MISSING THE POINT? LAW, FUNCTIONALISM AND LEGAL EDUCATION IN NEW ZEALAND

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I. INTRODUCTION

Legal education in New Zealand/Aotearoa has always placed significant emphasis on the practice of law as a profession rather than its study as a scientific discipline. Like its English counterpart, the New Zealand system of legal education developed from an "apprenticeship" model. This model saw academic study take place in conjunction with practical training, if such study took place at all.[1] It is to New Zealand's credit that it never slavishly adopted the English approach, in particular demanding university study as part of a legal education early in its development.[2] Yet, despite this early adoption of an academic component, the development of law as an autonomous university discipline was to occur much later in New Zealand than in its English parent.[3] In fact it was not until the 1950s that the South Island Law Faculties acquired full-time professorial staff.[4] Even after the establishment of such positions, law remained a subject to be undertaken part-time as part of a practical education until the 1960s.

The legacy of this practical focus continues to influence the teaching of law in New Zealand and acts as the historical backdrop to the issues discussed below. This paper argues that the dominance of practical approaches to legal education continues to influence the very parameters of the subject of law as it is taught and understood in New Zealand today. The legacy of this approach has seen the largely uncritical adoption of a "formalist" definition of law in New Zealand. This formalist approach remains so pervasive that it is often accepted without critique or comment. The practical consequence of such formal dominance is to "privilege" the formal elements of the legal system while "othering" those elements of the legal system that fall outside this category. This in turn leads to a poor understanding of the practical operation of New Zealand's legal system and fundamentally limits the ability of the system to develop in the future.

This article argues for a broader definition of law and a more holistic approach to legal education in New Zealand than has become the norm. It argues that we need to consider not only justice, but law "in the round" if academics are to both understand their own system of law and equip their students to cope with the realities of working in that system. To achieve this, it advocates the adoption of a functionalist definition of law and the incorporation of such a concept into legal education. Such an approach would enhance the understanding of law's role in New Zealand society.

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1. P Spiller, J Finn and R Boast *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) at 291.
2. Ibid.
3. RL Abel *The Legal Profession in England and Wales* (Blackwell, Oxford, 1988) at 263.
4. Spiller et al, above n 1, at 1.

This paper argues against the dominant formalist tradition in New Zealand, but it does not suggest that such approaches are universal in Aotearoa and elements of this approach are to be found in a number of individual courses and texts.[5] It is significant, for example, that a version of this article was first delivered at the University of Waikato. The choice of venue was no accident. There is no doubt that the founding commitment of Te Piringa – Faculty of Law to law in context has come closest to the delivery of some of the elements that I advocate in this paper. Although others have advocated such approaches throughout the history of legal education in New Zealand,[6] Te Piringa – Faculty of Law and the University of Waikato have come closest to putting these ideas into coherent practice. Nevertheless, they remain outliers in their approach and formalism remains the dominant paradigm within which legal education operates in New Zealand.

My own personal journey also has much to do with the approach I suggest in this paper. Although I have taught at both Te Piringa – Faculty of Law and The University of Canterbury Law School, I come originally from somewhere far removed from New Zealand. Despite the fact that I have spent more time outside Scotland than in it, it remains part of my identity and self. The fact that I have a split identity is significant to my approach to this subject. When, like myself, a person loses their roots and their turanagawaewae becomes confused, they start to question some core issues. Such questions revolve around identity and more importantly what we mean by identity. Such quests for essentialism also find their way into academic life.

Like many legal academics who work outside the systems in which they were educated, I found myself drawn inexorably to comparative law and comparative method. Such approaches demand a different approach to law and legal education than is provided in the relatively narrow context of a national legal education. They demand a more essentialist approach to our subject and fundamental questioning of long cherished assumptions. More specifically, they drive us to constantly ask what we mean by "law". The underlying argument presented in this paper is that such uncomfortable considerations must be far more fundamental to our approach to the teaching of law than is currently the case. If we are to be confident in our approach to legal education, we need a solid place to stand. I would argue that to achieve this requires greater use of the functional approach to law, of the type familiar to comparative method.

