

TEACHING LAW TODAY

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I had an uncle who, 20 years after leaving school, hid behind a tree when he saw his former housemaster. I have a similar impulse when I visit law schools. I was not the sort of student my amazing law lecturers deserved. One of them told me very kindly when the Supreme Court was set up that he was very glad that we had one member of the Court who understood contract law. It was not me. Mind you, later after one of our decisions he was to tell me that he found he had been let down in his faith in my colleague, the contract expert. Although he did not exactly mention my dissenting opinion in that case, I have chosen to treat his comment as high praise and have hoped that he regarded it as some sort of vindication of his teaching.

The teaching I received at law school has stayed with me. I have had reason to value all my professional life the association I have continued to have with those who teach law and whose writings and lectures keep the flame of law alive. So the opportunities I have had to attend meetings from time to time of the Australasian Law Teachers Association have been very welcome. I have enjoyed much friendship and been greatly extended in my thinking by the contact I have had with you. I appreciate deeply the honour you do me in making me an honorary life member of the Association. So thank you.

Although I see I am billed as providing some sort of inspirational address tonight, I did get agreement from the organisers that I need attempt nothing as ambitious. I intend simply to throw out some thoughts about law and why I think the teachers of law carry special responsibilities in guarding not only its rationality but the spark which is law itself and which six years ago in Auckland in addressing the Association, I described as "love".

As appellate judges are pleased to say, I have had the advantage of reading in draft the powerful remarks just made by Sir Geoffrey Palmer. There is much food for thought there and much with which I agree. I was, however, struck by Sir Geoffrey's suggestions that the academy clings to what he calls the traditional common law suspicion of statutes and a preference for the stories told by the

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cases. He wonders whether legal education faces the past too much, although he does think there is room for legal history. Sir Geoffrey questions whether we are focusing sufficiently on hard analysis and in particular the enacted statutes which he says are not merely king but emperor of law. Now, I have a few quibbles with these views.

First, I think that the relatively young jurisdictions of New Zealand and Australia have grown up with a less suspicious view of statutes and enacted law than Sir Geoffrey suggests. The circumstances of small populations at the ends of the earth mean that in our tradition there has, I think, been a willingness to see the law obtained through decisions of the courts as part of one system with the law enacted by Parliament. Within the sphere of legislative competence, statutes are supreme law. Both courts and teachers of law in my experience treat them with the utmost seriousness, read them closely and apply them faithfully. That may not be the view of the public and the view of politicians who seem highly suspicious of judge and co. That is a challenge for our legal systems. It is a misconception the teachers of law may be best placed to tackle.

Secondly, the stories of law are its life's blood. If I have a criticism of the teaching of law, it is that it is too analytical, too positivist and that it often neglects the human and social needs to which law responds. Law schools have to take facts, as well as rights, seriously. It is a skill that may be less readily imparted than how to read statutes. But it is why *reading* cases rather than skimming headnotes or digests of the propositions to be extracted from them is essential and should be part of the instruction in law schools. It is why legal history is not, as Dicey thought, "mere antiquarianism" in regard to a proper understanding of English law and the law of the constitution.¹

Thirdly, familiar wrangling about the relative merits of the work of legislatures and courts is domestic focus which is surely too limited for an adequate description of law. The working parts of a legal system may be dominated by domestic legislatures and courts, but their work does not encompass the idea of law. It is bigger than the product of either.

Any understanding of law must look to the law of nations and the body of doctrine and learning which is drawn on alike by legislatures, courts and all who work with law. The common learning inherited by our courts was not a series of rules. Even in a common law system, the cases serve only to illustrate the principles and give them form, as Lord Mansfield recognised.² These principles are derived from what Roscoe Pound described as the "general body of doctrine and tradition" which is

1 AV Dicey *An Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan Press, London, 1979) at 14.

2 In *Jones v Randall* (1774) 1 Cowp 37, 98 ER 954 at 39,955, Lord Mansfield said: "The law of England would be a strange science indeed if it were decided on precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England ... depends on principles; and these principles run through all the cases according as the particular circumstances of each have been found to fall within one or other of them."

invoked in judgments and "by which we criticize them".³ They draw on sources much more ancient than the common law.

