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Critical cross-field outcomes: A Rortian view on why and how to teach jurisprudence in South Africa in the 2010s

Abstract

Higher education authorities strive towards a transformed, democratic, non-racist, non-sexist system which will, *inter alia*, promote a democratic ethos and human rights culture through educational programmes and practices that will foster creative thinking, cultural tolerance and a collective commitment to reach the ideals of a humane, non-sexist and non-racist society. The critical cross-field outcomes that must be demonstrably achieved by any programme approved in terms of the National Qualifications Framework echo these ideals. Law faculties typically refer to their Jurisprudence modules to demonstrate compliance with the requirements that students should understand the world as a set of related systems and be sensitive to different cultures, meanings and perceptions across a range of social contexts. However, the design and presentation of such modules should be reconsidered. It is argued that the ideas of the liberal pragmatist Richard Rorty (1931-2007) provide valuable insights into these aspects and that a new justification for inclusion of Jurisprudence in law curricula is, in fact, established through it.

Kritieke kruisvelduitkomst: 'n Rortiaanse siening oor waarom en hoe om Regsfilosofie te doseer in Suid-Afrika in die 2010's

Hoëronderrysowerhede moet streef na 'n getransformeerde, demokratiese, nie-rassistiese, nie-seksistiese stelsel wat onder meer 'n demokratiese etos moet bevorder deur opvoedkundige programme en praktyke wat kreatiewe denke, kulturele verdraagsaamheid en 'n kollektiewe verbondenheid tot 'n nie-rassistiese, nie-seksistiese samelewing sal kweek. Hierdie ideale word herhaal in die kritieke kruisvelduitkomst waarvan die bereiking gedemonstreer moet word alvorens enige program ingevolge die Nasionale Kwalifikasieraamwerk goedgekeur word. Regsfakulteite verwys tipies na hul Regsfilosofie-modules wanneer daar bewys moet word dat studente die wêreld verstaan as 'n stel verwante sisteme en dat hulle sensitief is teenoor verskillende kulture, menings en persepsies in verskillende sosiale kontekste. Die ontwerp en aanbieding van sodanige modules moet egter heroorweeg word. Daar word geargumenteer dat die idees van die liberale pragmatist Richard Rorty (1931-2007) waardevolle insigte bied in hierdie verband en dat daar inderdaad 'n nuwe regverdiging bestaan vir die insluiting van Regsfilosofie in regscurrikula.

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1. Introduction

Since the transition to democracy in South Africa, the debate on the role and purpose of higher education institutions in post-apartheid South Africa has been fervent. In the White Paper dealing with the transformation of higher education, a transformed, democratic, non-racist, non-sexist system is proposed which will promote, among other ideals, a democratic ethos and human rights culture through educational programmes and practices that will foster creative thinking, cultural tolerance and a collective commitment to reach the ideals of a humane, non-sexist and non-racist society.¹ A single national qualification framework (NQF) has been implemented, which entails that all higher education qualifications must be registered with the South African Qualifications Authority (SAQA).²

The policy document, which sets out the guidelines for recognition and evaluation of national qualifications, distinguishes between two types of qualifications: those based on unit standards and those based on exit-level outcomes.³ Universities confer the latter. The central question for recognition of a qualification is: Will the achievement of this qualification contribute towards the full personal development of the learner and to the social and economic development of the nation at large?⁴

Students or learners must be prepared for a specific occupation, but much more must also be attained. The student must be prepared for lifelong learning, the qualification must embody the transformation aimed for by the national qualifications framework, and the critical cross-field outcomes (CCFOs) must be reached. The principles of responsible citizenship, cultural and aesthetic sensitivity and the effective use of science and technology are emphasised.⁵ One of the requirements for recognition of both types of qualifications (respectively based on unit standards and on exit-level outcomes) is that an applicant must indicate how the CCFOs are achieved.⁶ The practical implication is that all tertiary legal qualifications will only be recognised if compliance with the CCFOs is demonstrated. CCFOs are described as generic outcomes “that inform all teaching and learning”.⁷ Ten are listed, to wit:

- Identifying and solving problems where responses to problems show that such critical and creative thinking has been used to make responsible decisions.

1 Department of Education *Education White Paper 3 – A programme for Higher Education Transformation* Government Gazette Number 18207, 15 August 1997, item 1.14.

2 Department of Education *Education White Paper 3 – A programme for Higher Education Transformation* Government Gazette Number 18207, 15 August 1997, items 2.66 and 2.67.

3 SAQA 2005:2.

4 SAQA 2005:3.

5 SAQA 2005:3.

6 SAQA 2005:9, 13.

7 SAQA 2005:95.

- Working effectively with others as a member of a team, group, organisation or community.
- Organising and managing oneself and one's activities responsibly (*sic*) and effectively.
- Collecting, analysing and critically evaluating information.
- Communicating effectively using visual, mathematical and/or language skills in the modes of oral and/or written presentation.
- Using science and technology effectively and critically, showing responsibility towards the environment and the health of others.
- Demonstrating and understanding of the world as a set of related systems by recognising that problem-solving contexts do not exist in isolation.
- Reflecting on and exploring a variety of strategies to learn more effectively.
- Participating as responsible citizens in the life of local, national and global communities.
- Being sensitive to different cultures, meanings assigned and perceptions across a range of social contexts.⁸

Like other faculties, law faculties have to demonstrate compliance with the CCFOs. The CCFOs are broadly formulated and are thus open for a variety of interpretations. The majority of law faculties include compulsory basic skills modules in their curriculum and attempt to integrate the acquisition of other skills into their entire curriculum by, for instance, making use of group tasks, electronic learning platforms, as well as a variety of oral and written tasks. However, some of the CCFOs, especially (vii), (ix) and (x), are more difficult to integrate.

