

Chapter 17

Law Teaching as a Vocation*

17.1 Introduction

In 1918 in a lecture translated as 'Science as a Vocation', Max Weber gloomily predicted the bureaucratisation of universities, with the consequent threat to academic freedom and to the traditional scholar pursuing truth with passion, integrity and hard work.¹

In 1975 in a lecture in Lagos glibly entitled 'The Law Teacher as Superstar', I more optimistically argued that one could find fulfillment in a career as an academic lawyer, provided that our discipline developed so as to realise its full potential.²

Twenty-five years later, as universities around the world have become more bureaucratised with the associated talk of accountability, performance indicators, productivity, output and meeting the needs of employers, there are grounds for thinking that Weber's pessimism may fit today's situation better than my upbeat optimism. But I wish to suggest that the current scene is more complicated than that. For instance, Weber's idea of bureaucratisation included the paying of salaries to academics and he considered this to be a threat to academic freedom.

The theme of the conference to which this chapter was a contribution was 'Social Responsibility of Law Teachers and Researchers'. In thinking about what I might contribute as an outsider, I decided that I knew too little of the local concerns that stimulated this topic to address it directly. However, I felt that it might be helpful to set some of these issues in the wider international context of the actual and potential roles of law schools and individual law teachers in a time of rapid change and to consider how such roles fit in with demands to be

* This is a revised version of a paper given at the Conference of the Society of Law Teachers of Southern Africa at Grahamstown in January 2002 and published in (2002) *Speculum Iuris* 161–80. As this was a retrospective view of the period 1975 to 2000, I have not tried to update it. The main developments since then include the Bologna Process (integrating higher education systems in Europe) (see Terry (2007) Lonbay (1998), (2004)) and the uneven curricular development in respect of globalisation and the transnationalisation of law.

¹ Max Weber, 'Science as a Vocation' (1918), (1958) Ch. V.

² Twining, *Academic Law and Legal Development* (Taylor Lectures, Lagos, 1976) Lecture III.

‘relevant’ or productive or politically engaged or socially responsible. In short, what are law schools and law teachers for?

Such questions need to be considered in the context of a coherent, articulated ethos about the role of universities, law schools and law teachers as a particular kind of professional. Since law schools and law teachers are diverse and many of the issues are contested, there is scope for different positions on many of these issues. But a reasonably coherent approach is possible within a framework of a fairly traditional view of the academic ethos.

In order to save time, let me re-assert as assumptions, rather than argue, a number of theses that I have discussed at length elsewhere³:

- (1) How the discipline of law is institutionalised varies considerably at different times and in different places.⁴ So too with higher education, legal cultures and legal professions. The history and organisation of the higher education system are quite different in your country and mine; our legal traditions and history are only partly shared; and the pressing issues facing our countries internally are obviously distinct. However, there is much in common in respect of values in our university traditions and of some aspects of our legal education systems. Moreover, there are shared trends, associated with transnationalisation and so-called ‘globalisation’ and more parochially affecting legal education, legal scholarship and legal practice. So we may be justified in talking cautiously in general terms about some basic issues, concepts and principles.
- (2) I shall focus today on the discipline of law in universities, for these are the main institutions that harbour career law teachers and scholarly legal research. We should remember that within many national legal education systems, university law schools are only a small part of the total picture and that most formal learning about law takes place in other institutions – including law firms, commercial law schools, departments of public administration, police academies, judicial training centres, secondary schools and legal awareness or street law programmes.⁵ Similarly, in most countries, more teaching of law is done by part-time teachers (and even by non-lawyers) than is done by full-time scholar-teachers of law. Furthermore, part-time teachers, if properly deployed, can and do contribute immensely to legal education in universities – but that is beyond the scope of this chapter.⁶ Everyone in society needs some legal education from cradle to grave. Not all of this education is formal. Law Schools do not, could not and should not have a monopoly on formal legal education. As Lawrence Friedman has said, Western society is ‘one, vast diffuse school of law’.⁷ But law schools, as institutions specialised to the study of law in all its aspects,

³ Especially *BT* and *LIC*. ⁴ *LIC* 294–5, *BT* Chapter 3. ⁵ *LIC* Chapter 15

⁶ This is also the place to recognise the special contributions of ‘clinicians’ and vocational trainers, many of whom are full-time and are involved in a particularly demanding kind of teaching.

⁷ Friedman (1989) at p. 1588.

can play a key role in the advancement and dissemination of knowledge and understanding about law at many levels and in many constituencies.

- (3) The primary mission of a university is the advancement, stimulation and dissemination of learning. The role of a university law school is the advancement and dissemination of learning about law and legal phenomena.⁸ In the classic form, to which I subscribe, the central values include intellectual rigour, toleration of different views, relative detachment, breadth of perspective and a capacity for independent critical thought. There is plenty of room for differences about priorities, objectives, methods and values within this conception and about the relationship between teaching and research. But this idea of the university as a House of Intellect is unequivocal in its rejection of strong analogies with factories or businesses or political parties or evangelical churches or guerilla bases.⁹
- (4) The advancement and dissemination of learning can only flourish under conditions of 'academic freedom'. This involves a combination of freedom of speech and enquiry with relative institutional and individual autonomy. 'Academic freedom' is variously interpreted. It is often in tension with a number of other values, including public accountability, state dirigisme and perhaps even social responsibility.¹⁰
- (5) In many countries, including my own, university law schools have traditionally played a quite limited role compared to their potential. In recent years they have extended the range of their activities, but this has often been constrained by a highly restricted self-image as being essentially undergraduate institutions or, as I would prefer to put it, as primary schools concerned almost always with introductions and first steps and hardly ever with more advanced work.¹¹ This concentration on the introductory and the elementary applies as much to contributions to education of non-lawyers, to the vocational stage and even to continuing education as it does to undergraduate degrees. Advanced or specialised study, where it exists at all, is almost invariably treated as marginal.

