The Library of Essays in Contemporary Legal Theory

LEGAL THEORY AND THE LEGAL ACADEMY

VOLUME III

Maksymilian Del Mar
William Twining and
Michael Giudice

Legal Theory and the Legal Academy Volume III

Edited by

Maksymilian Del Mar

University of Lausanne, Switzerland

William Twining

University College London, UK

and

Michael Giudice

York University, Canada

ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data:
Legal theory and the legal academy. – (The library of essays in contemporary legal theory)
1. Jurisprudence–Study and teaching. 2. Comparative law–Philosophy.
I. Series II. Del Mar, Maksymilian, 1979 – III. Twining, William L. IV. Giudice, Michael.
340'.0711–dc22

Library of Congress Control Number: 2010926291

ISBN 9780754628880

Mixed Sources
Product group from well-managed forests and other controlled sources
www.fsc.org Cert no. SGS-COC-2482
© 1996 Forest Stewardship Council

Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Acknowledgements

The editor and publishers wish to thank the following for permission to use copyright material.

The American Journal of Comparative Law for the essays: William Ewald (1998), 'The Jurisprudential Approach to Comparative Law: A Field Guide to "Rats"', *American Journal of Comparative Law*, **47**, pp. 701–707. Copyright © 1998 William Ewald; Catherine Valcke (2004), 'Comparative Law as Comparative Jurisprudence—The Comparability of Legal Systems', *American Journal of Comparative Law*, **52**, pp. 713–40. Copyright © 2004 Catherine Valcke.

Cambridge University Press for the essays: Mark Van Hoecke and Mark Warrington (1998), 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *International and Comparative Law Quarterly*, **47**, pp. 495–536. Copyright © 1998 Cambridge University Press; Geoffrey Samuel (1998), 'Comparative Law and Jurisprudence', *International and Comparative Law Quarterly*, **47**, pp. 817–36. Copyright © 1998 Cambridge University Press.

Hart Publishing for the essay: William Twining (2009), 'Implications of "Globalisation" for Law as a Discipline', in A. Halpin and V. Roeben (eds), *Theorising the Global Legal Order*, Oxford: Hart Publishing, pp. 39–60. Copyright © 2009 Hart Publishing.

Harvard International Law Journal for the essay: Günter Frankenberg (1985), 'Critical Comparisons: Re-thinking Comparative Law', *Harvard International Law Journal*, **26**, pp. 411–55. Copyright © 1985 Harvard International Law Journal.

Journal of Legal Education for the essay: Patricia A. Cain (1988), 'Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections', *Journal of Legal Education*, **38**, pp. 165–81. Copyright © 1988 Journal of Legal Education.

Oxford University Press for the essay: Mathias M. Siems (2008), 'Legal Originality', *Oxford Journal of Legal Studies*, **28**, pp. 147–64. Copyright © 2008 Oxford University Press.

Taylor and Francis for the essays: Roger Cotterrell (2000), 'Pandora's Box: Jurisprudence in Legal Education', *International Journal of the Legal Profession*, 7, pp. 179–87. Copyright © 2000 Taylor and Francis Ltd; Seow Hon Tan (2009), 'Teaching Legal Ideals through Jurisprudence', *Law Teacher*, **43**, pp. 14–36. Copyright © 2009 Seow Hon Tan; Andrew Halpin (2000), 'Law, Theory and Practice: Conflicting Perspectives?', *International Journal of the Legal Profession*, 7, pp. 205–23. Copyright © 2000 Taylor and Francis Ltd.

John Wiley and Sons for the essays: Hilaire Barnett (1995), 'The Province of Jurisprudence Determined–Again!', *Legal Studies*, **15**, pp. 88–127. Copyright © 1995 John Wiley and Sons;

Neil MacCormick (1985), 'The Democratic Intellect and the Law', *Legal Studies*, **5**, pp. 172–83. Copyright © 1995 John Wiley and Sons; Alan Hunt (1989), 'The Role and Place of Theory in Legal Education: Reflections on Foundationalism', *Legal Studies*, **9**, pp. 146–64. Copyright © 1989 John Wiley and Sons; Neil MacCormick (1989), 'The Ethics of Legalism', *Ratio Juris*, **2**, pp. 184–93. Copyright © 1989 Neil MacCormick; Mark Van Hoecke and François Ost (1993), 'Epistemological Perspectives in Legal Theory', *Ratio Juris*, **6**, pp. 30–47. Copyright © 1993 Basil Blackwell Ltd.

Every effort has been made to trace all the copyright holders, but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

Series Preface

Contemporary Legal Theory

The last thirty years have witnessed a proliferation of theorising about law, as well as reflection on the very practice of that theorising. As the discipline of legal theory has flourished, so have methodological debates and controversies. These debates are not only relevant to how legal theory understands its own enterprise: its problems and aims, and issues of scope. They are also relevant to many other aspects of the practice of legal theory, and its role vis-à-vis the practice of law and the practice of other related activities, such as legal scholarship and legal education. Further, as the ambitions of legal theory grow, so do questions concerning its relations with other disciplines, such as comparative law, but also, much more broadly, the social sciences.