The principles of the law are also derived from ancient statutes and charters, such as those collected in New Zealand's Imperial Laws Application Act 1988, too much neglected. They are found and further reflected into law in modern statutes too, particularly those of general application like the New Zealand Bill of Rights Act 1990 and legislation for access to official information. Underpinning legislation such as this is insistence on rationality and justification for the exercise of power. They are principles applied across the law, in the areas of law we label for convenience (but at some risk to the coherence of the whole) as private and public. Indeed, such underlying principles of the law prompted the legislation in the first place.

Academic lawyers hold the centre for law because in our societies it is the law schools which today keep this learning alive and build on it. You have a greater freedom than others involved in the development of law. You can identify the questions that must be asked. Good teachers create the frames of reference and provide bridges to understanding for legislators, judges and the wider society. As Steyn LJ pointed out, legal literature is critical influence for all those who work in law – legislators, practitioners and judges. The examination of "the history of the problem, the framework into which a decision must fit, and countervailing policy considerations",⁴ are what practitioners look to the teachers of law to provide. The health of our law schools as producers of legal literature is now critical to the common law as a system. Maitland described the common law as depending on "strict logic and high technique".⁵ He was rejecting the idea that common law is simply "common sense and the reflection of the layman's unanalysed instincts". His was an insistence on law as learning, not untutored instinct. If in part a reflex, it is, as Lord Goff claimed, at least an *educated* reflex.⁶ There is no legitimate judicial common sense solution to a legal problem which is not grounded in a lot of learning – of the whole sweep of law and its principles. Those who teach law carry the responsibility of maintaining this learning.

When I last spoke to this Association, I expressed concern about loss of connection between the law schools and the profession and society. I questioned the extent to which the informal social understanding of law may be being lost. It has never been adequate to confine the idea of law to what is enacted or decided; the case law disparaged by Jeremy Bentham as "law unauthoritative"⁷ or

3 Roscoe Pound "Judge Holmes's Contributions to the Science of Law" (1921) 34 Harv L Rev 449 at 453.

4 *White v Jones* [1995] 2 AC 207 (HL) at 235 per Lord Steyn.

5 FW Maitland "Introduction" in *Selden Society: Select Pleas of the Crown* (Spottiswoode and Co, London, 1887) series I, vol I, viii at xviii.

6 *Smith v Littlewoods Organisation Ltd* [1987] 1 AC 241 (HL) at 271 per Lord Goff.

7 Jeremy Bentham "Of the Laws of England" in JH Burns and HLA Hart (eds) *A Comment on the Commentaries and a Fragment on Government* (Clarendon Press, Oxford, 1977) 118 at 260.

as "para" or "sub-law" as Lord Radcliffe suggested statutes might be regarded.⁸ As Sir John Baker has suggested, law is also the collected wisdom to which people adhere, not simply to keep out of trouble, but because they think it is right.⁹ A special responsibility of academic lawyers, those whose vocation is to see the whole, is to make sure that there is space in our conception of law for this shared common learning. Such law-mindedness is something we should cultivate. There are real risks if law is seen as remote, elite, inaccessible and incomprehensible.

Statutes and case law are not particularly accessible. They need explaining. But, indeed, other law is even less accessible because it needs to be discovered. What happens in the name of law is no longer adequately seen in the processes of legislatures and courts which at least provide public demonstration of rationality and are open to view. Much law is now hidden in practice manuals and protocols and other formal policies by which discretion is channelled. They must not be allowed to develop as legal black holes.

Engagement by academic lawyers with the profession and with the judges is critical. Law is the loser if scholarly writing and the teaching of law is seen to be remote from the issues confronting others engaged in law and the matters that exercise society. Ours is a thinking profession and it is best served by those who have the assurance of deep learning and the imagination to see how it must adapt to meet the needs of the modern world. Peter Birks thought it was important to keep the law schools attached to the law in action.¹⁰ That does not mean that the teachers of law should become centres of vocational training where students are taught the rules in force from time to time. The responsibility of the teachers of law is to encourage intellectual curiosity in students and in the profession.

