



Legal educators – the peddler of precedent, the skill builder and the socially conscious knowledge generator

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The time is ripe to encourage law teachers to evaluate their individual subjective views of the law before embarking on another study of best-suited methodologies for modular teaching. This article does not aim to entertain the various methodologies of legal education in order to determine a *best-fit* or *fit-for-purpose* standard of legal teaching. It rather examines the epistemological importance of the law teacher's intrinsic view of law, and its translation in legal education, thereby recognising the continuous transformation of exploratory educational discourse. The article purports that the personal views of law held by a law teacher are expressed in the way law is interpreted and articulated to students. In illustration of the above premise, we refer to three general types of law teacher. The first type honours the positive law, thereby preserving the recognition of contextualised doctrinal institutions of the law. The second, and most sought after in the contemporary context, prizes applied skill as a commodity necessary for practice. The third type augments teaching philosophy with social responsibility and therein the pursuit of *good* justice. We conclude that all three types have advantages and challenges. However, South Africa, as a plural society, requires law teachers who acknowledge that law has a social mandate and that the knowledge they instil must be fused with social consciousness in order for students to contribute to both society and the development of law as a professional discipline.

The directive for this volume of *Acta Academica* centres on the supposition that law has a social agenda and a desire to be transformative or reformative.¹ As law teachers, this brief brings Shaw's (1955: 5) words to mind²:

I will not pretend that the modern actor-manager's talent as player can in the nature of things be often associated with exceptional critical insight. As a rule, by the time a manager has experience enough to make him as safe a judge of plays as a Bond Street dealer is of pictures, he begins to be thrown out in his calculations by the slow but constant change of public taste, and by his own growing conservatism.

Shaw demonstrates the two challenges of engaging in reflective practice. First, law teachers are formed over time by their experiences, whether practical or academic, and as such are subject to the ebb and flow of changing demands of law-school graduates and the organised profession. Secondly, experience is a creature of hindsight and by the time experience has refined the views of a law teacher towards his profession, he may find himself miles from his point of departure. Shaw's "growing conservatism" is evident, for example, in the approach both authors encourage to the reading of law. This conservatism is, however, tempered with the ideals inherent in a socially conscious approach to law. Each type of law teacher instructs a student in a particular manner and with a particular legal attitude in mind. Stated differently: *what* we teach is often a measure of the *way* we teach. The substance of our teaching has a profound effect on the formation of law graduates. Traditionally, law teachers were viewed as the bridge between the reading of law and its practice. It is, however, trite that this traditional approach has not produced the required results, namely law graduates who can work and engage independently and thus contribute meaningfully to employers and to the needs of those requiring legal services. The quality of students entering law schools now demands that we engage with our students in a manner which informs their views of legal culture and tradition – this is a far stretch from simply facilitating rote learning. In turn, this form of legal education requires that law

- 1 The following submission is inspired to a great extent by the work "Lighthouse no good" (Prosser 1948: 1017-31). Prosser demonstrated, albeit from an American perspective, that the role and, more specifically, the inherent nature and extra-legal formation of legal educators, have a wide-reaching impact on the type of legal counsel law schools produce. The submission hereunder extends Prosser's views and applies them to the South African context.
- 2 Both authors are law teachers at South African universities and both have had previous experience of working in, and fulfilling managerial roles at a university law clinic. This experience informs most of this submission and is used as a basis to offer an internal view of the challenges facing law teachers in South Africa.

teachers examine their personal views of law, legal culture and legal tradition.³ In agreement with Petersen & Osman (2013: 14), in their explanation of “critical social theory” as “[the provision of] a basis for social enquiry”, we equate the law teacher’s individual understanding of how the law functions, the value it holds in society, and the manner in which it is implemented to a position of formation – it informs what we teach and reflects our individual dispositional bias which is, in turn, reflected in the classroom. Each one of us approaches the teaching of law with an agenda – whether it is indecisive or certain in nature, often informed by our own teachers and legal experiences. In our experience as South African law students, law teachers and legal practitioners, law faculties are generally staffed by three types of law teacher, which we analyse hereunder.⁴ We demonstrate the impact of legal education on law graduates who inevitably form the final product of the system we call academic scholarship.

