

## ARTICLES

### TOWARDS A BETTER LEGAL EDUCATION FOR THE NEW CENTURY - A STUDENT'S PERSPECTIVE

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*Lawyers are all right, I guess - but it doesn't appeal to me... I mean they're all right if they go around saving innocent guy's lives all the time, and all that, but you don't do that kind of stuff if you're a lawyer. All you do is make a lot of dough and play golf and play bridge and buy cars and drink martinis and look like a hot shot.*

- Holden Caulfield<sup>1</sup>

*Lucky Pierino, because he can speak, unlucky because he speaks too much. He who has nothing important to say. He who repeats only things read in books written by others just like him. He who is locked up in a refined little circle, cut off from history and geography.*

- School Children of Barbiana<sup>2</sup>

*A strength of our profession for 100's of years, is that lawyers have been leaders in government and society. This peculiarity marks our profession. Good lawyers are persons, whose intelligence, broad liberal education combined with a lawyer's direction, specially equip them for leadership at every level of society. I do not want to lose or diminish their capacity or inclination for this kind of service.*

- William Stoebuck<sup>3</sup>

At the close of the 20th century, perception of law and lawyers, remain as conflicting as ever before. There is the in-house view of lawyers as belonging to a noble profession, but to those outside the charmed circle, the view is different.

If Holden Caulfield, or the children of the school of Barbiana, are taken as a barometer of public opinion, all is not well with the legal profession. Those within the charmed circle of lawyers, judges and law teachers, might congratulate themselves on their public calling, but it does not match to the outside perception. If there is a crisis in legal education, it would trace itself to this fundamental, conflicting world view. The 21st century is not about how to improve the skills

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1 J.D. Salinger, *The Catcher in the Rye*.

2 School Children of Barbiana, *Letter to a Teacher* (1992). Though the children are not talking about a law student in particular, what they describe bears a remarkable accuracy to the public perception of a lawyer.

3 William Stoebuck, *Back to the Crib*, 69 Wash L Rev 618 (1994).

of those yet to be initiated into the arcane of mysteries of the law, it is about restoring some credibility to a profession mired in self aggrandizement masquerading as intelligence.

What is being articulated here, is a student view. A student, not yet a part of the profession, has multiple subjectivities. He or she is not an expression of the objective law. There still exists some measure of ambivalence, some bit of Holden Caulfield. Students would still harbour those romantic notions of lawyers as people, "who go around saving innocent guys lives all the time." There would still be a deep dissatisfaction at seeing yourself make a lot of dough, and playing golf and buying cars and drinking martinis and looking like a hot shot. A student would still have a problem with people "who speak too much and repeat things read in books". He would, in some sense, be outside the sphere of positive law. Peter Gabel analyses this phenomenon beautifully in what he calls the reifying nature of legal reasoning. As he puts it, students learning "that they are all abstract citizens of an abstract United States of America, that there exists liberty and justice for all and so forth - not from the content of the words, but from the ritual which forbids any rebellion." Gradually they will come to accept these abstractions as descriptive of a concrete truth, because of the repressive and conspiratorial way, that these ideas have been communicated (each senses that all the others "believe in" the words and therefore they must be true). once this acceptance occurs, any access to the paradoxically forgotten memory, that these are mere abstractions will be sealed off. And once these abstractions are reified, they can no longer be criticised because they signify a false concrete.<sup>4</sup>

The outsider to the law would be the best critic, helping law to be self-reflexive. Hard core insiders, who have been reified by legal reasoning, can only mouth platitudes about it being a noble profession. A student is in a unique position, being both insider and outsider, to be reflexive about the role of legal reasoning, in constituting him or her as a subject. Furthermore, a student has access to that "paradoxically forgotten memory", with which he or she entered law school. Thus a student is placed in a unique position wherein, he or she is personally trying to resolve these conflicts, the conflict between what the law as a profession demands of him or her and of what he or she feels about the law. It is out of this conflict that this essay is written.

#### ***THE CONTEXT - THE DOMINANT AND SUBORDINATE ASPECTS OF LEGAL EDUCATION***

Law as a profession to which Indians could aspire, originated in the context of colonial India. To a certain class of people, who could aspire to imitate the lifestyles of the colonisers, it became a means to move up the social and educational hierarchy. It is in this context that legal education should be problematised.

