

Skeptical Legal Education

How to Develop a Critical Attitude?

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1 The age of critique

If one were to ask law teachers nowadays what distinguishes academic legal education from professional and vocational training, they probably will refer to the capacity of critical thinking. As law teachers at the university we want students to develop a critical attitude. But what exactly does it mean to be critical and why is it important to be critical? How can a critical attitude be promoted and developed? In legal theory the notion of critical thinking seems to be annexed by followers of the Critical Legal Studies movement.¹ By wearing the banner of ‘critical’, ‘crits’ such as Duncan Kennedy, Allan Hunt and Peter Goodrich, suggest that they have acquired the monopoly of being critical; other, mainstream liberal or conservative approaches have to be dismissed as hopelessly uncritical. ‘Critical’ in this understanding is connected to a left-wing political agenda that aims at exposing *and* subverting existing power structures in society. This is certainly one way of being critical, but the notion of critique is a distinctively modern notion that contains other possibilities of being critical as well.

The notion of critique lies at the core of our modern self-understanding that originated in the Enlightenment. Kant (2003, p. 54) defined Enlightenment famously as ‘man’s emergence from his self-incurred immaturity’ or, more properly, ‘speechlessness’ (*Unmündigkeit*). In the *Critiques* that he developed he sought to liberate thinking by means of reason from the *idées reçues* handed down by tradition.² As Bauman (1993, p. 6-7) argues, in a similar vein, enlightenment involves the possibility of emancipation and liberation. It empowers the individual to liberate herself from a heteronomous social order. Critical education contributes to the subject’s emancipation and autonomy. Traditionally, the university is regarded as the central place where critical learning is taught and encouraged.

As we hope to demonstrate below, there are other and less politicized and biased ways in which critical thinking can be understood and promoted in legal education that do more credit to the academic ideal of generating knowledge and insight. As we will explain below, reflexivity plays an important role in our understanding of critical thinking. Reflexivity not only refers to one’s own learning pro-

1 For an introduction to the ‘first wave’ of Critical Legal Studies, see Kelman 1987.

2 Bauman (1993, p. 8) suggests that this contradiction establishes ‘an aporetic situation’ – the contradiction between autonomous rational individuals (being able to choose between wrong and right) and heteronomous rational management to prevent people choosing ‘wrong’. Skeptical legal education, it is suggested here, takes issue with this aporetic situation.

cess but also to the social context of modernity in which learning takes places, as described by social scholars such as Beck, Giddens & Lasch (1994).

In this article we intend to elucidate the role that critical thinking may play in legal education, building on Oakeshott's notion of liberal learning.³ Michael Oakeshott belongs to the tradition of secular humanism that aims at initiating students in a 'great conversation' which shapes them intellectually as well as morally (Kronman 2007, p. 86-87). In *The Voice of Liberal Learning* (a collection of essays published in 2001), Oakeshott characterizes learning as a strictly non-instrumental activity. In schools and universities, knowledge is acquired for its own sake. First, we will clarify Oakeshott's notion of liberal learning (section 2). Second, we will introduce the idea of *skeptical legal education*, which is to a large extent based on Oakeshott's understanding of liberal learning but which relativizes its insistence on the non-instrumentality of learning and reinforces its critical potential (section 3). In addition, we will discuss the role that reflexivity plays in skeptical legal education. Thirdly, an example of skeptical legal education in the study of law will be presented (section 4). Finally, building on this example, we will show the relevance of the suspension of judgment that skeptical legal education requires, for legal practice (section 5).

2 The art of conversation

According to Oakeshott (2001, p. 10), the human world is essentially a 'place of learning'. As an *animal rationale* man is involved in an on-going process of attributing meaning to the world around him. By doing so, he creates a human world, not because this world solely consists of human beings and all the things that they produce, but primarily because it is a product of the human activity of signifying. Learning involves an unlimited *semiosis*: every attribution of meaning to the world by man is temporary and incomplete. Learning does not follow a pre-established plan and has no final destination. It is an adventure with an uncertain and unpredictable outcome:

"This engagement is an adventure in a precise sense. It has no preordained course to follow: with every thought and action a human being lets go a mooring and puts out to sea a self-chosen but largely unforeseen course' (Oakeshott 2001, p. 11).