1. The peddler of precedent

This educational prototype is the peddler of precedent. This teacher suggests

the resolution of questions today in the same manner as they were decided yesterday, either because it is convenient to do so or because it is a means of profiting from the accumulated wisdom of the past, or because it ensures certainty, or for no better reason than that of honouring tradition (Hosten et al. 1995: 386).

Whilst all but the first reason for this method of teaching are admirable, one must question a methodology which forces acquiescence to the decisions of the past with no independent inquiry of the contemporary application or justness thereof. Even when the aim is solely to teach the *principle* of precedent, the teacher must structure his teaching to incorporate deliberation on the *value* of precedent, allowing the student to share in understanding the *relevance* of the precedent and possibly promoting an *appreciation* which justifies contemporary *application* thereof. Hahlo & Kahn (1968: 595) quote Lord Cooper of Culross: “When the architects of a legal system are looking around for new material with which to fill in the blanks in their native legal philosophy, it matters little where the chosen principles originated, provided they are capable of being usefully adapted to meet the needs of the situation”. Similarly, we submit, the peddler of precedent

3 To contextualise: we can no longer teach from the pages of a book or statute without questioning or exploring the origin, content and social relevance of the law. In this, we expose our personal views, ideals, morals and, in some instances, prejudices, which, in turn, affect our students.

4 The types we suggest are not constant. They are found in isolation, and in combination and often law teachers shift between extremes.

seeks old methods to make new as opposed to seeking alternative methods to the recreation of the law. Teaching law without succeeding in facilitating the student's understanding of the relevance of what we teach is tantamount to jeopardising the underlying legitimacy of the teaching. The result of such teaching causes the student to disassociate with the precedent. It further teaches coercive obedience to unilateral interpretations of positive law. The teaching of law and the nature of legally binding agreements have this in common: "The general rule is that acceptance of an offer must reach the mind of the offeror" (Hahlo & Kahn 1968: 34). We submit that focusing teaching exclusively on doctrine fails to reach the mind of the offeree and only succeeds in satisfying the mind of the offeror (in this instance, the law teacher). This law teacher is self-congratulatory in his ability to inculcate legal concepts in students without any question of their meaning in the minds of a classroom composed of a plural population. The job of teaching is done, and done well, for this teacher where the student can cite the precedent in both formative and summative assessment.

However, Hahlo & Kahn (1968: 36) cite Frank who disputes this method with the submission that

Even in a relatively static society, men have never been able to construct a comprehensive, eternized set of rules anticipating all possible legal disputes and settling them in advance [...] How much less is such a frozen legal system possible in modern times [...] The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions. [...] Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.

The hybrid nature of the South African legal system, specifically in criminal procedure and evidence, is essential to the fortification of adjectival process, and yet the constitutional court has not hesitated to develop legal formalism to conform to the prevailing needs of society. This is no more evident than in, for example, the constitutional case of *S v Makwanyane* (1995 (2) SACR 1 (CC)) and many other instances thereafter.⁵ Some precedent teachers, however, suffer the illusion of *stare decisis et non quieta movere* and inevitably teach, especially in adjectival subjects, that law is an end-based pursuit applied to the

5 For example, *S v Williams and Others* 1995 (2) SACR 251 (CC), *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), *Soobramoney V Minister of Health (Kwazulu-Natal)* 1998 (1) SA 756 (CC) and *Le Roux and Others v Dey* 2011 (3) SA 274 CC.

merits of the individual case. This method fails to relate the individual relief as being applicable to the advancement of social transformation. In this system of teaching, the student does not learn that legal disputes in practice are the symptoms of social disharmony and thus does not recognise that law is more than a piecemeal solution to individual legal dispute. Kairys notes that “[s]tare decisis is so integral to legal thinking and education that it becomes internalized by people trained in the law, and its social role and ideological content become blurred and invisible” (as referred to in Van Blerk 1998: 160). In essence, this is the flaw in teaching exclusively through precedent. The challenge with precedent teaching in adjectival subjects, specifically in the new South Africa, is that “equity [no longer] follows the law”, but rather law follows equity, where equity is a corrective concept based on human rights concerns as opposed to strict formalism (Du Plessis 1993: 70). This type of teacher cannot be criticised based on individual intention, but rather for over-reliance on a teaching tradition, better suited for legal realism than philosophy.

