence is involved in this continued and unexamined privileging of dominant social identities in the law classroom? What relation, if any, exists between the continuances and repetitions of colonial-apartheid power relations in the broader society and the reproduction of a colonial-apartheid legal identity and legal culture? It is hardly controversial, now at least, to remind ourselves that consequent to law’s preservative role in reinforcing the *status quo*, legal education also partakes in reinforcing dominant political ideologies and power relationships.³⁰ Both the structure and content of the LLB curriculum represents a very particular worldview and way of life – one structured by the logics and aims of neoliberal

²⁶ 5. See also Klare “Teaching Local 1330 – Reflections on Critical Legal Pedagogy” (2011) 7 *UNBOUND: Harvard Journal of the Legal Left* 64.

²⁷ See Modiri (2013) *Stell LR* 458-464 and the sources cited there.

²⁸ In one of the most recent and major first-year law textbooks, T Humby, L Kotze & A Du Plessis (eds) *Introduction to Law and Legal Skills in South Africa* (2012), the notion of “thinking like a lawyer” is stressed as a central feature of legal education and (at xi) is defined roughly as the ability to appreciate the specific features of “legal epistemology” which mainly involves recognising the distinction between legal reasoning and other forms of reasoning. I will later take issue with this very problematic, arbitrary and uncritical divide between law and its others, namely politics, morality, literature and other academic disciplines. Contrast with J Fedler & I Olckers *Ideological Virgins and Other Myths. Six Principles for Legal Revisioning* (2001) where the authors describe the distinction between the legal and the non-legal as the hallmark of an “acontextual” approach to law that results in a narrowing of what is considered relevant in law, thereby excluding and concealing pertinent historical, political, psychological, and socio-economic factors and backgrounds.

²⁹ See B Bhandar “Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education” (2002) 14 *Can J Women Law* 341-361. Also see G Peller “The True Left” (2015) *UNBOUND: Harvard Journal of the Legal Left* 108.

³⁰ D Kennedy “Legal Education and the Reproduction of Hierarchy” (1982) 31 *J Legal Educ* 591; P Williams *The Alchemy of Race and Rights* (1991) 80-98; Bhandar (2002) *Can J Women Law* 341; A Harris & D Maeda “Power and Resistance in Contemporary Legal Education” in D Kennedy et al *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (2004).

capitalism and liberal legalism. The centrality of certain “core” courses such as Constitutional and Administrative Law, Corporate Law, Law of Contract, Delict and Property as well as Criminal Law also reflects the consolidation of a statist, procedural or bureaucratic, individualistic and capitalist vision of social life. To the extent that the legal knowledge being conveyed in the law classroom reinforces the social and economic interests of dominant groups in broader society, it is no wonder that the degrees of voice and belonging in university and in the law school differ between white and black students and correlate with the imbalances in their respective social positioning.

To be sure, the serious problem with the presently dominant form of traditional legal education is not only that it posits one, univocal, jurisprudential paradigm (formalism or positivism) for framing and understanding law and legal culture. It is that, consequent to its roots in Western legal modernity and the influence of Enlightenment rationality, the South African legal order and thus South African legal education posits one singular dominant version of law as Law (namely, lawyer’s law or State law). A subversive approach to law then would also perform a decentring of law, and of the modernist legal form as such by troubling law’s claim to singularity, centrality and universality. Given the largely colonial origins of South African “law”, and given as well the cultural and religious diversity in South Africa, legal pluralism (the fact of the co-existence of and tension between competing normative orders and value systems – State law, non-State law, indigenous law, people’s law, religion, moral codes etcetera – that could each be called “law”) must be considered and brought into the classroom. Legal pluralism contends that the emphasis on State law and its recognised sources offers only a partial and hence incomplete picture of the nature and function of law. This underscores the fact that legal modernity is “but one, deeply contingent, way of imagining law, tied to a particular [European] time and place”.³¹ In sum then, to be subversive – as law students and law teachers – is to continually question received and imposed notions of what constitutes the current legal “common-sense” and to enquire into the omissions and exclusions of the particular story of law that we rehearse.

2.2 The problem of constitutional worship

The argument for a subversive, insurgent and critical legal education extends as well to a problematisation of what Jean and John Comaroff have called “the fetishism of law and constitutionality” or the “fetishism of the legal ... in constitution-obsessed South Africa”.³² Given the limits of law, and the tendency of law to co-opt and silence radical political struggles, I share the Comaroffs’ concerns about the implications of placing such disproportionate

³¹ S Veitch *Jurisprudence: Themes and Concepts* (2012) 207-215.

³² J Comaroff and J Comaroff “Law and Disorder in the Postcolony: An Introduction” in J Comaroff and J Comaroff (eds) *Law and Disorder in the Postcolony* (2006) 21-33; “Policing Culture, Cultural Policing: Law and Social Order in Postcolonial South Africa” (2004) 29 *Law & Social Inquiry* 513 – 545; J Comaroff “Reflections on the Rise of Legal Theology: Law and Religion in the Twenty-First Century” (2009) 53 *Social Analysis* 193-216.

faith in the Constitution of the Republic of South Africa, 1996 (“Constitution”) (“[an emphatically], modernist, Eurocentric and liberal”³³ document) and its institutions to resolve social problems. I therefore strongly distance myself from authors as varied as Lesley Greenbaum,³⁴ Jonathan Campbell,³⁵ Andre van der Walt,³⁶ Dennis Davis³⁷ and Geo Quinot,³⁸ all of whom have recently argued for the reform of legal education to be centred on affirming the Constitution, constitutional values and “transformative constitutionalism”.³⁹ Each of these authors lament the way in which legal education in South Africa continues to be approached with disregard for the transformative influence of the Constitution on key areas of law (especially private law) and without critical engagement with constitutional values. For them, the failure to suffuse legal education with the ideal of constitutional transformation and the insistence on a pure common law, stifles the development of law in a more egalitarian, just and fair direction.

The putatively progressive politics behind their arguments is severely undercut by their uncritical construal of the Constitution as somehow universal, immutable and uncontested and their fetishised faith in constitutionalism, liberal democracy and the rule of law. To my mind, the problem with legal education during apartheid was not only the fact that the content and substance of law was taught with confounding indifference to the blatant oppression that was being perpetrated by the apartheid government. It was more pertinently the fact that law students were being instructed into a loyalty and attachment to the legal and political culture of the time, thereby developing a belief in law’s innocence, impartiality and autonomy and cultivating an unquestioning attitude towards the existing legal arrangement.⁴⁰ Conversely, if students are taught instead to develop a critical distance from the present legal order, they may be better prepared to engage critically with the transformation of law and the legal tradition – especially in contexts where that order may inevitably come into a crisis of legitimacy and coherence. To replace one legal “master-narrative” (the common law) with another (the Constitution) seems to me to only reproduce the problem. And it is always worth remembering that the roots of totalitarianism – of the mind and of the body politic – lie precisely in this pathological attachment to the reigning legal and political order.

³³ Comaroff (2004) *Law & Social Inquiry* 521.

³⁴ L. Greenbaum “Legal Education in South Africa: Harmonising the Aspirations of Transformative Constitutionalism with our Educational Legacy” (2015) 60 *New York Law School LR* 463 - 491

³⁵ J Campbell “The Role of Law Faculties and Law Academics: Academic Education or Qualification for Practice?” (2014) *Stell LR* 15-32

³⁶ Van Der Walt “Legal Research and Legal Education 20 years after the Advent of Democracy” in *Memory and Meaning* 203-219.

³⁷ Davis “Legal Transformation and Legal Education: Congruence or Conflict?” in *A Transformative Justice* 172-188.

³⁸ G Quinot “Transformative Legal Education” (2012) 29 *SALJ* 411.