The 'primary school model' leads to the non-involvement of law schools in vast swathes of legal life and vast tranches of professional development. It also involves the neglect of the legal education needs of the rest of the population, not only the poor and the oppressed, but also other professions (e.g. engineers and

⁸ In order to anticipate objections from practicing lawyers that this is too 'academic', let me emphasise that on my interpretation learning here includes know-how, as well as know-what and know-why – and that there is no necessary tension between the values of a traditional university and the idea of professional or vocational education. The familiar debates about liberal education and vocational training are largely tangential to my argument: medicine, engineering, theology and law are among the older disciplines found in modern universities and the academic ethic accommodates useful knowledge, professional training and both applied and pure research. (BT 50–1)

⁹ Shils (1983) and BT Chapter 2

¹⁰ Robust, but differing interpretations of academic freedom are Russell (1993) and Shils (1983).

¹¹ LIC Chapter 15.

accountants) and those working at the frontiers of science (e.g. on issues arising from biotechnology or intellectual property). As the legal system's House of Intellect, law schools should be involved not only in providing elementary introductions to non-lawyers, but also in sustained interactions with cutting edge issues at the frontiers of science and other disciplines.¹² As long as university law schools fail to take seriously such ideas as 'life long learning' and 'law for non-lawyers', they are likely to play a rather marginal role in the legal system as a whole.¹³

I ride this old hobby-horse of the primary school model here for one simple reason: if part of the social responsibility of scholar-teachers of law is to work at the frontiers of legal knowledge and legal action, then they will be greatly constrained if their institutional base, the law school, concentrates nearly all of its efforts on first degrees in law and pre-qualification training.

17.2. Scholar Teachers of Law¹⁴

And so to the vocation of scholar-teachers of law. My lecture of 1976 began as follows: 'What did William Blackstone, Oliver Wendell Holmes Jr., President William Howard Taft, Prime Minister Pierre Trudeau of Canada, El Sayed Zaki Mustafa of the Sudan, Mr Justice Aguda and Chief Justice Elias have in common?'¹⁵

Today one might substitute a new list of names but the question would remain the same: in Ireland, ex-President Mary Robinson, President Mary McAleese and Mr David Trimble; in the United States, Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia; ex-President Clinton and Senator Hillary Clinton; in Britain, Lord Hoffman, Lord Rodger and ex-Lord Chancellor Lord Irvine; or in South Africa, Justice Albie Sachs, Justice Kate O'Regan and Dr Kader Asmal.

¹² Contact with accountants should be as much about takeovers, mergers, privatisation and insolvency as the basics of contract. Whether or not such matters are appropriate concerns for undergraduates or trainee practitioners, law schools should be involved in such matters as bio-ethics and medico-legal issues, intellectual property law as it affects engineering and pharmaceuticals. The international law of war and peace and terrorism from the point of view of politicians and the military should be as much on the agenda as elementary first steps that are derogatorily referred to in some quarters as 'service teaching'.

¹³ In December, 2001, some of us attended a Commonwealth Legal Education Association conference in Sri Lanka. During the conference I counted over thirty passionate appeals for the inclusion of compulsory additions to 'the curriculum', some through new courses, some through a pervasive approach: human rights, environment, international law, professional ethics, gender sensitivity, cyber law and so on. Most of this litany is familiar. Almost all of these appeals were seemingly directed at first degree curricula, which as we all know are drastically overcrowded and unable to meet demands for expansion without corresponding sacrifices; so the Night Club or Revolving Door principle must apply – One Out before the Next In. Not once did I hear anyone suggest that 'the curriculum' referred to anything other than first degrees in law.

¹⁴ Parts of this section have been adapted from my original lecture in 1975. (n.1 above) The large amount of updating required is referred to in the text. It illustrates both some continuities and the rapidity of change in legal education transnationally in the past twenty-five years.

¹⁵ *Ibid.*

One answer to this question is that each of these individuals, for a significant part of their career, was a teacher of law, but they went on to make their name in public life. These examples suggest, if nothing else, that a career in law teaching is not such a dead-end as it is sometimes thought to be – though a cynic might add ‘provided you do not stay in the profession’.

My 1975 lecture was based in part on the well-known International Legal Center Report on *Legal Education in a Changing World* to which I had contributed a little and from which I learned a lot. In particular, the ILC report took as its starting point two assumptions about my topic:

1. Law schools of the future should be viewed as multi-purpose resource centres dealing with all levels of legal education and staffed by a corresponding variety of specialists.¹⁶
2. The single most important resource in any national system of legal education is the law teacher.¹⁷

I think the two basic assumptions of the ILC Report still hold good, but too much has happened since then for the rest of my argument to be worth repeating. What has changed in the past twenty-five years? I cannot do justice to this here, but let me list some indications from Britain and some other common law countries. In 1960 the London LLM was considered rather bold in listing thirty options; today it offers nearly 150;^{*} I doubt whether in 1975 many of us would have been able to list fifty different legal subjects. In 1990 I wrote

¹⁶ ‘Law schools, perceived as multipurpose centers, can develop human resources and idealism needed to strengthen legal systems; they can develop research and intellectual direction; they can address problems in fields ranging from land reform to criminal justice; they can foster the development of indigenous languages as vehicles for the administration of law; they can assist institutions involved in training paraprofessionals; they can help to provide materials and encouragement for civic education about law in schools and more intelligent treatment of law in the media; they can organize, or help organize, advanced specialized legal education for professionals who must acquire particular kinds of skills and expertise.’

ILC Report (1975) at p. 39.

¹⁷ After considering various aspects of the problem of recruiting, training and retaining law teachers, the Committee concluded as follows:

44 As legal education is perceived to be a panoply of programs and educational efforts calling for diverse expertise, so traditional narrow perceptions of law teaching and legal scholarship may give way to appreciation of the spectrum of different teaching resources needed for a multi-purpose, complex law school. Some teachers will need extended multi-disciplinary training and research experience in social sciences. Some must be experienced litigators or public administrators (as well as capable instructors). Some will need other kinds of special technical expertise. Many should receive some kind of training in learning theory and educational methods and administration. It becomes increasingly important to see the ‘law teacher’ not as a single prototype, nor his career as following a single *cursus honorum*. The faculty of a law school might better be perceived as a team of specialists working in a complex system of education.

45 The full-time scholar-teacher of law may need to be better equipped as a professional in three respects: as a lawyer, as a researcher and as an educator.’ (*ibid.*, at pp 23–4).