The effect of habitual positive teaching is that the student is informed merely of what the law is, and any notion of justice or morality is separated from doctrine so as to arrive at a principle of law or method of procedure. The method cannot be criticised for its reliance on the doctrinal law, but rather for its inability to recognise that positive law arises from the interaction of law and man, which harks back to the functional theory of the rule of law as opposed to the rule by law.

The precedential teaching of legal instruction is dangerous, because it requires no more than the reading and assimilation of various tracts, treaties, cases and legislative instruments which are assessed using a formative method which asks only ‘What is the law?’. The teacher serves as the canonical gatekeeper and not the catalyst of reformation. Without social context, the law is taught using what we consider to be antedated. The student in this exercise is likely to have a faulty assumption that the teacher is the font of knowledge and that the production of new knowledge or the challenging of existing knowledge is better left to those who sit on wooden benches, in sandstone courts, clothed in the surety of robes of higher office. The teacher never asks the student to consider what elevated the higher echelon to that position nor to challenge the correctness of legal authority issued from the hallowed grounds of the court. The teacher of precedent does not advocate for social change, because the law is viewed as an internal locus of control, which has no relevance to social condition or culture. Law is what it is and cannot be altered without following the recipe of legal authority and rules, which plague doctrinal law. In the words of Langa J (2006: 357) with which the authors concur: “It is when adherence to the word is taken too far, when the upholding of a law obscures or ignores that law exists to try, however difficult, to ensure justice,

that formalism becomes dangerous. It is this type of conservative or formalist approach to law that is inconsistent with a transformative Constitution.”

On a less critical note, the positive aspect of the precedent teacher lies in his provision of a framework, which seeks to limit the possibility of error and arbitrary use of state power. The precedent teacher is thus demonstrative of Hart’s theory of law as rules that seek to protect law and democracy from individual acts, or omission, which cause harm to the collective (Van Blerk 1998: 21). The precedent teacher, however, insists that formalism serves the purpose of stabilising any effort of legal reform which, although essentially true, fails to establish whether such reform has a restorative or transformative nature.

2. The skill builder

The doctrinal law teacher is the target of a great deal of the criticism levelled at legal education from both the student population and the organised profession. The general outcry raised against the doctrinal teacher is that s/he fails to impart practical skills in teaching law. Whilst “many [...] traditional law courses [...] make inroads in instilling [...] skills [...] they are almost a by-product of the course content and are not focused on or assessed” (Bezuidenhout in her criticism of Condlin 2010: 56). In doctrinal teaching, skills are “ancillary as opposed to fundamental” (Marson et al. 2005: 37).

A skill builder begins the process of legal moulding from a foundation of doctrine and thereafter advances skills specific to legal practice. This teacher ultimately asks whether the student can ‘do’ as opposed to deconstruct and develop. However, the skill builder soon encounters the problem of the damage of legal categorisation. Chambliss & Seidman (Hosten et al. 1995: 538) posit the following: “[P]rofessional lawyers [and in our submission law teachers] proceed from the assumption that the *prescriptions* reflected in legal rules are in fact *descriptions* of phenomena in the real world”.

The disadvantage of this type of learning in isolation is, however, obvious. The teaching of law is modelled on the practice of law, and skill builders encourage law students to do like lawyers and not to “think like lawyers” (Hosten et al. 1995: 540). This relationship is one of inequality. Whilst formalism cannot be abandoned completely, it results in students who cannot engage with the social context of their own communities or with the authoritarian figure of the law teacher who leads them, inexorably in a lecture-style teaching setting, into legal indoctrination. Take, for example, the average course in the law of criminal procedure or the law of evidence. Both are systems, which labour under the misconception that the rule is king and that mechanical application will always produce a certain outcome. This is, however, not

the reality. The skill teacher teaches adjectival principles without examining the value of the values inherent in the normative principles. This type of law teacher develops career professionals – practitioners who can make a living (and, in most instances, a name) out of the law by solving basic legal problems and the demands of individual clients. This product of legal education utters the terms and phrases of law without reference to the law as a social tool which is expected to benefit and improve society as a collective.

The student is imbued by the skill teacher with selective practice skills (usually at a bare minimum level), but is rarely challenged on his understanding of the jurisprudence or legitimacy of each case in which these skills are put to practical use. The skill teacher works to develop the student to both contribute to, and survive in the economy. The skill teacher develops economically independent practitioners – in essence, this results in the old argument of teaching students to be jurists or legal mechanics.

