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Legal Education and People

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BOOK REVIEW

Legal Education and People

Jeremy Cooper and Louise G Trubek, editors, *Educating for Justice: Social Values and Legal Education*, Aldershot, Hants, England, Ashgate Publishing Company, Brookfield Vt USA and Dartmouth Publishing Company Limited, 1997, pages x + 311. Price $127. ISBN 1 85521 967 0.

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"Absence of a Larger Vision"

Tan Le, 1998 Young Australian of the Year, wrote in the *Sydney Morning Herald* on 3 March 1999:

> Let me illustrate from my experience. I have just completed a law degree. One reason why I (and many others) chose law was because I believed a law degree would enable me to contribute in a special way — to do what I could to make a better world.
>
> But nothing in the entire law curriculum addressed the issue in a serious and engaging way …
>
> Young people are not being educated to take their place in society. They are being trained in a narrow body of knowledge and skills that is taught in isolation from larger, vital questions about who we are and what we might become.
>
> There is, in other words, a complete absence of a larger vision, and many young people who enter the university in the hope of learning how to make a better world find out that this is not a consideration. This lack of vision prevails not just in tertiary education. Our society has replaced vision with what might be called a rationale. A rationale is more pragmatic, smaller in scope, less daring and does not fire the heart or capture the imagination …

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Some years ago, Sir Anthony Mason, then Chief Justice of Australia, said:

> Law schools must resist the temptation to become business schools, deferring to the demands of large commercial practices and ignoring consideration of intellectually demanding questions posed by the traditional subjects as well as the large and enduring jurisprudential issues relating both to the structure of legal systems and to the law's role in society.[1]

Ms Le clearly feels she attended a law school that may have ignored Sir Anthony's advice. The pressures on law schools to defer exclusively to demands of large commercial firms and the students who aspire to work in them (as well as the students' families) have increased in the decade since Sir Anthony spoke. Professors Cooper and Trubek, however, have edited a book that proves some law teachers still share the same concerns as Ms Le and Sir Anthony Mason. Whether or not such law teachers will remain in law schools for much longer is open to question.

In most countries, including the United Kingdom and Australia, reduction of government funding of Universities has put two kinds of pressure on law schools. First, they are recruiting relatively few new staff. Secondly, their scarce resources are concentrated on teaching the compulsory core of traditional subjects in the least costly way. In addition, as some of the contributions to this book point out, the pressures on students have changed in ways that influence their career choices and, at least indirectly, possibly their values as well.

What Ms Le observes may be universal. One essay in this collection, Kim Economides' "Cynical Legal Studies", suggests that the pressures on both law students and law teachers reduce legal education to training in cynicism. He identifies the preoccupation of law firms and universities with "market forces" as one factor. Students are under pressure to find virtually any employment; they can no longer choose. In any event, as a result of "market-oriented" government policies, there is now far less employment available in the public sector and in what at one time was called "poverty law". The author also holds the "nihilistic" element of the Critical Legal Studies approach to legal studies responsible for developing

1 A Mason, Universities and the Role of Law in Society in J Goldring et al, *New Foundations in Legal Education* (Sydney & London: Cavendish Publishing (Australia) Pty Limited, 1998) x.

a degree of cynicism in law students, especially because its more radical approach to law and society led to isolation from some of the more radical elements of legal practice. If this is true, what room is there left for an approach to the study of law which takes account of social values? One could go further: where, in the course of most legal education, do students encounter the "human" element in law?

The study of business and property law rarely exposes students to the fact that law arises out of and affects the actions of individual people who have appetites, moods, likes and dislikes. The Aristotelian or scholastic tradition that influences so much of higher education (including legal education) in the western culture is obsessed with systematisation and rationalisation. Human individuals at times need systematic thought and rationality, but essentially they are anarchic and irrational. A starting point for legal studies might be that lawyers need to accommodate human individuals to the demands and opportunities presented by laws. This approach, however, is relatively rare, and for that reason law students may not be exposed to the sort of social values which interest the contributors to this book. When law is "personalised" or "humanised" in some of the ways described by the contributors, the outcome is very different, no matter whether that process takes place in New York City, Sri Lanka or Bangladesh.

