LEGAL EDUCATION AND PUBLIC POLICY**

LG Baxter*

Lawyers in all sectors of the legal profession have become concerned about the structure and contents of legal curricula in the universities. In October 1983 the first major Conference on Legal Education was held at the University of the Witwatersrand. Attention was focussed mainly upon the division of responsibility for legal education between the universities, the private professions, and the Department of Justice. Some consideration was also given to the pressure placed upon university curricula to cater for the increasing technical complexity of the law and specialization of legal practice. Yet this pedagogical ferment has so far failed to identify what I believe to be a much deeper difficulty facing legal education: namely, the dramatic politicization of the legal system that has occurred during the course of the past century.

The boundary between law and public policy that has long been drawn by lawyers has been steadily eroding. In the result, lawyers find themselves researching, teaching and practising in an environment which, by virtue of their training, assumptions and values, is often unfamiliar. This seems to suggest that legal education requires substantial adjustment if lawyers are to retain a significant role in the prevention and settlement of disputes, the protection of individual rights and interests, and the regulation of government behaviour.

In order to defend this view, it will be necessary for me to explain the sources of our dilemma. I shall then attempt to justify a continued and even enhanced role for lawyers in the official regulation of society, before closing with some observations on the implied consequences for academic legal education. In the process I shall draw distinctions between two kinds of society, two kinds of public policy, and two kinds of law.

TWO KINDS OF SOCIETY

As we all know, the nineteenth and twentieth centuries have witnessed massive scientific, technological, economic and social transformations. The

** This is an unrevised version of an inaugural lecture delivered in the University of Natal, Pietermaritzburg on 17 October 1984 and reproduced by the courtesy of the University of Natal Press, Pietermaritzburg, 1984.

* B Com, LL B (Natal), LL B, Diploma in Legal Studies Studies (Cantab), Ph D (Natal), Professor of Law, University of Natal (Pmb).
result is that we now believe, rightly or wrongly, that we are able to exercise some control over our collective destiny. Social activities throughout the world have been subjected to central planning and control; society has been transformed from what Friedrich Hayek calls ‘grown’ or ‘spontaneous’ order to what he terms ‘made’ or ‘organizational’ order.¹ We have encouraged, or have at least acquiesced in, a great extension of state activities, and this has led in turn to the growth of the phenomenon popularly referred to as the ‘administrative state’, in other words, to the growth of a system of governance in which the public administration is by far the most dominant arm of government, performing most of the functions that were traditionally performed by Parliament, on the one hand, and by the courts of law, on the other.²

TWO KINDS OF POLICY
This transition is partly reflected in changing conceptions of the importance of public policy and the methods of its formulation. Public policy is a notoriously difficult concept to define, but there is general agreement that it relates to matters of collective welfare, rather than individual interests per se.³ In the modern world public policies often reflect the active pursuit of community goals, to the extent that public policy has even been defined as ‘the purposive activity of government’.⁴

There are various forms of public policy - economic, social and environmental - and these have many branches. Because of our familiarity with governmental management, when we talk of ‘economic policy’ we might have in mind government spending, devaluation of the Rand, or matters such as industrial deconcentration, agricultural marketing, the control of credit agreements, and the regulation of road transportation. ‘Social policy’ suggests such activities as welfare programmes, the award of pensions, the provision of health care, or, more unfortunately, the control of group areas and censorship. ‘Environmental policy’ conjures up thoughts of pollution control and the regulation of land and water usage. On the other hand, the term ‘public policy’ might suggest to us something which is more conservative: for example, it is thought to be ‘contrary to public policy’ that persons should be allowed to enjoy the benefits of criminal activities.⁵

Public policy has always been a feature of social organization; it is of course an axiomatic element of society. But the forms it has taken have varied according to the methods by which it is formulated. One may distinguish between two principal kinds of policy-formulation: the rationalist and the incremental.⁶

We have become so sure of our technological capabilities that the first, rationalist method, probably seems most familiar. The policy-maker stipulates

his aims and objectives in advance, devises the measures and instruments whereby these are to be achieved, and then directs the implementation of the policy by means of specific instructions. The directives are clearly stipulated and allow little or no deviation. The policy is then implemented in a mechanical way and according to the predetermined plan of action. Policy is formulated by superiors and implemented by subordinates. Hence rationalist policy-making is conducted on a centralized basis.

The second method of policy-formulation is that splendid technique of social governance known as 'muddling through'. It represents an incremental or heuristic approach to the solution of human problems. Policy is formulated in an evolutionary and experimental manner, and is continually adjusted in the light of accumulated experience. Goals and objectives are formulated much less clearly, instruments and strategies are varied with time, and various measures are adopted or discarded as the general enterprise proceeds. The institutions that have been established to implement the policy are given wide discretion to decide which measures to adopt, how they should be fashioned, and sometimes even what objectives to pursue. Policy is formulated at all levels of administration. Incrementalist policy-formulation thus tends, unlike rationalist policy-formulation, to be a highly decentralized activity.

Despite the maturing of the science of public administration, some technocrats and many self-assured politicians are still inclined to hold the second method of policy-formulation in disdain. It is thought to be 'unscientific', clumsy and unpredictable. Yet the techniques of social management have proved a good deal more crude and unreliable than were once imagined, while the societies to which the policies are to be applied have turned out to be complex and unpredictable themselves. It is now generally recognised that most policy-formulation consists in practice of a blend of both methods. As Carl Friedrich has said, 'Public policy, to put it flatly, is a continuous process, the formation of which is inseparable from its execution. Public policy is being formed as it is being executed, and it is likewise being executed as it is being formed."

