

# SOME THOUGHTS ON LEGAL EDUCATION

*Sir Geoffrey Palmer QC\**

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*As well as holding a practicing certificate for over 50 years, Sir Geoffrey Palmer has spent years teaching law, both in the United States and in New Zealand. Here, he reflects on his experiences of the law as a student, a practitioner and as a teacher and makes some observations about what this means for the discipline of law. The address concludes with the thought that what it means to be learned in the law is changing, and legal education has to change with it. Address delivered at the Australian Law Teachers Association (ALTA) 2016 Conference in Wellington on 7 July 2016.*

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Thank you for the honour of Life Membership you have bestowed on me. I appreciate it.

The teaching of law is an honourable estate to be respected and valued. Legal education is rather more difficult to carry out than those who have not tried it may think. Law teaching offers endless fascination and is the best way to keep up to date, master a field and learn from young minds. I have been asked to provide an inspirational address, not the sort of thing lawyers or law teachers customarily deal in. The articulated reason for this invitation was that I had enjoyed a worthwhile legal career. For me, that career has been interesting and fulfilling. In that respect, I owe the law a great deal. I suggest to you that all lawyers should reinvent themselves from time to time to avoid becoming stale and bored. Otherwise, they cease to think creatively. There is a serious point here. There are many different types of lawyers doing many different things and taking on many different roles. Fragmentation in this age of legal complexity is inevitable. But it also offers many opportunities.

A word about politics. Political experience provides the richest education available about how a country really works. More lawyers should go into politics and try to make our country a better place. Politics is an unattractive career. It can be exceedingly unpleasant for one's family. But it really is the only way to ensure big policy changes occur. Judges can make the common law and change the law in important ways, but they cannot paint on a broad policy canvas. The legislature is more important than the courts, vital as their role is. Too many lawyers have too comfortable a life to take the plunge into politics. More of them should.

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I have always thought that being a law professor was something of a modern aristocratic existence, at least in the United States. The standard teaching load was six hours a week. Faculty members could research and write on any topic they chose. For three months in the summer, you could do anything you liked. And the pay was better than for a state Supreme Court Justice. Good work if you can get it. But the halcyon days for American law schools may now be over. Applications have fallen even at the elite schools.<sup>1</sup> One student unsuccessfully sued her law school because when she graduated she could not get a job. The market for United States law graduates is tough. Students graduate with massive debt and cannot find legal jobs.<sup>2</sup> Richard Posner has written an interesting and recent book on the divergent paths of the academy and the judiciary in the United States.<sup>3</sup> He calls for much change. Some of the same divergences may be at work in Australasia.

Law as a university discipline suffers from some infirmities. In the home of the common law, England, for many years the Inns of Court, not the universities, were the main providers of legal education. Exquisite methods of networking exist in those Inns as I found when being made a Master of the Bench of the Middle Temple earlier this year.<sup>4</sup> English barristers who went to university often did not read law. In New Zealand, the universities became established quite early as the main providers of legal education. It is important for reasons relating to quality that law be treated as an academic discipline and the universities should bear the main burden of legal education.

What are the essential characteristics of "law" that justifies it being treated as a discrete academic discipline, such as one of the humanities or the sciences? Should it better be regarded as a craft or trade? Are lawyers, as William Twining famously put it, more like Pericles or the plumber?<sup>5</sup> It has always seemed to me that it has to be something of both, depending on the circumstances.

Lawyering is a profession. Entry to the profession is controlled by law and highly regulated. Lawyers enjoy a protected status and tend to earn high incomes. But a university degree in most countries does not entitle the recipient to practice law. Nor does it in New Zealand. The Council of Legal Education lays down the requirements that students must satisfy if they are to be admitted as

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- 1 Natalie Kitroeff "The best law schools are attracting fewer students" *Bloomberg* (online ed, New York, 27 January 2016).
  - 2 Noam Scheiber "An Expensive Law Degree and No Place to use it" *New York Times* (online ed, New York, 17 June 2016).
  - 3 Richard A Posner *Divergent Paths: The Academy and the Judiciary* (Harvard University Press, Cambridge, 2016). While the gap in New Zealand is not as marked as Posner paints it, there are trends in that direction.
  - 4 For a skillful depiction of that legal culture, see the novel of Ian McEwan *The Children Act* (Vintage Books, London, 2014).
  - 5 William Twining "Pericles and the Plumber" (1967) 83 LQR 396. See also his "Pericles Regained" (1998) 1 Legal Ethics 131.

barristers and solicitors. They must take certain stipulated subjects in their LLB and they must undergo a period of professional training before they can be admitted.