The majority of faculties of law offer one or more modules in Jurisprudence in their curricula;⁹ it is necessary to reflect on whether

8 SAQA 2005:42.

9 For example, the Universities of Pretoria and Stellenbosch compel LLB students to complete one semester in Legal Philosophy or Jurisprudence in year three with an elective in year four (<http://web.up.ac.za/sitefiles/file/publications/2014/yearbooks/Law-2014.PDF> [pp. 18-19] and [http://www.sun.ac.za/english/Documents/Yearbooks/2013/2013_Law_\(Eng\)_WEBpdf.pdf](http://www.sun.ac.za/english/Documents/Yearbooks/2013/2013_Law_(Eng)_WEBpdf.pdf) [pp. 16-17]). Although the University of Pretoria prescribes two modules entitled "Jurisprudence" in the first year (JUR 110 and 120), their content relates to general introductory topics to legal studies and legal history (see pp. 55-56 of the calendar). The University of Johannesburg prescribes one compulsory semester course in Jurisprudence in year four (<http://www.uj.ac.za/EN/Faculties/law/Documents/FACULTY%20REGULATIONS%202014.pdf> [page 26]). The University of the Witwatersrand will only offer LLB as second degree from 2015 and prescribes one module in Jurisprudence (http://www.wits.ac.za/law/llb_programme/15664/llb_programme.html#Available). The North-West University decided that two additional modules should be

these CCFOs can indeed be reached by presenting courses or modules on Jurisprudence and Ethics. What, for instance, are the requisites regarding content and presentation if this is the case? It could even be asked whether a new motivation has not been established to justify the inclusion of modules such as Jurisprudence or Ethics in a law curriculum.

In this search, the valuable insights of the liberal pragmatist Richard Rorty (1931-2007) will be considered. His lifelong philosophical project was to reconsider what philosophy is, what it should be, and how persons should act to attain the liberal goals he proposed and that are presumably now set for South African tertiary institutions through the CCFOs.

In his *Philosophy and the mirror of nature* (1979), Rorty rejected the representation theory that served as the foundation of Western philosophy to date. He argued that the end of epistemologically centred philosophy has arrived, but not the end of philosophy as such. In a later compilation, *Consequences of pragmatism* (1982), he expanded his views on what philosophy should be and also on what the task of philosophers is. In addition, Rorty¹⁰ expressed his views on the usefulness of ethics education. The possible contribution of Rorty's views to the development and presentation of these and similar modules will also be contemplated, as they offer a candid assessment of what can and cannot be achieved by compulsory courses of this kind.

First, Rorty's view on whether the world can be understood and whether philosophy taught at university plays any role in such a process will be investigated. Secondly, his opinion on ethics and applied ethics, as well as the formative value (if any) of modules addressing these issues, will be considered. In the last instance, the justification for including modules in Jurisprudence and Ethics in law curricula will be explored.¹¹

included in each programme leading to a first degree, generically referred to as "understanding-the-world" modules. The purpose with these is twofold: to provide a historical overview of ontological views and to address ethical issues relevant to the chosen field of study – typically philosophical topics. The generic outcomes require, *inter alia*, that students voice their own opinions on ethical issues and that they formulate "acceptable ethical solutions to contemporary problems". CCFOs (vi), (vii), (ix) and (x) (possibly even (i) and (iii)) are, therefore, achieved by these modules. In the four-year LLB curriculum, Jurisprudence (first semester, third year) and Jurisprudence and Ethics (second semester, fourth year) are regarded as modules complying with the statutory requirements; the Faculty of Law is not required to teach additional "understanding-the-world" modules. The first module entails a historical study of philosophers and jurisprudential schools. The second comprises a study of selected jurisprudential topics and legal-ethical issues with reference to jurisprudential and non-jurisprudential sources. (<http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-academic-administration/dokumente/jaarboek2014/Regte/PC%20Law.pdf> [pp. 21-22]; for outcomes see pp. 58 and 65.

10 Rorty 2006:373.

11 This is not an attempt to describe or evaluate pragmatist jurisprudence as such – that will be an altogether different conversation. Reference is made

2. Rorty's view of the nature of philosophy and the purpose of its teaching

Richard Rorty is controversial for his rejection of the representation theory, which, in essence, entails that human knowledge mirrors a reality outside humankind. Rorty's epistemological view directly leads to his rejection of the mainstream perception of philosophy as well as the usefulness of, or need for the so-called Big Projects of philosophy. Although he is accused of rejecting philosophy as such, he maintains that there is a place and role for philosophy, as long as it is not epistemologically centred. In *Consequences of pragmatism* (1982), he outlines what philosophy should be and what philosophers should be doing.

The harsh response to Rorty's view can be explained historically. Almost all earlier philosophical works accept the existence of God as the creator and regulator of human destiny. During the Enlightenment, however, Western thinkers rejected the idea of God, and human rational thought became the creator and governor of human destiny and even total reality. Where religion previously provided answers to life's so-called Big Questions, these solutions were now provided by philosophy. The type of philosophy that was to provide these answers was epistemologically centred, based on the capabilities of human rationality. Due to the rise of positivism and the emphasis on "scientific methods", philosophy was regarded as reliable only if the "scientific method" was applied – hence mathematicians made better philosophers than literati.¹²

Rorty rejects analytical philosophy or so-called Platonic philosophy, which aims to answer unsolved questions "left by science".¹³ The agenda for such philosophy is determined by "science" and it holds that there are answers to the so-called Big Questions, as there are extra-human essences. The underlying idea is that human reason creates a mirror image of reality outside human beings in order to make sense of it. However, according to Rorty, there is no reason why this metaphysical assumption should be upheld any longer.¹⁴ The search for big universal truths or constants is a waste of time – up to now, no (convincing) answers to the Big Questions have been found; nobody knows whether it will ever be found, or whether a certain answer would be correct. Neither will we know how to determine this, as there is nothing Big Out There against which we can measure or gauge our attempts. Human beings can only defend current descriptions to the extent that they can (currently) be satisfactorily justified. The idea of essences and external standards (i.e. beyond humanity) should be abandoned. For this reason, the assumption or idea that someone can "understand the world" or know it should be discarded. A certain aspect

to some sources on the topic throughout, but for an in-depth engagement with the topic, see, among others, Singer 1984:1-70; Belliotti 1989:33-51; Hunt 1990:507-540; Radin & Michelman 1991:1019-1058; Gregg 1998:382-398.

