Law as business in the corporatised university

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Business-oriented legal knowledge vs socio-legal scholarship.

DEDICATED TO THE MEMORY OF BRENDAN CASSIDY

Dr Brendan Cassidy, a member of the School of Law and Legal Studies, La Trobe University, died on 10 May 2000. He was uncompromisingly opposed to the corporatisation of the public university.

A recent review of the Faculty of Law and Management at La Trobe University, to which the School of Law and Legal Studies belongs, was instigated by the Vice-Chancellor to examine teaching, research and external linkages. The Report acknowledged the reputation of the School in respect of socio-legal scholarship, but took the view that such a direction did not comport with the more professional and vocational character deemed necessary for the 2000s.[1] The Report stated that professionalism was 'not proceeding fast enough, and that...many of the staff...[were] *not fully equipped to teach the law as practised* [my italics]'. To remedy the alleged weakness in the professional practice area, the Report recommended the use of 'exit packages' for socio-legal scholars and their replacement with more 'professionally-oriented' law teachers. Trade practices, competition law, intellectual property and tax were singled out as appropriate areas of specialisation for new appointments.

This cameo sets the scene for my article, which is to consider how business-oriented legal knowledge, understood as technocratic and uncritical, has succeeded in delegitimating socio-legal scholarship just when the latter was receiving a modicum of acceptance in the academy.[2] The phenomenon is by no means peculiar to La Trobe, but is a corollary of the corporatisation of universities which has spread like a canker throughout the world. Corporatisation, involving the application of business practices to universities, has arisen from the technological and globalising tendencies of postmodernism, as first postulated by Lyotard 20 years ago,[3] and elaborated upon by Bill Readings.[4] Corporatisation has received a boost from contemporary neo-liberalism to produce a climate in which the market reigns supreme.

Neo-liberalism, or market liberalism, includes contraction of the welfare state, privatisation of public goods, deregulation and globalisation. The intimate relationship between government and the market is designed to ensure that the market has free rein. Social institutions and interest groups that do not fit into the market paradigm are now in disarray. The university is a prime example. In Britain and its former colonies, Canada, New Zealand and Australia, the university has been conventionally viewed as a *public* good. Now that neo-liberal governments everywhere are declining to fund higher education, other than to a minimal level, education is being reconceptualised as a *private* good for which users ought to pay.

The corporate university

To overcome shortfalls in operating budgets, universities have become preoccupied with economic rationalism, efficiency, and income generation, particularly the marketing of courses for profit.[5] A significant by-product of globalisation and information technology is that markets can be located anywhere in the world. Capital no longer has a fixed abode, which means that financial flows need not be subject to regulation by nation states.[6] The rapid transmission of ideas of all kinds is also

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contributing to what Harry Arthurs refers to as the 'globalization of the mind'.[7]

Neo-liberal governments have encouraged competition in the higher education sector, asserting that it will foster greater efficiency and effectiveness, as well as enhance choices for students who, symbolising the changed mind-set, have become the university's 'customers' or 'clients'.[8] The assumption is that students are rational and autonomous consumers who are capable of making informed choices when they enter into a contractual relationship with an 'education provider'. Universities now inhabit a social-Darwinist environment in which the market has become the measure of all things and only the 'fittest' institutions are likely to survive. Within the prevailing economic rationalist discourse, this is known as 'competition policy'. If the 'customers' sue a university for offering a sub-standard course or failing to deliver what it advertises, it is too bad;[9] governments are absolved from responsibility for providing inadequate funds for the ever increasing numbers of students which universities are required to admit. Competition policy similarly absolves a university when courses with low enrolments fail; individual course conveners are held responsible if intellectually rigorous courses are unpopular. The 'customers', after all, do not want to be too intellectually challenged when they are primarily concerned with credentialism, not a liberal education. A system based on competition policy is economically rational, it is reasoned, because demand will increase only for those courses that are attractive to customers; others will atrophy.[10] Considerations, such as the social value of the knowledge acquired or the quality of the learning experience, are of incidental concern in a market-driven system, despite the rhetoric that competition fosters excellence.[11]

Excellence in research and excellence in teaching are proclaimed in the typical university, so that 'what gets taught matters less than the fact that it be excellently taught or researched'.[12] The focus on excellence and cognate terms, such as 'first class', 'preeminent', 'innovative' and 'cutting edge', have all been subsumed into the marketing rhetoric. Without advertence to content, all universities are claiming to be 'good at being good'. The language of excellence disguises the acts of administrators in cutting back disfavoured areas, such as classics, languages and music. Academics in such areas, unable or unwilling to be entrepreneurs, are deemed expendable. Law is included with the cluster currently deemed marketable, which also includes information technology, management and business. These areas constitute the core of the new knowledge industry.