This collection of essays follows the formation, by a group of law teachers in several countries, of an international working group on social values in law in 1992. As the editors state in their introductory essay,

> By social values in law we mean the belief that the primary function of law is to uphold the values of a humane and civilised society as expressed in the internationally accepted canon of fundamental human rights and aspirations. Maintenance of social values in law may, therefore, require lawyers to use law proactively to bring about social change in the interests of justice. It undoubtedly requires law teachers to develop amongst students an appropriate spirit of enquiry that is vigilant to the questions generated by this concept. (1)

This, of course equates, "justice" with "the belief that the primary function of law is to uphold the values of a humane and civilised society", and by doing so may invite philosophical or political disagreement. And law teachers who wish to educate for social values will find the avenues available to them for doing so extremely limited. But there are still opportunities,

and those who might otherwise despair might take heart from such essays as Professor Phillip Iya's description of what is happening at the University of Fort Hare in South Africa.

The Clinical Experience

Many essays in this collection describe attempts to integrate student learning with "real-life experience". They describe several types of "clinical legal education". In the context of "educating for social values" several of the authors seem to emphasise that the clinical experience of the law students should be of a special type.

Until the years 1920–1960, even in the United States, most lawyers were trained, at least in part, by apprenticeship or articles of clerkship. Law study in a university was regarded by the professional authorities as a minor part of legal training. Then, in the United States, credentialism and the desire of law schools to dominate legal education finally prevailed, and students were often admitted or licensed to practice with no experience at all of legal practice.[2] When suggestions were made that "clinical" experience might assist students to understand both the nature and content of professional responsibility and the nature of law in action, the professional authorities were receptive. The analogy of the medical schools, with students and recent graduates treating real patients, especially the more indigent patients, in the public teaching hospitals, was also useful. The legal profession (eagerly) and the law schools (with some reluctance) accepted that clinical legal education could be justified, even in the context of a scholarly institution.

Ideally, in this form of clinical legal education students practise "poverty law", under the supervision of experienced practitioners who have a primarily teaching role. The legal centre is controlled by local communities, so that their job, as well as including the traditional tasks of advice, representation and negotiation, is to empower less privileged members of the community. Indeed, some of the authors in this collection seem at pains to emphasise that while clinical legal education can and should train students in various relevant skills (especially skills of communication, advocacy, negotiation and research), that should not be the primary aim of clinical legal education in "educating for justice".

2 R Stevens, *Law School: Legal Education in America from the 1950s to the 1980s* (Chapel Hill and London: University of North Carolina Press, 1983).

The proponents of clinical programs, for the most part, had an additional agenda, usually hidden carelessly, if at all. The civil rights activism that swept the United States in the late 1950s and 1960s engaged some law students, who assisted civil rights litigation in various ways — and changed or deepened their commitment to law and lawyering. These lawyers, and law teachers who observed them, considered that engaging law students in the provision of legal services to a group of clients who were not businesses might not only give those clients access to legal services that would otherwise be out of reach, but might also educate law students by exposing them to a range of human predicaments quite often totally alien to the middle classes from which most law students were drawn.

Clearly there are tensions between the objectives of, on the one hand, service delivery to, and empowerment of, communities and, on the other hand, those of legal education. Resolving these tensions is one of the challenges to those seeking to educate law students for social values through some form of clinical experience. The essays presented here are evidence that that type of experience is not the only means of educating students for social values, though a common theme is that students who study and are exposed to the "law in action" as opposed to "law in the books" are more likely to develop the spirit of inquiry that the contributors consider desirable. As the editors say, "legal education matters". Legal education, particularly clinical legal education, has frequently been the source of innovations that improve both the experience of students and the welfare of communities. Several essays question the perception that law — and law schools — exist primarily to serve the business community. Clinical programs and social action research may develop students' critical awareness and make them aware of constituencies of law beyond business. While there were links between the "critical" (ie radical) and clinical legal studies movement, they were by no means congruent.

Integrating Social Values in Legal Education

The case studies presented here examine a broad range of legal education. They span a new approach at the beginning of law school studies to the teaching of legal research and writing through a range of clinical programs, as well as examples of community legal education — the demystification of law and empowerment of disadvantaged groups in Bangladesh, Slovenia and the United Kingdom. It is intended

that the materials presented can be used as a "tool kit" for people interested in using legal education as a base for integrating social values into law.

