

Legal education and development – achieving professional competence and pursuing emancipatory opportunities

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The potential that legal education holds as an instrument of development is invariably overlooked by universities and governments alike. Law schools are welcomed by their institutions for the popularity of their low cost teaching but struggle to compete with other disciplines in the competition for research funding. Teaching and research dominate the departmental strategy and law school heads are occupied distributing resources, marketing programmes and managing personnel.

This paper argues for an emancipatory and developmental responsibility for law schools. It is a role that is followed to differing degrees by many law schools including Warwick. It is also a vision that is under pressure in the competition for scarce resources and may be denied by those who believe that a narrow and too often self serving legal scholarship precludes the distractions of practical engagement.

The justice role for law schools has frequently been championed¹. Recently the narrowness of a liberal legal education that eschews vocational objectives and social engagement has been debated². This paper, whilst acknowledging the importance for law schools of the justice mission and an ethos of humanitarianism, explores the wider practical potential for law schools to realise the responsibilities of their scholarship.

The emancipatory possibilities for law schools

Legal education is conventionally redolent of the regulatory rather than emancipatory paradigm. Boaventura de Sousa Santos suggests that the crisis of modernity stems from ascendancy of knowledge-as-regulation that has eclipsed knowledge-as-emancipation³. Law, he argues, has played a central role in the hegemony of Western thought. With some trepidation, I want to explore the contradictions that post modernity has exposed for those seeking local change, and a degree of indigenous emancipation.

The developmental role of legal education I believe is significant for five principal reasons. Firstly, law itself as an objective of development is too abstract a project. It reduces to support for the administration and management of processes of justice at the expense of consideration or promotion of the values or such processes. It encourages the transportation of models of justice from resource rich jurisdictions to those with little experience of the architecture of justice. Legal scholarship leans to Rawls and Dworkin

¹ See for example the collection of papers, 'The Justice Mission of American Law Schools' in memory of Robert McKay, Dean of New York University Law School in *Cleveland State Law Review* 1992 Vol. 40 Nos. 3 and 4.

² Burrige R and Webb J, "The values of Common Law Legal Education: rethinking rules, responsibilities and relationships in the law school", *Journal of Legal Ethics*, (2007), Vol. 10, Part 1, pp 72-97

³ *Toward a New Commonsense: Law, Science and Politics in the Paradigmatic Transition*, Routledge, London, 1995 p. 25- 27

rather than Said or Baxi⁴. Law's role in development to be both appropriate and effective needs a basis in the indigenous institutions of legal scholarship.

Secondly, justice both as concept and process needs to 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 throughout the advanced common law and civil law worlds by exegesis, and applied hypothetical reasoning. The potential that education methods as well as content hold for personal and community development espoused by Dewey, Kohlberg, Schon, Freire and others are largely ignored in the law school where the 'legal' usually eclipses the 'educational'.

Thirdly, legal education is emerging more in Europe than elsewhere as a distinctive discipline that embraces theoretical and empirical evaluation in addition to doctrinal analysis⁵. The efforts of Harold Lasswell and Myres McDougal⁶ in 1943 and Julius Stone a few years later⁷ failed to convince US law schools that their mission should focus upon democracy and public interest as their mission. In the law schools of Europe with their preference for studying law as part of a programme of liberal higher education rather than trade school, the possibility of a broader curriculum is at least more feasible in theory if ignored in practice. The recent upsurge in enthusiasm in the UK for addressing the values of law as well as its rubrics in the law school may be received with some incredulity by those countries whose customs and values have been pillaged by the British. All of us however are in a process of development. The insistence that globalisation requires the law schools of the lesser developed world to concentrate exclusively upon furnishing its graduates with the wherewithal to promote international trade would represent an additional disenfranchisement – from the market of intellectual entrepreneurialism and the global trade in ideas. To eschew the theoretical and empirical research necessary to produce alternative visions of law and the administration of justice would ensure the continuing domination of western modes of justice.

Fourthly, economic and political expediency has forced the organs of international governance to reassert the role of law and lawyers in national security and market stability. 'High-end Globalisation'⁸ reaffirmed law's role in development. Law making achieved some

⁴ See Upendra Baxi, *Oxford Handbook of Human Rights*, 2005, OUP Oxford

⁵ The suggestion is by no means novel. In 1972 a group of international scholars published, *Legal Education in a Changing World* ((1975) Committee on Legal Education in Developing Countries, International Legal Centre, New York). They noted that legal education is a culture specific phenomenon and viewed universities as a critical resource centre. They 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 Report recognised that legal education holds a wider significance than accrediting lawyers for practice. It suggested that the law degree should be capable of equipping students for a wide variety of law jobs, dependent upon each institution's objectives.

