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Teaching Legal Practice Between "Theory" and "Skills"

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At the very beginning I should say that I do not teach positive law but legal history. Of course, it surely was not the reason for which I was invited to deliver these introductory notes at the round table on teaching legal practice. Rather, I believe that it was my discussion at our previous meeting in Ribno in which I approached this issue from a different angle than the prevailing one. There, I also referred to my own experience in legal practice. Thus, I should say that after I had graduated law twenty two years ago I worked for about two years in a barrister's office and then several months in the State Electric Company. In that introductory and rather short period of my professional life, I had passed through a quite intensive practical experience in "existential framework", i.e. I did not experimentally practice law from the cabinet but rather did it as *Beruf*. I think that up to a certain level, these two contexts ("the cabinet" and "real life practice") are two distinct realities, and this is one of the reasons why I consider that part of my experience as extremely important. Of course, I surely do not think that this modest experience provides an authority that would allow me to "explain" how the teaching of legal practice should be organized. In this regard, I surely do not consider important the fact that, as I was told, a large part of professors of positive law have less "real-life" practical experience than one legal historian. I am more than aware of my limits and I fully respect the professionalism of my colleagues. Yet, if my modest practical experience does not specifically qualify me for certain discussions, it surely does not disqualify me from expressing reservations toward some ideas of how to teach legal practice that have become quite widespread in recent time.

My intention is to warn from a "different angle" and not to deliver "the truth" – I do not think that any one question has just one correct answer. This is why these introductory notes are organ-

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ized in a certain way as a narrative *Impulsreferat* which is neither academically systematic nor precise and fully elaborated, and which quite often refers to my personal experience and my personal impressions.

Of course, when I say that there is no single proper answer to any one question I refer not only to what I say but even more to the opposite, to what I criticize. However, I am afraid — and I see it as a problem — that proponents of the other approach are usually less ready to take the contrary opinion seriously. That makes the problem much more difficult. But perhaps it is just my personal impression.

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I believe that it is not too hard to identify something like a core of contemporary criticism of the "traditional" legal education at European (or at least at Central European) universities. This criticism is mainly directed against the too "theoretical", "abstract", "knowledge based" education that lacks real contact with legal practice, because of which it does not prepare students to enter legal practice efficiently, i.e. in a short time and without too much preparation. According to this approach, the output of such model is an "un-finished" lawyer who only has to work on himself after the diploma in order to build up his abilities to operate in legal practice. This is achieved through (sometimes painful) experience or — when more systematic approach in some institutions is offered — through a kind of introductory training which prepares a young lawyer to work at certain placements. In both cases time, money and energy have to be spent to prepare a lawyer for a job after he had already normally spent no less than 5 years and respective subsidies in obtaining his degree. In addition, it is often mentioned that recently, big companies have been developing their own educational centres or they finance specialized and fully practice-oriented institutions that develop more specific skills and prepare students to start to work at their future working placement without an introductory phase. The spread of such a type of education is seen as a potential concurrence to the "old-fashioned" type of legal-education which, therefore, has to neutralize such treats from the environment by taking over the "practical" orientation of those institutions.

Traditionally, such criticism by and large comes from a side of "practice", be it from the business sphere or judiciary or other state agencies, but in a recent time it has been strongly accepted among the "reform-oriented" professors at universities, as well.

Such criticism — whether it appears in "instinctive" or in more elaborated forms — usually puts a strong emphasis on skill-oriented education. "Skill" has become a very "in" word and, probably, one of often repeated *mantras* (to borrow an expression from Professor Kranjc) in discussions on the reform of legal education. The development of students' skills is seen as a probably key tool that will make legal education more practice-oriented and prepare students for legal practice, into which they will "squeeze" smoothly after university education. It was at one of our colloquia in

Ribno that one respected Croatian practitioner — a friend of mine whom I consider a brilliant lawyer — recalled his first days at court when he was asked to sort a bunch of files and then learnt that there was special way of sorting documents, different from what could be expected; his idea was that bringing students to courts and learning such tiny experiences would offer some very simple but still productive means of softening a gap between university and practice. Of course, the "classical" and very often mentioned example — at least in Zagreb — is a fact that most of the students by far leave the university not knowing how to write a complaint. If that line of thinking is extrapolated — I do not say that it is a concept that anyone explicitly advocated, however it can be reconstructed as a tendency — then the curricula of legal study should be reorganized by giving a prominent role to skill-oriented teaching units. Considering that skills are a very practical and almost inevitably very specialized way of dealing with reality, I guess the number of such units shall be large.