II. A Functional Approach to Legal Education

Those who have engaged in the practice of legal comparison are well aware of the difficulties that it presents. This has long been recognised by the academic discipline of comparative law. This academic subject, and the methods associated with it, recognise that such examinations beyond the comfort zone of national systems require lawyers to quickly reconsider their preconceptions regarding the concept of law. The practical reason for this is simple. Unlike most academic disciplines, there is no accepted international "language of law". A biologist can be confident that the insect being examined in country "a" is the same as the one being studied in country "b" because of the use of Latin terms. By the same token, New Zealand geologists using the Richter scale can be pretty sure it is the same Richter scale that is being used by their colleagues in Japan.

Law, by contrast, has no such universality of language. For reasons that need not detain us here, there are no simple mechanisms to ensure universal understanding across legal systems.[7]

5 G Morris *Law Alive: The New Zealand Legal System in Conext* (Oxford Univesity Press, Melbourne, 2008).

6 R McGechan "The Case Method of Teaching Law" (1953) 1 Victoria University College of Law Review at 9.

7 P De Cruz *Comparative Law in a Changing World* (3rd ed, Routledge-Cavendish, Abingdon, 2007) at 219.

Leaving aside the obvious difficulties caused by the use of different languages in different systems, the application of legal concepts is often very different. This is so even when systems share a common language and appear superficially similar. The use of identical linguistic terms does not denote reference to the same concept. Something as simple as the word "precedent", for example, has the potential to cause significant confusion. Although the term is widely used in the United States and New Zealand, such are the differences between the approaches of judges in each system to the binding nature of previous judgments, its use is open to misinterpretation by lawyers from either system studying the other.

The lack of universalism in legal language (and thus legal thought) has led comparative law to develop methods to allow meaningful comparison. For these reasons, comparative law has turned, in the main, to functional approaches to legal study. These define law, not by reference to the form of particular rules, but according to the functions that those rules attempt to perform.[8]

The most famous example of this approach was taken by Karl Llewellyn in his work on the native American Cheyenne in the 1920s.[9] Llewellyn based his oft quoted argument upon a sociological approach to law. This approach, advocated by Emile Durkheim, argues that law is a product of society. Equally, it argues that a society without law is impossible.[10] The very definition of society, according to this approach, is closely bound to the notion of law. Law, by this definition, is the set of functions that must be performed to make a society function. These are Llewellyn's famous Law Jobs, which he identified as:[11]

- Resolving the Trouble Case (Dispute Resolution)
- Channelling of Expectations (Rule Making)
- Direction (Leadership)
- The Allocation of Functions

Of course, Llewellyn's definition implies that the academic discipline of law should examine how and where such functions are delivered, however that may be. The methods of delivery are therefore irrelevant to the definition of law and the scope of legal study.[12] In fact the study of law involves the examination of the mechanisms that deliver these functions, whatever they are. Their formality or otherwise is likely to be worthy of comment, but it does not define them as law or otherwise. This functional approach to law is vital to the effective comparative study of the subject. It is by these means that an international language of law can be constructed and true comparisons made. But such an approach can pay even greater dividends if we direct it inwards, to our own society. This, of course, was Llewellyn's original point.[13]

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8 The classic, if rather simplistic, formulation of the functionalist method in Comparative Law can be found in K Zweigert and H Kotz *An Introduction to Comparative Law* (3rd ed, Oxford University Press, Oxford, 1998) at 32. A more sophisticated approach can be found in R Michaels "The Functional Method of Comparative Law" in M Reimann and R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (Oxford University Press, Oxford, 2006) at 339.

9 KN Llewellyn and EA Hoebel *The Cheyenne Way* (University of Oklahoma Press, Norman, 1941).

10 E Durkheim (translated by George Simpson) *On The Division of Labour in Society* (Collier Macmillan, New York, 1963).

11 KL Llewellyn, "The Normative, the Legal and the Law Jobs: The Problem of Juristic Method" (1940) 49 Yale Law Journal 1355.

12 S Roberts *Order and Dispute* (Penguin, London, 1979).

13 KN Llewellyn *The Bramble Bush: On Our Law and its Study* (Oceania, New York, 1951).

III. The Dominance of Formalism

Llewellyn's work is hardly new, dating back as it does to the first half of the last century. His ideas are well understood and have long been part of the standard legal curriculum across most of the developed world. For the vast majority of academics, therefore, the above brief description is hardly worthy of note.[14] Under the influence of authors such as Llewellyn most, if not all, legal academics today would claim to have moved beyond the formal "Eurocentric" definitions of law that dominated the subject in the 19th and early part of the 20th centuries.