³⁹ First coined by Karl Klare (K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146) and later adopted by a number of scholars and judges in property, contract, delict legal theory, judicial adjudication and legal education, the concept of transformative constitutionalism has become somewhat of a master-signifier in post-apartheid legal discourse.

⁴⁰ See N Whitear-Nel and W Freedman “A Historical Review of the Development of the Post-apartheid South African LLB degree – with particular reference to Legal Ethics” (2015) 21 *Fundamina* 234 238 and the sources cited there.

In universalising the Constitution and embracing its hegemony as unproblematic and even desirable, what is overlooked are the many serious critiques of the culture of constitutionalism and the content and spirit of the Constitution. There is for example the view that the rise of constitutionalism and rights discourse has been something of an “anti-politics” and has incited a widespread juridification, even judicialisation of politics that has, aside from engendering passivity and reducing broad political conflicts into narrow legal questions, closed out the possibility of articulating justice claims in other registers, vocabularies and spaces.⁴¹ Here the worry is frequently expressed that the widespread culture of legality has the ideological propensity to colonise the imagination, distort or silence more radical voices and delimit the horizon of political and historical possibility.⁴² Hence, Terblanche Delport’s insight that the Constitution – self-authorised as supreme – functions to define the parameters of political speech and action and also plays an “all-pervasive role in structuring and setting up relations between people in the country”.⁴³

There is then the more grounded political critique that constitutional litigation and human rights in South Africa has barely – if at all – altered fundamental relations of power in society: colonial-apartheid relations of power remain intact and levels of racial inequality and poverty have not only stayed the same but have increased with a strong racialised and gendered bent. On this view, optimism about the Constitution’s transformative capacity is not only naïve but depends on a structural forgetting and erasure of the lives of those many South Africans – mostly Black - whose powerlessness, experience of marginalisation and daily exploitation have not at all been positively ameliorated in the new constitutional dispensation.⁴⁴ The argument continues that the Constitution is itself a product of the faulty negotiated settlement and compromises in the making of the post-1994 dispensation, which prioritised the economic interests of whites, absolved beneficiaries of colonial-apartheid from historical and political responsibility, and prevented large-scale redistribution and reparations (thereby ensuring the survival of the old economic order into the new dispensation). As Mogobe Ramose rightly contends, the description of South Africa as “miracle nation” under the aegis of “the best/most progressive Constitution in the world” still begs the

⁴¹ Comaroff (2004) 29 *Law & Social Inquiry* 522; J Modiri “Law’s Poverty” (2015) 18 *PELJ* 224-273. See generally W Brown *States of Injury: Power and Freedom in Late Modernity* (1995) and M Mutua *Human Rights: A Political and Cultural Critique* (2002).

⁴² See K van Marle “Lives of Action, Thinking and Revolt – A Feminist Call for Politics and Becoming and Post-apartheid South Africa” (2004) 19 *SAPL* 605-628; K van Marle “Laughter, Refusal, Friendship: thoughts on a ‘Jurisprudence of Generosity’” (2007) 18 *Stell LR* 194-206.

⁴³ T Delport “An Ethical (Anti-)constitutionalism? Transformation for a Transfigured Public” (2014) 46 *Acta Academica* 113.

⁴⁴ See T Madlingozi “Post-apartheid Social Movements and the Quest for the Elusive ‘New’ South Africa” (2007) *JLS* 77-98; P Bond “Constitutionalism as a Barrier to the Resolution of Widespread Community Rebellions in South Africa” (2014) 41 *Politikon* 461-182; S Sibanda “Not Purpose-made! Transformative Constitutionalism, Post-independence Constitutionalism and the Struggle to Eradicate Poverty” (2011) *Stell LR* 482-499.

questions: “a miracle by whom and to whose benefit?”⁴⁵ And, we could add: the “best constitution” for who and based on whose experience?

Of these critiques however, the most devastating are those that argue that the Constitution in South Africa represents the perfection of colonial conquest, that the incompleteness of the transition and the escalation of racial inequality arises out of the failure – if not the refusal – of the new constitutional dispensation to address the question of historical justice and to restore sovereignty, land, and dignity to the indigenous Black people of South Africa.⁴⁶ On this view, the key ideological and practical function of the Constitution is to inhibit the decolonisation of the country and the realisation of social justice, or as Ramose would put it: it is to constitutionally legitimise, the results of colonial apartheid.⁴⁷ This critique of the Constitution would show how the post-1994 constitution-making process was linked to the adoption of a Western legal paradigm and discourse that alienates indigenous African epistemologies. And it would also view the shift from parliamentary sovereignty to constitutional supremacy as an aversion to black political rule. Not only does the Constitution privilege euro-modernist colonial legal systems, cultures and institutions, it also secures the material privilege of whites and as a result maintains the symbolic and ontological debasement of Blacks that was initiated in 1652 through colonisation, land dispossession and cultural decimation. On this view, South African constitutionalism and constitutional scholarship turns out to be invested – at some level – in the prolonging of an anti-Black colonial project.

This is an obviously contested argument, given how fatally it debunks the putatively “revolutionary” or “transformative” character of the Constitution – and certainly one that borders on sacrilege given the deity-like status accorded to the Constitution which, together with Nelson Mandela and the Truth and Reconciliation Commission (“TRC”), among others, forms the symbolic architecture that legitimises the myth of the rainbow nation that is “post”-apartheid South Africa. A strong account of democracy, sound pedagogical practice and a serious commitment to justice and freedom requires acknowledgement that both the content and spirit of the Constitution is in serious contest, and this contest must be placed at the heart of legal education. Without such an acknowledgement, even a constitutionally-grounded legal education may turn out to be a conservative reproduction of hierarchy of its own.

⁴⁵ M Ramose “Ubuntu: Affirming a Right and Seeking Remedies in South Africa” in L Praeg and S Magadla (eds) *Ubuntu: Curating the Archive* (2014) 130.

⁴⁶ M Ramose “An African Perspective on Justice and Race” (2001) *Polyog* <<http://them.polylog.org/3/frm-en.htm>> (accessed 15-09-2016); M Ramose “Historic Titles in Law” in PH Coetzee & APJ Roux (eds) *The African Philosophy Reader 2* ed (2003) 541-543; M Ramose “I Conquer, Therefore I am the Sovereign: Reflections Upon Sovereignty, Constitutionalism and Democracy in Zimbabwe and South Africa” in PH Coetzee & APJ Roux (eds) *The African Philosophy Reader* 543-589.

⁴⁷ Ramose “I Conquer, therefore I am the Sovereign” in *The African Philosophy Reader* 560; 570.

2.3 Decolonisation and curriculum transformation

Since early 2015, a strong wave of mainly black-led student protests has spread across university campuses and into national public discourse.⁴⁸ In the main, student grievances turn on the fundamentally alienating educational experience in South African universities. Central to the student protests is a sense of the unresolved histories of universities: their complicity with colonial racism; their maintenance of class hierarchies; the marginalisation of black and female academics; the active and passive idealisation of heteronormativity and able-bodiedness, as well as the unexamined and deep-rooted Eurocentricity of curricula and institutional cultures. The University as microcosm of society – culturally and institutionally – reiterates and entrenches existing orders of inequality at the level of race, gender, class, culture and sexuality. As such students and staff whose group identities, social position and worldview does not correlate with those of the Eurocentric white middle-class heterosexual male ideal are “Othered” within the university space. In response to this alienation, student movements – aided by radical social movements, leftist political parties and public intellectuals on social media – have mobilised a politics of decolonisation and transformation focusing on: the demographic transformation of the student body and academic staff (through revising admissions and employment equity policies); the spatial and symbolic organisation of the university (re/naming of buildings and the location of colonial-era statutes); re-examining and dismantling the exclusionary, hierarchical and competitive institutional culture of universities; and curriculum transformation and the privileging of more African, Black and Global South voices and perspectives. I shall focus only on this fourth issue relating to the decolonisation and transformation of the curriculum.

