



Stop the illusory nonsense! Teaching transformative delict

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In this article, I provide a few thoughts on what it means to teach law, specifically 'law of delict', 'critically', as a response to conservative legal culture, which, I believe, currently prevails in South African legal education. By 'critically' I mean compliance with broad themes of critical legal theory, especially drawing from Critical Legal Studies (CLS) and its successive theoretical progeny (Feminist Legal Theory, Critical Race Theory and Queer Theory). I will tackle this project from the point of view that Klare's transformative constitutionalism is mandated by the Constitution, and that this theory is a South African manifestation of critique. Therefore, relying on specific aspects of transformative constitutionalism, I will highlight how we can teach delict in a constitutionally mandated transformative context by employing critical pedagogy.

If we are serious about social change grounded in law in South Africa, law teachers must consciously assume their role in the transformative project [...] I think that it is high time that we as law teachers start to ask critically what we are doing in our classes to further the cause of the [Constitution] (Quinot 2012: 432-3).

In my final year of undergraduate law, I was faced with a lecturer (whose subject was a semester-long course on a specific delict) who told the class that only he and Jesus Christ could obtain a distinction for “his” module. We were told that we would never obtain distinctions, because we lacked critical analysis skills. In a question in the final examination, requiring us to ‘critique the legal position’, I duly did so. I deconstructed the legal position in accordance with the basic principles of critical legal theory by illustrating the tension between individualism and altruism, and showed why the Constitution demands legal reform in this respect. Of course, I scored zero for the question. The memorandum for the question out of ten marks had twenty-five bullet points extracted from an article written by the same lecturer; the article frowns upon the current legal position because the “Constitutional Court failed to understand how the common law works”. To top it off, the memo ends off with “all twenty five of the above for full marks”.

I give this autobiographical sketch of frustration to make the point that, for most of my time spent at law school, I suffered from a bad bout of disenchantment. The belief in the neutrality, coherence and certainty of law, the veneration of legal formalism and positivism as well as the self-centredness (and self-worship) of law teachers led me to question the legitimacy of what the law school does in post-apartheid South Africa. For a student who is interested in the way that power operates in society, and who would like to see society change in a more substantively egalitarian direction, there is little, if any, scope for participation. “It is what it is” is a phrase that is ingrained in us from day one. The state of disenchantment in law schools is not a new phenomenon. Forty-four years ago, the American critical legal scholar Duncan Kennedy (1970: 71-91) wrote about why he believed the law school failed him and many others for mainly the same reasons as I extended earlier.

It is not a secret that legal education in South Africa has reached code-red status. At the brink of constitutional and political change, Dlamini (1992: 596-8) warned against “aimless teaching” which failed to give a voice to Black students and the Black community. I wonder to what extent we are still teaching aimlessly and failing to provide for the different voices in our law faculties. Not necessarily only the voices of Black people, but also those of women, homosexuals, leftists, and so on. Woolman et al. (1997: 44) blame the fact that students who arrive

at universities are underprepared and illiterate, and that the law schools lack resources to properly accommodate them. Godfrey (2009: 91-123) and Dednam (2012: 926-40) have provided a thorough overview of the skills and knowledge that law graduates lack. Kruuse (2012: 280-96) has criticised the current general method of teaching law as being too passive. Smith & Bauling (2013: 601-17) have evaluated the lack of political and self-transformation that law schools promote and have concluded that the majority of universities and law faculties have not yet decided what “graduateness” should mean. This is striking, as Professor Dlamini already warned us in 1992 about aimless teaching and not thinking carefully about where we are heading with our teaching. Modiri (2013: 458-9) goes a step further and tells us that legal education not only fails to prepare students for practice, but also promotes an “unjust and corrupt vision of social life”. The key question then remains: Why is very little changing in terms of how and what we teach?

The title of this article might come across as being too casual for the purposes of academic writing, throwing words such as ‘nonsense’ and ‘illusory’ around. The title is, however, not as aimless as the teaching of most lecturers of law. Kennedy (1982: 591) laments that the “dead” view of law that is taught in law schools is “nonsense”. It is nonsense in the sense that it gives an inaccurate and liberally biased account of law. Later, Kennedy (1983: 14) labelled the rationality and pure mechanical science of law as an “illusion”; a trick of the mind that allows us to forget about the social consequences of law for a while. A golden thread running through this article is the argument that our belief in the “illusory nonsense” needs to be brought to an end so that our method and content of teaching can be transformed. I hope to provide a few thoughts on what it means to teach law,¹ specifically ‘law of delict’,² ‘critically’, as a response to conservative legal culture,

1 I distance myself from the phraseology of “*the law*”, as it will become clear throughout this article that I do not view the law as objectively definite, determinate and certain.

2 Neethling & Potgieter (2010: 4) define law of delict as that part of law that regulates the private relationship between a delictual wrongdoer (who has conducted herself in a wrongful and culpable way that causes harm to another) and a victim (the sufferer of damage). Broadly speaking, delicts involve the causing of patrimonial loss, for example damaging or destroying another’s property, and non-patrimonial loss, for instance assault and defamation. This part of law does not concern itself with the criminal or penal aspects of wrongful conduct but rather fulfils a financially compensatory function between wrongdoer and victim (Neethling & Potgieter 2010: 6-7). Despite traditional legal analysis drawing a distinct line between criminal law (public relations) and law of delict (private relations), it is clear that a delict can often also constitute a crime. For example, spray-painting another person’s car may result in the payment of damages to the victim via delictual action, whereas it may simultaneously result in criminal sanction resulting from ‘malicious injury to property’. I will later show that this distinction between private and public law must be challenged. This is due to the fact that human rights and constitutional law are conventionally viewed as public law matters, while the Constitution of the Republic of South Africa (1996) (‘the Constitution’)

which, I believe, currently prevails in South African legal education. By ‘critical’ I mean compliance with broad themes of critical legal theory, especially drawing from Critical Legal Studies (CLS) and its successive theoretical progeny (Feminist Legal Theory, Critical Race Theory and Queer Theory). I will tackle this project from the point of view that Klare’s transformative constitutionalism is mandated by the Constitution (see Klare 1998: 146–88), and that this theory is a South African manifestation of critique (Van Marle 2009: 286–301). Therefore, relying on specific aspects of transformative constitutionalism, I will highlight how we can teach delict in a constitutionally mandated transformative context by employing critical pedagogy. It is my claim that, because the Constitution is the supreme law of South Africa and so applies to all law,³ and encompasses transformative constitutionalism, teachers of the law of delict (in fact, all law teachers) have the constitutional duty to teach their subjects in a transformative manner.

