Tulsa Law Review

Volume 34
Issue 4 *The Life and Legacy of Bernard Schwartz*

Summer 1999

The Atlantic Divide

(Lord) Woolf

THE ATLANTIC DIVIDE

The Right Honourable The Lord Woolf†

If it is right to say of England and the United States, that they are two nations divided by a common language, then it also fair to describe the legal institutions of the two countries as being divided by their joint heritage in the common law. As both our legal systems have the same source, it is not unreasonable to expect that the approach to subjects such as legal education in the two jurisdictions is likely to be the same or at least very similar. However reality continually dashes our expectations.

There have been a limited number of lawyers sufficiently familiar with the institutions of both countries to be able to penetrate the mist of misunderstanding which can so often exist as to those institutions. Bernard Schwartz was undoubtedly among their number. In his work he demonstrated a deep understanding of the English legal scene. He was well aware of its idiosyncrasies. Based on his exceptional knowledge he was able to explain to me in terms which made total sense, why, for example, the Supreme Court and the House of Lords have such a different approach to judicial review.

I regret that I did not have the opportunity to discuss with Professor Schwartz, Judge Edward's paper in the Michigan Law Review of 1992, *The Growing Disjunction Between Legal Education and the Legal Profession.* He would have been able to explain to me how the situation described in the paper, which I found so surprising, had come about. I have always regarded legal education in the States, especially at the prestigious law schools, to be well in advance of our own. The distinguished reviews with which they are associated I have regarded as being without equal and the training ground, not only of future Supreme Court judges, but also of their brilliant law clerks. (The "law clerk" being an institution much envied by some English judges[1] but an object of suspicion for others. We are just making our first timid experiments in their use.[2]) I had felt that the divide between the world of the academic and the practitioner, which had been, historically, a blot on the British legal landscape was absent from the American legal scene. I am attracted by the American "revolving doors" which have not been exported to Britain. Yet here was a serious

---

† Master of the Rolls, House of Lords; former Lord of Appeal in Ordinary; President of the Court of Appeal; Pro-Chancellor, London University.

1. Among whom I include myself, having been privileged, thanks to the American Inns of Court to have working for me for an all too short a period an ex clerk of a senior American Judge.

2. In 1997, the Court of Appeal commenced a trial involving a total of 6 newly qualified barristers and solicitors, called "judicial assistants" spending either six months part time or three months full time with the 36 judges of the Court of Appeal. The trial is proving a great success but it is made clear that they play no part in drafting judgements.

indictment of American law schools from a judicial source of the highest authority, expressed in terms which, I do not believe would be used by any of his English judicial colleagues to day about English law schools.

My reading of the Judge's paper suggested that the relationship between academics, practitioners and the judiciary on the two sides of the Atlantic could be moving in the opposite direction. Judge Edward's comments as to the increasing commercialism of the profession would apply equally to the English profession. The concerns which Judge Edwards so graphically expresses as to the lack of preparedness of the new entrants to the profession could well find echoes within this jurisdiction. There are shared concerns as to whether our system of legal education is producing lawyers who are equipped to meet the contemporary needs of the public. However the diagnosis of the causes of these problems in England would be strikingly different from those described by Judge Edwards. The process which Judge Edwards identifies of growing disjunction between practitioners and academics is almost diametrically opposite to what I consider is happening and needs to happen in England. Belatedly in England both the profession and the judiciary are increasingly recongnising that academics are able to make a fundamental contribution to the administration of justice and encouraging them to respond to the challenge which this creates. It is my belief that this is producing in England at the present time a process, not of growing disjunction, but growing conjunction between academics, the profession and the judiciary from which all lawyers, including law students, are benefiting.

There being, apparently, a striking difference in the contemporary position of legal education and academics on the two sides of the Atlantic I hope it will be of some interest if I give what is a very personal assessment of what is happening to education and the "divide" between the academics and the profession on my side of the Atlantic.

