

Enhancing critical thinking skills in legal education: A pathway to effective legal practice

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1 Introduction

Critical thinking is an essential ability in legal education, serving as the foundation of successful legal practice. It equips aspiring lawyers and legal experts with the skills to scrutinise intricate matters, assess arguments and formulate logical conclusions.¹ Considering the ever-changing and complex character of the law, it is crucial that legal education place great importance on fostering critical thinking abilities in order to equip students and prepare them for the obstacles they will encounter in their professional lives.²

In the South African Council on Higher Education's (SACHE) Report on the National Review of LLB Programmes 2018, it was stated that there is a serious lacuna in the legal education system about the inculcation of critical thinking skills to students. Almost half of the faculties/schools were found to pay insufficient attention to this important skill and even among those that were giving this skill due attention, there was room for improvement. It is suggested that critical thinking skill, as described by the Report on the National Review of LLB

1 A Lerner & E Talati 'Teaching law and educating lawyers: Closing the gap through multidisciplinary experiential learning' (2014) *International Journal of Clinical Legal Education* 10 & 96.

2 D Austin & R Durr 'Emotion regulation for lawyers: A mind is a challenging thing to tame.' *Wyoming Law Review* (2016) 387-411.

Programmes 2018 is the most important skill listed in the LLB standard, as they encapsulate all the other skills.³

2 Historical background

2.1 The colonial era

The complicated history of South Africa, which has been moulded by colonialism, Apartheid and the post-Apartheid shift to democracy has changed critical thinking in the country's legal education system.⁴ South Africa's distinct socio-political environment, the country's evolving legal system and the demand for legal experts capable of critically analysing constitutional principles, human rights and social justice have all had an impact on its development.⁵

During the colonial era, Dutch settlers introduced Roman-Dutch law, which is the foundation of South Africa's legal system.⁶ Roman-Dutch law demanded critical thinking in the interpretation of legal writings and precedents since it placed a strong emphasis on legal reasoning, logic and the methodical application of legal concepts.

During the British tenure, the English common law tradition had a significant influence on the colonial legal education model.⁷ During this time the main focus of legal education was on teaching lawyers how to apply laws and precedents; it did not always promote more comprehensive critical thinking, especially when it came to matters pertaining to racial inequality and colonial governance. Early legal education in South Africa was primarily formalistic, with a curriculum and teaching approach that prioritised memorisation of legal concepts and legislation.⁸ This left

3 South African Council on Higher Education's (SACHE) 'Report on the National Review of LLB Programmes' 2018 <https://www.che.ac.za/file/7291/download?token=P3RwkRn4> (accessed 02 October 2024).

4 R Madlalate 'Legal education in South Africa: In the globalization of legal education' in B Garth & G Shaffer (2022).

5 As above.

6 The South African Legal System: A guide for south african journalist <https://courtreporting.sanef.org.za/wp-content/uploads/1.-The-South-African-Legal-System-SANEF-Court-Reporting.pdf> (accessed 04 October 2024).

7 As above.

8 E Masiya & G Mdluli 'Critical legal education: A remedy for the legacy of colonial legal education?' (2020) 14 *Pretoria Student Law Review*.

limited opportunity for critical thinking and analysis of the social and political environment in which laws were applied.

2.2 The Apartheid era (1948-1994)

Legal formalism, which presented the law as an impartial, objective system divorced from moral or political factors and had a significant influence on South Africa's legal education during the Apartheid era. This strategy suppressed dissenting opinions regarding the function of the law in defending racial injustice, inequality and segregation.⁹ The Apartheid government used the law to promote racial policies, which abused human rights. During this period, legal education did not promote critical engagement with International Human Rights law let alone to encourage students to critically assess the morality or justice of these laws.¹⁰ One can say that during the Apartheid era critical thinking in terms of the legal domain was rather a glass half empty rather than half full as only a certain race was allowed to critically make laws that were in their favour depriving people of colour the opportunity to critically challenge such laws.