In light of the above, I even go a step further. As our democratic transition in South Africa involves crossing the bridge from a culture of authoritarianism to one of justification (Klare 1998: 147), we as law teachers need to recognise that the power we exercise through teaching law needs to be as equally well justified as the power exercised by the three arms of government. This involves not only carefully thinking about what and how we teach, but also substantiating to our students why we are teaching specific content through a specific method.

This article is structured around the general tenets of critical education, explained in light of transformative constitutionalism, with a non-exhaustive set of applied examples in law of delict. I rely, in part, on Van Marle’s proposal (2009: 288) that Klare’s “tension between freedom and constraint”, “acceptance of legal culture as normal” and “post-liberal reading of the constitution” are indicators that transformative constitutionalism is a type of critique. I take her ideas further and identify Klare’s recognition of “historical self-consciousness”, the “protection of vulnerable and victimised groups and identities” and “horizontality” as elements of critical legal theory. I will conclude this discussion with a few suggestions as to how we can ensure that the Constitution’s “development clauses” are thoroughly integrated into our method of teaching (Davis & Klare 2010: 410).

1. Tension between freedom and constraint

But judges still, and always will, confront the conflicting pulls and tensions (what we used to call ‘the dialectic’) of freedom and constraint (Klare 1998: 149).

demands the infiltration of the values of the Bill of Rights into private legal relationships.

3 Section 8(1) of the Constitution.

The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future (Kennedy 1976: 1685).

As a starting point for this section, Klare's thoughts on freedom and constraint probably originate from Kennedy's essay entitled *Freedom and constraint in adjudication: a critical phenomenology* (1986a: 518–62). Kennedy (1986a: 518) pinpoints a tension between "the law" and "how-I-want-to-come-out". In this context, Kennedy (1986a: 519) argues that, when we declare a decision to be "wrong", we are actually saying that the decision strikes a faulty balance between competing interests. But what exactly are these competing interests embedded in law?

Klare's (1998: 149) construction of the tension between freedom and constraint locates the "freedom" that judges (and I add, students and law teachers) experience in constitutional decision-making in the Constitution's many bendable provisions. The broad and ambiguous phrases found in the Constitution give noteworthy scope to judges to be innovative in their interpretative task.⁴ Klare (1998: 148–9) goes even further to suggest that a conscientious post-apartheid judge goes out of her way to forward the democratic ideals and values of the Constitution, in a strategic manner. This strategy is, however, not unconfined. On the contrary, Klare (1998: 149) notes the finding in the *Zuma* case, which stresses that judges cannot let the Constitution mean "whatever they want it to mean".⁵ This means that judges cannot be blind to the fact that they have a constraining text to work with, despite the lack of objectivity in such a text. At first glance, Klare's view seems to portray the American Legal Realist scepticism against the objectivity of rules, as rules are filled with "apparent and actual gaps, conflicting provisions, ambiguities and obscurities" (Klare 1998: 157).

However, I think Klare implicitly goes further than this. I construe Klare's tension between freedom and constraint as the realisation that each case presents a choice of two polar opposites: a choice in favour of the application of standards versus a choice in favour of the rigid application of rules. Following Kennedy (1976: 1685), the choice in favour of the standard correlates with the idea of altruism, whereas the choice in favour of rules sits comfortably in the domain of individualism. It is this irreconcilable difference between altruism and

4 See the examples mentioned by Botha (2005: 1) in the context of the interpretation of section 11 of the Constitution, which grants everyone the right to life. The question is: "Who is everyone?" Does "everyone" include a foetus, an attacker with intent to kill, and a person guilty of murder?

5 *S v Zuma* 1995 (4) BCLR 401 (CC) at paragraph 17.

individualism that the CLS movement has labelled as radical “indeterminacy” and “the fundamental contradiction” (Van Marle 2009: 288, Van Blerk 1996: 90-4). The indeterminacy thesis illustrates the political dualism that exists within the legal system, and shows that even the ‘blind’ application of rules, which is often incorrectly regarded as a neutral activity, is a political choice. That is, a political choice in favour of individualism as opposed to altruism. Individualism subscribes to self-reliance, rejects help of, and sharing with others and discards any type of obligation to sacrifice, without being completely egoistic (Kennedy 1976: 1713-6). Altruism, in contradistinction to individualism, embraces the ideas of sharing, distribution, sacrifice, mercy and not necessarily favouring one’s own interests over those of others, without being completely selfless and saint-like (Kennedy 1976: 1717-22).⁶ Let me illustrate this by means of an example.

Relying on Unger, Van Blerk (1996: 91) observes how rules and exceptions (and the underlying principles and counter-principles) usually also show the tension between the values of individualism and altruism: rules adhering to individualism, and altruism resounding with the exceptions to the rules. Therefore, if Kennedy and Unger are read together as critical legal scholars, it appears that both standards and exceptions to rules constitute that part of the law that opposes the rigid application of individualistic rules. To illustrate this claim, let us consider the ‘classical’ test for wrongfulness (Neethling & Potgieter 2010: 33).⁷ The first inquiry is to establish whether the defendant’s conduct objectively (wise after the event) infringed the plaintiff’s “legally recognised individual interest” (Neethling & Potgieter 2010: 33). Perhaps it is useful to formulate this first enquiry in terms of the articulation in *Tommie Meyer Films*.⁸ When a plaintiff’s subjective right has been infringed (that is, a plaintiff’s legally recognised interest) by the positive conduct of a defendant, such conduct is presumed to be wrongful (Neethling & Potgieter 2010: 45). To summarise: the first inquiry relates to the application of a general rule, which places a highly individual right at the forefront of the investigation. The second enquiry (after it has been shown that a legally recognised interest/subjective right has been infringed upon) involves the evaluation of the reasonableness of the infringement (Neethling & Potgieter 2010: 33). This criterion of reasonableness, as summarised and accepted in the influential case of *Carmichele*, is “determined

6 As an aside, it is interesting to note that Moseneke (2009: 12) characterised the Constitution’s transformative project as leaning towards the altruistic side of the scale.