^{*} Since this was written the London Intercollegiate LLM involving five University of London law schools has, unfortunately, been broken up and replaced by five competing courses involving much duplication and a narrower range of options.

that in my country and in large parts of the Commonwealth, the discipline of law 'had been transformed from a small-scale, cheap, low-prestige subject to an unrecognizably more sophisticated, pluralist and ambitious enterprise.'¹⁸

By the 1990s a new series of buzz words signaled the pace of change: in-house trainers, distance learning, access to legal education and the legal profession, street law, skills research and the skills movement, multi-disciplinary practice, multi-national practice, international mobility of lawyers, law teaching clinics, training the trainers, judicial studies, law and medicine, records management. Others, such as specialist certification, compulsory continuing education, programmed learning, expert systems and the implications of law in multi-lingual societies have made rather slower progress.

Another indicator is the extent to which the landscape has changed in my own subject, jurisprudence: by 1975 little or nothing had been heard of socio-legal studies or Ronald Dworkin or economic analysis of law or critical legal studies or feminist jurisprudence or legal semiotics or law and geography or socio-biology or critical race theory or post-modernism or autopoiesis. Even human rights as a subject of academic concern was not salient. These have been for the most part developments in more prosperous countries and were only partly disseminated abroad in the post-colonial era. In the past decade there have been some outstanding advances in constitution making and the uses of information technology. On the other hand, in poorer countries most law faculties had done pretty well to survive and keep going in the face of economic catastrophe, political upheaval, or natural disasters.

There has, of course, been some continuity: in most countries, the demand to study law has been buoyant and the production of law graduates has generally exceeded the absorptive capacity of legal professions. Perhaps related to this the perception of law as a low-cost 'cheap subject' in the eyes of governments and university administrators has not been shaken by potentially expensive developments such as the computer revolution, clinical and skills training, or the regionalisation and transnationalisation of law.

In all of these matters, generalisation is dangerous, especially in relation to the growing disparity between poorer and richer countries. But there are some patterns that are worth noticing, though with a cautious eye relating to their generalisability. While there have, of course, been many local variants and differences in timing, most of these items should today at least be familiar as ideas to legal educators throughout the Commonwealth. We are fortunate to belong to a strong and vital international network in which news of new developments, experiments and ideas is rapidly diffused.

Extrapolating from the UK experience, but confirmed more or less by impressions of other countries in North America, Europe and the Commonwealth, I would identify six transnational trends that may be of lasting significance for our discipline and for law teaching as a profession:

¹⁸ *LIC* p. 281.

1. The bureaucratisation of higher education;
2. Progress towards righting the gender balance within legal education;
3. The impact of information technology on learning and research, which after a slow start is now making itself felt;
4. The transnationalisation of law – especially at regional levels such as the EU and NAFTA and in areas such as trade, intellectual property, environment, transnational crime, terrorism and, of course, human rights;
5. A distinct pluralism in academic law, despite some homogenising pressures of ‘globalisation’.¹⁹ This pluralism involves not only a proliferation of new specialisms, but also a diversification of perspectives including, healthily in my view, the increased audibility of a number of previously unheard voices;
6. For these and other reasons nearly all full-time scholar-teachers of law are specialists rather than generalists.

Let us consider these points in relation to the law teacher as lawyer, educator, scholar and micro-politician. Let us start with some images. Twenty-five years ago within legal circles a variety of images or stereotypes of the academic lawyer abounded. There was the image of the failed barrister or attorney, a shy, retiring, cloistered legal monk, illustrated by Jerome Frank’s caricature of Langdell.²⁰ In civil law countries in Europe and Latin America, a standard image was that of the successful practitioner who holds a Chair as a prestigious sinecure. In the United States on the other hand, the most common stereotype was of the spectacular classroom performer who stretches and inspires his students by a combination of bullying and brilliance.

Outside legal circles the scholar-teacher of law has not, on the whole, been a particularly visible figure in most Commonwealth countries. This is hardly surprising given the relative newness of the profession and the much more conspicuous and dramatic figure of the courtroom lawyer. But there are exceptions. It is not entirely a coincidence that in the United States the law teacher as a figure has come closest to catching the public eye. Some of you may remember a popular film (and TV series) based on a rather less impressive novel entitled *The Paperchase*.²¹ This has given wide currency to the image of the heirs of Langdell as larger-than-life figures who combine erudition and artistry in

¹⁹ There is a constant tension between the homogenising trends of bureaucracy and pluralism in respect of subject-matters and perspectives. So far, in my country, pluralism has survived rather healthily as is illustrated by the diversity of legal education providers (e.g. the Open University, the College of Law and commercial law tutors), of programmes (with increasing niche providers), law publishers’ catalogues, agendas for conferences and so on. But we should not underestimate the pressure to conform symbolised by the most degraded kind of league tables by *US News and Report* and similar journals. There is now an extensive literature, much of it critical, about league tables in education. A particularly damning historical critique of *US News and Report* rankings is Chris Smith, ‘News You Can Abuse’, *University of Chicago Magazine*, October 2001, at pp. 18–25. On law school rankings see *GLT* 157–65.

²⁰ Frank (1963) at pp. 225 ff.

²¹ J.J. Osborn, *The Paperchase* (1971); the film of the same name was produced by 20th Century Fox and starred Timothy Bottoms and Lindsay Wagner, with John Houseman as Professor

orchestrating a large class through question and answer with a tyrannical and sadistic manner in dealing with students. This bears close resemblance to another stereotype, that of the regimental sergeant major or drill sergeant. As one reviewer commented, *The Paperchase* is rather like the film *Love Story* – except that, instead of leukemia, it has a contracts teacher as the villain.²²

It is quite an achievement to make a romantic drama out of a contracts class. Yet *The Paperchase* does this by skilfully exploiting the dramatic tension between the fascination of the ambitious pursuit of technical excellence and the de-humanising effects of such a pursuit. It also explores, albeit rather crudely, the nature of the power relationship between teachers and students and the way in which some teachers can abuse their power. Some John Grisham characters, not very memorably, were law professors. More recently, a light-hearted comedy, *Legally Blonde*, makes fun of Harvard Law School's pretensions. A hilarious scene involving a meeting of the Admissions Committee came quite close to the bone in catching some of the absurdities of one's academic colleagues.