When I began the study of law in 1960, many of the students were part-time and had jobs as law clerks in law firms. In those days, every legal subject in the LLB was compulsory. Law was not then regarded as being particularly desirable a field of study and arts and science students used to look down their noses at the law and accounting students. Law did not have the pulling power for good students that it has today. There was, however, great value in the learning on the job or apprenticeship that the position of law clerk then provided. The day I was admitted, I defended a careless driving case in the Magistrate's Court because I knew how to do it. We common law clerks hung around the courts constantly. The academic education today is more rigorous than it was when I started. There exists the LLB Honours programme now. Teaching in that is as good as it gets.

Most law students seem to do double degrees, a trend I applaud. But I have always thought it would be better if law were a graduate degree. Lawyers have to know how to do things. They have to be able to solve disputes and advise on what the law is. They have to be operators, not theorists. The law is much more complex than it used to be and there is more of it. Not all law graduates will practice law. Nevertheless, a law faculty is a professional school that owes obligations to train people to become members of a particular profession. The universities are gatekeepers to membership of the legal profession. But every law faculty is also part of the academy and has obligations to carry out teaching and research to a standard that befits a university, not a trade school.

There are tensions here. The first question a university must ask is what are the distinct features of the discipline of the law that must be imparted to students? Legal analysis must be the most important. The essence of legal analysis is to learn how to read cases and statutes in such a way that advice can be given on the application of the law to a particular set of facts. Many building blocks go into these intellectual tasks. First must be the ability to read and write English with proficiency. I have taught in law schools in the United States where students are required to have a first degree and have taken the Law School Admission Test (LSAT), and yet large sums of money have to be expended upon them to provide remedial instruction to read and write English to the required standard. Effective oral and written communication is essential for all lawyers. Secondly, there must be exposure to legal doctrine in core areas, coupled with ability to carry out legal research and write legal opinions. Context needs to be provided to the legal doctrine so students can understand the social, political, economic, historical and philosophical background to the law being studied. Lawyers need to understand the legislative process and how Parliament works, how public administration occurs and how the courts and judicial processes work. In my experience, very few New Zealand lawyers have the necessary knowledge about Parliament and government. Some exposure to legal theory is also necessary. I have always thought jurisprudence should be a compulsory course and international law as well. But I do not think faculty research should concentrate itself upon abstruse and recondite theory that seldom finds application in the real world. There is a trend in that direction.

The most effective programme I ever saw for teaching the basic skills that all lawyers need was pioneered at the University of Iowa at the time when I was a young faculty member. The small group programme meant that every student studied one of the basic subjects such as contract, torts, crimes or property in a small group of about 15 students with the same instructor both semesters. Written exercises were regularly scheduled, starting with extracting the ratio decidendi from a case, then synthesising a line of cases, writing legal opinions on fact problems, right through to authoring a brief written in accordance with the Federal Rules of Civil Procedure and everything in between. Oral arguments were also part of the programme. After each piece of written work, the student had an individual conference with the instructor. The Faculty provided money to have a couple of social functions with the students. There was no way a student could emerge from this system without proficiency in the fundamental skills of legal analysis. Returning to New Zealand, I managed to get the programme adopted at Victoria and it flourished for a number of years. But at both Iowa and Victoria, in the end, the programme came to end. It involved very heavy resources and the teaching of it was much more burdensome to faculty members than large class teaching. There is a lesson here. Large numbers of students will tend to reduce the quality of the educational experience and lower the standard of the graduates. There should also be scope in legal education for classroom teaching of a wide variety of lawyering skills such as negotiation, interviewing, fact investigation, drafting, mediation and advocacy. Lawyers have to learn how to operate in difficult environments where there is conflict. Learning such things in a university is not easy. The most important ingredient in all of that is judgement. Bright people sometimes lack it. It may be summed up as involving:<sup>6</sup>

... more than intuition or deduction; it is a process of deliberation that combines empathy and detachment in a harmonious balance; it includes an ability to imagine a range of unknown possibilities and to reflect on them coolly and calmly.

In New Zealand, which is a rather remote jurisdiction in international terms, there is always a temptation to concentrate on teaching the law as it now is. The mistake in this is that the law changes very rapidly. Law exams should not be memory tests of what the law is.

The single biggest requirement for being a proficient lawyer is restless and endless curiosity. Many different fields of specialised topics need to be mastered at various times in order to deal with disputes that arise. Lawyers encounter a much wider range of complex issues than they did formerly. Lawyers need to continue reading the professional literature throughout their careers. In many ways, law is the last of the general disciplines. But legal education tends to be too narrow and too thin. So far as I can see, the tasks of legal analysis are carried out relatively well in the New Zealand academy. But I do think students and faculty both prefer the narratives and stories of cases to the hard graft and dealing with big statutes, understanding and applying them to complex problems. As I am fond of

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6 Twining "Pericles Regained", above n 5, at 137.

saying, statutes are not merely king, they are Emperor. The traditional common law suspicion of statutes needs to be extirpated from the academy.

But here is a more serious issue.