The distinction nevertheless remains important for present purposes since it helps to cast light upon the attitudes of lawyers.

TWO KINDS OF LAW

Lawyers tend to avoid the question of public policy as much as they can. In my student days the concept seemed to induce the most unusual behaviour. One first sensed its presence when encountering judicial decisions in which the commonly accepted rules and principles of law appeared to have no influence over the result of the case at hand. When pressed for an explanation, such seldom being evident from the mysterious judgment itself, the lecturer concerned would invariably begin to shuffle about, looking for all the world like a prudish parent who had just received a forthright enquiry from a child as to the latter's origins. Eventually the facts of legal life would be murmured in

apologetic tones and, of course, entirely without prejudice. One’s estimation of the judicial decision, if not of the judge who made it, would be shattered as soon as it was exposed as having been reached on ‘policy grounds’. ‘Public policy’, to the extent that the concept was ever confronted, was regarded as a thoroughly unfortunate, rather dangerous phenomenon which ought not to be allowed to contaminate the pristine purity of the legal system except where this was quite unavoidable.10

In order to understand the lawyer’s aversion for public policy, it is initially necessary to consider a distinction that is drawn between two kinds of law. Non-lawyers might be surprised to learn that the first is sometimes curiously referred to as ‘lawyer’s law’.11 It is the law relating to contracts, delicts, private property, family relations and inheritance, crimes and judicial proceedings. By common consent, teachers of law, most of whom are decided ‘lawyers’ lawyers’, regard these subjects (and one or two of their derivatives) as the ‘core courses’ of any legal curriculum.

The second type of law is more difficult to name. If it is not lawyer’s law, it is obviously someone else’s. An Australian legal sociologist, Geoffrey Sawer, has called it the ‘law of social administration’.12 Friedrich Hayek, the liberal economist and political philosopher, calls it ‘public law’ or, more specifically, ‘administrative law’,13 while an English lawyer has chosen to refer to it as the ‘law of regulation’.14 None of these titles is really satisfactory since this body of law covers more than organized social administration, is concerned not only with the regulation of social activity, and is somewhat broader than that body of law traditionally referred to and approved of, even by lawyers’ lawyers, as ‘administrative law’. The term ‘public law’ is also unsatisfactory since it is used by lawyers for many different purposes. Perhaps ‘governmental law’, using the term ‘government’ in the broadest sense of the word, will convey its meaning more clearly.

The predominant characteristic of lawyer’s law, as the apparent tautology suggests, is that it is created by lawyers themselves. It has evolved through the process of judicial decision-making and also, in the case of South African law, at the hands of distinguished jurists, preferably of Dutch origin and drawn from a fairly fixed period in history - between the sixteenth and early nineteenth centuries (though a few living South African jurists seem to assume that this period has been extended to cover their own epoch as well, and their students are left in no doubt that this is so). It is significant that this body of law is also referred to as the ‘common law’.

Another feature of lawyer’s law is that it is not so much the product of conscious human creation as of a continuous and undirected evolution. Although it is now generally acknowledged, even by lawyers’ lawyers, that judges do make law, it is thought that they do so only in an ‘interstitial’ or

10. This hole-and-corner attitude might since have changed, though I doubt it. When I began to prepare for this lecture I sought an authoritative monograph on the concept of public policy which I knew had been written some years ago (viz Lloyd op cit). It was not held by our own library and, on acquiring it through an inter-library loan (from one of the largest law libraries in the country), I was only mildly surprised to discover that I seem to be the only person ever to have used it in the 31 years since its publication.
11. The term appears to have been coined by Courtenay Ilbert Legislative Methods and Forms (1901) 6.
LEGAL EDUCATION AND PUBLIC POLICY

‘incremental’ fashion, and it is also often assumed that many judicial decisions and juristic doctrines merely constitute the conscious articulation of law that has already become immanent in society. It is the law that corresponds to Hayek’s ‘made’ or ‘spontaneous’ social order.

When pressed, lawyers concede that their law does contain elements of ‘public policy’. However, the elements of ‘public policy’ referred to in this context nearly always relate to certain well-established considerations of community morality or international comity. For example, contracts that entail a violation of sexual ethics are usually said to be contrary to public policy and therefore void. Hence the public policy involved tends to be that which has been formulated in an incremental fashion: it is public policy that has evolved over a long period of time and is ‘already there’ for the courts to identify and apply. The courts themselves rarely develop principles of policy in a rationalist manner and lawyers usually deny that they do so.

Governmental law, on the other hand, consists almost exclusively of legislation made, not by professional lawyers, but by legislatures and administrative officials. It is the product of conscious attempts to implement public programmes, which are designed to regulate some form of human activity, provide some service or execute some plan of public action. Ideally, it is designed to advance the collective welfare and is the kind of law that tends to reflect considerations of public policy most clearly. It is also the kind of law that is subject to frequent amendment, even reversal, as the policies towards which it is directed are themselves revised or abandoned. On the other hand, just as lawyer’s law is not entirely free of public policy considerations, governmental law is not always free of lawyer’s law. Where policies have remained stable for a long period of time, the legislation in which they are enshrined tends to acquire an encrustation of case law as judges interpret and build upon it in the cases in which it is applied. An example is the case law attaching to national constitutions of long standing.