This three volume series on Contemporary Legal Theory aims to track and project the relations between legal theory and related disciplines. Accordingly, the first volume is devoted to preparing the way, by assembling recent work on the methodology of legal theory. It examines the problems and aims of legal theory, issues of semantics and epistemology, perspectives on morality in the theory of law and issues of scope.

The second volume follows naturally from where the first volume ends, and takes up issues to do with mapping the intersections between legal theory and the social sciences. It is divided into three parts: first, it looks at methodological disputes and collaboration; second, it considers how both legal theory and the social sciences employ a variety of different modes of explanation of behaviour, and the role that these modes play in the construction of theories about law; and third, it surveys how both legal theory and the social sciences might work together to portray legal phenomena, especially insofar as one sets out to study the language of law in its social context as well as the place of laws within a broader context of normative phenomena.

The third volume completes the series by considering four further aspects of relevance to the practice of legal theory: first, its role in the common law curriculum; second, how legal theory has been and may be taught; third, the relationship between legal theory and legal scholarship; and fourth, the relationship between legal theory and comparative law.

Although this series looks back, offering a panorama of the most important contributions made to legal theory in the last thirty years, it does so with one eye to the future. Given the richness of contributions, any selective project such as this one is bound to be a risky business. In that respect, we should stress that we have not aimed for comprehensiveness. Certainly, our selections have been informed partly by the acknowledged importance of certain contributions to the field, and the continued popularity of certain debates, but they have also been informed by the directions we think legal theory may develop in decades to come. This future-oriented aspect of the three volumes can be seen particularly well in its discussion of the scope of legal theory and its relations with other disciplines.

Each volume in the series contains seventeen papers, and is supported by a substantial introduction that summarises and contextualises the chosen articles. Where it was thought to be necessary, we have developed the context in some detail (for instance, as in the case of the role of legal theory in the common law curriculum in Volume III); at other times, we have used our selection to offer highlights of the relevant debates. These introductions are supplemented by selective bibliographies.

If the past thirty years provides any indication, the future for legal theory looks bright. Of course, at least when compared to certain other debates in philosophy, many of the issues that have emerged in contemporary legal theory are but newborns: the great majority of the work lies ahead us. We hope that with this series we are able to provide the future generation of legal theorists with the necessary tools for success over the next thirty years.

We would like to acknowledge the support and professionalism of the Ashgate team. We owe particular thanks to Professor Tom Campbell.

We dedicate this series to the memory of Sir Neil MacCormick, who was to be involved as a co-editor before falling ill. Contemporary legal theory is so much the richer for having had the privilege of both his work and his intellectual generosity and openness of spirit.

MAKSYMILIAN DEL MAR
University of Lausanne, Switzerland

MICHAEL GIUDICE
York University, Canada

Introduction

The focus of this third volume on *Contemporary Legal Theory* is the role of legal theory in the legal academy (predominantly in the common law world). Of course, this way of putting the issue immediately raises the following question: If we are to examine the role of legal theory in the legal academy, then what conception of legal theory are we to adopt for that purpose? The question is a good one and, as shall be illustrated by reference to the essays selected in this volume, any attempt to answer it soon reveals the many current and potential points of intersection among the activities engaged in the legal academy. In other words, the more accurate questions are: How does thinking about how we teach, learn and research law help us to think about the very methods and aims of legal theory? How does thinking about teaching law help us learn about the law? And how does thinking about legal theory help us to think about the practice of legal education and legal scholarship?

The collection is organized into four parts. Part I considers the role of legal theory in the legal curriculum, beginning with a historical account. Part II focuses on the teaching of legal theory. Part III focuses on the dynamic, two-way relationship between taught legal theory and research into substantive areas of law. Part IV takes a specific look at the potential for legal theory and comparative law to be mutually informative.

The Role of Legal Theory in the Legal Curriculum

The collection opens with the most recent available survey of the teaching of legal theory in Australia, Canada and the United Kingdom, produced by Hilaire Barnett (Chapter 1). This survey is particularly useful, for it includes a comparison with a series of previous, similarly oriented surveys (Cotterrell and Woodliffe, 1974–75; Barnett and Yach, 1985). In the context of the present collection, the survey reported in 1985 was particularly significant, for it sparked a debate that continues to resonate in the more recent research into the role of legal theory in the legal curriculum and the teaching of legal theory. An important moment in that debate was an essay by Neil MacCormick, included as Chapter 2 in this collection, which itself triggered two replies by Alan Hunt, a shorter one in 1986, and a more comprehensive one, included here as Chapter 3, in 1989. Two aspects of Hunt's essay continue to be discussed in the contemporary literature: first, his recommendation of 'principled pluralism' about 'theoretical conceptions of law' in legal education; and second, his critical sympathies, which are further illustrated in Roger Cotterrell's outline of the 'constructively subversive' potential of jurisprudence in the curriculum (included here as Chapter 4). Let us, however, proceed more slowly and place these essays in some context.