Law teaching and the curriculum in New Zealand have not changed much in 25 years. However, the world outside the academy has changed a great deal. Could it be that law faculties are backward looking and lacking in innovation in teaching? Are the incentives to encourage research coming at the price of reduced commitment to teaching? I am a great believer that legal education needs to be stirred up from time to time in order to keep the faculty on their toes and so the opportunity for fresh thought emerges. I taught for one dean who thought the curriculum should be turned upside down every 10 years.

Lawyers are not much good at policy in my experience and yet policy lies at the heart of all legal reform. Lawyers need some policy skills. It is necessary to recognise what Richard Posner called the decline of law as an autonomous discipline.<sup>7</sup> Economists, statisticians, accountants, policy analysts, social scientists and scientists are frequently more prominent in changing the law than lawyers are. It has taken a long time for empirical analysis to reach the law, but it now must be recognised that the utility of many legal doctrines and statutes has never been tested against what happens in fact in the real world. Yet, that is where the law must live in the future.

Christopher Columbus Langdell pioneered the case method at Harvard and argued that law was a science when it palpably was not, at least in the methodology he adopted. This was the system that produced Professor Kingsfield in the television programme "The Paper Chase" that people of my generation remember well. I have always used the method of Socratic dialogue in my own teaching. It seems clear to me that modern technology threatens to render lecturing redundant. One of the formative influences in my education was a Ford Foundation sponsored summer school in the United States for law professors called "Social Science Research Methods and Legal Education". Many of the social science methodologies have application to legal subjects and can throw light on:

- the actual performance of existing legal doctrines and statutes;
- unforeseen consequences of changes;
- the attitudes of the public toward legal institutions and practices; and
- whether the law on the ground resembles the theories upon which it is based.

When I was a law student at the University of Chicago nearly 50 years ago, there were economists and other social scientists in the law school. Anti-trust was taught one day by a law professor, the next by an economist. Hans Zeisel in partnership with Harry Kalven Jr brought the techniques of social

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7 Richard A Posner "The Decline of Law as an Autonomous Discipline: 1962-1987" (1987) 100 Harv L Rev 761.

science to throw light upon the American jury.<sup>8</sup> While we have done some of this in New Zealand, and I single out my former colleague at the Law Commission in this respect, Dr Warren Young, New Zealand has been slow to use the opportunities available in New Zealand to perfect and refine our legal institutions using evidence. Legal research has many more sophisticated tools at its disposal than decided cases and they need to be employed. I think some of these techniques must become subjects in the curriculum. Lawyers need to understand such subjects as survey research and other social science methods. Public law would benefit from political scientists involved in teaching and research in the law schools. Commercial law and competition law would benefit from economic analysis being taught. Our own legal history should be taught more than it is. We still await a constitutional history of New Zealand. It is my belief that what it means to be learned in the law is changing and legal education has to change with it.

Forgive me for saying this, but legal education in New Zealand seems to be caught in a rut. It is not sufficiently forward looking. Like most legal institutions, it faces the past. I wonder whether law faculties are too siloed from other academic disciplines within the universities. I worry too about the Performance-Based Research Fund (PBRF). Research is essential and necessary. But the PBRF seems to be slanted against researching and publishing on New Zealand subjects since New Zealand is a small jurisdiction and not of great interest to international journals. I also feel that the New Zealand legal academy is somehow too remote from both the legal profession and the developments in public policy that take place in New Zealand. Too few academics have anything relevant to contribute concerning contemporary developments. New Zealand universities accept a role as "critic and conscience of society".<sup>9</sup> The law protects academic freedom by giving staff and students freedom to "put forward new ideas and to state controversial or unpopular opinions".<sup>10</sup> It would be good to have some analysis from within the academy about what all this means. I have held a practicing certificate for more than 50 years in New Zealand, despite being outside New Zealand for significant periods. I do believe law teachers have to know how to practice law if they are to be effective teachers. I ask the question without answering it: how many of them have this experience?

The digital revolution promises more consequences for the law and the legal profession than have been visited upon it so far. Some say that the demand for legal services will drop as a result and legal outcomes will be machine generated. There is little doubt that the cost of lawyers is too high and far too many people are now representing themselves in court because they cannot afford to pay a lawyer and legal aid is not available. After 800 years, Magna Carta endures as a powerful symbol of liberty, of government under the law, of resistance to tyranny, a recognition that rulers have obligations, that justice is important and that proper legal process should be observed. Not until 1297 was Magna Carta

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8 Harry Kalven Jr and Hans Zeisel *The American Jury* (Little Brown & Co, Boston, 1966).

9 Education Act 1989, s 162(4)(a).

10 Section 161(2)(a).

officially copied into King Edward I's own collection of statutes. One provision of that version of Magna Carta remains in the law of New Zealand:<sup>11</sup>

No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

We might well ask whether New Zealand is living up to that ancient promise. New Zealand needs to take a hard look at access to justice in the civil sphere.

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11 Imperial Laws Application Act 1988, s 3 and sch 1.

