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Legal Studies

Editorial

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The past 30 years or so have seen a fundamental realignment of the intellectual and material conditions in which most legal scholars work. Declining central resources accompanied by massive expansions in numbers of differently qualified and motivated students, a greater market orientation (both financial and academic) of both legal publication and education more generally, and a revolution in the regulatory condition of modern economic and public life – the increasing 'juridification' of social practices – have introduced forces and tensions in legal scholarship which might have been unthinkable, let alone foreseeable, a generation ago.

But perhaps even more fundamental have been the intellectual upheavals of the past generation. These, whether critical or socio-legal studies, feminisms, post-modernism, race conscious or the revival of natural law and the rediscovery of the stoics, or a 'general concern with ethics' – as social historian Eric Hobsbawm has identified as the stigmata condition of the closing decades of the twentieth century – are slowly, sometimes imperceptibly, metamorphosing the very understanding of what it is to be a legal scholar.

To paraphrase English philosopher Bernard Williams, there is perhaps no revolution more significant than one through which one lives without recognising it. There is now almost no sub-disciplinary branch of the law curriculum which can claim to be untouched by the intellectual shifts of this past 30 years. No one, howsoever senior and learned they be, who has recently spent two or three days in the recent periodicals section of a first class library, could fail to be aware (they need not have agreed with, or even at first sight have understood, what they read) that there is no area of the modern law school diet which is not being reworked, rethought, recharacterised.

To aver that this change, these challenges, may be happening at the margins – even in the heartlands – of jurisprudence, but that this does not affect the way

in which one writes about (let alone teaches) the law of *x*, betrays several things. First, it tokens an indifference to the concerns of jurisprudence, broadly understood, which sells students far short of what a proper university education ought to consist in. It deprives them not only of a rounded understanding of law, it deprives them fundamentally of an education in wider citizenship. This education includes a study of the forces and vectors of modern intellectual challenge and change, and the way in which these changes and challenges intersect with, and are reflected in or refracted through, law.

To deny these challenges is to be so unaware of scholarly development, so to have fallen into ignorance of developments in modern scholarship, that it not only deprives one's students of the fruits of this intellectual endeavour, but it reinforces and contributes to the driving down of the intellectual base. The denial or ignorance of modern scholarship contributes to and concurs in the *erosion* of the very academic freedom that we all say that we praise and value so highly. A senior academic, a manager, who does not spend at least a couple of days a year reviewing intellectual developments in the other rooms of the academy, fails to discharge an important responsibility of seniority; has in light of that no business appraising, evaluating, benchmarking, assuring; has, indeed, no business appointing scholars to the academy of law.

The point is quite a simple, if not uncontroversial, one; the study of modern law, properly understood and conceived, the province of jurisprudence redetermined, has been recast, and is in the process of being recharted. To fail to observe that – or worse, to fail to notice it – to fail to keep pace with the changes in modern jurisprudence, the framework within which our tasks as scholars of law is discharged, is an intellectual wrong. To refuse to engage in the theoretical debate now swirling about the subjects of the law curriculum is to betray a fundamental misunderstanding of what modern jurisprudence might consist in, but also, and more controversially, of what the jurisprudence of modern law is or might become. But perhaps even more fundamentally, it is to fail to realise that the evident changes in scholarship are part of a fundamental *constitutional* change; a renegotiation, every bit as important and with potential significance every bit as great as the 'European' debate, devolution, or globalisation.

Neil MacCormick sometime President of the Society of Public Teachers of Law has reminded us that the '. . . fate of constitutionalism and the Rule of Law is nowhere a matter for complacency'. Teachers of law, '. . . protected by a justly defined academic freedom and imbued with a proper sense of professional self-respect and civic responsibility have a special role to play in maintaining critical awareness of the preconditions for law and liberty. The part they play is scarcely less vital than that of an independent judiciary and legal profession'.

MacCormick, rightly, makes the especial responsibility of the law teacher subject to one very special licence: that of academic freedom. This has been subject to new and urgent alarums over the past 20 years – not least from the demands and depredations of the practising branch of the legal profession itself. And that freedom is bought at the price of one very onerous condition: that of earning and constantly justifying the role of intellectual guardian of civic responsibility that the several aspects of constitutionalism demands.

The development of the academic study of law is relatively young, in the common law world at least. But law teaching has not slipped its vocational moorings; in many respects law schools are firmly rooted in the past and ambivalent about their role: of whether it is to train people to be practising lawyers

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or to provide a course of independent study. This has far-reaching implications for the place and form of scholarly research. If legal education is perceived as primarily vocational, then scholarly research output from universities will generally, even if only gradually, drift in a different direction. That is because research and teaching not only *are* closely connected in our universities, with most individual staff being engaged in both activities, but because it also makes sense in terms of higher education policy for them to be so connected.

What of that singular condition of freedom – that of earning and constantly justifying the role of intellectual mentor and guardian of civic responsibility which is the standard of the legal scholar? This is the greatest challenge, the most onerous aspect of citizenship, the deepest and most profound obligation that a body of professional academics can possibly have. How does the modern legal scholar respond to the crepuscular challenges, the adventurous arguments of those who would threaten or deny '. . . the preconditions for law and liberty'?

It is only in the past 30 or 40 years, at most, that a sound grounding in the basics of legal doctrine (a protean concept) has been separated from a requirement to understand something, however formal, of those elements of legal history, philosophy and sociology of law, to appreciate something of the comparative law method and to locate and to situate law, which distinguish an aspiration from that merely to instruct in law to deliver an understanding of law. Much recent legal writing has become derivative; descriptive yet profitable. The market for lecture notes has spawned a trade in lecture notes; for collections of statutory materials, a trade in such collections; for mere exposition, a trade in exposition. Publishers and publications have blossomed. Lawyers and teachers, doctors and students have grown apace; but we have not always, individually and collectively, flourished from that.