The nearest that a law teacher has come to being the hero or villain of a well-known novel, a play, or a film in the United Kingdom is the character, Lewis Eliot, who is the narrator in C.P. Snow's sequence of novels *Strangers and Brothers*.²³ Eliot is a rather unassuming man who rises from a relatively humble background, qualifies as a barrister without going to university, spends a period in practice until, finding it too demanding, he opts for an easier life and obtains a fellowship in law at a Cambridge college – a rather unexpected *cursus honorum*. The contrast between Lewis Eliot, as a law don and Professor Kingsfield of *The Paperchase* is striking. Kingsfield's life is centred on his teaching and writing, especially on his continual battle with his students in the classroom. Lewis Eliot, on the other hand, is in the mould of the easy-going gentleman amateur. He exhibits a considerable interest in college politics, but almost none in scholarship and teaching. He does a little consultancy on the side, but he has ample leisure to explore personal relationships and the corridors of power. Eliot views his pupils as somewhat casual acquaintances, whereas Kingsfield, whose relations with his students are at once remote and intimate, sees them as his products. There is no doubt which is the more dedicated professional and which is the more humane and cultivated man.

If Kingsfield or Eliot could ever have been fair representations or caricatures of career law teachers at Harvard and Cambridge up to about 1965, they are

Kingsfield. Subsequently it became a successful television soap opera. A more recent example of a law professor in fiction is Thomas Callahan in John Grisham's novel *The Pelican Brief* (1992). He is in love with the heroine of the novel, who is one of his students. Unfortunately, he gets blown up by a car bomb at p. 109 and his death only makes page 2 of the New Orleans newspaper.

²² Brody (1974). Cf. MacNeil (2007) Chapter 6 on *Paperchase* and *Legally Blonde*: "Critically Blonde: Law School as Training for *Hersteria*".

²³ C.P. Snow, *Strangers and Brothers* (1940), *The Light and the Dark* (1947), *Time of Hope* (1949), *The Masters* (1951), *The New Men* (1954), *Homecomings* (1956), *The Conscience of the Rich* (1958), *The Affair* (1960), *Corridors of Power* (1964), *The Sleep of Reason* (1968), *Last Things* (1970) – the hardback edition is published by Macmillan and Co., London. See Twining (1979).

now completely outdated. They are clearly recognisable figures from two very different kinds of institution, the Harvard Law School in the 1960s and the Cambridge College in the period 1930–65.

Even in 1975, they also presented a rather striking contrast with the kinds of law teacher envisaged by the International Legal Center's report on *Legal Education in a Changing World*. As I mentioned above, the ILC Report emphasises that, for any sophisticated system of legal education, the single most important resource is a body of full-time scholar teachers of law. This should represent a pool of quite varied talent, specialisms and experience. Despite its pluralistic vision, the report also assumes a common core that defines the identity of a distinctive professional group. It suggests that most of the members of the sub-profession need three different types of expertise – they need to be lawyers, educators and scholars. In the light of increased bureaucratisation, today I would add the skills of a manager or academic politician. Let us look at each of these briefly in turn.

17.3 The law teacher as lawyer

At first sight it may seem rather strange that there should have been controversy about so uncontroversial a proposition as that one qualification of teachers is that they should understand what they are talking about. Yet widely different views are held about the necessary, sufficient and desirable qualifications of academic lawyers. One view is epitomised in the advice by Sir William Holdsworth to an intending academic:

No one can teach law unless he has practiced law. Go to the Bar for five years and then think of teaching law.²⁴

Today, the American equivalent is a period of one or two years clerking for a senior judge – most prestigiously a Justice of the Supreme Court. A different view is illustrated by current international trends in the recruitment of law teachers, to wit that a good law degree, normally followed by some postgraduate work, preferably a doctorate, is sufficient. A professional qualification followed by one or two years of practical experience is treated as desirable, but not necessary.

Obviously the first view is *prima facie* more plausible, but in some countries the second is more influential, no doubt partly because of the realities of the market. The gap between the earnings of successful practitioners and academics has sometimes led universities to adopt a policy of catching them young before they are lost to academic life forever. The approach adopted in the ILC Report suggests a series of propositions that provide a common sense basis for reconciling these conflicting views. It suggests first of all that there should not be one model for the law teacher, nor any single set of necessary qualifications. Indeed,

²⁴ Newark (1973) at p. xiii.

it is now widely accepted that not all the staff of law schools need to be law trained; some larger institutions can and should have at least one or two non-lawyers on their staff.

An approach to academic law which purports to encompass the law in action as well as the law in books requires that its exponents should have direct and sustained access to relevant kinds of 'action' in the world of affairs, either as participants or observers or both. It follows from this that it is highly desirable that most law teachers should not only have first-hand experience relevant to their teaching and research interests, but also opportunities to refresh, up-date, or reinforce that experience. But it does not follow that the experience should be of the same kind for every individual. In earlier times, most law teachers were generalists. Today most are specialists. What is involved in mastery of one's specialism is a combination of academic expertise, inter-disciplinary and contextual awareness and good practical sense appropriate to that specialism. Ideally it should relate as closely as possible to the exact nature of the academic enterprise involved, but this need not be restricted to the private practice of law. Experience of administration, service in central or local government, in activist NGOs, in international organisations, in commerce, in law reform activities, or even in politics or prison, may for particular individuals be at least as relevant and valuable as experience in a law office or in court. Indeed what constitutes relevant experience of legal and social problems and processes is as broad as one's definition of academic law.²⁵ There are many areas of law in society of which private practitioners have little or no experience. Law in action is much wider than lawyers' action.

The relationship between practical experience and other kinds of first-hand experience on the one hand and learning, teaching and research on the other is a complex subject. It is important, for instance, to distinguish between factors which relate to opportunity and access; to competence; to self-confidence and gaining the respect of others; to possible strains between the values of detachment and commitment. It is important to distinguish between the mastery of a skill and the ability to transmit it; but it is also useful to recognise that

²⁵ There is a great deal of mystique attached to the value of practical experience and behind that mystique lies a good deal of confused thinking and over-simplification. It is pertinent to note that the *Strangers and Brothers* sequence of novels alternates between what C.P. Snow calls 'direct experience' and 'observed experience'. In most of the novels Lewis Eliot is what Henry James called a 'foreground observer' – that is to say one who contributes only marginally to the action, but who by virtue of his situation has the *opportunity* to observe events at close quarters. One of the classic handbooks of statecraft, Machiavelli's *The Prince* was written from such a vantage point. In *Strangers and Brothers*, Lewis Eliot plays a leading part in some of the novels, these are the novels of direct experience, whereas in the remainder he is more observer than participant. The novels of direct experience are essentially novels of self-discovery; whereas it is primarily in the others that Snow explores such themes as political intrigue, the problems of justice, processes of decision making and the relations between science and government. It is after all common to find that it is much harder to talk detachedly and systematically about matters in which one has had first-hand experience as an active participant than on matters in which one's role has been primarily that of observer or student. (Cooper (1959)).

experience may not only increase understanding and develop skills, but may also have distorting or narrowing or socialising functions. This is not intended as an expression of scepticism about the great, sometimes crucial, importance of certain kinds of practical experience for certain purposes within academic law. The point to be stressed in the present context is that the relationship between learning, understanding and action is very much more complex than is normally acknowledged in orthodox discussions of legal education.