I. THE ENGLISH ATTITUDE TO LEGAL EDUCATION

Professor Sherr commenced a recent lecture on legal education by comparing our approach to legal education to that of Bo Peep who had lost her sheep and did not know where to find them. He ended by citing Oscar Wilde's comment in the *Importance of Being Ernest* that:

> in England at any rate, education produces no effect whatsoever. If it did, it would prove a serious danger to the upper classes, and would probably lead to acts of violence in Grosvenor Square.[3]

In the past there was little danger of legal education producing the dangers against which Oscar Wilde warned. It is only relatively recently in the 19th century

3. Legal Education, Legal Competence,THE LAW TEACHER 37 (1998).

that law has been taken seriously as an academic subject of any significance. For centuries after the 12th century, in so far as there was any formal teaching of law it was in the control of the Inns of Court. It was as late as 21st April 1883, that Professor Dicey gave his famous lecture "Can English Law be taught at the Universities?". He answered the question in the affirmative, but all his contemporaries would not have answered the question in the same way. The then position of barristers was that they qualified to practice by eating the required number of "diners" at their Inn of Court and by being a pupil of a barrister.[4] If they attended a university this was a matter of choice. Even to day in England it is still a matter of debate as to whether law *must* be taught by a University.

The Universities have never had a monopoly over legal education in England. What is required to have a career in the law is laid down by the profession both in the case of barristers and solicitors. There are now three stages to legal education, the academic, the vocational and the post qualification or continuing education stage. The academic stage for the majority of the emerging lawyers will involve obtaining a law degree[5] but there is still a substantial number of students who instead take a degree in an other discipline and then "convert" to law by taking the one year combined professional course and exam. This conversion course has only recently been able to be offered by selected universities as well as the school of law run by the solicitor side of the profession. The content of the academic side even when it consists of a law degree has always been a matter over which the profession has sought to exercise a degree of control, not always welcome, by identifying obligatory core subjects. In the case of the vocational part of the education this has continuously been under the direct control of the profession.[6] The same is true of continuing education.

The involvement of the profession has meant that legal education in the universities has retained a practical bias. The words of Judge Edwards that "many 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars, who are disdainful of the practice of the law"[7] could not appropriately be applied to the law faculties of English universities. It could with greater justification have been applied in the past. Blackstone who held the first

4. All barristers will have to be members of one of the four Inns of Court and before they are called to the bar by their Inn. The dining process is an important part of developing the collegiate culture which contributes to professional standards. While their direct responsibility for legal education has been reduced recently they have increased their indirect role by holding educational events such as lectures, moots and debates. They are also now the source of scholarships, having raised substantial sums for this purpose.

They are less dominated than in the past by the judiciary, but the judiciary remain members on becoming judges. The Inns are in competition with each other and are keen to build up the closest possible links with the universities to recruit the best of the crop of young barristers. They are evolving with the times not with standing their great age.

5. Those students who take law at university will normally take law as a first degree. Law as a second degree can create funding problems for the student. This explains the popularity of the one year conversion course for those who do not have a law degree. They do not want to involve themselves in the expense of a three year law degree.

6. Universities have recently achieved a limited involvement in both solicitors' and barristers' vocational training but this has primarily involved the newer universities which do not have a research rating. Oxford was unsuccessful in an attempt to obtain validation for a course.

7. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992).

Chair in Common Law in his inaugural lecture saw two purposes of an academic legal education. The first and more important was to provide "a proper accomplishment of every gentleman and scholar" and the second was for the practising barrister since:

> If practice be the whole he is taught practice must be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him . . . .

However, as Professor Hepple points out, Blackstone's twin vision was not realised[8] and as late as 1948 Professor W.T.S. Stallybras was insisting that law could only be a fit subject for university education if it were "education in the Law and not.... for the Law".[9] For Professor Stallybrass, the best university subjects were those closely related to other university subjects, such as jurisprudence. This is an extreme example of what Professor Hepple describes as "the false antithesis between 'liberal' and 'professional' legal education" which has dominated legal education in England for most of the 20th century. The dominance was intended to be reduced by the Omerod Committee's report in 1972 and Professor Hepple now hopes it will be removed as a result of the recent report in 1996 of the Lord Chancellor's Advisory Committee on Legal Education (ACLEC), of which he is a member, which favours the integration of education and training.[10] A model which is intended to put an end to the sharp divide between the academic and vocational education and replace it with a combined approach in which "professional skills and values are studied within a substantive and transactional context."[11]

Not all commentators are however convinced by the move towards a more practice related approach to legal education. Judge Edwards would I suspect understand the concerns expressed at a conference on the ACLEC report by a solicitor who was the senior partner of one of our most distinguished law firms and was strongly of the view that 30 years earlier he had received a training which equipped him for practice since it "provided a really sound academic legal education followed by a good deal of useful skills training with plenty of substantive law".[12]

---

8. Professor Hepple, *The Renewal of The Liberal Law Degree*, [1996] C.L.J. 472-73.

9. Professor W. T. S. Stallybrass, Law in the Universities, (1948) 13 SPTL 157.

10. First Report on Legal Education and Training 1996. The Committee was established by the Courts and Legal Services Act 1990 by the previous Conservative government but it is not popular with the new administration so that its future is uncertain. It is to be hoped that at any rate its educational function will survive since this could play a vital role in promoting the improvement of legal education. Its chairman is usually a law lord, the other members are a circuit judge and 2 barristers, solicitors and teaches of law and 9 others. Besides education it is responsible for advising on rights of audience and conduct litigation.