2.3 The democratic era

A significant change in legal education was brought about by the 1996 adoption of the South African Constitution, which placed an increasing focus on human rights, constitutionalism and critical thinking.¹¹ The Constitution's emphasis on freedom, equality and human dignity, forced legal educators to reconsider the way they taught the law, abandoning legal formality in favour of a more revolutionary approach. Since the Constitution became the supreme law of the land,¹² legal practitioners needed to learn how to critically analyse its provisions as well as human rights standards and social justice concerns. Students were inspired to

9 V Gangavane 'How did the Apartheid affect South African legal education? 2023, <https://www.regenesys.net/reginsights/the-influence-of-Apartheid-on-south-african-legal-education-llb#:~:text=legal%20education%20landscape,-LLB%20and%20Apartheid%3A%20Shaping%20the%20Curriculum,communities'%20legal%20rights%20and%20perspectives> (accessed 4 October 2024).

10 As above.

11 Lerner & Talati (n 1).

12 Section 2 of the Constitution.

critically examine how the law contributes to injustice and inequality. Instead of viewing the law as a simple technical field, legal educators started to emphasise the significance of analysing the social, political and economic aspects of legal decisions.

3 The importance of critical thinking in legal practice

Critical thinking is universally recognised as an essential foundation of proficient legal practice. Critical thinking encompasses intentional, reflective evaluation that is essential for problem-solving and decision-making.¹³ It is imperative to emphasise that within the legal context, lawyers must acquire strong critical thinking skills in order to analyse statute, case laws and construct a persuasive argument. Legal practitioners with critical thinking skills are more adept at managing the complexities and uncertainties intrinsic to the legal system.¹⁴

In legal education, the cultivation of these skills has been insufficiently prioritised in conventional curricula. Legal education predominantly emphasises doctrinal learning, wherein students are instructed to remember rules and precedents, lacking the profound intellectual engagement essential for legal practice.¹⁵ This has led to calls for law schools to focus on developing students' critical thinking skills, rather than producing graduates who struggle to face reality or adapt their behaviour effectively.¹⁶

4 Challenges in teaching critical thinking in the legal education

Several scholars have noted the challenges involved in helping law students develop critical thinking skills. They observe that legal education frequently prioritises rote memorisation and doctrinal analysis above the

13 PA Facione 'Critical thinking: A statement of expert consensus for purposes of educational assessment and instruction' (1990) *American Philosophical Association*.

14 E Rios 'Critical thinking in legal practice: Preparing law students for the profession' (2016) *Law Teacher Review*.

15 J Kerr 'Rethinking legal education: A critical approach to pedagogy' (2018) *Journal of Law and Society*.

16 HN Buchanan 'Law schools should continue to develop critical thinking skills, not become finishing schools' 2023, <https://www.dorfonlaw.org/2023/04/law-schools-should-continue-to-develop.html> (accessed 4 October 2024).

development of analytical abilities.¹⁷ The conventional case method and Socratic questioning, although beneficial for imparting legal ideas, may not consistently stimulate the critical thinking essential for profound legal analysis. Furthermore, more emphasis is on the challenges associated with evaluating critical thinking in legal education.¹⁸ Conventional assessment techniques, like timed examinations and essay composition, frequently may not accurately reflect a student's capacity to critically analyse legal issues. It is argued that examinations should be structured to evaluate not only legal knowledge but also the capacity to examine arguments, recognise underlying assumptions and consider other viewpoints.¹⁹

Legal education has heavily depended on the conventional classroom model, characterised by a predominance of theoretical knowledge and doctrinal study. This approach encompasses lectures, case studies and Socratic questioning designed to cultivate critical thinking and comprehension of legal principles. However, this method has faced criticism for inadequately preparing law graduates for the practical exigencies of legal practice. The disparity between theoretical knowledge and practical skills has prompted calls for reform in legal education.²⁰ The Socratic method of questioning student is aimed at promoting theoretical knowledge rather than a practical skill to deal with complex legal situations. This method employs a sequence of inquiries intended to guide the student's cognitive pathways along specified trajectories.²¹ Students of the Socratic method at their best acquire legal argumentation skills by engaging directly in a Socratic discussion with the professor or indirectly by seeing the interaction between another student and the professor.²² The Socratic method effectively imparts advanced legal reasoning to numerous students, enabling them to independently formulate legal arguments. The disadvantages include its psychological

17 P Ghosh & L Akeroyd 'Doctrinal law education: the critical thinking deficit' (2019) *Journal of Legal Studies*.

18 M Carneiro 'Assessing critical thinking in legal education: challenges and opportunities' (2020) *Legal Education Review*.

