CHAPTER 5

CONSTRUCTING THE SOCIAL DOMAIN: CONTEXT OF CULTURE

5.1 Introduction

If students are seen as initiates, a critical question that must be asked is what is the nature of the domain into which they are being inducted? The question is critical in that this domain is both the target of their learning, and the context within which that learning takes place. What counts as knowledge, and what counts as successful acquisition or demonstration of that knowledge is fundamentally regulated from within this domain. Moreover, the selectivity thus imposed operates in dual fashion: it controls both access to the profession, and to higher levels of academic study within the discipline. Student 'choice' within this context may include the choice to succeed or fail, but has little impact on the boundaries of the terrain into which they are being inducted.

This chapter begins by sketching, as a tool for description of the domain, the taxonomy of academic knowledge and community provided by Becher (1989), and the constructs of classification and framing provided by Bernstein (1975). The domain itself is then examined: this account draws on three areas pertinent to legal education to substantiate claims made regarding the classification of the domain. These areas are the development of the legal academic field, legal pedagogy, and legal language. The final section of this chapter then returns to the classification sketched in the first section to provide a characterization of the 'culture of context' within which this study locates.

5.2 Boundaries and Classifications

Higher education has a function in society, the nature of that function is, however, neither simple nor

necessarily philanthropic. Although at its most benign, that function is to educate a future generation of professionals, the function also includes a large degree of selectivity, of inclusion and exclusion, of certain individuals from the benefits of its own provision (Bourdieu and Passeron, 1990, see also Bourdieu, 1988). Although in recent times, the tendency is to see this function of higher education as being to provide a social good, to respond to the needs of society by means of providing the kind of educated workforce required by that society (see Chapter 2), it can equally be argued that this should not be the primary function of higher education: Higgs (2002), for example, argues that if higher education were purely responsive to societal needs, it would inadequately fulfill these needs, as its primary benefit is to go beyond what already exists.

Included also in this function is that of its own reproduction - higher education must educate, not only to fulfil the needs of labour and the professions, but also to ensure its own continuation, the next generation of scholars. To quote Bourdieu,

> the University field is, like any other field, the locus of a struggle to determine the conditions and the criteria of legitimate membership and legitimate hierarchy, that is, to determine which properties are pertinent, effective and liable to function as capital so as to generate the specific profits guaranteed by the field (1988, p.11).

However, the academe itself is not monolithic. Although this 'struggle' may be a constant theme, there are different sites and different forms, as well as 'struggles' between these. As Becher (1989) points out:

> The tribes of academe, one might argue, define their own identities and defend their own patches of intellectual ground by employing a variety of devices geared to the exclusion of illegal immigrants. Some… are manifest in physical form....; others emerge in the particularities of membership and constitution. Alongside these structural features of

> disciplinary communities, exercising an even more powerful integrating force, are their more explicitly integrating cultural elements: their traditions, customs and practices, transmitted knowledge, beliefs, morals and rules of conduct, as well as their linguistic and symbolic forms of communication and the meanings they share. To be admitted to membership of a particular sector of the academic profession involves not only a sufficient level of technical proficiency in one's intellectual trade but also a proper measure of loyalty to one's collegial group and of adherence to its norms. An appreciation of how an individual is inducted into the disciplinary culture is important to the understanding of that culture. (p.24)

This study assumes also that the converse is true: that an understanding of disciplinary culture is important to understanding the process of the induction of individuals into it.

5.2.1 Academic territories

Becher's basic contention is that "there are identifiable patterns to be found within the relationship between knowledge forms and their associated knowledge communities" (1989, p.150). In order to examine this hypothesis he provides a descriptive schema of academia on two axes: that related to the content or 'subject' of the taught, which refers to the "cognitive component of a discipline" (with the term 'segment' "to designate the corresponding component of a specialism" or sub-discipline); and that related to the social relations of the discipline, the 'disciplinary community', or 'network' in the case of the specialism. These descriptive terms provide an initial means of mapping the domain of acquisition in this research.

