



The crises in legal education

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This article reflects on recent debates on legal education in South Africa. I argue that the value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and judiciary, but rather how it contributes to a new jurisprudence suited to the legal, social and political transformation of South Africa. I therefore argue against a reading of the crisis of legal education as one that is instrumental and economical (the inability to produce efficient legal professionals) and focus rather on the jurisprudential *crises* that lie at the heart of law and jurisprudence, namely the crisis set in motion by the shift from a general jurisprudence, centered on the ideal of justice, to a restricted jurisprudence, focused merely on the coherence of the positive law. I argue that what is needed as a response to this crisis is a critical legal education, or an approach to the study and teaching of law grounded in a *critical* jurisprudence. The turn to a critical legal education suggested in this article is then further linked to an understanding of law as a humanities discipline and to the humility that this will require of legal academics, lawyers and judges.

There is a serious crisis in education. Students often do not want to learn and teachers do not want to teach. More than ever before [...] educators are compelled to confront the biases that have shaped teaching practices [...] and to create new ways of knowing, different strategies for the sharing of knowledge. We cannot address this crisis if progressive critical thinkers and social critics act as though teaching is not a subject worthy of our regard (Hooks 1994: 12).

Would you choose to subject yourself to training as a salesman? If not, are you sure that your legal education will not be equally destructive? (Boyd White 1973: 8)

Legal education in crisis? was the theme of a summit held last year by the South African Law Deans Association (SALDA), the Law Society of South Africa (LSSA) and the General Council of the Bar (GCB) to discuss the future of the LLB degree. As evidence for this 'crisis', the 'stakeholders' at the summit pointed to the waning quality of law graduates leaving universities, noting specifically a pattern of inadequacy and incompetence in numeracy, literacy and computer skills, a dearth in critical thinking, analysis and reasoning ability, and a poor grasp of legal ethics together with patent immaturity and unawareness when dealing with complex cases (Sedutla 2013, Dicker 2013). Moreover, this 'crisis' is said to be exacerbated by the inadequate amount of government funding and the over-capacitated state of the majority of law schools (Dicker 2013).

While I will also examine legal education in post-apartheid South Africa through the prism of crisis, I shall depart significantly from this diagnosis of what constitutes the crisis in legal education that appears to have dominated discussions at the summit. Instead, I shall suggest that the crisis in legal education is better located in what critical theories of law, broadly defined, have long identified as the political, moral and ideological crises in the law itself. These crises are manifest in the political implications of law's separation from morality, and hence from justice, and its own participation in the construction, perpetuation and legitimization of hierarchy and inequality as well as its complicit affiliation to injurious social powers.

On this view, an understanding of the crisis in legal education linked to the profitability and marketability of law graduates and their ability to quickly acclimatise to the conditions in the private legal profession not only obscures the true or deeper crisis, but is also itself symptomatic of the crises in legal education. That there are crises in legal education is undeniable, but these crises

involve much more than questions about the duration and affordability of the LLB degree, throughput rates, university resources or the economic productivity and functional usefulness of law graduates. Indeed, that these are the main questions being asked in the first place and that they are only being asked at what seems to be the behest of the bureaucratic powers in the judiciary and legal profession is evidence of the effects of the corporatisation of higher education on the academic function and work of law faculties. It also reflects a staggeringly unimaginative and myopic understanding of what the teaching of law should entail, of what values and principles law faculties should uphold, and of what the ideal post-apartheid South African law graduate should be.

By contrast, I will suggest that what is (or rather should be) at stake in discussions and debates about South African legal education is the ideal of justice itself. In the South African context this would encompass political, economic and social transformation, reparation(s), the materialisation of substantive equality and a dignified life for all, epistemic decolonisation, as well as the inculcation of an active, democratic and publicly oriented politics (Modiri 2013, Van Marle & Modiri 2012).

The arguments in this article will unfold as follows. In the next section, I will trace the source of the crises in legal education in the history of jurisprudence as narrated by Douzinas & Gearey (2005: 3-42). Douzinas and Gearey describe the history of jurisprudence “as the movement from general to restricted concerns, [where] thinking about the law of the law” was replaced and overtaken by “a technical and professional approach” (Douzinas & Gearey 2005: 5). In response to these crises and following a consideration of the relationship between crisis and critique, I shall reiterate my previous call (Modiri 2013) for a critical legal education, this time placing emphasis on two senses of the “critical” in critical legal education, namely critical pedagogy and critical legal theory. I shall thereafter associate this conception of critical legal education with the humanities, and with humanities-inspired styles of thinking, reading and writing and distinguish them from, and against doctrinal, scientific and business/commercial styles and approaches.

Underlying this article is an insistence on the intrinsic value of knowledge, education, literature and theory as means of living in, and illuminating the many worlds, spaces and contexts we inhabit. Without such an insistence, the twin projects of re-imagining the law and defending a deep and broad university education against attempts to convert it into mere job training will be severely undercut. While it is my view that both these projects are in crisis, if not at the risk of evisceration and extinction, my aim in this article is not to resolve these crises (as if such a resolution were even possible), but to apprehend them as moments for resolute thinking and action so as to affirm the possibility of a legal education that can contribute to a just and meaningful life for all.

1. Locating the crises: from a general to a restricted jurisprudence – and back again

I conceive of the crises in legal education as mainly jurisprudential, as being rooted in the moral, political and ideological content of law and the conservative nature of the legal culture, and as having emanated from certain developments in modern legal theory that resulted in a technocratic and formalist approach to, and idea of law. One strong account of these developments comes from Douzinas & Gearey (2005: 3-4) in which they tell the story of the decline of legal philosophy due to the rise of rationalism and positivism and the resultant eclipse of philosophical and humanistic inquiry in legal study. Douzinas & Gearey (2005: 3) begin their story with a definition of jurisprudence as “the prudence, the *phronesis* of *jus* (law), law’s consciousness and conscience”. They insist that not only the wisdom, knowledge and consciousness of law should be central to jurisprudential enquiry, but also “the conscience of law, the exploration of law’s justice and of an ideal law” against which the positive law is to be judged (Douzinas & Gearey 2005: 3). A general jurisprudence in this vein would attend to both meanings of jurisprudence as the consciousness and conscience of law.