19 n 18.

20 <https://www.tnu.in/the-evolution-of-legal-education-from-traditional-classrooms-to-practical-approaches/> (accessed 31 December 2024).

21 AL Christie 'What critiques have been made of the socratic method in legal education?' (2010) *European Journal of Law Reform* 340-355.

22 n 21.

harm to students, its failure to impart a comprehensive array of legal abilities and its promotion of the professor's personal agenda.²³ The continued use of the Socratic method without due diligence being given to improving it will make creative learning skill an obstacle to law students as it confines them to their sphere of familiarity and does not allow them to think like lawyers, but to think like their professors.

Another challenge that hinders creative learning skill in the legal education is the inefficient use of problem-based learning. This method was influenced by the case-study method, which the study argues that it deprives students the opportunity to develop their skills of inquiry and communication as they are provided with a complete written out problem to solve. This limits the student's ability to independently explore issues creatively, as the problem is already outlined and defined for them. Due to its reliance on collaborative efforts, problem-based learning can result in uneven involvement levels.²⁴ Certain students may dominate discussions, while others may adopt a passive role, creating an imbalance in learning outcomes and diminishing the overall efficacy of the method in cultivating critical thinking skills.²⁵ The problem-based learning is similar to collaborative learning as students are encouraged to work in groups to solve a written problem. Law students mostly encounter challenges when participating in the collaborative learning method as it is seen in, for example, the constitutional law course where students may particularly encounter difficulties in creating a singular collaborative output that addresses issues related to abortion, privacy rights, racial and gender discrimination, sexual orientation, presidential pardon powers, the Second Amendment, voting rights, and disenfranchisement, among others.²⁶

23 n 21.

24 RH Cheryl & A Koraan 'Student-centred problem-based learning as a transformative approach to legal education' (2017) *The Independent Journal of Teaching and Learning*.

25 n 24.

26 AMKupenda 'Collaborative learning in the constitutional law classroom: Adapting the concept of inevitable disagreement in seven steps' *Journal of Legal Education* 68 <https://jle.aals.org/cgi/viewcontent.cgi?article=1620&context=home> (accessed 1 January 2025).

5 Legislative framework on critical thinking in legal education

5.1 Constitution of the Republic of South Africa, 1996

The Constitution of South Africa does not explicitly mention ‘critical thinking’ in legal education. However, section 29 of the Constitution supports the development of critical thinking, particularly in the context of education. This section is crucial for fostering critical analysis, debate and independent thinking, which are essential in legal education and the practice of law.

Section 29(2) provides that ‘everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable’. In order to ensure the effective access to and implementation of this right, the state must consider all reasonable educational alternatives, including single medium institutions and taking into account practicability. This section is interpreted to emphasise that education must be taught in a practical manner, including teaching students to develop creative thinking skills. In the legal education it further means that law students must be exposed to practicable scenarios whereby they deal with clients and partake in moot courts and mock trial. Their participation in such motivated activities must not be voluntarily or based on their submission of an essay as to why they should be chosen, but rather participation must be one of the requirements for obtaining their degree.

5.2 Universal Declaration of Human Rights (UDHR), 1948

The topic of critical thinking in legal education is not particularly covered by the Universal Declaration of Human Rights (UDHR). It does however, offer a more comprehensive framework that encourages critical thinking in all educational settings, including legal education. Articles on education, information availability, opinion and freedom of thought all have a direct impact on developing critical thinking abilities in the legal profession.

Article 26(2) of the UDHR provides that ‘Education shall be directed to the full development of the human personality and to the

strengthening of respect for human rights and fundamental freedoms.’²⁷ This Article stresses the holistic development of persons and highlights the importance of legal education in producing professionals capable of navigating complicated legal systems. Analysing legal principles, assessing court decisions and questioning established legal standards are all components of critical thinking in legal education. Article 26 encourages educators to provide a learning environment in which students are motivated to reason on their own, think critically and comprehend the larger social and ethical ramifications of the law.