I have an impression that the more radical "reformist" stream at law faculties can be found among professors of private law significantly more often than among the rest of the academic legal community. If this impression is correct, then perhaps it can be connected with the other impression — that it strongly correlates with the "market-orientation" of private law disciplines whose members easily verify their views on the market, while this is less possible as far as the public law and criminal law disciplines or theoretical and historical disciplines are concerned. Also, I believe it is interesting that my experience suggests (I surely do not put it as a general rule) that professors of positive law who have started their academic career immediately after graduation (i.e. without a single day of legal practice) are usually quite radical in advocating a skill-oriented legal study programme; a possible explanation for such an attitude might be quite interesting. But, if practical skill is so important — and I am quite sure that there is absolutely no other place besides practice itself where it can be trained properly — I wonder how professors of positive law who have not passed through such experience themselves can be successful professors. To advocate a skill-oriented legal education and be without a real legal practical experience — isn't that position a bit paradoxical? As of myself, I do not consider that training of skills is a *conditio sine qua non* at all and I am absolutely sure that somebody can be a good professor of positive law without any previous real-life practical experience (even though it is surely an advantage to have such experience). And, of course, I do not think that the divisions I mentioned above are so strict.

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Instead of such approach, I think that the dichotomy of "skills" (often interpreted as "practice") vs. "knowledge" (often interpreted as "theory") is artificial or that it has been far overestimated. I believe that consequences of the approach "from theory to skills" might be to turn faculties into centres for the training of skills that could change the nature of university education and, in a not-so-long perspective, produce damages that later will not be so easy to repair, especially in smaller countries with respective human resources deficiencies.

First and foremost, I am sceptical about the idea that in the legal profession, skills can be effectively learnt in the university environment. I am much closer to the opinion that skills are something that can effectively be learnt and adopted in practice. I am sceptical of the idea that a gap between different life positions and experiences of university students and practical lawyers, speaking from a holistic point of view, can be bridged over simply by the "teaching" of skills.

Then, by its very nature the "teaching" of skills necessary leads to specialization and fragmentation of legal knowledge, thus shading the organic complexity of a legal system. Perhaps extensive training of skills at university can improve the effectiveness of education if it is targeted toward a specific labour position. However, I believe that putting such a strong accent on skills is in contrast with the necessity of a fundamental and critical education that will enable a lawyer to respond to challenges that are put before him in a fast changing environment. Not to mention that law faculties are educating students for a very wide scope of labour orientations. In fact, the criticism of a sterile and theoretical legal education which was quite strong in former Yugoslavia (especially in Croatia) in the seventies and eighties resembles some aspects of the contemporary criticism. The preservation, at that time, of the "theoretical" and "inutile" academic model of university education (I do not say that it was perfect!) instead of turning it into an "efficient" practice & skill-oriented education preserved the abilities of the law faculties to respond better to the challenges that came with the changes of the communist system before and after its crash. Of course, I am quite aware that today's context is different — but, is it really so different that this experience should not be considered?

Skills are something that is adopted and developed through practice without too many problems. If I may recall my practical experience from twenty years ago, at that time (as well as I think today) the common objection was that after the university education, a fresh lawyer does not know how to write a complaint. As a student, I shared that objection — but when I entered practice it came out that I (as everybody else) started to write complaints in a very short time, it was not a big deal at all; some more time I needed to "grasp" how I should perform before the court in order to be more successful in certain situations. Of course, different people have become differently skilled and appeared before the court with varied success — but it was a question of talent and not of (omitted) training at the university. I also noticed that my colleagues who started to work at the court had problems with skills as well as with the understanding of certain legal issues. That put an average fresh lawyer at the court much behind his colleague at a barrister's office. The difference was in approach. The barristers' "tactic" usually consisted of pushing their employees into the water where in a short time they either drowned (very rarely) or started to swim and write correct complaints (let me not be misunderstood: I do not advocate such approach at all). In contrast, the fresh lawyers at the court were often treated as obstacles and if accidentally there was no enthusiastic judge who took care of a young lawyer, he was basically left to himself. Of course, I can understand that people in practice would prefer that law faculties do their job and save time and money that they should invest in proper training — but, what for? Not to mention again that there is a wide scope of legal professions with a variety of skills that can not all be reproduced through education.

At the court, I also noticed that investing time and energy into correct legal elaboration of the problem brought unexpectedly good results — especially when it came to writing appeals or delivering plaidoyers — even though I did nothing more than a decent proper job at that time. But, in fact I had the impression that there was so much routine activity at the court (shall I call it "skill-accented" activity) in which proper skill ("formalism") substituted good legal reasoning that everybody was very happy to see before him.

