Individual and Institutional Dimensions of Epistemic Injustice in Swiss Legal Education

Remarks and Ways Forward

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In Switzerland, the institutions through which legal knowledge and education are produced have systemically enabled epistemic injustice through forms of silencing and the cultivation of active ignorance at both the individual and institutional levels. As such, we argue that feminist critical theory is an important form of intervention in the legal education system, which could not only provide instruments to address epistemic injustice, but also better equip lawyers as individuals and as members of a collective, epistemic community. Providing access to and engagement with critical legal methodology is integral to the development of epistemic capacities. It would help to prevent the formation of insensitivities to experiences of injustice and interrupt the perpetuation of silencing and cultivation of active ignorance along individual and institutional dimensions.

1 Introduction

This article builds on the following claim: the purpose of a legal education is not only to learn, but also to become a co-contributor to the creation of knowledge within the institutions in which legal education takes place.[1] We argue that when one cannot engage both as a learner and as a co-contributor to the creation of knowledge in these institutions, epistemic injustice occurs – that is, one is wronged in their capacity as a knower or epistemic agent.[2] Specifically, we explore how epistemic injustice arises in institutions in which legal education and legal knowledge are propagated in Switzerland, due to forms of silencing[3] and the cultivation of active ignorance[4] along individual and institutional

1 Kotzee Ben, Epistemic Injustice and Education, in: Kidd Ian James/Medina José/Pohlhaus Gaile (eds.), The Routledge Handbook of Epistemic Injustice, New York 2017, pp. 324 et seq., p. 326.

2 Fricker Miranda, Epistemic Injustice, Power and the Ethics of Knowing, Oxford 2007, p. 1.

3 Dotson Kristie, Tracking Epistemic Violence, Tracking Practices of Silencing, in: Hypatia 2011/26, p. 236.

4 Medina José, The Epistemology of Resistance: Gender and Racial Oppression, Epistemic Injustice, and Resistant Imaginations, Oxford 2012, p. 25.

dimensions. We aim to raise awareness of the ways in which these epistemic injustices occur; how such wrongs are experienced by epistemic agents (ie, students); and how they are often deeply intertwined with other forms of social and political injustice.

We argue that there is an urgent obligation to reimagine and transform the legal education system in Switzerland on the basis that epistemic injustice engendered in legal education wrongs individuals and contributes to epistemic oppression.[5] «Epistemic oppression» is when deficiencies in social knowledge exist due to the exclusion of epistemic contributions of epistemic agents in certain social positions or communities. As a consequence, epistemic agents who are so positioned cannot make use of the shared epistemic resources that determine the shared social culture or be co-contributors to these epistemic resources. This creates barriers to full democratic participation in existing political institutions, as well as to equitable access and contributions to the production of knowledge through which these political processes are determined and maintained.[6]

Preliminary steps towards taking this obligation seriously would require a critical rethink of the norms, structures and forms of knowledge that discursively constitute these institutions, as well as our individual roles in upholding and maintaining them. What would it look like if we took this obligation seriously? In the following sections, we build on insights from feminist, decolonial and queer theory[7] to deconstruct and critique discourses such as the hierarchical organisation of the Swiss legal education system exemplified by the dominance of *ex-cathedra* teaching and the resistance to change in the content of legal curricula – particularly to the introduction of inter- or transdisciplinary legal methods and to critical frameworks that analyse and deconstruct the law's role and power in legitimising oppressive norms and institutions. This article thus bridges the

5 Dotson Kristie, A Cautionary Tale: On Limiting Epistemic Oppression, in: Frontiers: A Journal of Women Studies 2012/33, pp. 24 et seq., p. 24.

6 Anderson Elizabeth, The Epistemology of Democracy, in: Episteme 2006, pp. 8 et seq., p. 15; Anderson Elizabeth, Epistemic Justice as a Virtue of Social Institutions, in: Social Epistemology 2012/26, pp. 163 et seq., p. 172. A well-known example of a historically excluded political and epistemic community in Switzerland is that of third-generation migrants. The necessity of political as well as epistemic inclusion and co-contribution being fundamental to democracy was used as one argument in the since successful public initiative, Erleichterte Einbürgerung der dritten Ausländergeneration, in 2017. See Sekretariat der Staatspolitischen Kommissionen, Des améliorations sont nécessaires en matière de naturalisation facilitée des étrangers de la troisième génération, Bern 2022; Operation Libero, Bürger*innenrecht Gleiche Rechte statt auf Abstammung basierende Privilegien, Bern 2022.

7 To cite just a few: Kapur Ratna, Gender, Alterity and Human Rights: Freedom in a Fishbowl, Cheltenham 2018; Möschel Matthias/Bentouhami Hourya (eds.), Critical Race Theory: Une introduction aux grands textes fondateurs, Paris 2017; Fineman Martha/Jackson Jack/Romero Adam (eds.), Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations, Surrey 2009; Davies Margret/Munro Vanessa (eds.), The Ashgate Research Companion to Feminist Legal Theory, 2nd ed., Abingdon 2013; Fineman Martha/Thomadsen Nancy Sweet (eds.), At the Boundaries of Law: Feminism and Legal Theory, New York 2013; Baer Susanne, Feminist Theory and the Law, in: Goodin Robert E. (ed.), The Oxford Handbook of Political Science, Oxford 2009, pp. 305 et seq.; Matsuda Mari/Lawrence Charles/Delgado Richard/Crenshaw Kimberlé, Words That Wound: Critical Race Theory, Assaultive Speech, and The First Amendment, Boulder 1993.

gap between theoretical critiques by raising awareness of how epistemic injustice manifests in the legal education system in Switzerland and by proposing solutions and steps forward.