The debate on curriculum transformation deals with the question of epistemic authority: Whose knowledge counts? Whose worldviews and interpretations of social and natural reality count? Whose ideas and scholarship are afforded legitimacy and centrality in the curriculum? As Grada Kilomba argues, these questions cohere into one larger question, namely “who can speak”.⁴⁹ Thus for her, the struggle over the curriculum in universities arises from the ways in which “concepts of knowledge, scholarship and science are intrinsically linked to power and racial authority”.⁵⁰ She recalls in particular the historical role of Western and Westernised universities in constructing formal discourses through which Africans were constructed and marked as inferior Others – classified and positioned in a relationship of absolute subordination to the white subject.⁵¹ This relegation of Blacks to the “place of Otherness” or the

⁴⁸ It should be noted that many of the issues concerning transformation raised in the student protests that gained prominence in 2015 are not new. At least since 1994, protest, debate and conflict relating to curricula, institutional culture, admissions and employment equity as well as tuition fees have been commonplace in South African higher education. Furthermore, while much media attention has been focused on the privileged, historically white universities, the efforts and struggles of students in historically black universities and universities of technology should not be overlooked.

⁴⁹ G Kilomba *Plantation Memories: Episodes of Everyday Racism* (2008) 26.

⁵⁰ 27.

⁵¹ 28.

“position of objecthood” then results in the disqualification and invalidation of their knowledges and voices – which are marked variously as unscientific, specific, subjective, emotional and partial, whereas knowledge produced by the Western white subject comes to be seen as scientifically rigorous, universal, objective, rational and impartial.⁵² Kilomba thus draws our attention to the Eurocentric order of knowledge in universities, and also to Blacks’ routine and concrete experiences of marginalisation, pain, disappointment and anger in the same spaces. As she writes: “academia is not a neutral space nor simply a space of knowledge and wisdom, of science and scholarship, but is also a space of v-i-o-l-e-n-c-e”.⁵³

Another way in which the debate on curriculum transformation is frequently posed is the question of *African* universities versus (European) universities in Africa (in which the African-situatedness of the university is irrelevant to the self-conception of the university, its role, aims and priorities – aside from its branding and marketing). In our particular context, it is well-recognised that the curriculum in South African universities (as well as research and knowledge production by scholars) are overwhelmingly grounded in European and American epistemological paradigms which most closely correlate with the cultural perspective and social sensibilities of whites. This is to say in other words that the structure of knowledge in South African universities reveals them to be in the grip of a Northbound gaze.

The Northbound gaze, where the gaze of the scholar is fixed to the North, or the West, is a supplicating gesture, seeking the validation of and assimilation into the terms and protocols of Western epistemological paradigms. “[T]he Northbound gaze looks to the North, to Europe for theoretical approval of its assumptions”.⁵⁴ Furthermore, the Northbound character of knowledge production and scholarly pursuits in the South African academy is perfectly consistent with the original intentions of the European settler-colonialists who created the university in South Africa with the purpose of ensuring that their ideal descendants (the white population in South Africa) would remain intimately connected to, and appraised of, the trends and developments occurring in the imperial homeland (metropolis) of the coloniser.⁵⁵

The express colonial intent of creating “universities” in South Africa was to preserve and glorify Western cultural values in the colonies and to arm white settlers with the knowledge and skills needed to rule over and civilise the African people.⁵⁶ As a result, the South African University and therefore also the South African Scholar developed a peculiar detachment from the lived

⁵² 28.

⁵³ 28.

⁵⁴ A Zegeye & M Vambe *Close to the Source: Essays on Contemporary African Culture, Politics and Academy* (2011) 98.

⁵⁵ N Dladla “Decolonising the University in South Africa - A Precondition for Justice” in AISA (ed) *Peace and Security for African Development* (2012) 160-174. See L Gordon “Disciplinary Decadence and the Decolonisation of Knowledge” (2014) 39 *Africa Development* 81-92 and M Mamdani “Between the Public Intellectual and the Scholar: Decolonization and Some Post-Independence Initiatives in African Higher Education” (2016) 17 *Inter-Asia Cultural Studies* 68-83.

⁵⁶ See again Dladla “Decolonising the University in South Africa” in *Peace and Security for African Development* 160-174 and the sources cited there.

experiences and intellectual heritages of the place in which they were situated. This detachment, and the cultural chauvinism and coloniality that informs it, is what makes possible the superimposition of European and white knowledges on an explicitly African reality in an overwhelmingly black-majority country. Where African perspectives and Black voices are included or mentioned, this is only because they are marked as secondary to, subsumed by or derivative of some larger European theory, approach, doctrine, or explanatory frame.

The student-led agitations for decolonising the curriculum emerge out of this context, taking issue with the racism, sexism and ethnocentrism of the great white male authorities (sometimes referred to as the “Dead White Men”) that came to shape the disciplines as well as the experiential and intellectual disjuncture produced by the uncritical importation of frequently antiquated Western precepts, ideas, and thinkers without taking into account considerations of relevance and context. The effect is then that students are being taught for a world, a space and a time, that is not theirs and consequently struggle to address their own specific social, economic and political problems and realities clearly.⁵⁷ There is of course an ontological correlate to this epistemological problem; that is, the exclusion of African and Global South thinking is aligned with, and based on, the colonial claim that Africans and non-Western subaltern subjects lack the capacity to reason or to produce meaning and therefore are not properly human. It is in this sense that Enrique Dussel famously argued that the founding predicate of the Cartesian philosophical dictum “I think therefore I am” (*ego cogito*) which came to be the model of Western thought and subjectivity is preceded and made possible by the colonial declaration “I conquer therefore I am” (*ego conquiro*).⁵⁸ This means that the rise of Western modernity, understood as a particular order of knowledge, governmentality and law, cannot be separated from the violence of conquest and land dispossession, which is to say in other words that colonialism as a genocidal project was also epistemicidal – given its thoroughgoing, though never complete decimation and extermination of the knowledges and ways of knowing of the colonised and those classified as non-Western/non-beings.

For Ndumiso Dladla then, curriculum transformation and more particularly, epistemic decolonisation is part of the pursuit of historical justice in its endeavour to reverse the material as well as epistemological and cultural effects of colonialism and white supremacy.⁵⁹ This is the same for Kwasi Wiredu who describes the African philosophical project of “conceptual decolonization” in such terms as “methodological soul-searching”,

⁵⁷ T Delpont & N Dladla “Rehumanising the Colonialities” (13-05-2013) *Mail & Guardian Online* <<http://mg.co.za/article/2013-05-13-rehumanising-the-colonialities>> (accessed 09-02-2016)

⁵⁸ E Dussel *Philosophy of Liberation* (1985). See also NM Torres “On the Coloniality of Being” (2007) 21 *Cultural Studies* 240-270 who (at 252) reads the Cartesian formulation critically to mean: “I think (others do not think, or do not think properly), therefore I am (others are-not, lack being, should not exist or are dispensable)”

⁵⁹ Dladla “Decolonising the University in South Africa” in *Peace and Security for African Development* 160-174. See also the various chapters collected in B de Sousa Santos (ed) *Cognitive Justice in a Global World: Prudent Knowledges for a Decent Life* (2007).