Given that first-hand experience of various kinds is desirable for many law teachers, it is also important to recognise some of the practical problems involved in obtaining it. There are at least three problems facing the academic lawyer who wishes to obtain first-hand experience relevant to his or her work as a scholar and teacher. The first is psychological and varies from individual to individual. It reflects a wider problem of identity – is one first and foremost a scholar and teacher, a participant observer, or, when involved in practical affairs, is one above all a professional participant or is one merely in it for the money?²⁶ In short, there may be acute strains affecting the attitude adopted towards the enterprise. Secondly, where the primary purpose is to obtain experience in order to use it as a teacher and scholar, there are problems about how to exploit, order and communicate the lessons of experience. Thirdly, there are practical difficulties about when and how to obtain opportunities for gaining relevant experience without seriously interfering with one's duties as a full-time teacher and scholar or distorting priorities in other ways. Anyone who has been a Dean of a Law School will be familiar with the problems of moonlighting.

17.4 The law teacher as educator

Throughout the common law world, academic lawyers have been in the vanguard of the widespread attack on apprenticeship as a form of training for legal practice. They have helped to give currency to the view that many aspects of preparation for practice can be done more efficiently, more economically and more systematically through formal instruction and exercises than through the often random and inefficient process of learning by experience. In so doing, they have rejected the Pick-it-up theory of legal training. As a result the Skills Movement flourished, but in England it did not mean the end of formal apprenticeship, which survived and was reformed: there are now training contracts for intending solicitors. There are also training programmes that are quite carefully monitored. They are much more systematic and professional than they used to be and are supervised in larger firms by a new breed of in-house trainers.

²⁶ Of course, one of the factors that leads to emphasis on professional qualifications is to do with identity as a fellow professional – as a member of a 'fraternity' – rather than with the relevance of training and experience.

In contrast, the preparation of law teachers as educators is still, in nearly all jurisdictions, even more backward than the most inefficient system of apprenticeship for private practice. Yet if the scholar-teacher of law is to claim some sort of status as a distinctive type of professional, then part of her case needs to be based on a plausible claim to genuine educational expertise.

There are recent developments that give some grounds for hope. To give just four examples. First, intensive law teaching clinics, pioneered in Canada, have spread to some other parts of the Commonwealth and seem to have been particularly successful in Australia. The idea was picked up by the National University Law School of India in Bangalore, where for over a decade they have run substantial workshops for law teachers from all over South India.

Second, the Australian workshops stimulated what is the first full-scale handbook for law teachers, *The Quiet (R)evolution* by Marlene Le Brun and Richard Johnstone.²⁷ I have criticised the book for being too closely wedded to an educational theory that reeks of bureaucratic rationalism.²⁸ Nevertheless I recommend it as an extremely useful synthesis of modern educational theory and pedagogical techniques applied to the context of undergraduate legal education.

Third, a number of institutions have emerged that are dedicated to the professionalisation of law teaching and legal education. For example, the United Kingdom Centre for Legal Education (and its predecessor the National Centre for Legal Education) have done immensely valuable pioneering work in such areas as preparing teaching materials, curriculum reform and above all the intelligent use of new technologies in legal education.²⁹

Finally, at University College London we run an optional programme for present and intending law teachers from among our postgraduates. This has proved to be much more popular than we expected. Interestingly, in an era which emphasises student-centred learning I find myself in a constant tug-of-war with the class: what they want (or think they want) is almost entirely limited to classroom pedagogical techniques (how to lecture, how to handle overhead projectors, etc). I use my power and authority as teacher to insist on two themes: that it is no use rushing into the how of law teaching before you have given some thought to the what and the why – not only general educational theory and debates about the possible objectives of legal education, but also about the peculiar contexts within which learning about law takes place: the odd history and culture of law schools as institutions and the other contexts such as law firms, barristers' chambers and boozy half days of continuing professional development.

There is, of course, a widely held and not entirely implausible view that teachers are born, not made – or, at least, that good teaching is as much a matter of personality as expertise. There seems to be an equally widely held view

²⁷ Le Brun and Johnstone (1994). ²⁸ Twining (1996).

²⁹ See www.ukcle.ac.uk. See also the UKCLE's regular publication, *Directions in Legal Education*.

among law teachers that specialists in education have little or nothing to teach legal educators. In this extreme form, at least, such prejudices are both outdated and dysfunctional. In the UK, for instance, there has been tacit resistance to these developments especially from some senior law teachers and from older and generally more prestigious and research-oriented universities.

Such attitudes are outdated for two main reasons: First, they are often postulated on a relatively simple, unsophisticated learning situation which bears little recognisable relationship to the more complex and varied situations that we encounter today. The classic Oxford tutorial, the Langdell case-class, the traditional magisterial lecture and the old style professional examination were relatively simple forms that were quite easily comprehended by people working within the relevant tradition. The most telling attacks on the Langdell case method or the magisterial lecture have not been that such methods are useless, but rather that they were often over-used or used for inappropriate purposes. The Langdell case class is an inefficient means of imparting information or providing structure. The magisterial lecture is not an appropriate method for encouraging students to think for themselves. In a form of education in which multiple learning objectives are to be pursued, a multiplicity of techniques will almost certainly be needed. This is especially important in relation to assessment.

