

Kennedy in Berlin: Law schooling in Europe in light of the Hierarchy debate

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Duncan Kennedy paints a fairly bleak picture of law school in his 1983 pamphlet “Legal Education and the Reproduction of Hierarchy: A Polemic against the System” (LERH)¹ and related writings. Reading it today, I think it still strikes a chord for those of us who were drawn to the law as a means of making a positive contribution to society. His references to the “trade school mentality” and institutions “barren of theoretical ambition”² that must set to work “training the Hessians”³ help to articulate the vague queasiness that the young idealistic law student might feel but struggle to describe. In this sense, the pamphlet still serves as a welcome salve to alleviate the feeling of creeping alienation that is not unique to life in US law schools. This short piece takes an unscientific look at law schooling in Europe, based on experiences of legal education in Ireland and Germany, to explore the extent to which the LERH polemic applies on the other side of the Atlantic.

Much of the hand-wringing about the limited choices facing law students in the debate that sprung up around LERH centers on the huge debts incurred during law school, driving some graduates to compromise their ideals by taking up the kind of corporate work they would rather not do. This very significant restriction on the freedom to practice law in accordance with one’s principles does not apply to the same degree in Europe, where law is studied as an undergraduate degree and undergraduate education is in many countries close to free for EU citizens. Fees vary, but are miniscule in comparison with the cost of a law degree (plus undergraduate education) in the US. In Germany, there are no tuition fees. Undergraduate students pay administrative fees of around €250 (\$280) per semester. In this sense, students enjoy something close to the utopian law school described by Paul Carrington in his response to Kennedy’s Polemic Against the System. Carrington sets out his vision of a school which forswears tuition fees to create a morally independent legal profession and where students are “enjoined to borrow no money” in order to ensure their moral independence.⁴ Carrington states that “graduates would be instructed to repay any indebtedness they felt they owed to their university by serving the public interest as they

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¹ DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

² *Id.* at preface, *i*.

³ Duncan Kennedy, *Rebels from Principle: Changing the Corporate Law Firm from Within*, 3 *Harvard Law Bulletin* 36, 37 (1981).

⁴ Paul Carrington, *Reproducing the Right Sort of Hierarchy*, in DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION* 145, 151 (2004).

might best identify that interest”.⁵ While students in Europe receive no such explicit instruction, they are largely free to repay their indebtedness to society in a manner of their choosing. The one freedom unavailable is the freedom to join a large firm and then claim one had no choice. Those who do choose the corporate route need to find better reasons, which can give rise to lively and healthy debate. While the challenges of finding suitable employment means that there is still an element of risk involved in studying law in Europe, the stakes are not as high in the absence of the \$150,000 - \$200,000 debt typically borne by US law graduates.⁶

A look at the scene in the German capital suggests that law students are making use of this breathing space and are vigorously exploring avenues for progressive lawyering. One feature of US legal education adopted to good effect in Germany is the concept of the law clinic, which has migrated from the US to Europe and beyond. Students in Berlin can now join clinical programs to work on refugee law,⁷ criminal procedure,⁸ and a range of other fundamental human rights issues.⁹ Young lawyers from around the world—including the USA—take part in the education program at the European Center of Constitutional and Human Rights to develop their strategic litigation skills while working on cases of torture, targeted killings, corporate abuses, sexual violence and other rights violations. Regular workshops on setting up your own NGO offer scope for those who don’t find an organization that matches their aims or who do not wish to join existing hierarchies. All of this provides a means for students to go beyond the principle of “do no harm,”¹⁰ if they wish, and serve their idea of a common good through the application of the law.

I don’t think many European law graduates would describe their education as utopian. Certainly, there are ways in which the critical student is at a disadvantage here as compared to her US-based colleagues. The “tide of ‘theory’” that swept the humanities¹¹ since Kennedy first published his pamphlet has much less impact on the students in Germany and much of the rest of Europe who generally begin studying law at around 18, directly after leaving school and without the benefit of a primary liberal

⁵ *Id.*

⁶ American Bar Association, YOUNG LAWYERS DIVISION COUNCIL REPORT MARCH 2014 2 (2014), available at www.americanbar.org/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/march2014councilmeeting/2014_march_young_lawyers_division_report.authcheckdam.pdf.

⁷ REFUGEE LAW CLINIC BERLIN, <http://www.rlc-berlin.org/> (last visited Oct. 2, 2015).

⁸ CRIMINAL DEFENCE PRACTICE LAW CLINIC AT THE FREIE UNIVERSITÄT BERLIN, <http://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/singelnsteint/Law-Clinic/index.html> (last visited Oct. 2, 2015).