“intellectual liberation” and “the postcolonial African quest for identity”.⁶⁰ For Wiredu, conceptual decolonisation entails “the elimination from our thought of modes of conceptualization that came to us through colonization and remain in our thinking owing to inertia rather than our own reflective choices”.⁶¹ Wiredu further explains that conceptual decolonisation is an exercise in self-examination, the probing of the Western worldview and the removal of the “colonial encrustation” on our modes of thought. Among some of the concepts he names as particularly in need of a “decolonizing reversal” he includes concepts regularly encountered in the legal context: Reality; Being; Existence; Object; Property; Truth; Knowledge; Certainty; Person; Individuality; Community; Subjectivity; Objectivity; Cause; Reason; Meaning; Freedom; Democracy; Justice; Time; Life; and Morality.⁶²

Related to Wiredu’s account of epistemic decolonisation is Tsenay Serequeberhan’s elaboration of African philosophy as a “practice of resistance” or what he also describes as a “critical and combative hermeneutics”.⁶³ This means for Serequeberhan that African philosophy entails “[critically] un-packing” and “systemically putting into question” the ideas, discourses and conceptions that have historically legitimated Western hegemony and which continue to sustain the neo-colonial present.⁶⁴ The “critical-negative” project of African Philosophy as described by Serequeberhan discloses traces of a path for decolonising knowledge, research and scholarship in the university that is relevant to my argument here. Invoking temporality and geopolitical location, Serequeberhan points out that the context for his reflection on African philosophy takes place within the specific context of the enduring legacy of the colonial past in which “every aspect of our existence in the formerly colonized world is still – in essential and fundamental ways – determined and controlled by our former colonizers”.⁶⁵

From this starting point, Serequeberhan targets the ideology of universalism, the idea that European modernity is the “neutral cultural-historical horizon” of the world. In his view, the Western claim to universality has functioned to simultaneously solidify and legitimate European ways of life (knowledges, practices and institutions) as the proper, universal and all-encompassing face of modern humanity while eclipsing and marking Other histories and cultures as “residual, ethnic, backward and innately pre-modern”. In this way, European modernity – as a specific cultural and historical formation with a very specific geopolitical location – is imposed on all Other peoples, and persists through being perpetuated and conserved over time at the level of education, culture and politics. This has resulted in the production of a

⁶⁰ K Wiredu “Conceptual Decolonization as an Imperative in African Philosophy: Some Personal Reflections” (2002) *Rue Descartes* 56.

⁶¹ 56.

⁶² 58-59.

⁶³ T Serequeberhan “African Philosophy as the Practice of Resistance” (2009) 4 *Journal of Philosophy: A Cross-Disciplinary Inquiry* 44. See also T Serequeberhan *Contested Memory: Icons of the Occidental Tradition* (2007); T Serequeberhan “Decolonization and the Practice of African Philosophy” in NM Ceary (ed) *African Intellectuals and Decolonization* (2012) 137-159.

⁶⁴ Serequeberhan (2009) *Journal of Philosophy: A Cross-Disciplinary Inquiry* 44.

⁶⁵ 44.

“Westernized Africa” in which the subordination of Africans – culturally and materially – is normalised and taken for granted. It is against this persistent hegemony of Western ideas and European subjects that Serequeberhan directs the epistemic task of decolonisation.

The resistant core of African philosophy lies in its restoration and reclamation of Africa against colonial illusions (of epitomic superiority, beauty and rationality) and civilisational delusions. Part of the project of a philosophic reorientation to the indigenous involves “a critical “return to the source”, a “sifting” of “aspects of our pre-colonial and colonial heritage of indigenous and hybrid knowledge” and a revisiting of the archive of African liberation movements and struggles in order to make sense of the present and to “engage the singularity of our situation in the world as Africans”.⁶⁶ This then relates to the critique of Eurocentrism, which Serequeberhan defines as “a systematic de-structuring of the metaphysical-speculative myths of the colonial era that still control our contemporary world.”⁶⁷ It involves among other things a “counter-reading” of the icons and core concepts of the Western philosophical canon, which counter-reading should facilitate the exposure of the “logics of marginalization” that underpin Western thought, thereby undermining Eurocentric paradigms and conceptions.⁶⁸

In addition to the ideas on decolonisation offered above by Kilomba (decolonising of bodies and spaces within academe), Wiredu (decolonising foundational philosophical concepts from an African philosophical standpoint) and Serequeberhan (critique of Eurocentrism and the return to the source), we could also turn briefly to Ramon Grosfoguel. Expressing surprise at the staggering fact that the entire canon of thought in the Humanities and Social Sciences (including socio-legal studies and jurisprudence) is based on the knowledge produced mostly by white men from five countries in the Euro-Atlantic West, namely England, France, Germany, Italy and the United States,⁶⁹ Grosfoguel also suggests a few decolonial gestures that could dismantle Western epistemic privilege and perform a shift from Western University to Decolonial pluri-*versality*. First, he suggests that we acknowledge the provincialism, the particularity and partiality of the Western epistemic structure. Secondly, he counsels that the epistemic racism and sexism that underpins that structure be recognised as well. Thirdly, he calls for a break with universalism where one frame or paradigm or model comes to define the rest. And lastly, he urges for epistemic diversity and *pluriversality* of meanings and concepts through which a conversation between different intellectual traditions can take place.⁷⁰

⁶⁶ 47.

⁶⁷ 48.

⁶⁸ 48-49. See M Ani Yurugu: *An African-Centered Critique of European Cultural Thought and Behaviour* (1994).

⁶⁹ R Grosfoguel “The Structure of Knowledge in Westernized Universities: epistemic Racism/Sexism and the Four Genocides/Epistemicides of the Long 16th Century” (2013) 11 *Human Architecture: Journal of the Sociology of Self-Knowledge* 74.

⁷⁰ 89

The above reflections briefly trace the strong intellectual foundations of the impetus for curriculum transformation and decolonisation. What a transformed and decolonised curriculum in the different disciplines would entail, remains complex and multifaceted. It will, at minimum, involve a thoroughgoing re-education in African thought and a re-connection to Global South voices, perspectives and realities but not necessarily a total denunciation of Western thought. Rather the aim is to establish the conditions for parity between competing cultural and intellectual heritages and alternative understandings of the world, the social and the self.⁷¹ In other words, the decolonisation of the curriculum is not to substitute one norm for another, but to constantly resist normalisation as such. The broader challenge is to think in ways that do not affirm the conceit that The West is the apex site of civilization and to actively recognise that Western European cultural norms and intellectual traditions are not universal but only one among many other equally legitimate and valid norms and traditions.⁷²

In the context of the discipline of law, the transformation of the LLB curriculum could begin by taking account of what has been called the historical, political and ethical violence of law: not just law's historical role in constructing and supporting racial and sexual oppression but also law's ideological role in normalising and legitimising the social power and worldview of dominant social groups. Law's particular identity as a product of Western modernity and its co-emergence with and express facilitation of colonialism would also have to be interrogated and related to the present South African context. Often forgotten, yet painfully obvious, is the fact that South African law today is largely the law of the colonial settler imposed through colonialism and violence. While colonial law is viewed as universal and "common", indigenous African law is marked as particular, frequently cast in a civilisational narrative as being antithetical progress, development and rights, and is continually relegated and distorted from history into the present. Indeed, the fundamental contestation properly understood within legal education seems to emanate from the Western identity and white male subject assumed at the core of the discipline of South African law and the fact that it is conveyed primarily through English and Afrikaans.

South African law's historical unfoldment as part of a larger project of a "dark modernity" comprising European supremacy, racial capitalism and sexism and its development – substantively and procedurally – forged in the cauldron of slavery, colonisation and apartheid, has considerable bearing on how its operative concepts are understood and actualised, such as for example how and by whom disputes are adjudicated; what constitutes a family; the meaning and character of personhood; how relations of property (affecting contract and succession) are established and enforced; how obligations are formed and discharged; what modes of Statecraft and governance are employed;

⁷¹ On "pluriversality" and decolonial thinking, see W Mignolo *The Darker Side of Western Modernity: Global Futures, Decolonial Options* (2001).

