

‘WHAT DOES CHANGING THE WORLD ENTAIL?’  
LAW, CRITIQUE AND LEGAL EDUCATION IN THE  
TIME OF POST-APARTHEID

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‘Education is the point at which we decide whether we love the world enough to assume responsibility for it and by the same token save it from the ruin which, except for renewal, except for the coming of the new and young, would be inevitable.’ (Hannah Arendt ‘The crisis in education’ in *Between Past and Future* (1961) 193.)

## INTRODUCTION

This note is a joint venture between a student in his third year of studies at the University of Pretoria Faculty of Law and someone who has been teaching law in that Law Faculty since 1999. Several conversations about the need for critical thinking in law schools and our shared experience of the

absence of it resulted in this note which is offered here as a tentative contemplation.

The general aim is to reflect on critical thinking in legal education. Of course the issue of critical thinking, critical theory and critique and how to relate this to law, legal education and legal practice is complex and multi-layered. Many questions arise: How does one encourage students to think in a critical manner? How does one teach them/ illustrate to them what critical thinking entails? But beyond that, what does critical thinking about law or a critical approach to law mean? Of particular concern to us is what role critical theory plays in developing such a critical approach to law, and in teaching students a critical approach to law. Some might argue that even with all these questions we have missed the most crucial starting point: why is it necessary to include critical thinking in legal education in the first place?

Our argument unfolds as follows: with reference to the post-apartheid context and in light of the specific challenges faced by South African society in the 'new' legal and political order, we start by putting forward a tentative argument for the need for critical engagements with law. We then turn to two of the dominant critical legal theoretical traditions that have influenced critical approaches to law in South Africa during and in the aftermath of apartheid. Finally, we rely on some philosophical/theoretical reflections in support of thinking and theoretical engagement.

## WHY LAW AND CRITIQUE

### *The time and place of post-apartheid*

US Critical legal scholar Duncan Kennedy made the following statement a number of years ago:

'Law schools are intensely political places in spite of the fact that they seem intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be. The trade-school mentality, the endless attention to trees at the expense of forest, the alternating grimness and chumminess of focus on the limited task at hand — all these are only a part of what is going on.'  
(Duncan Kennedy 'Legal education as training for hierarchy' (1982) 31 *Journal of Legal Education* 591.)

Kennedy's views are most probably shared by other 'critical' legal academics thinking about how law schools teach, train and prepare students for the legal profession. At the heart of these views is the notion that too much focus is placed on 'text' instead of 'context', or to put it differently, that law schools are not teaching students to think critically about law and its tensile interaction with society, religion, culture, history and most importantly, politics (cf Ziyad Motala 'Legal education in South Africa: Moving beyond the couch-potato model towards a lawyering skills approach' (1996) 113 *SALJ* 695 and Stuart Woolman, Pam Watson & Nicholas Smith 'Toto, I've a feeling we're not in Kansas anymore: a reply to Professor Motala and others on the transformation of legal education' (1997) 114 *SALJ* 30 at 50–4). If their observations are correct, then an even greater problem arises: if law schools do not correctly reform the LLB curriculum and overhaul traditional

approaches to the pedagogy of law, then they ‘run the risk’ — as Jonathan Jansen puts it — of ‘producing technicians without ethics, products without politics, graduates without values, publications without commitments, materials without meaning, enterprise without community, change without transformation’ (Jonathan Jansen ‘Why Tukkie’s cannot develop intellectuals’ *Innovation Lecture Series*, University of Pretoria, 11 May 2001 at 5).

In the South African post-apartheid context, lawyers, legal academics and judges are challenged with the need for social change, the need to rebuild the South African community, and the need for redress. The role, limits and potential of law in a constitutional democracy must be considered. Law could either become an instrument of social transformation, social justice and social reconciliation or it could hinder progress in this regard. A pertinent question is thus how the university and particularly the law faculty could create an enabling environment for law students to think more deeply about these issues. Another important aspect to consider is the extent to which the views of students are heard and acknowledged in reflecting on these issues, in how *they* experience law and legal education. In this regard, an important consideration is to what extent students can even express themselves, coherently construct arguments and structure important information if universities do not provide the proper education and guidance in how to think critically, explore alternative views and logically lay out and present arguments.