7 By ‘classical’ I mean the test forwarded by Neethling & Potgieter (2010: 33), as opposed to the ‘new’ test formulated by Anton Fagan (which has since been applied by a number of Supreme Court of Appeal cases), which he supposedly mistranslated from the ‘proper’ Afrikaans definition of wrongfulness. For a full discussion on this issue, consult Neethling & Potgieter (2010: 78-82).

8 *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk 1977 4 SA 376 (T) 387.*

with reference to the legal perceptions of the community”.⁹ Translated into critical terms, reasonableness is the standard, which can act as the exception to the general rule of presumed wrongfulness in cases where an individual’s rights are infringed.

Practically, the interplay between these two legs of the enquiry involves the following. Once the plaintiff’s highly individualistic right has been infringed, the defendant must be at pains to formulate and prove reasonableness, which translates into a ground of justification (an exception to the general rule) such as private defence or necessity, and so on. In a particular case where wrongfulness is in dispute, the push-and-pull between the rights infringement (individualism) and the communal sense of the exception to the rule based on reasonableness (altruism) will often cause a great deal of uncertainty, unpredictability and, if you like, indeterminacy.

Even legal formalists such as Neethling and Potgieter, who are the leading textbook authors in this field, realise the flexibility of the grounds of justification. First, the grounds of justification are always subject to change, addition and subtraction (Neethling & Potgieter 2010: 93). Secondly, policy considerations have always roamed freely in the realms of grounds of justification (Van Aswegen 1993: 180). Under their discussion of the defence of necessity, for example, Neethling & Potgieter (2010: 94-8) provide nine “guidelines” for determining necessity. Not nine “elements” that can carefully, mechanically and scientifically be applied to a set of facts. *Just guidelines*. This reverberates with the sound of ‘standards’, and accordingly also social justice and altruism. If we further consider the definition of the defence of necessity, it is possible for a person to take heed of the interests of her fellow human being, by protecting them from imminent danger.¹⁰ The same basic idea applies to the defences called ‘private defence’ (where one can also protect the interest of another, but this time with the specific requirements that there must be an unlawful attack and the defence must be directed towards the attacker), “statutory authority”, “official command” and “official capacity”, which allow the police to protect the interests

9 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paragraph 42.

10 On the defence of necessity, see generally *S v Pretorius* 1975 (2) SA 85 (SWA); *Chetty v Minister of Police* 1976 (2) SA 450 (N); *S v Kibi* 1978 (4) SA 173 (E); *S v Adams* 1979 (4) SA 793 (T); *S v Adams, S v Werner* 1981 (1) SA 187 (A); *S v Bailey* 1982 (3) SA 772 (A); *George NO v Minister of Law and Order* 1987 (4) SA 222 (SE); *S v Mbanjwa and Others* 1988 (2) SA 738 (TkA); *S v Sixishe* 1992 (1) SACR 624 (CkA); *Robbertse v Minister van Veiligheid en Sekuriteit* 1997 (4) SA 168 (T); *S v Malan* 1998 (2) SACR 143 (C); *S v Lungile and Another* 1999 (2) SACR 597 (SCA); *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA); *Maimela and Another v Makhado Municipality and Another* 2011 (2) SACR 339 (SCA).

of civilians (see Neethling & Potgieter 2010: 82-116).¹¹ This community spiritedness of the defences seems to show a correlation with altruism. This altruism opposes the individualistic nature of the general rule of presumed wrongfulness detailed earlier. The irreconcilable nature of this political tension and the accompanying indeterminacy can and should be usefully employed by a teacher of delict to expose the impossibility of political neutrality in legal decisions.

If my explanation were to end here, the discussion would only be useful to show the true source of indeterminacy of rules and the fundamental contradiction. However, I am suggesting that we need to create the space for our students to realise that the less prominent side of the law (the community-oriented exceptions to the rules) could well be used to challenge the prominent position (the *status quo* which appears in the individualistic form of rules), similar to the sentiments expressed by Kennedy (1994: 87). This would create a more tolerant space for leftist students' voices to be heard, and for their views to receive academic recognition (Kennedy 1982: 594, 603, 1994: 86). Class discussions might easily be split into the two opposite poles of the fundamental contradiction (Kennedy 1994: 84), which, in turn, might go a significant distance in politicising the classroom. Harris (2010: 740) proffers a suggestion that the tension needs to be used in a way that students and teachers can situate themselves in the debate, but then not to fall into the trap of trying to resolve the tension. Once students and teachers debate and deliberate an issue with open minds, the ideals of civic republicanism and participatory democracy (at all levels) could be advanced (Botha 2000: 23-31).

Until now, the dominant voice in the law has been the liberal, formalist and individualist stance. Memoranda of tests and assignments are so rigidly formulated in veneration of the conservative tradition that no space for alternative argumentation is allowed, even in what many teachers may consider more difficult, grey areas such as the grounds of justification. What I am advocating is that open questions such as "Discuss the legal position" demand open memoranda. Different trains of thought (usually divided by the individualist/altruist line) need to be accompanied in our various forms of assessment (Kennedy 1976: 1723). Alternatively, we can set a question in a test and formulate class

11 A good example of a case of private defence where policy issues come forward is where a person kills another, for the sake of protecting property. This issue was dealt with in the case of *Ex parte Die Minister van Justisie: In re S v Van Wyk* 1967 1 SA 488 (A) where it was held that killing an attacker was the only reasonable way to protect the accused's property, and thus the private defence succeeded in this instance. This interaction between the rights to property and life might need to be re-evaluated in light of the Constitution. In this regard, see *S v Makwanyane* 1995 3 SA 391 (CC) 448-449.

discussions in such a way that students are specifically required to argue the case for the defendant, who is relying on a type of altruistic defence (Gordon 1989: 396). This will assist a process of requiring liberal and conservative students to confront their opinions and ideological commitments to individual rights, which also reflects the situation in legal practice that practitioners cannot always act for whoever has the strongest rights-based case (Kennedy 1994: 86-7). Perchance, if we force ourselves to argue a case with which we do not feel politically comfortable, we may just imagine a new way of thinking about a specific legal problem. The emphasis of Klare's argument (1998: 160) is after all on the fact that constraint can be overcome, in some instances, by uncovering a new outlook on legal materials to which we are accustomed.