Becher uses two sets of descriptors to characterize the nature of the subject: a subject can be hard or soft, and pure or applied. The hard-soft distinction refers to the degree to which the subject matter

for research within the discipline is restricted to its own field of investigation, or to which it extends across boundaries into other fields following its own line of enquiry (in this Becher synthesizes distinctions made by Biglan, 1973 and Pantin, 1968). There are a number of characteristics of knowledge domains that can be differentiated using these descriptors: hard knowledge (and in particular, hard, pure knowledge) shows a 'cumulative growth' and 'linear development' pattern (p.13). Problems to be researched are clearly defined by the field (boundaries are strong), and tend to assimilate or supersede previous knowledge. The criteria for establishing or refuting claims to new knowledge are clear. There is a strong focus within this domain on analysis, on the breaking down of research areas into simpler components. Explanations are strong, "deriving from systematic scrutiny of relationships between a few carefully controlled variables"(op cit). Research in this domain tends to be value-free and impersonal, and has precision of measurement as one of its underlying themes. By contrast, soft knowledge shows a "recursive or reiterative pattern of development"(op cit). The basic problems and issues to be researched retain relevance over time. Although methods and understandings may 'evolve', there is less of a sense of a clear development pattern in knowledge. Issues for research are less defined by the field, and more by individual taste. There is moreover a "diversity of criteria for and lack of knowledge about what constitutes an authentic contribution to new knowledge"(p.14). Research areas are also not demarcated by the field, but are determined by the subject under research and may extend into other related fields. The research focus is on holism and complexity, rather than reductionism. Explanations are weak, and judgement and persuasion are seen as more important than causal data. Research is, and is seen to be, value-laden and personal.

Distinctions between hard and soft knowledge do have status implications within academe: hard knowledge tends to carry a greater status (even though, as Becher points out, research in this tradition is often easier to conduct than the less defined soft knowledge research), and tends to receive a higher proportion of funding. The pure - applied distinction is seen to relate to "the degree of concern with application" (p.11).

With regard to social relations or community, Becher distinguishes between convergent and divergent disciplines. A convergent discipline is "characterised normatively, in terms of a commonality of intellectual values and a coherence of cultural assumptions among the networks and individuals within jurisdiction" (p.152). Divergent communities would be characterised by a lack of cohesion, and by less well-established intellectual boundaries. There is a connection between community and subject:

> (d)isciplinary communities which are convergent and tightly knit in terms of their fundamental ideologies, their common values, their shared judgements of quality, their awareness of belonging to a unique tradition ... are likely to occupy intellectual territories with well-defined external boundaries (p.37).

Differing communities constitute different relationships between the community and the individual: the patterns of interaction thus formed can be characterised as urban or rural. In urban scenarios, there are typically relatively few research topics in narrow area of study. Competition tends to be high, and there is a race to find solutions to well-defined problems. Collaboration is common and rapid information dissemination and retrieval is essential. Research funding is high, and publications tend to be in the form of journal articles rather than books (pp.79 - 80). Urban communities are thus "identifiable operationally, in terms of the types of activities and practices in which those who belong in them engage" (p.152). Rural patterns exist where there is a broad area of possible research coverage, and where the problems are not clearly demarcated and may be long-term and less amenable to a finite solution. In these scenarios, researchers tend not to cover topics currently being investigated elsewhere: competition is not so strong, time is not a critical element, and there is less call for collaboration. Book publications are more common. The research environment generally operates under less pressure than in urban environs, however, research outputs may also be lower (pp.79 – 80 and 101).

These categories that Becher provides are descriptive in nature, are arbitrarily rather than necessarily determined, are relative rather than absolute, and are not fixed, - they can change over time (p.153). However, an examination of disciplines in terms of these categories shows that, to some extent, knowledge areas or cognate aspects of discipline determine the types of community relation that can be generated:

> It would seem probable that tightly knit, cohesive academic clans would be promoted by the shared study of a restricted densely structured and clearly bounded area of knowledge; equally, one might regard subject areas with these characteristics as reflecting the shared definitions imposed by tightly knit academic groups. By the same reasoning, loosely knit communities would seem to be the likeliest products - or producers - of an unrestricted, inchoate and relatively permeable disciplinary field. (p.158)

Although "the correspondence ... is not as close in practice as it might promise to be in principle..." (p.158), Becher's research shows 'a fair degree of support' for his thesis of inter-connectivity between the social and cognate aspects, and with the relation above generally being confirmed.

5.2.2 Boundaries

If boundaries create community, as Becher suggests, and if these boundaries are at least partly determined by the subject of the community, a more thorough examination of the nature of these boundaries is necessary. The concepts of classification and framing provided by Bernstein are useful in this regard.

Classification, in Bernstein terms, refers to the relationships between contents (what is transmitted):

"where classification is strong, contents are well insulated from each other by strong boundaries. Where classification is weak, there is a reduced insulation between contents, for the boundaries between contents are weak or blurred" (1975, p.159). Frame, on the other hand, refers "to the form of the context in which knowledge is transmitted and received ... Thus frame refers to the degree of control teacher and pupil possess over the selection, organization and pacing of the knowledge transmitted and received in the pedagogical relationship" (op cit). The extent of framing can be assessed at different levels (selection, organization and pacing, boundaries between school and non-school knowledge), with sharp boundaries indicating strong framing, and weak or blurred boundaries indicating weak framing.