Throughout his whole life man is engaged in learning. Within this *education permanente* schools and universities occupy a privileged position. Characteristic for these educational organizations is, to begin with, that those involved are recognized and recognize themselves as *learners*, besides possible other roles they may fulfil in society (such as musician, major or 'meter maid'). Subsequently, learning

3 This article is a sequel to Van Klink (2013) in which a liberal and a critical view on education, as presented by Oakeshott and Kennedy respectively, are compared more extensively. Some parts of the current article are derived from this earlier article.

in educational organizations is focused on the learning of *something specific*. It does not aim at promoting intellectual development, spiritual growth or the broadening of one's horizon in general (these may be possible side effects), but at acquiring knowledge about a particular subject, within a particular discipline, with the help of the methods and conceptual tools typical for the discipline at hand. The learner has to conceive of learning as a specific task, which requires attention, patience and persistence. Finally, in schools and universities learning is not an instrumental activity, but *a goal in itself*. Knowledge is acquired not only, or not predominantly, for external purposes. Learning is an adventure, because the route to follow and the destiny are always uncertain and may change in the process of acquiring knowledge. It takes place in a separated sphere, far away from our daily cares and concerns. Therefore, Oakeshott (2001, p. 15) characterizes learning as liberal, not in the political sense but in the existential sense of 'liberated' or 'freed': at least for a couple of years, learners do not have to worry too much about 'satisfying contingent wants'. What the university offers, is 'the gift of an interval' (p. 114).

Oakeshott (2001, p. 69) describes education as a transaction between generations, which aims at introducing newcomers to an 'intellectual, imaginative, moral and emotional inheritance'. The inheritance is shaped and reshaped in an on-going conversation in which people are engaged in understanding themselves and their world. In order to be able to participate in this conversation, learners have to learn first to speak the language and to then recognize the different voices that can be discerned within this language. Every academic discipline constitutes a language of its own, with its own rules, by means of which certain aspects of the world and human existence can be expressed. It is the task of the teacher to teach the students the rules of the language and to show how one can make one's own contribution to the on-going conversation. Liberal learning is an initiation in this art of conversation.

According to Oakeshott, the 'free' conversation that takes place at universities was threatened by various developments within the British educational system in the 50s and 60s of the last century and modern society in general. Increasingly, learning is transformed into some form of *applied education*. That means that education is used for socializing students and preparing them for certain tasks in society. Instrumental learning replaces liberal learning and, as a consequence, teaching is reduced to the training of a series of technical functions for the sake of some social purpose instead of knowledge acquisition for its own sake (cf. Oakeshott 2001, p. 13). Nowadays, education is subjected increasingly to the logic of economic reason as universities apply business models, based on output, efficiency and economic utility as benchmarks of quality (see Francot & De Vries 2010). Due to these developments, schools and universities are no longer free spaces of learning, where learners acquire knowledge mainly for its own sake.

In modern universities there is an increasing tendency to reduce learning to skills training. Oakeshott argues that education never coincides with the training of specific techniques, not even in vocational education. In order to know *how* to do

something, one has to understand first *what* one is doing. In Oakeshott's view, knowledge contains two components: information and judgment. Information consists of both facts (for instance about what statutes are and where they can be found) and rules that prescribe how a specific skill (such as the interpretation of a certain statute) has to be carried out. Judgment is the knowledge that makes it possible to interpret information and to assess its relevance and, moreover, to determine which rule has to be applied in a given case and which actions are required by this rule. Without knowledge of this kind one would not be able to learn a skill: 'Before any concrete skill or ability can appear, information must be partnered by "judgment," "knowing *how*" must be added to the "knowing *what*" of information' (Oakeshott 2001, p. 49). A lawyer, for instance, needs to know more than the content of the legal norms; s/he also must know when in a given case which norm s/he has to apply and how that norm has to be interpreted in the case at hand. This kind of knowledge cannot be expressed in rules or, in other words, be translated into information. It gives us guidance in situations where there are no specific rules or methods available or where we do not know which rule or method to apply. Generally speaking, when we learn a language – whether it is English or Spanish or the language of philosophy or the law's language – it does not suffice to learn the rules only. A competent speaker is someone who is able to express himself or herself in a way that is not prescribed explicitly by the rules. Judgment cannot be taught as such, because it cannot be made an independent object of study.⁴ The teacher transmits it implicitly when giving information: 'It is implanted unobtrusively in the manner in which information is conveyed, in a tone of voice, in the gesture which accompanies instruction, in aside and oblique utterances, and by example' (Oakeshott 2001, p. 60). Students develop their faculty of judgment by recognizing and appreciating the individual intelligence at work in the way in which the teacher thinks and speaks, in his or her personal style and mode of expression.

In the past, nobody gave lessons in the art of conversation, but it had to be learnt by listening to competent speakers engaged in conversation. There are no shortcuts for learning by way of simple techniques or 'easy methods' (Oakeshott 2001, p. 179). Only by 'submerging' oneself in the practice of scholarship one can become a fully-fledged participant in this practice.

3 Skeptical legal education

Following Oakeshott, we conceive of education an initiation in the art of conversation in which scholars of a certain discipline are engaged. This does not imply that students have to be trained to be their master's voice; on the contrary, they have to develop their own voice. For that purpose, it is important to encourage students to reflect critically and to develop their faculty of judgment. Being critical is not the same as understanding society according to some pre-established

4 Kronman (1993, p. 53ff) expresses a similar idea when he describes the lawyer as a lawyer-statesman who possesses of 'practical wisdom'.

political scheme, as 'crits' like Duncan Kennedy assume. Critical thinking as promoted by Kennedy and others is *one* way of being critical, because it can make students aware of power structures in education and society at large. However, academic education is not a preparation for political activism. (In their private lives, students may of course choose to do so.) Academic education teaches students not to embrace any kind of political ideology (either of a conservative or a progressive strand), but instead to question and debunk it.⁵ The 'critical' approach to law advocated by Kennedy and others runs the risk of becoming in itself dogmatic and not open to self-criticism.