2 Methodology

The institutions in which legal education take place are the result of historically contingent social practices and power relations that organise knowledge in certain ways.[8] As such, institutions of legal education are constituted by powerful systems of knowledge – that is, discourses that shape and constitute legal education. As subjects to and agents within these discourses, certain experiences of being subject to, identifying with, and resisting these structures, as well as ways of knowing the social world, are constituted through them to the exclusion of others.[9]

Powerful discourses that shape institutions such as those of legal education can become so entrenched – in other words, so foundational to the structure and meaning of those institutions – that their own contingency becomes obscured and critical analysis or debate becomes difficult. Deconstruction is a way of revealing or making visible that contingency. It makes visible which discourses are operative, as well as why and how they came about – which in turn reveals which interests they represent in knowing in a certain way, and how they organise power and knowledge. In addition, it reveals how these processes shape our experiences as subjects and create certain subjectivities. Finally, it allows us to look for ways of knowing that have been excluded through the domination of certain ways of knowing over others.

Once these discourses have been deconstructed, one can pose critical normative, ethical, political and legal questions about them. In this case, we utilise the normative framework of epistemic injustice to guide these critical questions. This is referred to as «critical discourse analysis» and is the central method invoked in this text.[10] A few examples of discourses at which we level our critical gaze are *ex-cathedra* teaching; hierarchical structures of authority in legal education; and the exclusion of critical and contestatory perspectives and forms of legal knowledge such as feminist, queer and decolonial methodologies. We deconstruct these using a variety of sources: our experiences, as well as those of our colleagues within legal education institutions; studies of experiences of alienation and powerlessness that young lawyers endure in legal firms; and application of the theoretical frameworks of epistemic injustice and oppression.

We draw on our own experiences, as well as the testimony of colleagues, fellow conference participants and reading group members, as sources of knowledge which are relevant to the evaluation of these discourses. They constitute evidence of an ongoing pro-

8 Foucault Michel, The Archaeology of Knowledge and the Discourse on Language, Paris 1972, p. 50.

9 Foucault (fn. 8), p. 60.

10 Allen Amy, Power/Knowledge/Resistance: Foucault and Epistemic Injustice, in: Kidd Ian James/Medina José/Pohlhaus Gaile (eds.), The Routledge Handbook of Epistemic Injustice, New York 2017, pp. 187 et seq., p. 188.

cess of deconstruction and critical reflection among students of our own subjectivities. These experiences have also revealed to us contexts in which critical engagement with the institutions in which legal education take place are under-theorised or overlooked.

The experiences to which we refer are not casual observations, but rather have been collectively discussed at length in epistemic communities and contextualised by means of extensive literature reviews. These experiences have informed our research interests and career choices. Furthermore, understanding and taking seriously our experiences as epistemic agents in the Swiss legal education system is an important way to engage in bottom-up theorising that values the contributions of students as sources of knowledge, thus combating epistemic injustice. It also reveals important insights that can serve as a starting point for articulating our material and social interests in transforming this system.

3 Epistemic Injustice, Silencing and Active Ignorance

3.1 What is Epistemic Injustice?

«Epistemic injustice» is injustice that occurs when persons, groups or communities are wronged as epistemic agents – that is, as knowers.[11] There are many varieties of epistemic injustice.[12] Here we examine a few that occur along individual and institutional dimensions in the Swiss legal education system.

For the purposes of this article, the individual dimension of epistemic injustice is when individuals are wronged in their capacity as epistemic agents. Earlier, we outlined that in order to be a full epistemic agent, one must be able not only to receive knowledge, but also to co-contribute to its production. Examples of this include epistemic agents being unjustly given less credibility than they are due – for example, because of prejudice, implicit bias or stereotyping; or where the epistemic contributions of an epistemic agent are silenced due to the marginalisation of their social position. This exclusion from epistemic communities also leads to further wronging through the denial of access to engagement with epistemic resources. Epistemic resources are things that help us both to make sense of and understand ourselves and the world around us, and to communicate those experiences and be understood in doing so. They include things necessary for communication, such as shared language, interpretive schemas and shared social culture, as well as political and social institutions.[13]

The institutional dimension of epistemic injustice concerns the wronging of epistemic agents, groups and communities that occurs systemically within or as a result of institutional structures or systems of knowledge that perpetuate epistemic exploita-

11 Fricker (fn. 2), p. 1; Pohlhaus Gaile, Varieties of Epistemic Injustice, in: Kidd Ian James/Medina José/Pohlhaus Gaile (eds.), The Routledge Handbook of Epistemic Injustice, New York 2017, pp. 13 et seq., p. 13.

12 Pohlhaus (fn. 11), p. 13.

13 Dotson (fn. 5), p. 24.

tion,[14] epistemic objectification[15] or active forms of ignorance.[16] It can also pertain to institutional activities that create epistemic dysfunction that marginalises or excludes certain epistemic agents, distorts their epistemic contributions or stymies certain kinds of inquiry.[17]

Feminist theorists working in critical legal theory, queer legal theory and decolonial theory have become increasingly interested in the framework of epistemic injustice. The framework has helped to conceptualise the importance of understanding ethics, politics, power and the production of knowledge as being deeply interconnected.[18] As a result of this approach, there have been productive engagements that have revealed the ways in which structures and systems of oppression are constituted and maintained through the marginalisation of certain ways of knowing or understanding and the epistemic, moral, ethical, social, political and legal implications thereof.[19]

An important insight to emerge from such inquiries is that unequal social conditions situate us differently in the use and development of our capacities and resources as epistemic agents.[20] What does the full exercise of one's epistemic capacity or agency have to do with justice? The ability to know and understand ourselves and the world around us, and to share information based on our experiences, is dependent on access to resources – whether they be social, economic or cultural – and access to inclusion in epistemic communities. As a result, those who are disadvantaged or marginalised due to their social position often suffer compounding wrongs, being silenced through denial of credibility and deprivation of access to resources and spaces necessary to make sense of and share their experiences, knowledge, understanding and thus interests as a basis for organisation of shared social, ethical and political life.[21]

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14 Pohlhaus (fn. 11), p. 22.