Of course, I am not proposing that doctrine has become irrelevant. Kennedy (1985: 264) and Modiri (2013: 473) have emphasised that doctrine is of crucial importance. I am not, for example, saying that marks should be awarded when students, as they often do, provide the definition for necessity when they are clearly discussing private defence. I am not calling for a *free-for-all-everyone-gets-full-marks* approach. I simply want us to reconcile ourselves with the reality that rules are indeterminate and that there is no such thing as an objectively perfect answer in law. Consequently, our teaching, both in class and through our tests and assignments, must address the reality that conflicting positions are at least potentially relevant to all issues (Kennedy 1976: 1737). Once this is done, it will be possible for leftist students to realise how the law can be used to advance leftist aims in their exercise of legal practice (Unger 1983: 567), without legitimising the current conservative legal culture by participating in the slanted exercise of justifying the acceptability of all rules as they are (Kennedy 1985: 265). Gordon (1989: 397) condenses the advantages of teaching indeterminacy as the exposure of diversity and flexibility of rules, which can equip students with the necessary tools for adversary advocacy.

This leads us to the second critical aspect of Klare's work, namely the rejection of the devotion to conservative legal culture. In this discussion, I will build on my earlier arguments relating to the tension between the values of individualism and altruism, by showing how current law and legal education promotes hierarchy and amounts to training for conformity in the conservative system.

2. Refusing conservative legal culture

2.1 Klare on legal culture

[L]egal education causes legal hierarchy. Legal education supports it by analogy, provides it a general legitimising ideology by justifying the rules that underlie it, and provides it a particular ideology by mystifying legal reasoning (Kennedy 1982: 607).

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 (Van Marle & Modiri 2012: 212).

Klare classifies South African legal culture as being conservative. By legal culture he means our intellectual impulses that tell us what arguments are persuasive as opposed to those that are not (Klare 1998: 166). By branding our legal culture as conservative, he means that we follow “cautious traditions of analysis”, which suggests a type of formalism and positivism that stems from the liberal legal tradition, highlighting a belief in the determinacy and exactitude of neutral laws and legal analysis (Klare 1998: 168, 170). This tradition of analysis is a product of our history, legal customs and a false sense of efficiency (Gordon 1989: 402-3).¹² In post-apartheid South Africa, Klare (1998: 170) notes a line of division between the transformative goals of the Constitution and the conservative legal culture. He argues that this stifles innovation (necessitated by the idea of transformation) and subsequently he encourages lawyers to approach legal issues with creativity so as to re-imagine law in harmony with democratic values, in order to provide a counter to the hegemonic, conservative version of South African legal culture (Klare 1998: 171). Twelve years later, Davis partnered with Klare (2010: 405-8) to challenge the “judicial mindset” once again, in essence calling our attention to the same issue in different words. However, Davis & Klare (2010: 407) add a very important aspect to the analysis. Not only do South African lawyers buy into the literal interpretative mode of legal formalism where law is quarantined from politics, but they also suffer from formalist error. Formalist error is the flawed belief that *one* legal rule results in *one* legal answer to the exclusion of all others, while in reality rules are not self-revealing and political considerations do, in fact, enter the picture (Davis & Klare 2010: 408). Formalist error is thus the effect of a failure to embrace the indeterminacy of law, as I explained earlier.

12 On the reception of positivism and formalism in the South African legal system, see Dugard (1971: 183-4).

The deduction from this sequel article is that very little has changed in terms of legal culture in over a decade. In this section, I argue that the transformation of legal culture will remain largely asphyxiated as long as law teachers continue to employ conservative, unreflective methods of instruction that are aimed at maintaining the *status quo*. The *status quo* will be discussed here as hierarchy, which is simultaneously ubiquitous and illegitimate (Kennedy 1986b: 604). Instead, I propose that we as law teachers should stop teaching the nonsense that law is neutral and can be mechanically applied, as this belief is in itself intensely political, and should be presented as *one* of the modes of reasoning rather than the *only* mode of reasoning (Kennedy 1982: 591, 598). What is critical about this claim is that it attacks the “false consciousness” or the acceptance of legal culture as normal, and proposes a challenge to the hierarchical *status quo* (Van Marle 2009: 290).

2.2 Legal culture and the maintenance of hierarchy

I indicated earlier that the tension between individualism and altruism is linked to a further tension between a prominent (rules) and a less prominent (standards) position. In this section, I advance the idea that rules and individualism not only show a prominent side of the law, but also reflect the interests of a dominant rather than a subordinate group in society. For the purposes of an introductory example, a person who owns large amounts of things (property) has a lot more individual real rights compared to a person with fewer things, in other words, a poor person. A person who is influential in the community is entitled to greater compensation if he is defamed compared to a less influential person, and so on.¹³ Essentially, law of delict has a general predisposition to protect the interests of the rich and powerful in society. The rich and powerful have plenty of subjective rights – not simply by virtue of being human beings, as compared to fundamental rights. Thus our idea that rights will always protect oppressed groups is flawed as, in many cases the rights can effectively be used to maintain power relationships in hierarchy. The rules of delict, I showed above, primarily function to protect these

13 For example, in *Kyriacou v Minister of Safety and Security and Another* 1999 (3) SA 278 (O) 292, Mr Kyriacou succeeded with a defamation claim based on the fact that he was depicted in a police report as a criminal (which was distributed to various officials) before such report was entered into the police docket for Kyriacou’s murder trial. The court at 292 noted that his business success, prominence in the Greek community, and his political connections show that he is a citizen with an elevated status and standing. Regardless of whether the allegations in the report on his previous criminal conduct were true, his status and standing had to have an aggravating effect (that is, increasing) on the quantum of damage that he could claim. The corollary of this principle is that a gardener or domestic worker who is defamed in a similar manner will not be entitled to as large a sum of non-patrimonial damages.

rights and to maintain the dominance of the rich and powerful. We see a pattern emerging where 'one person has their foot on someone else's neck'. This is what Kennedy (1986b: 604), in rudimentary terms, calls hierarchy. If we accept that South African legal culture promotes a formalist and rule-bound interpretation which attempts to circumvent the politics of power and law by way of recourse to neutrality claims, it is clear that law of delict, upon strict application of the rules as opposed to exceptions and standards, promotes hierarchy where a dominant force or approach oppresses a subordinate body through the exploitation of rules and legal processes. The question arises as to what extent a course on delict trains for hierarchy.