The editors see two major approaches to integrating social values in legal education: clinical education, and through the curriculum.

Clinical Education

Clinical education seems to dominate the book, probably because it has been extremely successful in humanising the law for those who participate in it. In the United States clinical programs are part of the offering in most law schools. In the United Kingdom the law schools have been conservative in setting their curricula, and the community law centres movement is part of a more general radical community action movement and is not so closely linked with the law schools. Canada and Australia fall somewhere on the continuum between the United States and the United Kingdom, and possibly for that reason have experienced more closely the special tension that arises between the thrust for community control of the law centres that serve a special community, and the need to accommodate educational objectives and requirements. This is a question explored sensitively and thoughtfully in the collection by Mary Anne Noone.

Some academic activities mesh well with community needs, though the projects may at the time they are initiated appear to have more academic value than community value. Bernard K Freamon describes an "action research" program conducted at the law school of Seton Hall University in Newark, New Jersey. Seton Hall is a rather conservative, Catholic university. Newark is an urban area with huge numbers of homeless people, largely as a result of archaic and discriminatory tenancy practices. This is despite the existence of "fair" housing laws that prohibited racial discrimination. Students were encouraged to work in a "Fair Housing Clinic" and, in the course of enforcing the law, were obliged to work with social scientists to collect empirical data to support the cases. In addition, the law school initiated an "Affordable Housing Colloquium" which would function outside the clinic proper but would engage in "action research". As Freamon states (at 177–78)

> Lawyers are notoriously unscientific in their analysis and use of research and data and much of what lawyers call "research" is not worthy of the name — it is little more

> than anecdotal storytelling — and it sometimes leads to terrible discrimination by judges and legislators. So we determined that the research endeavour … would be conducted by well established and experienced scholars, policymakers, and researchers, all from universities, governments and agencies, with a good track record in the community and solid experience in the world of litigation and legislation. This research would accurately inform faculty concerning the empirical data and other forms of knowledge needed to educate students and make good decisions on the legal needs …

The information generated was fed back into the teaching program of the law school as well as being used in administrative and legal proceedings and in lobbying activity. This was particularly important, as judges had been asking for empirical evidence of the results of legislation and litigation. The process took more than five years. The results reflected not only in concrete results for law and policy, but also in understanding by members of various disciplines.

Freamon identifies political and ideological difficulties within the law school and the University. This would appear to be universal wherever either accepted practices are challenged, or academics adopt and advocate particular viewpoints based on social values. There are examples of this in Gary Blasi's account of the creation of an academic program in Public Law and Policy at the UCLA Law School. More familiarly to Australian readers, Noone gives an account of one of the two major obstacles to the introduction of clinical programs in Australia (and, from my observation, in the United Kingdom and Canada): the view among academic lawyers that they are primarily scholars in academic, research-biased institutions, which should not be involved in practical training, or as some put it, "technical training". The other obstacle has, of course, been the relative cost of clinical programs.

That argument is quite different from the argument whether the objectives of clinical programs should be those primarily of community service or of education. The contributors to Cooper and Trubek's collection, however, emphasise *education* which informs students of social values, rather than the *inculcation* of those values. There appears to be an appreciation among several contributors that the values inherent in much legal education, indeed, much law, are those of business and property. Duncan Kennedy articulated this in "Legal Education and the Reproduction of

Hierarchy"[3] many years ago. This alienates some students who already have developed their own social values and ideas which may differ from those of traditional law teachers.

Minna Kotkin, who had been teaching litigation skills and employment discrimination at Brooklyn Law School in New York, recounts the experience of the Violence Against Women Act Project, which grew out of a course which had, for many years, involved students in selected employment discrimination cases in the United States Federal Court. A new statute provided an opportunity to overcome what Minna Kotkin saw as shortcomings in the existing course. The students not only worked on the drafting of court documents, but became involved in community education about the new law. Despite the fears of students and staff that this would produce a flood of clients, relatively few emerged. Some potential litigation was considered, but none resulted, and this disappointed some students. The major outcome, however, appeared to be the process of critical reflection on the process of litigation which the course evoked in many of the students. This, in turn, influenced their career choice to some extent.