At least since John Austin's 'The Uses of the Study of Jurisprudence' (delivered in 1828 but only published in 1863) English and American legal theorists have made programmatic statements about their subject. Some have spoken specifically about the educational value of jurisprudence; others have outlined their conception of the field more broadly. A survey

of such pronouncements between 1863 and 1950 would include contributions by Holland ([1880] 1916, Ch. 1), Pollock (1882, Ch. 1), Buckland (1890),[1] Bryce (1901), Salmond ([1902] 1947, Ch. 1) and Vinogradoff (1928) in the United Kingdom and by Thorne (1901), Gray ([1909] 1921, Ch. 7), Pound (for example 1910–11, 1911–12), Llewellyn (1939) and Lasswell and MacDougal (1943) in the United States. Nearly all of these could be read as variations on the theme of resistance to the domination of Austinian analytical jurisprudence. A more concrete picture of the educational practice can be obtained from the leading students' works of the period. In the late nineteenth century, much of the focus was on Austin but over time the agenda was largely set by a series of elementary textbooks, several of which went into many editions: Holland (1st edition 1880, 12th edition 1916), Salmond (1st edition 1902, 12th edition by P.J. Fitzgerald 1966), Paton (1st edition 1946, 4th edition with David Derham 1972) and, latterly, Dias (1st edition with G.J.B. Hughes 1957, 5th edition 1985).

By the 1950s taught jurisprudence in the UK tended to comprise an uneasy combination of surveys of the main 'Schools' followed by detailed studies of basic concepts (for example personality, possession, rights, ownership) in English law, or at most common law. This kind of particular analytical jurisprudence was closely linked to the study of domestic law (especially private law) but was divorced from philosophy and from sophisticated methods of conceptual analysis. The picture in the United States was more varied and eclectic, with collections of readings analogous to Langdellian casebooks (e.g Fuller, 1949; Cohen and Cohen, 1951; Morris, 1959) outranking a few English-style textbooks (for example Patterson, 1953; Bodenheimer, 1974).

In 1946 Julius Stone published his magisterial work *The Province and Function of Law*, which followed in the footsteps of Pound but set out an even broader agenda, dividing jurisprudence into three broad areas (analytical, functional or sociological, and theories of justice). This, together with Wolfgang Friedmann's *Legal Theory* (1944), raised hopes of broader visions of legal theory, influenced by both Continental European and American ideas. However, the arrival of Herbert Hart on the scene radically changed the direction of English, and later, American jurisprudence. Hart reinforced the dominance of analysis of concepts but moved it onto a more abstract plane, with the result that particular analytical jurisprudence was transformed into general analytical legal philosophy. In a sharp critique of Dias and Hughes' (1957) textbook, Hart (1958) criticized the very idea of a *textbook* of jurisprudence and attacked the practice of focusing on what jurists had said rather than puzzling and arguing about issues. In short, students should do jurisprudence rather than learn about it.[2] The outcome was an increase in rigour and intellectual excitement at the cost of a sharp narrowing of vision.

Two responses to a survey by UNESCO provided overviews of taught jurisprudence in the United States and the United Kingdom in 1951, just before the advent of Hart. Writing in the early 1950s in response to a request from UNESCO, Albert Ehrenzweig argued that it was 'not until a rigid doctrine of *stare decisis* and a developed technique of "finding" the rule of the case had transformed the common law into a system, did jurisprudence become a separate

[1] On the long-running disagreement between Holland (who believed jurisprudence was a science and so must be universal) and Buckland (1890, 1945) (who maintained that law and legal theory were culture specific and so must be particular), see Twining (2001, Ch. 1).

[2] Hart is reported as saying that such 'books about books [were] designed to enable third class men [sic] to get seconds' (quoted in Lacey, 2004, p. 220).

object of study' (1951–52, p. 121) – a moment that Ehrenzweig marks with the availability of the work of Jeremy Bentham and John Austin. Beginnings were difficult. When, in the second half of the nineteenth century, Langdell's case method, and its 'scientific' pretensions ('long since proved incorrect', says Ehrenzweig; 1951–52, p. 122), began to dominate United States legal education, jurisprudence was at once freed from 'inquiries ... into the legal rule' and also sidelined, becoming a source of contempt for 'casebook teachers' and the lawyers trained by them (Ehrenzweig, 1951–52, p. 122). In 1891, for example, only nine law schools offered a course in jurisprudence or a related subject (Ehrenzweig, 1951–52, p. 123). According to Ehrenzweig, the most profound service to the state of American jurisprudence was rendered by the 'tireless efforts' of Roscoe Pound. Pound not only made available the thoughts of Continental legal philosophers in the United States but also called upon the training of lawyers in 'social, political and legal philosophy' (Ehrenzweig, 1951–52, p. 123). Slowly, the limitations of the case method, especially as an exclusive tool of instruction, were beginning to be recognized. By the time of Ehrenzweig's essay, 'most major and several smaller law schools' offered courses in jurisprudence and related fields (for a more detailed history of legal theory in American legal education, see Fisher, 2008).

