Review Essays

Lawyers, Legal Practice and Values

PROFESSIONAL COMPETITION AND PROFESSIONAL POWER: LAWYERS, ACCOUNTANTS AND THE SOCIAL CONSTRUCTION OF MARKETS by Yves Dezalay and David Sugarman (eds), London and New York, Routledge, 1995, viii, 283pp, $140.95, ISBN 0 415 09362 7

ETHICS IN LAW — LAWYERS' RESPONSIBILITY AND ACCOUNTABILITY IN AUSTRALIA by Stan Ross, Sydney, Butterworths, 1995, xviii, 425pp, $69.00, ISBN 0 409 30389 5

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Trade, information and finance today are increasingly globalised. The legal profession is not, and in Australia, some State law societies and bar associations are resisting the effect of the 1993 Mutual Recognition legislation, which aims to create a national profession, rather than a series of locally-based legal professions.

In Australia at least lawyers share a common tradition of organisation, discourse and culture. In Europe they do not. But in the advanced economies of the North, capital knows no boundaries. Transnational institutions move finance capital and information round the globe without regard to national boundaries. They expect advice and service on a global basis.

The major United States law firms have adopted a corporate form of business organisation over the last century, recruiting the brightest graduates of the most prestigious law schools, training them, and selecting the best after several years of sweated labour to become partners supervising, and profiting greatly from their highly specialised operations. Major commercial clients who can pay know they can get full service on any legal problem, 24 hours a day on a world-wide basis.[1] To satisfy demands of their clients, US firms started to open branch offices in major financial centres around the world.

The world-wide operation of American law firms caused at first some very hostile reactions from local lawyers, but, together with the type of services offered by accountants, has also produced some re-thinking of professional roles, especially in Europe.

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1 See Galanter, M and Palay, T, *Tournament of Lawyers — The Transformation of the Big Law Firm* (1991).

There is a justified suspicion that the "globalisation" of world finance is really "Americanisation" of world capital. In France, particularly, the *noblesse de la robe*, the ethos of the legal profession, seems to be an important feature of the national legal culture, though as in most civil law systems, the legal profession is organised in very different ways and has some quite different functions and traits to the legal professions of any of the common law jurisdictions. In continental Europe, practising lawyers have not traditionally filled the important role of business advisers that the most prominent US, English, Australian and Canadian lawyers have. Particularly in France, the fact that major accounting firms and some "transnational" law firms now offer a range of legal services to transnational corporate clients has caused some concern.

Dezalay and Sugarman suggest that the globalisation of finance and capital and the market penetration by US law firms has caused a restructuring of the legal profession, largely along US lines, in other countries. Worldwide emulation of this mode of practice raises important questions of values, especially for lawyers who work within these firms and law students who aspire to do so.

We may see accountants as the managers of finance and capital. The accountancy profession is often thought of as the "big six" transnational firms, though the truth is that most accountants — like most lawyers — work locally. Nevertheless, the accountants have modernised their mode of operation so that the firms through which they provide services to transnational, corporate clients, resemble in form the organisational structures of their clients. Initially they chose the New York law firm as a model, but roles now may have been exchanged. Accountants pioneered the formation of transnational, multidisciplinary partnerships. In New South Wales, the *Legal Profession Act*, now permits solicitors to form such partnerships, but have been relatively slow to do so.

Do these changes amount to a restructuring of the legal profession? And do the standards of conduct which lawyers must observe adequately reflect the values which the community expects of its lawyers?

Yves Dezalay is a French sociologist of law, who has looked extensively at the changes to the French and American legal professions; David Sugarman, a historically-inclined English law professor with a special interest in the development of the solicitors' branch of the profession. They have edited a collection of studies focussing on the impact on local legal professions, of competition from US-based law firms in Europe and from accountants. There is no Asian or Australian perspective, but many of their conclusions are relevant in Australia.[2] The contributions have a sound sociological foundation.

In the Preface and Introduction, the leading French social scientist Pierre Bourdieu and Dezalay both stress the strong political influence of corporate lawyers on the making of high-level corporate and political decisions. They point out that because the process of selection of partners of the corporate law firms favours the elite who have access to the most prestigious American universities and

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2 Professor Roman Tomasic has in fact looked at the relationship between the growth of corporate takeovers (the specific area chosen by Dezalay and Sugarman) and the function and structure of Australian law firms: "Lawyers, Litigation and Corporate Takeovers in a Capitalist Economy" in *Prawo w Zmieniajacym sie Spoleczenstwie* (1992).

law schools, there is also a class element which should not be ignored. Further, the changes in the way legal services are delivered may affect not only lawyers, but also the exercise of power in many parts of the world.

