CONTEXT, CRITICISM & THEORY

Law, theory and practice: conflicting perspectives?
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Even if we do possess the practical skill or know-how to deal with a situation in more than one context, we do not possess the practical skill or know-how to deal with the situation in another context. Alternatively, we can deal practically with the immediate situation but cannot deal with further ramifications of what we have done. Theory finds a role precisely where our practice is not rich enough.

Take apples falling from trees. The practice of apple picking was doubtless rich enough and in no need of improvement from a theory of gravity, but theoretical reflection on falling apples led to insights being gathered where practice was far from rich, like the exploration of space. Or take judges delivering judgment, and allow for the sake of argument that each judge is good at being a judge. Even if the right judgment is delivered, we may want to ask other questions about the process of judgment which we cannot readily answer and to resort to theory to give us a broader picture bringing in a possible explanation of, say the democratic implications of the process of judgment. Or, less optimistically, we may not be sure that the judgment is right and will then resort to theory to help us to find the criteria which will determine a good judgment.

The general point to be made here is that there is room for a distinct role for theory precisely where our practical skill or know-how runs out. Theory provides a possible way of explaining things when our practical experience is not sufficiently rich to provide us with all the answers we need or ask for. Put bluntly, theory is built on ignorance. As a corollary it follows that, if our practical experience becomes enriched due to our adopting a theoretical solution, testing it and finding it works, we no longer call the explanation theoretical but accept it as a fact. We confront a further experience with the theoretical understanding obtained through reflection on our first experience but, instead of seeking to put the theoretical understanding to the test, we use that understanding to explain the experience. This is a possibility that again arises from the fact that our experience is less than total, so that we can be selective about which elements of the experience we will acknowledge, or even what we are prepared to let in to our experience. Crucially, for this inverted relationship between experience and understanding to succeed we have to be prepared to close down our faculty of reflection.

If we are endorsing the virtue of open reflection on experience, then part of our search for a positive role for theory must deal with the manifest conflict that exists, not only between theorists and practitioners but also among theorists themselves. There exists a legitimate concern that theory might incarcerate our understanding in darkness instead of bringing enlightenment, by overriding significant particulars, by marginalising or even bypassing the significant interests of particular individuals, or by spuriously attributing significance to vested interests that they do not merit.

However, these concerns need to be balanced by a recognition that theory can have a proper role at a more general level than that of particular events or specific individual interests. Whether we are dealing with theory within particular legal subjects or general theory of law, the question of the legitimacy of theory has to be addressed. We have to be sensitive to the point at which theory properly degenerates into rhetoric, and the distinguishing mark of the former is that it retains its exploratory character.

It is possible to identify three strands of practitioner scepticism towards theory: (1) practice has no need of theory; (2) practice has only a limited need for theory; and (3) theory is diametrically opposed to practice. In (1), practice is regarded as sufficiently rich as to make theory redundant: the practitioner as skilled player. In (2), although a limited area of practical skill is specified, it is acknowledged that theory can provide an ancillary role: the theorist is admitted to manage the long-term strategy without detracting from the opportunities for the practitioner to shine in performing at his or her skill. In (3), theory has overstepped the mark. In relation to the practice it is supposed to represent, it takes the form of an alien rhetoric, closed to the values of what the practitioner holds dear and espousing the cause of insurgency.

A sample of practical experience suggests opportunities for theory in relation to the practice of law: providing a more coherent view of legal materials; providing a greater general understanding of the law so as to use it better in particular circumstances; and, more adventurously, working out how the existing state of the law might be transformed to accommodate cases not yet entertained as possible.

There remains, however, a residual tension between practice and theory due to the contrast between the propositions that: first, when asked for advice about the law, the practitioner is required to indicate how the law will perform its role, not how the law should perform its role in accordance with one of the available alternatives; and second, that it may be possible to argue for change to the law on the basis of an outlook or belief that would suggest a way of performing the legal role in a manner that is not at present within the range of potential legal responses. The dynamic nature of this tension can be brought out by considering different manifestations of what might loosely be described as legal reasoning, in the sense of reasoning towards a legal response to a particular case. It would be possible to arrange different manifestations of legal reasoning in the form of a continuum, ranging from mundane uncontroversial applications of the law to radically critical positions that exist in a hypothetical realm which goes beyond anything that falls within the scope of present plausible legal positions.

