Essay

Making Respected Gentlemen out of Law Professors. A Commentary on Albert Venn Dicey, Can English Law Be Taught at the Universities?[1]

By David Sugarman

One striking difference between the English and Continental European legal traditions is that English legal education has been organised and controlled by the legal profession, rather than universities. Until the late twentieth century, most English lawyers, and the vast majority of England's higher judiciary, learnt their law as apprentice-lawyers in practice, as a consequence of the legal professions' examination requirements[2], rather than at university.

While Civil Law (Roman Law) was taught at the Universities of Oxford and Cambridge from the thirteenth century onwards, the Common Law was taught at the Inns of Court in London by legal practitioners. The Inns, which today are the institutional home of the Bar, provided a relatively informal system of training for barristers, solicitors and attorneys, from medieval times to the late seventeenth century. Thereafter, such education as was provided by the Inns died out, and professional training for barristers and solicitors alike, was very largely dependent on apprenticeship.

Education in English (common) law emerged remarkably late. The first university professorship in English law – the Vinerian Chair at Oxford – was established in 1758. Its first incumbent was William Blackstone, and his published lectures rapidly became the pre-eminent commentary on the Common Law. Despite Blackstone's success, university legal education at Oxford failed to flourish. By the 1840s there were still only two law professors at Oxford: one of whom offered no courses, and the other – the Chair of Canon Law – which remained unfilled. The stories at Cambridge and London were similar. Cambridge created its first professorship in English Law in 1800; however, for much for the nineteenth century legal education at Cambridge struggled to become established. Professorships in law were created at the new University College in London in the 1820s, and at King's College in 1831; nevertheless, as in Oxford and Cambridge, the number of students and faculty remained small. From the 1850s onwards, the number of university law schools gradually increased. By 1909 there were eight law faculties in England and Wales. Yet the numbers of faculty, students, and degree courses remained relatively small. Meanwhile, more formalised training for lawyers was gradually introduced by the legal profession in association with the introduction and development of examination requirements from the 1860s onwards.

Intellectually, the position of law within the university was highly contested. Significant elements within the legal profession were hostile to academic law and those lawyers who graduated from university, especially barristers, tended not to study law. Scholars in other disciplines were sceptical about the potential of law to contribute to

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1 Essay on the source: Albert Venn Dicey: Can English Law be Taught at the Universities? (1883).

2 These examination requirements were gradually introduced from the 1860s onwards.

academia. Legal practitioners and academics in other disciplines tended to regard law as a practical subject, like plumbing, and best learnt in practice. Law schools were frequently regarded as intellectually inferior to the better established disciplines within the university firmament, such as classics, mathematics and science.

It was this collective distain for university legal education that Albert Venn Dicey (1835–1922) confronted in his inaugural lecture as the Vinerian Professor of Law at the University of Oxford, entitled *Can English Law Be Taught at the University?* (1883).[3] Addressing legal practitioners, judges and members of the university community, Dicey sought to persuade them that university legal education had something special and worthwhile for the legal community and universities, something above and beyond that which could be attained through apprenticeship and professional exams. In establishing a competence that was both useful to the legal community and sufficiently scholarly to merit a place in the university sector, without being unduly threatening, the principal role carved out by the new professional law professors was the exposition, simplification and synthesis of the leading cases of the Common Law, together with the core principles of which the leading cases were illustrative. University legal education would develop the notion of law as principled and coherent, demonstrate that the apparent chaos of the law was in fact grounded in a small number of general principles, and formulate and exposit these general principles by connecting particular cases to general principles and vice-versa.

Persuading the legal profession and the universities to acknowledge the place of university legal education and scholarship called for tact, circumspection and a sense of balance. The legitimacy of the university law school was, of course, asserted, but in a way that was congruent with the established provinces of the lawyer and the professor. Indeed, the rhetorical strategies available to Dicey were undoubtedly limited. For centuries, the legal profession had managed without university legal education. Legal practitioners had exhibited little intellectual interest in law. Moreover, Dicey, and the legal community of which he was a member, were not revolutionaries. Thus, Dicey sought not to monopolise legal education and scholarship, but merely to share it with the legal profession (para. 21). Nonetheless, the division of labour espoused by Dicey represented a radical departure from the English tradition of legal education and scholarship.[4]

What, then, was yielded to the sole competence of the legal profession? Dicey conceded that practitioners were the masters of how the law actually operated in practice, and of practical skills, such as drafting documents and arguing cases (paras. 3 and 4).