They lament, however, the shift in modern legal theory from this general jurisprudence (where juristic issues were central to philosophical concerns) to a restricted jurisprudence (where technical, functionalist and professional concerns became central). This restricted jurisprudence, Douzinas & Gearey (2005: 4) tell us, is the outcome of the cognitive and moral poverty that accompanied the development of modern legal theory, and is thus characteristic of legal modernity. The cognitive poverty of legal theory resulted in the study of law being treated as an “entomology of rules, a guidebook to technocratic legalism, [and] a science of what – legally-exists” (Douzinas & Gearey 2005: 4). Central to this cognitive impoverishment of jurisprudence was the rise and dominance of rationalism and rule-formalism within legal scholarship. Consequently, jurisprudence became an obsession with accounting for the history of the meanings of the word ‘law’ and an obsession with the question “What is law?” (Douzinas & Gearey 2005: 5). According to Douzinas & Gearey, the moral poverty of jurisprudence, on the other hand, was facilitated in large part by legal positivism. Legal positivism grounded law’s legitimacy in formal reason and procedure and completely excluded ethical and social considerations. Central to positivism is the epistemological recasting of law as a science or as a ‘pure’ discipline as well as the construction of a discursive opposition between the legal and the non-legal. Through this recasting and construction, moral values and principles are minimised, and the abstract is placed above the substantive: “Indeed, the rule of law is presented as the law of

rules, the main achievement of which is to rid the law of ethical considerations” (Douzinas & Gearey 2005: 7).

Douzinas & Gearey bring to light several of the political consequences of this double impoverishment of jurisprudence, of this reduction of law to a technical set of rules that isolated law from morality. These include the technicalisation of social conflict by private law rules, the belief in neutral, non-ideological problem-solving in the public law, the denial of law’s imbrication with racism and sexism, and its disconnection from the social reality (Douzinas & Gearey 2005: 7). Of relevance for our purposes is how the dual impoverishment of modern legal theory also transformed and reduced legal education which, under a restricted jurisprudence, took the form of “vocational skills training” (Douzinas & Gearey 2005: 4) in which issues deemed “theoretical” became peripheral, and legal academics and law teachers became “purveyors of a technical knowledge that must be condensed, memorised and repeated”, resulting in “death of the soul and the intellect” (Douzinas & Gearey 2005: 4).

Douzinas & Gearey’s call for a return to a general jurisprudence takes place in light of such consequences. For it is only a general jurisprudence that can expose how the values of any given legal system represent the dominant ideology of the powerful or unearth the violent and coercive content of legal rules. It is only a general jurisprudence that can upend the process whereby law became rooted in a “metaphysics of truth” rather than in the “politics and ethics of justice” (Douzinas & Gearey 2005: 8–9). General jurisprudence returns to the classical concerns of legal philosophy, specifically as they pertain to the organisation of society and the constitution of the social bond, and it adopts a wider concept of legality. It broadens the scope of what is relevant *in* and *as* jurisprudential inquiry, concerning itself not only with the posited law, but also with the law of law. Also forming part of a general jurisprudence are “legal aspects of the economic, political, emotional and physical mode of production and reproduction” within a society as well as questions that classical philosophy traditionally examined under the banner of law and justice (Douzinas & Gearey 2005: 10). Although general jurisprudence takes its bearing from classical philosophers in the Western canon from Plato and Aristotle to Kant, Hegel, Marx and Hume, it is now even wider. It also encompasses questions regarding the political economy of law, the postcolonial condition, the depths and contours of psychic and interior life, and the disciplinary as well as emancipatory dimensions of politicised identity. Because legality also operates at the level of social being and social existence, “a general jurisprudence examines ways in which subjectivity is created as a site of freedom and subjection” (Douzinas & Gearey 2005: 10). In summary, a general in contrast to a restricted or narrow jurisprudence reads legal texts “not only for their normative coherence but also for their omissions, repressions and distortions,

for signs of the oppressive power and symptoms of the traumas created” by law (Douzinas & Gearey 2005: 17). But it goes beyond the texts and into the world as well to explore how law is organised at the textual and institutional level, as a “pillar of the symbolic order” and as foundational to the “imaginary constitution of self and society” (Douzinas & Gearey 2005: 17).

Legal education in post-apartheid South Africa remains firmly in the grip of restricted jurisprudence – focusing as it does on the black-letter law with little to no reference to the wider historical and social context in which law operates and is experienced.¹ The majority of law courses focus exclusively on law as an exercise in technical rule-application and they are structured around what the legal rules and principles currently are; in which cases they were decided or from which legislation or other source of law they are derived and what, if any, exceptions are applicable to them. In some rare instances when students are taught what the law or legal principle *ought to be*, the focus is less on the broader normative, philosophical questions of law as it should be and more on a doctrinal critique of a court judgement or a procedural flaw in a legislative scheme – all with the aim of reasserting and maintaining the coherence, determinacy and predictability of law and legal rules.

Many law teachers in South Africa (especially, but not only those in private, mercantile and procedural law) approach their subjects as though colonialism and apartheid did not take place, as though new conceptions of politics, ethics and legality were not called for by the new dispensation, and as though the subjects they teach and the research they do is somehow impervious to the imperatives of transformation and social justice. Many still maintain a belief in law’s neutrality and stability and many more refuse to acknowledge law’s violence and its role in the maintenance of White colonial domination and hetero-patriarchal power and its facilitation of the economic injustices of capitalism. Through technicalising and depoliticising law in these ways, traditional legal education not only transmits a Western, conservative, bourgeois and false idea of law, but also works to dull students’ moral, political and intellectual impulses by unremittently reinforcing the notion that “thinking like a lawyer” involves an acceptance of the distinction between the legal and the non-legal (Williams 1991: 80-98, Kennedy 1982: 594, Cownie 2004: 50). Furthermore, it mandates the adoption of a legalist, formal and dispassionate sensibility in contrast to a morally and politically engaged consciousness (see Harris & Shultz 1993). Indeed, the purported ‘immaturity’ that SALDA, the LSSA and GCB identify in young law graduates may issue less from the lack of an extra year of study, but rather from the fact of being taught to value

1 Botha 2000, Madlingozi 2006, Quinot 2012, Modiri 2013.

logic, abstract rationality and value-free legal analysis over social and political context, lived experience and normative reasoning (Harris & Shultz 1993).