Kennedy has written a great deal about critical legal education in the United States and has been abundantly clear about his view that hierarchy is unacceptable. Despite the intolerability of hierarchy, it is nonetheless entrenched, often through teaching, as an exorable reality (Kennedy 1982: 600). Indeed, at the most uncomplicated level, we only need to observe the hierarchical position of law teacher versus student where the teacher often takes on the role of a master purveyor of delictual wisdom, and the student of the slave willing to regurgitate formalistically biased answers, structured around the teacher's formulation of the law (Kennedy 1982: 604). But the issue of hierarchy is more complex than this.

The content of our teaching (substantive law and how to approach it) has the potential to be hierarchical. From my own experiences as a student of law, lecturers often throw phrases around such as "you need to be trained for practice", "I'm teaching you what you need to make lots of money" and avoid the "bullshit of human rights and legal philosophy" because the "*big five* law firms in Sandton don't care about that stuff". Following these statements, NGOs and the so-called 'public interest lawyers' (if we accept that all lawyers do not act in the public interest) do not form part of legal practice and are engaging in some dubious practice that many White men on the South African borders once died for to prevent. When we simply train students for cold-blooded commercial practice (Kennedy 1982: 601), we are potentially teaching them to recite a pledge to inequality dedicated to conservative legal culture (Kennedy 1982: 603). This means that our teaching can constitute legitimation for hierarchy (Kennedy 1986b: 605), while we reject the possibilities of change and integration (Kennedy 1982: 596). Despite all this commerce talk that is disseminated in lectures, I indicated in the introduction to this article that the voices from legal practice are complaining of underprepared students who lack the necessary skills to survive in the brutal legal profession. How can this be, if we are teaching our students 'the law' objectively?

The simple truth is that the expression of legal culture (legal formalism and positivism) in legal education does not even properly prepare students to formulate their own formalistic arguments. Kennedy (1982: 594) and Modiri (2013: 464) consider the passivising effects of conservative legal education as one of the sources of legal education's failure. Modiri (2013: 466-7) constructs a Foucauldian analysis of conservative legal education where teachers train students to become docile bodies that are eager and willing to bow down to the capitalist gods. Students are taught to ignore the adverse effects of colonialism and apartheid, the subject of poverty, the experience of women and gender non-conforming individuals or groups, and African epistemicide (Modiri 2013: 467). Briefly, students are taught to accept the law as it is expounded in the classroom without qualification or justification (Modiri 2013: 470). It is this attitude and the inability to deal critically with legal materials that leave students ill-equipped for practice, regardless of the form that their practice of law may take. The next question is: What could or should the law teacher do? I do not intend to embark on a survey of issues that demand curriculum change. All that I wish to show is that a critical pedagogy could contribute to preparing students for practice, but most importantly, to ensure that students become aware of their roles as responsible, conscientious citizens and lawyers.

Kennedy (1982: 608) claims that law teachers need to take responsibility for, and contest hierarchy. I suggest that this involves reconciling ourselves with the great deal of power that we possess and exercise as teachers of law and to use this responsibly by exposing the illusions about the neutrality of law and teaching the tensions that underlie it. As a leftist, it also involves a strategy of teaching that can construct a "left intelligentsia" or, at the very least, a body of lawyers that will actively promote and fulfil the democratic values of human dignity, equality and freedom in a more radical fashion (Kennedy 1982: 611, Klare 1998: 149). We can achieve this strategy by teaching content that rebels against hierarchy in a way that tears conservative legal culture apart. Writing and reading skills that expose the fundamental contradiction in legal arguments put us in a position to use the subordinate side of law to challenge its dominant side with the ultimate goal of reconstructing society (Kennedy 1982: 611, Modiri 2013: 471, Klare 1998: 150).

Law of delict, similar to contracts and property law, is a prime example of an area where conservative legal culture can market the ideology that the capitalist system is normal, acceptable and impeccable, without acknowledging the possibility that a marginalised and excluded political philosophy such as Marxism or socialism can provide a valid alternative (Kennedy 1986b: 611). In the instance that a person's personality rights (such as reputation, dignity, privacy, physical-mental integrity, and so on) are unlawfully and culpably infringed upon, they are entitled to non-patrimonial damages. To be exact, Moseneke DCJ held

in *Van der Merwe* that they are entitled to money to “make good the loss”, “to amend the injury” and to “place the plaintiff in the same position she or he would have been but for the wrongdoing”.¹⁴ Let us take a spicy defamation case as an example to illustrate the point that there is an alternative, altruistic way of dealing with personality infringements that does not fall down at the feet of capitalism.

Let us say the *Sowetan Sunday World* publishes an article in which Mr Seima is said to have given his television-presenter-girlfriend a slap through the face after he saw her flirting with other men.¹⁵ Mr Seima feels that, because of this, his reputation and good name have fallen in the community. He sues the *Sowetan Sunday World* and all their affiliates for R150.000. He succeeds only with claiming R12.000. Following the reasoning of Moseneke DCJ set out above, R12.000 will restore Mr Seima’s standing in the community. His feelings will not be as hurt, and his life can carry on as usual. My intuitive response is to object, but let us first evaluate the current proposed rationale for this position. Neethling & Potgieter (2010: 241) draw our attention to the late Visser’s view that there are sound reasons for accepting compensation in the case of personality infringements, despite the injured interest not having a “direct or natural monetary value”. Visser makes a case that the community accepts the position as the proper way to deal with defamatory disputes and that personality rights have gained market value over time. From law of damages I recall that there is a practical critique of the current position. If Mr Seima is a very wealthy man, I doubt whether R12.000 will grant him much joy to take away his hurt. On the other hand, if Mr Seima lives a philanthropic lifestyle where money is not important to him, the R12.000 will also not make the cut. A critique that has not, as far as my knowledge goes, been offered in the South African context, is the following: the ‘community’ that accepts non-patrimonial damages as ‘appropriate’ is basically the rich and powerful who abide by capitalism, and who have enough money to make justice work for them, and the very fact that human personality traits such as good name and dignity are a disenchanting result of what Marx calls commodification of social life, where all aspects of human existence become measurable in money, money becomes our identity and the only thing that ties human beings together is their ability to buy and sell their property and themselves (Veitch 2012: 229). Considering this Marxist critique through the lens of *uBuntu* jurisprudence, one can start seeing the real value in Mokgoro J’s minority judgment in *Dikoko*, where she offers a restorative justice-based model to deal with defamation cases through apology,

14 *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as amicus curiae)* 2006 4 SA 230 (CC) at paragraph 41.