Lawyers tend to show scant respect for governmental law, except where it has survived long enough to have acquired the respectability of judicial gloss. Indeed, many lawyers refuse to regard it as ‘law’ in the ‘true’ sense of the word. Conversely, legislators have seldom in the past expressed much interest in lawyer’s law: as Sir Courtenay Ilbert once put it, ‘for lawyer’s law Parliament has neither the time nor taste’.

LAWYERS AND POLITICS

The explanation for this legal dichotomy and the lawyer’s disrespect for governmental law is to be found in a number of interrelated factors. In some

16. See Lloyd op cit passim.
17. Another example that has attracted some attention in recent years relates to the question whether agreements in restraint of trade are contrary to public policy and void: cf eg Roffey v Catterall, Edwards and Goudre (Pty) Ltd 1977 (4) SA 494 (N); Highlands Park Football Club v Viljoen 1978 (3) SA 191 (W); Poolaw Industries (Pty) Ltd v Griffin 1978 (4) SA 353 (W); Drewtons (Pty) Ltd v Carle 1981 (4) SA 305 (C); and cf Carmen Nathan ‘The Rules Relating to Contracts in Restraint of Trade - Whence and Whither?’ A Decade Later’ (1979) 96 SALJ 35; A J Kerr ‘Morals, Law, Public Policy and Restraints of Trade’ (1982) 99 SALJ 183; Brahm du Plessis & D M Davis ‘Restraint of Trade and Public Policy’ (1984) 101 SALJ 86.
18. Though not always: see Lloyd op cit 113-4.
respects the distinction between lawyer's law and governmental law can be traced back to the distinction drawn in Roman law between public law and private law.\textsuperscript{22} Public law, in imperial and republican Rome, was really forbidden territory for lawyers except where they were acting in a political capacity. Later, during the Middle Ages, the distinction was newly expressed by a division drawn between matters of 'government' or 'policy' (gubernaculum/politie), on the one hand, and 'jurisdiction' or 'justice' (jurisdiction/justitie), on the other.\textsuperscript{23} This signalled the beginning of a process that led to the delineation of the three separate functions of government, legislation, execution and adjudication, and to the development of the doctrine of Separation of Power.\textsuperscript{24} Questions of government were deemed not to fall within the regulatory purview of the general law; instead they were matters for the discretion of the ruler. On the other hand, questions of justice were matters which fell for final determination, in accordance with the existing rules and principles of the common law, by the courts.

The precise boundaries of 'government' and 'justice' were subject to continual dispute throughout Europe during the sixteenth, seventeenth and eighteenth centuries. The disputes were settled in various ways, but the common result in Western Europe and Britain was that the legal professions acquired a high degree of professional autonomy at the price of a substantial loss of political influence. In Britain, the courts, having won their struggle against the Crown, concluded their alliance with Parliament by recognising the political supremacy of the latter. The formulation of and responsibility for public policy was left to Parliament and its principal committee, the Cabinet. Grievances relating to the content and application of public policy were left to be redressed by means of a system which required Cabinet accountability to Parliament. In the Netherlands the courts were confined to the settlement of private disputes alone, and political remedies were created in order to cater for grievances relating to public authorities. In France the old courts of law were replaced after the Revolution by new courts and the latter were strictly confined to matters that did not involve questions of public administration. Later, under Napoleon, a judicialised department of the Council of State, which functioned entirely within the arm of executive government, began to evolve as a separate administrative court, and this fulfilled the demand for redress in respect of complaints relating to the action of public authorities.\textsuperscript{25}

During the course of these developments there emerged a phenomenon which many social theorists have suggested is unique to the West, namely the Rule of Law\textsuperscript{26} or, as Roberto Unger has described it, the concept of 'legal order'.\textsuperscript{27} There are numerous contending theories as to what constituted the essential preconditions and driving motivation for this development. The peculiar structural legacies of the papacy and of feudalism,\textsuperscript{28} the Protestant

\textsuperscript{22} See Baxter 56, and the references there cited.
\textsuperscript{23} Idem 19, 23.
\textsuperscript{24} M J C Vile Constitutionalism and the Separation of Powers (1967); L G Baxter ‘The State’ and Other Basic Terms in Public Law’ (1982) 99 SALJ 212, 213-16.
\textsuperscript{25} See generally Baxter 19-27.
\textsuperscript{26} Cf F A Hayek The Constitution of Liberty Chs 11-14.
\textsuperscript{27} Roberto Mangabeira Unger Law in Modern Society: Towards a Criticism of Social Theory (1977) 52.
LEGAL EDUCATION AND PUBLIC POLICY

...the rational requirements of capitalism,29 class compromises and the emergence of group pluralism,30 probably all contributed in one way or another. But most social theorists seem to agree that the common result was that lawyers secured a high degree of professional autonomy at the price of a substantial diminution in their political influence as lawyers. Philippe Nonet and Philip Selznick have characterized the resulting ethos as follows:31

A cardinal feature of the rule-of-law model, and a bulwark of institutional autonomy, is the disjunction of political will and legal judgment. Law is elevated "above" politics; that is, the positive law is held to embody standards that public consent, authenticated by tradition or by constitutional process, has removed from political controversy. The authority to interpret this legal heritage must therefore be kept insulated from the struggle for power and uncontaminated by political influence. In interpreting and applying the law, jurists are to be objective spokesmen for historically established principles, passive dispensers of a received, impersonal justice. They claim to have the last word because their judgements are thought to obey an external will and not their own.'