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<sup>4</sup> Peter Gabel, *Reification in Legal Reasoning* cited in M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* 973 (1994).

As C.S. Dias put it, "In social terms, colonial societies were often characterised by a marked dichotomy between a small urban centred, western acculturated population and the mass of unschooled people. Lawyers were recruited from educational systems which replicated that of the colonial power... Their status derived in part from their unique familiarity with the language culture and institutions which had been imposed by that power and retained after independence. In part law was attractive because it was one of the most lucrative private occupations".<sup>5</sup> So law as a profession, was one of the continuity, between the time of the British and post independence India. Lawyers were part of the modernising elite, who were supposed to take India out of the darkness of colonialism into a new society. These were the aspirations of the founding fathers. However it proved to be difficult if not impossible to transcend the discourse of caste and class. Indian lawyers proved to be status quoist in the extreme.

As Lynch observed in the colonial context, "Most Colombian lawyers come from the upper middle class. Their legal education is based on the values of social stability, the protection of private property, the sanctity of contract, formal equality before the law. The market for legal services has fostered a set career pattern which channel the most capable individual to the highest paying clientele in the corporate sector."<sup>6</sup> What goes for Colombia, goes for India too. By and large, the legal profession has a status quoist mindset, and strives religiously to protect its interests. The fact that law has not been an effective instrument to effect land reforms<sup>7</sup> stands testament to the fact that, by and large the Indian legal profession has stood behind the doctrines of social stability, private property and the sanctity of contract.

Historically the legal profession has always gone, where there have been financial rewards. There has been no change at the end of the 20th century. To give just one example, *India Today* featured an article on Legal Eagles, subtitled "The post liberalisation years belong to a new pack of super achievers, who are young, argue cases of national importance and yes, command astronomical fees".<sup>8</sup> This Article went on in much the same vein, featuring the opinions, interests etc., of some of India's best known lawyers.

The point being that the self image of lawyers is that of people on the fast track, on the way to quick money and fame. The author seems to feel no need to explain, how one can celebrate self aggrandisement on such a scale except for

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5 C.J. Dias *et al.* (Eds.), *Lawyers in the Third World: Comparative and Developmental Perspectives* 343 (1981).

6 Cited in *ibid.*

7 Land reforms are essential in a society where inequality exists. In such a context, since independence, just a little over 1% of total cultivable area has been redistributed. That is, of 45 million acres, only 4.5 million have been redistributed among the poor. See, P. Sainath, *Everybody loves a good drought*, 422.

8 *India Today*, Mar 31, 1997.

noting that "they work hard for their money". In a country where poverty is a major problem, a profession which is so divorced from the other realities, and can exist in a make-believe world of cocktail circuits and holidays in Scotland is living in a dream.

At the end of the 20th century, it is this which makes one deeply uncomfortable with the legal profession; the fact that it is built on self interest and completely ignores the context in which the large majority of the Indian people exist. The legal profession is a guild which constructs a different world abstracted from the other worlds.

There is an effort at constructing an individual insensitive to suffering. It is this problem that legal education must address. Law is a powerful discourse which constructs realities. Lawyers see as problems to be solved only issues which are integrated within the market. Thus legal problems are those which have financial rewards!

It is this power of the law to construct realities which must be questioned. Dias puts forward this point powerfully when he notes, "few studies of lawyers have examined the legal profession from the perspective of victims of the gaps, notably the vast number of people in rural areas living in conditions, approximating absolute poverty. Histories and surveys of lawyers may tell us about the principle markets for professional legal services, about economic activities which generate work for lawyers, about the clientele and interests served by different groupings within the profession, but they tell us little about the needs and interests of people who don't employ lawyers, because poverty, ignorance and the demographic distribution and social distribution of professions makes it difficult or impossible to do so."<sup>9</sup>

Legal education, as training for a profession, is a powerful system of exclusion. Very important questions like *the real needs of the people* are not questions within the market framework. So if the majority of people are poor, then legal education is complicit in structures, which invisibilise and silence the poor. It is this aspect of legal education which needs to be questioned. The other question is, does the legal education we "receive" give scope for expression of multiple subjectivities? Or are we all forced to adopt a regimented way of thinking. While it is difficult to agree that legal education is about creating robots, one cannot deny dominant ideological biases in legal education. Legal education is supposed to make you think like a lawyer. We are taught "the skill of parsing cases, spotting issues, separating the holding from the dictum, the relevant from the irrelevant and the law from the policy."<sup>10</sup> A lot of debate on what legal education should be, revolves around the best way to inculcate legal skills in the

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9 C.J. Dias, *supra* n. 5 at 319.