⁷² D Chakrabarty *Provincialising Europe: Postcolonial Thought and Historical Difference* (2000) and P Chabal *The End of Conceit: Western Rationality after Postcolonialism* (2012)

how tensions between law and cultural traditions ought to be reconciled; how transgressions of the law and community values are addressed and penalised; how the division between the public and private spheres is formulated and so on. Therefore, a decolonising reading of modern law and of South African law in particular involves questioning the cultural assumptions embedded within legal rules and the epistemological frameworks that structure our interpretations and conceptions of law, legality, justice and fairness. However, consequent to the *force* of the law and its sovereign logic which imposes itself as binding on the social whole, the transformation of the LLB curriculum also has institutional implications: unlike other social sciences and humanities-based disciplines, the practice of law has material effects in everyday legal disputes, the operation and structure of state and government, the corporate legal environment, court procedure and etiquette, and legislative processes. Fortuitously, the difficulty but also the promise of the transformation of the discipline of law is how readily it might also transform the legal culture, the legal profession and the judiciary, and thus society as a whole.

Against the background sketched in this section, I propose the revisioning of legal education in South Africa along three lines: firstly, the *social and political context*: focusing on the powers and discourses shaping the contemporary, in particular issues of socio-economic justice, reparations and redress, and the influence of race, class, gender and sexuality on law and society, ought to be examined across the spectrum of legal study including private, public, mercantile, and procedural law; secondly, *intellectual paradigms and epistemology*: engaging with multiple intellectual traditions and resisting the universalisation of western cultural norms (Eurocentrism); and thirdly, *pedagogical method*: crafting a way of teaching and conveying legal materials that emphasises critical thinking, conceptual engagement and theory while immersing students within the current social reality. Elements of this pedagogy are explored in the next section.

3 Critical (legal) pedagogy

My concerns with the disconnected nature of South African legal education are as much jurisprudential as they are pedagogical. With almost no exception, South African law schools remain intellectually “frozen in positivistic time”.⁷³ As already intimated above, our style of teaching remains predominantly technocentric as students are taught to see law in purely technical and formal terms; “law” and the legal domain are viewed as autonomous, isolated from other disciplines and somehow more special than other areas of study within the university. Legal language and jargon also become a way of redefining social and political realities in the image of law. In this way, legal education tends to be remarkably closed off from the world. Put another way, the teaching and learning of law, owing to its conservative heritage, is structured by a univocal narrative, a disconnection from time and

⁷³ A Sachs “A Gentle Provocation: A reply to Stu Woolman” in S Woolman & M Bishop (eds) *Constitutional Conversations* (2008) 37.

space that Paulo Freire names “narration sickness”.⁷⁴ “Narration sickness” as Freire explains it, emanates from a hierarchal teacher-student relationship, where the teacher occupies the position of “narrating Subject” and students take on the position of obedient, “patient, listening objects”.⁷⁵ In this process, the content being conveyed tends to “become lifeless and petrified”.⁷⁶ Freire explains it as follows:

“The teacher talks about reality as if it were motionless, static, compartmentalized, and predictable. Or else he expounds on a topic completely alien to the existential experience of the students. His task is to “fill” the students with the contents of his narration— contents which are detached from reality, disconnected from the totality that engendered them and could give them significance. Words are emptied of their concreteness and become a hollow, alienated, and alienating verbosity.”⁷⁷

A central characteristic of this narration sickness that is most evident in legal education is that students are expected to merely record, memorise and repeat what is conveyed to them.⁷⁸ For the most part, an internal view of law stands as the central framework that confines and defines what can be said or questioned in the classroom. This debilitating and silencing pedagogy is what Freire names the “banking concept of education” where students are reduced to mere containers or receptacles of the information and knowledge being deposited by the teacher. In the banking concept of education, “knowledge is a gift bestowed by those who consider themselves knowledgeable upon those whom they consider to know nothing.”⁷⁹ The banking concept of education projects absolute ignorance on students and negates their lived experience and in this way produces a pedagogical practice that mirrors and reiterates oppressive social relations.⁸⁰ Freire further argues that the banking concept of education results – in the long term – in the production of students as “manageable and adaptable beings” who, in accepting their passive role as students, also develop a passive attitude towards social injustice, unable to develop the critical consciousness to intervene in the world and to contest the fragmented view of reality deposited by the teacher.⁸¹ In illustrating very clearly how dominant pedagogical practices function primarily to domesticate students and regulate the process by which they adapt to and even valorise the *status quo*, Freire is in alignment with both Michel Foucault and Louis Althusser who in their respective arguments have identified educational institutions as central instruments of disciplinary power geared towards the production of docile bodies (Foucault)⁸² and in other terms as part of an ideological apparatus in the process of interpellation by which people come to be subjects of power (Althusser).⁸³

⁷⁴ P Freire *Pedagogy of the Oppressed* (1970) 71.

⁷⁵ 71.

⁷⁶ 71.

⁷⁷ 71.

⁷⁸ 71.

⁷⁹ 72.

⁸⁰ 73.

⁸¹ 73.

⁸² See generally M Foucault *Discipline and Punish* (1977).

⁸³ See the essay “Ideology and Ideological State Apparatuses (Notes Towards an Investigation)” in L. Althusser *Lenin and Philosophy and Other Essays* (1971).

There are resonances between the banking concept of education which Freire describes and the traditional black-letter legal education that prevails in South Africa. Traditional legal education depicts the Law Teacher as the Expert, the one who has deciphered the Truth of law and legal reasoning and positions the Law Student as an empty vessel into whom formal legal knowledge is to be deposited and then recorded, memorised and mechanically applied to changing sets of facts. Such legal knowledge is generally underpinned by the myth of a neutral and virtuous law, thereby producing law students who either see law as innocent in relation to unequal social arrangements or who adopt a humanitarian, even messianic, view of law as the panacea for all social problems. Both responses lack complexity and nuance and make it harder for students to realise the existence and extent of structural injustice and more importantly, to recognise the strong legal dimension to the reproduction of that injustice.⁸⁴ More problematically, it deprives students of the intellectual and political tools of analysing and addressing intersecting forms of subordination and hierarchy at the level of roots rather than symptoms.

Against this backdrop, we should consider Freire's critical pedagogy as an alternative approach to the teaching and learning of law. In Freire's critical pedagogy, the values of critical thinking, creativity, dialogue, solidarity, consciousness, worldliness and emancipation stand central. In search of a mode of education that rejects the authoritarian, depoliticising and dehumanising effects of the banking concept of education, Freire calls for a "problem-posing education".⁸⁵ He urges teachers committed to liberation, justice and humanity to "abandon the educational goal of deposit-making and replace it with the posing of the problems of human beings in their relations with the world".⁸⁶ A liberatory pedagogy consists in acts of cognition – thinking, understanding, experiencing and sensing – not merely transfers of information.⁸⁷ In a critical pedagogical environment, problems are posed and reflected upon rather than being presented as authoritatively solved or settled. Vertical relations of thinking and speaking are replaced by horizontal ones:

"[The] problem-posing educator constantly reforms his reflections in the reflection of the students. The students — no longer docile listeners — are now critical co-investigators in dialogue with the teacher. The teacher presents the material to the students for their consideration, and re-considers her earlier considerations as the students express their own. The role of the problem-posing educator is to create; together with the students, the conditions under which knowledge at the level of the *doxa* is superseded by true knowledge, at the level of the *logos*..."⁸⁸

The problem-posing method at the heart of critical pedagogy eschews abstractions and seeks to educate students who will be able to critically apprehend and intervene in their reality and concrete context. This is education as the practice of freedom where teachers and students engage broadly with the many world(s) and imaginaries they inhabit. As opposed to the more

⁸⁴ Harris & Maeda "Power and Resistance in Contemporary Legal Education" in *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* 171.

⁸⁵ P Freire *Pedagogy of the Oppressed* (1970) 80.

