

## **Skeptical Legal Education: How to Develop a Critical Attitude?**

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### *Summary*

*Law teachers at the university 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? In this article we intend to elucidate the role that critical thinking may play in legal education. We will introduce the idea of skeptical legal education, which is to a large extent based on Michael Oakeshott's understanding of liberal learning but which relativizes its insistence on the non-instrumentality of learning and reinforces its critical potential. Subsequently, the article presents a teaching experiment, where students, based on self-organization, study and discuss fundamental texts. The experiment is meant to demonstrate the possibility of reflexivity in skeptical legal education.*

### **1 The Age of Critique**

At the core of our modern self-understanding lies the notion of critique. Kant (2003: 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.<sup>1</sup> As Bauman (1993: 6-7) argues, enlightenment involves the possibility of emancipation and liberation and 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 encouraged.

If one were to ask law teachers nowadays what distinguishes academic legal education from professional and vocational training, they probably will refer to

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<sup>1</sup> Bauman (1993:8) 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.

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.<sup>2</sup> 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. However, 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 a central role in our understanding of critical thinking. Reflexivity not only refers to one’s own learning process 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.<sup>3</sup> 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: 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, the notion of reflexivity is discussed. 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 what the relevance of the suspension of judgment that skeptical legal education requires, for legal practice (section 5).

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<sup>2</sup> For an introduction to the ‘first wave’ of Critical Legal Studies, see Kelman (1987).

<sup>3</sup> 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.

## 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 fulfill in society (such as musician, major or meter maid). Subsequently, learning 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, 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 takes place in a separated sphere, far away from our daily cares and concerns. Therefore, Oakeshott (2001: 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” (Oakeshott 2001: 114).

Oakeshott (2001: 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

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. In ordinary life, he argues, mainly one language is spoken – the “language of appetite” (Oakeshott 2001: 33). It is a language full of clichés by means of which superficial impressions and emotions can be expressed in general terms that are recognizable and repeatable for everyone. Its sole purpose is to satisfy immediate needs in the quickest, easiest and cheapest way possible. 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 (cf. Oakeshott 2001: 13). Nowadays, education is more and more subjected to the logic of economic reason where universities apply business models, based on output, efficiency and economic utility as benchmarks of quality (see: Francot-Timmermans & 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: 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 learned, because it cannot be made an independent object of study. 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: 60). Students develop their 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: 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 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. 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.<sup>4</sup> The ‘critical’ approach to law advocated by Kennedy and others runs the risk of becoming in itself dogmatic and not open to self-criticism. What the ‘crits’ do demonstrate, however, is that law and its foundations (as social constructs) are not self-evident. Skeptical legal education is *reflexive* in that it questions current assumptions about what law is, how it functions in society and what or whose purposes it serves. It means that modern law calls for an understanding of modern society and the processes of modernization that shape society. Reflexivity refers to the task of understanding processes of modernization, such as individualization, globalization, industrialization and secularization, in order to find out what they imply 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 means that a skeptical attitude towards the study of law and its foundations is not limited to academic self-development, based on intellectual doubt and uncertainty. It is also aimed at discovering to what extent our understanding of the foundations or organizing principles of law, such as the rule of law, causality, and responsibility are still effective and if not, why and how to address them (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 political position as espoused by, for example the CLS. It exists in a constant self-confrontation of our assumptions about law both for academic self-development and the development of law.

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. Whereas Carrington (2004: 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 a ‘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

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<sup>4</sup> For a detailed critique on Kennedy’s view on critical legal education, see Van Klink (2013: #).

should never be taken for granted, but questioned and discussed from within the context of accepted ideas handed down through particular traditions. 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.

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 (i) the student's activity in and outside the classroom, (ii) the manner in which the teacher transfers knowledge and (iii) 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'.<sup>5</sup>

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. For that purpose 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 classroom 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. They 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 need not stop at the formal class hours. Moreover, the faculty could invest in these extracurricular student-teachers activities by providing financial support and other facilities.