The central theme of most of the contributions is the tension between the national orientation of most legal professions and the pressure to adopt a form of professional organisation which is more transnational and multidisciplinary, and more in tune with the organisation of the clients, as the accountants have done. The European contributions throw great light on this. Olgiati reports a study of the self-perceptions and opinions of randomly selected lawyers in Spain, France, Britain and Italy — countries in which there are, he concedes, fundamentally different professional structures and organisations. In Spain and Italy, lawyers are not permitted to form large firms. A significant majority of lawyers in those countries perceived that most of their work would continue to be locally based, and that there was little prospect of change either in the nature of their work or in the way they did it. On the other hand, French and British lawyers, who find it easier to form groups, perceived that their work would become more national and regional, and that there would be major change both in the nature of their work and the way they did it.

Other contributions draw attention to the different social organisation of the legal profession. Dezalay, Bancaud and Boigeol point out that in many European countries, the elite of the profession comprises not the practising lawyers or judges as in the English-speaking jurisdictions, but rather the academic lawyers, who have close ties to the political and bureaucratic elites, rather than to business. Both academics and bureaucratic elites have tended to regard business with a degree of disdain. However, in Germany, as Hartmann and Rogowski show, law graduates working within business, especially banking, have a disproportionate influence on commercial practice and decision-making and therefore on political decisions. In general, the permitted or traditionally accepted structures of legal practice have not encouraged the formation of large, US-type, firms.

The 1970s and 1980s were marked by two major changes in the Europe of Commerce: the emergence of Eurodollar capital markets, and the growth of corporate mergers and acquisitions (takeovers) that accompanied the growing economic integration of Europe. Both developments faced regulation by governments, possibly simultaneously in several different countries. The players were often transnational corporations, used to a high level of service in both capital financing and in mergers and acquisitions from their US lawyers. They sought the same level of quality in the services they now required in Europe.

European lawyers responded in several ways. Flood's contribution looks to the way in which US, and to a lesser extent, London-based, firms responded to the European challenge by changing their operations and structure, and opening branch offices in major centres, where they recruited local partners, often with postgraduate degrees from US law schools. Miller and Power recount the way in which accountants had become the leaders in a new field of practice concerned with business insolvency and restructuring. Picciotto's first contribution describes and analyses the way in which the needs of business for advice on taxation matters had been treated by lawyers and accountants in the US and in Britain. McCahery and Picciotto, in the final chapter, deal with "Creative Lawyering and the Dynamics of Business Regulation".

The common themes are that because of globalisation of capital markets, and a growing tendency of governments (following the lead of Thatcher and Reagan) to move much commercial activity out of the area of "public" ordering into the realm of "private" arrangements, business generates new demands for legal services. Business requires not only traditional advice, whether from lawyers or accountants, but also new types of advice that may require new types of expertise and knowledge. If lawyers respond adequately to this demand, they have the opportunity for exercising even greater power than they do now.

These studies have a message for Australian lawyers, and especially for law schools. McCahery and Picciotto point out, for example, that, contrary to popular belief, and the admission requirements of many jurisdictions, litigation plays only a small role in the work of most lawyers. Advice, drafting, negotiation and other transaction-related work forms the bulk of most lawyers' work. Through this work, lawyers have power within society, and they need to change their organisation if they wish to retain that power.

Few law schools in Australia have examined their activities to see whether their students are developing skills and knowledge that equip them to exercise that power, let alone to evaluate the moral dimension of that power.

There is a wider question, however. How meaningful is it now to speak of a single legal profession? The partners and employed solicitors in large firms may now have more in common with government lawyers and other corporate officers than they have with barristers (in may ways the traditional role models for other lawyers) or solicitors in small firms. Are the current aims of legal education and professional licensing adequate and appropriate to meet such a wide variety of demands?

These essays, especially the contributions from continental Europe, tend to be obscured by sociological jargon but if this can be penetrated, the contributions are thoughtful, well grounded in a sound, clearly articulated theoretical framework, and pertinent. They throw light on some central questions facing lawyers and legal educators in Australia today.

Most practising lawyers now realise that the practice of law is now much more clearly a business than anything else, even more than it is a profession. In business, the bottom line is usually the only really relevant ethical standard, if we are to believe the economists who now dominate our intellectual life. So why should someone like Stan Ross take the trouble to write a book about ethics in law? Is the task not oxymoronic?