While Dicey acknowledged the value of apprenticeship ("reading in chambers"), he laid out in much greater detail its anomalies and defects (paras. 2, 5, 6, and 7). Dicey articulated why law can and should be taught in universities by reference to the sole competence of university legal education and professors of law. He argued that only the

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3 See, Dicey, Albert Venn, Can English Law be Taught at the Universities? An inaugural lecture delivered at All Souls College, Oxford, 21 April 1883 by Albert Venn Dicey to mark his election as Vinerian Professor of English Law at the University of Oxford, London 1883. Dicey exercised a significant influence on English legal education and scholarship. See, Cosgrove, Richard A., The Rule of Law. Albert Venn Dicey, Victorian Jurist, London 1980.

4 Dicey took a keen interest in contemporary politics, and until the 1880s he embraced orthodox Liberalism and law reform. The conversion of William Gladstone (the leader of the Liberal Party) to home rule for Ireland, the increasing power of the working classes and a fear of socialism turned Dicey into a Conservative in all but name.

new university law teachers could teach law in a logical and coherent manner, enabling students to gain a firm grounding in legal principles, and that legal academics would create a new and important legal literature (paras. 8, 9, 10, 11, 16).

Thus, the new professional jurist would simplify, rationalise and codify the law, providing a guide to and a warranty of "legal authority". Comparative experience – in France, Germany, Scotland, the United States, as well as England – demonstrated that the published lectures of university law professors had significantly shaped the form and content of the law, and that law professors were the *de facto* codifiers of modern legal systems. It was in this context that the casebook and treatise (textbook) became the pre-eminent forms of legal scholarship in the United States and England respectively. Dicey celebrated the creative and legislative role of jurists, as well as the importance of the new juristic scholarship (paras. 12, 13, 14, 15, 17, 18, 19).

Dicey's measured denunciation of contemporary legal education followed the charges already levelled in parliamentary reports and debates as well as newspapers and magazines, notably the highly critical government reports of 1846 and 1854 – charges that almost invariably emphasised the invidious comparison between legal education in England, and that in Continental Europe and the United States. Thus, Dicey's lecture drew upon a pre-existing linguistic repertoire and rhetoric to underpin his arguments. From a comparative perspective, Dicey's inaugural lecture was one of several such clarion calls. It was part of a transnational movement, associated with the period circa 1850–1914, that sought to establish a particular form of modern university law school and of liberal legal science that became the "orthodoxy" of modern legal education and scholarship. The project entailed creating a significantly enhanced province for the university law teacher, while sustaining a mode of legal education primarily concerned with the teaching of "black-letter" law and the teaching of the student to "think like a lawyer" and attain an education in "legal science". It is a story of a small number of full-time, elite jurists in a small number of elite institutions in Continental Europe, England and the United States, constituting, transmitting and legitimating university-based legal education and scholarship principally for the elite who it was envisaged would become the legal establishment.

Consistent with this cosmopolitan project, Dicey celebrated those foreign jurists and institutions that he treated as exemplars for the English – including Pothier (French); Savigny (German); Kent, Story and Langdell (American) and the Harvard Law School (US) – as well as role models closer to home, such as the authors of the first systematic treatment of Scottish and English law, Lord Kames and Sir William Blackstone respectively, both of whom were jurists *and* judges (paras. 17, 18, 19).

The German professoriate, German private law science and the German university law school were influential role models in England, and, in particular, the United States. Savigny epitomised, perhaps more than anyone, the rigour, scientific pretensions, importance and status to which the new professional jurists, such as Dicey, aspired.[5] Indeed, Dicey's inaugural echoes Savigny's important manifesto on the importance of jurists with respect to the clarification and systematisation of the law.[6]

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5 Reimann, Mathias (ed.), The Reception of Continental Ideas in the Common Law World 1820–1920, Berlin 1993.