Not only are changes in the idea of the public university as custodian and producer of knowledge profound, but the structure of the university itself has changed to become more like a private corporation. At the top is the vice-chancellor, the CEO, with a tight management structure effected through line managers, including deputy and pro-vice-chancellors, mega-deans, faculty deans, school heads, and departmental chairs. This managerial apparatus draws substantial funds away from academic activities, including teaching. Unlike private corporations, however, there are no shareholders in public universities to whom management is accountable, a factor that poses novel legal and ethical questions when the public university embarks upon questionable enterprises, such as the establishment of a private university under its own name.[13] The norms of collegiality and consultation can no longer be relied upon to exercise a brake on such activities because they have been replaced with ever increasing layers of surveillance, accountability and control within a quasi-private, bureaucratic structure. Line management necessarily focuses on the activities of subordinates; it precludes a reciprocal scrutiny of senior managers. The enthusiasm with which managers have embraced the new culture is impossible to ignore, particularly as they now exercise considerable power over academics, including power to dismiss those whose areas of specialisation have been declared redundant.[14] They may even dismiss those who are critical of their activities.[15] Today, we are less likely to encounter the idea that university management and academic staff are engaged in a common enterprise, for they seem to have become members of separate castes, locked into an adversarial relationship.[16]

Within the new corporatised university, administrators, or managers, as they now like to be known, have become the core workers of the university.[17] Even though they may be former academics, once they have assumed the managerial persona, they tend to slough off any commitment to collegiality. Their loyalty is transferred to the university 'centre' and its corporatist mission.[18] The substantial perks of management, including high salaries, cars, and corporate credit cards, are seductive. The title of 'Professor' may be bestowed on line managers to confirm their elite status, although they may be unlikely to qualify on the merits. Appointment on short-term, performance-based contracts is an effective means of ensuring that the incumbents do the bidding of senior management.

The new managerial élite also evince a distinctively masculinist aura. Senior managers, who are themselves invariably male, prefer to surround themselves with men who possess similar characteristics to themselves.[19] Homosociability may be strengthened through drinking, lunching, joke-telling and sport. Although such a depiction of the club mentality of management may appear *passé* after more than two decades of equal opportunity, the masculinist character of authority has received a new lease of life through corporatisation.[20] Corporatisation engenders a bureaucratised and depersonalised style of top-down management in which authority is frequently conflated with command.[21] The softer tones of the feminine voice are less easily heard within the corporatised academy than a collegial, consultative environment.

The legal academy

Legal practice is new knowledge work, or brain-based service work, a dimension of wealth creation that has replaced primary production and manufacturing in the marketised economy. An entire generation of new contract lawyers is required to effect the privatisation of public goods and the facilitation of global market activity, as well as to resolve intellectual property dilemmas arising from new technologies. At the same time, a law degree is a commodity to be sold like any other university course, with the added attractions of prestige, high student entry scores and relatively cheap provider costs.[22]

Universities have eagerly sought both to implement and to capitalise on the aims of the state by accepting the role of primary educators of new knowledge workers. Law schools are encouraged to mass-produce service-oriented professionals by offering technocratic, skills-based courses, which satisfy the admitting authorities but accord scant regard to the university's traditional *raison d'être* of dispassionate inquiry. The result is that there is a danger of returning legal education to the 'trade school' mentality of the past.[23] I have used the term 'technocentrism' to emphasise the technocratic imperative which operates to disqualify social forms of knowledge and disguise the political ends of law.[24]

While socio-legal scholarship is generally being contracted, it is nevertheless apparent that the conjunction of law and certain kinds of social knowledge, such as economics, may possess a modicum of legitimacy. Thus, the Law and Economics movement is not deemed to be 'soft' and expendable in the same way as feminist, Queer, or critical race theory.[25] Economic rationalism, because it is in vogue, justifies the ascendancy of business, management and law. These disciplines could be said to be currently 'joined at the hip' with corporate and government bureaucracies.[26]

The recent tendency in Australia to couple law schools with business schools in restructured faculties provides evidence of the close relationship. At La Trobe University, the Faculty of Social Sciences, to which the School of Law and Legal Studies formerly belonged, became a Faculty of Law and Management to signify the market turn. Management, Business, Hospitality and Tourism were deemed to be more appropriate partners within a mega-faculty than Sociology and Politics, which attested to the School's association with the broader understanding of socio-legal scholarship.[27] Similar restructurings around law have occurred in many other universities. Combined degree courses in Business and Law, which are becoming increasingly popular, also help to entrench the idea that the relationship between them is 'natural'.