12 Rorty 1982:221.

13 Rorty 1982:164-165, 192-193, 215, 222.

14 Rorty 1982:211, 222; Stumpf & Fieser 2003:485.

of the world or reality may be explained or described by making use of the vocabulary of the time that is useful in the context, but the inevitable deduction is that Rorty would be very sceptical about any claim that the world as such could be “understood”. According to him, any implication by an educational institution that any module it teaches would reveal the Real Reality to students would be false.¹⁵

For Rorty, philosophy – like mathematics, physics, or chemistry – is a vocabulary employed to describe a dimension or certain aspects of reality.¹⁶ Human beings use a certain (totally contingent) vocabulary that is useful to describe the world for particular purposes. Someone would draw on the vocabulary of quantum physics to explain the relationship between mass, speed and energy, but the vocabulary of theology or metaphysics would be utilised to speculate on the origin and coherence of the reality we know. However, the world or reality has no preference with regard to the vocabulary that should be used to describe it. *People* have vocabularies and language. These are contingent instruments, and circumstances determine their efficacy.¹⁷ The inference is that people will choose a vocabulary that fits the circumstances and their needs. We currently use an expedient vocabulary to describe the nature of things, but there is no guarantee that the current description will remain intact or that it will not be replaced in a year or ten with a new, more expedient description.¹⁸

Language is thus central in Rorty’s theory, as opposed to reason and knowledge, which were previously accorded the place of honour.¹⁹ The title of one of the chapters in Rorty’s *Philosophy and social hope* is “Hope in Place of Knowledge” – a fitting description of his anti-Platonic view of reality. He notes: “I want to demote the quest for knowledge from the status of an end in itself to that of one more means toward greater happiness.”²⁰

15 Rorty 1982:xliv. Rorty (1982:165-166) states that pragmatism “... wants us to give up the notion that God, or evolution, or some other underwriter of our present world-picture, has programmed us as machines for accurate verbal picturing, and that philosophy brings self-knowledge by letting us read our own program. ... There is no method for knowing when one has reached the truth, or when one is closer to it than before.” See Stumpf & Fieser 2003:486. The Critical Legal Studies (CLS) movement that became active in the United States of America in the second part of the previous century advocated recognition of “radical indeterminacy”, rejection of the idea that the social order is objectively correct and rejection of the idea that law is a “neutral, dispassionate inquiry conducted by quasi-scientists” (Bellioiti 1989:33-34). These sentiments echo Rorty’s ideas on philosophy and, for this reason, he was referred to by Bellioiti (1989:50) as the philosophical “champion of CLS”. For more on CLS and postmodernism, see Hunt 1991:520-523.

16 Rorty 1982:xli-xlii, 90.

17 Rorty 2008:6, 16.

18 Rorty (1982:xlii) rejects the idea of a “final vocabulary” that may be the purpose of “Philosophy”. See also Stumpf & Fieser 2003:487. Gregg (1998:390) refers to “ad hoc theories” used by pragmatists to “understand their world in a manner pragmatically efficient”; Radin & Michelman 1991:1031.

19 Nielsen 2006:137.

20 Rorty, as quoted by Cooley 2008:200.

Human beings' ultimate quest should not be to understand the world (as this cannot be accomplished), but to attain greater happiness. In the ideal, liberal society we must attempt to attain, cruelty and discrimination will have been eliminated. Rorty refers to a "classless, casteless, egalitarian society".²¹

As The Truth and The Good do not exist, any pursuit thereof in traditional metaphysical philosophy is fruitless. "Truth" and "Virtue" are positive concepts, but cannot serve as metaphysical standards. People ought to speak the truth and perform good deeds; but to mull over *The Truth* or *Virtue* will not achieve that objective. The kind of philosophy advocated by Plato and Kant, which assumes fixed universal principles and a metaphysical reality outside human beings, must be rejected.²² According to Rorty, philosophy becomes an attempt to ascertain "... how things, in the broadest possible sense of the term, hang together".²³ Philosophy can, at most, be a description of all the descriptions ever given, a comparative literature study, a form of cultural criticism.²⁴

The main task of philosophy is, therefore, not a search for a transcendental source of truth – concepts such as *Law* and the positivist reliance on the unchanging nature of reality are discarded.²⁵ Philosophy's quest becomes a search to establish how all the different vocabularies cohere – transcending all borders imposed by time and culture.²⁶ Its quest is for a better description of the coherence, one that will provide hope for a better future and that will make us better persons.²⁷ Yet, there is no guarantee that there will be a better future. Rorty does not attempt to describe the future, but refers to a "principled fuzziness" used to describe the hope for a future that will "astonish and exhilarate".²⁸

Rorty observes that his colleagues fear for more than their jobs and incomes in view of this downgrading of philosophy to a form of literature – they are also anxious about the possibility that Western intellectuality, a valuable treasure of Western civilisation, will be lost and that philosophy will degenerate into an irrational conversation.²⁹ According to Rorty, this is inevitable due to the gradual fall of positivism.³⁰ There simply remains no place for philosophers such as Descartes and Kant who believe that *they* understand reality better, or that *they* have the Right Answers to the Big Questions. In Rorty's system, the status of the philosopher is lowered and, instead, philosophers become all-purpose intellectuals who are able to offer opinions on virtually anything "... in the hope of making it hang

21 Cooley 2008:200.

22 Rorty 1982:xvi, xlii; Hunt 1990:519-520.

23 Sellars, as quoted by Rorty 1982:xiv.

24 Rorty 1982:xl.

25 Rorty 1982:xvii; Rorty 1999:27.

26 Rorty 1982:xxxviii.

27 Rorty 2008:80.

28 Rorty 1999:28.

29 Rorty 1982:xxii.

30 Rorty 1982:xxii.

together with everything else”. The philosopher’s task and speciality is “... seeing similarities and differences between great big pictures, between attempts to see how things hang together. He is the person who tells you how all the ways of making things hang together”.³¹

This type of philosophy will be more valuable than traditional models, as more knowledge of descriptions of reality and its coherence will enhance a person’s frame of reference, thus enabling one to handle life and cope better. Philosophy is necessary to form a coherent total image of reality, but this philosophy does not attempt to provide an absolutely coherent image, nor does it claim to provide the real image. It is adequate to merely have an idea on which convictions can be based.