Tshepo Madlingozi argues that there is a correlation between the moral-political convictions and social commitments of an academic and the manner in which he or she teaches:

‘Most legal academics teach students in a manner that only seeks to prepare them for uncritical application of legal doctrines to specific scenarios. This low-level teaching leads to surface-learning that does nothing to teach students critical thinking skills, does not encourage them to pose serious questions, let alone approach problems in an interdisciplinary manner. Instead, students are taught to be vending machines that chuck out a solution when one inserts a case. This sort of teaching does not enable us to bring out of law schools/faculties graduates who have a serious commitment to communities experiencing various social hardships, who pose serious questions to power and who seek to challenge the *status quo*.’ (Tshepo Madlingozi ‘Legal academics and progressive politics in South Africa: Moving beyond the ivory tower’ *Pulp Fictions* (2006) 17. See also Henk Botha ‘Civic republicanism and legal education’ (2000) *Codicillus* 17 and C R M Dlamini ‘The law teacher, the law student and legal education (1992) 109 *SALJ* 595.)

Academics and educators in universities should be concerned about the impact this ultimately has on how students are taught and therefore on what kind of graduates will be produced by these universities. In addition to the need to produce critical thinkers and intellectuals, law faculties need to inculcate in students an acute awareness of law not merely as a technical science and a set of rigid rules, but also as a system for resolution and reconciliation of conflicting social and economic interests and for the

fulfilment of needs, desires and aspirations of the people and communities that make up our society (D M Davis 'Legal education in South Africa: A re-examination' (1978) 95 *SALJ* 424).

One could connect this with the responsibility of educators (or learning facilitators) and the role of the university in public life. What will make the university a heterogeneous public space is giving students the freedom to be educated, to pursue academically multiple possibilities without too quickly, prematurely limiting them to the realities of practice. (See Karin van Marle 'Jurisprudence, friendship and the university as heterogenous public space' (2010) 127 *SALJ* 644; 'Universities as heterogenous public spaces' 2000 *Codicillus* 32.) Of course for legal academics to take their 'new' critical role as educators seriously and for law schools to inculcate critical thinking and resist traditional or positivistic orthodoxies requires that legal education changes in order to reflect the changes in our legal system:

'Transformation requires a certain culture change — it entails risk. An institution and the people who work in it must place themselves and their way of doing things, of thinking and of living on the line, and must be willing to sacrifice some part of it.' (Karin van Marle & Danie Brand 'Ten thoughts on transformation' in Hans Visser & Christof Heyns (eds) *Transformation and the Faculty of Law, University of Pretoria* (2007) 55–8.)

A critical approach to law in this view would entail problematising existing positions of power; in other words a radical questioning of that which we see as normal, and a re-evaluation of standards, merit and excellence. South African law schools need a decidedly dynamic and radically different curriculum which does not lock students into a teaching style based on traditional modes of analysis and ill-defined learning outcomes, but rather opens them up to a diversity of approaches and places an emphasis on certain social and ethical commitments that underlie any democratic legal system. This is a risk, but a project that law faculties will have to embark upon if they are intent on producing lawyers who are prepared for both the profession and the changes that the profession will continue to undergo. The same goes for the aim of educating future academics who are able to set new trends in legal academia and in the legal culture in South Africa (see Cheryl Gillwald 'Legal education and receptiveness to change' 2000 *Codicillus* 17).

The four-year LLB must be critically evaluated in this light as present it does not sufficiently provide opportunities for critical thinking/ the acquisition of skills. Law schools must be cautious of churning out functionaries who can serve the current system without thinking critically and who are not self-reflecting. This would affirm business as usual but will in no way contribute to the strengthening of democracy/constitutionalism.