2. Crises and critique: towards a critical (sense of) legal education

2.1 Crisis beckons critique

If the crises in legal education are recast as a problem arising out of the impoverishment of the moral, epistemological and political foundations of law and jurisprudence as opposed to being solely rooted in the failure to produce law graduates with the requisite skills to work productively and efficiently as part of a revenue-generating workforce in legal practice, then the response or counter to these crises would involve more than technocratic and superficial changes to the LLB curriculum, but should involve the adoption of an alternative, more critical conceptual approach to law and jurisprudence, and, in turn, to legal education as well. To be sure, the crises in legal education, I will suggest, beckon a more critical legal education. In this instance, 'critical' for me implies going "beyond the confines of conventional legal theory or jurisprudence" (Pavlich 2013: 32), and "reaching beyond current orderings" (Pavlich 2013: 33). Before I elaborate on some aspects of a critical legal education and its relation to critical pedagogy and critical legal theory, a brief theoretical excursion into the relationship between critique and crisis is instructive.

In an argument defending critique as a *hope* rather than a luxury in dark times (or times of crisis), Brown (2005) recalls the etymological roots of 'critique'. As she tells us, 'critique' is an old term that derives from the Ancient Greek *krisis*. For our purposes, she indicates that *krisis* is, in fact, a jurisprudential term identified with the art of making distinctions; an art, she writes, considered essential to judging and rectifying an alleged tear in the order of democracy. In its Biblical terminology, *krisis* is also equated to justice and Right. Brown (2005: 5) notes that "in contrast to contemporary concerns with distinguishing the two, in its original usage *critique is an explicit project of judgement*". What is suggestive about critique in this old usage is how it connects a specific political condition or worldly phenomenon that is in crisis with the immediate need to comprehend that condition or phenomenon "by sifting, sorting, or separating its elements, to judge and to respond to it" (Brown 2005: 7). Critique, in this sense, is non-optional in restoring the moral health, and the balance of justice and democracy, of any given polity. Because of its restorative and discerning aim in relation to the crisis or *crises* provoking it, critique can therefore never be merely academic,

hyper-theoretical, nihilistic, disinterested or destructive, because its project is to “[discern] and [repair] a tear in justice through practices that are themselves exemplary of the justice that has been rent” (Brown 2005: 4-6). To be sure, critique – connected as it is to knowledge, deliberation and judgement – aims to render any given crisis readable so as to orient us *through* and *out* of the darkness of that crisis (Brown 2005: 15).

The call for both a return to a general jurisprudence and a critical legal education that stands in the guise of a general jurisprudence is situated in this understanding of critique as always-already a project of restoration and renewal in relation to crisis. In Arendt’s (1961: 169-93) meditations on the “crisis in education”, in which she declares that “the essence of education is natality” (Arendt 1961: 171), the close connection between critique, judgement, crisis and renewal surfaces strongly. Because education, as an elementary and indispensable human activity, must speak to the realities and context of the present world, and because that world is permanently changing as new human beings enter and inhabit it, education for Arendt is inseparable from the preservation and restoration of the world:

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 that ruin which, except for renewal, except for the coming of the new and young, would be inevitable (Arendt 1961: 193).

For Arendt (1961: 171), a crisis is an occasion for judgement, reflection and exploration; it “forces us back to the questions themselves and requires from us [...] direct judgements”. In this instance, “judgement” entails the imagining of new responses and approaches and not simply responding with preformed prejudices, or a business-as-usual mentality. In this vein, the response by SALDA, the LSSA and GCB (as well as the judiciary) reflects a pragmatist and functionalist framing of the ‘crisis’ in legal education, one that reduces the crisis to the lack of ‘skilled’ or ‘well-trained’ (rather than educated) graduates. This is evident in how these ‘stakeholders’ at the LLB summit failed to interrogate, among other more substantive issues, the jurisprudential foundations of post-apartheid law; the substantive content of the courses taught in law schools as well as the ideological and political perspective that informs them, and the relation between legal culture and legal education (specifically the way in which legal education functions as an instrument of the dominant, conservative legal culture). Such an uncritical process can only result in proposals for more managerial and technical solutions (such as more government funding, an additional year of study, more practical problem-solving questions, more legal drafting exercises, more practical and professional training). By contrast, having framed the crisis differently, I will now

suggest that the solution, if there is any, is a thoroughgoing reconceptualisation of the content, culture and practices that currently constitute legal education – a reconceptualisation which, in my view, is inseparable from critique and critical theory as such.

2.2 Critical legal education

I associate the development of a critical legal education in post-apartheid South Africa with both the notion of a general jurisprudence and the meaning of critique described earlier. Law and jurisprudence in South Africa and, therefore, legal education as well, is faced with the demand of responding to, and acknowledging the crises and tragedies of colonialism and apartheid. The constitutional aspiration to a new 'South Africa' and the moral and political demand for the restoration of parity between all South Africans requires an interrogation of the consciousness, wisdom and knowledge of (the) law, but more importantly, given its own role in the injustices of the past and present, also an interrogation of law's *conscience*. Moreover, the need to renew and restore the polity and to bring about a new community of citizens should stand central to post-apartheid jurisprudence, the legal culture and legal education.

Two senses of 'the critical' are pertinent in underscoring the nature of a critical legal education, namely critical legal theory and critical pedagogy. I shall briefly elaborate on each of these in turn.

2.2.1 Critical legal theory

The teaching of law, like the law itself, can never be a neutral and value-free exercise. It requires the postulation, even if implicitly, of a specific definition, analysis and theory of law and legal reasoning – a definition, analysis and theory which, in turn, contains and is undergirded by a *particular*, and thus contestable, vision of social life (Frug 1989). The very act of 'definition' – whether one is defining law or designing a course – involves a demarcation, an establishing of boundaries between the inside and the outside; the central and the marginal; the relevant and the irrelevant. Such demarcation itself necessarily issues from choices and perspectives which are not natural or immutable, but ideological and cultural. Thus, the teaching of any area of law always-already integrates a particular form of legal, political and moral reasoning and a particular jurisprudential approach. Accordingly, law teaching does more than merely 'teach' students; it also plays some role in moulding their sensibilities and comportment and in constructing their overall consciousness and world view.