11. Professor Hepple, *ACLEC'S First Report: Four Central Ideas* (1996) 13 SPTL 2.

12. Richard Youard, *A Plea For An Old Fashioned Academic Education* (1996) 13 SPTL 9. In the same way as Judge Edwards consulted his law clerks Mr Youard consulted the young articled clerks in his firm when he became increasingly concerned about the quality of young lawyers the firm was recruiting and he found they lacked the "substantive law element" in their education.

He had real doubts as to whether this was being provided to day.

Whether the concerns which exist are justified I would doubt. The older universities' law faculties have long objected to the intrusion on their academic independence by the continued insistence by both sides of the profession on a minimum content of hard law in a degree before it will constitute a qualification for entering on to the vocational stage of legal education. The profession have however stood firm and have not been persuaded to surrender all control. They have been helped by the fact that the success of the conversion course has put the university law schools on the defense. From both sides of the profession the message was being heard that a disproportionate number of their best recruits were products of the one year conversion course despised by many academics and not of the three year law degree. Other factors no doubt contributed to this but the message was a brake on any tendency to allow degree courses to become totally detached from reality.

What can be said results from the involvement of the legal profession in England with the content of legal education is that it has helped to avoid the anti practice bias and the excesses of which Judge Edwards complains. This has not however, fortunately in my view, meant that law is taught in a vacuum isolated from other disciplines. For this to happen would be a retrograde step. Economics and the other social sciences as well as the law are commonly in play in the decisions in the courts and judges cannot ignore the economic consequences of their decisions. If this is true of the judges it is also true of the lawyers that appear before them. They have to be able recognize the social context in which a decision is reached or legislation is enacted in order to fully understand the significance of the decision or the legislation. The range of subjects being offered to first degree students is being continually enlarged; mixed degrees and multi-discipline courses are now common place; the choice of subjects available for second degrees is mind boggling, but the university law schools recognise their responsibility to provide a proper grounding in substantive law so that their graduates are qualified to proceed to the vocational stage of their training.

The question mark that I would raise is in relation to the future. The ACLEC Report provides support for a greater range of law degrees. Seventy percent of law graduates do not now enter the profession and their concerns must be catered for. The report is correct to suggest there should be more emphasis on international and civil aspects of the law. But the report also suggests that the links between the universities and the professions over the content of degrees should be weakened. The "dead hand" of the professions should be lifted. The report states that the requirements for a degree to be qualifying: "imposes uniformity, inhibits innovation and diversification of law degrees and contributes to the overload of the undergraduate curriculum".

Does this raise a danger of a departure from the present balance which could produce the results Judge Edwards describes? I hope not, but I am concerned, that if the profession surrenders its control, we could find that we have graduates who have had little if any exposure to conventional substantive law but are still entitled to call themselves law graduates and who regard themselves as qualified to proceed to

be admitted into their selected side of the profession. This danger explains why the Judge's paper is salutary reading for all those concerned with what is happening within our law schools. Entrants to the profession are becoming a smaller proportion of the increasing number of law graduates. However the universities role in training the profession is growing and will continue to grow as both sides of the profession are forced, because of demands involved in providing education, particularly continuing education, to delegate more of the teaching of the law and legal skills primarily to the universities.

The profession must not be unduly rigid in the requirements that it imposes but the academics must recognise the proper concerns of the profession. It should be possible for the legitimate interests of both sides to be met. They need to be for the protection of the public and in the interests of law students. The fact that a degree does not have to be a qualifying degree does provide an escape route for law schools, if this is necessary.