Article 19 provides that ‘Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.’²⁸ It is essential for legal education system to allow students to freely express different legal theories, criticise legal systems and participate in open discourse. The freedom to discuss different points of view is guaranteed under Article 19, which is essential for law students to improve their analytical and critical thinking abilities. Law students’ need to be free to question accepted legal doctrines, criticise established legal precedents and suggest reforms. The safeguarding of freedom of expression fosters the kind of intense discussion that results in improved legal reasoning and the creation of novel legal solutions.

Article 18 provides that ‘Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private to manifest his religion or belief in teaching, practice, worship and observance.’²⁹ The foundation of legal education is the development of critical thinking skills related to legal ideas, systems, and policies. Students and legal academics are permitted to challenge accepted legal standards under Article 18, regardless of whether they are motivated by social, political or religious convictions.

27 Article 26(2) of the UDHR.

28 Article 19 of the UDHR.

29 Article 18 of the UDHR.

5.3 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR is a key human rights treaty that can be effectively used to equip critical thinking in legal education, such as in public international law, human rights law and constitutional law. Law students can be encouraged to interpret international norms, compare legal systems and debate justiciability using the ICESCR as an instrument to explore the intersection of law, policy and morality. Law students should be encouraged to critically assess laws not just from a technical standpoint but also from a human rights perspective. By integrating the principles of the ICESCR into the curriculum, students can develop a deeper understanding of how laws impact economic, social and cultural rights, promoting analytical skills that go beyond doctrinal learning.

6 Rationale

The integration of critical thinking in legal education equips students with the necessary skills to effectively handle complex legal issues, evaluate different viewpoints and anticipate opposing arguments in real-life legal practice.³⁰ Present pedagogical approaches that mostly emphasise memory and case-law analysis lacks the capacity to sufficiently prepare students to handle real life complex matters in the legal field. Improved critical thinking skills will enable law graduates to effectively address the intricacies of contemporary legal matters and deliver more efficient legal advocacy.

The right to education often implies that education should be designed to develop a range of skills, including critical thinking. For example, Article 26 of the Universal Declaration of Human Rights (UDHR) states that education should be directed to the full development of the human personality, which can be interpreted as including the development of critical thinking and analytical skills. The Constitution often mandates the creation of educational systems that promote democratic values, human rights and the rule of law. These principles are inherently linked

30 The Pandemic of Argumentation (2022) in *Argumentation library* <https://doi.org/10.1007/978-3-030-91017-4>.

to critical thinking, as legal education must prepare students to analyse, critique and apply laws within these frameworks.

7 The importance of enhancing critical thinking skill in legal education

One of the most important things in academic legal education is critical thinking. Students who practice critical thinking are more equipped to grow academically, expand their horizons and critically evaluate their own educational experiences. Numerous educational research emphasise the importance of metacognitive skills in the learning process.³¹ Critical thinking is not something that is performed just for some specific task or during the study period only but, ideally, it is part of a lifelong process of learning.³² It is a life purpose that is motivated by the 'willingness to inquire'. A university education ought to foster a transformational link between students and an organised corpus of knowledge, allowing them to both alter and transform the body of knowledge already in existence.³³

Critical thinking plays a significant role to the development of knowledge and innovation. Critical thinking lawyers are likely to be better legal practitioners because they are constantly seeking for methods to improve both their own and other lawyers' work.³⁴ Additionally, because they can examine several angles, consider multiple possibilities, compile pertinent data and critically evaluate it. The main reason to engage in critical thinking include curiosity, the never-ending pursuit of knowledge and the pursuit of truth which is what legal practitioners strive for.

In the legal field, critical thinking aid in preparing for complex decision making. Complex decision-making is essential in various professional domains, especially in law where practitioners often face intricate situations necessitating thorough study and discernment.³⁵

31 M Davies & R Barnett 'Introduction' in M Davies & R Barnett (eds) *The Palgrave handbook of critical thinking in higher education* (2015) 1-25.

32 P Green 'Teaching critical thinking for lifelong learning' in Davis & Barnett (n 31) 107-125.

33 P Ashwin 'Transforming university education: A manifesto' (2020).

34 VK Bart 'Critical thinking in academic legal education', *LaM* August 2023, <https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2023/08/lawandmethod-D-22-00006> (accessed 29 December 2024).