⁸⁶ 80.

⁸⁷ 80.

⁸⁸ 80-81.

alienating banking concept of education, problem-posing education seeks to situate students as subjects embroidered within history/ies, as subjects in the world, not above or outside of it. In this way, the world ceases to be seen as a static reality but “as a reality in process, in transformation”.⁸⁹ Whereas the banking concept of education (especially in a narrow discipline such as law) conceals certain facts about the way humans live in the world, problem-posing education sets itself the task of demythologising the fabricated reality taught in the law classroom.

For Freire, the process of education is always one of becoming within the context of a “likewise unfinished reality”.⁹⁰ It is a process through which humans fulfil our “ontological and historical vocation of becoming more fully human”.⁹¹ In this vein he presents education as the endless acquisition of a “deepened consciousness”⁹² – moving first from a state of “semi-intransitivity of consciousness”, rooted in the sphere of necessity where survival is the primary interest and overall perception and sense of life is limited⁹³ and then to the intermediate stage of “naïve transitivity” of consciousness characterised by oversimplification of problems, lack of interest in investigation and a preference for polemics and nostalgia rather than dialogue and futurity.⁹⁴ The third stage of consciousness – the “critically transitive consciousness” – is what Freire marks as the ideal of the education process.⁹⁵ It is a stage characterised by “depth in the interpretation of problems... by the testing of one’s findings, and by openness to revision”.⁹⁶ It is a stage marked by the avoidance of “preconceived notions” when analysing problems and the rejection of “passive [and rigid] positions”.⁹⁷ Critical transitivity is not just a state of consciousness but a way of life – one imbued with a sense of responsibility and agency.

“The classroom remains the most radical space of possibility in the academy ... a place to learn.”⁹⁸

Paulo Freire positions critical pedagogy in opposition to an instrumental and functionalist conception of education as mere professionalisation or job-training. In this way, it resists a number of reductions: the reduction of knowledge into information, of students into consumers/clients, of universities into neoliberal corporations, and of a pedagogy of questions and investigations into a pedagogy of answers and certainties. Because of its association of education with an emancipatory social vision of anti-subordination, feminist politics, anti-racism and decolonisation, critical pedagogy eschews a mode of education that simply prepares students for making a living, for a luxurious and elite lifestyle, or for the reproduction and affirmation of social inequality.

⁸⁹ 83.

⁹⁰ 84.

⁹¹ 84.

⁹² P Freire *Education for Critical Consciousness* (1974) 14-15.

⁹³ 14-15.

⁹⁴ 14-15.

⁹⁵ 15.

⁹⁶ 15.

⁹⁷ 15.

⁹⁸ b hooks *Teaching to Transgress: Education as the Practice of Freedom* (1994) 12.

This critical posture in respect of the vocation of teaching is particularly suggestive for legal education, and for the training of law students for social justice and activism. Law teachers in search of more progressive pedagogical practices that could interrogate law's violence and law's limits, and expose the "formalist error" within the legal culture,⁹⁹ could turn to critical pedagogy for traces of an alternative.

Critical pedagogy insists on the centrality of embodiment, positionality and subjectivity. Racial, cultural and sexual difference, class backgrounds and unequal power relations shape the learning experience and must be interrogated in the classroom space.¹⁰⁰ The separation between mind and body, between the academic and the non-academic is also blurred, giving way also for the spiritual, political and emotional dimensions and making room for excitement, provocation and curiosity to be expressed.¹⁰¹ Consciousness about the political and social reality, clear apprehension of injustice and an interrogation of deeply sedimented values, assumptions, and practices define the core aims of a critical pedagogy. Envisioned as a "liberatory practice" or a "practice of freedom", critical pedagogy is a way of teaching and learning, of studying texts and materials that also enables the voicing of silences, the complication of pure narratives, and the recovery of the forgotten. Education in critical pedagogy is therefore an act of border-crossing, engaging in dialogue with others, and with textual and visual sources.

Critical pedagogy thus represents an expansive understanding of education. It could also be useful in expanding the terms of present debates on legal education and the LLB degree. In particular, the repeated complaints concerning the poor literacy and numeracy skills of law graduates and the absence of a course dedicated to legal ethics call for a response from a critical pedagogical perspective.¹⁰² To what extent are these complaints driven by an instrumental, technical and market-based agenda? Are there other ways we could conceive of these skills and their purpose? To my mind, reading and writing are more than just professional skills, but should be conceived of as attributes of an emancipated and imaginative self.

To read, one must be able to read not only words and sentences but also to read *and interpret* worlds and senses, to trace the affect, histories and narratives that structure legal texts, to be attentive to complexity, to absences and to the constitutive power of language.¹⁰³ Students should be exposed to more than just cases, textbooks and journal articles, but also novels and poems. Analytical skills on this view ought to consider not only the logic of an argument but also the ideology and *world-sense* it represents. To write must also entail an engagement with meaning and the imagination and with

⁹⁹ I De Villiers "The Lawyer as Mapmaker and the Spatial Turn in Jurisprudence" (2014) 46 *Acta Academica* 25-39.

¹⁰⁰ hooks *Teaching to Transgress* 23-35; 134-139; 177-190.

¹⁰¹ 134 – 135; 193.

¹⁰² See D Hawker "Illiterate 'Learned Friends' Need Educating" (10-07-2012) *Sunday Independent* <<http://www.iol.co.za/sundayindependent/illiterate-learned-friends-need-educating-1338288>> (accessed 20-09-2016).

¹⁰³ P Freire & D Macedo *Literacy : Reading the Word and the World* (1987).

the tensions between form and substance, with the gendered and culturally specific character of certain forms of writing. Beyond simply aligning facts, authority and conclusions, writing must involve interrogation and searching. Writing thus encompasses thinking and reflection and this would mean that writing assessments should not be limited to drafting office memorandums or heads of argument but also essays and journals.¹⁰⁴ The same goes for numeracy. Counting, measuring and weighing cannot be separated from the practice of reflective judgement, from the question of what those numbers mean for the people involved. Ethics too must be an emancipatory ethics or an “insurrectionist ethics,”¹⁰⁵ not only rule-bound but also linked to political struggle against marginalisation, exclusion and powerlessness; not only how to conduct oneself as a professional but also how to live in the world with others. To be ethical in the highest sense is to be on the side of the oppressed.¹⁰⁶

This is to say that these practical skills which law schools are now under serious pressure to provide and improve should simultaneously also function as critical tools for deconstruction and dissent.

“If we accept education in this richer and more dynamic sense of acquitting a critical capacity and intervention in reality, we immediately know that there is no such thing as neutral education. All education has an intention, a goal, which can only be political. Either it mystifies reality by rendering it impenetrable and obscure – which leads people to blind march through incomprehensible labyrinths or it unmask the economic and social structures which are determining the relationships of exploitation and oppression among persons, knocking down labyrinths and allowing people to walk their own road. So we find ourselves confronted with a clear option: to educate for liberation or to educate for domination.”¹⁰⁷

4 Current issues in legal education: comments on the CHE LLB review process

I have so far offered some thoughts on a political and theoretical revisioning of legal education from the perspectives of a subversive approach to law and constitutionalism, decolonisation and critical pedagogy. Before concluding, some brief comments are offered on the Council on Higher Education’s (“CHE”) review of the LLB degree that is currently underway in South African law schools.

As part of its statutory responsibility to conduct regular quality assurance of higher education qualifications, the CHE has, in a pilot study, developed a set of “qualification standards” for the LLB degree.¹⁰⁸ The standards have been developed in order to assess whether the qualification offered at each university in South Africa, meets or exceeds the basic threshold in terms of teaching and learning, content and assessment in the particular field of study (in this case, law). The “Qualification Standards” for the LLB degree (“Qualification Standards document”) therefore sets the overarching

¹⁰⁴ Van Marle (2014) *Acta Academica* 209-211.