A more flamboyant American professor, speaking of the same phenomenon but from another perspective and within a slightly different context, put it thus:32

"In Britain you treat your lawyers very well. You dress them up in costumes - though principally middle-aged drag - and when they become judges you give them very wide powers of contempt to protect their dignity. But you give them, or in any case wish to give them, very little real power.'

The price paid for this autonomy is reflected in the retreat by lawyers into the realms of legal formalism. There is no time here to examine the development of the historical and pandectist schools of legal science in Germany, which provides corroboration, but I ought to refer briefly to developments in England since these have profoundly influenced the professional outlook of lawyers in South Africa.33 Jurists such as Jeremy Bentham savaged the 'naturalistic fallacy', which it was argued had enabled their predecessors to smuggle political or value judgments into their legal expositions. A distinction, based upon the distinction between fact and value or between the 'is' and the 'ought', was drawn between 'expository' and 'censorial' jurisprudence. The former was the business of the professional lawyer, the latter of the politician and only those lawyers who were prepared to become scientific legislators. (Curiously, this latter aspect of Bentham's jurisprudential cogitations has exercised relatively little influence over lawyers - at least South African ones - despite, or perhaps because of, the fact that although Bentham's spirit departed from this mortal coil in 1832 his person remains; he sits in a glass case in University College, London, and is brought out once a year to attend the annual dinner of the Bentham Society.) His student, John Austin, focussed more intensely upon what Bentham had termed 'expository' jurisprudence - the analysis of existing legal concepts. In

30. Unger op cit 66-76.
the process, Austin narrowed the scope of legal theory still further and laid the ground for a century of conceptual analysis which celebrated the alleged political neutrality and autonomy of the rules and principles of lawyer’s law. At the same time emphasis was placed, as had been done in Germany, upon the historical development and evolutionary nature of the common law, and this reinforced the belief that true law has a spontaneous and self-generating quality.

It would, of course, be a mistake to assume that the area of autonomy that had been secured by lawyers had no political significance. The creation, application and practice of law is and always has been a ‘political’ activity. The concept of legal order or the Rule of Law is profoundly political in that it places limits upon the exercise of state power and it seeks to protect individual rights and interests. Indeed, it is this political or ideological feature of the Rule of Law (or concept of legal order) that distinguishes it from other concepts such as that which perceives law to be no more than a technique or instrument of government. Unger terms the latter concept of law ‘bureaucratic regulation’, and its use signifies rule by law as opposed to rule under law.

On the other hand, the ‘political’ aspect of the Rule of Law is a limited one. To quote again from Nonet and Selznick, ‘In effect, a historic bargain is struck... Legal institutions purchase procedural autonomy at the price of substantive subordination.’ Except to the extent that the judicial procedures that protect individual rights might be directly subverted, they are not concerned with policies relating to the general welfare.

As we shall see, however, the bargain has not been kept, nor do the conditions under which it was struck still exist.

THE DECLINE OF LEGAL AUTONOMY

During the past century and a half the professional autonomy of lawyers has been substantially undermined. There are two principal causes. The first is the growing ‘interpenetration’ of governmental law and lawyer’s law, a development common to both the Western and the South African legal systems. The second relates to conditions that are peculiar to South Africa.

1. The ‘interpenetration’ of governmental law and lawyer’s law seems to have occurred in all capitalist societies. The dramatic trend toward ‘collective consumption’ and the growth of state regulation and services has generated a flood of legislation emanating both from parliaments and, much more profusely, from subordinate administrative legislatures and officials at all levels of government. The greater proportion of this legislation seeks to facilitate the implementation of public policy and much of it makes substantial inroads into the lawyer’s law.

Statutory companies have become a standard feature of the treatment of industrial relations by means of the law of deregulation of the consumer.

Even within the lawyer’s law is the extrusion of subordinated order to give place their important role.

I said earlier that governments have political interests sometimes in their situations. Geoffrey Sacks has always been legislation, controversy.

2. Turning to the South African context:

In the development of governmental regulation
Secondly, administrative law is sometimes immune to the relationship that infringes on the sovereign countries. Africans is property law:

34. The cross-influence between German and English legal theory is of relevance here: for some discussion, see eg W. L. Morison John Austin (Jurist: Profiles in Legal Theory) (1982) 60-3.
35. Marxists would argue that it seeks to protect or legitimize ruling class interests.
inroads into the private rights and interests that are the traditional domain of lawyer's law. Commercial and employment contracts are subject to extensive statutory regulation; most commercial associations are regulated by companies legislation; family law is governed by statutory provisions relating to the treatment of children and the division of matrimonial property. For industrial and traffic injuries people are much more frequently compensated by means of statutory compensation schemes than by means of the lawyer's law of delict. New concepts of property have been created by statutory sectional titles and time-sharing schemes. Credit agreements are subject to consumer protection legislation. The list goes on and on.