Ehrenzweig was, however, cautiously optimistic about the future of jurisprudence in American legal education. Some of the difficulties are by now familiar: the pedagogical techniques used in the case method, such as casebooks, the Socratic method and large lectures, were clearly inadequate when it came to the teaching of legal theory, which, in the absence of alternatives, meant that jurisprudence courses were relegated to largely unpopular elective courses. Ehrenzweig recommended assigning at least one instructor on each faculty 'to assist his colleagues ... in a jurisprudential and comparative reconsideration of their courses' or giving 'class time in as many courses as possible for one or several lectures treating each subject from this standpoint' (1951–52, p. 126). As we shall see, this proposal for integrating legal theory into the legal curriculum has continued to resurface in the contemporary literature.

A parallel essay, also in response to UNESCO's request, examined the teaching of legal theory in the United Kingdom. R.H. Graveson's 'The Teaching of Jurisprudence in England and Wales' (1951–52) also traced the beginnings of the pedagogy of legal theory to the early nineteenth century, highlighting the appointment in 1828 of John Austin to the Chair of Jurisprudence and International Law in the University of London (Graveson, 1951–52, p. 127). Of course, Graveson also pointed out that jurisprudence – principally natural law theory but also later Hobbes and Locke on the common law – had been taught in English universities since the Middle Ages. But it was, according to Graveson, really only with Austin, and his delimitation of the province of jurisprudence to 'the study of the nature of law, the theory of sovereignty and of the state, and the analysis of concepts of English law' (1951–52, p. 127), that jurisprudence began to be established in English universities. It is not without significance that Austin, as we shall see later, continued to be taught in the majority of law schools until 1995 (based on our most recent figures provided by Barnett in Chapter 1, though it is quite probable that he continues to be taught in the UK today). As Graveson put it, 'Austin's analysis and rationalisation of the principles of mature legal systems, despite its various defects, made a contribution of untold value to the study of law as distinct from the study of practice in the nineteenth century' (1951–52, p. 128). Two other developments accompanied, and also further expanded, the teaching of jurisprudence in the UK: first, historical jurisprudence, as expressed by Sir Henry Maine, and, second, the retention of Roman law in the curriculum, which became

and to some extent has continued to be a source of comparative insights about legal concepts (such as persons, ownership and possession; Graveson, 1951–52, pp. 128–29).

Like Ehrenzweig, Graveson also mentions the importance of the reception of continental theorists, only a small minority of whom continue to be taught today: Kant, Savigny, Jhering, Ehrlich (who is experiencing somewhat of a revival: see Hertogh, 2009), Geny, Duguit, Kelsen and Olivercrona. Although he stresses the significance of Austin and Bentham, as well as, later, Dicey and Maitland, Graveson does not neglect to acknowledge the influence of American theorists such as Hohfeld (who continues to be taught today), Pound and Cardozo. But what is perhaps most significant about Graveson's contribution is the observation that the most important limit within the English legal system on the contents of the teaching of legal theory is the 'position of the English judge' (1951–52, p. 129). It was, according to Graveson, as a result of the peculiar position of the English judge, and the much more diminished role of the jurist (when compared to the Continent), that 'jurisprudence in England shows a strong attachment to positive law and a judicial approach to problems' (1951–52, p. 129). 'English law', he said, 'is a body of empirical growth and the logic which it attempts to achieve is sometimes far from perfect' (Graveson, 1951–52, p. 129). It was a prophetic statement, the accuracy of which still applies today, both in the UK and the United States (and other common law systems, such as Australia and Canada), where much of legal theory is driven by an examination of the 'judicial approach to problems'.

It is instructive to compare the teaching of legal theory in the UK at the time of Graveson's essay with the situation in the mid-1970s, as portrayed in the survey by Roger Cotterrell and J.C. Woodliffe (1974–75). Graveson's survey revealed that jurisprudence was largely taught in the third and final year of the law degree, that it was compulsory everywhere except at the University of Cambridge and that the most commonly studied theorists (in order of popularity) were American sociological theorists, particularly Pound and to a lesser degree Cardozo, with Kelsen and the fact sceptics, represented by Frank, equal second and Plato and Aristotle, the natural law school, and Hohfeld in third place. In 1974 jurisprudence was still compulsory in the majority of schools, and still taught mostly in the third year (Cotterrell and Woodliffe, 1974–75, pp. 76–77), but the syllabus had changed radically. This was single-handedly a result of the publication of Hart's *The Concept of Law* (1961). Not only was Hart now taught 'fairly fully' in all UK law schools (Cotterrell and Woodliffe, 1974–75, p. 80); the figures he either discussed in his book or with whom he exchanged views in other contexts also remained popular, including Austin, Devlin, Fuller and Kelsen. There were other additions, such as D'Entrèves' *Natural Law* and Marxist Legal Theory, but it was by far and away Hart's book, and his treatment of the subject, that dominated the teaching of legal theory (a legacy that continues to this day) (Cotterrell and Woodliffe, 1974–75, p. 80).