In South Africa, the dominant jurisprudential guide for legal research and legal education is some or other brand of legal positivism and interpretive formalism strongly rooted in a liberal capitalist ideology. While socio-legal (law in context or law as policy), comparative and traditional legal-historical approaches have also begun to circulate in law schools, they are often used either to supplement and strengthen this doctrine-based formalist approach or they are used in only a few courses/electives (such as Street Law, International Private Law, HIV/Aids and the Law). They remain marginal, however, to the broader traditional, formalist culture and orientation of the law faculty. There is also a strong connection between the manner in which students are assessed and examined and this pervasive culture of legal formalism. The tests, assignments and examinations that students frequently have to complete not only correlate with the rote-learning to which they are exposed in the classroom, but also perform the ideological function of making students believe that only one of the many legal choices and interpretive possibilities available in any legal scenario takes undeniable precedence over the rest. As such, legal education in South Africa largely conforms to a black-letter model of teaching, focusing mainly on law as rules and law as procedure.

The relation between crisis and critique, where critique emerges in light of a crisis, played out once more in the many responses from South African legal academics to the ascendancy of legal formalism and legal positivism – especially to the extent that formalism and positivism were central to the maintenance and legitimation of the apartheid legal order and are currently no longer consonant with the ideals, values and objectives of the new constitutional dispensation (see Dugard 1971, Dlamini 1992, Klare 1998). Many of these responses drew on a critical perspective, method or approach in illuminating the crises in law and jurisprudence that were occasioned by traditional/conservative theories of law and, as such, they provide some important starting points in reflecting on the need for an alternative, more critical paradigm for law teaching.

I should state from the outset that by critical legal theory, as the substantive pillar of a critical legal education, I have in mind something more expansive than merely affirming the supremacy of the Constitution against the common law and insisting on the infusion of a commitment to the project of constitutional transformation (as described, for example, by Klare 1998) into the work of judges, lawyers and legal academics. While the advent of a new constitutional order did inaugurate a considerable alteration in the moral and political foundation of South African law that must be taken into account in the teaching and practice of law, my sense is that centring the reform of legal education on the Constitution can itself border on the uncritical. Not only is there no certainty that the Constitution will not itself be treated in a formalist and jurisprudentially conservative manner, but this approach also tends to assume and affirm Western liberal constitutionalism

and moderate politics to the exclusion of more radical alternatives (see Sibanda 2011). When the transformation of legal education is reduced to genuflection to the Constitution, not only does it treat the Constitution as universal, uncontested and non-ideological, it also elides powerful critiques of the content and function of the Constitution concerning its own capacity to stifle genuine social and economic transformation and to silence historical justice claims. Often overlooked as well is the fact that the epistemological basis of the South African Constitution still represents a Western and hence colonial order of legal knowledge that suppresses and marginalises indigenous African ways of knowing and doing law (see Ramose 2001, 2007, 2012, Santos 2014).

Critical legal theory or critical theories of law that could inform legal education are useful in that they seek to offer a more complex, multidimensional picture of law and its inextricable relation to society, politics, morality, history, ideology, power, and community. There are many critical legal theories or critical approaches to law that could come into play in this instance. These include first and in a more narrow sense the two dominant critical legal traditions in South Africa, namely US CLS and Euro-Brit CLS (Motha & Van Marle 2013: 20-1). US CLS following American legal realism points to the inescapably political nature of law and conceives of the law as site of fundamental ideological tensions and contradictions (Kennedy 1976, Unger 1986). In US CLS, law's indeterminacy is rooted in the impossibility of a rational, self-generating legal outcome and in the fact that, despite the existence of constraint, legal materials also harbour the possibility of interpretive freedom, which, in turn, invites moral and political judgements (Klare 1998). In Euro-Brit CLS, law is theorised through the categories of language, ontology and ethics and the ultimate instability and violence of legal categories and authorisations is emphasised. And there, the indeterminacy of law raises a question not only of the constitutive grounds (and groundlessness) of law and the legal order, but also of the impossibility of ever grasping and grounding identity, community, nation, subjectivity and of making a claim to the full realisation of justice (Douzinas et al. 1993, Fitzpatrick 2001, Fitzpatrick & Tuitt 2004). In a wider sense, critical theories of law based on politicised identity and power relations between social groups (specifically critical race theory, feminist theory, queer theory) are also crucial in exposing the identity politics of the law itself. These theories draw attention to the way in which the law traditionally favours a specific genre of the human – not only in the manner in which the law has actively participated in securing and entrenching the material subordination, invisibilisation and degradation of Blacks, women and homosexuals, but also in the way that the epistemological grounds and cultural assumptions of law and legal rules idealise a neutral subject, where this neutrality actually functions to disguise the preferences, interests, moral impulses and world view of socially dominant and powerful groups. Even

wider, in this instance, are theories such as postcolonial studies, which seeks to explain and analyses the legacies of colonialism and to trace repetitions and continuations in colonial relations of power and knowledge. Other approaches, such as law and literature as well as critical strands of social movement theory/ transitional justice scholarship, legal pluralism, African jurisprudence, and Marxist theories of law, among others, would all fit into the meaning of critical legal theory as argued for here.

What is important for a critical legal education is not so much the content and development of these theoretical traditions and perspectives, but the method/angle they employ. Each of these theories proceeds, in some way, from a rejection of a view of law as a fully rational, technically fair and neutral body of rules to conceiving law in the first place as itself invested with the capacity to injure and oppress and through framing law within a broader social and discursive context. Each of these theories also proceeds from a problematisation of law's exclusive claim to Truth and Reality and views law as but one situated and internally contested form of knowledge that is frequently hostile to other registers, discourses and vocabularies. Underlying these theories then is an often-explicit challenge to the central tenets of modernity and Enlightenment thinking – its Western hubris, its coloniality and masculinity as well as its naïve exaltation of, and belief in the possibility of objective knowledge and the inevitability of historical progress.