Unlike the precedent teacher, the skill builder usually has a better method of relation to the students, due to the informality of legal skills training and because students are often attracted to courses which instruct them on how to perform a lawyer's work. Although this is to be encouraged, it can lead to a situation where the student idealises the teacher to the degree where no independent thought or action is created or required. The world is viewed through the eyes of the skill builder who convinces the student that entering legal practice without higher level skill is tantamount to career suicide. In addition, the skill teacher teaches from the perspective of his field of law, which is a limited view within the entire scope of the legal system. Once the student enters legal practice, however, the view created of skills and practical training is destroyed by the rigors of practice and the often contrary views of practitioners who require different skills to be applied in different cases, which are not always within the student's skills base. This is the consequence of teaching from pro-forma templates that serve to teach skills in a singular manner. This results in the perpetuation of the idea that a university education in law is flawed, because it does not produce a practice-ready and economically self-reliant practitioner.

However, where the skill builder is open and honest with the student from inception of training and through critical examination of the study material, a relationship of mutual knowledge and trust is established (Nicholson 2005: 61). This type of relationship further bodes well for lifelong learning, in that a student who returns for postgraduate study will gravitate towards a teacher with whom a relationship of trust was previously established.

3. The knowledge generator

The pluralistic nature of the South African polity demands that knowledge be generated to answer the questions of legal dispute, more specifically those posed by transformative constitutionalism. The answer sought is, however, often 'different' from the traditional conservatism of schools of law. Equating this to teaching, we adopt what Taylor (quoted in Osman & Petersen 2013: 191) describes as a "transformative learning theory". To the latter author, "Learning, in the sphere of transformative learning, happens when prior interpretations are used to help construct new interpretations of experiences in order to guide future action". The knowledge generator does not teach a student that laws provide certain answers, but rather instils a desire to challenge existing knowledge schemas, thereby dismantling the shackles of doctrinal law, which is not a panacea for the social ills facing South Africa, the subcontinent and Africa. This teacher is fundamentally a believer in "social re-constructionism", which Osman & Petersen (2013: 237) explain as a "philosophy or ideology which looks at the role of education as a means of reconstructing society".

This teacher acknowledges that the reading of law must include four pedagogic characteristics, namely formalism, functionalism, realism, and social justice. This teacher does not disregard formalism, but sees it for what it is – the foundation on which to encourage activism as opposed to re-activism. Functionalism incorporates 'skills', but requires that these applied competencies be put to better use than application in a few well-chosen, law-clinic cases or in a once-off moot/mock court. Realism forces law students to engage in critical discussion affecting the legal system in the South African and African context. Embedded in this approach to teaching is the automatic creation of a "transformative learning space" where critical discussion is essential (Osman & Petersen 2013: 237). It requires that 'law' be interpreted from a socially conscious perspective – not the contexts prescribed by so many of South Africa's western ideological approaches, but from a standpoint that takes into account the 'africanisation' of both law and legal society. Realism is, however, tinged with the expectation that the law teacher, in teaching the student to generate knowledge, will not avoid critical and often sensitive social issues. The final ingredient in the knowledge generator's cache is social justice. Social or distributive justice is part of the economic and political agenda of the law. Social justice does not require that the rich give to the poor, but rather that each pole of the equation acknowledges the rights and duties of the other. Within it, the law teacher is required to scaffold teaching from the bare basics of formalism, through the demands of functionalism, over the challenges of realism and ultimately arrive at the point where the students operate within a social values system that uses law as a social tool rather than an economic weapon.

The knowledge generator does not expect rote learning, but rather encourages students to challenge existing knowledge frameworks within the bounds of reason and rationality. The knowledge generator teaches that law is both a sword and a shield that can be used effectively in both guises through the operation of the same rules of formalism demanded by the doctrinal teacher. The sword function is a negative operative, since it is used when an infringement of the law has already occurred. As a shield, it is used to protect against infringement of both fundamental human rights and the due process of systemic justice. The sword is thus retributive, whereas the shield is restorative. Naturally, this approach to teaching requires the student to understand the values within which the entire legal system operates. These values – whether expressed constitutionally or doctrinally – are the basis of every legal module of instruction. Using criminal law, procedure and evidence as examples, the knowledge generator does not simply teach the *nullem poena* doctrine, but instead encapsulates the principle into a discussion of the rule of law or perhaps the adjective habits of legality. The student is thus able to ‘see’ that section 35(3)(l) of the Constitution has both an adjectival nature (formalism), which operates functionally to prevent the infringement of basic legal rights that realistically can occur in any legal system, and therein grasps the concept of social justice or, more specifically, social interconnectedness. When the law teacher links this approach to a specific remedy of law, such as, for example, the writ of *habeas corpus*, antiquated and inarticulate concepts have a contextualised meaning to the student and his social reference system. This approach does not detract from the ability of the student to ultimately enter practice and make an economic success, but instils within the responsibility to use the law as both sword and shield. Using Raz’s sharp-knife analogy, the knowledge generator demands that students, whether intending to litigate or to enter commercial practice, acknowledge the power of the law to both harm and heal. In this context, the law teacher is not an educator, but rather an agitator.