Cotterrell and Woodliffe also noted that a division of the subject on the basis of problems, rather than clusters of 'schools' or theories, was becoming more widespread (1974–75, p. 81). One division based on schools was between 'Philosophical Theories of Law (including problems of validity of law, Natural Law, sovereignty and imperative theory, etc) and Scientific Theories of Law (historical, sociological and realist)'. Another was between 'Analytical and Positivist theorists, with, on the one hand, Natural Law and, on the other, sociological and historical jurisprudence' (Cotterrell and Woodliffe, 1974–75, p. 81). The division on the basis of problems included 1) problems of creation and application of law; 2) the nature of law; and 3) the purpose and values of law (which involved a wide range of issues relating to the social

role of law). Cotterrell and Woodliffe offered a comment on the increasing popularity of the analysis of legal concepts, sometimes as part of the jurisprudence course and sometimes as an independent course. They noted that some were of the opinion that the analysis of legal concepts should be conducted at the moment in the teaching of substantive law, as the need arose. According to them, 'the inclusion of a detailed and exclusively analytical treatment of particular legal concepts such as right, duty, personality and ownership may impair the balance and structure of a jurisprudence course which aims to encourage the student to view law from many contrasting aspects ... and to achieve a balance between those approaches' (Cotterrell and Woodliffe, 1974–75, p. 82). Here again we are witness to the stirrings of a central issue for this part of the collection, namely the relationship between the teaching of legal theory and the teaching of the rest of the legal curriculum: how far is it, and can/should it, be integrated?

Cotterrell and Woodliffe made a number of other prophetic remarks worth mentioning here. For example, they observed that 'there is a greater willingness to borrow from disciplines such as philosophy, sociology, anthropology and psychology to find insights relevant to the issues of jurisprudence' (Cotterrell and Woodliffe, 1974–75, pp. 86–87) – this being clearly visible today, though, interestingly, such interdisciplinarity is perhaps more visible in legal scholarship than in the teaching of legal theory (for support of the claim that legal scholarship is increasingly interdisciplinary, see McCrudden, 2006; the issue of the relationship of legal theory and the social sciences is taken up in Volume II of this series, where McCrudden's essay is included and discussed). They also raised two issues for the future of the role of legal theory in the legal academy: first, 'the value of jurisprudence for the practising lawyer' and, second, a view of the subject as 'compensating for what is regarded as the narrow outlook and approach of the typical law degree' (Cotterrell and Woodliffe, 1974–75, p. 87). As we shall see later, these issues continue to be of central importance – and no less so in Cotterrell's own later work.

We come now to the survey conducted in 1984 by Barnett and Yach, which, to recall, will lead us into the debate between MacCormick and Hunt. The 1984 survey revealed a trend towards offering jurisprudence as an elective course, with only 18 of the 37 canvassed universities offering a compulsory course (interestingly, the percentages were better in the case of polytechnics, with 74 per cent offering compulsory courses; Barnett and Yach, 1985, p. 153). This was a clear shift away from the 1973 result, which had reported 21 out of 28 universities offering a compulsory course of at least one year duration. As we shall see, this trend towards optional course offerings in jurisprudence became a significant point of debate (as Barnett and Yach note, the computation of the results was made somewhat difficult, given the range of different courses offering some jurisprudential content, for example legal reasoning courses: see Barnett and Yach, 1985, p. 154). These numbers, however, were not indicative of the attitudes of respondents, with the majority remaining in favour of a compulsory course even where their institution offered optional courses. 'This suggests', Barnett and Yach asserted, 'that the pressure for optional courses comes not from jurisprudence teachers but from teachers of other subjects within law faculties' (1985, p. 155). Those in favour of compulsion gave the following reasons for their position (in order of priority): '1) To make students think about the nature of law; 2) To provide students with a broad perspective and understanding of law as an important social activity rather than as a mere technical exercise; 3) Philosophical, ethical, and analytical perspectives are a necessary part of higher education; 4) To provide

intellectual diversity and act as an appropriate culmination of the academic study of law; and 5) Professional relevance' (Barnett and Yach, 1985, p. 155).

The 1984 survey also pointed to some other important developments. In terms of the content of the course, for example, Hart's *The Concept of Law* continued to dominate, as did those figures – as in 1973 – whom Hart had responded to (especially Austin and Kelsen). The 'most significant development', according to Barnett and Yach, was the 'vastly increased interest in Marxist legal theory', with 41 of 57 universities and polytechnics treating it 'fairly fully' (1985, p. 158). The liberation of Marxist theory of law from Soviet law, as well as the general advancement of 'western Marxism', among other reasons, were cited by respondents as the causes of the increased interest. This increase of interest also had an effect on other previously popular aspects of the course, such as the analysis of legal concepts, which had been prominent in 1973 but had come to play a much less significant role in jurisprudential pedagogy of the mid-1980s (of course, other causes, such as the increasing dominance of Hartian jurisprudence, contributed to this effect). Barnett and Yach did not mention whether this was a result of other courses covering the material, though they did indicate that other previously traditional jurisprudential topics, such as legal method, judicial technique and legal reasoning, were now largely offered as compulsory first year courses (as part of broader introductions to English law) (1985, p. 162). Finally, Barnett and Yach also indicated that in 1984 there was increasing interest in 'Sociological Jurisprudence, Sociology of Law and Economic Analysis of Law both within traditional jurisprudence and as substantive optional or alternative course of jurisprudence' (1985, p. 163).