Traditional philosophers³² find the above approach unacceptable, as there remains no guiding principle, structure or reference to how things “really are”. The pragmatic idea that there is nothing “out there” to be found or to be relied on, but that instead everything is about language and vocabularies, is rejected by them as being nothing but decadent.³³

The idea of description and redescription originates in Rorty’s emphasis on language. He compares description, redescription and criticism to holding two depictions of something next to each other and comparing them, without having access to the original.³⁴ We do not know what the original is like and the quest to describe the original should, therefore, be forsaken, as explained earlier. Because of this reasoning, Rorty is accused of relativism, a charge he denies: “The difference between pragmatism and cultural relativism is the difference between pragmatically justified tolerance and mindless irresponsibility.”³⁵

Rorty argues that there are better and worse answers, and those rendered by Western liberalism are better as they had worked better thus far. This view elicits stringent criticism, due to its perceived arrogance and implied ethnocentrism. Rorty, however, refutes this criticism and claims that his version of Western liberalism will ultimately not be ethnocentric, because through the extension of sympathy with others, the group constituting “us” will continuously be expanded.³⁶ This type of ethnocentric pragmatism, then, is not relativism.³⁷ It may even be called a “horizontal philosophy” characterised by tolerance, replacing a “vertical philosophy of domination and exploitation.”³⁸

31 Rorty 1982:xl.

32 Rorty capitalises concepts hailed by traditional philosophy, hence Philosophers would be those advocating that platonic Philosophy can provide Big Answers.

33 Rorty 1982:xxxix-xl.

34 Rorty 2008:80.

35 Rorty as quoted by Melchert 2002:723.

36 Melchert 2002:722. In this way Rorty escapes being labelled a “cultural imperialist”. See Otakpor 1994:65.

37 Allen 2000:223.

38 Otakpor 1994:67.

Redescription can make almost anything appear better or worse, and one should guard against presenting one's own redescription as The Big Answer or The Truth.³⁹ We should remember that nobody has "a sacred claim to a messianic civilizing mission in a universe as diverse and federated as our own".⁴⁰ Rorty argues that post-metaphysical philosophy should avoid any claims to provide a final, decisive vocabulary, as the possibility of a better vocabulary always exists and cannot be excluded.⁴¹ Ultimately, any reference to a god-like entity outside humankind should be withdrawn, irrespective of whether it is to God, Truth or Science: it appears that Law and Justice could also be included in this list. It does not follow that simply any view or conviction becomes acceptable. Although we can never escape our context, our convictions have to form a coherent and consistent unity.⁴²

The promise of certainty offered by metaphysical philosophers is, in fact, a way of escapism, as reality is not accepted for what it is. The falsely claimed certainty is replaced by hope for a better future.⁴³

Rorty does not deny the illustrious history of philosophy and, in fact, urges universities to make students aware of how the "great dead philosophers" enjoy a presence nowadays through their thoughts and writings.⁴⁴ This must not be done in an attempt to provide answers to the Big Questions, but to increase students' "linguistic and argumentative repertoire, and thus an imagination".⁴⁵ Rorty describes philosophers who do this as the "scientific" type.

The majority of Jurisprudence modules offered by South African faculties of law would (at least partially) fall in the category of studies of the "presentness of the past" in the form of the "great dead philosophers"⁴⁶

39 Rorty 2008:7-8.

40 Otakpor 1994:67.

41 Rorty 1982:xliv-xlviii; Rorty 2008:73, 75.

42 Nielsen 2006:133. See also Otakpor 1994:68-69.

43 Rorty 1999:33.

44 Rorty 1982:62, 68. He quotes Bloom who states that this task was mostly performed by teachers of literature (as a general type of intellectual) in the United States of America at the time, as those in history, philosophy and religion have "withdrawn as agents from the Scene of Instruction".

45 Rorty 1982:222.

46 See Rorty 2006:373. The third-year module at Stellenbosch University is described as follows on page 39 of its calendar, [http://www.sun.ac.za/english/Documents/Yearbooks/2013/2013_Law_\(Eng\)_WEBpdf.pdf](http://www.sun.ac.za/english/Documents/Yearbooks/2013/2013_Law_(Eng)_WEBpdf.pdf): "An introduction to legal philosophical concepts and methods with particular reference to issues of elementary scientific theory and scientific philosophy and themes encountered in the history of Western and African philosophy on law and justice." On page 56 of the calendar at <http://web.up.ac.za/sitefiles/file/publications/2014/yearbooks/Law-2014.PDF>, the University of Pretoria describes Jurisprudence 310 as "An overview of the most important jurisprudential approaches amongst others natural law, positivism, realism, critical legal theory, modern and postmodern approaches. The theoretical and practical value of these approaches [is] investigated within a post-apartheid context." The purpose of

that will typically be presented by the “scientific philosophers” or lecturers. Any module, in which students are exposed to a wide variety of views on typical jurisprudential topics such as the purpose of law, social justice, the role of judges, law and morality, and so on, will increase their imagination. Theories expounded and opinions aired in prescribed material probably successfully demonstrate how various authors and thinkers approached and viewed a certain matter and how these views have influenced contemporary notions on the topic. Students are routinely expected to formulate their own opinions on the topic. In Rorty’s parlance, this process can be summarised as follows: Big Questions are introduced and various answers in different vocabularies are presented, but he would warn that no Correct Answers should be advocated. Rorty would have expected the lecturer to present the different stances and to convey the message that they are all contingent descriptions in contingent vocabularies.

The second type of philosopher is the creative poet-philosopher who develops new vocabularies and convinces the new generation to use and further develop the vocabulary. These types of thinkers (and lecturers) break through the “crust of convention” and make others reconsider their vocabularies.⁴⁷ Their half-formed vocabularies compete with established ones and create exciting philosophy,⁴⁸ but this does not mean that this kind of philosopher is superior. Rorty⁴⁹ argues:

There is no more reason for pitting the world-disclosing “poetic” philosophers against action-coordinating “scientific” philosophers than there is for pitting construction workers against ballet dancers, or accountants against comedians. The two may not be able to work together, but culture and society will always need to have both on hand.

the module Jurisprudence at the University of Johannesburg is stated as: “A student who has completed this module will have sufficient knowledge to be able to discuss meaningfully the nature and structure of law and the function of law in society, to recognise and distinguish different schools of legal thought and styles of adjudication, and to discuss meaningfully the relationship that exists between law and justice, between law and morality, and between law and politics.” On page 56 of the calendar at <http://www.uj.ac.za/EN/Faculties/law/Documents/FACULTY%20REGULATIONS%202014.pdf>., Jurisprudence at the University of the Witwatersrand entails: “Theories of law, including natural law, positivism, realism, the historical, sociological and materialist approaches; theories of justice; and contemporary thought, including critical approaches to law. In addition, students will acquire skills in legal essay writing” – see page 270 of the calendar at http://www.wits.ac.za/files/3inii_766210001383036386.pdf. At the North-West University, the third-year module Jurisprudence similarly covers “the terminology of Jurisprudence and different theoretical approaches to the law and legal studies, with special reference to Western jurisprudential traditions; twentieth century jurisprudential debates and current jurisprudential issues” – page 58 of the calendar at <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-academic-administration/dokumente/jaarboek2014/Regte/PC%20Law.pdf>.