6 Von Savigny, Friedrich Carl, Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft, Heidelberg ^{2}1828 (English translation: Of the Vocation of our Age for Legislation and Jurisprudence, translated from the German by Abraham Hayward, London 1831).

Dicey pointed to the fact that elsewhere, the relationship between the legal profession and university legal education was harmonious, and that in countries, such as the United States, some of the foremost judges were also jurists, law professors and the authors of the leading legal texts in their fields. The superior status enjoyed by law professors abroad, especially the ease with which law professors in the United States might be appointed to the highest courts of the land, was in stark contrast to the inferior status of jurists in England together with the mixture of condescension and contempt that law professors frequently encountered from legal practitioners. It was common parlance within the legal community that those who taught law did so because they were unable to make a successful career in legal practice.

Dicey was obsessed with the inferior status of university law teachers relative to the established professions, and in particular, the legal elite. His recurrent discontent with the world of legal practice was personal: originally, Dicey – in the hope that it would provide a springboard into the world of politics – had sought and failed to establish a career at the Bar. His failure to win distinction in legal practice was a significant context for understanding his transition from would-be barrister-politician and senior judge to Dicey the Vinerian Professor of Law. On the one hand, Dicey's dissatisfaction with his experience at the Bar, and the Bar as an institution, was evident in his earliest publications[7] where he attacked the Bar's culture of patronage, deference and restrictive practices – criticisms that provide part of the background to his inaugural lecture. On the other hand, Dicey never ceased aspiring to membership of the imperial class to which elite legal practitioners and senior judges belonged. Dicey's inaugural lecture came close to advocating what would then have seemed heresy to many – namely, that the qualities and virtues of the new university law teachers were such that in class terms they merited parity with elite legal practitioners. In effect, Dicey argued that the important work of legal academics would be thwarted until they were released from the prison of their lower middle-class status. Thus, Dicey set out to transform both himself and university law teachers from upstart opportunists to successful gentleman professionals. Such efforts are evidence of politics articulated by class and of the cultural strains in English social relationships. Dicey's life and work were rooted in mid-Victorian values and the politics of class. He was a jurist concerned with appearances and status. Dicey's career is illustrative of the hidden strengths of such considerations, and the power they exerted on his creative mentality. It is one of the most significant and still least acknowledged keys to Dicey's complexities.[8]

Dicey's struggle to accommodate legal practitioners, and to gain admittance to the upper echelons of the profession, came at a cost. By defining the province of the university law school in such narrowly positivistic terms, and ceding "reality" to the exclusive competence of legal practitioners, Dicey's inaugural lecture embodied and ratified a conception of legal education and scholarship that does not take full account of the institutional, practical, moral, political and historical foundations of law. Although Dicey was among a generation of university law teachers who ultimately fostered a closer *rapport* between university legal education and practising lawyers, he was not interested in bringing other disciplines – such as history, politics, sociology and anthropology – into the law school.

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7 Dicey, Albert Venn, Legal Etiquette, in: Fortnightly Review 8 (1867), pp. 169–179.

8 It also points to the value of understanding Dicey's inaugural lecture through the lenses of contemporary middle-class politics and professional turf wars.

Law has become predominantly a profession of law graduates. While the Diceyan orthodoxy remains at the heart of the legal education enterprise[9], university law schools have not only grown considerably, but the approach taken to legal education and scholarship has broadened enormously.[10] The discipline of Law has become increasingly integrated within the academy. In terms of professional standing and confidence, law teachers at the beginning of the twenty-first century have a far more equal relationship with practising lawyers. Yet even today there are a relatively small, but influential, number of lawyers who argue that non-law graduates tend to produce the best lawyers. As in Dicey's time, the relationship between legal academics and practitioners continues to be a site of struggle and contestation.

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9 Collier, Richard, We're All Socio-legal Now?, in: The Sydney Law Review (2005) pp. 503–536; Bartie, Susan, The Lingering Core of Legal Scholarship, in: Legal Studies 30 (2010), pp. 345–369.

10 Twining, William, Blackstone's Tower: The English Law School, London 1994; Cownie, Fiona, Legal Academics: Culture and Identities, Oxford 2004; Cownie, Fiona; Cocks, Raymond, 'A Great and Noble Occupation!': The History of The Society of Legal Scholars, Oxford 2009.