However, what CLS rightfully point to is the contingent and contestable nature of law: the question what law is (as a social construct), how it has to be founded and how it is used in society, is not self-evident but open for critique and amendment. Skeptical legal education is *reflexive* in the sense that it questions current assumptions about what law is, how it functions in society and what or whose purposes it serves. Reflexivity means that modern law calls for an understanding of modern society and the processes of modernization that shape society. It refers to the task of understanding processes of modernization, such as individualization, globalization, industrialization and secularization, in order to understand their implications for the structure of contemporary society and its foundations, in particular in politics and law (cf. Beck, Giddens & Lash 1994). Applied to legal education, reflexivity asks for a skeptical attitude towards both the law and its foundations such as the rule of law, causality, responsibility and so on, in order to find out whether these foundations have to be reconsidered in the context of contemporary society (De Vries 2013). In short: a reflexive approach aims at laying bare the seemingly self-evident assumptions of (any) authoritative interpretation of law and presupposes an intellectual position towards the study of law rather than a particular political position as advocated by, for example, CLS. It exists in a constant questioning of current assumptions about law, for the benefit of both our knowledge of the law and its foundations and the intellectual development of the student. In this sense, skeptical legal education differs from the positions taken by Kronman (2007) and, more recently, by Nussbaum (2010). Kronman defends an entirely non-instrumental view on education, in which learning contributes to self-understanding through the study of canonical texts.⁶ Nussbaum, on the contrary, conceives of education as a tool for reinforcing citizenship with democracy as a key notion (though not very well developed). Skeptical legal education serves no immediate political purposes nor is it part of an existentialist quest for the meaning of life.

What matters is, that students learn to make their own assessment of the information that they receive from teachers while reading literature, listening to lectures and engage in discussion. Students cannot and do not invent the standards of evaluation from nowhere, but they have to build hermeneutically and critically on the values that are already accepted within the community of legal scholars. In

5 For a detailed critique on Kennedy's view on critical legal education, see Van Klink 2013.

6 See, e.g., Kronman 2007, p. 261 (Appendix).

this sense, it is critical towards the ‘enlightened’ notion of critique, developed by Kant and others, where critique is seen as liberation from tradition and traditional prejudices (see section 1). Whereas Carrington (2004, p. 149) conceives of ‘moral and intellectual autonomy’ as the ultimate goal of education, we would prefer to speak of the moral and intellectual *integrity* to use one’s ‘own’ faculty of judgment. The student’s autonomy is always related and relative to the intellectual environment in which s/he is raised. So it is a critical attitude that has to be developed starting from an ‘uncritical’ (or self-evident) background of shared opinions and beliefs. This different sense of being critical is what we intend to capture in our notion of skeptical legal education: knowledge claims should never be taken for granted, but questioned and discussed from within the context of accepted ideas handed down through particular academic traditions of thought. The general aim of education is not to raise political awareness but intellectual awareness: to feed epistemological doubt and uncertainty so that students learn to assess knowledge claims critically. Hence, learning involves the responsibility to reflect upon the knowledge gained – on its foundations and the social and political purposes it may serve. To reflect, for example, upon the question: What kind of lawyer do I want to be? The answer to this question cannot be taught but only learned – in an autonomous education setting in which learning for its own sake is emphasized.

For the development of judgment in the context of legal education in particular three conditions have to be met. These conditions which we will discuss below concern (1) the student’s activity in and outside the classroom, (2) the manner in which the teacher transfers knowledge and (3) the institutional context of the faculty management respectively. We have derived them to a large extent from Oakeshott’s notion of liberal learning as described above, but we have modified them in some respects in order to make the learning process more (or more explicitly) critical, more engaging and less ‘inward oriented’.⁷

To begin with, legal education should give more room for student participation in courses. According to Oakeshott, students have to learn the language of a specific discipline, so that one day they are able to generate new utterances in this language. However, Oakeshott adopts a rather hierarchical model of learning in which the teacher transfers knowledge to the students. We suggest modifying this model and adding more horizontal and interactive elements to it. In our view, it is essential that students participate more actively in class than Oakeshott acknowledges. One may learn a lot from reading texts and listening to competent speakers, but in order to master a language fully, one must be given regularly the opportunity to speak for oneself. This may be accomplished by means of group discussions, presentations, moot courts and so on, and solely in classes of limited size. The cases discussed in law courses should give a representative overview of the law as it is understood in legal doctrine and should encourage students to make their own assessment of it (without ‘politicizing’ the class-