47 Rorty 1991b:15.

48 Rorty 2008:9.

49 Rorty 2000:152.

The “scientific” philosopher, who will be the typical lecturer, is the construction worker or the bookkeeper in society, not necessarily as creative as the performing artist, but just as necessary for the proper functioning and development of society.

The teaching of compulsory philosophy modules will, therefore, serve a positive purpose, provided that the content complies with Rorty’s idea of philosophy and its contents. One should steer clear of universal Right Answers to Big Questions; rather, the purpose of the modules should be to broaden horizons. Philosophy, in general, and certainly Jurisprudence, in particular, should point out injustice.⁵⁰ The role of the philosopher in a liberal democracy such as South Africa is not to be revolutionary or radically sceptical, but to juxtapose the virtuous and base features of society.

It is not known whether this is indeed the case in all South African law faculties. In respect of the American situation, Romano⁵¹ points out that, despite Rorty’s convincing views, philosophy faculties and departments have continued as always:

In the face of Rorty’s devastating exposure of positivistic philosophy’s ahistorical, pocket-full-of-examples approach to knowledge, philosophy professors largely kept to their program for the same reason Afghans keep growing poppies – it’s either this, or we’re out of business.

Bertrand Russell⁵² maintained that the biggest task philosophy has in contemporary society is that it can and should assist people to live without fear, without being paralysed by hesitation. Rorty’s attempt to achieve this is successful according to some, but it is not according to others. It is clear that Rorty provides a contemporary, balanced and realistic view of the role of philosophy and its teaching at tertiary institutions. It is also clear that his views are not welcomed by philosophers in existing structures at such institutions, however, as it threatens the basis of a discipline and tradition. Rorty asks that we all be honest for a moment and consider whether there is really any hope of finding the Right Answers to questions that have been asked for over two millennia. Should philosophers not refrain from preaching Certainty, Truth and Final Vocabularies? The resulting uncertainty may be unsettling, but at least one can then proceed from that point onward. It should not be alleged that “the world can be understood”, but rather that “there are many ways in which the world can be understood”, and it should then be asked: “Which description will work best in the current context?”⁵³ Pragmatist critique does not necessarily reject an entire framework; instead, it is sensitive to the situatedness of a

50 Rorty 1991b:25.

51 Romano 2007:3.

52 As quoted by Romano 2007:4.

53 This resonates with pragmatist jurisprudence that accepts the idea of indeterminacy and rejects the concept of “legal determinacy as one of the false ‘grand narratives’ of the European Enlightenment” (Gregg 1998:382-383). Gregg (1998:384-385) describes pragmatism as antifoundationalist, and localist (but not parochial).

discourse that may result in certain bias.⁵⁴ It indeed appears that this is what CCFOs (vii)⁵⁵ and (x)⁵⁶ aim for, and that Rorty's views on the composition of modules that are prescribed to reach these outcomes, should be heeded. However, the ethical or normative dimension of the requirements set by government should also be considered.

3. Ethics, morality and the teaching thereof

During a speech, Rorty made the following observation:

There is no teachable skill that will help you sort out your moral intuitions so as to come to the right conclusion. Neither law school nor philosophy school can be relied upon to improve a student's moral character.⁵⁷

On the other hand, he was an outspoken supporter of liberal university lecturers' active efforts to expose fundamentalist students to alternative ways of thinking, for example by prescribing first person accounts of homosexual experiences to homophobic students.⁵⁸

The idea that a person can be "developed" into an all-round, well-cultivated, morally exemplary citizen by a university would be problematic for Rorty.⁵⁹ This presupposes a political citizenship, but there is an inherent tension between the typical individual focus of modules, in which individual behavioural traits are discussed, on the one hand, and the ultimate goal, which is at a collective level, on the other.

Rorty believes that positive growth in a society is possible and that curricula such as those under discussion may help to reach that goal. However, their focus should be the cognizance of others' fate and the enhancement of empathy with others. These goals will not be reached by a curriculum that teaches abstract universalism and absolute rationality.⁶⁰ The fact that divergent views on values and sources of truth exist within communities will be recognised when the search for universal and moral truths is abandoned. Instead, the pragmatist will then search for more descriptions that may be useful in different contexts: "... [p]ragmatism gives you the ability to hit moving targets while still acknowledging that you, too, are moving".⁶¹

54 Radin & Michelman 1991:1031-1032.

55 This CCFO refers to the "understanding of the world as a set of related systems by recognising that problem-solving contexts do not exist in isolation".

56 This CCFO requires that sensitivity for "different cultures, meanings assigned and perceptions across a range of social contexts" be cultivated.

57 Rorty 2006:376.

58 http://en.wikipedia.org/wiki/Richard_Rorty (accessed on 5 September 2009).

59 Cooley 2008:197.

60 Cooley 2008:201.

61 Cooley 2008:201. Hunt (1990:525) quotes White who uses a different metaphor: "When we discover what we have in this world no earth or rock to stand or

This does not mean that “everything goes”, as pragmatism still provides for normative critique.⁶² Rorty identifies “moral progress”⁶³ and distinguishes morally acceptable and unacceptable behaviour.⁶⁴

In Rorty’s view, the ideal (educated) human being will be the “liberal ironist”.⁶⁵ The liberal dimension is public, for it requires involvement with others, but the ironist is a self-searching individual who always strives for a better self-description and vocabulary.⁶⁶ Rorty’s liberalist believes that physical or psychological cruelty is the worst people could do to each other, and it follows that the ironist’s vocabulary is aimed at minimising cruelty that may cause humiliation, neglect and institutional injustice.⁶⁷ The ironist should strive to analyse his or her own actions continuously, to seek the best vocabulary and to act in pursuance of the good. In this sense, “good” means recognition of, and respect for freedom, diversity, sensitivity, solidarity, limitation of cruelty, and growth. If these traits are aspired to, there will indeed be personal growth.⁶⁸

He postulates that the two central questions that must be addressed are how we can create a better world for our descendants to live in and what kind of person / should attempt to become.⁶⁹ This implies that I can become a better person, and that I can decide to change for the better. This

walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but to learn to sail.”