Given this claimed rejection of formalism, it is perhaps surprising how pervasive the formal approach to legal education remains both in how law is taught in New Zealand and, by extension, how it is understood. When New Zealand law students later practise or utilise law throughout their careers (legal or otherwise) they do so through the formalist lens provided by their undergraduate education.

The dominant formalist theory in this regard remains that of HLA Hart, whose seminal text, *The Concept of Law* remains influential in New Zealand.[15] Hart's concept of law revolved around the formal usage of rules. When rules accorded to a particular formal structure, these were to be regarded as law. According to Hart's definition, for rules to be regarded as "law" required them to fit into his famous pyramidic structure, topped by a rule of recognition and supported by primary and secondary rules. Despite the fact that few students will have been exposed to Hart's work first hand, his three tiered pyramid continues to implicitly and uncritically dominate our approach to legal education. It seems accepted wisdom in New Zealand that this concept of law is the basis upon which legal education should be built. Although many of New Zealand's introductory law texts today give a brief nod to wider conceptions of law, their content remains limited by the Hartian paradigm.[16]

The evidence for such an uncritical adoption of formalism across much of the New Zealand legal academy can found by reference to the standard texts used by the core courses required by the Council of Legal Education.[17] These books, although excellent in themselves, focus heavily upon the formal law as decided in the superior courts. They teach law as seen in the courts, not how it applies to individuals in practice. For example, they teach the law of contract and its formalities, not how people interact outside the formal and how contracts are practically used in our society. Such an approach risks teaching a one-dimensional view of law.

We can see this approach more clearly if we look at one area of law as an example. In my own discipline of administrative law, the focus of most courses does not accord with the reality as experienced by individuals. The main textbook in public law, for example, gives very limited coverage outside the formal judicial process.[18] In Joseph, there is no chapter on tribunals, while the Ombudsman gets only the most cursory of nods. Even this limited coverage is couched only in terms of the office's statutory powers. This is not to criticise Joseph's work, which remains

14 See for example, J Adams and R Brownsword *Understanding Law* (2nd ed, Sweet and Maxwell, London, 1999) at 135.

15 HLA Hart *The Concept of Law* (Clarendon, Oxford, 1961).

16 See for example D Webb, K Sanders and P Scott *The New Zealand Legal System: Structures and Processes* (5th ed, LexisNexis, Wellington, 2010). An excellent book but formalist in its coverage of the legal system.

17 I have specifically avoided reference to individual texts here as my intention is not to attack individual authors but to argue for a wider approach to law teaching across the core curriculum.

18 PA Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Thomson, Wellington, 2007).

the leading text in New Zealand. The lack of recognition of such non-judicial elements in the key public law text is instead symptomatic of the general approach to the subject.

To put it rather crudely, public lawyers in New Zealand largely teach judicial review. In the year 2010, the majority of public law exams approved by the Council of Legal Education were comprised entirely, or predominantly, of case based problem questions on judicial review. According to this, admittedly anecdotal and limited sample, public law teaching appears to be focussed primarily upon the actions of the courts through the medium of judicial review. Yet such is the cost and complexity of judicial review in New Zealand that only the rich, the desperate and the insane go to court over administrative matters. Why do public lawyers spend so much time teaching it?

Further evidence of this formalist dominance can be seen in the approach taken to non-judicial remedies in the New Zealand legal curriculum as whole. These are largely placed in special optional boxes outside the core subjects. These can have different names such as "dispute resolution" or "alternative remedies". Whatever the particular name utilised, the point to note is that they are always "othered" and treated as something outside the "law". Rarely are they even regarded as a core subject (Waikato seems to be the exception to this general rule) and where they exist at all they are often regarded as a quaint alternative to the standard optional subjects. The most damning example of this approach can be seen in relation to Māori customary law. Due to the dominance of Eurocentric formalism, tikanga is treated as separate entity from ture (and implicitly seen as inferior), if it is taught at all. In a country where such law is fundamental to understanding of our bicultural state such an educational approach appears deeply flawed.