Maresh provides evidence that students who participate in clinical education programs are more likely than other students to engage in various forms of "public interest" legal practice after completing their studies. These results speak for themselves. Maresh comments on the reason for the change in attitudes:

> [T]hey acknowledged a "personalisation" of the plight of the poor, a realisation that many of their clients needed representation through no fault of their own, a recognition that the integrity of the judicial system is dependent on equal access to representation regardless of individual resources … (164)

Any educational experience which does not "personalise" social differences and differences in attitudes and experiences of different social classes is unlikely to change students' perceptions of social phenomena, and therefore their attitudes and social values. Students are unlikely to comprehend social difference in any concrete way unless they experience such differences. Maresh is able to express in a rational way what was immediately obvious to the early law teachers

3 (1982) 32 *Journal of Legal Education* 591.

and students who were engaged in and by the civil rights movement in the United States and (to a lesser extent because the numbers were smaller) the anti-Vietnam war and early community legal centres movements in Australia.

Curriculum

Traditional curriculums and the pressure to get law studies over and done with, so that students can get on with the serious business of earning money and repaying their student loans, directly impede the development of social values in individual students. Clinical programs are one way to counter this. But they are expensive, and many students may see them as involving unnecessary work without corresponding benefits.

The essay by Adrienne Stone is particularly significant for Australian law schools in this regard. Her essay, and that of Kim Economides mentioned above, may be seen too to reflect the opening remarks of Ms Tan Le. Ms Stone has been both teacher and student in Australia and at Columbia Law School in the United States. Her observations focus on the women who are now a significant majority of students in most law schools in both countries. Many women students aspire to public interest practice when they commence their studies, but the *process* of a traditional legal education can easily dissipate these aspirations or instil the type of cynicism that Economides discusses. This is because they are "dehumanised".

On the other hand, Amy Ruth Tobol's essay on integrating critical awareness in a course on legal research and writing — typically offered to law students in their first semester — demonstrates that law schools themselves can equip law students to perceive the "hidden agendas" and underlying values of the traditional law school curriculum by demonstrating that the substance and the practice of law embody (and are the result of) particular social pressures and reflect particular values. By introducing students to the practice of working cooperatively rather than as competitive individuals, they can learn a good deal about the power relationships reflected in law. Forewarned and armed in this way, students may be able to avoid some of the cynicism and disillusionment that might otherwise be the end result of their education.

Conclusion

"Social values", however defined, recognise that human beings are the raw material of society. Law affects people. They are the subjects and frequently victims of a legal system. Many

law students are kept ignorant of this fact. Although the formalism that characterised law and legal education 20 or 30 years ago may no longer be so dominant, the human element in law is still somewhat lacking. Attempts to portray the law as rational or systematic are misleading, and approaches to law such as "Law and Economics" are particularly pernicious because, if they consider individual humans at all, it is as an abstracted mass of people, not idiosyncratic individuals who are essentially irrational.

Teaching law so that students are exposed to questions of values may occur in any type of legal education, whether the learners are members of the community seeking information about their rights as domestic violence victims, tenants, people who have to work with the law (social workers, rural development workers, police etc) or law students. Law students risk avoiding questions of value more than others, because of the nature and tradition of law teaching, and the widespread expectation that they will proceed to work in commercial law or business. Many will, but if a society based on the rule of law is to survive, many must work in other areas such as criminal, welfare and housing law, where legal skills are needed.

As Stone points out, *every* law student needs much of what students in traditional law schools receive: a knowledge of the substantive rules and practices that make up law. Clinical experience is not a substitute for fundamental core material, though in some situations it may be a vehicle for learning such matters. What clinical experience adds, though, in ways that seem highly desirable, is the *humanising* element. This would seem the case wherever students are exposed to real human clients. But clinical learning may, and perhaps should, have wider objectives. It allows students to gain the ability to comprehend "law in action", and that law is more than rules and books, but a living system. The human element is a vital part of this understanding, but there are others. That is why some questions which the contributors do not answer are important if one's concern is specifically community legal education or clinical legal education. But these essays stress the important link between the development of social values and the fact, often ignored in traditional legal education, that law is fundamentally about *people,* and often people who are particularly vulnerable and powerless.