Law schools will be further impoverished by academics teaching and researching only in those areas adjudged by administrators to be ''for the good of the institution', or in other words teaching and research which will bring in the dollars'.[28] As the cost of research is shifted to business, funded research is more than likely to be restricted to consultancies with their instrumental ends.

Law schools are in danger of becoming pale carbon copies of each other as they slough off any academic distinctiveness they might have developed over the last two or three decades. A similar list of subjects, including contract, property, tort and corporate law, has long tended to comprise the universal 'core' curriculum, subjects which are primarily designed to facilitate market interests and protect property interests.[29] Blandness and an uncritical stance typify the teaching of this cluster of subjects.[30] The predilection in favour of the market is highlighted by a debate held by the Victorian Council of Legal Education in 1990 as to whether company law or family law should be made compulsory for the purposes of admission. Perhaps unsurprisingly, company law was deemed to be of greater significance.[31] The development of the Australian Uniform Admission Rules in 1994, which mandated proficiency in 11 areas of knowledge, included company law. These areas of knowledge, which constitute the 'core' curriculum,[32] evince a remarkable degree of similarity throughout both the common law and civil law worlds.

Twining refers to the propensity for conformism in law schools as the 'football league syndrome'. With particular reference to American law schools, he suggests that they tend to behave 'as if they are all playing exactly the same game in a single hierarchically organized league'.[33] Pursuit of a new path is viewed not only as radical, but as potentially damaging for a school's graduates in the labour market. The new areas of critical legal scholarship, which made a tentative appearance as optional subjects during the 1970s, 1980s and 1990s are already beginning to disappear. Legal education is reverting to an emphasis on technocratic skills, or how best to serve one's (corporate) client. Accordingly, law school hiring policies everywhere are privileging business law, including international business law, intellectual property and information technology. They are also sloughing off critical, contextual approaches in favour of more practical skills.

What, then, one may ask, is the justification for continuing to teach law in a university? Again, the answer is functional, not academic. The disciplines of business and law generate university income in ways not possible for the humanities. Marginson noted that more than 70% of domestic full-fee paying university places in Australia were in business or law.[34] Commodification in accordance with the user-pays principle of neo-liberalism almost inevitably results in a lowest common denominator approach. The University of Melbourne is offering a two-year law degree (with the American nomenclature of a JD (Juris Doctor)), available to graduates for A$72,000. What is the effect on the law degree of the reduction in time from what is normally a three to five-year program to a two-year program? A focus on credentialism, designed to facilitate new knowledge work, as well as generate income, necessarily renders critical, interdisciplinary and theoretical content marginal. A critical, or even a liberal, legal education is not the concern of managers.[35] Minimalist skills-oriented courses are favoured to attract 'customers' into a university environment where income generation is the primary aim, and where the advancement of knowledge, intellectual rigour, public good, the enrichment of youth, and social service are incidental.[36] Competition policy and benchmarking operate to discourage diversity in law — despite the rhetoric of 'market niches'. If one law school can satisfy both the professional admission and the degree requirements in two years for paying customers, why would other law schools bother to retain three or four or five-year programs?

Undeniably, the fear of unemployment faced by young people was unknown in the post-War boom years. Technological displacement and economic instability have produced a sense of permanent insecurity. Universities play upon such fears through their advertising, which promises a secure future through credentialism in a *professional* program. It is the 'use value' of the knowledge that is all important, not thinking critically about that knowledge,

which is regarded as a waste of time. The commodification of legal education has endowed students with considerable power to shape the law curriculum via the market:

> Market-minded law students, as customers, can be expected to demand a greater say over content, ideology, and pedagogy. Socio-legal scholars and courses, which are already scarce on the ground within very traditional law schools, would be under particular threat.[37]

The market also socialises students in particular ways — not for humane and ethical legal practice, but for a future in corporate law firms where they service the needs of corporate clients as good technocratic lawyers.

Ironically, most law schools and legal academics themselves are anxious to shake off the 'trade school' image of the past and are ambivalent about accepting the new role envisaged for them. Indeed, the pressures to restructure have been actively resisted by some law schools which, in the case of Waikato in New Zealand, culminated in legal action against the University.[38] In that case, the restructuring proposed by the Vice-Chancellor included the amalgamation of the Schools of Law and Management. Proceedings relating to the adequacy of consultation were initiated by the Staff Association, a Professor of Maori Studies and the Law Dean. The Vice-Chancellor initially sought to argue that the restructuring was an administrative, not an academic matter, but conceded that moving Law into a School of Law and Management did possess an academic rationale: 'It rests, he said, on a view that *"law" is moving in the direction of the kinds of matters which are taught in management schools* [my italics].' The Vice-Chancellor's evidence is illuminating as an express statement of what is, or ought to be occurring, in legal education. Nevertheless, the New Zealand High Court found that the Vice-Chancellor had acted beyond power; he had no right to reduce the number of schools from seven to four without input from the academic board.