Scepticism about taking education seriously is still quite widespread. It is outdated because the systematic study of education has made some progress during the past twenty to thirty years. Both the literature of legal education and educational technology are unrecognisably more sophisticated than they were even ten years ago. And the educational context is much more complicated than it used to be. In the modern world there can be no excuse for a law teacher being ignorant of the standard literature on teaching techniques, such as Le Brun and Johnstone's *The Quiet (R)evolution*, Bloom's *Taxonomy of Educational Objectives*, Donald Schon's *The Reflective Practitioner*, or recent writings on information technology, access and assessment.³⁰ One should be familiar with at least some of the classics of legal education. And, perhaps most important of all, one should have an awareness of the range of standard devices and aids. But how many law teachers in England, or Nigeria, or the United States, or South Africa know about buzz-groups, algorithms, brainstorming, law firms, resource-based learning, tele-conferencing, or what is involved in framing learning objectives in behavioural terms?

If higher education is largely about self-education, *a fortiori* law teachers ought to be able to inform themselves adequately about the basics of history, theory, context and conflicts within legal education, as well as about pedagogical techniques without too much need for formal instruction. Any law school, or any individual law teacher, can quite easily take the first step of achieving an awareness of the standard literature on education (including legal education)

³⁰ See also Burridge, Paliwala and Varnava (2002).

and of the range of possible objectives that can be pursued within a law curriculum and the range of standard devices and techniques which can help to achieve these objectives. University teachers, of all people, ought to be able to undertake this relatively straightforward kind of self-education without difficulty.

To sum up: on the whole the professionalisation of education is to be welcomed, but some of the scepticism behind resistance to these developments is healthy. Yes, we should take educational theory seriously, but the most fashionable kind of educational theory at present is too intimately bound up with bureaucratisation. Moreover, familiarity with educational theory and pedagogical technique is not a substitute for being competent in and enthusiastic about one's subject.³¹ A switch from focus on teaching to a focus on learning is welcome, but beware of phrases like 'student-centred learning' which may just be 'ed-speak' for a different kind of Big Brother culture. If the switch to emphasis on student responsibility for their own learning is genuine, then it involves a radical rethink both of the role of teachers and of the nature of the teacher-student relationship.

17.5 The law teacher as politician and administrator

In my seminar on legal education at UCL when we come to academic politics and administration, I merely circulate Cornford's classic, *Microcosmographia Academica*.³² Academic micro-politics do not seem to me to have changed much since Cornford's satire, which is half way between Bentham's *Book of Political Fallacies* and Machiavelli's *The Prince*. The characters, the caucuses, the tricks of argument are still familiar. But, with increased bureaucratisation the opportunities for genuinely democratic Machiavellianism have diminished or they have been transferred to higher in the hierarchy in which many of the lead players are not academics, but professional managers. And the academic who aspires to becoming the Head of a University as Vice-Chancellor, President or Principal nowadays has normally to serve an apprenticeship in the central university administration and may be well-advised to take some courses in management.

17.6 The law teacher as scholar

When we consider the law teacher as lawyer, it is natural that we should compare and contrast her situation with her practitioner counterparts. Similarly, when we consider the law teacher as scholar the most natural comparison seems to be with scholars in other disciplines. In short the systematic study of law teachers

³¹ One of my criticisms of Le Brun and Johnstone is that their enthusiasm for educational professionalism seems to edge out any idea of the love of one's subject, see n. 28 above.

³² Cornford, *Microcosmographia Academica: Being a Guide for the Young Academic Politician* (1908)

needs to treat them not only as a sub-branch of the legal profession, but also as a sub-branch of the academic profession. In the past, this suggested in a rather stark manner that the world of legal scholarship compared rather unfavourably in certain key respects with the attitudes, standards and commitments to research of scholars in most disciplines.³³

At this very general level the point can be quite simply illustrated by looking yet again at the two fictional characters, Lewis Eliot and Kingsfield. Research does not figure prominently in the lives of either of them. Kingsfield, it is true, is engaged in the writing of an article on a particular point in contract and we would not be surprised to find him devoting a great deal of his research time to compiling anthologies of so-called teaching materials – an activity which would probably not be graced by the name of ‘research’ by many scholars in other disciplines.

Lewis Eliot appears to get by with doing virtually no research at all and one might ask, how often in the course of eleven novels does he enter a library or even read a book? He contrasts very sharply with some of the other academics in the *Strangers and Brothers* sequence, such as Roy Calvert, a dedicated Orientalist, who devotes himself passionately to deciphering and interpreting fragments of ancient text. Similarly, the professional life of the physicists is seen to centre around their research, whereas Lewis Eliot does not seem to be expected to think or behave in this kind of way.

Over the past twenty-five years or so in many countries there has been a trend towards assimilation of academic lawyers into the university. Surveys by Halsey and others suggested that by the 1980s this process was quite far advanced in Britain.³⁴ For example, scholar teachers of law only seemed to differ from their colleagues in two respects that were statistically significant: first, they had the lowest number of PhDs (about 12%) and second they were more uxorious (i.e. more of them were actually married).³⁵ I do not know how to interpret the second point, but it is my impression that the percentage of young academic lawyers with doctorates has recently increased, even though it is difficult both to complete a doctorate and obtain substantial practical experience before embarking on an academic career.

During the past fifteen years in the United Kingdom the biggest single factor in reinforcing this process of assimilation into the academy has been the notorious Research Assessment Exercises – the epitome of the bureaucratisation of scholarship.

Weber recognised some values in bureaucracy. It makes for efficiency, cost-effectiveness, even-handedness and rationality. It tends to dampen individuality, creativity and above all passion. Like many of my colleagues I have deeply ambivalent feelings about the bureaucratisation of higher education. I accept that education should be purposive, but I am resistant to pressures to formulate

³³ E.g. Becher (1989); See also. *BT* Chapter .6. See now Cownie (2004)].

³⁴ *BT* 201–6. ³⁵ *Ibid.*

precise, specific, measurable and objective learning objectives in behavioural terms.³⁶ I accept that publicly funded education needs to be accountable, but I object to many of the methods currently used to achieve this. I value my academic freedom, but I also like to have security and a salary.

Bureaucratisation of higher education is not all bad. But too often in recent times the costs have outweighed the benefits. Nowhere is this more clearly illustrated than in the highly contentious Research Assessment Exercises (RAE) to which UK universities have been subjected over the past fifteen years or so and which completed their third round in 2001.