IV. Functionalism and Legal Education in New Zealand

It is the belief of this author that when a more coherent concept of law is utilised, the selective nature of New Zealand's legal education becomes more evident. When a functional lens is properly directed against New Zealand's domestic legal system, perceptions of both the nature of law and its role within New Zealand society change dramatically.

To illustrate this argument, let us take a simple example. According to the law jobs theory, the second job of a legal system is to resolve the trouble case or, to put it more prosaically, resolve disputes. To properly understand the scope of law under this concept, we must answer the simple question, how is this law job undertaken in New Zealand? The answer is both multi-faceted and complex, but a brief moment's thought leads us to a wide range of possibilities. Disputes in New Zealand can be solved through negotiation, tribunals, ombudsmen, on marae, through statutory (or voluntary) watchdogs, internal disputes mechanisms and the judicial system (amongst others). The point to be made here is that the formal court process is only one element of the wider legal system. It is clearly an important one and may, depending upon the nature of the dispute, provide the framework for all the others, but it is not the whole story. Indeed, from the viewpoint of the disputee, courts are peripheral to the resolution of disputes in the vast majority of cases.

Yet, despite the fact that most disputes get nowhere near a court, this is where the bulk of our consideration of dispute resolution at law school focusses. Students can go through an entire law degree with little or no exposure to the non-judicial elements of the legal system mentioned above. Instead, students are served a diet of court decisions and even these are limited to the higher appellate courts. First year students might be briefly exposed to the lower courts in the early years of their education but, after a worthy comment on their importance, the next five years are

then confined to teaching about appeal court cases. To paraphrase Adams and Brownsword, many legal academics appear to have contracted "appeal courtitis".[19]

When the legal curriculum does focus on other elements of the legal system it tends to teach them as alternatives, outside the mainstream of "law", relegating them to the educational back blocks of optional courses, subject to the fickle winds of student preference, assuming that they are taught at all. These elements of our legal system are "othered" and thus de-privileged in the eyes of our students. In the fullness of time they potentially suffer the same fate in the wider world as these same students make their way in society in general and the legal profession in particular.

V. Why Functionalism Matters

Having explored the dominance of formalism in New Zealand and its impact on legal education, the reader may be forgiven for asking why such a state of affairs should concern us. Why should academics move beyond their formal limits and embrace a more functional concept of law? The answer to this is both simple and, I believe, fundamental in its importance. The underlying acceptance of a formal approach to legal understanding leads to an implicit pre-supposition that equates formal "law" with "real" law. The impact of this on legal understanding can be profound and lead to fundamental misunderstandings on the nature of a legal system. In essence I would argue that without a functional conception of law, students can never hope to truly understand the legal system that operates in New Zealand. As an anecdotal example of this, I recall many years ago attending a seminar paper on the codification of law in certain Pacific Island states. The paper was interesting and well presented but when asked about the project's interaction with customary law, as practised by the majority of individuals in these islands, the speaker answered that the project was only concerned with "law" not "custom". Such a response appeared to suggest that the project would be 100 per cent accurate and 0 per cent useful, given that such "customs" were in reality the "law" by which most citizens of these islands lived. By approaching the subject with a formal conception of law the project had failed to engage with key elements of the legal system. To use Llewellyn's words, it managed only to engage with a few of the societal mechanisms used to deliver the law jobs. A formal definition excludes such rules from our legal universe, a functional one includes them.

Such formalist definitions of law also undermine any attempts to re-consider the nature of the legal system from the standpoint of its users or its purpose. The pre-supposition that such a definition contains, takes as its starting point the desirability (or necessity) of formal law. This limits attempts at reform and institutional development both in New Zealand and overseas. Even when New Zealand has appeared to lead the world in its development of "alternatives" to the court process, the formality of our approach to law has had a significant impact upon their development.

Such a drift towards judicialisation can be seen, for example, in both the current structure of Commissions of Inquiry and their proposed reforms. Today's inquiries are dominated by pseudo adversarial processes, cross-examination and the presence of counsel. Their involvement (which stems from the predominance of judges as inquiry heads) becomes self-perpetuating as interested parties rightly demand legal representation in what they deem to be a hostile and legalistic environment. The attitude of the courts, in both allowing judicial review of inquiries and imposing

19 J Adams and R Brownsword *Understanding Law* (4th ed, Sweet and Maxwell, 2006), referring to the ideas of Jerome Frank. This "disease" is, of course not exclusive to New Zealand. Frank was referring to United States practice while Adams and Brownsword were referring to United Kingdom experience.

court-developed rules of "natural" justice, has encouraged this process.[20] Despite the best intentions of judges, commissioners and counsel, this unthinking judicialisation of inquiries and their procedures cannot but defeat the primary purpose of the institution.[21] Inquiries exist to inquire, not decide.