¹⁰⁵ L Harris “Insurrectionist Ethics: Advocacy, Moral Psychology and Pragmatism” in J Howie (ed) *Ethical Issues for a New Millenium* (2002) 192-209.

¹⁰⁶ See E Dussel *Ethics of Liberation: In the Age of Globalization and Exclusion* (2013).

¹⁰⁷ Interview with Paulo Freire cited in b hooks *Talking Back: Thinking Feminist, Thinking Black* (1989) 101.

¹⁰⁸ CHE *Higher Education Qualifications Sub-Framework: Qualification Standards for Bachelor of Laws (LLB)* (May 2015).

framework for assessing the state, quality and relevance of the legal education being offered in South African universities at present, with each law school being expected to engage in a self-evaluation process of individual modules to gauge their overall compliance with the basic threshold established in the Qualification Standards document.

While the CHE process is a potentially fruitful exercise, it is hard to resist the (perhaps overly cynical) conclusion that many legal academic colleagues will view and approach it as a superficial box-ticking exercise where the underlying formalist, liberal legal, Eurocentric and modernist paradigm of law will be maintained. Rather than a reconceptualisation of legal education, more cosmetic tinkering and adding seems to be in order. This worry is compounded by the fact that the review of the standard of the LLB degree seems to be motivated by professional and instrumental concerns and driven through managerial channels and processes. Although the document gestures towards a few critical stances (such as a mild recognition of the politics of law, the critique of formalism, the insistence on social justice and transformation, the concern with class sizes that enable debate and engagement and the focus on interdisciplinarity), its overall conceptual, epistemological, jurisprudential and pedagogical framework seems to me to still repeat a number of familiar and problematic patterns – many of which place it not just in contrast, but also in tension with the insights of critical pedagogy.

The preamble of the document sets out the role of South African law as one of “the consolidation of the constitutional project”.¹⁰⁹ Law in the document appears only as virtuous and redemptive, impervious to critique and the panacea for social and historical injustice. Law, we are told, is central to creating a “cohesive and successful society”, facilitating economic development and entrenching constitutional ethos and values.¹¹⁰ Nothing is said of its violence, its colonial roots, its affiliation to oppressive social powers, its inability to effect real change, and its role in the production of poverty – in a word, its “hidden cruelties”.¹¹¹ These omissions are significant and reflect an uncritical relation to law.

This uncritical relation to law is continued further when the preamble declares that “legal education cannot be divorced from transformative constitutionalism”.¹¹² That an interpretively contested, possibly dated, concept, developed by a white male North-American scholar holds such sway over “progressive” legal academics and now has the bureaucratic affirmation of the CHE, confirms its status as unquestionable dogma of “post-apartheid jurisprudence” but it may also reveal the conceptual and political hollowness of the term. I have already argued against centring legal education mainly on the Constitution – given how contested it is currently, and also how moderate its politics is in contrast to a politics of decolonisation and liberation – but it is

¹⁰⁹ 7.

¹¹⁰ 7.

¹¹¹ W Brown “Suffering the Paradoxes of Rights” in W Brown & J Halley (eds) *Left Legalism/Left Critique* (2002) 421.

¹¹² CHE *Higher Education Qualifications Sub-Framework: Qualification Standards for Bachelor of Laws (LLB)* 7.

worth pointing out however that aspects of the document reflect a substantive misreading of and inattention to some key arguments elaborated by Karl Klare in the 1998 paper and developed further in the 2010 piece he co-authored with Dennis Davis.¹¹³ Consider for example that in requiring legal education to be responsive to “the needs of the economy... and globalisation” while also “advancing the course of social justice”, the document ignores the fact that social injustice and poverty are precisely generated and upheld by the workings of the global capitalist economy. There is, in my view, a strong argument to be made that the capitalist logic and structure of *the economy* (whose needs students are expected to cater to, or be responsive to) is a fundamental impediment to the materialisation of at least three key pillars of transformative constitutionalism, namely redistribution, the affirmative state duty to realise socio-economic rights, and a substantive conception of equality.¹¹⁴

A few pages later, under the heading “critical thinking skills” the document states as a standard that a law graduate should be able to “analyse a text and/or scenario to find the key issues, i.e., to distinguish between relevant and irrelevant information *and distinguish between legal and non-legal issues...*”¹¹⁵ This latter distinction between the “legal and the non-legal” strikes the eye as a distinct contradiction of Klare’s argument, in that it seems to restate the law/politics distinction that he very clearly identifies as the hallmark of jurisprudential conservatism¹¹⁶ or mainstream (traditionalist) thinking.¹¹⁷ Klare speaks of a deep-seated formalist anxiety to limit adjudication and interpretation to the domain of “the legal”, defined as the necessary opposite of the political and the subjective, and to thereby expel everything *non-legal*. But as he further argues, both the notion of “the legal” and the pressure to establish the “law-ness”¹¹⁸ of a particular issue, result or line of reasoning (what Klare calls “legal constraint”) are culturally constructed.¹¹⁹ The distinction between the legal and the non-legal itself invites value judgements due to the absence of “*solely legal criteria of correctness*”¹²⁰ as well as the “gaps, conflicts and ambiguities”¹²¹ within the legal tradition about exactly where the boundary is drawn. Indeed, to the extent that “legal materials do not self-generate their own meanings” and nor are they “fixed [and] unyielding”, it is also the case that there can be no “bright-line framing” between the legal and the non-legal and between law and politics.¹²² Indeed for Klare, the point of critical thinking in legal education would be to continuously question, blur

¹¹³ See K Klare “Legal culture and transformative constitutionalism” (1998) *SAJHR* 146-188. See also K Klare & D Davis “Transformative Constitutionalism and the Common and Customary Law” (2010) 26 *SAJHR* 403-509.

¹¹⁴ Klare (1998) *SAJHR* 153-154.

¹¹⁵ CHE *Higher Education Qualifications Sub-Framework: Qualification Standards for Bachelor of Laws (LLB)* 9.

¹¹⁶ Klare (1998) *SAJHR* 171.

¹¹⁷ 152, 158.

¹¹⁸ 173.

¹¹⁹ 161.

¹²⁰ 164.

¹²¹ 157.

¹²² 157.

and complicate – Klare uses the word “soften” – such a distinction rather than to reinforce it.¹²³ Klare writes:

“[W]hat makes for a ‘good’ or ‘legally sound’ or ‘legally correct’ interpretation is partly a question of the practitioner’s training, skill and insight, and partly a question of choices about the allocation of her intellectual energies and resources. But the latter turn ultimately on moral and political sensibilities and convictions that cannot be derived entirely from the legal materials, since it is often the case that the meaning and constraining power of the legal materials is uncertain and unknowable without the intervention of legal work.”¹²⁴

The problem continues as well when, rather than engaging critically with the legal culture, challenging its deeply conservative underpinnings, the Qualification Standards document further lists also as “critical thinking skills”, a law graduate’s ability to “demonstrate familiarity with legal discourse – knowledge of conventions (and terminology) of legal discourse and the ability to use them appropriately.”¹²⁵ It cannot be denied that each discipline has its own set of “conventions” which come to be observed by its participants – students, academics and professionals. It is also the case however that such conventions also produce a certain “cultural coding”¹²⁶ a set of “professional sensibilities, habits of mind, and intellectual reflexes”¹²⁷ that come to be seen as normal and neutral. That is to say that the “conventions of legal discourse” do not consist simply of the routine, functional and discipline-specific tools, processes, institutions and vocabulary (jargon) within the discipline as the document seems to suggest but also includes the “rhetorical strategies... argumentative moves... political and ethical commitments ... assumptions about politics, social life and justice [and] the inarticulate premises”¹²⁸ that shape the discipline and the profession. These are of course not value-free either, and have a problematic historical and cultural background. The Qualification Standards document’s affirmation of the “knowledge of conventions of legal discourse” seems utterly unacquainted with Klare’s warning that:

“Un-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation.”¹²⁹

Under the section on “research skills”, the Qualification Standards document also presents legal argument as a largely straightforward process of finding and interpreting sources, determining the legal authority of sources and reaching plausible conclusions. Nothing is mentioned of the ability to assess or examine the hidden (ideological) presuppositions in certain arguments and sources. The document’s construction of problem-solving skills is also questionable.¹³⁰ It presents students merely as solvers of *already-defined* legal

¹²³ 159.

