Our Capacity For Legal Research

The Social Sciences and Humanities Research Council of Canada established, in the fall of 1980, a group to 'examine and advise upon research and education in Canada'. The writers submitted their Report entitled, "Law and Learning", in the winter of 1982. It is the purpose of this comment to provide a short paraphrase of this important document for those who will not have the opportunity or the time to read and digest the report itself with its four attendant research papers.* As formal discussions are about to begin on the implementation of the group's recommendations, it is important that all interested persons involved in the law are aware of the present state of legal education and research and of the proposals for their improvement. The author is writing in his capacity as a participant in the group's deliberations.

The study was undertaken by means of the broadest consultation possible through regional meetings, by the invitation of briefs, and by the development of surveys and questionnaires to gather the essential data. This task was to some extent hindered by the paucity of responses from professional and governmental bodies which was something of a surprise in light of the wealth of criticism of legal education and research from those constituencies.

The group undertook to examine the condition of legal research and scholarship within the context of the present Canadian system of legal education. This decision was determined by the fact that the very nature of law teaching incorporates some degrees of research as well as by the fact that much of the published research is aimed at the law teacher as a consumer. Yet, while it was immediately clear that the importance of legal research requires little supporting argument, it was also obvious to the writers that there had been little systematic inquiry into the fundamental questions as to the making of law, its administration and its impact on Canadians as a whole. The function of the study was not to attempt these questions but rather to measure the abilities of the various estates in the legal establishment. Thus the group identified for itself the following questions: Is the present system of legal education designed to instill in the graduate lawyer the skills of his profession; the capacity of judgement to perform well, and the ability to evaluate critically the system within which he operates. Thereafter, the members set out to inquire into the preparation of legal researchers and their understanding of their own terrain. And lastly, the group sought to find out whether or not the Canadian public had sufficient knowledge and understanding of their legal system

*Law and Learning SSHRC Nov. 1982; Canadian Law Professors (McKennirey, 1982); Canadian Law Faculties (McKennirey, 1982); Profile of Published Research (Janisch, 1982); Sources of Support for Legal Research (McKennirey, 1982).

unique as it is encompassing two languages, two separate systems of law, indigenous peoples, a parlimentary-confederal structure and an individual constitution.

The detailed terms of reference precluded any inquiry into formal public or continuing legal education, inter-disciplinary studies, the quality of legal services or the competence of the personnel of the legal establishment. Nevertheless, the considerable indifference of the establishment to the work of the committee suggests a level of interest in legal research on the part of the profession and to some extent in government and the universities. The limited participation of these bodies prompts an intuition that no one knows what is happening in legal education and research and, despite occasional noises, a fear that no one cares too much. Similarly, the lack of response by the Bar when coupled with their appetite for practitioners for expository and low-level research writing raises again the question of whether we are members of a learned profession. However, the law schools themselves cannot pretend superiority in this regard since they have hitherto striven to produce purely destinal writing and have eschewed the fundamental research which is typical of other sciences. The schools have been encouraged in their choice by the intrusion of government agencies whose target or project research requirements have circumscribed professional efforts both in terms of scope and time.

The desire of the law professors to meet both the needs of the profession and of government arises from the professional schizophrenia torn as they are between their academic and professional aspirations. This in turn influences the present nature of legal education by inhibiting the completion of the transformation of law studies from mere office training to a properly based university enlightenment. Further, the nearly common curriculum of all schools bears the stamp of 'core' courses required for professional accreditation and the reforms of the last twenty years have been aimed at improving the professional education of the student rather than being designed to secure any fundamental reappraisal of the purpose and function of a university-based department of legal studies. This fact can be established no clearer than by an examination of graduate law schools, few in number, lacking in reputation, and run on the cheap. It is that dismal situation which reveals the level of commitment to fundamental research. This is exacerbated by the recognition that the intermediate post-graduate degree has been permitted, in many cases, to become no more than a fourth year of law study to consolidate substantial information already received. It is rarely a vehicle for the form and structural introduction to research techniques and ideas. In addition, the part-time graduate programmes available are overtly professional. Accordingly, it is not surprising that the best of our graduates still go abroad for their further education either by choice or by persuasion.

At the undergraduate level the professional component is kept alive and well by the utilization of part-time teachers from the Bar who as profes-

sionals, not scholars, offer up to twenty percent of the courses taught in some law schools. The tradition, so inimical to the research function, of running a law school by hiring teachers to tend large classes of students with some access to a working library continues today as a consequence of the prevalent university policy of treating the law degree as an undergraduate qualification for funding purposes. This results in little priority of funding for research projects.

The professional component which remains in university legal education is revealed also in the attitudes of the law professors to their economic situation. The universal unhappiness of the law professor is a reflex conditioned by his desire to be the financial equal of his practicing sibling. The implementation of salary differentials in the universities for law professors has not alleviated the concern. Further, it is clear that the university law professor is not as convinced of the intangible attractions of academic life as is his university colleague.