In addition to their critique of the core assumptions of legal formalism and legal liberalism and their exposure of how domination occurs in liberal and illiberal societies alike, three common themes/aspects of the critical theories of law stand central to a critical legal education that is important to emphasise:

- *The critique of legal necessity and the possibility of alternatives.* Explicitly or implicitly, critical theories of law show that legal choice is not pre-determined or limited by legal rules and, therefore, that legal outcomes are not produced through the mechanical application of legal rules, but are influenced and determined by reigning social and economic arrangements, interests and powers. Hence, through different conceptions of law and legal reasoning, alternative answers and outcomes to 'legal' problems are possible.
- *A commitment to transformation, renewal and justice.* Because they each proceed from some apprehension of, and objection to injustice, human suffering and inequality, critical theories of law have a strong commitment to social transformation and justice, even liberation, especially in ways that would reverse historically entrenched hierarchies of power and bring about new formations of community, democracy, politics and ethics. In this instance, transformation is often distinguished from reform through the

insistence for a more radical change in the social, economic and political structure and not simply a superficial improvement in the *status quo*. Whether that transformation is possible through law is highly contested of course, but what is not contested is the need to overcome hierarchy and subordination in society and the recognition that lawyers have some role to play in this project.

- *Interdisciplinarity*. One of the reasons why critical theorising about law is difficult to define and categorise with full exactitude is the wide array of disciplines from which they emerge or with which they interact (and the tensions and complementarities this produces). Critical theories of law often self-consciously engage in inter- or multidisciplinary inquiries as a form of resistance against the disciplinarity of law, and against the exclusions and illusions of depicting law as a circumscribable, bounded and solid discipline and field of knowledge. Philosophy, the critical social sciences, literature, history, and art enter legal discourse to disrupt the purported fixity and determinacy of law and legal discourse and work to constantly expand the imagination, consciousness and knowledge of lawyers.

2.2.2 Critical pedagogy

Widely recognised as having its genesis in the work of Freire (1970, 1973, 1985, 1998), critical pedagogy or resistance pedagogy draws on radical democratic political philosophy, feminism, critical race theory, queer theory, postmodern and postcolonial criticism, and Marxism in developing a pedagogy primarily concerned with social justice, substantive democracy, and freedom.² In its formulation of a radical, politicised account of the social function of education in contemporary society, critical pedagogy conceives of education as being central to the struggle against oppression, hegemony and inequality in society. Critique's discerning function is at play here, as well as in the way in which critical pedagogy, in its approach to reading and analysis, goes beyond and below surface meanings and given narratives in order to excavate the roots, archaic structures and deeper 'essences' of a particular problematic. As such, critical pedagogy implores teachers to develop educational knowledge(s) and practices that resist dominant power relations and cultural formations, and that question and problematise rather than affirm or normalise the *status quo*. Moreover, this egalitarian and 'anti-subordination' philosophy of education must materialise not only in the content being taught, but also in the way in which it is taught, in the classroom environment, in the assessment methods employed and in the

2 See Shor 1987, 1992, Giroux 1988, hooks 1994, Kincheloe & McLaren 2007, Darder et al. 2009.

teacher-student relation. From a critical pedagogy perspective, the ultimate aim of the education process is to produce critical and creative thinkers, imaginative intellectuals, and active and democratically minded citizens as opposed to merely churning out successful professionals or productive employees. In this way, critical pedagogy resists the reduction of education, which connotes the *teaching of knowledge* into mere vocational or technical skills training. Emphasising identity, lived experience, context and complexity, and focusing on the structural power relations shaping society, critical pedagogy also troubles the infiltration of market and State-oriented agendas together with scientific, empirical and epistemologically positivist approaches to knowledge within secondary and higher education.

Consequent to the formalist understanding of law as a science and as a self-generating and coherent body of rules, many legal academics approach their work as *descriptive*, that is, limited to teaching students where to find the law and then how to logically 'apply' the rules and principles of law in order to determine the 'correct' legal answer to any given problem. Law teachers who approach their educative role in this mechanical way rely on a view of legal materials as self-revealing and fixed and of law as autonomous from political, social and moral reasoning. In its pretension to neutrality and objectivity, such an approach stands in contrast to the critical pedagogy understanding of education as "inherently political" (Kincheloe 2008: 10). It also elides the law teacher's responsibility for the ideological and cultural messages that they convey in their teaching. Drawing from a critical tradition within the discipline of education, in addition to insisting that legal academics should take their role as teachers/educators seriously, is helpful in developing an engaged pedagogy and style of teaching that is coterminous with the kind of progressive, social justice-oriented content that should form a core component of the LLB curriculum.

A critical legal education would have to combine both critical legal theory and critical pedagogy. A critical legal education, following critical pedagogy, must accord to the student-teacher relationship in the law classroom a certain degree of integrity and sacredness in order to be a space that affirms students, their experiences and their potential for critical thinking and thoughtful reflection. It must convey to students more than mere technical knowledge and legal jargon, but rather knowledge about how to live and be in the world, and how to perpetually remake the world (hooks 1994, 2003, 2010). Simultaneously drawing from critical legal theory, broadly defined, a critical legal education must be oriented around the promotion of a counterhegemonic and emancipatory view of social life, one that enables resistance and questioning as well as transformation and re-imagination and one that offers to students a multidimensional and contextual

analysis of law, society, and history that is at once morally and politically engaged (Valdes 2003).

3. Law, humility and the humanities

The two senses of critique that were related earlier as forming part of a critical legal education, in addition to having strong roots in literature and scholarship developed in the humanities, are both linked to an understanding of law as a humanities discipline (Sarat et al. 2010). The humanities, in turn, is cast as a continuous engagement with the human and its encounter with and experience in the world, an engagement which includes a concern with human culture(s), creative acts, and meaning-making practices (Camiss & Watkins 2013: 71). Conceiving of law as a humanities discipline embodies precisely the return to a general jurisprudence discussed earlier, in that it adopts both a wider concept of legality and more expansive criteria for what counts as relevant and quotidian legal inquiry. Such a conception also illustrates that the foundational concepts and categories of law – such as justice, fairness, Right, harm, reasonableness, legitimacy, life, autonomy, obligation, property, power, subjectivity, punishment, judgement – all yield questions and inquiries whose full exploration cannot be confined to traditional formal legal texts such as case law, written custom and legislation – nor are they susceptible to empirical quantification or scientific prediction (Sarat et al. 2010, Camiss & Watkins 2013). These legal categories are simultaneously moral, political, social and ideological, and they have a history and philosophical basis. Legal analysis in relationship to them would remain incomplete, if not impoverished, without knowledge and skills in the humanities where they are investigated and studied in more depth (Balkin & Levinson 2006).