Universities hope for financial benefit, in addition to course fees, from the conjunction of law and business. They hope for generous donations, such as corporate Chair endowments but, as Connie Backhouse asks, will Chairs in Business Law swamp Chairs in Poverty Law?[39] Of course, they will. The occasional law firm might wish to have its name attached to a Chair which advertises its altruism, but this is likely to be rare. The suggestion is that teachers of poverty law, socio-legal scholars, feminist scholars, and others engaged in non-business fields are 'asset strippers — taking out their pay but not bringing in resources'.[40] While business law academics do not automatically generate income, it is assumed that they have the capacity to do so because their associates are more likely to be the rich than the poor.

Even if endowments are secured from private corporations, there are traps. In *Bernard Marks v CCH Australia Limited and the University of Melbourne*,[41] the incumbent of the Chair instituted legal action following the withdrawal of funding. This case hints at the danger of moving away from an independent or quasi-independent position in regard to funding. What scope is there to interrogate the nexus between law and justice when one's appointment is contingent on the good graces of a benefactor whose business practices might be under the microscope? An intimate relationship between the legal academy and business must necessarily produce a particular kind of legal knowledge.

Conclusion

The neoliberal imperative in favour of economic rationalism and the privatisation of public goods has caused the state to withdraw financial support from higher education, leaving universities to the vagaries of the marketplace. The creation of uncertainty in the academy is imbricated with the utilitarian desire for skilled technocrats, or new knowledge workers, of whom both legal academics and lawyers are key examples. The assault on universities, so far as their traditional role is concerned, confirms the ideological sub-text. This theory is supported by the current undermining of interdisciplinary approaches to law, particularly those which invoke the critical insights of the humanities and the social sciences. I have suggested that competition policy legitimates the disregard for independent intellectual inquiry through the privileging of a shallow conformity which serves the market and the prevailing neo-liberal political economy.

While the university, in the sense of the disinterested pursuit of scholarship, might be in disarray, training institutions, or trade schools, with their unequivocal functionalism, are in the ascendancy. A concerted push by the state to break down the division between the academic and the vocational is apparent from recent political developments.[42] In 1988, Education Minister John Dawkins sought to do away with the binary system in higher education. Colleges of Advanced Education, formerly the Cinderellas of higher education, became universities under sweeping reforms. However, the public purse could no longer sustain full funding of 36 universities, particularly if they all persisted with a *laissez-faire* approach to teaching and research; these institutions had to be reined in and made to serve the state. The end of the binary system in Australian higher education acted as the catalyst for the realisation of Lyotard's black vision of knowledge as commodity.

As Jane Kelsey points out, 'Market-friendly sectors of the universities will thrive, while the non-commercial wither and die'.[43] Many academics accept that the best way to protect themselves and their schools is to accommodate the market message, the leitmotif of the early 21st century. 'Do nothing' universities are told that they will not survive, for governments will not bail them out. A return to the past is not possible, so little is to be gained from nostalgia, although the hollowness of the excellence rhetoric is likely to be manifest in a decade. Grey institutions will contribute to the greying of the state and its eventual decline in favour of global alliances. Legal education is undoubtedly in crisis, although I am mindful of Hillis Miller's observation that 'crisis' may not be the right word as it suggests that recuperation is possible, but one cannot recover from a condition that is irreversible.[44] We are already approximating the realisation of a Lyotardian vision of impoverished, anti-intellectual, and bureaucratised universities in which academics are expected to generate their own salaries, particularly through contract research, with its predictable outcomes.[45] A few Internet providers of 'core' law courses will be franchised throughout the world with standardised quality controls for tutorials and examinations. A global chain of McDonalds' Law Schools, teaching lowest common denominator courses in order to produce docile knowledge workers, comports with Lyotard's prognosis.

Ever since law for practice has been taught in the university, it has been contentious. There has never been unanimity about what are the elements of the law curriculum, the canonical legal texts or whether law

qualifies as a humanity or not. Today, it is not just the discipline of law that is intellectually riven, for there is no longer a *uni*-versity committed to a common cultural purpose. The technological revolution, globalisation and postmodernism, as well as corporatisation and commodification, have thoroughly disrupted the idea of the universal in the university.

However, academic passion for ideas can never be entirely eradicated, despite management's wishful thinking. Legal academics will continue to display courage in withstanding the depredations of corporatisation so that at least small critical spaces are safeguarded for students in which to envision the possibility of justice. It is just that without a legitimate space for socio-legal scholarship, it has become so much more difficult to do so.

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