15 *Mogale and Others v Seima* 2008 (5) SA 637 (SCA).

reconciliation and truly working towards healing emotional wounds.¹⁶ In this way, a non-capitalist, non-Western methodology can offer a radiant challenge to the blindly accepted capitalist norms that inform our law of personality. This way of thinking needs to permeate class discussions and various forms of assessment. This will ensure what Modiri (2013: 473-4) calls for, namely the successful integration of legal theory and history into our teaching.

If a law teacher is not comfortable with the idea that the subordinate side of the law needs to be elevated, the minimum starting point would be to teach students that the law is not neutral, as I have tried to show throughout this article, and that alternative (leftist) forms of argumentation also exist. Justifying this minimum starting point, Kennedy (1986b: 615) argues that leftist argumentation will be useful even to a conservative student as they should be aware of how leftist judges think and what types of arguments they will accept as being persuasive.

To summarise my argument up to this point, Quinot (2012: 422) advised that we start teaching students how to justify law rather than the positivist idea that “it is what it is”. By justification, we do not mean reciting one sentence that provides the invariable rationale for a rule without noting the effects of the rule, mainly because we accept that there are opposing, yet valid, justifications and critiques for law (Kennedy 1985: 264-5). As a substitute for the one-answer approach, Quinot (2012: 423) encourages use of the imagination where we are required to engage with our conservative assumptions and then to unmask the conservative legal culture that we accept as being normal.

Although many may be sceptical of this idealistic project, at the very least it poses a challenge to conservatives (Kennedy 1982: 613), and if by 1994 at Harvard Law School 38% of students admitted that legal education had made them “more radical” (Kennedy 1994: 85), who knows what the possibilities could be in South African law schools where a transformative Constitution can be fully embraced.

At this point, I would like to make it abundantly clear that I am not of the view that law of delict is a frightful part of the South African legal system. I am arguing that a legally conservative approach to delict, whether it is in the class or in the courtroom, is a problem. Law of delict has phenomenal potential to restore relations between people in a community and maintain a sense of public spiritedness and altruism, as Mokgoro J shows us in *Dikoko*.¹⁷ We have already seen a multitude of delictual cases where women’s rights and their social position have been recognised, and concerted efforts have been made to achieve substantive equality. Just to name a few, there is the case of Mrs *Van der Merwe*

16 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at paragraph 68.

17 *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at paragraph 68.

cited earlier, where a woman married in community of property succeeded in the Constitutional Court in claiming damages from her husband who deliberately drove over her with a motor vehicle,¹⁸ and the case of the young women who were brutally raped by two policemen who succeeded in claiming compensation for assault.¹⁹ I envisage that, by teaching delict in a critical way, we can inspire more students to fight cases that will have transformatively justifiable consequences.

3. Historical self-consciousness

This historical self-consciousness was most clearly articulated in the Postamble to the interim Constitution, which presented the document as ‘a historic bridge between the past of [...] injustice, and a [democratic] future’ (Klare 1998: 156).

The crucial point is that we cannot get rid of history, just as we cannot get at history in its pure form (Van der Walt 2006: 46).

The role of history and historical context is so important to Klare’s idea of transformation that he includes it in his definition of transformative constitutionalism (Klare 1998: 150). Under his discussion as to why the Constitution can be read as a post-liberal document, Klare (1998: 155–6) explains that the Constitution is not “timeless and metahistoric” in the sense that it does not pretend that it is a neutral document created from nothing with no context, nor does it claim to be everlasting. Ultimately, we realise that our past, tainted by colonialism and apartheid, must play a necessary role in our interpretation of the Constitution. Although Klare is specifically writing about the Constitution, the theme of history and historical context that he covers in his article contains the critical notion that law is a historical contingency (see Gordon 1984: 57–125).²⁰

Nicholson (2011: 110) teaches that lawyers can only truly appreciate the tools of their trade once they understand its underpinnings. Thus, to have real insight for the present, one needs to turn to the past. Nicholson (2011: 109) further notes that legal history provides a vivid picture of the politics of law. Although she makes no reference to critique or CLS *per se*, the idea of law as/and politics has firm roots in said tradition. As a matter of fact, Kennedy’s *Form and substance in private adjudication* (1976: 1685–778) amounts to ninety-two pages of a detailed

18 *Van der Merwe v Road Accident Fund (Women’s Legal Centre Trust as amicus curiae)* 2006 4 SA 230 (CC).

19 *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) and *F v Minister of Safety and Security and Others* 2012 (1) SA 536 (CC).

20 The first South African work on the issue of critical legal history is that of Visser (1989). See specifically Visser (1989: 335–50) on the history of delict.

historical tracing of the tension between individualism and altruism, which basically aims to show the political dichotomy of law.