15 Haslanger Sally, Objectivity, Epistemic Objectification, and Oppression, in: Kidd Ian James/Medina José/Pohlhaus Gaile (eds.), The Routledge Handbook of Epistemic Injustice, New York 2017, pp. 279 et seq., p. 280.

16 Medina (fn. 4), p. 102.

17 Pohlhaus (fn. 11), p. 13.

18 Mohanty Chandra Talpade, Feminism without Borders: Decolonizing Theory, Practicing Solidarity, Durham 2004; Spivak Gayatri C, Can the Subaltern Speak?, in: Nelson Cary/Grossberg Lawrence (eds.), Marxism and the Interpretation of Culture, Basingstoke 1998, p. 271.

19 To cite a few: Tuana Nancy, Feminist Epistemology: The Subject of Knowledge, in: Kidd Ian James/Medina José/Pohlhaus Gaile (eds.), The Routledge Handbook of Epistemic Injustice, New York 2017, pp. 125 et seq.; Collins Patricia Hill, Intersectionality and Epistemic Injustice, in: Kidd Ian James/Medina José/Pohlhaus Gaile (eds.), The Routledge Handbook of Epistemic Injustice, New York 2017, p. 115.

20 Medina (fn. 4), p. 103.

21 A well-known example is Kimberlé Crenshaw's work, in which her theory of intersectionality is introduced. Crenshaw explains how both aforementioned dimensions of epistemic injustice are often inextricably intertwined. She demonstrates how, along the individual dimension, Black women's testimony of their experiences of discrimination as Black women have been silenced due to the marginalisation of their voices in anti-racist as well as feminist political movements and theorising. This in turn has led to a failure on the institutional level to conceptualise discrimination under the law as occurring along multiple intersecting axes of systems of oppression – such as, race and gender. See Crenshaw Kimberlé, Demarginalizing the Intersection of Race

3.2 Epistemic Injustice as it Relates to Legal Education: Dual Dimensions

3.2.1 The Individual Dimension

Let us take up the discourse of *ex-cathedra* teaching, which is the pedagogical norm in Swiss undergraduate legal education. We might remember being advised (read: warned) by a first-year professor to take a good look around at our fellow students and realise that there was a fair chance that only one out of three of us would make it through our first year of studies. In our experience, this pedagogical approach has not generally been contextualised. For example, one might posit this as an intentional strategy meant to «narrow the pack», which is likely a survival mechanism of a legal education system that does not have the resources to educate students in a more comprehensive manner. No; instead, we insidiously learned that those who do not thrive in an environment where exhaustive memorisation and recall are the gold standard of learning, who could not cope – the *other* two out of three persons in that room – did not deserve to be there. Or perhaps one recalls, as we do, lecturers telling us we might be able to form an opinion on what the law should be once we had finished our studies. In such a climate, voicing an opinion, commenting on an interpretation of legal doctrine or beginning a discussion was seldom encouraged or was pre-emptively silenced. The message to us was clear: «The knowledge you produce is not consequential to what we as lawyers do. You are not a credible knower.»

This served to undermine the cultivation of the courage, boldness and self-confidence necessary to develop as epistemic agents; and ultimately to hinder us in understanding ourselves as credible knowers, which many of us may see as the central goal of pursuing education and developing critical thinking skills. It also forecloses the possibility for students to articulate critical inputs, and forecloses their engagement with and contribution to epistemic resources such as formalised disciplinary schemes. Students of the law are indeed positioned within the legal system, but are also outsiders to it, thus being a critical resource that the legal education system should make use of. Not having internalised the status quo, they can pose challenges and create resistance to dogmatic forms of knowledge that have become formalised within their disciplines.

Through this, we learn that specific ways of generating legal knowledge are more valid, more credible than others. We learn to shut up and listen; to be receivers and not co-producers of knowledge. We learn to stop asking questions about certain things. Our epistemic capacity goes unexercised and our epistemic credibility wanes. We become doubtful and silence ourselves when we are not being silenced by the systems in place.[22]

Silencing, exclusion or marginalisation of the epistemic contributions of individuals is an important component of the cultivation of what political philosopher José Medina has referred to as «bodies of active ignorance»: cultivated forms of «self-protecting ignorance» which result from systemic epistemic disfunctions, distortions and insensitivities.[23] Essentially, individuals, groups and institutions actively fail to see or seek out

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and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, in: University of Chicago Legal Forum 1989/1, pp. 139 et seqq.

22 Dotson (fn. 3), pp. 244; Medina (fn. 4), p. 94.

23 Medina (fn. 4), p. 107.

information that would raise questions about their ways of knowing or understanding. This is often because they have an interest in not knowing, as it would challenge the dominance of their epistemic, social or political position. A paradigmatic example of this is the notion of «white ignorance».[24]

As individuals, the cultivation of bodies of active ignorance wrongs us, in that it prevents us from seeing others or from hearing their voices in a way that is necessary to take them seriously in the exercise of their epistemic capacities and as co-contributors of the social world. Being unable to see or hear about certain experiences shapes our outlook and where we orient our epistemic gaze in the future. It impacts our ability to make sense of our own experiences in the world and to see experiences of injustice of others. If we cannot see injustice; if we do not possess the tools to learn about it, then we cannot understand it, let alone address it. Such epistemic injustice is experienced not just by marginalised persons, who are deprived of epistemic resources to make sense of their experiences or whose voices and experiences cannot be communicated or heard, but also by those who are privileged due to their social position. The latter fail to develop in their epistemic capacity and to engage properly to create shared social culture, and often continue to perpetuate epistemic injustice due to their insensitivities.