For the majority of legal academics in South Africa and elsewhere, to embrace the notion of law as a humanities discipline requires a certain *humility*, an abandonment of certitudes and an “openness to new worlds” (Van Marle 2014, Cornell 1993: 1). It requires the unlearning of old, conventional approaches and perspectives in favour of new ones as well as the giving up of claims to law’s autonomy, determinacy and stability. It is a now oft-stated observation that law teachers very rarely view themselves as teachers and as users and transmitters of knowledge. Consequent to both legal formalism and the professionalisation of the legal academy, many law teachers craft their professional self-image either in the figure of a *lawyer* (as in the odd and duplicitous title of “academic lawyer”) or that of an “expert” or “leading researcher” in their field (Greenbaum 2012: 17). This repudiation of our teaching role, coupled with the need for a title that expresses self-importance, exceptionalism and expertise, confesses the haughtiness and ruthlessness often associated with lawyers. It also confesses the degree to which

legal academics are disconnected from the imperatives of having to teach law *differently* in a changing context where the aim should be to produce not only lawyers and professionals, but also citizens, activists and intellectuals.

Law teachers frequently presume full possession of total and complete knowledge about the law, their discipline and often also about fields in which they have no training (medicine, sociology, criminology, philosophy, human nature, science, and so on). They often work in silos and in isolation from colleagues in their departments – let alone in other departments or faculties. As a result, they are unable to think globally about the legal education being offered as a whole and that is also the reason why law courses and course materials are often so formulaic, outdated and stale. These excessive conceits are partly the result of a lack of humility on the part of law teachers and they constitute a large part of how and why legal education came to be in such crisis. The humility being invoked here then is one that asks for introspection from all law teachers about their role in a university and their responsibility to students and to society. It is a humility that calls for law teachers, first, to think deeply and then to think at the limits, to be able to redraw old boundaries and rethink conventional categories, to be willing to accept and engage with uncertainty, contradiction and *aporia* (Harris 2007). “To be ‘knowing enough’ [...] above all entails humility before the vastness and complexity of the world, an appreciation of what one does not know” (Brown 2011: 27).

Boyd White brings to light the semiotic, conceptual and even affective connections between humility, the humanity of the law and the humanities in law. For him, legal education must cultivate in students a broad sense of culture, knowledge and language. Law teaching must be a

training in the ways one can learn from one’s experiences and acquire experiences of a new and better kind, in the ways one can learn from one’s culture and contribute to it, in the ways one can live with an increased awareness of the limits of one’s knowledge and mind, accepting ambiguity as the condition of life (Boyd White 1973: xv, see also Boyd White 2000).

In Boyd White’s (1973: xv) view, “a real [legal] education” in which students are trained to write and think, is never merely about the acquisition of information or data or about learning a formal technique and method. It is rather, consequent to his understanding of law as a rhetorical activity, “an art of making: making language, character and community, making a culture and a world”.

The effort to apprehend law as a humanities discipline is also an effort to distinguish or distance law and legal study from three currently typical styles of legal inquiry and pedagogy, namely the doctrinal approach, the scientific

approach and the business/corporatist approach. In the doctrinal approach, legal doctrine and legal texts are read like a maze or framework in which the correct, purely legal solution is to be objectively ascertained. This approach views law as an internal, self-sustaining mechanism and in this way reduces the 'correctness' of a specific legal outcome to its conformity with the extant legal rules and precedent to the exclusion of a consideration of its socio-political, distributive and moral consequences. The scientific approach shares a great deal with the doctrinal approach in its treatment of law as value-free and autonomous, but is more wide-ranging in its complete epistemological recasting of law as a science, and its resolution of legal problems through scientific axioms, logics and formulas. Law is discoverable by means of deductive reasoning and works much like an experiment in which the rules (understood as fixed, reliable) are applied to the facts (the variable factor) in order to automatically arrive at a conclusion or answer. The business/corporatist model, an effect of the rising hegemony of neoliberal capitalism and seen from the rising enrolments in the BCom LLB study route, views law as subordinate to, and as a tool of economics/the economic system. Law in the business/corporatist model functions primarily to facilitate commercial transactions and to support economic growth in line with the demands of trade, industry, commerce/banking, technology, labour and investment. Law is considered a subcategory within the discipline of economic and management studies as it is represented as a mechanism to control debt and as a tool to regulate the relationship between economic actors in order to aid in the efficiency of the market. Each of these three approaches, in turn, constructs an approach to legal education and legal reasoning coterminous with its purposes and ideological assumptions about law.

On the contrary, humanities-inflected approaches to law and thus legal education adopt a more expansive and imaginative conception of what 'reading' entails and what a legal 'text' is; it thinks and writes in ways that are non- or even anti-scientific, suspending science as the exclusive model for knowing, and it rejects the annexation of law to the priorities of economics and business. Concerned with the analogous reduction of political theory into political science, Brown (2010) describes aspects of humanities modes of inquiry that illustrate their explicitly non-scientific, non-doctrinal and non-corporatist character.