⁶ Harold D. Lasswell & Myres S. McDougal, (1943), *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *Yale Law Journal* 203 at p. 207

⁷ Julius Stone, (1959), *Legal Education and Public Responsibility*, AALS

⁸ 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

status, albeit a fragile one⁹ as an important item 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 (or rather its absence) became a concern.

Most significantly, however, human rights discourse has taken hold as a complementary framework for addressing injustices amounting to a new legality that is no longer the secret domain of lawyers. Constitutional assurances that foundational rights of individuals can be protected, even if the infrastructures of enforceability are lacking, resonates in parts of civil society that lawyers and the courts may be unable to reach. The 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 new legality has presented legal education and law schools with an opportunity to return to the abandoned efforts to equate law teaching with justice, and to invert the perception of human rights-in-law to an understanding of law-in-human rights.

This reappraisal of legal education as an instrument for local development has a particular spatial resonance. Whilst it should alert us to the oligopolistic potential for northern law schools in the international market for law students, it also promises the possibility of locally articulated and culturally honed human rights. The exertion of political and economic power that fuels globalisation also creates vacuums that alternative forces may occupy. However fragile, these may support alternative solidarities and succour independent dissents. Public interest legal education can help bolster geocentric legality and withstand what de Sousa Santos has identified as a renewed egocentric legality, pursued by multinational corporations eager to trample the tiresome regulations and costly procedures of state based laws.

This paper continues with a brief reassessment of the global role of legal education, recognising the importance of lawyer expertise within a wider responsibility for legal scholarship, including interrogation of legal philosophy, the design of administration of justice systems and the development of alternative legal services. It then considers the implications of globalisation for locally focused law schools. It recognises the distortions that 'high-end globalisation' can impose on the race for an international corps of business lawyers, regulated to ensure efficient market development. It concludes with a tentative agenda of issues and activities for law schools to adopt in pursuit of national and international development.

The contested spaces for law informed development

In advancing the possibility of a wider consideration of lawyer competences, the traditional responsibilities of law schools to the profession should not be underestimated. A reappraisal of the opportunities for turning attention to legal discourse as a mechanism for promoting an emancipatory as opposed to regulatory development is pursuant to an appreciation of the role of legal expertise and knowledge in the furtherance of wider

⁹ 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

political and humanitarian objectives. It involves on the one hand the acceptance of law's 'pre-eminent role in confining the state to its proper place in the new neo-liberal dispensation'¹⁰; and the simultaneous rejection of law as the pivotal guarantor of justice in the development process. It leans instead towards the theories and practices of education and human rights culture for promoting a justice strategy.

A traditional function of legal education has included the norms and processes for market and financial services regulation. The legal system reforms promoted by the World Bank are focused upon the ordered development of emerging economies and the democratisation of unorganised or 'failing' states. The processes of governance and justice systems for transplant are predominantly models developed in the US and Europe. As the current global financial crisis reminds us, the much vaunted checks and balances of Western models of governance are fallible. Market collapse and regulatory failure may also open the possibility of fresh solutions and revised systems for which legal education has a local and international role.

Legal education has become a field that is fulfilling a range of functions. It promotes knowledge and expertise about the role of law and how it works to a wider audience than those who will practice it. Its role in promoting the market and containing excessive state power has already been noted. It also has the potential to become 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 development¹¹ that Amartya Sen viewed as the principal means of substantive freedom.

Valuable though such conventional initiatives have been, the most radical contribution to local emancipation and global justice has emanated from the disparate ideas and individual projects of a small band of law teachers who practice their profession under the motley banners of cause or collaborative lawyering; human rights, justice education and public interest clinics. The international spread of clinical programmes and a fresh pedagogy for the study of law privilege education alongside legal trope and technique in the law school.

The balance between appreciating the distinctiveness of legal reasoning and its context, with an understanding of the practical implications of law's use is a key challenge for any legal education system. Some societies have a greater need for paralegal workers than practitioners, for which the assimilation of the appropriate skills and familiarity with practical challenges is as significant as the accomplishment of the rudiments of appellate advocacy may be for practitioners in another jurisdiction.