Even where no legislation has been enacted, the traditional concepts of lawyer's law have been employed as a form of governmental law. An example is the extensive use, by public authorities, of their contractual capacity in order to give effect to policies which they believe to be desirable. Where they place their contracts, and the conditions upon which they do so, have become important instruments of public policy. 41

I said earlier that legislatures tend to shun lawyer's just as lawyers tend to avoid governmental law. This was once itself an indication of the relative political importance of each kind of law, but even here significant changes have occurred. Governments have created law reform commissions whose principal purpose is to secure statutory reform of lawyer's law. Lawyers sometimes argue that the reforms advocated and secured by these bodies merely involve incremental adjustments to the corpus of lawyer's law in situations where the courts have been unable to do the job themselves. As Geoffrey Sawar has shown, however, this is a naive view: the adoption or abandonment of even the most orthodox of legal rules and principles is, and has always been, an act of policy. The appearance of new companies legislation and matrimonial property regimes, for example, are politically controversial events and their implementation and application remain so. 42

2. Turning to the second factor, it is obvious that South African society and the South African legal system differ in marked respects from those of Western countries.

In the first place, South Africa has always been in a state of infrastructural development, and this has entailed extensive state activity and bureaucratic regulation from the earliest times. 43

Secondly, and more importantly, most of the activities of the public administration in South Africa are based upon a philosophy which, despite the rhetoric, is extremely interventionist. The policy of apartheid has had an immense impact upon the legal system and it has profoundly altered the inter-relationship of law and public policy. It has entailed a much greater infringement of traditional lawyer's law than has occurred in Western countries. Most of the (notionally private) law relating to black South Africans is subject to qualifications imposed by urban areas legislation. The property law applicable to all races is modified by the Group Areas Act. 44

41. See eg Philip Selznick Law, Society and Industrial Justice (1969) Ch 6; Baxter 396, and the references there cited.

42. Law in Society 130-3.

43. Economists sometimes refer to the phenomenon of extensive state activity in undeveloped societies as 'Wagner's Law'.

Censorship and security legislation, designed to minimize opposition to apartheid, make extensive inroads into areas traditionally regulated by the common law. The judicial process has been truncated by legislation that is designed to free public officials from all procedural constraints. Race classification legislation imposes a system of governmental law that is quite unknown in the West. Much of this legislation authorizes public authorities to implement a wide range of policy alternatives through the medium of administrative discretion.

Contributing to this complex system of governmental law is an official preference for the use, wherever possible, of legislation and legal regulation as a technique of social control. Whatever the motives - whether it constitutes an attempt to create an air of legitimacy, or whether it is simply because the legal process provides a convenient method of implementing these policies - the result is that resort is had to governmental law as the dominant instrument for the implementation of public policy.

PUBLIC POLICY IN MODERN LEGAL PRACTICE

All of these developments have thrown lawyers headlong into the realms of policy. Public policy has 'infiltrated' legal practice in two directions: through the courts themselves and via the administrative process.

First, the ordinary courts have had to face the statutory modification of large areas of the common law, and much of the legislation they have been called upon to apply has been concerned with the implementation of public policy.

Their initial reaction was to interpret this legislation as strictly as possible, permitting it to have as little effect upon the existing body of common law as its terminology would tolerate. This approach still finds its expression in such well-entrenched presumptions of interpretation as the principle that the legislature is assumed to have intended to alter the common law as little as possible. In the same vein, the courts have nearly always refused to take into account parliamentary debates relating to the legislation they are called upon to apply: this, they hold, is not an acceptable means of ascertaining the intention of legislatures. Again, the effect has been to divert attention from the public policy underlying the legislation.

On the other hand, some courts in Western countries have now begun to adopt a more pliant approach, according to which legislation is more explicitly interpreted within the context of the policies it is designed to realize. At the turn of the century Roscoe Pound, the prolific American jurist, predicted that courts would eventually come to interpret and rely upon legislation in much the same way as they have always employed judicial precedent, and there seems to be some evidence that the prophecy is being fulfilled, especially in the United States.


LEGAL EDUCATION AND PUBLIC POLICY

If lawyers are being forced to face considerations of public policy in the courts of law - their home ground - it is even more clear that they are having to do so in the newer territories towards which they are being drawn. During the past century, a vast web of tribunals has been created within the public administration itself.\(^47\) Most of these have been created specifically in order to implement and develop public policy, and in many cases they have replaced the ordinary courts as adjudicators in the areas of social activity concerned. Some idea of their importance may be gained from the following statistics. In the year from July 1982 to June 1983 the magistrates' and Supreme courts issued about three-and-a-half million criminal and civil processes.\(^48\) During an equivalent period national and local road transportation tribunals adjudicated in more than 92 000 cases,\(^49\) while the Workmen's Compensation Commissioner made just under half a million awards of compensation for industrial injuries.\(^50\) These are only two of dozens of administrative tribunals in South Africa, all of which are applying highly complex governmental law, as well as significant elements of lawyer's law, and in the process are continually implementing and developing public policy. So without even allowing for the fact that many of the cases now coming before the courts of law raise issues of public policy, the matters handled by formal administrative tribunals constitute a substantial proportion of the litigation with which lawyers are involved.

THE RESPONSE OF LAWYERS

How have professional lawyers and legal educationalists responded to this intermingling of law and policy?