#### *Responsibility-in-complicity*

Mark Sanders puts forward a complex and critical notion of complicity that is important for our argument for the need for critical thinking in post-apartheid South-Africa (Mark Sanders *Complicities: The Intellectual and Apartheid* (2002)). He argues that in a time after apartheid, thinking about the

question of complicity is unavoidable. For Sanders it is significant to note how apartheid as a system of enforced social separation was unsuccessful in exactly the sense that opponents to apartheid affirmed an essential ‘human joinedness’ (ibid at 1). However, opponents to apartheid in many cases had to face up to their own complicity, the extent to which they were implicated in the practices of apartheid, and their responses that were shaped by it (ibid). He notes that the notion of complicity was central in the working of the Truth and Reconciliation Commission. The TRC in fact was aimed at formulating an account of complicity that could generalise ‘ethico-political responsibility’/moral responsibility that goes deeper than legal and political responsibility (ibid at 2). Sanders notes the importance of acknowledging the ‘little perpetrator’ in each of us (ibid at 3). He refers to a letter written by Émile Zola concerning the Dreyfuss affair and makes two observations: first, that the duty to speak arises from the desire or will not to be complicit in injustice; and secondly, that this complicity takes place on behalf of another:

‘The duty to speak out is linked with a will or desire not to be an accomplice. Responsibility unites with a will not to be complicit in injustice. It thus emerges from a sense of complicity — not the criminal complicity of the French generals . . . but the actively assumed complicity of one whose silence could allow crime to go undiscovered. The second thing to note about this assumption of complicity is that it takes place on behalf of another — an other whose otherness is scripted by racism.’ (Ibid at 4–5.)

Sanders describes some of the responses to the Dreyfuss affair as a joining of the abstract and the empirical, the universal and the contingent (ibid at 5). Important themes come to the fore from these responses that are significant for our own reflection on moral responsibility in South-Africa after apartheid — the relation between justice and injustice; the idea of ‘foldedness’; and Karl Jaspers’ idea of metaphysical guilt (ibid at 6). Sanders refers also to Antonio Gramsci’s view that what it means to be an intellectual must be separated from activities that restrict the social functioning of intellectuals. Sartre also refused to subject universal ideas to ruling class interests (ibid). Sanders responds critically to what he considers as the privileging of particular affinities. For him, responsibility requires acknowledgement of one’s complicity in injustice and the realisation that there is no neutral place from where one can act. Each opposition and resistance depends on complicity, on shared responsibility.

‘Complicity, in this convergence of act and responsibility, is thus at one with the basic folded-together-ness of being, of human-being, of self and other. Such foldedness is the condition of possibility of all particular affiliations, loyalties, and commitments. In the absence of acknowledgement of complicity in a wider sense of foldedness with the other, whether welcome or not, there would have been no opposition to apartheid.’ (Ibid at 11.)

The notion of responsibility in complicity/human foldedness is important for our consideration of the need for critical thought, but more than that, critical theory in post-apartheid society and particularly for a post-apartheid theory of law. Sanders’ emphasis on complicity, and the need to take

responsibility for it, raises the danger of producing technocratic legal graduates who uncritically serve the dominant hegemony/ruling class. One could ask then to what extent a conservative legal education which negates the social, ethical and political significance of law links up with lawyers' and legal academics' complicity in the social ills that pervade post-apartheid society.

## TWO APPROACHES TO LAW AND CRITIQUE

South African legal scholars have relied on multiple critical approaches. However, if two predominant approaches could be identified they would be US Critical Legal Studies (CLS) and Euro/British Critical Theory. Both have been influential in the South African context (see for example Wessel le Roux & Karin van Marle *Post-Apartheid Fragments. Law, Politics & Critique* (2007) and Costas Douzinas & Adam Gearey *Critical Jurisprudence. The Political Philosophy of Justice* (2005)).

'US CLS', inheritors of a realist tradition from the early 20th century, elaborate a notion of law *as* politics (the political categories will usually include, class, race, gender, and sexuality: see for example Duncan Kennedy 'The structure of Blackstone's commentaries' (1979) 28 *The Buffalo LR* 20; Duncan Kennedy 'Freedom and constraint in adjudication: A critical phenomenology' (1986) 36 *Journal of Legal Education* 526 and generally David Kairys (ed) *The Politics of Law: A Progressive Critique* (1998)). US CLS challenges the conventional view that law is autonomous, free of wider social and political influence, and thus merely a formal posited rule. Instead, realist critiques see law as a reflection, indeed a mirror, of ideology. Law is thus conflated with politics — and the work of critique is to expose the political biases and determination of law by politics (usually the decision of the judge, but also of legislative schemes). The task of critique is then seen as exposing political bias — and once cognisant of the defect, suggesting how the ideological determination might be averted. This leads to an over-emphasis on adjudication as the site of political transformation, and thus a juridicalisation of politics. It also results in the law being treated as the main site of politics.