As Brown (2010: 682) tells us, humanities modes of inquiry seek to reckon with the complex historicity of all life forms; insist on epistemological reflexivity and critique; are deeply cognisant of the constitutive power and indeterminacy of language, and are internally aware of the contingent and culturally variable nature of the categories and terms we use to organise knowledge in our disciplines. Furthermore, they are concerned with upending and bringing to light both the presence and workings of subterranean social powers of, among

other aspects, race, class, and gender. At the level of reading and interpretation, humanities techniques seek to apprehend meanings beyond their surface, whether conscious or unconscious, explicit or disavowed. At the level of history, humanities thinking conceives of history not in terms of development or timeline, but in terms of the weight of history on the present, its power to configure the present. Where science presumes stability and neutrality, the humanities seeks out manifest powers and meanings, deconstructs sedimented and taken-for-granted terms and grammars, and probes inconsistencies and exclusions in how legality or politics or other forms of life and knowledge are framed and conceived (Brown 2010: 682). For Brown, the insurgent value of humanities approaches lies precisely in how they differ markedly from the protocols of business, science and doctrinalism, and move along completely different axes of analysis, employ different vocabularies, styles of inquiry and angles of vision, bringing into view hitherto unseen or suppressed dimensions and domains of inquiry. To the extent that these styles and approaches have been influential in the development of critical legal theory, they should also inform the teaching of law from a critical perspective.

From this perspective, an approach to law rooted in the humanities or rather an approach to law that acknowledges law's already-existing historical roots in the humanities promises to overcome the closures and silences generated by orthodox and traditional theories and approaches and, in this way, could imbue in students at least a wider sense (and sensibility) of inquiry and transgression. It could, in this way, disclose "a justice of the future" (Ronell 1992)

4. Conclusion

In this article, I have contested a reading of the crisis in legal education as being primarily one of a failure in producing a productive workforce for the private legal profession – a view, which more broadly reduces universities into factories whose sole purpose must be the mass production of efficient and effective participants in the market. Not only does such a reading of the 'crisis' effectively render legal academics accountable to the demands of the State and market, it also more problematically overshadows the much deeper, more troubling problems facing law, legal study and jurisprudence in post-apartheid South African universities. These problems include the racialised, gendered and Eurocentric order of knowledge that still subsists in most curricula; the problem of institutional racism and lack of transformation, and the rising corporatisation and privatisation of higher education, to name a few.

I suggested that the source of the crises in legal education, in particular, can be encapsulated in Douzinas & Gearey's narration of certain developments

within legal theory in which the meaning of law, originally rooted in a continuous concern with justice and the common good (a general jurisprudence), was truncated and deflated and came to refer solely to the positive law (restricted jurisprudence). I then traced the etymological relationship between crisis and critique to argue for a critical legal education in response to the many crises facing legal education, drawing in particular from critical theoretical traditions in the disciplines of both law and education. Briefly, a critical legal education would signify the return to a general jurisprudence, where questions about the law of law, the conscience of law, and law's role within the social would stand central. In challenging traditional/conservative approaches to law and legal education, and reaching beyond and through the disciplinary boundaries of law, it would also continually affirm new emancipatory possibilities and radical alternatives against the *status quo*. While I only briefly sketched a picture of a critical legal education, one aspect that was highlighted was the inseparability of a critical legal education from a conception of law as a humanities discipline – and it was here that I suggested that such a humanities-oriented approach to legal pedagogy would simultaneously demand a certain humility and radical openness on the part of judges, lawyers, legal academics and law students in embracing the epistemological, political and conceptual transformation of the law. I recall Negri's statement that "it is jurisprudence, ultimately that creates law", in order to underscore the argument that the problems of legal education are inherently linked to the quest for a post-apartheid *jurisprudence* (Deleuze 1995: 169).

It is tempting to end on this note, but doing so would leave part of the spirit of this article unheard. As the title itself indicates, I have throughout this article framed our failures as law teachers in terms of a narrative of a plurality of 'crises' – a narrative that could be challenged for its hyperbolic or melodramatic character or even for its nihilism. However, given the earlier treatment of critique's etymological roots, my reference to crisis is not meant to only connote upheaval, catastrophe and calamity. On the contrary, a crisis is a decisive moment/a moment of decision and as such it is an occasion for reflection, judgement and action. The crises in legal education are themselves a confluence of the violence and disciplinarity of the law, the conservatism of our formalist legal culture, the disenchantment of law students and teachers, the neoliberalisation of knowledge, the corporatisation of the university, the erosion of an active, democratic public sphere, the maintenance and legitimisation of inequality, misery and powerlessness, and the deeply entrenched supremacy of Western epistemological paradigms. Paradoxically, as Brown (2011: 36) makes clear, in order to combat and interrupt all of these contemporary crises that we face, we would need to *antecedently* become what only a good quality, critical education can make us into. While this is a paradox that appears intractable, we

cannot afford not to act for equality, freedom and justice, among the many ideals a progressive lawyer should aspire to, and we cannot survive without people who are educated, critical, culturally and socially literate, thoughtful and democratic in character (Brown 2011: 36).

For apart from inquiry, [...] individuals cannot be truly human. Knowledge emerges only through invention and re-invention, through the restless, impatient, continuing, hopeful inquiry human beings pursue in the world, with the world, and with each other (Freire 1970: 72).

Bibliography

- ARENDT H (1961) *Between past and future: eight exercises in political thought*. New York: Penguin Books.
- BALKIN J & S LEVINSON (2006) *Law and the humanities: an uneasy relationship*. *Yale Journal of Law and the Humanities* 18: 155–87.
- BOYD WHITE J (1973) *The legal imagination*. Chicago: University of Chicago Press.
- BOYD WHITE J (2000) *From expectation to experience: essays in law and legal education*. Ann Arbor, MI: University of Michigan Press.
- BOTHA H (2000) Civic republicanism and legal education. *Codicillus* 41: 23–31.
- BROWN W (2005) *Edgework: critical essays in knowledge and politics*. Princeton, NJ: Princeton University Press.
- BROWN W (2010) Political theory is not a luxury: a response to Timothy Kaufman-Osborn's "political theory as a profession". *Political Research Quarterly* 63(3): 680–5.
- BROWN W (2011) The end of educated democracy. *Representations* 116: 19–41.
- CAMISS S & D WATKINS (2013) Legal research in the humanities. In: Watkins D and Burton M (eds) *Research methods in law*. Abingdon: Routledge, pp. 71–84.
- CORNELL D (1993) *Transformations: recollective imagination and sexual difference*. New York: Routledge.
- COWNIE F (2004) *Legal academics: culture and identities*. Oxford: Hart Publishing.
- DARDER A, M BALTODANO & R D TORRES (EDS)
(2009) *The critical pedagogy reader*. New York: Routledge.
- DELEUZE G (1995) *Negotiations 1972–1990*. Transl M Joughan. New York: Columbia University Press.
- DICKER L (2013) The 2013 LLB summit. *The Advocate* August 2013: 15–20.
- DLAMINI C R M (1992) The law teacher, the law student and legal education in South Africa. *South African Law Journal* 109: 595–610.
- DOUZINAS C & A GEAREY (2005) *Critical jurisprudence: the political philosophy of justice*. Oxford: Hart Publishing.
- DOUZINAS C, R WARRINGTON & S McVEIGH (1993) *Postmodern justice: the law of texts in the texts of law*. London: Routledge.
- DUGARD J (1971) The judicial process, positivism and civil liberty. *South African Law Journal* 88: 181–200.