Those in Western countries have made significant attempts to modify their attitudes. The successes of the empirical method in the natural sciences have exercised an enormous influence over lawyers. With the emergence of pragmatic legal science, especially in America,\(^51\) and the growing emphasis that is being placed upon sociological jurisprudence throughout the Western world, jurists have begun to pay much closer attention to the relationship between law and public policy.\(^52\) Journals with titles such as Law and Policy have begun to appear.

The attempt by courts to integrate governmental law and lawyer's law and to take considerations of policy more explicitly into account has provoked a great debate concerning the political legitimacy of judicial decision-making. Is it consistent with democracy that unelected and unaccountable judges should be able to interpret and develop public policy? Jurists have tried to meet this objection in various ways. Ronald Dworkin has argued that if one

---

47. See generally Baxter Ch 8, esp 180-3, and Ch 9, esp 239-46.
51. See Summers op cit passim.
52. For some recent examples, see Bell op cit; the authors cited in n. 53 below; and cf McAuslan op cit; J Dignan 'Policy-Making, Local Authorities and the Courts: The "G.L.C. Fares" Case' (1983) 99 Law Quarterly Review 605. For one of the rare examples in South African law, see Du Plessis & Davis op cit.
draws a distinction between principles and policies, the former relating to political rights and the latter to political goals, and if one confines judicial decision-making to questions concerning the former, then judges do not in fact ‘make’ or ‘create’ law or policy; they merely give expression to the ‘background rights’ which members of society already have.53 Yet even he equivocates when it comes to the judicial application of statutes, as distinct from the common law.54 Others have challenged the belief that legislation can itself be said to represent the democratic will: it might well have been enacted by a majority that no longer exists and it might not be capable of amendment because the current legislative majority is paralysed by sectional interests. Under such circumstances the courts could prove better able to respond to popular opinion.55 On the basis of this assumption an American with impeccable lawyer’s law credentials, Guido Calabresi, recently delivered a series of lectures entitled A Common Law for the Age of Statutes,56 in which he proposed a grand theory envisaging the complete integration of legislation and common law under the active supervision of the courts.

In South Africa the response of lawyers has tended to be rather different. Instead of even attempting to adapt their ethical heritage to meet the demands of a policy-oriented system of law, the majority of lawyers have confined their attention to the steadily diminishing body of lawyer’s law inherited from an earlier age. It is true that they have participated actively in the reform of those areas of law least affected by the grand policies of apartheid, but even here few have demonstrated much sensitivity to the policy-implications of the reforms they have advocated.

Few South African lawyers have seriously tried to reconcile the values of legal order and the Rule of Law with the deluge of governmental law. The small group that have done so have, ironically, been chastised by other lawyers for their efforts. They have been accused, in familiar refrain, of ‘bringing politics into law’, as if legal autonomy still prevails. Two generations of lawyers bombarded their students with attacks upon the ideology of the concept of legal order. They directed their hostility against the English version of the Rule of Law, yet in so doing they attacked not only the values of English lawyers but those of their European counterparts as well.57 Thousands of lawyers were left by their teachers with the impression that governmental

54. Cf Taking Rights Seriously 107-10; ‘Seven Critics’ op cit 1257.
55. This argument applies, of course, with greater force in South Africa, where legislatures are hardly representative of the popular will. It is therefore not surprising that most opponents of the government would support judicial activism in the modification of governmental law.
56. Oliver Wendell Holmes Lectures (1982).
57. The example usually cited is J P VerLoren van Themat’s Staatss. In the first two editions of this work it was argued that the Rule of Law is a political, not juridical, concept (see eg 2 ed (1967) 124). He and others argued that the existence of legal authority for state action constituted sufficient compliance with the Rule of Law; in other words, the only juridical content of the Rule of Law was the notion of rule by law (of the text at n. 37 above). The effect was to eliminate from lawyerly consideration the ethical content of the law. (For a review of the relevant literature, see eg John Dugard Human Rights and the South African Legal Order (1978) Ch 3. The leading work in South Africa is of course, Anthony Mathews’ Law, Order and Liberty in South Africa (1971).)
law was not to be evaluated or modified by lawyers.\(^5\)

The combined effect has been that the content of lawyer's law has not only shrunk in significance, it has also been shorn of its ethic. Lawyers' lawyers have lost much of their subject and some lawyers' lawyers have lost their standards too. Paradoxically, many have also retained their professional prejudices: to them, the legislation with which they are confronted is not really law but public policy itself and, just because it is, they have concluded that lawyers can do little about either its content or its application.\(^5\) Instead, the jurists at some university centres have diverted their intellectual efforts towards the development of a doctrinal legal science which places great emphasis upon the purity and internal consistency of legal concepts; a science quite unlike the empirical sciences of other applied disciplines and one which provides a complete escape from the issues of public policy - and reality.

THE NEED FOR EDUCATION IN PUBLIC POLICY

In the circumstances, it seems to me that there is a pressing need for the inclusion of a public policy content in our legal education. I believe that the case can be made out by referring to legal practice itself.