The related world of the tribunal has also seen a drift towards judicialisation. The most obvious example of this is the increased linkage between the office of the Chief Dispute Tribunal Referee and the judiciary.[22] Such a relationship is explicitly seen as a positive development and forms a key plank of the Law Commission's now stalled tribunal reform proposals.[23]

Such privileging of formalist legal rules risks perpetuating the dominance of a formal, expensive, court based system that requires significant numbers of lawyers to operate it. In turn, such systems require the training of large number of legal practitioners capable of both understanding and using them. However, do we really need such formalities and do we really need so many lawyers? By such mechanisms, the dominance of legal formality risks becoming a self-perpetuating prophecy.

The formal approach to legal education leads in turn to a formal approach by lawyers both to their own work and legal reform. Such dominance means that whenever problems in our society or legal system are identified, reforms will tend to propose a formal legal response as the default position.[24] In a country such as New Zealand where lawyers make up such a prominent part of society the formalist bias of the legal community potentially provides a serious barrier to reform. Although the number of practising lawyers has fallen in recent years, New Zealand still ranks in the top three states for lawyers per head of population.[25] Of course this figure under-represents the role of lawyers in New Zealand as around only half of law students move into the profession itself. Whatever the exact figure, the influence of the formalist approach to legal education in New Zealand is all pervasive.

VI. Functionalism and the Future

This article has argued that the dominance of formal concepts of law in New Zealand legal education remains strong and has had a significant impact upon New Zealand society. However, such a critique would be somewhat churlish without considering how the chilling effects of such an approach might be reduced. For this we need to return to the earlier theme of functionalism and the comparative method. The easiest way to mitigate the impacts of legal formalism upon the New Zealand legal system is to develop a better understanding of that legal system in the first place. If we are to truly educate our lawyers in how the New Zealand legal system works, law schools must encourage their students to ask the right questions. Such questions will emerge from

20 I Harden and ND Lewis *The Noble Lie: The British Constitution and the Rule of Law* (Hutchinson Education, London, 1986).

21 PP Craig *Administrative Law* (6th ed, Sweet and Maxwell, London, 2008) at 287.

22 The current Chief Tribunal Referee is a District Court Judge.

23 Law Commission *Tribunal Reform* (NZLC SP20, 2008). See WJ Hopkins "Order From Chaos? Tribunal Reform in New Zealand" (2009) 2 JALTA 47.

24 See, for example, The Law Commission's proposals for Commissions of Inquiry. New Zealand Law Commission *A New Inquiries Act* NZLC, R102.

25 *NZ World Leader in Per-Capita Lawyer Stakes* NZ Herald 15th July 2010. These figures are open to significant interpretation, but the general point seems valid.

a method that makes clear to students the role of law in society. It should not start from a formalist pre-supposition.

Comparative law does not provide a magic bullet but its methods do provide a pragmatic mechanism for students to truly understand their future role as lawyers within any society. This should not be provided as some optional paper tucked away in third year but as one of the first things that students learn when they enter law school. Such an approach would see first year courses begin, not with a discussion of the New Zealand legal system, but with an examination of legal systems generally. Such an approach could examine tikanga, indigenous systems, Pacific custom or the law of France, the substance matters not. Whichever legal systems were examined would be unimportant, the aim would be to show that the concept of law is not related to the form it takes but the functions it performs. Such a radical, yet conceptually coherent, approach would provide students with a broader and better understanding of the discipline of law. It would show at the very least that oranges are not the only fruit and that current practice in New Zealand is not the only way of organising a legal system.

This could provide the basis upon which other elements of the legal system could be far more effectively taught and understood. If such an approach were adopted in New Zealand, graduates might truly understand the nature of law in their country. In the years to come such students might eventually create a system more closely attuned to the needs of a South Pacific state with a bi-cultural constitution, rather than one based upon assumptions taken from its colonial past and the dead hand of British history. Such a legacy would be valuable indeed.