7 These modifications follow from the imaginary encounter between the liberal and ‘critical’ view on education, as described by Van Klink 2013.

room as advocated by Kennedy (1995 and 2004)). Furthermore, students should be encouraged to continue their learning process outside the classroom through various kinds of study-related extracurricular activities such as reading clubs, online blogs, and student seminars. Teachers can stimulate this by facilitating reading clubs, giving book suggestions or possibly by organizing such reading clubs themselves. The 'Law & Lounge' experiment described below is an example of the 'horizontalization' of learning. Moreover, students can get involved in online activity, start discussions on relevant topics, and so on. As the university is a community of both students and teachers, interaction does not need to stop at the official class hours. Additionally, the faculty could invest in these extracurricular student-teachers activities by providing financial support and other facilities.

What is required, subsequently, is that law teachers convey information from a detached point of view. That is, they should present the law as it is, as much as possible independently from their own ethical and political preferences.⁸ This descriptive, seemingly 'neutral' account of the law does not presuppose that understanding law is in itself a neutral or value-free activity. On the contrary, law teachers are required to present the law as it is and to expose the legal, moral and political values on which the law (and their understanding of it) is based, however without identifying themselves with these values. If they evaluate the current law and give recommendations to amend it, they have to make clear that they are not describing the law as it is at a certain moment in time but are expressing their personal opinion about how the law ought to be in the future. Value judgments are controversial in science, because their validity depends on the acceptance of certain values and ultimately of a worldview (or an ideology in 'critical' terms) whose truth can never be established by scientific means (cf. Weber 1989, p. 25-26). So when teachers are evaluating the law, they should make clear on the basis of which values they are reasoning, how they understand these values in the given situation, and how their evaluation is connected to their general worldview. In this respect a CLS approach may be useful as it helps to reveal moral and political choices that are involved in making law and teaching law, which traditional legal education tend to ignore. However, political education should not amount to political activism.⁹ As Max Weber (1989, p. 19) puts it: 'politics has no place in the lecture-room'. Instead he recommends that teachers offer examples of hypothetical reasoning: if one accepts a specific value (for instance, democracy), one has to acknowledge certain rights as well (such as the freedom of speech), without committing themselves (nor the students) to the acceptance of this value (p. 25-26). Reasoning in such a way gives students the opportunity to arrive at a different assessment, building on different values, on a different understanding of the same values, or on a different worldview. Similarly, law teachers should explain and justify on the basis of what theoretical assumptions and what sources they make factual assertions about the content of the law.

8 This requires what Raz (1979, p. 158) calls 'non-committed detached statements': 'Since one may know what the law is without knowing if it is justified, there must be a possibility of making legal statements not involving commitment to its justification.'

9 A powerful contemporary defence of this position can be found in Fish 2008.

Knowledge is always fallible and disputable, when it comes to both normative and factual statements. In order to give students a feeling for the fragility of knowledge, it is important that teachers, in group discussions with students, take a counter position against the *communis opinio* in the group at hand, question it and demonstrate its ultimate groundlessness, as in Socratic dialogues.¹⁰ Inspired by Socrates, ancient Greek skeptics such as Sextus Empiricus developed practices of argumentative inquiry that are meant to expose internal contradictions within a given position. As a result, the dispute remains undecided and one has to suspend his/her judgment (*epoche*).¹¹ 'Skepsis' means an inquiry or an examination guided by reason and in search for truth, however in vain perhaps this search may be. In the interim that the university offers interruptions have to be built in that halt temporarily the creation of knowledge. Learning also involves the experience that one does not know or does not know enough. In ancient skepticism, the suspension of judgment served to attain a peaceful state of mind (*ataraxia*) so that one no longer worries about truth and falsity anymore.¹² In our view, the ultimate goal of the infinite questioning is not tranquillity of mind but, on the contrary, an increased awareness that knowledge is always a temporary and fallible construction and that it has – as soon as it is accepted and becomes naturalized and fixed as truth – a huge impact on our convictions and actions. In our modern age knowledge acquired at universities is used more and more to intervene in society.¹³ Reflecting on the way knowledge shapes society, for better or worse, should therefore be part of every education. Students have to learn that knowledge, in its application, can be misinterpreted, distorted, even abused and has yet unknown side effects.¹⁴

Finally, on the institutional level, the faculty management has to provide for a mixture of teachers with different political, cultural, and religious backgrounds. If they are exposed to a variety of opinions, students will soon discover that truth in science is always a matter of debate. As Oakeshott argues, education is an introduction to a shared inheritance. However, the inheritance that is handed over from one generation to the other is not a fixed entity, but is changed in every transmission.¹⁵ Every teacher will give his/her own version of the canonical texts, depending on the theoretical perspective and worldview s/he has adopted. Not

10 For an introduction to the Socratic method in legal education, see Areeda 1996.

11 Burnyeat (1983) gives an insightful description of the skeptical practice of inquiry.

12 In our view, skepticism does not necessarily involve the exclusion of emotions that Nussbaum (1994) rejects in ancient and modern skepticism. On the contrary, these emotions can be part of a critical inquiry, both as an object of inquiry (in order to understand which emotions sustain a specific argument) and as a means of criticizing a certain position (when it contravenes significant emotions such as sympathy or love).