Take administrative tribunals, for example. The complexity of the legislation applied by these bodies has meant that when appearing before them laymen frequently require professional representation. As expected, they usually turn to lawyers for assistance. Yet what often happens is that legal practitioners, trained in the tradition of lawyer's law, litigate before these tribunals in complete ignorance of the public policies which these bodies have been created to implement. To the annoyance of professional administrators, they try to formulate the disputed issues in terms of more familiar yet quite inappropriate concepts.\(^6\) This often provokes the hostility of the administrators, who sometimes respond by adopting a bigoted approach themselves, which ultimately works to the disadvantage of the lawyers' clients. An illustration of the kind of over-reaction that can be provoked is the case of social security tribunals in England. During the 1960s and early 1970s relations between lawyers and social security officers reached a low ebb and at one stage a rule was adopted that parties could be represented by anyone except a lawyer! As one commentator observed, 'this was about as logical as a rule that illness might be treated by anyone except a doctor'.\(^6\)

Should lawyers be involved in tribunal activities at all? This question is not as rhetorical as might appear: many administrators regard lawyers as uninformed and pettifogging nuisances.

I believe they are mistaken. First, the widespread use of legislation as a means of facilitating the implementation of public policy implies that

\(^5\) In recent years, however, most (though by no means all) South African writers seem to have accepted that the Rule of Law, in its wider form, expresses a creed with which lawyers should be concerned: see eg Marinus Wiechers \textit{Verloren van Thematat Staatreg 3} ed (1981) 135-42, and the literature there cited.

\(^6\) Credit should, however, be given to the small band of lawyers who formed the Statute Law Society at the University of Zululand in 1983; and see N J C van den Bergh (ed) \textit{Legislative Drafting and Drafting Techniques} (1983).

\(^6\) See eg the example cited in Baxter 242 n. 332. Relations between lawyers and the National Transport Commission seem particularly poor.

administrators are likely to require the technical assistance of lawyers. Lawyers and administrators really depend upon each other. Just as lawyers ought to acquire a knowledge of the general elements of public policy, so ought administrators to be guided by lawyers when it comes to making sense of complex legislation or rationalizing their decisions.62

But there is an even more important reason why lawyers should be involved in the application and development of public policy: they are able to bring to bear upon this process their legal reasoning, that unique and most disciplined form of practical reason. There are many differences of opinion among jurists as to its detailed characteristics63 but it is clear that it is quite unlike most other forms of reasoning. It constitutes a complex and tightly structured amalgam of argumentative and justificatory techniques. It employs syllogistic and deductive reasoning, but also relies on inferences and analogies. It builds upon precedents, yet it takes into account consequential and utilitarian arguments. It places a high value upon the criterion of relevance and upon social concepts such as reasonableness, fairness and justice. Except for the fact that insufficient account is taken of the purposive elements of decisions, it offers one of the most unpartisan and least arbitrary methods of devising and applying public policy at the practical level of government. For this reason I like to think that, as long as they are properly apprised of the principles of public policy, are excellent choices as discretionary decision-makers and incremental policy-formulators.

If it is accepted that lawyers do have an important role to play, does it necessarily follow that they ought to be specially trained for this role? Many lawyers, perhaps most, assume that governmental law lacks the necessary intellectual content to merit serious study, and that appearing before tribunals is an activity best assigned to one's articulated clerk or a particularly hard up advocate. Those who do accept that lawyers should participate do not normally perceive any need for special training beyond a study of the rudiments of statutory interpretation.

The objection that governmental law is unworthy of study reveals complete ignorance of the structured nature of public policy,64 though lawyers are not entirely to blame for their prejudice: the erratic manner in which policymakers adopt and abandon policies sometimes provokes justifiable contempt. In the United States there has been much debate concerning the efficacy or otherwise of economic regulation, and there have been various attempts to untangle the web of bureaucracy that regulates trade and industry. But all has not gone well. Reviewing a recent book on regulatory reform, Professor Colin Diver sarcastically observed:

"First we had market failure; so we tried regulating markets. Then we had regulatory failure; so we tried reforming regulation. Now, it seems, we have reform failure.65"

Nevertheless, as Stephen Breyer, Harvard law professor and now federal judge, has shown, it is the very failure to pay regard to the general principles

63. Most of which are conveniently summarized in J W Harris Legal Philosophies (1980) Ch 15.
64. Cf Ogus op cit 44-5.
underlying economic regulation that is responsible for so many of the mistakes committed in the formulation of regulatory law and policy. 46

As far as statutory interpretation is concerned, it is quite wrong to assume that the disputes before administrative tribunals can be resolved solely by reference to the empowering legislation itself. Such legislation almost invariably confers a degree of discretion upon the tribunal concerned. It is through the process of exercising this discretion that much public policy is actually formulated, and it is in persuading a tribunal to exercise its discretion in his client’s favour that a lawyer needs to be fully au fait with the considerations of public policy that the tribunal must take into account.

There is, however, one penetrating objection to the legal education of public policy, especially in the South African context. Are the values underlying legal practice, as expressed in doctrines such as the Rule of Law, not fundamentally incompatible with the study and application of public policy? Is this not the main reason that those lawyers who adhere to Western legal values have failed to modify their discipline? Is this not why they have continued to focus their attention on the remaining vestiges of lawyer’s law to the exclusion of all considerations of public policy?