Professor Hepple[13] strongly endorses the view of ACLEC that the distinction between the academic and professional or vocational stages of the training of our lawyers has resulted in adverse consequences. It is suggested that an undesirable distinction between theory and practice results and this encourages the anti intellectualism on the part of some practitioners and reinforces intellectual snobbery on the part of some academics. He also considers that the distinction had deprived the profession of the greater contribution which academic lawyers could make to the subjects which constitute the vocational stage. I am sure there is substance in these comments. Professor Hepple then summarises the ACLEC's objectives as being that:

> all stages of legal education and training should aim to achieve intellectual integrity and independence of mind, knowledge of the general principles, nature and development of law and of the analytical and conceptual skills required by lawyers, an appreciation of the law's social, economic, philosophical, moral and cultural contexts, as well as a commitment to legal values.

These are all objectives with which I would not expect anyone to take exception, but Professor Hepple concludes his list with an additional sentence which caused me to pause. He says: "The intending barrister or solicitor will also need to know the tricks of the trade, that is how to act in various practice settings."

I am afraid this sentence rang for me very loud warning bells and I suspect would also do so for many practitioners and many other judges, possibly including Judge Edwards. Professor Hepple, besides being an outstanding academic, is recognised as the or one of the principle architects of the ACLEC Report. He is no stranger to practice and practitioners and so I am concerned that he should be apparently so dismissive of what could be an essential and central part of the training of lawyers. Are civil and criminal procedure and the law of evidence part of the

13. *See* Hepple, *supra* note 8, at 478-79.

"tricks of the trade?" I would certainly not so describe them. What about professional ethics and the duties that the lawyer uniquely owes to the court? I know from the rest of his paper that Professor is aware of the significance of ethics, and I believe he would agree that the ethical dimension of being a member of the profession to day is extraordinarily difficult. But the division between lofty objectives and lawyers tricks of the trade is just the demarcation line that I hoped had been relegated to the past.

I stress this because I would share Professor Hepple's aspiration that the ACLEC Report will provide an historic opportunity to achieve in partnership the integration of academic resources and the end of academic and vocational aspects of legal education. However this does not have to involve, as ACLEC and Professor Hepple suggest, the profession having to rely on trust and market forces to ensure that the integrated education provides what the profession requires. The profession should as partner continue to have its say as to what is provided.

II. THE ENGLISH ATTITUDE TO ACADEMICS AND THEIR WRITING

The walls of the Ivory Towers do not seem as high as when I started practice. This is not just a question of the changed perspective resulting from advancing age. There have always been exceptional individuals who were able to have a foothold in both the world of practice and academia, but they are not so rare as they were in the past. It is still, I am confident in saying, more common in the States than in England to find academics who are practitioners and practitioners who are academics and even those who can be described as both practitioners and academics, but their number is growing rapidly on my side of the Atlantic.

Professor Peter Birks, a highly distinguished academic, who is deeply concerned with legal education, in a lecture[14] indicated that a symbol of the old world's approach to academics was the convention which forbade the citation of the work of a living academic's work. This convention is now dead and citation is now being made constantly from the writings of living authors. As Professor Birks points out there are a number of areas of the law which bear very distinctive finger marks of the influence of well known academics and even areas of the law which they can be said to have created and developed.[15]

The British appellate judiciary are today dependant on academic support. While Judge Edwards[16] cites a study which shows that law reviews are seldom cited by the federal courts of appeal, my impression, in the absence of a similar review in this jurisdiction is that over the last few years we have progressed from virtually no citation in the judgments of the higher courts to a thin stream, the flow of which is steadily increasing. Professor Birks had no difficulty in citing recent decisions of the

14. Peter Birks, Clifford Chance Lecture delivered at the University of Leldon (Dec. 3, 1993).

15. An obvious example is Administrative Law where the influence of Professor de Smith and Professor Sir William Wade has been especially significant. Sir William and Professor Schwartz were long term collaborators on Anglo American administrative law.

16. Edwards, *supra* note 7, at 45.

highest authority as to the value of academic writings in assisting the courts to come to particularly difficult decisions.[17] Of course the quality of British law reviews does vary. There are reviews today focusing on almost any legal subject it is possible to identify and indeed on some topics which would not be regarded as being entitled to be treated as a subject in their own right, but for the existence of a law review devoted to that topic. Nonetheless I would expect most of my colleagues to share my opinion that we suffer from not having the time to read sufficient of the material of high quality which pours onto the market. In particular we value the comparative material. There was a time when we were objectionably arrogant and not much interested by what was happening in other jurisdictions, but that is far from being the case today. In the House of Lords and to the extent that time permits, in the Court of Appeal, when we are considering in which direction the law should develop we are anxious not to progress without being aware of the position in other jurisdictions.