Learning that certain ways of knowing are more valid than others also encourages coercive forms of othering in which those who do not «get it» are assigned diminished credibility.[25] As a result, those who know differently often do not meet the standards necessary for advancement. On this basis, potential narrowing of the pack within this epistemic community is understood to be well justified instead of critically examined. This also often leads to tokenisation of those outliers who make it through by internalising these harmful epistemic standards and practices.[26]

This situation makes studying the law a hostile environment for anyone who feels an intrinsic incongruity between their experiences and what they are being told by authority figures or institutions is normal. This in turn can create an out-of-sync feeling with the reality of how we understand the law and the relevance of how its practice affects the people we know and love. Some of us have felt stymied in efforts to reflect on fundamental questions and about how experiences of fairness and justice shape our lives, such as: What is the purpose of law? What is justice? What does the law protect? Who ultimately benefits from it?

As a result, when we law students look back at our undergraduate years, many of us recall experiencing feelings of inadequacy. Not because we had difficulties grasping legalese or because we were not motivated to learn about the founding principles of our democracy; rather, this inadequacy stemmed from the ways in which the realities of legal education undermined our individual capacity as epistemic agents within the legal education system.

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24 Mills Charles, White Ignorance, in: Sullivan Shannon/Tuana Nancy (eds.), Race and Epistemologies of Ignorance, New York 2007, pp. 11 et seq.

25 Pohlhaus (fn. 11), p. 19.

26 Davis Emmalon, Typecasts, Tokens, and Spokespersons: A Case for Credibility Excess as Testimonial Injustice, in: Hypatia 2016/312, pp. 485 et seqq., p. 487.

The normalisation of unjust and unfair experiences produced through these epistemic practices echoes through our lives and careers. One does not, by virtue of graduation or completion of an internship, feel oneself become epistemically credible or leave behind these epistemic habits or bodies of cultivated active ignorance. For example, sociologists have shown how, for young lawyers practising in Switzerland, globalisation, neoliberalism, high rates of attrition and experiences of dissatisfaction have led to experiences of alienation.[27]

In this study, alienation was conceptualised along four axes: (i) powerlessness, understood as various forms of dependency (on the partners and on the clients) experienced by young lawyers and the effects of this powerlessness; (ii) purposelessness; (iii) deprivation of time as it impacts on personal choices about family planning; and (iv) unfairness, understood as experiences of unequal treatment (iv).[28] This in many ways mirrors what we have described as experiences of a sense of incongruity between the expectations of what it entails to practise law versus what it actually entails; and further shows how this is experienced and felt by young lawyers.

The experiences along each axis of alienation were also reported to vary due to social positionality as measured by variables such as gender, firm size, family situation and professional status, which echoes our claim earlier about how one's social position influences how these injustices shape our lives. For example, the authors show how unfairness and time deprivation stem from the negative effects of a gendered professional ethos. According to them, the ethos of dedication to work is also marked by a «masculine mystique», which affects men and women differently, according to the possibilities of delegating domestic labour and care work. This hegemonic model of masculinity also produces gender discrimination or experiences of gender stereotyping during interviews, as well as in the context of hiring processes and possibilities of attaining associate partnerships. For example, women often suffer from harassment or discriminatory comments; and men are unable to reduce workload or are badly perceived when they do so.

3.2.2 The Institutional Dimension

When we zoom out and examine the institutional dimension of epistemic injustice, it becomes clear that wrongs or injustices occurring along the individual dimension of epistemic injustice are fundamental to the instantiation and entrenchment of structures and systems of knowledge. These entrenched systems or structures perpetuate epistemic oppression and bodies of active ignorance; or justify the preservation of institutions and institutional activities that create epistemic dysfunction. Epistemic dysfunction takes many forms, such as the systemic marginalisation of certain epistemic agents and resultant distortions of their epistemic contributions; or when certain kinds of inquiry are

27 Boni-LeGoff Isabelle/Lépinard Elénore/Le Feuvre Nicky/Mallard Grégoire, A Case of Love and Hate: The Four Faces of Alienation Among Young French and Swiss Lawyers, in: Law and Social Inquiry 2020/45, pp. 279 et seqq. See also Boni-LeGoff Isabelle/Lépinard Eléonore/Le Feuvre Nicky/Mallard Grégoire, Do Gender Regimes Matter?, Converging and Diverging Career Prospects Among Young French and Swiss Lawyers, in: Adams Tracy/Choroszewicz Marta (eds.), Gender, Age and Inequality in the Professions, New York 2019, pp. 114 et seqq.

28 Boni-LeGoff/Lépinard/Le Feuvre/Mallard (fn. 27), p. 279.

stymied – for example, when asking a question in a certain institutional context is no longer permissible or possible due to lack of uptake of what is being asked.[29]

In turn, actively ignorant bodies of knowing are entrenched in structures and institutions that organise social life, further silencing socially marginalised persons by rendering their experiences invisible as a matter of ethical or political concern.[30] In the long term, this has resulted in systemic epistemic dysfunction, such as the AIDs crisis, disproportionate levels of violence against trans* people of colour and the normalisation of sexual violence to the point that «rape culture»[31] makes permissible incredibly harmful and abusive behaviour, with survivors systemically dismissed as unreliable.[32] Being made invisible as a subject of political, legal and social concern goes beyond neglect. It puts those persons' lives and experiences beyond the purview of justice; it denies them agency and makes invisible their subjectivity, which is more than simply ignoring the historical contingency of one's social positionality and how it impacts on our experiences; it removes one's experiences as a matter of particular human concern.[33]

