

SIX PROPOSITIONS FOR LEGAL EDUCATION IN LOCAL AND GLOBAL DEVELOPMENT

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Legal education is now required to fulfil a range of functions, in addition to preparing those who aspire to practice law. It promotes knowledge and expertise about the role of law and how it works to a wider audience than those immediately concerned in the administration of justice. Its role in promoting the market and containing excessive state power is well established. It is a vehicle for defining and upholding democratic and legal accountability; for describing and maintaining the function of the legal system and the administration of justice; for providing instruction in and about law for any personnel who work with it; for monitoring and evaluating the use of state power, the regulatory role and the discharge of statutory duties and fulfilment of civic responsibilities; and it can assume a significant role in securing rights for individuals and collectives. It is a discipline that is gaining international recognition as a focus for reflection, critique and comparative evaluation. In a small but significant way legal education can contribute at more than one level to the quest for ‘instrumental freedoms’ in development¹.

In an effort to crystallise thinking about the local development of globally focused programmes for legal education, some tentative propositions can be suggested from the combined histories of recent law-in-development initiatives. The propositions are appropriate for educating and training ‘lawyers’, including members of the judiciary, those who practice in the courts (advocates, prosecutors, public defenders), or are accredited to conduct legal proceedings on behalf of others². They are aspirational rather than prescriptive and can be used to reflect upon the effectiveness of specific

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programmes, the identification of common themes and the nature of the content and quality of international legal practice. They are not novel and some of them may seem either obvious or idealistic. In some respects their apparent banality belies our conviction that our own legal education system is best. What we take for granted may be unknown, irrelevant or ineffective elsewhere. The propositions address legal education as a continuum from knowledge attainment to practical implementation, which occur in the shadow of an overarching objective of servicing local interests in a global environment. They do not presuppose any particular location for education and training delivery, although one of the propositions insists upon the place of universities in preparing for professional practice.

As each legal culture strives for its definitions of justice and fairness, a wider understanding and articulation of principles is emerging. Legal education is one of the most influential sites of such development. The propositions below may reflect a Common Law background and probably display a European affection for external regulation in the balance between private autonomy and state intervention. They are derived from the accounts of recent initiatives to develop law, lawyers and legal education in a variety of locations at differing stages of social, economic and constitutional development.

Proposition One: The accreditation of lawyers includes the study of law at a university to degree level or equivalent

In any legal culture the distribution of legal tasks may vary. The core capability defining a lawyer is an understanding of foundational principles and familiarity with key concepts and norms that are observed in the courts of the jurisdiction where s/he is accredited to practice. It is feasible to accrue the knowledge and skills for legal practice in a working environment through apprenticeship. However, an adequate understanding of the significance of law and its role in society is unlikely to occur unless opportunities are provided for reflection, analysis and critique in organised learning programmes, independent of employee or commercial obligations. In most jurisdictions the formal accreditation of lawyers already includes graduate level study. Recent proposals from the

Law Society in England and Wales would theoretically countenance qualification based upon exclusively work-based programmes. Whilst craftism has in the past produced many capable lawyers in the United Kingdom, the knowledge and insight of lawyers in the 21st century requires a breadth of learning and independence of outlook that is attained through the study of law in an academic setting. The research and scholarship necessary to guide development, enlighten policy and improve practice is dependent upon an environment with an inquisitive and independent ethos.

The significance of the university to legal education is more than a methodological concern. Justice both as a concept and a process can look to education theory as much as legal theory. The values of law across the developed world receive little attention in the law school either in the curriculum or in the pedagogy. With the important exception of clinical legal education and other experiential learning initiatives, the power of law is traditionally taught through the advanced common law and civil law worlds through exegesis, and applied hypothetical reasoning. The potential that education methods as well as content hold for personal and community development espoused by Dewey, Kohlberg, Kolb, Schon, and others are largely ignored in the law school where the 'legal' usually eclipses the 'educational'.

Proposition Two: Professional legal education includes the study of the significance of law and lawyers in national and international governance

Law has a role in national and international development and all jurisdictions are in a state of development. The growth of modern systems of justice administration, international governance and global regulation has created personal and collective legal needs that private services are inadequate to deliver, without external subsidy or government support. Since justice itself is a state issue, increasingly legal education provision has to become so.

Blueprints for law schools becoming bastions of civic justice and breeding grounds for the champions of democracy are reflected in clinics, projects and community actions worldwide. The Deans of leading US law schools first outlined such a mission in

the 1940s. Harold Laswell, Myers McDougal³ and Julius Stone⁴ attempted to convince US law schools that their mission should focus upon democracy and public interest. The vision was repeated in the blueprint of the Committee on Legal Education in the Developing Countries, whose report made the case for legal education as ‘an Avenue to World Affairs’ and as a ‘Vehicle to study ... Affairs in Society’.⁵ Constitutional theory and human rights are foundational to the study of law.

Proposition Three: Those who provide legal education or train lawyers bear a responsibility for identifying their objectives, designing suitable programmes and monitoring effectiveness.