13 According to Giddens (1991, p. 123), the era of late modernity is characterized by 'regular shifts in knowledge-claims as mediated by expert systems'.

14 Weber (1989, p. 22) puts it as follows: 'Anybody who is a reasonable teacher has as his first duty to teach his students to acknowledge "inconvenient" facts, I mean facts which are inconvenient for their party opinion.'

15 This follows from Gadamer's characterization of understanding as application (Gadamer 2006, p. 305-308).

one dominant voice should be heard, but a plurality of voices. This plurality of voices will inevitably be a *limited* plurality, because not everyone will be allowed to speak. In the selection of teachers not only academic requirements are applied (teachers have to have the right qualifications), but also norms of decency (teachers have to meet some standard of good behaviour and political correctness).¹⁶ Kennedy (2004, p. 15) is undoubtedly right that the mainstream in law schools is quite moderate. Generally speaking, law teachers are conservative in the sense that they want to protect what they deem to be valuable in the law as it is. They tend to resist radical change because they believe – for good reasons – that a legal system can only function properly if the law is more or less stable and predictable. However, within this mainstream many different (liberal, republican, conservative, communitarian, feminist and other) positions can be discerned and, if one listens carefully, one may even hear some radical and ‘critical’ tones. In order to set the stage for a (by necessity limited) plurality of voices, the curriculum should not only consist of courses where the ‘black letter law’ is taught, but also of courses in which the law’s efficacy and legitimacy and its historical development can be discussed on a more principled and theoretical level. This is the field of the so-called ‘meta-judicial’ courses, such as legal sociology, legal theory, legal philosophy and legal history. Although they are doomed to remain in the periphery, as Kennedy (2004, p. 36) notices rightfully, they are central for critical reflection on the law as it is and how the law ought to be according to mainstream law teachers who teach ‘black letter law’.

Skeptical legal education does not mean that law teachers have to reject the legal system at hand, in part or in whole (nor do they have to embrace it wholeheartedly). It means that they are asked to present their knowledge claims and value judgments for what they are: fallible opinions which are debatable and have to be debated within the community of both teachers and learners. This will improve the students’ faculty of judgment and make them more critical towards people who want to impose their worldview on them. So it appears that learning, after all, does have an indirect instrumental value: namely to make students skeptical towards any attempt to instrumentalize knowledge for dubious purposes and to apply it in an uncritical manner.

4 Skeptical legal education in practice: the Law & Lounge experiment

As explained above, skeptical legal education requires active students and detached teachers. An experiment, carried out at the Faculty of Law, University Utrecht, sought to bring into practice these requirements.¹⁷ The experiment – colloquially called ‘Law & Lounge’ – was embedded in an introductory course of law, mandatory to all first year students in the honours program. The introductory course provides students with the foundations of Dutch modern law,

16 Universities will, for instance, not be inclined to give voice to teachers with overtly fascist sympathies.

17 This experiment was carried out by Bald de Vries.

addressing themes such as legality, the rule of law, justice, liberalism, equality and solidarity, adjudication and interpretation. These themes are explained in textbooks which students study at home in preparation for the class room sessions. In class, the themes were reviewed on the basis of study questions and assignments.

The approach taken in the introductory course discourages students accessing the primary sources (fundamental texts in legal philosophy, legal theory and sociology of law) and critically assessing their conceptual, moral and political presuppositions. The teacher focuses on knowledge transfer to the students through the use of textbooks in which these primary sources are explained and summarized. The teacher may teach the students 'the rules of the language' but he does not show 'how students can make their own contribution to the on-going conversation'. This approach is defended with the idea, or so the argument goes, that first year students would not be able to read and critically assess primary sources, because they are deemed to be too difficult.

The Law & Lounge experiment sought to allow students to make their own contribution to the conversation, building upon two basic assumptions. The first relates to difficulty. It is important that we confront students from the very start of their academic career with primary sources, or fundamental texts that underscores a broader understanding of law and legal concepts. It may well be that first year students find these texts difficult and perhaps understand only part of the theory presented in the texts at hand. We as teachers should not expect students to understand the texts in the way we do – it took us time and effort as well to fully understand them. Furthermore, students will read many such texts or at least the themes these texts address (such as theories on power, legality, etc.) repeatedly and over time their understanding of them will improve. The aim of the experiment does not lie in explaining students how to fully understand such texts, as if it were a course in exegesis, with the sole aim of reproduction of knowledge. The aim is rather to awaken in students a critical potential and assess the value of the theories presented in the selected texts and in the social context of today's world.¹⁸ It starts with exposing them to texts and confronting them with what can be termed 'intellectual uncertainty'. It expresses the idea that knowledge must be gained, that it takes an effort and that it exists also in searching one's own thoughts for clues about what the text means and the learning purposes it may serve. Research shows that if students are challenged in education, their capacity to learn improves significantly (Scager et al. 2012).