35 E Felton & M Sims *Critical thinking and decision-making in legal practice* (2020).

Critical thinking is essential for equipping individuals the necessary skills to manage such situations adeptly. It enables students and professionals to evaluate conflicting interests, assess various viewpoints and foresee possible consequences. Critical thinking cultivates skills in evidence assessment, logical reasoning and ethical deliberation, ensuring that conclusions are both informed and justifiable.³⁶

The ability to analyse and evaluate information objectively is essential for promoting social fairness and facilitating significant reform in the legal system.³⁷ It allows individuals to rigorously evaluate the fairness and equity of laws, regulations, societal frameworks and pinpointing aspects that sustain inequality or injustice. By challenging established norms and evaluating legal frameworks through ethical and inclusive perspectives, critical thinkers can devise novel solutions to systemic difficulties.

8 Pedagogical strategies to enhance critical thinking in legal education

Numerous efficacious ways for cultivating critical thinking abilities in law students have been proposed by this study. The first is the Socratic method, which has been a tried-and-true approach in law school pedagogy to encourage students to think critically when they engage with legal texts and concepts. The Socratic method works best when applied appropriately. Instead of focusing only on obtaining the right legal answer, this method will be more effective if it is used to challenge presumptions about the law and build multiple perspectives surrounding it. This will encourage profound critical thinking. An example of the Socratic method used in critical thinking within legal education is to allow students to analyse and present case laws in their first year of study and focus mainly on the elements of the case in question by allowing law students to engage with the professor in a more debatable manner. This will result in law students challenging assumptions and refining legal analysis. Another key example proposed by this study is that professors in universities must encourage law students to read every day a decided case law published at the South African Legal Information Institute

³⁶ As above.

³⁷ D Cornell *Beyond accommodation: Ethical feminism, deconstruction, and the law* (1991) Routledge.

(SAFLII) to enable students to present the case while questioning the case and its judgement.

Another pedagogical strategy that has emerged as a tool for encouraging critical thinking in legal education is problem-based learning. Problem-based learning entails students engaging in real-life legal problems and solving them accordingly on the face of it.³⁸ This will help students in developing critical thinking skills at an early stage of their legal career if this method is effectively introduced to students before they embark on their legal profession. To achieve the efficiency of this strategy the senior counsels can help young and upcoming counsels by giving them the time of their day by participating with them in a trial advocacy both in the civil and criminal trial. This will ensure that they become adverse with the legal field in the early stage of their law profession.

An additional pedagogical strategy that encourages critical thinking is collaborative learning. Students are exposed to a range of perspectives when working in groups and are required to defend their legal arguments to their colleagues. According to Johnson et al, this process of mutual critique helps students improve their arguments and develop a deeper grasp of legal issues.³⁹ To guarantee that every student participates equally in collaborative learning and that conversations stay on the subject of critical analysis rather than just reaching consensus, careful facilitation is necessary. This strategy will promote debates among the students and different perspective on the legal system. To put it more into a practical sense, this study proposes a good example of incorporating a diversion of law students in the university by separating them in mini law firms while rotating them among themselves and providing them with real life case scenarios for the students to solve while working together. Critical thinking should not be encapsulated into a law student after his/her four-year degree has been obtained but it should start in their first year, hence the study proposes that this example should not be effected when law students attend law schools but must be introduced at the onset which is in the first year.

38 The University of York 'Guide to problem-based learning' https://www.york.ac.uk/media/law/documents/pbl_guide.pdf (accessed 29 December 2024).

39 DW Johnson, RT Johnson & KA Smith 'Active learning: Cooperation in the college classroom' *Interaction Book Company* (2019).

9 Conclusion

There is increasing agreement in research regarding the value of improving critical thinking abilities in the legal education. Although the transmission of doctrinal knowledge is a major focus of traditional legal pedagogy, critical thinking abilities are essential for the practice of law in the complicated legal environment of today. Successful educational approaches for encouraging critical thinking have been discovered, including problem-based learning, case-based learning, and collaborative learning. Legal education fosters critical thinking skills, ensuring that future lawyers are not just knowledgeable about the law, but they are also able to apply it morally and imaginatively in a world that is becoming more and more complex.