The RAE system was introduced in the 1980s ostensibly to increase the accountability of universities and individual academics for public expenditure on research and to provide a basis for allocating general research funds to the universities on the basis of merit. A cynic could point out that the timing of the scheme coincided with the sharp reduction of public funding of research and that the system had the desired effect of making institutions compete with each other for their share of a diminished cake rather than combining together to make the case for a larger cake. In this view, it is a particularly successful example of a strategy of divide and rule.

Over time the system has been revised and generally improved. So far as the Law Panel is concerned the 2001 exercise had certain merits: it involved peer review; it was based on quality rather than quantity and on what you publish rather than where you publish; the RAE cycle was extended for the 2001 exercise from four to five years; assessment was done on the basis of looking at only four publications for each individual entered by their institution; the criteria were reasonably transparent; the definition of 'research' has been clarified to extend to include interdisciplinary work, research into legal education and practitioner-oriented publications of scholarly merit. By and large the assessments of successive panels have been accepted as a reasonably fair reflection of general impressions and local self-assessments.³⁷

The most important claim made on behalf of the RAE in respect of Law is that it has improved the quality of legal research in British universities. Subject to one major *caveat*, my impression is that this claim is broadly correct – but this is only an impression. The claim can invoke some common sense support: all institutions that did not opt out of the exercise have taken extensive measures to encourage and support serious research; they have tried to generate local 'research cultures' and have pressurised all but a few non-research-active individuals into producing four published pieces in five years. Overall the scheme has had the effect of generating a more professional approach to the pursuit and management of research.

³⁶ One standard form, known as SMART objectives (Specific, Measurable, Achievable, Realistic and Time-Bound), does not transfer easily to teaching, learning, or research.

³⁷ This passage does not deal with the fourth round of the RAE (2008).

Perhaps the strongest point is that, judged by the Panel's own criteria – which they claimed have not changed substantially – many institutions have performed substantially better than they did in the last round. The Panel reported:

The average score of institutions has increased quite strikingly since the last RAE in 1996. Many institutions scored 5 and there has been a very satisfying number of 5*s. The Panel does not believe that there has been any 'grade inflation' in assessing whether outputs were of international excellence or national excellence.³⁸

My strong suspicion is that those who sneer that this is merely 'grade inflation' are quite wrong. If so, what we have is a better informed, well-organised purposive commitment to original research. By and large legal research in the UK has improved significantly in recent years.

However, there have been enormous costs. These include not only the time, resources and angst involved in doing research under pressure, but also the extraordinary amount of bureaucracy involved in the exercise. Some of this may have been necessary; a great deal of it was not. A sort of RAE mania spread through some institutions and severely damaged morale. There have, of course, been some victims of the process. First, the RAE has been a deterrent for long-term, intellectually ambitious projects, especially for younger scholars.³⁹ More generally, expanding publishers' lists support the idea that the market has been flooded with many pedestrian RAE-generated works, prepared more in the spirit of homework than Weberian passion.

Another class of victims have been some colleagues who may have been outstanding teachers and invaluable institution persons, but who have paid the price for not being 'research active'. They tend to feel undervalued, some have been forced artificially to write articles just to meet the production targets and a few have been driven from academic life. There has been a huge human cost for such persons and for younger academics generally.

Third and most important are the students. The RAE has not been counter-balanced by a credible system of assessing teaching and the value of the educational experiences of students. Academic audit and Teaching Quality Assessment have in practice bordered on farce. As a result, research has more than ever been given priority over teaching in appointments, promotions, preparation and delivery of courses and, above all, in educational innovation. In many instances, I suspect, the RAE has undermined important aspects of the intimate, but

³⁸ Law Panel Report, 2001 RAE (www.hero.ac.uk/rae/Results/). In the report on the overall results across disciplines, it is stated: 'There has been a considerable increase in the volume of research that equates to national or international excellence. 64% of the submissions in 2001 fell into these categories and were awarded grades compared with 43% in 1996'.

³⁹ During a career in which I have been lucky enough to have escaped such pressures, nearly all of my projects have been spread over at least seven to ten years. As the editor of two series of law books, I am quite an experienced mid-wife: I reckon that the normal gestation period for a substantial work of scholarship from a twinkle in the eye to birth is usually seven years or more. I regularly advise authors to slow down rather than rush into print.

delicate interaction between teaching and research. British universities have long prided themselves in taking teaching seriously. During this period there has been a rapid expansion of student numbers without any corresponding increase in funding. This has meant that our research effort has improved, but there has almost certainly been a significant deterioration in the education we provide. These are only reasonably well-informed impressions about law: it is hoped that systematic, reasonably detached research and assessment of this costly experiment will be forthcoming.

17.7 Commitment, detachment and social responsibility – anecdotes from Northern Ireland

There is nothing in the academic ethos that precludes engagement with important public issues. Law teachers, like other academics, do this regularly in both their personal and professional capacities. The academic ethic, founded as it is on freedom of enquiry and freedom of speech encourages tolerance, wide scope for differing opinions and rational, informed debate. Nevertheless acute dilemmas can and do arise, especially in divided societies. Can a university place any limits on the political activities of its staff? Does academic freedom protect only academics or does it extend to students? Given that the teacher-student relationship involves imbalances of power, to what extent do students need to be protected from the imposition of teachers' views on them in the classroom and particularly in assessment? And so on.

Some of these issues have been quite salient in the deeply divided society of Northern Ireland. From 1966–72 I taught at the Queen's University Belfast. This encompassed the period of university unrest internationally and the resurgence of local 'troubles' in Northern Ireland. Queen's had a long tradition of being a haven of tolerance in a small, sharply divided society in which public debate and sectarian politics were marked by intolerance. For most of its history the University had managed to remain aloof from local politics. In some ways it was analogous to a secular version of a medieval sanctuary, affirming liberal academic values, but not tolerating sectarian intolerance on campus. This stance was generally understood and respected both within and outside the University. However, universities are expected to contribute to their local community and to engage in an appropriate fashion with important issues of the time. Aloofness can be seen as irrelevance or evasion.