There is a cultural specificity to legal roles. Non-adversarial systems may ascribe tasks to the judiciary that are not observed elsewhere. For legal education and training to be effective it is important that roles are identified and practitioners equipped with the appropriate knowledge, skills and understanding. A curriculum or training programme should address specific roles so that they can be taught and evaluated. Institutions such as universities that provide legal education need to ensure that their programmes are relevant to the varied social, economic and constitutional needs of their society. This is commonly a product of negotiation or accommodation between the universities, the state, the professions and employers.

Proposition Four: Professional legal education includes the study of legal practice, professional responsibility and legal theory

Legal procedures, rituals and techniques are ineffectual if they do not respond to contextual constraints. The economic, social and practical environment within which law is practised is a necessary object of study for lawyers, as are the fundamental principles and values that are espoused in its doctrines. The responsibility for ensuring that these issues are part of lawyer education and training falls to the professions or the state, or in their absence the universities.

In the United Kingdom jurisprudence or legal philosophy is only mandatory in a few law schools, although most would claim that the study law includes enquiry into its social relevance and philosophical implication. The proposition that lawyer education incorporates understanding of theoretical accounts of its functions, meanings and potential is one of the characteristics that distinguishes the law curriculum from a vocational trade programme.

Proposition Five: Lawyers are accredited by reference to identifiable criteria, are assessed for their ability to fulfil the role, and are accountable for their professional conduct

Lawyer roles – advocate, consultant, counsellor, adjudicator, – have their own profile of skills, knowledge, know how and social responsibility. Those who work with the law should be able to define these abilities and their services and reassure others that they have the appropriate aptitude for the role. Technical competence to perform a given legal role may be insufficient on its own to equip those who utilise legal knowledge on behalf of others. Private practitioners and state employees who practice law on behalf of others should be familiar with the objectives of their role, their responsibilities to others and the potential of the law for fulfilling their role. The theoretical and practical context of law, and the capabilities required to fulfil legal roles, should be studied and evaluated in the course of their development. Candidates in any field should display an understanding of the ethical responsibilities of their job. The points of qualification to various levels of expertise may differ, and the best strategies identify progressive stages that may include continuing education for experienced practitioners. Standards of lawyer behaviour are defined and deviant behaviour regulated. This proposition requires that programmes identify their objectives and relate their students’ and society’s needs, ensuring at some stage opportunities for ethical understanding and its evaluation.

Proposition Six: Legal education methods are geared to the content of its programmes

Legal programmes that observe the first five propositions have accepted the role and responsibilities that law and lawyer hold for development, whether local national or global. I suggest that it also requires that the processes of legal education reflect the principles of its practice. The message of learning the law is in the medium. There is hence an obligation upon those who teach law, to do so in the manner befitting professional practice. The activities of legal practice – counselling, drafting, advocacy, adjudication, transacting – demand more than purely cognitive ability. Legal education accordingly requires appropriate methods for understanding practical expertise. The law

teacher additionally may be expected to act fairly, be professionally responsible for student learning, adopt the most effective methods for learning and maintain a sense of democratic and open engagement with the student body. Effective learning we know includes experiential methods. A practical emphasis upon legal understanding will therefore only be served by including experiential opportunities, such as simulations, role plays or clinics.

A developmental strategy for legal education.

Legal professions are creatures of their culture as well as the product of market forces⁶. In the Common Law world they are often unwieldy objects for change. Proposals for legal education reform have often been earnest but ineffectual judging by experience in the US⁷ and the UK⁸. The various reviews contain perceptive critique and practical recommendations for reforms, which if instigated at all have been slow and piecemeal. They have also primarily focused on legal education as the foundation for professional practice. Central though this role is, the wider needs of justice administration also need to be addressed⁹.

Legal education is a tool of social and economic development in every jurisdiction. Since development has been uneven, the histories of international experiences have tended to adopt export rather than exchange as a model. In devising a strategy for legal education in local and global development, the lessons learnt from the law-in-development are pertinent.

Law's role in development theory in the 1970s was largely characterised by a conviction that international salvation could be achieved by spreading good laws and promoting proper judicial practices. The transition from a policy of exporting law by might to one of transplanting law by mission proved to be elitist and ineffectual¹⁰. Law school reforms in South America based upon extolling the virtues of the case method and supplying scholarships for training law professors in the US were challenged¹¹ for their focus upon a "liberal American model alien to local legal culture".¹²

By the 1990s attitudes and global politics had changed¹³. In the US, and to a lesser degree also in the UK and other parts of Europe ‘high-end globalisation’¹⁴ reaffirmed law’s role in development. Law making again achieved some status, albeit a fragile one¹⁵, on the development agenda. The construction of court systems for the local adjudication of disputes became accepted as a prerequisite for widening markets. Corruption control provided a fresh impetus for criminal justice upgrading. Lawyer training became a concern.

Human rights discourse has emerged as a complementary framework for addressing injustice. Constitutional assurances that foundational rights of individuals will be protected, even if the infrastructures of enforceability are lacking, resonates in parts of civil society that lawyers and the courts are often unable to reach. The new discourse promises local attention realisable at a political as much as a legal level. It also carries a significant economic potential for donor aid, as the NGO sector delivers more direct, accountable and malleable mechanisms through which a variety of economic, environmental, educational, religious and health related policies can be realised.