We have a strong tradition of law teaching in Australia and New Zealand and it has never been insular. Although John Salmond, the first professor at Victoria University College, was home-grown and indeed had practiced law in Temuka (which is about as small town as you can get), he arrived at Victoria in 1906 from a chair in Adelaide, enthused by the ideas current in Australia about systematic teaching of law. He was plugged into the wider world of ideas. His book on torts won the Ames Prize at Harvard; he was influential in setting up the American Law Institute. His colleague in law and physics at Victoria, Richard Maclaurin, later became President of the Massachusetts Institute of Technology. We borrowed outstanding Australians like Julius Stone. These were men known and valued throughout the world. But they were of our legal system too. They were fully

8 Lord Radcliffe "Law and the Democratic State" in *Not in Feather Beds* (Hamish Hamilton, London, 1968) 45 at 47.

9 JH Baker "Why the History of English Law has not been Finished" [2000] CLJ 62 at 78.

10 Peter Birks "The academic and the practitioner" (1998) 18 LS 397 at 406.

engaged in the profession. Salmond, for example, considered that the rule of law was "secured and enforced by the pressure of public opinion" and that the bar was critical in shaping public opinion.¹¹

While the scientific teaching of law developed in the American law schools, which so impressed Dicey on a visit in the 1890s, did not last and craft and experience once again came to be seen as essential to the learning of law, what spread was the sense of excitement of law through teaching its history, its methods, and its principles in universities. Such teaching confronted the way in which new problems (or apparently new problems) would be confronted in the future. They developed what Dicey described as an "atmosphere of legal thought".¹² Those of us who learned law in the law schools established in their mould with professional teachers of law from the 1960s were the beneficiaries. Today, no one would think that vocational training is sufficient preparation for law.

I do not minimise the challenges the law schools and the law face. The economic incentives on universities to increase the intake of law students may be a substantial challenge for teachers and students and may become a challenge for the legal profession if it dilutes standards and impedes legal scholarship. I do not know how real this challenge is.

I have, however, raised questions before about the potential distortions of the performance-based funding of law schools which seem to make matters of domestic interest less important. I agree with what Sir Geoffrey says about this challenge. The risk is not only that we may miss out on critical analysis of the judgments here, but that how they fit within a broader comparative context may not be squarely confronted. That is a real risk. Although in legal systems derived from a common source much common ground continues, there is more divergence than is often appreciated. A recent spectacular example is the Privy Council and United Kingdom Supreme Court's correction of the doctrine of party liability, meaning that New Zealand law, based on a statutory provision, falls to be applied in a way now repudiated for the United Kingdom.¹³ Much United Kingdom criminal law is significantly different from New Zealand law. It should prompt more caution in the use of United Kingdom case law than it does. Similarly, while Australian public law provides important insights for New Zealand law, that is only if the very different constitutional and public law system is properly understood. Our borrowings from other jurisdictions need to be carefully checked and set in a wider context. The sense of what is indigenous in New Zealand law or in Australian law needs cultivation. Who is to provide it unless it is the teachers of law?

A further challenge for law today is the expectations of law in the circumstances of our pluralistic societies and the need to keep open minds about the response to be made. Law in a

11 John Salmond *Jurisprudence* (7th ed, Sweet & Maxwell, London, 1924) at 55.

12 AV Dicey "The Teaching of English Law at Harvard" (1899) 13 Harv L Rev 422 at 436.

13 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, [2016] UKPC 7, [2016] 2 WLR 681.

society may offer a means of achieving equilibrium¹⁴ or, if you like, a temporary stay against confusion.¹⁵ But there are real risks for legitimacy and method in such cases. Courts may lower the stakes and allow the political processes to adapt, or, as William Eskridge has warned, they may also raise the stakes in a way that fractures societies.¹⁶ In both Australia and New Zealand, political issues have given rise to significant litigation in recent years. There is good and not so good in that. Authoritative vindication of conduct as lawful or rights-compliant is a principal contribution of legal process to the rule of law. It provides legitimacy. What is more, full public exposition of questions that have been glossed over or overlooked in the political process is a benefit of the deliberative process of litigation. It facilitates wider understanding. While these may not be matters in which courts are best placed to make the final decisions, they may facilitate engagement by society. If that is to happen, academics and practitioners are important in providing bridges to understanding.