In commenting more generally on the results, Barnett and Yach made a few further remarks, some of which were later picked up by Hunt in his response to MacCormick. These included that 'initial student resistance to jurisprudence may be enhanced by the de-intellectualising effects of two years of "black letter" law which for various reasons (not least syllabus demands) has traditionally been devoid of theoretical considerations' (Barnett and Yach, 1985, p. 166), going on to suggest that there was thus a case for including the study of jurisprudence sooner in the curriculum. This would have the added advantage, they said (on the back of another respondent's comment), that it would free jurisprudence courses from offering a 'Cook's tour' of great names, and concentrate instead on 'substantive issues and contemporary debates' (Barnett and Yach, 1985, pp. 166–67). This, in turn, raised the issue of generality versus specificity in a jurisprudential course, including how connected the course had to be (or at least appear to be) to 'black letter law'. Interestingly, this had already been a source of controversy in a survey of jurisprudential teaching in Edinburgh conducted by Peter Sheldrake (1974–75). It is instructive to quote the following response to that issue from MacCormick:

> If nothing else were true, it would at least be true that we in the University should be concerned to show putative lawyers that to conceive of law as comprising bundles of knowable facts is to cultivate a misconception. We have a balancing act to perform; we have to encourage rigour and accuracy in knowing what has been laid down as law, and in stating what one knows or thinks; yet at the same time we have to instil an awareness of how much that may be said about the law or in the law is intrinsically contestable and dubitable and always subject to change. We have to show how the law is, from one point of view, an objective normative order, and yet how it is, at the same time, and from another point of view, inevitably permeated by some prevailing set of political and moral values which is itself far from incontestable. We are concerned both with rigorous accuracy and with rigorousness as to the limits of accuracy in any pronouncement about the ordering of human affairs. (1974–75, p. 360)

Already here we are witness to the pedagogy of law offering a view of not only the demands of legal theory but also the nature of law and legal work. Before moving on to MacCormick's more elaborate responses to the 1984 survey, let us say a few words about the survey included in this collection (Chapter 1). Barnett's 1995 survey has been chosen principally because it compares data both synchronically (between Australia, Canada and the UK) and diachronically (from the 1974, 1984 and 1994 surveys).[3] Another advantage of the survey is that it places the discussion on the teaching of legal theory within a broader perspective of legal education in the common law world, largely as a result of a proliferation of inquiries into legal education in each of the above three jurisdictions. This broader perspective can be very significant for a discussion of the role of legal theory in the legal academy; consider, if only, the finding that only 50 per cent of law graduates become practising lawyers – a finding that, according to Barnett, suggests that 'Even if it were possible – which clearly it is not – for legal education to teach all "the rules", it is undesirable in principle and practice for the educational enterprise to present the image of preparation for technical crafting and no more' (p. 4). Here, the issue as to how far rule-based pedagogy can serve the purposes of legal education (as well as legal practice) is concomitant with the more general, and typically modern, legal theoretical question as to whether, and if so to what extent, 'law is an affair of rules' (the phrase is Hart's: see Hart, 1961, p. 13).

We should now have sufficient background to turn to the issues raised by MacCormick and Hunt in response to the 1984 survey. MacCormick's most pronounced opinion on the survey results is mentioned right at the beginning of Chapter 2: the trend towards treating 'jurisprudence, legal theory and cognate subjects as wholly optional within' the curriculum – a trend that the survey indicated was on the increase – was, said MacCormick, 'a disturbing, indeed a deplorable trend' (p. 43). Legal theory, MacCormick argued, is 'far from being properly optional'; instead, 'an element of theory seems essential to legal education both as liberal education and also, indeed, as vocational training fit to the vocation in question' (p. 43). Of course, it matters how one teaches legal theory, for depending on the manner of the teaching, the role of legal theory in the curriculum will change: if, for example, one provides nothing but a 'Cook's tour' of great names, injecting the course into the stream of controversies between schools of jurisprudential thought, then one ought not be surprised to see one's course becoming increasingly alienated not only from the student body but also more generally from the other teaching staff. The great contribution of MacCormick's essay is to offer a general framework – composed of a sequence of general philosophical questions – for the design of a jurisprudence course, which, in turn, shows just how important such a course is for the understanding and practice of law. Indeed, MacCormick's position is even stronger; he says that 'law is indeed in its very nature a philosophical enterprise and that a proper legal education thus contains a substantial philosophical element' (p. 44).