4. Conclusion

The law teacher elevates the teaching of law to his understanding of the law through method and use (Bezuidenhout 2010: 40). From the above, it is apparent that the law teacher cannot escape the banal terminological descriptions of methodological requirement. That being said, however, we submit that the teaching of law is not a methodology, but rather an obligatory epistemology, which requires the teacher, as the centre of the process, to acknowledge that traditional teaching, followed by summative and formative assessment, is insufficient within the requirements of the social agenda within which we find ourselves on the continent. What we discussed in the first and second

metaphorical approach is not what the law teacher ought to be. This submission is based on the fact that we serve a greater purpose than merely legal education. Is it not time to acknowledge that law teachers themselves must have the internal make-up to rise above method and instil the drive towards the improvement and development of society by producing students capable of affecting such? After all, “public responsibility resounds in different educational aims [...] and is often termed as civic responsibility” (Bezuidenhout 2010: 50). Universities play an integrated role within society (Rosseeel 2005: 229). Part of the obligation placed on the law teacher’s shoulders is to develop the law and therein teach it as it is capable of being.

We must, however, be mindful that the entire weight of the system cannot be placed at the feet of the law teacher. A student enters the reading of law with a specific mindset to both the field of study and legal educators. We do not wish to address the shortcomings of secondary education or the economic gulf between privileged and underprivileged students, short of saying that we inherit students in law who are short on both cognitive and conative skills and the ability to reason logically. Coupled with this situation is the innate sensitivity of students and faculty to what is said and how it is said in a classroom situation. It is illogical to suggest that all law teachers and all law students embrace all of the values and freedoms in the Constitution. This disjoint can contribute negatively to the realism of the knowledge generator’s style of teaching. More importantly, should the law teacher encourage the students to discuss their personal views and opinions in an open forum? It is fanciful to think that the law teacher could simply teach the provisions of the law and keep opinions out of the classroom. As much as positivists believe that law and politics can be neatly divided, the reality is that law and politics are so entangled that the division is arbitrary to argue, let alone to aver. The answer, we suspect, can be found in reflecting on the degree to which law teachers believe or assimilate the constitutional values they are required to teach. However, this process requires honesty, openness, and a non-discriminatory forum. This ‘safe place’, we submit, is not too often found, even within the halls of academic freedom. Within this, the law teacher has an obligation, albeit moral or legal, to develop the student as received and not to force the student into a pre-conceived subjective ideal legal practitioner. The aim of teaching law should be to acknowledge that law students are part of the development of law and not the observers of the machinery of justice. Facilitating the students’ sharing of perspective is a valuable teaching tool in, and of itself. This process requires reason and logic, not the application of the majority rules principle, in determining both what law should be, and what purpose it should serve. Where early law schools were places of discussion and debate among faculty and student, contemporary law schools are focused on institutionalised, impersonal knowledge for the sake of producing graduates

that can fill the market demand as well as the 'business of graduation'. Unfortunately, 20 years into democracy, we fail to acknowledge the right of student participation. We feign acknowledgment of the student as an individual, with a specific social context, and we placate the student with teaching legal subjects in a manner, which appears *prima facie* to embrace personhood and humanity. The truth of the matter behind the closed doors of many a faculty is, however, that law teachers are themselves unsure of how to challenge the social issues facing their students and the population as a whole. The teaching of law vacillates between schools of thought; in the methodological debate, we lose sight of the faces that confront us both in the classroom and in our faculty boards. In the words of Prossner (1948: 1017): "Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog come in just the same".

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