Some lawyers, not just a few idealistic academics, do think that legal practice is more than just another business. It involves what Julius Stone referred to as "ministering to justice". Some of us, Stan Ross being one, take that function seriously, even if it does not mean maximising profits.[3]

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3 Questions of this type are posed in the context of a withering critique of legal education and legal practice in the United States which should be compulsory reading for any Australian lawyer interested in the subject: see Kronman, A T, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993). Ross refers to another invaluable American work, Luban, D, *Lawyers and Justice* (1988).

The Australian legal system, and others like it, depend totally on skilled personnel who can be relied upon to behave in certain ways. The rules and standards of professional practice, for the most part, exist for just that purpose. They do not embody the moral connotations that the word "ethics" invokes for the philosopher. As one trained as a philosopher first, then a lawyer, I find it disappointing that Ross has chosen to perpetuate the myth that professional "ethics" is virtually congruent with the rules of professional conduct. However, he more than most is justified in using the word "ethics" in the title of his book, because he does attempt to raise provocative moral questions about the values inherent in modern Australian legal practice, even though some parts of the text, and the treatment of some of the more technical subjects, tend still to accept the myth that rules of professional conduct may be imbued with a moral worth that other legal rules lack.[4] Use of the word "ethics" both in relation to moral values and to standards of professional conduct, though common, perpetuates this myth.

For more than 20 years Stan Ross has been involved in teaching a subject, "Law, Lawyers and Society", which has always been a compulsory part of the LLB curriculum at the University of New South Wales,[5] and which has been a model for subjects in other law schools which have similar objectives.[6] Ross' new book is designed as a text for such a subject, and draws on the materials that Ross and his colleagues have developed, as well as some original work that Ross has done in the field of the ethics of tax practice. It follows that the bulk of the book is a description of the rules and standards of professional conduct applying to lawyers in Australia, though the opening chapters are concerned with wider questions of values, moral issues, inconsistencies and quirks are raised throughout the book in a critical way.

Ross was educated, and initially practised as a lawyer, in the United States of America, where it is fair to say that the rules and standards of conduct of the legal profession are both higher and more transparent than they are in Australia. A much larger, and far more entrepreneurial legal profession has naturally produced more thought and detailed guidelines on standards of professional conduct than has been possible or necessary in Australia. Unfortunately, Ross sometimes presents the wealth of US material in a rather confusing way. It is valuable as a standard with which to compare the Australian material, but the book often reads as if the American, rather than the Australian rules, were the basis of discussion. The American material may be sounder and more complete, but because little indication is given in the text of the relevant differences between the US and Australia, a student might get the impression that the American material represented the position in this country. Australia may be changing in that direction, but we are not Americans yet.

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4 This is but one of several myths explored, possibly exploded, by Hamilton, J W, "Metaphors of Lawyer's Professionalism" (1995) 33 *Alberta LR* 833.

5 The scope and content of the subject are reflected in the book of materials: Disney, J, Basten, J, Redmond, P and Ross, S, *Lawyers* (2nd edn, 1986).

6 For example LLB311 The Legal Profession and Australian Society, which I designed and, with the assistance of Margot Stubbs and Ainslie Lamb, have taught since 1991 at the University of Wollongong.

There are, however, some good uses of American material[7] in the discussion of a case where the High Court affirmed that the prosecution in a criminal trial has a discretion to decide whether evidence is "credible" and therefore must be disclosed to the defence.[8] American courts require such questions to be decided ultimately by the court, and this was the basis for a strong dissent in the High Court. The American material is set out in full, and Ross uses it well in a trenchant and convincing criticism of the High Court's view.

The substance of the book is otherwise well assembled and provides a solid grounding for the Australian student of the law and practice of the legal profession. It includes extracts from the legislation and rules of conduct of the legal profession in various parts of Australia, and accounts of the leading decisions in sufficient detail for the student to form a sound understanding of what the law and rules are. This material, which follows the introductory chapters and occupies, perhaps, two-thirds of the text, is well organised and well illustrated.

Most Australian legal academics, and a growing number of practising lawyers now understand that knowing the text of the rules does not give a complete understanding of the law in operation. For that, some further skills and information are required often including information not readily available in Australia.

The material in Ross's earlier book,[9] plus a few other studies,[10] represent the majority of the research on the sociology of law and the legal profession in Australia. Ross develops some of these themes, and also draws on more recent work on the composition of the legal profession and the type of work lawyers do. This material is of growing importance, particularly in light of the issues raised by the essays in the Dezalay and Sugarman collection.

The legal profession is growing at an unprecedented rate, and is also increasingly specialised. The majority, perhaps, of law graduates are not working in private legal practice as barristers and solicitors five years after their graduation. Thus today's law students must face the question whether the solicitors and barristers who are subject to these legal rules represent the whole of the body of legal personnel who should be regulated, whether the regulation is adequate, and whether it is appropriate.