Towards the end of my time at Queen's some students were critical both in private and in public of this posture of detachment. 'Why does the university not come down off the fence and exhibit some leadership in regard to local problems?' 'Get off the fence – on which side?' was an easy rejoinder, given that local students divided approximately in a ratio of 55% (Protestant) to 45% (Catholic). But this response was really too glib. So some of us in the Law Faculty formed a non-sectarian, staff-student working party to consider and to contribute 'with relative detachment' to public debate on contentious issues – notably

interrogation techniques and emergency powers. The group included local Catholics and Protestants and outsiders like myself. No doubt hard-liners on either side stayed away. We consciously applied academic values in our approach to the task and some people may have felt that we over-intellectualised issues about torture and detention without trial. This was an exercise in consensus politics. On the whole the process was educationally valuable, but I for one was ambivalent about some of its products. In particular, we produced a pamphlet on emergency powers which understandably represented a balanced package of compromises.⁴⁰ When the pamphlet was published it was widely quoted out of context – largely by Tory MPs who selectively cherry-picked particular recommendations that on my own I would have opposed. That too was a lesson. However, the exercise represented a reaffirmation and application of the academic ethic to political issues.

Another problem concerned the active involvement of academics in local politics. The Law Faculty had several – mainly young – individuals who were deeply involved in local politics. The non-locals who did this tended to adopt the stance of legal expertise and to claim some degree of relative detachment. But some local colleagues were much more deeply involved, in particular Kevin Boyle in the Nationalist People's Democracy, David Trimble in the Unionist Vanguard (which was considered to be a particularly hard-line version of Unionism) and Tom Hadden, a civil libertarian who tried to build bridges between the two communities, most notably through his journal *Fortnight*. In the face of complaints about these activities both from outside Queen's and less often from students, the official response was that provided academic staff were engaged in politics in their private capacity and it did not affect their teaching or dealings with students or other academic activities, this was none of the University's concern. This was fine in theory, but what if you were teaching about discrimination, Constitutional Law, or Jurisprudence?

A recent biography of David Trimble brings out the complexities of the situation.⁴¹ Trimble, then the First Minister of Northern Ireland, was my student and colleague at Queen's. He was then well known for his uncompromising political commitments on the Right Wing of Unionism. The University maintained a consistent stance in response to complaints about his activities and those of colleagues who were his political adversaries. In his teaching he gained a general, but not universal, reputation for fairness and even-handedness. Indeed he seems to have gone to great lengths to keep any politics out of his teaching – which is a difficult, some would say an impossible, stance to maintain. When one of his Catholic students was interned in Long Kesh, Trimble arranged for him to continue his studies while interned and between late 1971 and May 1972 visited Long Kesh to give him a weekly tutorial.

⁴⁰ *Emergency Powers: A Fresh Start* (1972) ⁴¹ Macdonald (2000).

Despite the seeming tolerance of the authorities and his severe professionalism in carrying out his academic duties, Trimble felt that his political activities held back his academic advancement – including ruining his chances of obtaining the Deanship of the Law Faculty or the Directorship of the Institute of Professional Legal Studies. In 1987, the post was given to Mary McAleese, a Nationalist, who later became President of Ireland. The appointment to the Directorship became the subject of heated public controversy.⁴² I do not know about the details of this, but I believe it is true that Trimble's experience at Queen's both as a student and an academic fundamentally affected his ability to break out of the box and deal rationally with many kinds of people who were his political opponents or enemies.

17.8 Conclusion

Any systematic view of academic lawyers as a group needs to give adequate weight to the varied nature of the demands and expectations to which they are subjected by a diversity of clients and reference groups. Perhaps the key problem facing individual academic lawyers and the profession as a whole, is a problem of identity:⁴³ on the one hand, as lawyers, they are called on to identify with and to some extent to model themselves on, private practitioners of law; law as a subject inevitably carries within it a strong magnetic pull towards certain values and attitudes towards authority. This can create real strains for those who are not 100% in sympathy with such values or attitudes. As scholars and teachers academic lawyers have, as a quite different set of reference groups, colleagues in other disciplines, especially in cognate fields which have more scientifically oriented or academically 'purer' intellectual traditions, such as philosophy, psychology and, to a lesser extent, sociology. As we all know, the strain between liberal and vocational objectives has been endemic within legal education; and there may be other factors, which contribute to the academic lawyer's problem of identity.

In a famous interpretation, Max Weber advanced the thesis that the distinguishing characteristics of a tradition of legal thought and indeed of a national legal system, are attributable in large part to the identity of the class of people whom he termed the legal *honoratiores* – that is to say the characteristics of the gentlemen of the law who are particularly dominant in the formative era of the system.⁴⁴ Weber used this concept to contrast the common law tradition with that of the civil law; whereas the latter was dominated by legal scholars, the characteristics of the common law tradition are largely explicable in terms of the fact that legal practitioners, rather than academics, were responsible for the development of the legal culture of the common law.

⁴² *Ibid.*, pp. 78–9. ⁴³ Bergin (1968). ⁴⁴ Weber (1954).

There is no need to finish on a gloomy or pessimistic note. On the contrary, the variety of demands made on academic law is not necessarily so great as to be unmanageable. This variety has very positive aspects: it can make for richness and diversity on the one hand and for creative tension on the other. The way individual academic lawyers can best resolve their problems of identity is first through the open recognition that they are members of a profession which has its own unique characteristics and strains and, second, by having a clear appreciation of the actual and potential role of academic law within the legal world and more generally within their own society.

Let me end by giving my own personal interpretation of what that role ideally should be: First, as scholars academic lawyers are the persons primarily responsible for developing and communicating knowledge and understanding about law in society and in the world at large; as teachers they have a key role in influencing the attitudes and values as well as the technical competence of lawyers of the future; but they also have a responsibility for helping to demystify the law by spreading understanding of it among people who are not first and foremost lawyers, many of whom may gravitate to positions of considerable influence in society; academic lawyers are better placed than any other group to assist in the development of national legal literatures; legal theorists have a crucial role in setting the tone of the intellectual milieu of the law; and it must also be remembered that academic lawyers are better placed than any other group in society to provide informed, independent, systematic criticism not only of law books and the law in books, but also of the law in action. The independence of the academic lawyer as informed critic of the legal system at large may sometimes be as socially important as the independence of the judiciary when deciding individual cases. This unique combination of tasks is sufficiently important, interesting and demanding to stretch and satisfy even the most talented – for a lifetime, or for a substantial portion of it.

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