The situation in the House of Lords is that our judges still depend entirely on the advocates that appear before them to do the research which in the States would be done by law clerks. For the advocates time is money and a well reasoned article is obviously an economic tool with which to place material before their lordships. In my experience the material is generally of a high standard and valuable. The problems begin when the academics disagree! However it is better to be aware of the conflict than to underestimate the difficulty of the principle involved in a particular decision.

Why should my reaction be so different from that of Judge Edwards? I suspect the answer is to be found for the difference in the far greater financial resources available to the academic lawyer in the States. Their British colleagues can not afford the indulgence in theory which the financial independence makes possible for the American academic. The publishers of British reviews are usually well aware that practitioners are an important part of their market and they take care to ensure that a fair proportion of their wares meet the professions pragmatic needs.

The influence of the profession on legal education may also play a part. The focus which the profession gives to what is taught influences what is written. Teachers would not be human if their writing and teaching did not usually overlap.

Another factor I am more hesitant about mentioning is the significance which may be attached by academics to being held in high esteem by the judicial and professional establishment. The links between the academic, professional and judicial hierarchies are many and much valued by most of those involved. This could be a subtle restraint on academic licence on this side of the Atlantic.

Judge Edwards also expresses concern about law teachers lack of experience as practitioners detracting from their skills as trainers of aspiring practitioners. As I have indicated this is probably a greater problem in England than in the States, but in England it is mitigated by the division between the academic and vocational side of legal education. The vocational courses are either well served by practitioners or

17. *See, e.g.*, Woolwich Equitable Bldg. Soc'y v. IRC, [1993] App. Cas. 163 and Airdale NHS Trust v. Bland [1993] App. Cas. 789.

academics with personal experience of practice.

III. CONCLUSION

The picture that I paint of the English legal scene is therefore one which contrasts dramatically with that drawn so vividly by Judge Edwards. This does not detract from the importance of what Judge Edwards has to say for an English reader. He encourages the open debate which is so much needed on this side of the Ocean. He helps us to find the best way forward and should assist us to avoid the pitfalls which he identifies so clearly. We may not have the problems now to which he refers, but we certainly have problems. Many of those problems relate to the lack of resources available to our universities. However despite this I believe, that while we must not let our academics be complacent, it has to be acknowledged that they do produce law graduates to day who are generally of higher calibre then ever before. We are fortunate that they are attracting youngsters into the law who are of first class ability so the universities have the right material to work on. That while the division between the academic and the vocational is artificial it has produced beneficial results, especially since both sides of the profession radically overhauled the vocational training they provided. It is however extremely wasteful for each side of the profession to have its own training programmes. It would be sensible to entrust education to the universities as ACLEC suggests. But if this is done, in my view, it is essential that the profession are active partners playing a real and not a nominal role in deciding what is taught and ensuring that the practical side of the training receives the attention it requires.

Fortunately as a result of the closer relationship between the profession and the academics I believe an active partnership can still be consensual, but if and when agreement is not possible the lesson that should be drawn from Judge Edward's paper is the profession must have the final word as to what is or is not a satisfactory qualification with which to practice law. This is too important a responsibility to be taken on trust. As the then Professor Frankfurter said in the quotation cited by Judge Edwards: "[i]n the last analysis the law is what the lawyers are. And the lawyers are what the law schools make them."

As to academic scholarship in Britain I have no complaint. My worries are two fold, both related to financial resources. If we are to retain academics of the highest calibre, which we need to do, we must reward them better than we do at present. It is desirable that they should be exposed to practice but they should not, as is becoming more and more the case, be dependant on practice for their ability to survive. The development of the common law, which is of the greatest importance to society as a whole needs, to be the joint work of the judges, the profession and academics. In addition the academics and the universities need more resources for research. There are dramatic constitutional and procedural changes about to take place in Britain, but our knowledge of how our legal system works is patchy in the extreme. The legal system, including the courts, are going to be more dependant on the assistance of academic lawyers than ever before if the process of change is to be

satisfactorily handled. There is a huge task in training judges as well as the profession to prepare for the change. It is too much to hope that adequate resources are to come from the state alone. The alternative is to learn from the American law schools and ensure that those who have benefited in their careers fully acknowledge and repay the debt which they owe to the institutions without whose assistance they would not have achieved their worldly success.

I do not know of any recent acts of violence in Grosvenor Square. However, it is just possible Bo Peep may find some of her sheep.