62 Gregg 1998:385-387.

63 Rorty (1999:81, 82) describes moral progress as the broadening of sympathy beyond existing borders, not limiting one’s sympathy to a specific nationality, gender or race. He (Rorty 1999:87) states: “The hope is to sew such groups together with a thousand little stitches – to invoke a thousand little commonalities between their members, rather than specify one great big one, their common humanity.”

64 Rorty (1982:166) emphatically states: “‘Relativism’ is the view that every belief on a certain topic, or perhaps about any topic, is as good as every other. No one holds this view.” In his view, morally acceptable behaviour is congruent with an enlargement of sympathy and solidarity, diminishment of cruelty, and so on. Singer (1984:55-56) explores Rorty’s ideas of “good”. See also Prinsloo’s (2004:397, 400) exposition of this view and explanation that “Relinquishing the ‘truth’ does not imply that nothing prevails. Adopting pluralism does not mean that everything goes.” Otakpor (1994:60), who writes about cultural relativism, also argues that relativism does not necessarily lead to an absence of value judgements: “... all cultures may differ in their respective visions of life, after life, death and salvation; they may differ and perhaps disagree about what is a good life or a bad life but none permits wanton killing, cheating, lying or the abuse of other persons. Prohibitions against any or all of these can be found in all cultures in one form or the other. Yet this is not to say that the reasons behind the prohibitions are universalisable (*sic*).”

65 Kwak (2004:347) describes his view as: “Rorty’s ‘liberal ironist’ as the postmodern picture of the educated in the liberal utopia”.

66 Jordaan 2006:3; Kwak 2004:348.

67 Melchert 2002:718-719.

68 Rorty 2008:73, 75-77, 88, 92-94.

69 Rorty 2006:370.

process of growth or progress takes place when one has more alternatives to choose from.⁷⁰

Gregg⁷¹ argues that this pragmatist conception of justice, to wit a normative choice between “real alternatives” can still be morally coherent. This allays what Hunt⁷² refers to as the “Big Fear” that any rejection of objectivity or concession to contingency will lead to nihilism. Nihilism is dreaded and “conceived as catastrophic”, as it is understood to be a denial of any “cognitive, ethical or moral judgement”. With Rorty, Hunt retorts that this is an unnecessary fear, as “no witnesses can be subpoenaed who hold, let alone advocate, such a position”.⁷³ We must “keep the conversation going”⁷⁴ and define which alternatives are *better* or *worse*, although this will not be done with reference to the Big Values such as Truth.⁷⁵ The fact that we are called upon to actively converse, consider and reconsider choices increases our responsibility – we can no longer expect an objective, rationally determined standard, in fact not even “... legal theory can[not] answer the question of how we are going to live together. We are going to have to answer that question ourselves”.⁷⁶

The first task – how we can improve the world we will leave behind – is a shared task. Rorty⁷⁷ distinguishes between “agents of love” and “agents of justice” in a community. The task of the first group is to enlarge the circle of empathy by including those who are different, while the second group should ensure that those in the circle are treated equally. Recent history has shown that philosophers and theologians are not the most effective agents of love – specialists such as writers and journalists force us to reassess and broaden our definition of our community and as such they are more effective in that role. We have to continue heeding their calls so that our moral borders persistently expand.

In recent years, the South African lawyers who took up the causes of those marginalised by the mainstream⁷⁸ can certainly be added to the select list of agents of love. It cannot be contested that the entire legal fraternity should strive for equality and equal protection – we are, by

70 Rorty 2006:373.

71 Gregg 1998:395-396. Postmodernism, in his view, fails to provide such a coherent theory of justice as it rejects the idea of social or legal critique, is parochial or radically subjectivist, precludes individual autonomy and states that legitimacy is plural – i.e. we can “no longer claim a capacity to identify evil; we could merely identify ‘tastes’ dissimilar to our own”. On the effects of postmodernism on law, particularly interpretation and legal theory, see Hunt 1990:507-540.

72 Hunt 1990:524, 529.

73 Hunt 1990:524; Rorty 1982:166.

74 Hunt 1990:525-526; Singer 1984:51-52.

75 Hunt 1990:537-538; Singer 1984:52-53.

76 Singer 1984:58-59, 62-63, 66, quotation on 59.

77 Rorty 1991a:206-207.

78 One immediately thinks of those representing the schoolgirls with dreadlocks and nose studs, the families who adhere to ancient burial rituals, or the gay couple wishing to adopt and raise children.

definition, agents of justice. Students should be aware of these roles they are required to play in society, but it is not clear whether we are succeeding in getting this information across.

For a Platonist, who believes in Correct Big Answers to the Big Questions, a module on ethics should force students to ask: “Why should I not be cruel towards others?” A series of logically justified answers will then be proposed. But for Rorty, the question is rather: “What do I do that humiliates others?”⁷⁹ The focus shifts and becomes personal.

Rorty then uses different types of texts to reach this goal. He distinguishes between two types of texts: those that prevent self-centredness and those that remind us that we ourselves can make our lives “works of art”. The first goal is normally reached through “middlebrow literature” such as television and films, while the second is reached through “highbrow literature”.⁸⁰ “Middlebrow literature” facilitates moral growth, while “highbrow literature”, typically prescribed by universities, will be of little value in morality education. Prescribing a contemporary film as study material in a Jurisprudence module could, therefore, have just as much value as prescribing a technical philosophical research article.

This approach is criticised for its lack of appreciation of the value of literature as a form of art.⁸¹ Obviously, a philosopher will be able to voice similar criticism – to compare Kant’s work to a novel amounts to a renunciation of its “intellectual” and “scientific” value. Rorty would probably have answered that the value of a text or material is not determined by its intellectual level, but by its impact.