I think that the essence of legal education should be the development of a fundamental legal reasoning, i.e. a profound understanding of law and facts in their contexts, the identification of the main problems and the finding of effective legal and respective factual arguments for potential solutions. These abilities, I do not consider as skill. I guess that skills (I do not mean it in a pejorative way, such as corruption) are becoming much more important if the legal system is significantly unprofessional or bureaucratized — but this is another problem.

I believe that legal education should be primarily oriented toward the development of a fundamental legal reasoning and not toward the training of skills. I believe that a casuistic concretization of legal principles through dealing with cases is a good method; however, it is not skill but a part of good "theory". The ways to execute such an orientation are probably numerous — ranging from the classical discussions in seminars to moot-court simulations.

A part of the problem of rationality and efficiency of today's legal education may be that in the framework of university autonomy, "internal" interests replaced the main ("external") purpose of legal education to educate good legal practitioners — I am referring to the universities that I am more familiar with, but the same indications are probably present at some other places as well. Thus, I believe that reform is necessary, including changes that should improve or replace petrified forms. But, I do not think that the *ratio* of reform should be that organization, contents and forms that are basically rational should be destructed in the name of progress or harmonization. I might again be burdened by experience of experimental voluntarism of the communist period — but then again, some of its aspects resemble the contemporary reformism.

I would also like to comment on the model 3+2, based on the idea that the first cycle should prepare students for more simple practical positions while the fundamental, "elitist" education shall be achieved in the second cycle that fully completes the education for more or less all kinds of the legal profession. If consequently applied, that concept implies a "practical" and skill-oriented organization of the first cycle instead of the traditional start with the introductive and fundamental disciplines which are followed by a gradual transition to a more profound and developed legal reasoning. Apart from the criticism that I have already basically expressed, I believe that another crucial mistake of this concept is that in certain time it will inevitably lead toward an "adapting" (i.e. lowering) level of teaching and evaluation at the first cycle to that part of the student population that is supposed to leave the faculty after the first cycle. Of course, this decline will affect the entire student population and I do not see that the "elite core" can develop in such an ambient; in-

stead, I believe that their "legal mind" might become so spoiled by this "practicisation" that it will not be possible to raise it up. I also believe that such radical re-orientation is especially dangerous in small countries like Croatia and Slovenia — considering their professional human resource potentials and an isolated cultural-linguistic position — where radical experimentation can lead to radical and un-reparable damages, unlike in big and developed countries with a developed and strong institutional, professional and financial basis.

The typical lawyers' answer to a possibility of introducing a 3+2 model is that it would be interpreted as a form in which reorganized old scheme that goes from introductory toward more practical subjects will be preserved. Of course, it is in fact a rational answer that makes things different, but it is hard not to see it as contrary to the orientation of the Bologna declaration. But then, my impression is that such an approach is widely spread, which can lead one to ask oneself how rational is the solution whose main goal is intentionally misinterpreted on a wide scale from the very beginning.

At the end, allow me to mention a political aspect of the problem. With an experience of living under a "soft" authoritarian (but still authoritarian) communist regime I believe that an important goal of legal education should not be to educate skilled executive officers, good administrators in whichever professional branch (business, judiciary, public administration...), but critical lawyers who will be able to understand and respond to social and political challenges from their individual position. Even-though authoritarian times are behind us I believe that sophisticated contemporary bureaucratization inevitably brings similar challenges. I think that a "practical" orientation toward skills can contribute to the development of unreflective, non-critical and purpose-rational oriented lawyers who do not care for values. I know that speaking like that today sounds as too declarative, too romantic and too old-fashioned or simply as a demagogy — however, I believe that this is a fallacy not of such a commitment to values but of today's distorted reality. And even though today's universities inevitably re-orient themselves from their privileged isolated positions (which often stimulate atrophy) into market-oriented services, I believe that remnants of the idea of classical university as a place critically distanced from environment should not be given up.

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Let me not be misunderstood. I do not think that learning how to write a complaint at the law faculty is bad thing (on the contrary). I do not think that the training of skills is useless. I am aware that the position and function of university education has changed in the contemporary world. I do not mean to say that law faculties should pretend to be blind and avoid seeing practice-oriented concurrence growing around them. I do not say that law faculties should not adapt themselves to the needs of the market in general. In particular, I do not say that today's model of legal education is a perfect one and should not be changed and made more rational and effective one.

However, I believe that a strong emphasis that has often been put on understanding legal education as a skill-oriented study is counter-productive and quite dangerous, especially in certain contexts. I believe that the learning of skills basically belongs to the lifelong learning process. And most of all, I believe that the main goal of academic legal education should not become preparation for a quick entry into some of various legal professions but the development of a critical and broad legal mind that will enable a lawyer to join and change any of the legal professions where he will develop and change necessary skills.