10 Carric Menkel, *Narrowing the gap, by Narrowing the field: what's missing from the Mac Crate report - of skills, legal science and being a human being*, 69 Wash L Rev 616 (1994).

student. We had the shift from the lecture method to the Langdellian case method; we had the introduction of clinicals to really learn the law.

In a sense what is missing is a self consciousness of where all this skill training is to be put to use. This placing of education in a context and understanding of the use to which your skill is going to be put, should be an emphasised area. Once again, we have to stand outside law to see what we are being trained to do. What the children of the school of Barbiana had to say, provides some kind of clue so as to further self reflexivity. "I try to understand you. You look so civilized. Not a link of the criminal in you. Perhaps though something of the Nazi criminal. That superhonest, loyal citizen who checked the number of soap boxes. He would take great care not to make a mistake in figures (four, less than four), but he does not question whether the soap is made from human fat."<sup>11</sup>

What the children are saying, is that the most horrifying creation of the 20th century is not the serial killer, but what Noam Chomsky calls the *New Mandarins*. A breed of people who can speak a technical language and justify and legitimise any activity on the basis of that technical language.

As Chomsky notes, "the formulation of values and ideals, the production of articulate and suggestive thinking has not, in their education kept pace to any extent whatever with their technical aptitude.... (Dewey's) disciples have learned all too literally, the instrumental attitude towards life, and being immensely intelligent and energetic, they are making themselves efficient instruments of the war technique, accepting with little question, the ends as announced from above."<sup>12</sup> Though Chomsky is talking in the specific context of the Vietnam genocide, the argument of an intelligent group of people, who can technicalise anything is extremely valid. Legal education is about teaching us a language, within which we would then function. Communication is unimportant, performance is.<sup>13</sup>

To give the example of the Bhopal gas tragedy in 1984, all of India's top lawyers, lined up to represent Union Carbide. There is no basis for critiquing them in the language of the law as "every person deserves a fair trial". Ethics thus plays a limited role in legal education. It is true that there is a course on professional ethics in the National Law School, but substantive political questions are not raised. Furthermore the course is constructed as a final year, finishing course. The issues raised by each and every subject are ignored, and pushed into a course, which is widely perceived as unimportant.

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11 School Children of Barbiana, *supra* n. 2 at 67.

12 Noam Chomsky, *American power and the New Mandarins* 9 (1969).

13 For a further elaboration see, Habermas who argues that discourses like the law, are a spread of instrumental reason, as opposed to communicative reason. Hence, law is never about human beings, and therefore depersonalising. William Outhwaite, *Habermas: a Critical Introduction* (1994).

**LEGAL EDUCATION AS CLASS ROOM POLITICS**

Legal education, as has been contended here, is not about skill inculcation alone. It should probe more deeply into societal relations of power. It should be about recognising an understanding difference. The reason why the classroom becomes important is because power has been reconceptualised. Power is not seen as a thing which vests in one authority, but is seen as diffuse and present throughout society. Therefore any kind of social change, has to take into account, the fact that power operates in different institutions in civil society. One such institution is the class room. In short, the class room is a terrain on which different kinds of struggles are being waged, whether acknowledged or not. This kind of view flows directly from the notion that power is polycentric, and the realisation that there is an intricate process of dominance and silencing, going on in the class room.<sup>14</sup>

Feminists have been especially sensitive to this entire process of silencing. As Torrey notes, "In discussing language, Mackinnon asserts that power constructs the appearance of reality by silencing the voice of the powerless by excluding them from access to authoritative discourse... While they are not the only arenas of authoritative discourse, the law school classroom and legal forums serve as places to establish and use personal power. When we are not allowed to speak in the class room, or when that speech is rejected because of the speaker's gender, we cannot acquire personal power. Legal education can and should have the concept of empowerment as a goal. Once sorted out in the classroom, women's (and other minorities) stories of oppression and inequality and their proposed legal remedies can then be brought to court".<sup>15</sup>

The feminist argument seems to be that some issues are never raised in the public forum, or are deemed legitimate in public forum. As a result, these issues are invisibilised. They remain as problems for women, but there is no chance of the issue reaching the court because the issue never had a public sphere to articulate itself in. Here the classroom is conceptualised as a public sphere, where issues of substantive equality are raised. The classroom is seen as a significant arena, from which public issues emerge.