'Euro-British CLS' draws heavily on contemporary continental philosophy to elaborate a theory of law as a linguistic phenomenon (see for example Peter Fitzpatrick & Alan Hunt (eds) *Critical Legal Studies* (1990); Peter Goodrich *Languages of Law* (1990); Costas Douzinas, Ronnie Warrington & Shaun McVeigh *Postmodern Jurisprudence* (1993) and Panu Minkinen *Thinking Without Desire* (1999)). Deconstruction of texts and close hermeneutic readings seek the paradoxes and slippages that ultimately expose the instability of legal categories, and the foundation of legal authorisations. There is some overlap here with US CLS and their emphasis on the ultimate 'indeterminacy' of the law. But Euro-British CLS, and their collaborators in Australia, South Africa, and Canada, extend the indeterminacy thesis beyond the texts of law to the subject, community, identity, and justice (see for

example Douzinas & Gearey op cit at 229). Rather than law being a *transparent* site of politics, as with US CLS, here the emphasis is on the impossibility of grasping the subject, community, identity, nation, and so on. This makes political programmes and legal reform difficult to elaborate with any confidence. As a consequence, Euro-British CLS is often accused of nihilism or political quietism.

As indicated above, South African legal scholars have relied on various aspects arising out of US CLS and Brit-Crit. Quite often these approaches would have been referred to simultaneously. (We discuss an example of US CLS influence below: for examples of Brit-Crit influence in the work of South African scholars see Johan van der Walt *Law and Sacrifice* (2005).) A good example of CLS influence after the political and legal change of 1994 is that of Karl Klare who, in a renowned essay, describes the legal culture in South Africa as ‘conservative’ (Karl Klare ‘Legal culture and transformative constitutionalism’ (1998) 14 *SAJHR* 165) because South African jurists, as opposed to their American counterparts, display a ‘relatively strong faith in the precision, determinacy and self-revealingness of words and texts. Legal interpretation in South Africa tends to be more highly structured, technicist, literal and rule-bound’ (ibid at 168). This is of course not a concern in itself — the real concern is that this culture is treated as normal (see Karin van Marle ‘Transformative constitutionalism as/and critique’ (2009) 20 *Stell LR* 286). Klare articulates this concern by warning that ‘[conservatism] reduces the transparency of the legal process, thereby undermining its contribution to deepening democratic culture’ (op cit at 171). He then argues that judges will always have to balance the freedom to make judgments wisely with the constraints posed by statutes and precedents:

‘[A]djudication runs head-long into the problems of interpretive difficulty and the indeterminacy of legal texts. Legal texts do not self-generate their meanings; they must be *interpreted* through legal work. Legal texts, particularly constitutions, are shot through with apparent and actual gaps (unanswered questions), conflicting provisions, ambiguities and obscurities. Indeed, it is frequently debated what the relevant text *is*, with respect to a particular legal problem, eg, where multiple legal sources (drafting history, prior lines of interpretation, foreign authorities, etc.) are referenced, or where a document is sought to be elucidated or trumped by other cultural artifacts (eg, customs, accounts of popular morality, historical narratives, etc.). In the face of gaps, conflicts, and ambiguities in the available legal materials, what’s a decisionmaker to do? Apart from abdication, there seems no option but to invoke sources of understanding and value external to the texts and other legal materials.’ (Ibid at 157.)

By describing the challenges of adjudication by emphasising the inevitable extra-legal factors which arise in the process, Klare captures the everyday convergence of law and politics. In his call for South African lawyers to accept the challenge of transformative constitutionalism, he refers to a prevailing conservative legal culture amongst the South African legal community. He defines legal culture as the ‘professional sensibilities, habits of mind, and intellectual reflexes’ of judges, lawyers and legal academics.