There are many structural factors in the legal education system that cause, contribute to or exacerbate the dysfunctional epistemic systems that perpetuate these injustices, such as lack of diversity in the student population on the basis of race, class, migratory background, disability, sexual orientation or gender expression, among others; powerful exclusionary mechanisms such as discrimination, lack of role models and failure to consider daily experiences of discrimination such as racism as impacting the quality of education one may have;[34] the insular and repetitive nature of a legal curriculum dominated by civil law; the creation and promotion of courses on «digitalisation and the law» or «blockchain and the law» at the expense of history and philosophy of law; changes in the legal profession such as hyper-specialisation due to globalisation and neoliberalism; and finally, a pedagogical style that is overly reliant on lecture-style teaching, which does

29 Medina (fn. 4), p. 94.

30 Butler Judith, Beside Oneself: On the Limits of Sexual Autonomy, in: Butler Judith (ed.), Undoing Gender, New York 2004, pp. 17 et seq.; Spivak (fn. 18), p. 271.

31 On rape culture, see Henry Nicola/Powell Anastasia (eds.), Preventing Sexual Violence, Interdisciplinary Approaches to Overcoming Rape Culture, Basingstoke 2014.

32 Temkin Jennifer/Gray Jacqueline M/Barrett Jastine, Different Functions of Rape Myth Use in Court: Findings From a Trial Observation Study, in: Feminist Criminology 2018/13, pp. 205 et seqq.; Smith Olivia/Skinner Tina, How Rape Myths are Used and Challenged in Rape and Sexual Assault Trials, in: Social & Legal Studies 2017/26, pp. 441 et seqq.; Cusack Simone/Timmer Alexandra, Gender Stereotyping in Rape Cases: The CEDAW Committee's Decision in Vertido v The Philippines, in: Human Rights Law Review 2011, pp. 329 et seqq.; McGregor Joan, Is It Rape?: On Acquaintance Rape and Taking Women's Consent Seriously, Hampshire 2005.

33 Butler (fn. 30), p. 18. For more on this topic in legal theory, see also MacKinnon Catherine A., Feminism Unmodified: Discourse on Life and Law, Cambridge 1987; MacKinnon Catherine A., Toward a Feminist Theory of the State, Cambridge 1989; MacKinnon Catherine A., Are Women Human?, And other International Dialogues, Cambridge 2006; MacKinnon Catherine A., Response to Five Philosophers: Toward a Feminist Theory of the State Some Decades Later, in: Feminist Philosophy Quarterly 2017/3, pp. 1 et seqq.

34 Grünberger Michael/Mangold Anna/Markkard Nora/Payandeh Mehrdad/Towfigh Emanuel, Diversität in Rechtswissenschaft und Rechtspraxis: Ein Essay, Baden-Baden 2021, pp. 24 et seq.

not foster critical or open discussion of basic legal concepts of justice or inclusive ways of lawyering.

At the institutional level, forms of active ignorance intersect with operations of power. In turn, actively ignorant ways of knowing are entrenched that effectively silence oppressed persons by rendering their experiences and identities invisible. This prevents investigation of the ways in which our experiences impact on operations of oppression upon us. For example, it has long been a standard in legal thinking that the law should be gender or race blind – that is, it should treat us the same despite our experiences as racialised and gendered persons.[35] In doing so, knowledge of experiences that help one understand how gender and race – and further, the very principle of equality – should be accounted for in legal institutions to address the impact of structural inequality are actively ignored as integral to the practice and creation of the law.[36]

In what follows, we argue that there is an urgent obligation to make silencing and the cultivation of active ignorance visible within the Swiss legal education system, and to address epistemic injustice by reimagining and transforming systems of legal education. We utilise insights from feminist legal theory to argue that systems of legal education in Switzerland do not inform students on how to critically view their own or the law's role in these processes; or to look at the places where persons are excluded, marginalised or subjected to the law in ways that are harmful to their agency or ability to understand themselves.

4 Ways forward

We have argued that the contributions of law students are smothered or silenced, which leads to harmful internalisation of forms of legal subjectivity, in which students and eventually young lawyers experience epistemic injustice because they are unjustly deprived of epistemic credibility, unable to develop in their epistemic capacity as inquirers and receivers of legal knowledge and hindered in developing resistant collective epistemic communities. We have further argued that this maintains, justifies and legitimises epistemic injustice along the institutional dimension – particularly *vis-à-vis* structures and institutional activities that lead to systems of knowledge that perpetuate the cultivation of active ignorance,[37] or through institutional activities that create epistemic dysfunction by marginalising certain voices or making certain kinds of inquiry impossible.

How is this connected to the practice of law? Why or how would reimagining the legal education system do anything about it? Essentially, because lawyers are in large part

35 Medina (fn. 4), p. 26; MacKinnon (fn. 33), p. 249; Naffine Ngaire, Who are Law's Persons?, From Cheshire Cats to Responsible Subjects, in: Modern Law Review 2003/63, pp. 346 et seqq., p. 365.

36 This might explain the recent interest of legal scholars in the sociological concept of «sexism» and its relation to law. See, inter alia, in comparative law, Duparc Caroline/Charruau Jimmy (eds.), Le droit face aux violences sexuelles et/ou sexistes, Paris 2021; Charruau Jimmy, Le ‹sexisme›: une interdiction générale qui nous manque?, in: Revue de droit public 2017/3, pp. 365 et seqq.

37 Medina (fn. 4), p. 102.

products of their educational environments. It is in these epistemic communities that the contours of legal knowledge are defined which shape how one approaches practising law, what tools one has to do so and what epistemic capacities one develops in order to be able to know, understand and contribute to the generation of legal knowledge through one's education and practice in law.