Jollimore and Barrios⁸² are of the opinion that Rorty’s view of morality education is typically sentimentalist, as the point of departure is that a text appeals to the reader’s emotions without necessarily conveying any moral *knowledge*. The effect is, therefore, sentimental rather than cognitive. Cognitivists believe that a text may teach the reader something that may influence future choices; sentimentalists believe that a text may move a reader to take certain action.⁸³

Rorty is reproached for failing to explicitly indicate *how* a person, who is emotionally moved by a text or experience, should act. The challenge is to refrain from pitying someone who suffers, but instead to do something to improve that person’s fate, but Rorty does not deal with this aspect.⁸⁴ Some authors are sceptical about the supposedly automatic sentimental

79 See Kwak 2004:352.

80 This refers to any type of literature displaying the features “stylistic intricacy, psychological subtlety, epistemological complexity”. “Middlebrow literature” does not possess any of these characteristics and is not limited to one genre or medium. Kant’s works on morality and a book such as *Uncle Tom’s cabin* perform the same function (Jollimore & Barrios 2006:369).

81 Jollimore & Barrios 2006:368-369.

82 Jollimore & Barrios 2006:365.

83 Jollimore & Barrios 2006:366.

84 Jollimore & Barrios 2006:375, 378.

reaction that sentimental literature will elicit, as someone may well ask: “Why should I care?” A further problem is that the person responsible for exposing others to such literature becomes a Pavlov who shamelessly (attempts to) manipulate the emotions of others.⁸⁵ In addition, divergent groups such as Blacks and Whites, straights and gays, men and women will not necessarily have more empathy with each other in response to an appeal to recognise their universal traits, since they will deny having any.⁸⁶

However, using works of literature (or literary judgements) that employ language and idioms particular to the marginalised and that describe their plight may evoke sympathy and association as the reader identifies with them and their circumstances.⁸⁷ The reader becomes a “judge of some sorts” who is invited to condemn unacceptable practices and institutions.⁸⁸ Such a “sympathetic imagination” enables one to “enter into the predicament of the ‘Other’, the marginalised and vulnerable.”⁸⁹

The debate between cognitivists and sentimentalists is not empirically solvable, as the long-term effect of the different types of texts cannot be reliably isolated and measured.⁹⁰ However, the CCFOs, that require universities to ensure that their students would participate in local, national and global communities as responsible citizens and that they are sensitive to different perceptions across a range of social contexts, seem to require action rather than knowledge.

85 Jollimore & Barrios 2006:375-376.

86 Rorty, as quoted in Jollimore & Barrios 2006:375.

87 Lenta (2007:315, 325-327) demonstrates how Justice Albie Sachs used language in various judgements to create empathy with the plight of the “marginalised, oppressed, or ‘othered’”, citing Nussbaum and Rorty as authority for the assertions that this “literary imagination” that is awakened, will broaden and increase a judge’s “capacity for empathy and compassion” and “alert readers to suffering and sensitise them to cases of cruelty and humiliation.”

88 Lenta 2007:325. Woolman (1997:120) states that the stories and pictures that are used to develop our sense of justice may not always be verbalized in judicial decisions; yet they play a role in the process.

89 Lenta 2007:329. He also states that employing literature enables a judge to “convey persuasively to their audience – both the legal audience, but also ... the South African people as a whole – the reasons for their judgements.” This article does not aim and will not attempt to discuss the phenomenon of “law and literature” comprehensively. The judgements of Justice Sachs remain remarkable examples of judicial use of the story and language to broaden sympathy and foster identification. South African scholars have engaged with “law and literature” in various ways: Woolman (1997:119-120) applies “a storytelling approach to limitation analysis”; Prinsloo (2004:395-408) investigates “[t]he possibility of a postmodern legal interpretation: reading *Country of my Skull* from a social constructivist perspective”; Van der Walt (2009:695-739) engages Marlene van Niekerk’s novel *Agaat* to demonstrate, among others, the fallacies of justice in the apartheid era; Le Roux (2006:101-120, especially on 109) argues that South African constitutional scholarship has even moved beyond law and literature and has taken an “aesthetic turn” by referencing art works in the development of constitutional theory. These are merely some examples and not an exhaustive list.

90 Jollimore & Barrios 2006:370.

The liberalist stance that all broadening of solidarity is good and leads to (moral) growth is criticised, because it does not take phenomena such as exaggerated patriotism into account. History has taught us that identification and association sometimes lead to negative consequences, such as the justification of racism and infringement of rights. Nazi Germany is a classic example of this;⁹¹ another more recent example is the intense reaction against Muslims after the 11 September 2001 attacks in the United States of America. In the South African context (and in many others), exaggerated association with the fate or supposed fate of a certain racial or ethnic group should be avoided, due to the potential negative impact of the resultant condescendence or misplaced sympathy for perceived struggles.

It is clear that mere association and increased solidarity do not guarantee moral growth. Rorty would probably retort that someone who is guilty of exaggerated patriotism does not properly associate, since he or she associates and empathises with the similar, not the *different*. Jollimore and Barrios⁹² justly maintain that any morality education should not merely be aimed at identification and compassion, but that it should include a dimension that highlights, weighs and judges the demands of different parties. According to the authors, judgement requires a cognitive element and the application of knowledge and comprehension. Rorty's denial of the cognitive element thus results in an incomplete theory.

A further problem in a globalising society is that the majority of the privileged and powerful never come into real contact with the underprivileged and powerless, unless they make a conscious effort to do so. The risk of significant injustice unfortunately also increases and Westerners seldom experience the pain and suffering they cause directly or indirectly. To cultivate empathy under these circumstances is virtually impossible.⁹³ In contemporary South Africa, these boundaries are just as stark, and university lecture halls are among the few places where the privileged and underprivileged are in direct contact with each other.

A further concern is how Rorty's distinction between the private and public spheres influences his thoughts on morality. He compares interaction between the public and private dimensions to a Mid-Eastern market (Kuwaiti bazaar), where everyone trades during the day and acts according to liberal values (respect, tolerance, and so on). However, at night everyone may retreat to his or her private spaces (compared to English gentlemen's clubs).⁹⁴ The implication is that one may choose whom to associate with and which views to hold in one's private space. The same person may embrace different values in the different spaces. The public liberal and private ironist may differ on the same matter, such as tolerance towards different racial groups.

91 Jollimore & Barrios 2006:371.

92 Jollimore & Barrios 2006:371-372.

93 Jollimore & Barrios 2006:374.

94 Rorty 1991a:209.

This distinction by Rorty elicits criticism:

... Rorty's liberal ironist is a kind of person who can stop behaving indecently to others without really being a decent person.