Current legal education is of course inseparable from legal culture. Former Chief Justice Pius Langa made the following observation concerning legal education: ‘that [kind of] education is no longer enough. We can no longer teach the lawyers of tomorrow that they must blindly accept legal principles because of the authority’ (Pius Langa ‘Transformative Constitutionalism’ (2006) 17 *Stell LR* 351). This is very much in line with the shift called for by the late Etienne Mureinik and echoed by Klare from ‘a culture of authority’ and parliamentary sovereignty to a ‘culture of justification’ and constitutionalism (Etienne Mureinik ‘A bridge to where? Introducing the interim Bill of Rights’ (1994) 10 *SAJHR* 32). Here the influential insights of CLS are useful in South Africa in so far as they challenge law schools to train students in more than just reciting case law, technical rules and legislation, but also in preparing them to become active participants in the legal culture. This can be linked to US CLS, which aimed to

[reinvent the law] to give it a revolutionary new purpose, that is to lead the dismantling the various hierarchies of power and privilege that through the perversions of the legal process have come to threaten the higher values of our society’ (C Woodard ‘Toward a “super liberal state”’: A review of *The Critical Legal Studies Movement* by Roberto Unger’ *The New York Times* 23 November 1986 at 27).

The CLS movement, of course, did not escape criticism. Paul Carrington, Dean of Duke University Law School, is quoted as saying that CLS teachers ‘are morally bound to resign, for it is immoral, at best, to profess to teach a subject, law, in which one does not believe’ (ibid at 27). However, this criticism must appear churlish to anyone who appreciates why and how CLS came to be. Law students during the troubled period the world was in when the CLS movement was formed were clearly struck by the contrast between the law taught to them in the lecture halls and the legal and ideological tensions that were dividing nations around the world, including South Africa. The gap was too wide, and a deeper understanding of the nature and role of law was sought. They focused on the ways that law has contributed to illegitimate social hierarchies, producing domination of women by men, blacks by whites and the poor by the wealthy. CLS scholars draw upon diverse intellectual currents — ranging from literature, political philosophy and history to Marxist and social theory — in order to expose the indeterminacy of legal rules and the possible impotence of rights to address social problems. Their exposure of the politics of law, that law is not neutral; the apt description of indeterminacy; and the insistence on challenging false consciousness, seeing that things are not normal contributed to views that things can be different, thereby disclosing the possibility of transformation in law — and in legal education.

## LAW, CRITIQUE AND LEGAL EDUCATION

Our argument is premised on the idea that thinking is crucial to the existence of an active public sphere, democratic politics and democratic citizenship.



There are also other over-riding concerns when it comes to the role of a university — a ‘heterogenous public space’ — and the education of students against the milieu of tolerance, ‘multiple voices’ and diversity in our transformative context: the university must be open to, accommodate, protect and actively support plurality concerning language, religion, culture, sex, gender, sexual orientation, race and ethnicity, amongst others. It is the task of the management of the university to see that this is integrated at all levels. Our concern goes beyond these to further question how, by pursuing knowledge and intellectual thought, heterogeneity can actively be pursued.

German political theorist and philosopher Hannah Arendt is well known for the emphasis she placed on the need for a public space where human plurality can come to the fore. Her theory was aimed at protecting and developing the activities of action and speech that take place in the public realm distinguished from the activities of labour and work that are connected to the private. Arendt’s engagement with the interrelated activities of thinking and judging as the basis for the survival of publicly-minded political judgement, and her recollection of the trial and subsequent execution of Adolf Eichmann is relevant for this discussion (Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963)). According to Arendt, Eichmann’s role in the atrocity that was Hitler’s ‘Final Solution’ did not emanate from a malevolent intent to do evil or a delight in murder. Instead, Eichmann was a willing servant of the Nazi regime through a failure or absence of the sound faculties of thinking and judging. He was an insipid individual who operated thoughtlessly. It was his lack of the imaginative capacities that would have made the human and moral dimensions of his activities tangible for him that was the problem. When students are taught that ‘this is how things are and nothing can change it’, it would be wise to recall Arendt and the horrors that people like Eichmann unleashed upon the Jews in Nazi Germany.