Forms of epistemic injustice such as the cultivation of bodies of active ignorance on the institutional dimension are not just the cumulative effect of all the injustices that occur along the individual dimension, but also depend on the interplay of these wrongs with historical, political, social and material conditions that differentially situate people both socially and in their access to epistemic resources as a result of existing social, political and legal structures. As such, they can also be contested through forms of collective resistance in marginalised epistemic communities, such as raising awareness, protesting, organising and implementing resistant epistemic practices in institutions of education.[38]

There are already some promising contestatory developments, such as the introduction of legal clinics at the universities of Geneva[39] and Neuchatel.[40] In the case of the clinic at the University of Geneva, one of the explicit goals articulated in their teaching pedagogy is to incorporate critical theorising and methodology in their teaching and practice within the clinic setting.[41] They do this by engaging students with interdisciplinary methods regarding the function and role of the law, and by bringing in a wide variety of experts with whom students work on both practical and theoretical projects.[42] Furthermore, in both clinics, it has been shown that students benefited through direct engagement with the persons on whose behalf they are practising law. They were able to relate to their cases in new ways and see how the circumstances of their lives are important to the practice of lawyering as well as theorising about the law.

4.1 A Feminist Critical Theory in Legal Education

In general, doing «feminist» research or teaching in a feminist way implies engaging not only in a mission to encourage the adoption of methodologies that apply scientific theory to research on women and gender, but also in a mission to propose new theories of knowledge or feminist epistemologies. According to criminologists Véronique Jaquier and Joëlle Vuille, three aspects allow us to better understand characteristics of feminist epistemologies and the resistance they encounter in the academic field: the importance

38 Medina (fn. 4), p. 257.

39 Zimmerman Nesa/Eskandari Vista/Carron Djemila, Des pédagogies cliniques aux pédagogies critiques : l'évolution de la Law Clinic sur les droits des personnes vulnérables de l'Université de Genève, in : Cliniques juridiques 2021/5, pp. 1 et seqq.

40 Di Donato Flora, How to Increase the Role of Vulnerable People in Legal Discourse?, Possible Answers from Law & Humanities and Legal Clinics: Teaching Experiences from Italy & from Switzerland, in: Teoria E Critica Della Regolazione Sociale/Theory and Criticism of Social Regulation 2020/15, pp. 35 et seqq., p. 49.

41 Zimmerman/Eskandari/Carron (fn. 39), p. 1.

42 Zimmerman/Eskandari/Carron (fn. 39), pp. 1 et seqq.

of women's experience as a source of knowledge; notions of objectivity in the social construction of science; and the close links between feminist research and social, political action.[43]

In law, a common element in all feminist interventions is the analysis of the law in the light of women's experience and the importance of women as subjects of the law.[44] The main purpose of the legal norm is to establish an official, objective and non-factual standard, thus making systemic biases – about gender, race or other characteristics – invisible to the mind or legal reasoning. Indeed, according to all feminist interventions – though they may vary in scope or subject matter – the law tends to legitimise the status quo and existing power relations in that it gives no consideration to the concrete realities experienced by women, or Black, Indigenous and people of colour (BIPOC) and queer folk, as subjects of rights.[45]

A major intervention has consolidated feminist legal dogmatics and feminist legal theory.[46] Feminist legal dogmatics establish general doctrines on concrete, positive law, which reorganise and reconstruct the systematic creation of law and its interpretation. They propose, for example, that general clauses should always be interpreted with a view to ensuring effective gender equality, thus departing from traditional methods of interpretation. Generally, feminist legal theory begins from the assumption that women suffer a particular injustice because of their social status or position, and thus marginalisation on the basis of gender as well as along other axes of oppression. As such, it is argued that these particularities ground a need for feminist theories of justice.[47]

Feminist legal methods are diverse; beyond epistemology and feminist dogmatics, a few other methods exist – for example, taking practice as a source of theory in which one's theoretical point of departure is the factual everyday-life experiences of women, queer and BiPOC people.[48] These approaches call for the use of inter- and/or intra-disciplinary methods that take the law and legal rights as research subjects *per se*, such as socio-legal studies[49] or legal consciousness studies.[50]

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43 Jaquier Véronique/Vuille Joëlle, Les femmes et la question criminelle : délits commis, expériences de victimisation et professions judiciaires, Geneva/Zurich 2019, pp. 33 et seqq.

44 Chinkin Christine, Feminism, Approach to International Law, in: Peters Anne/Wolfrum Reto (eds.), The Max Planck Institute for Comparative Public Law and International Law, Oxford 2010.

45 Scales Ann, Legal Feminism: Activism, Lawyering and Legal Theory, New York 2006; MacKinnon (fn. 43), p. 248.

46 Francis Leslie/Smith Patricia, Feminist Philosophy of Law, in: Zalta Edward N. (ed.), The Stanford Encyclopedia of Philosophy, Stanford 2021.

47 Sen Amartya, Gender Inequality and Theories of Justice, in: Glover Jonathan/Nussbaum Martha (eds.), Women, Culture, and Development, New York 1995, pp. 259 et seqq.; Kirp David/Yudof Mark/Strong Franks Marlene, Gender Justice, London 1986.

48 Bartlett Katharine, Feminist Legal Methods, in: Harvard Law Review 1989/103, pp. 829 et seqq., p. 857.

49 Bradney Anthony, Law as a Parasitic Discipline, in: Journal of Law and Society 1998/25, pp. 71 et seqq., p. 73.; Silbey Susan/Austin Sarat, Critical Traditions in Law and Society Research, in: Law & Society Review 1987/21, pp. 165 et seqq.