The importance of the classroom, in forming a political identity is captured by Prabha, a student at the National Law School of India University. "When I react on women's issues, I have been jeered as well as cheered. Sometimes I realise my statements are being reduced to a joke, and others resent what they think is feminist ramble. This trivialization has silenced me, and until sometime back, I would think twice before raising a feminist concern in class. I realize that male approval does seem important to me. I have felt stifled and guilty. I have wanted to speak out and at the same time I feared that I would be laughed at. By

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14 See the works of Michel Foucault on power. Paul Rabinow (Ed.), *The Foucault Reader* (1984).

15 Morrisson Torrey et al., *Teaching law in a feminist manner: A Commentary from Experience* 13 Harv Wom L J 187 (1996).

keeping silent, I did reach a painful and uneasy compromise and realised that women pay a heavy price for this silence."<sup>16</sup>

### ***THE TWENTY FIRST CENTURY - SOME ALTERNATIVES***

The twenty first century will be a time of further concentration of wealth in fewer hands, through the new legal entity called the Transnational Corporation.<sup>17</sup> There will be greater marginalisation of the already disempowered. At the same time, as *India Today* puts it, salaries will be up, up and away. In terms of law as a profession, it will undoubtedly be more lucrative.<sup>18</sup> In this context, what should be the role of legal education?

#### ***a. Theory in Legal Education***

So far, the study of the law has been seen as the study of various legal doctrines. If law is to be democratized, if in some sense it is to reflect broader societal concerns, then the legal curriculum should be restructured.

One of the more important perceptions, with which students enter Law School is, that this is the place which will help me make a decent living. There also exists in some amorphous form, the notion that I should be able to do something "good". However by the time a person passes out of Law School, that amorphous memory is quickly rendered inaccessible, by a virtual deluge of case law and statutes. This burial is also a burial of the last remnant of self consciousness, with the public person taking over from that point. The lawyer is an "image", a technical man who is "apolitical". He can argue out the most passionate issues in technical terms. The lawyer functions as an instrument of the status quo.. The status quoist nature of law is attributable in some measure, to the kind of education we receive, when we perceive law to be merely legal argumentation. Hence the most important change would be to introduce theory at all levels of study. Theory, which critiques the role of law in society, so that one knows exactly what one's position is in the larger political context.

Thus theory as here conceived, involves the self conscious scrutiny of the choice and selection of concepts, the forms of argument, and the standpoints and perspectives adopted. Theory thus conceived should suffuse legal education.<sup>19</sup> Theory should enable you to say, "this whole body of implicit messages is nonsense. Teachers teach nonsense, when they persuade students that legal reasoning is distinct, as a method for reaching correct results from ethical and political discourse in general (i.e., from policy analysis)."<sup>20</sup> Status quo's, which

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16 Prabha, *The Story of Women in Hiding - Speaking out* (1993) 5 NLSJ 142.

17 See, Fredric F. Clairmont, *The Transnational Gulag*, 32 EPW, Nos. 9 and 10.

18 The salaries paid by multinational firms like Arthur Anderson, show how lucrative law has become.

19 Alan Hunt, *The role and place of theory in legal education: reflections on foundationalism*, 11LS 146 (1991). See also, Alan Hunt, *Jurisprudence, philosophy and legal education - against foundationalism* 6 LS 292 (1986).

20 Duncan Kennedy, *The ideological content of legal education* cited in M.D.A. Freeman, *supra* n. 4 at 1022.

are oppressive, operate because it is understood as natural and hence incapable of change. What theory does, is expose the value premises and interest hidden behind the objective law. It is an effort at bringing about radical change, by shaking the foundations of an oppressive order. Once students are conscious of the way law operates, an important space for reconceptualising and reworking law is opened up. Change which is progressive is enabled, by theory.