We also wish to refer briefly to an argument made by Marianne Constable in which she laments the becoming of US legal theory as social legal (Marianne Constable ‘Genealogy and jurisprudence: Nietzsche, nihilism, and the social scientification of law’ (1994) 19 *Law & Social Inquiry* 551). Constable follows Nietzsche’s history of metaphysics as told in *Twilight of the Idols* in which he illustrates how through various phases (Platonism, Christendom, Kantianism and utilitarianism) the ‘real’ or ‘true’ world has been replaced by a world of phenomena, one that is observed and described according to empirical precision (ibid at 552). Translating this into legal research one finds a similar shift from questions posing ‘what should the law be?’ and ‘why should one obey the law?’ — ‘ought questions’ — to questions posing ‘what is law?’, ‘why do individuals and groups obey the law’ — typical ‘is’ questions (ibid at 554). Like Nietzsche, Constable’s concern is that in observing the apparent we are not only neglecting ideals, but we lose focus on material issues: they also disappear: ‘We have abolished the real world: what world is left? The apparent world perhaps. . . . But no! With the real world we have also abolished the apparent world.’ (Ibid at 552. See Friedrich

Nietzsche (tr R J Hollingdale) *Twilight of the Idols* (1968) 40–1.) Her argument amounts to much more, but bringing this to bear on our concern here is the shift away from or the break with theoretical engagements that are seemingly not of direct and immediate practical value. By this we are not calling for a disengagement with the demands of the real world (the legal profession, legal practice) but for an engagement with the ideal of justice.

‘Sociological knowledge as the truth about law . . . Sociology — whether as science or as interpretation, as law or as philosophy — speaks the truth of positive law in the language of belief and appearance, the language of “legitimacy”, “values”, “norms”, “distribution”, and “policy” — from which justice and the “true” world disappear.’ (Ibid at 588.)

Towards the end of her article Constable asks, ‘what world is left . . . what remains?’ (ibid at 588). The danger for law and legal education is for ‘the law of sociology . . . to become absolute command. . . . Sociological law threatens to be the consummation of Nietzsche’s history of metaphysics: the permanent transfiguring or becoming of absolute subjectivity’ (ibid at 590). However, Constable ends with the possibility of ‘something other than the law of sociology show[ing] itself’ (ibid). Legal education (and practice) should be concerned with this ‘other’, with the possibilities of a world that remains, with other kinds of subjectivity.

## CONCLUSION

In this brief note we reflected on the reasons and need for critical thinking and critical theory in South African law schools. As stated by Constitutional Court Justices Moseneke (‘The fourth Bram Fischer memorial lecture: transformative adjudication’ (2002) 18 *SAJHR* 309) and Langa (‘Transformative constitutionalism’ (2006) 17 *Stell LR* 351) the legal education of the past cannot be continued without taking into account the changes and transformation of the South African legal and political order. We recalled what could be regarded amongst others as the dominant approaches to critical legal theory, US Critical Legal Studies and the Euro-Brit critical tradition. These approaches still have their value, but it is important that a critical theoretical approach that is situated within and responds to the post-apartheid context is developed. The reflection by Mark Sanders on complicity and responsibility, and human foldedness underscores the ethico-political responsibility of everyone involved in South African law, politics and society in the aftermath of apartheid. Marianne Constable’s concern for the ideal and her argument on how an emphasis on what is regarded as ‘practical’ and a preoccupation with empirical observation (one only counts if one counts) leads to the detriment of justice, is significant to the development of a critical approach to law in the South African context.

The title of our piece echoes a question posed by Drucilla Cornell (*Beyond Accommodation* (1999) xv): ‘what does changing the world entail’? Changing the world is of course a complex issue. Our aim with this note was to raise a few ideas about the role of legal education in ‘changing the world’, thereby

joining the wider discussion on this issue. We would like to conclude with the late South African philosopher Paul Cilliers's observation on the link between complexity and modesty.

'The view from complexity argues for the necessity of modest positions. In order to open up the possibility of a better future we need to resist the arrogance of certainty and self-sufficient knowledge. Modesty should not be a capitulation it should serve as a challenge — but always first as a challenge to ourselves.' (Paul Cilliers 'Complexity, deconstruction and relativism' (2005) 22 *Theory, Culture & Society* 263.)