- FITZPATRICK P (2001) *Modernism and the grounds of law*. Cambridge: Cambridge University Press.
- FITZPATRICK P & P TUITT (EDS) (2004) *Critical beings: law, nation and the global subject*. Surrey: Ashgate.
- FREIRE P (1970) *Pedagogy of the oppressed*. New York: Herder and Herder.
- FREIRE P (1973) *Education for critical consciousness*. New York: Continuum Publishing.
- FREIRE P (1985) *The politics of education: culture, power, and liberation*. Westport, CT: Greenwood Publishing.
- FREIRE P (1998) *Pedagogy of freedom*. Larnham: Rowman & Littlefield.
- FRUG G (1998) A critical theory of law. *Legal Education Review* 1: 43-58.
- Giroux H (1988) *Teachers as intellectuals: toward a critical pedagogy of learning*. Westport, CT: Bergin & Garvey Publishers.
- GREENBAUM L (2012) Current issues in legal education: a comparative review. *Stellenbosch Law Review* 23: 16-39.
- HARRIS A (2007) Teaching the tensions. *St Louis University Law Journal* 54: 739-54.
- HARRIS A P & M J SHULTZ (1993) A(nother) critique of pure reason: toward civic virtue in legal education. *Stanford Law Review* 45: 1773-805.
- HOOKS B (1994) *Teaching to transgress: education as the practice of freedom*. New York: Routledge.
- HOOKS B (2003) *Teaching community: a pedagogy of hope*. New York: Routledge.
- HOOKS B (2010) *Teaching critical thinking: practical wisdom*. New York: Routledge.
- KENNEDY D (1976) Form and substance in private law adjudication. *Harvard Law Review* 89: 1685-778.
- KENNEDY D (1982) Legal education and the reproduction of hierarchy. *Journal of Legal Education* 32: 591-615.
- KINCHELOE J (2008) *Knowledge and critical pedagogy: an introduction*. Springer.
- KINCHELOE J & P MCLAREN (EDS) (2007) *Critical pedagogy: where are we now*. New York: Peter Lang Publishing.
- KLARE K E (1998) Legal culture and transformative constitutionalism. *South African Journal on Human Rights* 14: 146-88.
- MADLINGOZI T (2006) Legal academics and progressive politics in South Africa: moving beyond the ivory tower. *PULP Fictions* 2: 5-24.

- MODIRI J M (2013) Transformation, tension and transgression: reflections on the culture and ideology of South African legal education. *Stellenbosch Law Review* 24(3): 455-79.
- MOTHA S & K VAN MARLE (2013) Introduction. In: Van Marle K and Motha S (eds) *Genres of critique: law, aesthetics and liminality*. Stellenbosch: SUN Press, pp. 17-30.
- PAVLICH G (2013) Dissociative grammar or constitutional critique? In: Van Marle K and Motha S (eds) *Genres of critique: law, aesthetics and liminality*. Stellenbosch: SUN Press, pp. 31-48.
- QUINOT G (2012) Transformative legal education. *South African Law Journal* 129: 411-33.
- RAMOSE M (2001) An African perspective on justice and race. Polylog <<http://them.polylog.org/3/frm-en.htm>>
- RAMOSE M (2007) In memoriam: sovereignty and the 'new' South Africa. *Griffith Law Review* 16: 310-29.
- RAMOSE M (2012) Reconciliation and reconfiliation in South Africa. *Journal on African Philosophy* 5: 20-39.
- RONELL A (1992) *Crack wars: literature addiction mania*. Lincoln, NE: University of Nebraska Press.
- SANTOS B (2014) *Epistemologies of the South: justice against epistemicide*. Boulders, CO: Paradigm Publishers.
- SARAT A, M ANDERSON & C O FRANK (EDS) (2010) Introduction: on the origins and prospects of a humanistic study of law. In: Sarat A, Anderson M and Frank C O (eds) *Law and the humanities: an introduction*. New York: Cambridge University Press, pp. 1-46.
- SEDUTLA M (2013). LLB summit: legal education in crisis. *De Rebus* July 2013: 8-10.
- SHOR I (1987) *Critical teaching and everyday life*. Chicago: University of Chicago Press.
- SHOR I (1992) *Empowering education: critical teaching for social change*. Chicago: University of Chicago Press.
- SIBANDA S (2011) Not purpose-made: transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty. *Stellenbosch Law Review* 22: 482-500.
- UNGER R (1986) *The critical legal studies movement*. Cambridge, MA: Harvard University Press.
- VALDES F (2003) Outsider jurisprudence, critical pedagogy and social justice activism: marking the stirrings of critical legal education. *Asian Law Journal* 10: 65-96.

- VAN MARLE K (2014) Abandoning certitudes, becoming human – for a jurisprudence of generosity: an essay in tribute to the work of Albie Sachs. In: Cornell D, Van Marle K and Sachs A (eds) *Albie Sachs and transformation in South Africa - From revolutionary activist to Constitutional Court judge*. Oxford: Birkbeck Law Press, pp. 49-74.
- VAN MARLE K & J MODIRI (2012) 'What does changing the world entail?' Law, critique and legal education in the time of post-apartheid. *South African Law Journal* 129: 2019-219.
- WILLIAMS P (1991) *The alchemy of race and rights: diary of a law professor*. Cambridge, MA: Harvard University Press.