The most wide ranging analysis of international legal education came from a group of international scholars convened by the International Legal Centre published. *Legal Education in a Changing World*¹⁶, which identified legal education as a culture specific phenomenon, also viewed universities as the critical resource centre, and advocated a study of law that draws upon the sources of philosophy, history, and the social sciences as well as from its own memories. The ILC Report emphasises the wider significance for societies than accrediting lawyers for practice that legal education hoods, recommending that the law degree should be capable of equipping students for a wide variety of law jobs¹⁷.

A developmental agenda emerges which expands significantly the part that legal education can play. In doing so it transcends the established view of legal education as a system exclusively designed for generating private practitioners. The wider functions of legal education require a strategic approach that pursues theoretical and empirical scholarship with the promotion of practical expertise for a wider constituency than the legal profession. It extends legal knowledge beyond professional study, or even as a

subject for higher education scholarship, to an appreciation of law's facilitative role in the development of civil society.

Such a strategy¹⁸ will only be effective if it is tailored to local needs and emanates in the main from local initiatives and is the product of local expertise. It has to be responsive to local circumstances and culture within an overall framework of both informing and receiving those international practices that are perceived to be in the broad interests of its citizens and will expand their opportunities for advancement. A local strategy can aspire to building regional strengths when provision may be beyond local resources.

An effective legal education strategy has the potential to maintain the production of legal expertise to service economic growth. A strategy that fails to address human rights, the broader aspirations of social justice and the promotion of participatory democracy will impede economic development. Experience has shown that they need addressing substantively in the curriculum and pervasively in methods by which students learn the central significance to the administration of justice.

¹ Amartya Sen, *Development as Freedom*, 1999, Knopf, New York at p 38

² The Committee on Legal Education in Developing Countries focused upon the education of 'lawyers' as "those who have been certified to practice law in at least one jurisdiction", Committee on Legal Education in Developing Countries, *Legal Education in a Changing World*, (1975) International Legal Centre, New York at p 15

³ Harold D. Lasswell & Myres S. McDougal, 1943, "Legal Education and Public Policy: Professional Training in the Public Interest", *52 Yale L.J.* 203 at p. 207

⁴ Julius Stone, 1959, *Legal Education and Public Responsibility*, AALS

⁵ *Supra*. note 2. p.35

⁶ See Rob McQueen, "Together we fall, Divided we stand: the Victorian legal profession in crisis 1890-1940" in *Lawyers and Vampires - Cultural Histories of Legal Professions*, Wes Pue and David Sugarman (eds.), 2003, Hart, Oxford at p.297. Lawyers and Vampires generally and McQueen in particular, argue for a major revision of Rick Abel's 'market control' thesis, (expounded in *Lawyers in Society: Volume One, the Common Law World*, (1988) University of Berkeley) to accommodate the significance of local cultural factors.

⁷ Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, *Legal Education and Professional Development – an Educational Continuum*, (1992), American Bar Association, Chicago. It is popularly known as the 'MacCrate Report' after its chairman, Robert MacCrate.

⁸ There was a succession of reviews of legal education in the UK, including the Royal Commission on Legal Education in England and Wales, (1974); the Marre Committee *Report for the Bar of England and Wales*, and the Report of the Lord Chancellors Advisory Committee on Legal Education

⁹ The MacCrate Report set out to narrow a perceived gap between legal educators and the profession. Its first conclusion was that no such gap existed and that legal education and the practising bar are 'part of the one profession'. The various reviews of legal education in the UK reflect its separation into 'academic' and 'vocational' stages.

¹⁰ For a wider analysis of the effectiveness and failure of legal transplants as an instrument of development see Watson, A, *Legal Transplants*, (1974), Scottish Academic Press, Edinburgh

¹¹ Hugo Fruhling, "From dictatorship to democracy, Law and social change in the Andean region and the southern cone of South America" in , Mary McClymont and Stephen Golub (eds.), *Many Roads to Justice, the law-related work of Ford Foundation grantees around the world*, Ford Foundation

¹² Ibid. at p.56

¹³ See also; Jeremy Cooper and Louise Trubek (eds.), *Educating for Justice: Social values and Legal Education*, (1997) Dartmouth, Aldershot; Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities*, 1998, OUP, Oxford and Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyering and the State in a Global Era*, 2001, OUP, Oxford

¹⁴ L Michael Hager, 'Low-end Globalisation, Bringing Wealth-Creation to the Poor' in *Governance, Development and Globalization*, Faundez J, Footer M and Norton J (eds.), 2000, Blackstone, London at p 186

¹⁵ Faundez, J, "Legal Reform in Developing and Transition Countries: Making Haste Slowly", in *Governance, Development and Globalization*, Faundez J, Footer M and Norton J (eds.) op. cit. p. 31

¹⁶ Op. cit. note 2

¹⁷ Ibid. p.56

¹⁸ *Legal Education in a Changing World* (Supra note 12 at pp 40-55) set out the need for objective setting and function identification. Perceptive though its authors were, the hindsight of a quarter of a century's progress has widened even further the scope for legal education in development