⁹ HUMBOLDT LAW CLINIC ON FUNDAMENTAL AND HUMAN RIGHTS AT THE HUMBOLDT UNIVERSITÄT BERLIN, www.hlemr.de/ (last visited Oct. 2, 2015).

¹⁰ See the pledge suggested by Duncan Kennedy in *The Responsibility of Lawyers for the Justice of their Causes*, 18 TEX. TECH L. REV 1157 (1987).

¹¹ Angela Harris & Donna Maeda, *Power and Resistance in Contemporary Legal Education*, in DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION, *supra* note 4, 168 at 170.

arts degree or other third-level studies. While students might be exposed to some critical theory through a progressive lecturer or the chance to take a class in legal sociology or similar, it would still be easy to graduate without any real exposure to critical legal thinking.

I suspect too that under the civil law system in Germany, for instance, with its heavy emphasis during legal education on statute law, it can take longer for the young law student to notice the space for politics left by the indeterminacy of the law. A student under the British or Irish system will spend the first few months of her studies reading decisions from common law courts—not statutory provisions—and grappling with the myriad ways a judge might come to a verdict. It would be difficult to spend time reading decisions in which a judge makes elegant recourse to a poem, novel or a pop song¹² to give weight to an argument and not swiftly develop a sense of the elasticity of the law. The first year student of German law, on the other hand, can generally be found riffling through an enormous collection of statutes, as if finding the “right answer” to any legal question is merely a matter of locating the appropriate provision through a system of color-coded post-its. While this, of course, is a simplistic distinction,¹³ I would argue that the reliance on statute does, at least initially, make it more difficult to realize that interpretation of the law is not “separate and autonomous from moral and political discourse.”¹⁴

I think it would be a mistake, though, to spend too much time lamenting the lack of critical theory or other flaws in existing legal education. Would it be preferable if law schools less resembled what Kennedy described as “ideological training for willing service in the hierarchies of the corporate welfare state”?¹⁵ It would, and any developments in this direction are to be welcomed.¹⁶ But the education system, at least under the low-cost European model, does not actively prevent us becoming the kind of

¹² See Lord Denning’s recourse to, among other literary sources, the poetry of William Cowper in a decision on the scope of the Mareva injunction or the text of *Alice in Wonderland* in a Court of Appeals case concerning cabbage seeds: “‘The time has come’, the Walrus said, ‘to talk of many things - of ships and shoes and sealing wax - of cabbages and kings,’” detailed by Charles Stephens in *THE JURISPRUDENCE OF LORD DENNING: A STUDY IN LEGAL HISTORY, IN THREE VOLUMES* 80 (2009). For a review of the song lyrics most commonly cited in US judgments see Alex B. Long, *[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing*, 64 WASH. & LEE L. REV. 531 (2007).

¹³ Indeed I was often struck by the theoretical rigor of German legal education and the caliber of courses in legal philosophy and history available to interested students.

¹⁴ This formulation from MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY* 193 (1992).

¹⁵ DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM*, *supra* note 1, at *i*.

¹⁶ George Monbiot describes an interesting example of a move to counter the influence of large corporations over students at Cambridge University, England, where the careers service “imposes a fee on rich recruiters and uses the money to pay the train fares of nonprofits,” in *How a corporate cult captures and destroys our best graduates*, *THE GUARDIAN* (June 3, 2015), available at <http://www.theguardian.com/commentisfree/2015/jun/03/city-corporates-destroy-best-minds>.

lawyers we want to be.¹⁷ A lack of theory might be impoverishing, but it's not fatal. It can be remedied through private study and exchange with others in both critical and more conservative circles. Besides, a desire for societal change is not something that must necessarily be taught within the framework of formal education. "The leftist writers would lead you to believe you need to read a book to find out that you're hungry", complains one of the characters in Bertolt Brecht's play *Flüchtlingsgespräche* ("Refugee Dialogues").¹⁸

What the US LEHR debate makes clear is that access to low-cost legal training is a rare privilege. While flawed, the education available in Europe allows students—assuming an underlying readiness to work with the existing system—to learn the tools and formal skills needed to pursue the kind of lawyering they prefer

¹⁷ See also Paul Carrington, *Reproducing the Right Sort of Hierarchy*, *supra* note 4, at 148. Carrington argues that law schools have less influence on the moral fiber and professional conduct of law students than previously supposed.

¹⁸ "Wenn man auch nach der Lektüre von den linken Schriftstellern glauben könnte, ihr müßt auch das noch aus den Büchern lernen, daß ihr Hunger habt." Bertolt Brecht, *Flüchtlingsgespräche*, Suhrkamp, 1990, 20. Translation author's own.