Whether it is comfortable or not, theory can provide a broader understanding to those elements of our practice of which we may choose to remain ignorant. This further relates theory and practice but does little to reduce the conflict, and there still remains the conflict between theorists. Is

there any basis for viewing our disparate attempts to carve out limited areas of practice, or keep a grasp of our limited theoretical understanding, as in some way subject to a uniform demand upon us all? This question may be related to some of the points noted above. The indeterminacy of our meaning, practice or theory is potentially countered by the contingency of common experience. Our ability to explore the possibility of having a common experience is dependent on our current recognition of ignorance. The usefulness of theory is ultimately a matter of what we are prepared to experience, or indeed are capable of experiencing, in common.

Postmodernism: legal theory, legal education and the future
T Murphy
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The future of legal theory will depend on the future of legal education. The future of legal education will depend on the future of law. The future of law will depend on the future of legal practice. The future of legal practice will depend on?

We do not know the answers to any of these questions. Nor are such neat strings of dependencies themselves without their problems. For example, the future of legal theory must depend on the future of legal education. Obviously. But the future of legal education will depend as much on the funding of teaching and research in the future as on anything else. This in turn is linked to academic salaries and terms and conditions of employment of academic staff, and therefore to the kind of personnel universities old or new will be able to recruit in the future and, in the field of law, over the next two decades. The future of legal education in terms of its scale and scope as well as content will also depend on the students it is able to recruit: on whether the present high volumes of applications are sustained; on the composition of entrants in terms of class, gender, ethnicity and national origins; and on the level of opportunities in the future for law graduates to enter the legal profession in some capacity or other.

Students are going to need to know more about the world and less about the law in the traditional sense of the minute contents of cases. And this may mean not just more policy, or even more of an injection of socio-legal studies, but also more theory. At the same time, legal education will need to adapt to what students already know and what they do not. Teachers cannot remain oblivious to the cultural horizons of their students.

As for what kind of legal theory, it is already too late for legal theory to return to the old enclave it used to inhabit. The genie is out of the bottle. There is an unparalleled range of reference points for legal theory, which is itself the product of a range of factors. Legal theory has almost always been derivative, or parasitic upon other disciplines, usually philosophy. But what is happening now is a genuine collision of discourses within legal theory itself, which may or may not prove to have impact on legal education.

With institutional contexts in mind, there are two trends set to continue that flow from those developments which have already taken place. First, the critical evaluation of legal scholarship, with its implications for the personnel of the academic legal profession in the future, seems likely to become more problematic or even arbitrary. Secondly, one would expect legal theory or jurisprudence courses to continue to diversify as to their content in legal education.

Postmodernism is probably best seen as a shorthand for a complex network of critical strategies and possibilities drawn from heterogeneous sources, not as a coherent movement. More a collection of often warring tribes than a unified nation, there is perhaps an identifiable core theme or sensibility which is shared by 'postmodern' authors, namely a reaction against certainty or 'central control' mechanisms, whether these are sought for or postulated as operating in the human subject, in human society, in texts, in history, in truth or in meaning.

A crucial variable for the dissemination of post-modern theory into legal education is clearly the development of accessible secondary works serving as commentaries on authors or on themes. So far, Foucault, like Habermas, has been quite well served here. Popular postmodernism is as necessary as popular science, and for purists carries the same risks and dangers, as well as a tendency in some commentators for little of the main cultural impetus of the work to survive its translation into a different cultural space.

Post-modern theory is not a way of smuggling into legal education a range of proposals or projects about how the law or the legal profession should develop or behave in the future. It is not in the business of ethical certification, although other forms of legal theory are. For legal education, the principal strength of post-modern currents is a certain distance from the present, which is opened up through the plurality of the critical resources post-modern writers make available to us.

That antithesis or conflict between post-modern theories and much more practical issues of the 'future of law' – and especially the 'future of the legal profession' – is artificial and unnecessary. Traditional legal-theoretical strategies are largely bankrupt as handles on the analytical questions which arise in seeking to pose alternatives for the future. There is one challenge in/ for the future which both mainstream liberal theory and its critical cousin postmodernism may face: the implications for theory of the recognition of multiculturalism.

CURRICULUM

Building the world community: challenges for legal education
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We are witnessing a dramatic transformation in the world today, caused by a combination of forces, such as global trade, foreign investment, the advent of the Internet and other communications technologies, the breakdown of authoritarian political structures, the emergence of new nations, and expanded roles for individuals, multinational corporations and non-governmental organisations in international activities. In this new, essentially bor-