Both judges and academics share the challenge of staying engaged and staying real. Law cannot be remote from real people. It must be able to communicate and reflect their needs without condescension or jargon. Academic lawyers and judges both must beware the temptations identified by Lord Goff. The temptation of elegance; oversimplification (with dangers of under inclusion and the ability to grasp the complexities and difficulties of the working constitution); "the fallacy of the instant, complete solution", neglect of historical context, and the "dogmatic fallacy" of being unable to see the principles for the rules.¹⁷

The specialisation of practitioners of law, both academic lawyers and practitioners, poses challenges for those who value the connections and coherence of law. In a recent paper, Lord Sumption has spoken of the impoverishing effect of specialisation on the law and the dangers for final appeal courts, dealing with cases where the existing authorities are "inconclusive, unsatisfactory, out of date or non-existent".¹⁸ Increasingly, the courts look to academic writing to make the connections and identify the principles that can be translated across categories. There is nothing new in ransacking the attics and looking at problems from outside the narrow category into which it has been convenient to assign them. As Lord Sumption points out, in the last half-century, the law of contract has been influenced by public law, human rights law has shed new light on the

14 Peter Birks "Adjudication and interpretation in the common law: a century of change" (1994) 14 LS 156 at 174–175.

15 Robert Frost "The Figure a Poem Makes" in *Collected Poems of Robert Frost* (Henry Holt and Company, New York, 1939).

16 William Eskridge "Pluralism and Distrust" (2005) 114 Yale LJ 1279.

17 Robert Goff "The Search for Principle" in William Swadling and Gareth Jones (eds) *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford University Press, London, 2000) 313 at 318–320.

18 Lord Sumption "Family law at a distance" (paper presented to "At a Glance" Conference 2016, London, 8 June 2016) at 5.

concept of property, and the law of securities and restitution have been transformed by a much wider resort to equitable principles than might have been thought appropriate a few decades ago. So in the development of modern administrative law principles of equity were invoked by Lord Reid in *Ridge v Baldwin*.¹⁹ The interconnection of law is real, but seeing it whole is life's work. As Maitland remarked, a little gloomily:²⁰

Life I know is short, and law is long, very long, and we cannot study everything at once; still, no good comes of refusing to see the truth, and the truth is that all parts of our law are very closely related to each other, so closely that we can set no logical limit to our labours.

Lord Reid was one who emphasised the critical role of the finder of fact in law. In his 1972 Fairytale speech to the Teachers of Public Law, he pointed out that error of law can be corrected on appeal. But if the facts are wrong, error may be very difficult to set right.²¹ If I had a suggestion to make to those who teach law, it would be to spend more time on facts. Both because I know no better way to communicate the excitement of law, but also because there is no better training than to come to law through facts. All cases ultimately turn on facts.

The final challenge I touch on concerns the fragility of our institutions. Law can be eroded unthinkingly and imperceptibly if it is not valued by our society. The rules and systems which govern access to the courts are increasingly under the control of the political branches of government. The teachers of law need to be vigilant to ensure that access to justice is not unreasonably impeded by the understandable imperatives of government. It is not an easy message to get across that courts stand apart. Courts are increasingly treated as though a department of government. Judges have the security of tenure and salary that is the legacy of the Act of Settlement 1700. But institutional independence is compromised in a number of jurisdictions represented here. There are considerable challenges in ensuring that access to independent courts and the ability to make that access real are valued by the community as essential to good government under law. That requires understanding and explanation of our constitutional and legal history.

Members of a thinking profession need to stand apart a little from the fashions of the time and the classifications of the day. They must also understand that the law must adapt itself as society changes. So, successful lawyers, whether judges, academics or teachers of law, must be adaptable and intellectually curious. It is not enough to master the rules of the day. The lawyer must be concerned with the way in which new and unimaginable problems can be addressed. Law schools must teach "the law-making enterprise".²² The expression "the law-making enterprise" is one used

19 *Ridge v Baldwin* [1964] AC 40 (HL).

20 FW Maitland *The Constitutional History of England* HAL Fisher (ed) (Cambridge University Press, Cambridge, 1931) at 539.

21 Lord Reid "The Judge as Law Maker" (1972) 12 JSPTL 22 at 22.

22 KJ Keith "1883 to 2008: Law and Legal Education Then and Now" [2009] NZ L Rev 69 at 76.

by a teacher of law from whom I have learned much, although he was never formally a teacher of mine. I refer of course to Sir Kenneth Keith. Clear thinking, constant questioning, and insistence on connections and cross-references, were what he tried to impart to me. In an essay, he summarised his own method in law. "Beware of slogans. Look past the familiar words and formulas. Look for new spaces and new linkages."²³ There is no better precept for those who love law.

23 KJ Keith "Sovereignty at the Beginning of the 21st Century: Fundamental or Outmoded?" (2004) 63 CLJ 581 at 604.