Altogether then, the make up of the law degree, the desires of the practicing profession, the attitudes of the professors and the students, along with the fiscal responses of the university administrators serve to ensure that fundamental research in the law schools receives 'sporadic attention and marginal participation'. Yet, there is a clear divergence between the reality and the perception of what is going on within the law schools. Public statements by deans and others are suggestions of high flown purposes and goals. For example, many would argue that they provide a legal education which seeks to develop in the student a critical reflection on the law rather than a mere technical training for the practice of law. But every measuring device illustrates that the law schools are still in the business of producing legal technocrats. This is hardly surprising when one realizes that law schools do not provide research time for faculty members and that traditional research is expected to emanate from the daily problems analysed in the classroom. These are then written up in the summer vacation for publication. On the other hand, even if the professors did have time available to them for fundamental research, where would they conduct such work? In most law schools the law libraries are working, custodial facilities rather than research laboratories. Although there has been growth in relatively recent years, this has now been turned back by the fiscal difficulties of late. These financial problems may be offset to some extent by developments in information retrieval systems.

Whatever time is made available to law professors for research is intruded upon by invitations to become involved in programs of continuing legal education or even in Bar Admissions courses. Of course these demands are often no more than extensions of the law classroom performance and so are as attractive to the professors as they are to the school needful of harmonious relations with the Bar. Yet, whatever personal or political advantages are gleaned from such involvements there can be no doubt that there is the negative factor of distraction from fundamental research.

Much of the above presumes that the present members of the law teaching profession are capable of the research function. The typical entrant holds a primary degree, a law degree, an intermediate post-graduate qualification and sometimes a little experience in the practice of law or in government. But that background is scarcely conducive to future research productivity rather, it serves to explain the predominance of the professional bias. The latter is of course demanded both by the student body whose ambition is private practice, and by the profession at large and their certifying organization. This is not to say the vocational training in the law faculties has reduced them to the status of 'trade schools' or guilds for apprentices, rather the goal is the inculcation of a professional training through the assimilation of skills and knowledge in what is commonly called 'the humane professional' world. Despite these efforts at conformity with practice the law professor must accept the frequently expressed opinions of graduates that their law school training is the least relevant or effective of the three aspects of their training that is, law school, bar admission and articling. The professors' frustration must be viewed against the impossibility of designing any law school training which would be 'relevant' to the manifold diversity of the practice of law. This is particularly true when it is realized that what many lawyers do for a living could be done effectively without any law training and indeed without any university education whatsoever. The law professors must also cope with the graduate's perverse cry that law schools must teach "the law" and "the rules". Experience indicates that the degree to which a particular school gives in to this demand is likely to vary inversely with its research involvement.

The law school which seeks to accentuate the professional aspect of the training of its students can do this most efficiently by investing in a legal clinic. It is there that the novice lawyer can enjoy the practical experience and learn the necessary personal skills for the law office. Most law schools have embraced the clinical solution together with its difficulties. The legal clinic is cuckoo-like in its capacity to push out of the law faculty nest the other components of legal education. That is, without effective external subsidy the clinic's appetite for dollars soon intrudes upon the thin resources of the law school to the detriment of all other programmes. Consequently, clinics tend to exist uneasily on the periphery of the law school while that institution debates its primary function.

By way of review, what we can say from the above is that the law schools are neither scholarly nor academic nor indeed are they efficiently professional. The gloomy picture is the result of the competing forces comprised of student demands, the pressure of the profession, the ambitions of the teachers and the fiscal policies of the universities. Meanwhile, the professors and deans continue to express their purposes in grandiloquent terms and to perceive their performances in an overly optimistic light. It is a singular achievement of the Report under review that it so accurately describes the present situation of legal education.

The present state of legal research in this country is generally agreed to be not yet acceptable although recent developments in treatise-writing and away from case-book compilation suggest that some of the harsher strictures should now be modified. Yet, the prevalent 'research' activities are made up of the expository text and the short law review article dealing with rules of substantive law or the evaluation of current doctrine. Some current research is designed to argue for and to stimulate change but there is little evidence of fundamental legal research. That is to say, research encompassing intellectual inquiry into law as a social phenomenon and research into law from historical, philosophical, economic or political perspectives. The tragedy must be seen as one of unfulfilled potential since there can be little doubt of the capacity of profound legal research to contribute beneficially to change in the social and political system of this country. But the story to this time has been one of 'preoccupation with the technical and neglect of the fundamental'. The low research visibility of the law professional has a number of explanations. Only twenty percent hold doctoral qualifications. While the relative youth of the professors is the result of a rapid turn-over of persons who do not have a life-long commitment to their academic career. In addition, most teachers maintain contacts with the practice of law as a preferred distraction from the research function. Also, it is clear that law professors are not subject to the 'publish or perish' syndrome since fifty percent are tenured professors, but only twenty-nine percent have published a book in the last decade. It is also true that the writing of the routine journal essays is done by a loquacious minority.