I have no doubt that our revulsion for the policies embodied in apartheid, censorship and security legislation provides an important explanation for the lawyer’s aversion for public policy. Indeed, this might be just as well for some of the victims of such legislation. In a recent study 47 James Lund examined the application of section 29 of the Black (Urban Areas) Consolidation Act, 48 one of the key instruments of the apartheid machinery which permits administrative officials to take drastic action against black persons whom they deem to be ‘idle and undesirable’. (For example, they may consign such unfortunates to a farm colony for up to two years and cancel their urban residence rights.) He observes that by pointedly ignoring the policies contained in the Act some judges have managed to mitigate the harshness of its effects. 49 Conversely, there are cases in which judges have taken into account the policies contained in apartheid legislation and the result has proved to be harsher for the affected individuals than it would otherwise have been had more traditional principles of law been applied. In one example 50 the Appellate Division refused to declare invalid a group areas proclamation even though the proclamation failed to meet the well-established legal requirements of reasonableness and equal treatment as between race groups. Holmes JA explicitly justified this refusal by referring to the policy contained in the legislation which, he said, represented a ‘colossal social experiment’, the success and harshness of which was not the concern of the courts. 51

To the extent that such policies directly conflict with the basic standards of reasonableness, fairness and justice valued by lawyers, I am forced to concede that they are quite incompatible with the traditional legal ethos. But, I would

49. See esp In re Kau 1967 (1) SA 150 (O), 153H-154. Contra the dissent of De Vos Hugo J at 164-5 where, in paying regard to the policy of the Act, the judge adopted a harsher interpretation.
50. Minister of the Interior v Lockhart 1961 (2) SA 387 (A).
51. At 502. For critical discussion, see Dugard op cit 319-20.
argue, this legal ethos is *itself* a public policy which must sometimes directly compete with that reflected in the sort of legislation to which I have been referring. Where lawyers’ standards are imposed upon this legislation, this is an act of policy-application in itself and, I would argue, a legitimate one given the undemocratic nature of South African legislation. It is only a dogged refusal to recognise that the courts and lawyers are back in the business of policy-making and policy-application that causes us to hesitate before advocating the bold reassertion of the politics of procedural justice.

I would also argue that even where the policies concerned are abhorrent, the process of legal reasoning, which tends to eliminate arbitrariness, can ameliorate their application. One illustration relates to censorship. Under its present lawyer-chairman, and with the assistance of lawyers who have specialized in arguing censorship appeals, the Publication Appeal Board has developed a fairly consistent set of principles relating to censorship which have undoubtedly led to a less arbitrary, more predictable, and possibly even more liberal system of publications control.\(^2\)

So even if public policies are an anathema, I would still argue that lawyers can make a worthwhile contribution by squarely confronting them.

**EFFECTS ON THE STRUCTURE OF LEGAL EDUCATION**

How, then, do all the developments I have outlined affect the shape of our legal education? If my arguments are accepted, then all lawyers, and not merely those intending to pursue a career in the public service, ought to understand the relationship between law and public policy. Such an understanding is necessary for the purpose of legal practice *itself*, for litigation before courts of law and before administrative tribunals.

This implies substantial changes to the legal curriculum. As an important component of one of their compulsory courses, law students should be given an introduction to the general principles of public policy, and they should be afforded the opportunity of studying optional courses relating to specific areas of law and policy, such as economic regulation and economic incentive,\(^3\) environmental regulation, welfare law, and law and social administration.\(^4\) Existing subjects should also be revised so as to include an analysis of the relevant areas of public policy. In addition to law reports and doctrinal texts, teachers should make much greater use of materials such as the reports of commissions of inquiry, parliamentary debates, government departments and administrative tribunals.

My colleagues are probably astonished to hear me advocating not only the enlargement of some present subjects but also the addition of still more law courses in what is an obviously overcrowded curriculum. Besides, a number of other subjects, such as labour law, income tax law, and commercial transactions, are already competing for recognition on equally well-deserved grounds and often for the same reasons.

I must immediately concede that the L.L.B. degree as it is presently structured cannot accommodate these claims, nor could our students cope

---

74. My colleagues at the Howard College School of Law in Durban are about to introduce a course on race legislation, which is not dissimilar to what I have in mind.
with the additional demands made upon them. But I think that the difficulties can be reduced by the employment of devices such as a law major and a streamed LL.B., as well as by substantially reducing the quantity of traditional lawyer's law that we presently teach. I say 'reduce', not 'eliminate', because we should never lose sight of the fact that it is the study of lawyer's law which best inculcates the disciplined legal reasoning that constitutes the *sine qua non* of the discipline of law itself.

I have my own ideas as to how the reorganization might be done, but these are details better left to faculty boardrooms than inaugural lectures. It would be sufficient for the moment were I to have succeeded in persuading some of you that the hard-won virtues of the notion of legal order, the principles of procedural justice, and the Rule of Law, can be saved only by confronting and assimilating, once again, the policies from which the ideal of law can no longer escape.

I should like to close by paying a brief tribute. The special organization of the School of Law implies that I have no formal predecessors. Yet it is also true that I was appointed to a chair formerly held by the late Exton Burchell. Although it is now more than two years since his sad and unexpected passing, it is fitting for me to pay tribute to his memory. All of us in the Law School owe Exton an immeasurable debt. He was a lawyers' lawyer in the most orthodox tradition, yet it is perhaps a measure of the permanence of this contribution that the qualities which provide the very *raison d'être* of legal participation in policy formulation and application, namely, objectivity, disciplined argument, reasonableness and concern for individual justice, are those which he demonstrated so well. The example he set provides us with the soundest possible base upon which to mould legal education for the future.