The other assumption relates more directly to the first two conditions that were described above: the attitude of students and the position of the teacher. These are communicating vessels: when a teacher puts herself at the centre of the learning process, telling students what they must know, giving them the 'right' answers, she creates a passive audience of students, who are merely encouraged

18 This doesn't mean that course in logic and argumentation is not essential in a law degree curriculum. The point is that it is more efficient to do one thing at a time.

to process information and apply – unreflective – the trick of legal analysis exemplified by the case study method. White (1986, p. 156) already pointed, in a somewhat caricature fashion, to the numbing experience of students of the case study method: ‘a wonderfully exciting educational experience degenerates into a mechanical and empty ritual that robs it of almost every value, a transformation in which both sides are complicitous.’ As White (1985, p. xiv) explains, the study and practice of law is a creative act – ‘an art, a way of making something new out of existing materials’. As a side effect, students may become aware that law is more than ‘positivistic and rule-based’ (p. xii).

Is it possible that students ‘take over’ and are put in full control of the classroom sessions, as a means to experience uncertainty, responsibility and creativity? Pedagogically, this was the first aim of the Law & Lounge experiment. In their very first semester, students experienced how it is to be a teacher, how it is to take responsibility, as a group, for their own learning process. Second, considering the contents of the course – studying and discussing basic texts about legal concepts – the aim was for students to experience the confrontation with the uncertainty of not-knowing (without resorting to authority (the teacher, as s/he remained detached in a radical way), and to discover that this is part of the learning process as a step to adopting a critical, skeptical attitude.

The experiment consisted of ten sessions that ran parallel to the ‘normal’ class sessions and were offered to three groups of first year honours students, the groups consisting of about 17-22 students. The sessions were made part of the honours programme and they were in this sense mandatory. Students did not receive a grade, nor was there a final exam or a paper to write. The reason for not examining the students was to prevent any strategic behaviour focused upon grades. Each session lasted an hour. The preselected literature and one documentary were linked, directly or indirectly to the themes of the course, including texts of John Locke, Thomas Hobbes, James Boyd White and Oscar Wilde.¹⁹

All students were expected to read the texts in preparation for the class discussion. In addition, in each session a small group of about three students was responsible to organize the session as they saw appropriate, and lead the discussion. The role of the teachers was limited to that of an observer. They would, if asked, discuss prior to a session with the students who were responsible for that session, their ideas about how to organize the session and afterwards would give some feedback on the chosen format. The teachers did not interfere with the content of the discussions about the texts. No ‘right’ answers were given, nor did the teachers explain to students the essence of the texts. It was up to the students themselves to figure that out, together during the group discussion. In general, the sessions had the following pattern: a brief introduction of the author, a short presentation of the essence of the text, and a discussion based on a few theses formulated by the group responsible. Usually, these theses sought to link the text to contemporary societal problems.

19 See Table A, below, for an overview.

Upon completion of the course a number of (preliminary) observations can be made.²⁰ These relate to (1) the central pedagogical aim of students ‘taking over’, (2) the format chosen by the students, (3) the critical potential (skeptical legal education) together with (4) the role and position of the teacher in terms of the selection of the texts and his scholarly assumptions and perspectives. In the last two observations a link is established between the experiment and the concept of skeptical legal education.

The use of self-organization (as a pedagogical tool) without ‘supervision’ is feasible, when certain conditions are met. As said before, the students were honours students, selected to take part in the honours degree program referred to as Utrecht Law College. They are selected on the basis of past (school) results, motivation to learn, academic curiosity and societal interests. As the groups stay together from day one, they quickly get to know each other, creating together with the teachers an ‘academic community’. It was obvious to them to come prepared to class and to have an active attitude during class sessions. Indeed, research shows that honours students score high in respect of intelligence, creative thinking, openness to experience, desire to learn and a drive to excel (Scager et al. 2011). The students took the experiment serious and took responsibility for their learning process. (This is not to say that all students equally ‘liked’ reading the texts and discussing them.) However, the task of organizing the individual sessions by students remains a cause for concern. The chosen format and developing pattern – that was not intervened with – caused students to study and discuss the texts on a level that appeared too superficial. They felt that they were being thrown into the deep without the tools to both read such basic texts and discuss them. After each session, they felt uncertain about their efforts in understanding the text and its essence. The experiment could be improved in this respect. However, the idea of intellectual uncertainty is considered to be a positive effect in shaping an academic and critical attitude insofar this uncertainty triggers curiosity – the desire to find out. As the experiment progressed and students found connections among the texts and between the texts and the ‘ordinary’ course sessions, students slowly started to understand (and accept) the value and function of this uncertainty.