¹⁰ Lawrence Tshuma, 'The Political Economy of the World Bank's Legal Framework' in *Governance, Development and Globalization*, Faundez J, Footer M and Norton J (eds.), 2000, Blackstone, London at p 7

¹¹ Amartya Sen, *Development as Freedom*, 1999, Knopf, New York at p 38

The suggestion that legal education has a wider relevance than the service of the private profession is not therefore to denigrate that role. It may however prompt enquiry into why, where state support is involved, the professions should wield influence over and beyond the wider purposes that a country may expect from its higher education system.

It is the wider sphere of the legal infrastructure – courts and institutions to ensure that property and personnel are secure, and that profits will not be illegally usurped – to which much international legal effort is directed. It is in the interstices of the framework of laws, courts, administration and citizenship that legal education can contribute. It is pertinent because law provides the backstop for controlling commercial and citizen behaviour when other normative influences fail¹². It is also relevant because as well as being concerned with rules, it ascribes to a value system. However elusive and problematic the latter may be, concepts of justice and human rights can and should inform the teaching of law, and some breaches of these values may be justiciable.

This does not mean that legal education is the only method of pursuing the wider agenda of development. Education, health, welfare, environment, and the institutions of central and local government bear similar responsibilities. Law happens to bring with it personnel, practices and inherent value systems that are adaptable to the wider role. Few today would deny the role that law plays in development¹³. Since the role is now acknowledged, it would be perverse to deny its wider significance in contributing to the creation of social conditions that can facilitate economic growth. The wider that recognition becomes, the greater the influence that legal education can exert in a development strategy.

Drafting a developmental agenda

The dominant model of legal education as training ground for the private profession therefore requires radical readjustment to accommodate the range of needs that countries in different stages of development may have of their universities. The broader starting point of law school as the forum for the inculcation of substantive law, knowledge of legal systems, legal work study, and the values of justice and human rights offers the potential for a variety of approaches, both between and within legal education institutions. It also suggests that each law school could reflect upon its regional and parochial responsibilities, its capacity to meet all of some of its societies' demands, and its ability to maintain a balance of supply between legal expertise that services the City (in the sense of financial core) and those who administer legal services on behalf of the citizens. The more successful ones may also be able to consider how they address the growing demand for international legal expertise and experience.

Meeting these demands would involve a much wider consideration of education methods than most jurisdictions presently consider. An approach focused on social needs for legal services opens up possibilities for involving students in the activities of law as part of their basic legal education. The emphasis today upon clinical teaching methods as mirroring the

¹² Sen observes that external enforcement processes are required when accepted market ethics and business trust are not yet established. Law thus plays a key role in economic development in providing the 'assurances' that contracting parties need. Sen (1999) (*supra* note 8) at p 268

¹³ See, for example, Burg, EM, Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement', *American Journal of Comparative Law*, Vol. 25 (1977)

private lawyer, personal plight scenario can be adjusted to embrace active and experiential learning through involvement in street law projects, and paralegal outreach work.

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 essentially designed for generating private practitioners. The new 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.

To be effective such a strategy¹⁴ can be tailored to local needs and would emanate in the main from local initiatives and would engage with local expertise. It would 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.

In developing a strategy it may be helpful to plot the various constituencies to be considered against the functions available. Constituencies should reflect core educational responsibilities to the institution within the financial and legal frameworks of higher education, including the needs of students. Professional accreditation imposes further obligations. Beyond these core stakeholders are the broader needs of community and state. These could embrace corporate, government, constitutional, environmental, educational or social interests. Responsibilities are owed beyond tangible interests of particular constituents and extend to humanitarian, moral and pedagogical values. The functions and activities for strategic development of a law school can then be plotted for each constituent. These would commence with the identification of the core functions of education and research. The traditional law school may be satisfied with this conventional role. The emancipatory mode however would emphasise the developmental possibilities for law schools. Moreover its core education and research activities would extend education into vocational training and recast research to embrace policy formulation and law reform.

An effective legal education strategy can accomplish, but extend beyond, the production of legal expertise to service economic growth. It can also ensure that appropriate knowledge and skills are available to service the legal infrastructure and the administration of justice and democratic governance. A strategy that fails to address human rights, the broader aspirations of social justice and the promotion of participatory democracy will impede economic development. These values need to be addressed substantively as well as observed in the professional practices of law teachers.

¹⁴ *Legal Education in a Changing World* (Supra note 2) 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