Of course, one is aware that this call for theory at the end of the 20th century is coming at a moment when movements, which are about change like the critical studies movement, are under increasing attack. Harry T. Edwards, singles out CLS and interdisciplinary scholars as purveyors of impractical writing. He says, "much writing in law journals is useless to the legal profession and to judges. He divides scholarship into that which is practical, i.e. prescriptive and doctrinal, directed towards the profession, and that which is impractical, which is wholly theoretical and ignores the applicable source of law."<sup>21</sup> What Edwards is doing, is mounting a frontal attack on theory. It is important to disagree with him because any kind of change is premised upon a new theoretical understanding. CLS scholars are concerned with progressive social change, and if theory is the route through which they operate, they should be encouraged.

The point, which Edwards misses, is that theory is premised on a challenge to the ideology on which law teaching is based. It is an effort at changing mindsets of those, who will become lawyers, judges and law teachers. In short, legal education becomes a space from which change is progressively generated. Thus it is important to change the nature of legal education, to make the point that "the universe of legal scholarship is not bounded by the concerns of the legal profession."<sup>22</sup>

#### ***b. Practise in Legal Education***

The two areas, which would give scope for radical intervention, would be,

1. Clinical legal education
2. Law Reform projects

Clinical legal education is in some ways an experience with the sheer practicality of the world outside the academy. Law in the book is seen as law in action. In clinical legal education, the student confronts difference in all its myriad connotations. The first thing that clinical students encounter is difference. They then try to grapple with it. Everything and everybody is different from what they have ever encountered, at least in law school; the clients, the neighbourhoods, the courthouses, the jail and even the teachers are different...<sup>23</sup>

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21 Harry T. Edwards, *The growing disjuncture between legal education and the legal profession*, cited in William Stoebuck, *supra* n. 3.

22 Alan Hunt, *supra* n. 19.

23 Abbe Smith, *Rosie O'Neill goes to Law School: The clinical education of the sensitive new age, Public Defender*, Harv CR CL L Rev (1989).

It is this confrontation with difference that promotes self reflexivity, that questions what it means to be a professional. As has been noted before, lawyers live in a world which is different from the world of poverty. Hence the important thing is to make the law student, with all his or her budding professional certainties, confront poverty. This is one of the few points of attack of the intimate link between law and capital. As Kessler put it, "The uncertainties which beset the poor cannot be rendered predictable by law as can the uncertainties of capital. It is only selectively that the law can deal with the problems of the poor. It can deal in general with the problems of capital. And the reason for this is that the law has either constituted or recognised the modes of existence of capital. What capital is at a point in time and what the law is, are the same. There is an integral relationship between law and capital brought about by lawyers. But there is no such relationship of reciprocal constitution between law and poverty. The being of poverty lies elsewhere."<sup>24</sup> It is this relationship with capital that law students must be reflexive about, and it is the alienation from poverty, which is a condition of the majority of the world's population, which they must confront. Clinical legal education is one small tool, which can be used to chip away at the massive edifice called ruthless pursuit of self interest.

The other space, from which radical intervention can be made, in a practical sense is the Law Reform Competition. This has been pioneered by the National Law School of India University. In this effort, students are expected to stay with a marginalised community for a period of three months and based on their experience of the problems of the community, come up with a law reform proposal. In this case, law is seen as a remedy for the real problems facing the people. The starting point is the problems of the people, and law emerging as a response to it. The topic for 1996-97 was "Law Reform to offset/mitigate the adverse impacts of globalisation on rural/vulnerable groups." The team from the National Law School has decided to look into the effects of mega-industrialisation in the Mangalore area. The immediate consequences have been a direct questioning of the very concept of development. Development for whom and at whose cost? Thus the small space given by the topic is converted into a radical critique of development itself.

### **CONCLUSION**

Thus legal education for the 21st century must be about critique - both practical and theoretical. It should be about changing the image into which the law student is fitted. The only way in which we will have lawyers who will make law meaningful to a large majority of the world's population, is by constantly confronting law students with the present limitations of their own profession. If the future is to be meaningful, the present must be critiqued.

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<sup>24</sup> See, Mark Kessler, *Lawyers and social change in the post modern world* 29 LSR (1995).