... Rorty's liberal ironist ... lacks the moral dimension of the life in which the tension between personal fulfilment and social justice is personally at stake.⁹⁵

Rorty persists that individual autonomy should be maintained, despite being slated for the fact that it may negate the ideal of social justice.⁹⁶ For Rorty, this tension is irresolvable, due to the differences between private self-creation and public social justice. As there is no universal essential to rely on, the conflict cannot be resolved and should be accepted. Morality thus becomes a social practice, but the danger always exists that private self-description may influence and determine public justice. Rorty would probably react to this by explaining that the ironist's own realisation that his or her vocabulary and self-description are contingent and not necessarily the best will prevent him or her from confronting others about their ideas on good and bad. Yet, his critics argue, the problem remains that the ironist may become so narcissistic that he or she will not accept any public responsibility, as Rorty's description of the liberal merely as someone who avoids cruelty is too thin.⁹⁷

The public/private liberal/ironist approach leads to Rorty's distinction between "individuation" and "socialisation" as two different educational objectives. Education up to secondary level ensures that learners are socialised, whereas individuation takes place at tertiary ("college") level.⁹⁸ High school graduates must be educated to be liberals and university students should be academically challenged to become ironists. This causes a dilemma: the purpose of the CCFOs under discussion is probably socialisation rather than individuation or individual growth. In addition, students will not inevitably challenge each other on their differences in opinion, as liberal conditioning requires that they accept differences without provoking debate, as it may be perceived as cruel. Rorty's liberal high school graduates will accordingly not be prepared to engage in a serious public debate on fundamental differences.⁹⁹ Rorty's response would probably be to question the necessity of such a debate: Why would I seriously argue with someone about our respective descriptions of good and bad if I am not sure that my description is correct or if I deny the existence of Right Answers? South African law students are, however, not as liberally conditioned as Rorty would have liked to see. Personal experience has shown that senior law students, in particular, do not hesitate to engage in debates on their fundamental differences and this is

95 Kwak 2004:347, 348.

96 Kwak 2004:349.

97 Kwak 2004:350-352.

98 Kwak 2004:356.

99 Kwak 2004:357.

exactly what can and should be elicited in modules such as Jurisprudence and Ethics.

How should law faculties then present their Jurisprudence and Ethics modules to facilitate moral growth or larger solidarity, according to Rorty? Of course, these types of modules should not attempt to provide Big Answers. Neither is it necessary to force students to study the technical aspects of jurisprudential or ethical theories. A morally virtuous world remains a dream¹⁰⁰ and we can merely hope that more options will lead students to better choices.¹⁰¹ A better choice will be one that fits in with a coherent set of (liberal) views.

4. Conclusion

The requirements set by the educational authorities through the CCFOs offer a new justification to include compulsory modules in Jurisprudence and Ethics in law curricula. South African law faculties are now obliged to deliver graduates who are knowledgeable about divergent world views, beliefs, cultures and fundamental issues.¹⁰² In addition, they should be sensitised about these differences and be enabled to make sensible choices as responsible citizens.

These goals are consonant with the liberal ideals proposed by philosophers such as Rorty, seeing that it will broaden students' vocabularies and increase solidarity. Students should also be aware of their increased obligations as citizens to actively participate in debating alternative choices. However, there are several reservations concerning this.

A module such as Jurisprudence will only have positive value if justice theories are presented as contingent descriptions of reality, and not as Big Answers based on essences such as Truth, Science or God. As such, no module can claim to provide students with The Way in which reality or the world can be understood. Such courses should present a menu of options for students to choose from and emphasise the responsibility that accompanies the privilege of making such a choice.

More and better knowledge will not guide human endeavours – the emphasis should rather be on how humanity can become happier and on how this happiness can be achieved when cruelty is done away with or at least minimised. A more “benevolent populace”¹⁰³ is, therefore, the objective, and this involves that the so-called character-forming modules and curricula should not focus on the acquisition of knowledge, but on

100 Rorty 2006:378, 379.

101 In a slightly different context Prinsloo (2004:406) states: “It is only through the acceptance of multiple truths, realities, meanings and interpretations that we can construct narratives that are accommodating and comprehensive.”

102 Required by particularly CCFOs (vii) and (x), as quoted in the introduction and referred to earlier.

103 Cooley 2008:200.

the cultivation of sensitivity and solidarity. Lecturers in Jurisprudence and Ethics courses have a definite role to make law students aware of their possible roles as agents of love and agents of justice.

One can hardly argue with Rorty's assertion that no curriculum will teach a person to act ethically. Exposure to the history of philosophy and jurisprudential theories will broaden students' horizons, though, and it is hoped that this will also cultivate greater awareness and sensitivity to prevent cruelty. Rorty would probably have encouraged any type of education that achieves these goals, regardless of the form in which it is presented. He is hopeful and optimistic that democratic and social change will result in greater ethical and political solidarity.¹⁰⁴ It is hoped that more options will result in better choices by students.

To accomplish this, a study of a variety of legal-ethical views would not inevitably be more valuable than a first person narration by a marginalised victim; a course called "Jurisprudence" or "Ethics" will not necessarily achieve better results than a course in literature with appropriate prescribed material. Unconventional study material such as films, magazine articles or television shows could, according to Rorty, be just as effective to provoke a sentimental reaction and compel a student to perform good deeds or to act more sensitively – something which is not guaranteed if only the history of Jurisprudence is studied.

In any module that aims for forming of character, Rorty would thus like to see that literature be prescribed that fosters empathy and solidarity. The challenge will be to choose the literature carefully in order to avoid unwanted over-association. In this instance, the lecturer would have to make a cognitive judgement on what would be acceptable or not. Whenever material is prescribed in the hope of eliciting a certain emotional response, the lecturer should acknowledge that he or she is manipulating students' emotions to some degree. For Rorty, this would be acceptable, as long as it results in a broadening of solidarity.

The same could be remarked about the persons who are presenting courses of this kind: it cannot be overemphasised how important it is for students to experience a lecturer with an unfeigned desire to minimise cruelty and with empathy towards others, who wishes to foster solidarity with the weak and the excluded and who emphasises justice towards all. Courses such as those under discussion will accordingly require a considerable measure of personal commitment from presenters. They need not necessarily be "poetic" philosophers; honest, enthusiastic and dedicated "scientific" philosophers will suffice.

104 Cooley 2008:198.

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