What, then, are the elements of this enterprise? Generally speaking, philosophical study has two dimensions: first, an 'intellectual side' that 'gave pride of place to speculative philosophy' (what MacCormick also calls 'generalism') and, second, a 'democratic side', which was partly that of 'giving access to higher education to all who by talent showed themselves able to profit from it' but also, more generally a matter of 'openness' (p. 44). MacCormick positions himself

[3] In terms of the USA, no recent survey is known to the editors. The most recent discussion of the history of legal theory in American legal education can be found in Fisher (2008).

as continuing the great Scottish tradition of liberal, humane education. This tradition is one that calls on the development of 'persons of breadth and generosity of mind, not mere narrow technicians' (p. 46). For MacCormick, then, the practice of philosophy encompassed a wide range of intellectual traditions, especially the philosophical literature of the Enlightenment, and was certainly not limited to modern analytical philosophy (see also MacCormick and Twining, 1986, pp. 253–54, fn. 10).

MacCormick's focus in Chapter 2 is on the intellectual side but it is clear that the intellectual and the democratic dimensions go hand in hand. Indeed, many since MacCormick have also recognized the intertwining of the two dimensions – consider, for one, Martha Nussbaum's call for 'Cultivating Humanity in Legal Education' (2003; significantly, Nussbaum extends this approach to the US context, where students already come with a general liberal arts degree). Here, the capacity for 'speculative' philosophy or, in Nussbaum's terms, 'Socratic self-examination' goes hand in hand with the view that 'democracy needs citizens who can think for themselves rather than simply deferring to authority, who can reason together about their choices rather than just treating claims and counterclaims' (Nussbaum, 2003, p. 269).

To recall, MacCormick's great contribution in Chapter 2 is to offer a general framework – composed of a sequence of philosophical questions – for the design of a jurisprudential course that reveals its vital role in maintaining the generalism and openness of legal education. Too often the call for a liberal, humane legal education is made in the absence of such a vision, and yet the rub is precisely in pedagogical details. The specific sequence of questions MacCormick offers are as follows:

> 1) What is there? 2) What is the structure of the things there are, and how do different kinds of existence interrelate? 3) How do we know what there is, and how do we have acquaintance with the things that exists [sic]? 4) By what method should we explain and expound the various matters open to our knowledge? 5) What is the place of human beings as rational agents in relation to whatever else there is? and 6) In the light of all this, how are we to live and conduct ourselves? (p. 48)

These are the six questions that, according to MacCormick, 'any serious approach to higher education ought to allow of some answer, preferably one reached after substantial reflection' (p. 48). Having provided them, MacCormick then proceeds to work through these questions on the basis of a discussion of past and current legal theories. The result is an overview of what a course in jurisprudence, based on these questions, would look like. Of course, MacCormick does not place emphasis on the answers: it is not the answers to these questions that matter (from a pedagogical perspective); 'what really matters', he says, 'is the range of questions, not a set of cut and dried answers', and he continues as follows:

> The questions are ones which ought to remain open and alive for every law teacher, law student and indeed legal practitioner of whatever rank and eminence. That they are fundamental for lawyering and for legal education is one reason why a jurisprudence course is of structural and vital importance to any law degree within the tradition of the Democratic Intellect; that they are so fundamental indicates why all those providing law degree courses should wish to bring them within that tradition. (p. 51)

The vital thing to notice about this is that no matter how general and abstract the questions at first appear, they are integral to the concrete practice of understanding law and to working with(in) it. MacCormick's aim is certainly not to drive a wedge between theory and practice; on the contrary. Nevertheless, MacCormick was characteristically modest enough here to go

on to suggest, following William Twining (1984), that there are 'all sorts of middle-ranged theoretical questions about law and legal institutions' – in addition to those above – which we also need to engage if we are to make sure that theory and substantive courses in the legal curriculum do not 'run on quite different tracks' (p. 52). Again, understanding law – whether as a jurist or as a judge – is, for MacCormick, an 'intrinsically philosophical discipline ... Traditions in the development and exposition of legal doctrine are expressions of positions in practical philosophy' (p. 52).