This diminished record of publications is often explained away by law professors asserting lack of research funds, but close scrutiny of external agencies' decisions makes it clear that funds for legal work are no lless plentiful than for other highly productive disciplines. At any rate, money itself is not the determinant of research output as is obvious from the successes of the law teachers in Australia and Britain where funds are even more scarce. If funding is neither the explanation nor the solution for our situation, what else is there? The essence of our problem is pointed out by the modesty of the contributions offered to our too numerous law reviews. If the material submitted to and published by the journals provides an accurate picture of the preoccupations and capacities of the persons in the law schools, then we have to admit that there is little chance of immediate change away from the professional concern and toward a genuinely scholarly discipline. It is relevant here to note the recent reassertion of authority by the profession over our 'flagship' journal, the Canadian Bar Review, and the schemes adapted to render it 'more relevant'. The law schools cannot disclaim responsibility for the narrowness of expectations of their graduates who have pursued such policies.

The research weaknesses of the teaching profession derive from the modesty of their research ambitions primarily. As has been said above the profession does not demand much by way of research and in fact their

support for traditional, expository, textural or monographic research is slight as the law publishers' statistics show.

What then is to be done? The Report 'proposes the establishment of a scholarly discipline of law'. This entails root and branch reform of the present legal education system through the recruitment of professors, the revision of both curricula and teaching methods and the proper development of graduate studies. All of this is to be considered at a time when universities are under severe economic pressures and law schools, in common with all other disciplines, are expected to retrench rather than reform.

The writers feel that to some extent the development of a scholarly discipline in law will result from the maturing process of the law schools themselves. That is, although some schools are approaching their centenaries the legal education system as a whole is relatively young and is the product of the last twenty-five years or so. However, they are prepared to assist the movement by proposing the construction of a scholarly or non-practice stream within the law faculties. Further, they propose the aggressive development of inter-disciplinary linked together with the operation of practice and non-practice streams. In this way it is hoped to create a student body with scholarly interests who in turn will provide potential, broad based, graduate students. Clearly, such a vision will require the revamping of our graduate programmes and their transformation into breeding grounds for researchers and prospective law teachers. It will mean the end of the LL.M. as a 'tourist' degree.

The proposals contained in the Report inevitably pertain to those presently teaching in the law schools. It is believed that there are a number of potential scholarly academics already in the law schools and that this group may be amenable to retraining in order to participate in a non-practice oriented legal education. But of course the major effort here must be made by recruitment of persons of promise or those with proven research records. In short, the law schools who presently proclaim their excellence should prove it by hiring scholars and by demanding scholarly achievement of candidates for promotion or tenure.

It must be accepted that these proposals cannot be based on nothing more than articles of faith to be espoused by each and every law school. Some hard decisions will have to be made with regard to the allocation of existing funds and the marking of priorities in money raising exercises. As a footnote, the members suggest that the faculties should take a close look at their law reviews, often perceived as a developing nation views its national airline, and determine whether it might be better to bring it to an end. Most importantly, the Report endorses the setting up of research centers in which scholars can spend substantial periods of time involved in projects of fundamental research. By such devices individual law schools will be left to make their own decisions as to their best options in terms of their provincial responsibilities and their greatest strengths in relation to their extant

personnel. At the same time, the group supports the proposal that funds be made available by the Social Sciences and Humanities Research Council to facilitate the work of law teachers involved in traditional legal research. And they underline that this group must also be given support by the universities in the form of release time to complete significant work. What the Report is supporting here is the notion that scholarship and practice are necessarily inter-related. All of the questions about competence of the profession and the quality of service are really inarticulated concerns about the failure of the profession to absorb the new knowledge developed in the law schools. At this juncture it is obvious that it is the responsibility of the law professor to effectively 'sell the product' to the practicing Bar who as this time remain largely unaware of their need for research. It cannot be denied that the professors are being asked to perform a most delicate balancing act but the teaching lawyers are now being asked to shoulder the traditional obligation of all other academics which is the extending of the boundaries of knowledge rather than the enshrining of the present state of the discipline. The plea of the writers in this regard is for money of course, but even more essential, they are pleading for 'imagination, determination and passion from the participants in legal education.

The Report contains some fifty-six recommendations for the achieving of the betterment of legal education and the development of legal research in this country. This recommendation will be the subject of detailed debate in the coming year or so and the final agreement between students, teachers, the Bar, Bench and government on implementation defies speculation. At this time, all that is necessary is that we respect the group's analysis of the present and strongly support in principle their clearly stated goals.

The Report recommends the enhancement of the law school practice-related programmes and the development of a scholarly programme. The group believes that the faculties have not met the needs of the profession nor have they developed the research capacities incumbent upon them. Accordingly, they are asking that the schools re-examine their curriculum and come forward with one curriculum which will properly attack professional education and which will also engender legal research. In order to nurture the growth of legal research, the writers recommend that strategies be devised which will improve the training of the researchers, establish their purpose and function, facilitate the production of research and 'improve the dissemination' of all types of legal research.

While the work of the writers is now done it is obvious that the job of persuasion and ultimately implementation of the detailed recommendations is about to begin. This will require not only the agreement of the diverse constituencies but also their cooperation in a national scheme of considerable logistical complexity. It is to be hoped that governments, universities and professional organizations will find the courage to forego their political concerns in order to promote the larger national need for a scholarly discipline of law.

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