Ross's own views are usually clear, but the questions are raised squarely and as objectively as possible. The legislation, practices and rules that he describes developed in a time when virtually all legal work was thought to have been done by judicial officers, by barristers or by solicitors. Much of the law and practice relates specifically to that traditional type of legal professional practice.

An implicit question raised by the material is the common question of conflict of interest. How does a lawyer who is employed in a private institution, a government office, an accounting firm or a transnational mega-firm reconcile his or her "ethical" duty as an officer of the court with his or her legal duty as an employee to obey the orders of a superior when those directions may not be consistent with, say, a duty of candour to the court or a duty of disclosure to the

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7 For example, at pp393–5.
8 *Richardson v R* (1974) 131 CLR 116.
9 Above n5.
10 Notably the work of Roman Tomasic.

client? While earlier works may have suggested this possibility, it is often more than a potential problem for an increasing number of lawyers.

In order to understand the relevance and operation of the law and practice governing lawyers' professional conduct, a student needs probably to have had some personal experience of working with lawyers, and a background of information about the structure and composition of the body of legal workers and the nature of legal work, including the way lawyers relate to, and communicate with their clients. It requires a clear notion of what a "profession" may be, and to what extent, in modern conditions, a profession can be self-governing without that self-government becoming a mask for restrictive trade practices which operate to the public detriment. Ross supports the subjection of the legal professions in New South Wales to the provisions of the *Trade Practices Act* 1974 (Cth), but presents arguments on both sides and does so in a way that faces the student with the relevant questions.

Ross also raises some important questions of values. They are the centre of the opening chapters, where the distinction between moral judgments and questions of law and practice are properly and clearly distinguished. In later chapters the emphasis is on rules, and sometimes the moral dimension, and the questions that arise in it, are not as clear as they might be. Ross does, however, raise interesting issues. Why, he asks, are the standards of personal integrity required by the admitting authorities so much higher for those aspiring to be admitted (as set out in the decisions in the cases of *Bacon*[11] and *Wentworth*)[12] than they are for miscreant lawyers who have committed some breach of the required standards after admission and face the loss of their licence to practice? This is a very pertinent question, and one which admitted lawyers and students should face.

The value choices facing tax practitioners is Ross' specialisation, and indeed, the moral choices facing practitioners here are probably sharper than in other areas of legal work. The practitioner has a duty to obey the law; the law requires payment of taxes. The practitioner has a duty to serve his or her client; the client wants to avoid the payment of taxes. Though the standard of proper conduct for a lawyer may be clear in theory, in practice the choices may be extremely difficult, and the material here raises issues in a unique and original way.

Ross does raise the issue of the role of women in the legal profession — a glaring omission from the Dezalay and Sugarman collection — and the change in the gender composition of the legal profession. There are probably several relevant questions of values within the profession that will become more obvious as women gain more power within it, which, despite the obstacles confronting them they are sure to do.

As a member of the legal profession and as a teacher of the law and practice of the legal profession, I found the book helpful and stimulating. As a teaching resource, it would need to be supplemented by reports of some of the major cases relevant to each of the Australian jurisdictions. There are far too

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11 Application of Bacon Sup Ct, NSW, Ct of Appeal, 3 November 1981, CA No 159/81.

12 *Wentworth v New South Wales Bar Association* unreported, Supreme Court of New South Wales, 14 February 1994 (No 40044 of 1993).

many typographical and spelling errors and blank white spaces, and some solecisms which annoy me intensely, such as the use of "counsels" for the plural and the inconsistency in using "J" after the name of a judge. Some parts, especially chapter 6, appear to rely on single (American) secondary sources. Perhaps the publishers, in order to make the work affordable by law students, have not employed a book editor, with the result that much of the text looks more like a final draft than a finished product. These "unprofessional" lapses do not spoil the substance of what is otherwise a useful, comprehensive, and, so far as I can ascertain, accurate and up-to-date book.

In America, writers like Kronman,[13] Luban[14] and Rhode[15] have stimulated valuable discussions about the basis of the rules of professional conduct. The vastly greater number of lawyers and the variety of types of legal work there make this almost inevitable. In Australia, our smaller, narrower legal profession is certainly changing. Some of the directions of change may be the same. The issues of moral value certainly overlap. Taken together, these two books provide a foundation for asking what the relevant questions might be, and underscore the urgency of asking them.

13 Above n3.
14 Above n3.
15 Rhode, D L, *Professional Responsibility: Ethics by the Pervasive Model* (1994).