Van der Walt (2006: 1-47) has argued a case for critical legal history in South Africa. In so doing, he draws our attention to the role that history can play in a transformative society. The main theme of his article is to show that the common law is situated in a particular context and cannot simply be accepted as normal, as this would be buying into the false consciousness that critique rejects (Van der Walt 2006: 13). As Critics have called language indeterminate due to its contingency, so too history and the law (which are both conveyed through language) are indeterminate and contingent (Van der Walt 2006: 20-1). In the past, legal history might have been used as a justification for maintaining the purity of law, seeing that a golden thread supposedly runs from Justinian's *Corpus Iuris Civilis* to the present. With this belief in the authority of the common law came the related interpretative practices of that tradition (Van der Walt 2006: 27). Despite the work of Feenstra and Van Zyl in the 1900s who saw history as a context-creating tool in law, adherence to formalism and positivism still remained/remains at large in South Africa (Van der Walt 2006: 33). The key claim of the contextual-historical approach to law is that history has the ability to teach us that society and its laws can adapt and transform. The lessons we can learn are thus captured by the narratives of history; history does not teach continuity as much as it teaches "discontinuity and dissent" (Van der Walt 2006: 37). The legal historian Philip Thomas (1997: 202-13) explained that a basic course on Roman Law could be used to illustrate this very discontinuity and dissent (read: indeterminacy) for which critical legal historians are pleading. Due to the fact that basic courses on Roman Law are systematically being phased out at the majority of South African universities, teachers of delict need to seriously consider teaching the history of our subject in contemporary delict courses. This view on legal history teaches us that we are not stuck and that it is possible to break free from hierarchy and the *status quo*. It shows us that transformation is possible (Van der Walt 2006: 39).

Another level of the debate surrounding legal history addresses the impact of apartheid on the common law (Van der Walt 2006: 4). Ten years earlier, Van Blerk (1996: 103) warned that the Roman Dutch common law did not only bring substantive principles with it, but also a mode of reasoning – one which has a firm belief in the neutrality of law, and a commitment to the maintenance of the *status quo*. Therein lies the problematic part of Roman Dutch Law, against which Van der Walt argued in our use of legal history.

Further, in the post-apartheid context, we need to be mindful of the fact that the apartheid government often either used the common law to fulfil its own needs such as by abusing the lack of protection for evictees (Van der Walt 2006: 14), or

circumvented the common law such as in cases of unlawful arrest and detention which infringes on a person's personality right to physical integrity. In this way, the common law was often abused or left underdeveloped. Our teaching needs to draw students' attention to these realities.

Delict has the potential to casuistically show how police brutality has run as a common thread from the apartheid police force until the present. Unlawful arrests,²¹ assault and rape by policemen and other failures on the part of the police service to protect citizens,²² are all matters that demand serious change, especially in the dark shadow of our past. Contextualising the current state of affairs on these topics will assist students to make persuasive, well-informed policy arguments when it comes to an issue such as vicarious liability of the state for its police officials.²³

4. Outsider jurisprudence

Thus far I have touched on certain aspects that could spark meaningful conversations about the experiences of women, especially in the context of physical violence, in a course on delict. I have also pointed out the possibility of creating a space for African jurisprudence to challenge our current Western justification on an issue such as defamation, and so start working towards reconstructing African epistemology (see Woolman et al. 1997: 49, 59, Godfrey 2009: 98-9, Dednam 2012: 927) In addition to this, Olowu (2010: 353-71) suggests that the plural study of law should also open up discussions about the role of Islamic jurisprudence, and by analogy I argue other religious and cultural norms, so that the generality and neutrality of law can be debunked at yet another level.

A specific form of outsider jurisprudence, which I have not discussed at all, is queer legal theory. A specific case that can effectively be utilised to introduce ideas such as heteronormativity in a delict class is the case of Dr Louis Dey.²⁴ Briefly, Dr Dey was the deputy headmaster of Waterkloof Hoërskool. Some of his pupils photoshopped and distributed a picture of two muscular men sitting next to each other, with their hands in the area of their genitals (with the school crest covering their 'essentials') and the faces of the headmaster and deputy superimposed onto the two bodies. The boys were given detention, the headmaster forgave their misbehaviour, but Dr Dey was so offended by being depicted as a *moffie*, that

21 For an overview of cases on this topic, see Scott (2009: 724-37).

22 See Carpenter (2003: 252-65).

23 See Roederer (2005: 573-606).

24 *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA274 (CC).

he sued the boys for defamation.²⁵ He succeeded in claiming R25.000 in the Constitutional Court. Barnard-Naudé & De Vos (2011: 407-19) have lashed out against this decision. Despite the Court being at pains to remind us that it is not in itself defamatory to call a person gay, the majority of the Court (at paragraph 98) described the picture as follows: "In short, the vision created is one of two promiscuous men who allowed themselves to be photographed in what can only be described as a situation of sexual immorality, which would be embarrassing and disgraceful to the ordinary members of society."²⁶ Barnard-Naudé & De Vos (2011: 409) explain that this description of the picture is heteronormatively biased, in that a reasonable person would not conclude that it shows "sexual immorality" nor that it is "disgraceful". If the judges accepted that heterosexuality is "normal" and any deviant behaviour is "unacceptable", then it is understandable why the court found the picture to be defamatory. Homophobes will easily associate homosexuality with promiscuity and disgrace, whereas a truly constitutionality-thinking reasonable person will not. It is thus the authors' argument that the picture depicted two men participating in completely normal sexual activity that should not be labelled as "disgraceful" in a transformative society. I take their argument a step further. I am astonished by the fact that the judges failed to see that they indirectly supported Dr Dey's homophobia by rewarding him with money. I understand that the boys could not get away with disrespecting their teachers, but surely there are other more effective ways of dealing with discipline than claiming R25.000, which would ultimately be paid by the boys' parents. A class discussion of *Le Roux v Dey* that deals with the social effects of the judgement can provide rich insights into how society still needs to transform and how the law can aid or stifle this process, instead of simply providing a distillation of the legal principles repeated in the judgement. Incorporating feminism, African jurisprudence and queer theory into a course on delict will not only make students more socially conscious and aware of the urgent need for the protection of victimised groups and identities (Klare 1998: 155), but it will also keep classes active and exciting amidst a sea of potentially dull and dreary legal rules viewed in a vacuum.

25 It is clear from his pleadings and testimony in the High Court that he viewed the image as defamatory, because he was depicted as a homosexual or because he participated in homosexual activity (at paragraph 176).

26 *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* 2011 (3) SA274 (CC) at paragraph 187.

5. Post-liberalism and horizontality

The South African Constitution intends a not fully defined but nonetheless unmistakable departure from liberalism (as contemplated in classic documents such as the U.S. Constitution) toward an 'empowered' model of democracy (Klare 1998: 152).