¹²⁴ 163.

¹²⁵ CHE *Higher Education Qualifications Sub-Framework: Qualification Standards for Bachelor of Laws (LLB)* 9.

¹²⁶ Klare (1998) *SAJHR* 168.

¹²⁷ 166.

¹²⁸ 166-167.

¹²⁹ 168.

¹³⁰ CHE *Higher Education Qualifications Sub-Framework: Qualification Standards for Bachelor of Laws (LLB)* 11.

problems and problem-solving itself as a rational process of using the relevant sources to “generate” reasoned solutions. The ability to identify and *pose* social, political problems, as Freire would have it, is not envisioned in the document. Fixing and solving, to the exclusion of exploring, questioning, and transgressing fixed frameworks, is made central to legal education. In at least the important respects I have highlighted here, the document’s deployment of transformative constitutionalism as a framework for legal education in post-1994 South Africa seems conflicted at best and perfunctory and superficial at worst. So even when it gestures towards some critical and normative engagement with law as part of legal education, the document and its authors seem unable to escape the ultimately rationalist, legalist, professional-centric and conservative idea of law and legal education that persists in South Africa.¹³¹ I am mindful however that this might be a problem inherent to the law itself.

In the process of undertaking this review of the LLB degree, space should be created for academics to also contest the limited and limiting framework of legal education represented in the Qualification Standards document. Moreover, connections should be drawn explicitly between the examination of the standard of the LLB degree and the process of “curriculum transformation” currently being debated and planned in South African universities. My central protest against the document is with its drive to rationalise and standardise legal education, thereby eclipsing creativity, debate, provocation, and doubt. As I see it, although law students come to receive training in the discipline of law, its history and sources and the different sub-divisions of law, in preparation mostly for life as legal professionals, they also come to be transformed, enraged and discomfited, to discover themselves politically and intellectually, to leave more thoughtful and intelligent. The focus on law graduates’ “professional duties”, on strict categories of knowledge and on keeping up with global and technological trends seems to miss the *incalculable* dimension of learning, of becoming undone by new ideas, texts, and people, of becoming a renewed self.

5 Concluding remarks

In this paper, I have put forward an argument for a critical legal education based on a subversive and decolonised idea of law and transmitted through an engaged pedagogy. I argued as well for legal education to be situated within, and responsive to, the time and space (context) of its surrounding political, intellectual and social milieu.¹³²

As the paper unfolded, I put forward an argument for a subversive approach to law, jurisprudence and legal history, one that recognises the cracks and

¹³¹ The document’s engagement with transformative constitutionalism (or social and legal transformation more generally) follows what Karin van Marle describes as an instrumental or functionalist or pragmatist approach, which she contrasts against the more critical approach that she views as more faithful to Klare’s project. See K van Marle “Transformative Constitutionalism as/and Critique” (2009) 20 *Stell LR* 295.

¹³² See, in contrast G Quinot and L Greenbaum “The Contours of a Pedagogy of Law in South Africa” (2015) 26 *Stell LR* 29-62.

tensions within the legal tradition, one that recalls the violence of law, and its inherently political nature. I posed this subversive approach to law and its engagement in a counter-hegemonic critique of law, against the now widespread worship of the Constitution, pointing out its epistemic and political coloniality, its practical ineffectiveness and its ideological conservatism. I then also suggested a few pathways for a decolonisation of law that could inform the transformation of the LLB curriculum, emphasising in particular the critique of Eurocentrism, the return to African epistemologies and a revisiting of the colonial, racist and sexist roots of the South African legal system. The subversion of legal discourse, the critique of constitutionalism and decolonisation served as the three focal points for the revisioning of legal education. At the level of pedagogy, I returned to some key insights in the work of Paulo Freire in search of an expanded and imaginative vision for the teaching of law and legal skills. Noting some disturbing homologies between the traditional banking concept of education that Freire criticises as disempowering and the technocentric legal education that remains dominant in South Africa, I drew on Freire's call for an emancipatory pedagogy, one that prepares students for resistance against hierarchy and the liberation of the oppressed. I also identified the idea of a problem-posing – rather than problem-solving – education, and an anti-instrumental view of skills as tools for deconstructing and critically interpreting the world as also central to a critical legal education for a post-1994 South Africa. The preceding discussion was then brought to bear in an analysis of the CHE-driven review of the LLB degree, with some concerns being voiced over the problematic framing of legal education reflected in the Qualification Standards document.

The arguments and thoughts presented in this paper have been an attempt to respond to an underlying question, namely: what should legal education and jurisprudence be or look like in the “afterlife” of colonial-apartheid, after the TRC, after Marikana, after Mandela, in the midst of #RhodesMustFall, #FeesMustFall, and Israeli-Apartheid to name but a few historical and political contexts shaping and configuring the present? To my mind, the continuation of racial inequality, of a colonial symbolic and cultural order, of sexual violence, and of poverty in South Africa should be at the heart of legal education and legal scholarship in the present. Robust notions of democracy, critique, academic integrity and justice and a vision of the university as a public space for thinking, and thinking against the grain, demand that we provide law students with an education that is intellectually stimulating, challenging and grounded in the present social, political, historical and global context. Law students deserve an education that prepares them for an ethically, culturally and politically complicated world, not simply for a well-paying job. As stated above, the purpose of a higher (and *deeper*) education should not be to mirror the present, not only because of the injustices and exclusions harboured in that present, but also because of the loss of futurity, change and imagination attendant upon such mirroring. Rather than simply being an adherence to the given time and space, legal education could “blow up” time and negotiate alternative ways of inhabiting space. To teach law critically in this time and space connects with what Gayatri Spivak calls an “aesthetic education”, a

“training of the imagination for epistemological performance of a *different* kind.”¹³³

“Rather than training students for jobs that do not exist, maybe a future university can make a real difference in terms of imagining a different economy, different social relations, different modes and means of production and different ways of life.”¹³⁴

SUMMARY

South African legal education remains trapped “at the centre of the knot” which is to say it is fundamentally disconnected from its social context and thus largely unable to grapple with the complex political and intellectual predicaments of post-1994 South Africa. This article reiterates arguments made previously concerning the need for a critical legal education that produces lawyers who are not only technically and professionally competent but also socially, politically and intellectually engaged. Three particularly significant themes for engagement in critical legal education are identified as firstly, the turn to a subversive approach to law; secondly, the problematisation of constitutional fetishism; and thirdly, the decolonisation of knowledge and legal knowledge in particular. Paulo Freire’s insights on critical pedagogy are also considered as they disclose an alternative view of legal education linked to social justice, liberation and critical self-reflection. This argument for a renewal of legal education is then further extended to a critical analysis of the current Council on Higher Education’s review of the standard of the LLB degree. What emerges throughout is the search for not only a higher education but also a deeper education, one that prepares law students for what is an ethically and politically complicated world. Teaching law critically in this time and space demands nothing less.

¹³³ G Spivak *An Aesthetic Education in an Era of Globalization* (2012) 345. (own emphasis).

¹³⁴ Mbembe (2012) *Social Dynamics* 13.