As noted above, MacCormick's argument has met with some criticism. The most immediate and vociferous of these responses came from Hunt (1986 and Chapter 3 in this volume). Hunt's gripe was not with MacCormick's 'criticism of the narrow and intellectually barren fetish of "learning the rules" which', said Hunt, 'constitutes the great bulk of law teaching' (1986, p. 292). Indeed, he argued that his 'purpose is to strengthen, rather than undermine, MacCormick's case for the role of ... the democratic intellect in legal education' (Hunt, 1986, pp. 292–93). Rather, his gripe was partly philosophical and partly practical. Philosophically, Hunt disagreed with the 'foundationalist view of philosophy' that, he argued, MacCormick espoused: the very nature, and sequence, of the questions suggested by MacCormick placed philosophy on a pedestal, above other forms of 'theory' (including other social sciences), as if a 'more or less solid foundation' could be provided for all other disciplines. For Hunt, this 'foundationalism' had 'problematic implications', among which were that it presented 'law as an autonomous object of inquiry' (Hunt, 1986, p. 298). MacCormick's foundations, said Hunt, were but instances of a particular philosophical tradition, all the more misleading for presenting themselves as foundational. Further, even if something could play the role of a foundation, it was not clear, to Hunt, that the role of legal theory in the curriculum should be to provide one (for legal scholarship or legal practice). On the contrary, Hunt argued that 'the aspiration that jurisprudence can produce a unified project for legal scholarship overburdens jurisprudence by giving it a task which not only rests on a questionable assumption of disciplinary unity' but also 'sets up an objective that is almost certainly doomed to failure; jurisprudence cannot provide a unification and integration which flies in the face of the reality of differentiation and sub-division within the various disparate projects which are the reality of the law enterprise' (Hunt, 1986, p. 299).

As noted above, the brunt of Hunt's response is twofold: first, a defence of 'principled pluralism' about 'theoretical conceptions of law' and, second, an argument that rather than contribute to 'the legitimation of professional roles', jurisprudence ought to be 'problematising' them (1986, p. 299). Hunt illustrated how these points would inform the construction of a jurisprudence course by posing his own set of 'big questions'. He began with the most general one: 'What questions about law are generated by our contemporary perception and experience of legal phenomena?' (Hunt, 1986, p. 300) – a question that, he believed, would lead to 'a more rigorous pluralism ... since it generates questions which embody the concerns and preoccupations of different constituencies':

- Can legal regulation provide a framework of social integration in increasingly pluralistic and fractured communities?
- Is it possible to articulate persuasive internal and external grounds for obedience as the forms of law become more varied and expand their regulatory fields?

- What capacity do legal mechanisms have as viable agencies of social change in the diverse struggles for human well-being and emancipation?
- How are legal mechanisms and institutions related to the persistent inequalities of social power and conditions of life? (Hunt, 1986, p. 300)

Put more succinctly, Hunt's point is that 'today it is the radical intellect rather than the liberal intellect that can provide the surest defence of pluralism' (1986, p. 301).

It was noted above that Hunt's gripe with MacCormick was not purely on the philosophical side; there was also a practical disagreement. Hunt argued that 'the demise of compulsory jurisprudence is not a cause for concern' (1986, p. 292). His argument was as much against compulsory jurisprudence as it was with the timing of such a course, namely as a final year subject. This 'orthodox model', he said, 'is not the guarantee of intellectual values nor does it necessarily create the space for their presence within the curriculum that MacCormick believes it provides' (Hunt, 1986, p. 294). In fact, according to Hunt, this model suffers from 'the finishing school syndrome', namely 'it is both too little and too late. Jurisprudence plays the part of the intellectual icing on the otherwise stodgy cake that is legal education' (1986, p. 294). Coming at the end of the degree, jurisprudence 'provides a rationalisation for a "learning the rules" orientation towards substantive law by "removing" or postponing theoretical issues that may arise in the context of substantive law' (Hunt, 1986, p. 294). If directed at MacCormick, Hunt's argument is surprising, for MacCormick, as noted above, was insistent on the importance of running theoretical and substantive inquiries on the one track. Yet the more general point is, arguably, a good one: if theoretical inquiry in the legal curriculum is confined to a final year compulsory jurisprudence course, it is difficult to see how it could not, at worst, alienate most students, while, at best, becoming 'a safe haven for those students who are alienated from the massification of legal rules' (Hunt, 1986, p. 294). Further, to the extent that a jurisprudence course comes at the end of a law degree, its critical capacity is largely restricted to internal debates between schools of thought rather than 'the evaluation of legal institutions, rules and procedures' (Hunt, 1986, p. 295). Again, for Hunt, this only leads to the separation of substantive law and legal theory, and thereby 'operates to the detriment of both' (1986, p. 295). His own practical suggestion is 'that an explicitly theoretical dimension should be introduced into all stages or levels of the law curriculum', such that 'substantive law syllabi become more self-consciously theoretical' (Hunt, 1986, p. 296). Indeed, there are law schools – for example the law school at Griffith University in Queensland, Australia – that have developed a curriculum that incorporates theoretical self-consciousness both within specific areas of substantive law and in the form of themes that range across those areas (and thus over the course of the entire degree). For the sake of clarity, it should be emphasized that MacCormick certainly endorsed a compulsory course in jurisprudence, though not necessarily one that came at the end of the degree. Indeed, in a joint essay with William Twining – 'Theory in the Law Curriculum', which was included in a vitally important collection for the issue of legal theory in the legal curriculum, *Legal Theory and Common Law* (Twining, 1986) – MacCormick supported placing jurisprudence in the second year of a typical three-year degree (see MacCormick and Twining, 1986, p. 250). This was done precisely so as to allow it to feed into substantive courses, as well as to avoid the entrenchment of student resistance to theory. In Chapter 3, Hunt acknowledges this position