And, for all that we talk about globalisation, about technical and technological revolution, about the conditions of modernism and the new waves of feminisms, the need for holistic government and the search for new constitutional settlements, the fundamentals of the law school curriculum have hardly changed at all. True, most law schools offer a range of subjects that would not only have looked strange 25 years ago, they would have been meaningless. Critical theory, race theory, feminist legal theory, gender studies – all these were very much of the future when many now teaching in law schools were themselves at law school. But would a student who went into a deep sleep in 1970 fail to recognise the core of the law degree taught today?

Lessons of feminist legal scholarship, with insights about women *in* law and in legal knowledge seem to have penetrated only very marginally if at all into the way we teach law. The developments of 'law in context' and of 'socio-legal studies' have not made a significant impact on the average law school diet or the method of consumption. In many law schools, students can select a scheme of study that is almost entirely doctrinal, and many do. With one or two exceptions, students at UK law schools will by the end of their first year have been assimilated into a way of thinking about law which is rule-bound and rational, partial and positivistic.

Many law teachers will claim that this is much as it should be, that modern debates in the intellectual forum are ones which are ignored – and rightly ignored – by modern legal pedagogy; that the concerns of the modern teacher of law are properly no different from the generations which have preceded, and that debates of the modern or post-modern condition have no place in the legal classroom.

Some will believe that, as individual scholars and teachers, we have no responsibility to introduce our students to these concerns of fashionable areas of intellectual inquiry. There will be, perhaps for generations to come, perhaps for ever, those who continue steadfastly to maintain that nothing or little has, and nothing or little will, ever change in the practices of law and in the way in which it is permissible, even 'accurate', to write about law. Some will maintain that law (and hence the proper subject of its academic study) is primarily, if not solely, what the legislature and courts do, and that it is the task, the primary if not the sole task, of the properly informed and directed legal scholar to document and occasionally to offer glossary on that. As Brian Simpson has observed: '... most lawyers and indeed most academic lawyers have little interest in high theory, and function satisfactorily without possessing a very fully worked out theory of judicial decision. Like bumble bees they manage to fly in spite of the theoretical difficulties in explaining how they manage to do it.'

As editors (the first time incidentally that the editorship has passed not only from single to joint responsibility but also involved a woman at the desk), we are the first whose primary legal education was not delivered at Oxford or Cambridge. This is a note not for criticism but for celebration of those inspirational teachers and scholars of the Universities of Kent and of Warwick where we respectively learned something of whatever elements of craft we now bring to this task. We owe an enormous intellectual debt to those scholars, as we do to John Bell, our immediate predecessor, and to John Andrews, the first editor of *Legal Studies* in its modern form. They have set a tone and a standard, established a métier, which will be difficult for us to emulate.

However, we are fortunate not only in inheriting a journal with an established intellectual pedigree, but also having done so with the backing of the Executive of the Society of Public Teachers of Law, which wanted to see the journal develop intellectually as a living organism. *Legal Studies* is the flagship publication of the Society. As such it should, and we believe presently does, reflect the mainstream concerns of members as a premier English language analytical law journal which seeks to publish scholarship across the broad spectrum of the modern intellectual constellation of academic law. Its first and foremost concern and consideration should be to publish high-quality and leading-edge academic scholarship as befits a major refereed journal of a professional association. Any developments should proceed from this starting point and maintain this as the cornerstone of the journal. We recognise that *Legal Studies* remains the journal of its members; we are merely stewards for a temporary interval. However, we put to the Executive a number of changes, of emphasis rather than style, which over time we wanted to introduce and to implement.

Accordingly, we would welcome submission of shorter, sometimes more polemical essays, which seek to advance scholarship in a particular sub-discipline in an innovative fashion. We also intend to commission a continuing series of essays which have as their brief the review of increasingly specialised areas of law. We do not intend by this either an annual review of subject areas or simple guides of legal specialism. Rather, we would intend these essays to be a form of scholarly stock-taking, an intellectual assessment of the forces and vectors of change in English, European and comparative law. Obvious areas for immediate and familiar attention would be the developing roles of public law in the modern state; the continuing impact of European law; developments in judicial reasoning in the common law; the contemporary face of constitutional

authority; the place of personal property; the jurisdiction of privacy law; modern corporations law; electronic commerce and so on.

Legal scholarship can often stand accused of having undersold its particular and distinctive character and contribution to the intellectual life and times of contemporary society. We hope in our tenure of the editorship of *Legal Studies* to ensure that that cannot be said to be a distinguishing quality or characteristic of the modern legal scholarship of the early twenty-first century. We are grateful to have the opportunity with *Legal Studies* to provide a forum which encourages and seeks out legal research which takes us from the traditional mask of law as blind to difference to a more reflective and contemporary acknowledgment of the complexities of 'otherness' in law.

Maybe as individual scholars we can escape the trends and currents, the changes and challenges in the academy without opprobrium; the worst changes in one's professional life are always those which one does not understand – and to which one cannot, perforce, respond. But, it seems to us, these changes place a particular responsibility on editors of contemporary scholarly journals that have any pretence to intellectual force. This means several things: striving to maintain a balance between the traditional and modern; praising and parsing the analytical, while yet challenging old canons; debating and dissecting dogma (properly so called); and, as occasion demands, publishing material which is clearly experimental.

These are difficult, turbulent times, intellectually. For many of us they involve taking risks which we are rightly or understandably loath to contemplate or countenance. And that is why *Legal Studies* must.