50 Silbey Susan S., After Legal Consciousness, in: Annual Review of Law and Social Science 2005/1, pp. 335 et seqq.; Commaille Jacques, Les Legal Consciousness Studies selon Susan Silbey: une

Apart from trans-disciplinarity and using situated, material analysis, a feminist or gender-informed perspective on the law, as a political exercise, could have myriad positive outcomes not only for legal education, but also in the legal professions, by creating and reinforcing individual and collective dimensions of epistemic justice. Methods from feminist and critical race theory can help to raise awareness of important principles that are generally considered «neutral», and can provide tools to challenge and address them from another perspective. They also help to disrupt the idea that the «woman question»[51] is independent from the rest of the legal system. This is because studying the history of legal discrimination can contribute significantly to the development of the right to self-determination. Understanding that gender is constructed by the law, and that the law is a socio-political tool in the way it is practised, can in turn shape gender roles and expectations. As such, it is fundamental to the use and questioning of the law as a factor of socio-political power. As lawyer Catherine A Mackinnon has put it: «Feminism will be real in legal education when students are taught that almost everything they do is on one side or another of a real social divide that includes sex, with material and differential consequences».[52] As she argues, there are many advantages to adopting a feminist point of view of the law, which requires rethinking fundamental notions at the heart of human rights and criminal justice. Indeed, insights such as the analogy between consent in contract law and consent in sexual relations,[53] or the framing of domestic violence as «terrorism»,[54] have emerged though analysis using these methodologies. Comprehensively mainstreaming feminism in the legal curriculum thus provides students with useful tools with which to critically question the legal world and to work with social equality as a whole; and provides access to points of view of persons that have been otherised, which is critical to combating bodies of active ignorance.

While debates about what should be included in a feminist or gender view of the law are salient in other parts of the world – such as in common law states, where they spark great controversy[55] – it is important to ask and examine how a feminist perspec-

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dissonance entre données empiriques et ressources théoriques?, in: Droit et société 2018/100, pp. 657 et seqq., p. 658.

51 MacKinnon (fn. 33), p. 16.

52 MacKinnon Catherine A., Mainstreaming Feminism, in: Journal of Legal Education 2003/53, pp. 199 et seqq., p. 212.

53 Loick Daniel, ‹As if it were a thing›: A Feminist Critique of Consent, in: Constellations, An International Journal for Critical and Democratic Political Theory 2020/27, pp. 412 et seqq., p. 412. See also Garcia Manon, La conversation des sexes : Philosophie du consentement, Paris 2021, p. 81.

54 Sloan-Lynch Jay, Domestic Abuse as Terrorism, in: Hypatia 2012/27, pp. 774 et seqq.

55 Briefly summarised, some self-proclaimed «gender-critical» feminists make a clear distinction between sex as a biological «reality» and gender as a social construct. They tend to fight for a return to sex as a criterion of distinction and are commonly referred to – sometimes rightly and sometimes wrongly – as «TERFS» (i.e., Trans Exclusionary Radical Feminists) by transgender and queer activists. This has led to the phenomenon known as «no-platforming» in the academic world, particularly in the UK. See the case of Oxford University Professor Selina Todd: BBC News, «Oxford University Professor Condemns Exclusion from Event», March 4, 2021; and Fazackerley Anna, Sacked or silenced: academics say they are blocked from exploring trans issues, in: The Guardian, January 14, 2020.

tive should be approached and implemented by Swiss lawyers and legal scholars. Thus far, much of the discussion concerning feminist legal perspectives in Switzerland, Germany and France has focused on educating students on important debates regarding the historical and social «exclusion and inclusion»[56] of certain legal subjects or classes of persons (eg, women, LGBTQ+ persons) in legal institutions. We are also arguing for the mainstreaming of a feminist legal epistemology. This approach centres decompartmentalising the teaching of law via the aforementioned changes to the hierarchy of legal education and teaching styles; as well as increasing trans-disciplinarity; and transforming legal knowledge through collective, critical reflection grounded in the experiences of marginalised persons.

4.2 The Need for a Feminist Standpoint in Legal Discourse in Switzerland

The institutional dimension of the epistemic failure of legal education can be exemplified through the case of the institution of gay marriage in Switzerland. Legislation to allow same-sex marriage was passed on September 2021, following a national referendum. Largely supported by most of the Swiss national parties (apart from the Swiss People's Party, the Evangelical People's Party, the Ticino League and the Federal Democratic Union), the discourse was considerably «first wave»[57] oriented, in that it was articulated using the idealistic and liberal model of formal equality, which aims to put the status of «homosexual» and «heterosexual» on the same level – that is, to grant LGBT+ people rights in order to integrate them into pre-existing institutional and traditional regimes, such as marriage. This not only normalises the violent neoliberal assimilation of LGBT+ persons at the hands of heteronormative norms under the guise of the extension of «heterosexual rights», but also hides how discrimination and violence against LGBT+ people can be addressed in other ways that do not reaffirm forms of exclusionary regulatory and political state power and legal subjectivity.

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56 Baer Susanne, Inklusion und Exklusion: Perspektiven der Geschlechterforschung in der Rechtswissenschaft, in: Verein ProFri Schweizerisches Feministisches Rechtsinstitut (ed.), Recht Richtung Frauen: Beiträge zur feministischen Rechtswissenschaft, St. Gallen/Lachen 2001, pp. 33 et seqq.

57 The first wave of feminism is a liberal and egalitarian movement that emerged at the beginning of the twentieth century in Europe and the United States, which focuses on the demand for formal equality between men and women; see Froidevaux-Metterie Camille, Un corps à soi, Paris 2021, p. 13. Above all, it aims to reform public and legal institutions, to establish formal equality in and before the law. At present, three or even four chronological waves of feminism have been distinguished as ways to conceptualise feminist political movements or eras. Each wave has given rise to different schools of thought and different claims. However, reducing the feminist movement to chronological waves is a controversial method among historians; see, for example, Pavard Bibia/Rochefort Florence/Zancarini-Fournel Michelle, Ne nous libérez pas, on s'en charge: Une histoire des féminismes de 1789 à nos jours, Paris 2020, p. 9; Dean Jonathan/Aune Kristin, Feminism Resurgent?, Mapping Contemporary Feminist Activisms in Europe, in: Social Movement Studies 2015/14, pp. 375 et seqq., p. 376 et seq. However, it does have the advantage of connecting historical movements to the developments or delay of the achievement of rights for women. Thus, second-wave feminism was built on demands related to sexuality, notably related to the control of women of their own bodies. Third-wave feminism fostered development of and coined concepts such as «gender», «intersectionality» and so on.