The idea of intellectual uncertainty connects the observations about the format of the experiment with the observations relating to skeptical legal education and the role and position of the teacher. Oakeshott referred to education as ‘the art of conversation’. The experiment allowed students to engage with each other about ideas, theories and concepts, found in the authoritative texts that underpin the understanding of (positive) law. In doing so, students are put in a position to develop their own critical view about law and its foundations, formulating answers to the fundamental questions: What is law? What is its function? How to recognize law? This view and these answers may be naïve at first but as students are progressing in their studies their view on law does become more sophisticated

20 The experiment is currently subject to further (empirical) research by reference to educational theories in respect of honours teaching, self-organization, grading and feedback.

and academically sound. As far as the position of the teacher is concerned, the experiment takes ‘detachment’ quite literally, in the sense that the teacher gives over ‘control’ of the learning process. We would not promote, to be sure, this to be a pedagogical *Leitmotiv* in the entire curriculum but to allow students (in the shadow of the current approach in which the teacher is in control) to take over does seem to inspire them. It makes them realize the responsibility they have, as students, for their own learning process. The experiment presupposes a skeptical attitude: the awareness that theories about, for example, power, equality, freedom, punishment and so on are diverse and can be questioned. Questioning is inquisitive – a means of learning and academic self-development. Questioning (being critical) does not imply these theories are necessarily wrong, as if students must express an opinion, but refers to ‘the suspension of judgment’. The next step is to introduce the idea of reflexivity, as set out above, and to go a step further. It exists in eventually making a judgment about law and its functioning in contemporary society with an aim of continuous legal development and the need for change.²¹

5 The suspension of judgment

Building upon the concept of liberal legal education, as espoused by Oakeshott, we introduced the idea of skeptical legal education. Whereas Oakeshott stresses the importance of the ‘interval’ – a non-instrumental moment of learning and suspended judgment through the art of conversation –, we put moral and intellectual integrity in the centre of legal education. It refers to the requirement that students feel responsible to use their own faculty of judgment when encouraged to do so while studying and discussing legal texts. Skeptical legal education stresses the importance of conversation, discussion and suspended judgment and in doing so it promotes the students’ critical potential. A skeptical attitude starts with the intellectual awareness that knowledge claims cannot be taken for granted but must continuously be questioned in order to properly understand and use them in a critical way, and to do so from a detached point of view rather than on the basis of a particular political ideology. After they are graduated, lawyers can use their skeptical attitude to contribute in a critical way to the development of law. After all, legal education is to a large extent oriented towards legal practice and those who we teach will shape legal practice.

Skeptical legal education poses a challenge to legal education, its teachers and students as well as the organization of law faculties. The experiment illustrated how we can give shape to skeptical legal education but, obviously, skeptical legal education is not limited to this example. What the example shows is that learning and teaching must be a collective activity where learners and teachers each can have their responsibilities, which law faculties must be able to provide and facilitate. It may be that skeptical legal education fits well at first sight within the so-called meta-judicial courses in the field of, for example, legal philosophy or the

21 In the future this element will be added to the experiment.

sociology of law, but it is not necessarily restricted to these kind of courses. At each level and in each course skepticism is required to understand law as it is and *why* it is as it is. It is only then that students can draw their own conclusions about the law and its meanings and operations and how the law as it is can or has to be changed, in the awareness that these conclusions are temporary and questionable. Skeptical legal education also allows them to raise questions about their role as a lawyer: What type of lawyer do I want to be? How do I shape my career as a lawyer? Questions that equally apply to us teachers: What are our moral and political values? How do I want the law to be and why? What kind of law teacher do I want to be for my students? How do I want them to prepare for the practice of law?

References

Areeda 1996

P.E. Areeda, 'The Socratic Method', *Harvard Law Review* 1996, p. 911-922.

Bauman 1993

Z. Bauman, *Postmodern Ethics*, Oxford: Blackwell 1993.

Beck, Giddens & Lash 1994

U. Beck, A. Giddens & S. Lash, *Reflexive Modernisation. Politics, Tradition and Aesthetics in the Modern Social Order*, Cambridge: Polity 1994.

Burnyeat 1983

M.F. Burnyeat, 'Can the Skeptic Live His Skepticism?', in: M.F. Burnyeat (ed.), *The Skeptical Tradition*, Berkeley: University of California Press 1983, p. 117-148.

Carrington 2004

P. Carrington, 'Reproducing the Right Sort of Hierarchy', in: D. Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic against the System*, New York: New York University Press 2004, p. 145-153.

De Vries 2013

U. de Vries, 'Kuhn and Legal Research, A Reflexive Paradigmatic View on Legal Research', *Recht en Methode in onderzoek en onderwijs/Law & Method* 2013-1, p. 7-25.