Klare's (1998: 151-6) framing of the Constitution as a "post-liberal" one effectively surmises my earlier arguments for teaching delict in a transformative manner. Klare invites us to participate actively in governance (and by extension, I argue, in political debates in the classroom, too) to embrace multiculturalism by allowing our own thoughts and opinions to be challenged by those with different views, to be historically self-conscious and to re-imagine our approach to law by rejecting formalism and positivism in favour of social transformation. In this section, I argue that horizontality as an aspect of post-liberalism gives us a useful tool for the re-imagination of our traditional legal culture. By horizontality I mean the application of constitutional rights to private persons. The traditional account of constitutional rights only involves the state being bound to refrain from infringing on its citizens' rights. Our Constitution is different, because among ourselves in the private sphere we are also compelled to respect each other's rights. It is possible that two constitutional rights can conflict directly with each other, and result in a cause of action. In the defamation case of *Khumalo v Holomisa*, the Constitutional Court had to weigh up the section 16 right to freedom of expression of the defamer with the section 10 right to dignity of the victim.²⁷ The Court held that the right to dignity outweighed the right to freedom of expression and so a plaintiff in a defamation case does not necessarily have to plead that the defamatory statement was a false one. It is, however, also possible for the Constitution to have an indirect effect on private disputes. In *Carmichele*, it was held that section 39(2) imposes a duty on courts to develop the common law in line with the spirit, purport and objects of the Bill of Rights, and so the Constitution has an indirect effect on private persons.²⁸ In this instance, I will rely primarily on the work of Davis & Klare (2010: 403-509) on this topic, as it speaks most directly to the transformative goals of horizontality.

Despite progress being made in terms of developing South Africa's common law, our adherence to formalism and positivism and the concomitant blind eye turned to the social effects of an untransformed society are currently all inhibiting the process of transforming private relations through the common law

27 *Khulamo and Others v Holomisa* 2002 (5) SA 401 (CC).

28 *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC).

(Davis & Klare 2010: 408). The authors argue that a more conscientious use of the development clauses, that is section 8(3), which promotes direct horizontality and section 39(2), which involves indirect horizontality, can assist in achieving social justice by framing legal issues differently. They do not propose a new, unitary definition for wrongfulness that will ensure a perfectly transformative answer in each case. They are simply arguing a case for context-oriented problem-solving that promotes the Constitution and that does not blindly reverse the common law (Davis & Klare 2010: 412). They argue that the current state of the common law cannot be presumed to be suitable for the new constitutional transformative ideals. Neethling & Potgieter (2010: 17) teach that our courts are of the opinion that common law delictual principles are in line with the Constitution unless “the contrary is clearly apparent”. In *Carmichele*, we note that judges have the general duty to develop the common law, yet they do not always have to consider whether development is needed in each case. It seems that judges decide whether development is necessary through an arbitrary process of gut feeling (Davis & Klare 2010: 463-4). If the judges do decide to embark on the arduous task of updating the common law, they should do so cautiously, always be mindful that they are not the legislature, and develop the common law in light of its own paradigm (Davis & Klare 2010: 463). Indeed, Davis & Klare (2010: 426) are militating against this attitude, and plead with the judiciary to “carry out an audit” and re-invent the common law. Each legal problem should now be constitutionally framed (Davis & Klare 2010: 430). I support their contention.

If we consider the Constitutional Court’s approach in *Bato Star*, we find that the new approach for interpreting statutes in the constitutionally supreme era involves first and foremost the identification of a value in the Bill of Rights that can be forwarded by a particular interpretation.²⁹ Botha (2005: 54-5) teaches that the starting point for statutory interpretation after *Bato Star* is thus not the text of the statute *per se*, but the Constitution. It is interesting that this notion that the “spirit, purport and objects” of the Bill of Rights must be forwarded in the process of interpreting statutes stems from the same section 39(2) upon which we rely to develop the common law. Yet, until now, our starting point in formulating common-law problems is not the Constitution, but the worshipful common law itself. We either need to have *Bato Star* overruled, or we need to change our approach to common-law issues. Considering sections 2, 7 and 8 of the Constitution, the latter suggestion seems more justifiable. In *Pharmaceutical Manufacturers*, it was held that “there is one system of law” and no longer a

29 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 CC at paragraphs 72, 80 and 90.

common law which could be detached from the Constitution.³⁰ In light of all of the above, the context-oriented approach of Davis & Klare should be taken more seriously by law teachers. I am, like Davis & Klare (2010: 467), not completely pessimistic about the judiciary's efforts thus far in developing law of delict and other areas of private law. What I would, however, like to see is more enthusiasm about teaching common-law development to such an extent that the private-public-law-divide collapses in the true spirit of the unity of law under the Constitution. A simple example would be to consider all cases where children are involved – I am thinking specifically of the reasonable person standard imposed on children in cases of negligence – through the lens of the best interest of the child standard, as required by section 28(2) of the Constitution. If we can teach law students a new way of thinking about delictual disputes in a constitutional light, perhaps they will become practitioners who are capable of presenting innovative arguments in courts that forward transformative ideals (Moseneke 2009: 13).

6. Concluding thoughts

In this article, I have made out a case for a critical pedagogy to be used in a course on delict in South Africa. I have shown how aspects of transformative constitutionalism can be particularly useful in this regard. A constitutional duty is placed on teachers of delict to address the fundamental tension between freedom and constraint (that is, individualism versus altruism) in our teaching. We need to be conscious of how we portray the current legal positions in our subject as being 'normal' and the 'only way' that things can and should be. We must actively fight against hierarchy and false consciousness, possibly by drawing from other disciplines such as politics and philosophy. The role of critical legal history should be effectively employed to illustrate the capability of any society to transform and that tensions and contradictions in law are normal, and should not be ignored or explained away by means of illegitimate formalist arguments. The realities and experiences of women, Black people and gender-non-conformists can and should be usefully illustrated through the instrumentality of a course on delict. Lastly, delict has provided and can still provide fertile ground for common-law development – to show both substantively what must change, but also procedurally how we should go about it. In short, teachers of delict have the necessary bricks and architectural building plans in their hands to assist in the building of the bridge from the authoritarian past to our transformative present and future.

30 *Pharmaceutical Manufacturers Association of South Africa and Another: In re ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at paragraph 44.

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