Another salient example is a case before the Basel Court of Appeals[58] in which a rape sentence was allegedly reduced because of the victim's unrestrained and provocative behaviour. While criminal procedure is certainly more complex than the media attention on such judgments would suggest, especially in the post-#MeToo era, training on the relationship between gender stereotypes and the law would be beneficial for magistrates and lawyers. Members of the bar, judicial authorities and state services are still insufficiently aware of the ways in which gender and discrimination operate.[59]

It is terrible to be failed by politics, to suffer at the hands of interpreters of the law who have an incomplete view of how inequality shapes our lives in different ways; but it is worse not to be seen or addressed as a potential subject of justice at all. Decision-making authorities in general should not overlook the numerous research studies, from several disciplines, on the effects of gender stereotypes in their judgments. This research may lead to different formulations and decisions by the authorities concerning, for example, sexual or family rights.[60] This is why there is a need for a «radical» change – that is, a change that uproots the current system and starts this transformation at the source of the transmission of legal knowledge. Transforming the system of legal education in Switzerland is a necessary step in redefining the practice of law, as it would expand conceptions of legal subjectivity as well as the function of the law. As such, our goal is to impart upon legal theorists, students, educators and lawyers an obligation to address these epistemic injustices, as well as the social, political and legal implications thereof, by gaining and raising awareness of these issues. Transforming legal institutions – such as the systems of education, legal theory, legal practice and the law itself – that perpetuate oppressive social arrangements is an obligation we share by virtue of our shared goals of creating equity and justice. To enact social change and challenge oppressive social structures and systemic forms of inequity and injustice, this obligation must be taken seriously.

Furthermore, a few theoretical and practical justifications can be given that ground the obligation to adopt a feminist or gender perspective in the law. First, such theoretical justification is found in the Convention on the Elimination of All Forms of Discrimination against Women,[61] which provides for the fulfilment of positive obligations of states to implement the right to scientific knowledge and inclusive education. Another theoretical justification is that mentioned earlier of the democratic necessity to ensure that every person in society has equal access to knowledge and development, to the best of

58 Appellationsgericht Basel SB.2021.9 (AG.2021.589), July 30, 2021.

59 Federal Council (Bundesrat), Le droit à la protection contre la discrimination, Report in response to Postulate Naef 12.3543, Bern 2012.

60 See Burgat Sabrina, Quelques réflexions sur les stéréotypes de genre en droit des familles, in: Droit matrimonial Newsletter 2020, who criticises the Swiss Federal Court in a family law case (decision of the Swiss Supreme Court 5A_831/2018 section 6.2) for seeming to simply ignore the extensive research on gender stereotypes and social norms on the roles of women and men, and particularly of mothers and fathers. This research implies that the Federal Supreme Court needs to change its usual formulations and, in particular, its understanding of the concept of the «child's best interests» (bien de l'enfant/Kindeswohl/bene del figlio) to include close relationships with male and female figures.

61 Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau, RS 0.108, entry into force for Switzerland on April 26, 1997.

their ability; and that one's potential to flourish and contribute to society is guaranteed. Finally, practically speaking, this obligation is demanded by the authority and credibility afforded to lawyers in all domains of public life, and by the importance of civil education and its role in helping lawyers become informed citizens.

5 Conclusion

There are already promising developments in Switzerland that are exemplified by the growing interest of Swiss legal teachers or scholars in feminist critical interventions.[62] Sadly, however, lawyers, and theorists who articulate a demand for this project of raising awareness and conceptualising transformations are often dismissed. It is argued that we do not understand the realities of working within the existing legal system or that our proposed changes are too utopian.[63] This is another way of saying that our ideology concerning what the law is, should be and does is fundamentally irreconcilable with what currently exists. However, these proposed changes are transformations which are necessary: they address injustices being perpetuated now.

It is this claim which is central to motivating our arguments on why legal education must be transformed. We must educate and train upcoming lawyers and theorists to be able to look for the mechanisms through which the law, as an institution, serves to legitimise certain ways of knowing and delegitimise others; and how this culminates in forms of legal subjectivity. Those who practise law hold tremendous epistemological, social and political power. They go forth into the world and define the limitations of equality; draw borders at which human subjectivity is no longer relevant for collective social and political action; and enact administrative processes that discipline and exercise authority over the way others can live their lives. If they are not given the tools to be made aware of their own positionality and how that impacts on the way that legal knowledge and knowledge of the law are constructed, then their training should be changed. Finally, we also need to actively work against the silencing of students – future practitioners of law – who are differently socially positioned. This would help to create an epistemic community in which theorising about law becomes more inclusive and lawyers do not suffer harmful experiences of alienation, exclusion and discrimination.

62 Some faculties of law in Switzerland now offer interdisciplinary courses on gender and the law, as well as clinical legal education.

63 Often, these critiques originate from feminists or sociolegal scholars themselves; see Harrington John/Manji Ambreena, The limits of socio-legal radicalism: social and legal studies and third world scholarship, in: Social & Legal Studies 2017/26, pp. 700 et seqq., p. 706 et seq.; Halley Janet, Split Decisions: How and Why to Take a Break from Feminism, Princeton 2008, passim.