Fish 2008

S. Fish, *Save the World on Your Own Time*, Oxford: Oxford University Press 2008.

Francot & De Vries 2010

L. Francot & U. de Vries, 'Adieu Von Humboldt? Over domme organisaties en slimme mensen (Adieu Von Humboldt? About Ignorant Organizations and Smart People)', in: L.J. Dorsman & P.J. Knegtmans (eds.), *Het universitaire bedrijf. Over professionalisering van onderzoek, bestuur en beheer (The University Enterprise. About Professionalization of Research, Governance and Management)*, Hilversum: Verloren 2010, p. 73-86.

Gadamer 2006

H.-G. Gadamer, *Truth and Method*. Second, revised edition. Translation revised by Joel Weinsheimer & Donald G. Marshall, London: Continuum 2006.

Giddens 1991

A. Giddens, *Modernity and Self-Identity. Self and Society in the Late Modern Age*, Cambridge: Polity Press 1991.

Kant 2003

I. Kant, 'What Is Enlightenment?', in: H.S. Reiss (ed.), *Political Writings*, Cambridge: Cambridge University Press 2003, p. 54-60.

Kelman 1987

M. Kelman, *A Guide to Critical Legal Studies*, Cambridge: Harvard University Press.

Kennedy 1995

D. Kennedy, 'Politicizing the Classroom', *Review of Law and Women's Studies* 1995-4, p. 81-88.

Kennedy 2004

D. Kennedy, 'Legal Education and the Reproduction of Hierarchy', in: D. Kennedy, *Legal Education and the Reproduction of Hierarchy. A Polemic against the System*, New York: New York University Press 2004, p. 9-144.

Van Klink 2011

B. van Klink, 'De kunst van het converseren. Over de rol van vaardigheden in Michael Oakeshotts opvatting van *liberal learning*,' in: C.G. Breedveld-de Voogd (ed.), *Signora Senatrice. Over recht, onderwijs en politiek. Opstellen aangeboden aan Ankie Broekers-Knol*, Den Haag: Boom Juridische uitgevers 2011, p. 217-225.

Van Klink 2013

B. van Klink, 'The Role of Hierarchy, Example, and Language in Learning. A Confrontation between a Liberal and a "Critical" Understanding of Legal Education', *Recht en Methode in onderzoek en onderwijs/Law & Method* 2013-1, p. 26-47.

Kronman 1993

A.T. Kronman, *The Lost Lawyer. Failing Ideals of the Legal Profession*, Cambridge, MS: The Belknap Press 1993.

Kronman 2007

A.T. Kronman, *Education's End. Why Our Colleges Have Given Up on the Meaning of Life*, New Haven: Yale University Press 2007.

Nussbaum 1994

M.C. Nussbaum, 'Skepticism about Practical Reason in Literature and the Law', *Harvard Law Review* 1994, p. 714-744

Nussbaum 2010

M.C. Nussbaum, *Not for Profit. Why Democracy Needs the Humanities*, Princeton: Princeton University Press, 2010.

Oakeshott 2001

M. Oakeshott, *The Voice of Liberal Learning*, Indianapolis, IN: Liberty Fund 2001.

Raz 1979

J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford: Clarendon Press 1979.

Scager et al. 2011

K. Scager et al., 'Do honors students have more potential for excellence in their professional lives?' *Higher Education* 2012, p. 19-39.

Scager et al. 2012

K. Scager et al., 'Challenging high-ability students', *Studies in Higher Education* 2012, p. 1-21.

Weber 1989

M. Weber, 'Science as a Vocation' (translated by Michael John), in: P. Lassman, I. Velody & H. Martins (eds.), *Max Weber's Science as a Vocation*, London: Unwin Hyman 1989.

White 1985

J.B. White, *The Legal Imagination* (abridged edition), Chicago: The University of Chicago Press 1985.

Bart van Klink & Bald de Vries

White 1986

J.B. White, 'Doctrine in a Vacuum: Reflections on What a Law School Ought (and Ought Not) to Be', *Journal of Legal Education* 1986, p. 155-166.

Supplement Table A

Course themes:	Selected texts: ²²
1. Legitimacy of power	Locke, <i>Second Treatise</i> (excerpts)
2. Sovereignty	Hobbes, <i>The Leviathan</i> (excerpts)
3. Research methodology	Siems, 'Legal Originality'
4. Fair trial/authority	Documentary: 'The Millgram Experiment'
5. Judicial autonomy	Wiarda, <i>Drie typen van rechtsvinding</i> (excerpts)
6. Law and sociology	Schwartz, 'Social factors in the Development of Legal Control'
7. Justice	Wissenburg, 'Aristoteles over rechtvaardigheid'
8. Liberty	Mill, <i>On Liberty</i>
9. Equality and solidarity	Wilde, 'The Soul of Men under Socialism'
10. Legal education	James Boyd White, 'Doctrine in a Vacuum' ²³

²² Full references are available upon request.

²³ The last session deviated from the course theme and instead concluded with a discussion on legal education.

²² Full references are available upon request.