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<sup>5</sup> These modifications follow from the imaginary encounter between the liberal and 'critical' view on education, as described by Van Klink (2013: #).

What is required, furthermore, 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.<sup>6</sup> 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: 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. As Max Weber (1989: 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 (Weber 1989: 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.

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,

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<sup>6</sup> This requires what Raz (1979: 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.”

question it and demonstrate its ultimate groundlessness, as in Socratic dialogues.<sup>7</sup> 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*).<sup>8</sup> ‘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. In our view, the ultimate goal of the infinite questioning is not tranquility 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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup> Every teacher will give his/her own version of the canonical texts, depending on the theoretical perspective and worldview s/he has adopted. Not 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

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<sup>7</sup> For an introduction to the Socratic method in legal education, see Areeda (1996).

<sup>8</sup> Burnyeat (1983) gives an insightful description of the skeptical practice of inquiry.

<sup>9</sup> According to Giddens (1991: 123), the era of late modernity is characterized by “regular shifts in knowledge-claims as mediated by expert systems.”

<sup>10</sup> Weber (1989: 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.”

<sup>11</sup> This follows from Gadamer’s characterization of understanding as application (Gadamer 2006: 305-308).

academic requirements are applied (teachers have to have the right qualifications), but also norms of decency (teachers have to meet some standard of good behavior and political correctness).<sup>12</sup> Kennedy (2004: 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-juridical’ courses, such as legal sociology, legal theory, legal philosophy and legal history. Although they are doomed to remain in the periphery, as Kennedy (2004: 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

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<sup>12</sup> Universities will, for instance, not be inclined to give voice to teachers with overtly fascist sympathies.

Utrecht, sought to bring into practice these requirements.<sup>13</sup> The experiment – colloquially called “Law & Lounge” – was embedded in an introductory course of law, mandatory to all first year students in the honors program. The introductory course provides students with the foundations of Dutch modern law, 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 teaching students how to study such texts, as if it were a course in exegesis. Rather, the aim is to awaken in students a critical potential and assess the worth of the theories presented in the selected texts as such and in the social context of today’s

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<sup>13</sup> This experiment was carried out by Bald de Vries, co-author of the present article.

world.<sup>14</sup> Research shows that challenging students appropriately improves their capacity to learn (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 center 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 to process information and apply – unreflective – the trick of legal analysis exemplified by the case study method. White (1986: 156) already pointed, in a somewhat caricatural 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.” Is it possible that students “take over” and are put in full control of the classroom sessions? Pedagogically, this was the central aim of the experiment.

The experiment consisted of ten sessions that ran parallel to the “normal” class sessions and were offered to three groups of first year honors students; the groups consisting of about 17-22 students. The sessions were made part of the honors program and they were in this sense mandatory. Students did not receive a grade, nor was there a final exam or a paper to write. 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.<sup>15</sup>

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

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<sup>14</sup> 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.

<sup>15</sup> See table A, below, for an overview.

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.

Upon completion of the course a number of (preliminary) observations can be made.<sup>16</sup> 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 honors students, selected to take part in the honors 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 honors 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 being thrown into the deep without the tools to (i) read such fundamental texts and (ii) discuss them. After each session, they felt uncertain about their efforts in understanding the text and its essence. The experiment should improve 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

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<sup>16</sup> The experiment is currently subject to further (empirical) research by reference to educational theories in respect of honors teaching, self-organization, grading and feedback.

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 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.<sup>17</sup>

## **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 center of legal education. It refers to the requirement that students use their own faculty of judgment when encouraged

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<sup>17</sup> In the future this element will be added to the experiment.

to 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-juridical courses in the field of, for example, legal philosophy or the sociology of law, but it is not necessarily restricted to this 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?

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## Supplement:

Table A

<b>Course themes:</b>	<b>Selected texts:<sup>18</sup></b>
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	Boyd White, “Doctrine in a vacuum” <sup>19</sup>

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<sup>18</sup> Full references are available upon request.

<sup>19</sup> The last session deviated from the course theme and instead concluded with a discussion on legal education.