An examination of the classification and framing strengths in a particular context enables an understanding of the power relations operating in the context and an understanding of identity formation in that context:

> Where classification is strong, the boundaries between the different contents are sharply drawn. If this is the case, then it presupposes strong boundary maintainers. Strong classification also creates a strong sense of membership in a particular class and so a specific identity. Strong frames reduce the power of the pupil over what, when and how he receives knowledge, and increases the teacher's power in the pedagogical relationship. However, strong classification reduces the power of the teacher over what he transmits, as he may not overstep the boundary between contents, and strong classification reduces the power of the teacher vis-a-vis the boundary maintainers. (op cit, p.160)

Bernstein uses the concept of classification to distinguish between collection and integrated curriculum types: strong classification between subjects yields a collection-type curriculum, which, depending on the strength of the relationship between the contents, may be specialized or non-specialized. Integrated codes display a reduced classification between contents, but moreover, "refers

minimally to the subordination of previously insulated subjects or courses to some relational idea, which blurs the boundaries between the subjects" (p.163).

Within collection codes, the strength of classification and the degree of specialization can be connected to the development of subject loyalty and the extent of socialization into the system (and hence to the self-perpetuating ability of the system): "the deep structure of the specialized type of collection code is strong boundary maintenance creating control from within through the formation of specific identities" (p.165). Integration codes both reduce the authority of separate contents and reduce the variation in pedagogy and evaluation (although at the level of the teacher there is more framing within this code, at the level of student it is less framed). Whereas in the collection code, authority is external to the student in the delineation of the specific contents and their framing in context, in the integrated code, authority is dependent on consensus about the integrating idea, coherent linkage between integrating idea and knowledge to be coordinated, and criteria and systems for evaluation and feedback.

This sketch of the educational domain, with its focus on the regulation of power in the 'message systems' of curriculum, pedagogy and evaluation, fits well within a Vygotskian understanding of the socialization process in education: an understanding of the internalization of regulation, and not only of content, is fundamental to this account. An integration of the concepts provided by Becher and Bernstein suggests that where classification between contents is high and framing is strong, community is likely to be convergent, there is likely to be little control by students in the situation, and identity frames (expectations regarding 'belonging') are likely to be strongly defined. The extent to which this is the case in legal education is examined below.

5.3 Legal education

This section provides a broad-brush account of the field of legal education. This field provides the contextual location of this study, and the broad context of culture within which the study is located. The account provided focuses on three aspects of legal education that together provide a description of a field that has traditionally been insulated, mystified, and inaccessible, but which is currently facing challenges on at least two fronts. The development of the field of legal education is first examined: international developments and more recent local developments and debates are outlined. Some key debates within legal pedagogy are then explored. Finally a brief account of legal language is given: although legal language differs from the academic Discourse under scrutiny in this study, the influence of this language on the practice of law is profound, and it thus circumscribes any attempt at entry to this practice.

5.3.1 The historical development of legal education

Legal education is a relatively new academic field, and much of its development over the past century has been directed towards establishing itself as a legitimate member of the academy, and its object as one "fit for study" at that level (Tribe, 1999, p.127). This development is examined in this section: in the first instance, a particular account of the historical development of the field in the United States of America (USA) is provided. The relationship between legal education and the profession is then examined, prior to an examination of local developments in legal education. The final segment of this section briefly examines the concept of 'Africanisation' of law as a contested area within local legal education development.

a) The rise of legal education in the USA

Legal education has developed along different trajectories in different countries. Many of the modern debates around that education, however, can be traced to the development of the field in the USA. Tomlins (2000) offers a fascinating account of this development that highlights some of the critical characteristics of the domain: this account is summarised at some length here. These identified characteristics include the creation and maintenance of legal education's isolation from academia, the pedagogical rather than intellectual rationale for legal education, and legal education's ability to resist outside intervention and change.

Tomlins describes the first half of the 19th century as one of intellectual 'commingling' (op cit, p.914) of the professional disciplines. There was, at this stage, no distinction between academic fields and the discourse of enquiry was dominated by the commitments of Protestant Baconianism: natural theology; inductive reasoning and science as taxonomy; systematic analogical reasoning; and an understanding of science as a 'public undertaking' (p.914) which would lead to a rational understanding of the world. Although the legal profession was one of the emerging core professions in this era (the other two being divinity and medicine), the developing professionalism in this era did not extend to legal education: legal education at this time was restricted to apprenticeships in legal offices, and was entirely focussed on the practical. The academic discipline of law remained undeveloped as a result.

The post- civil war period in America was characterised by 'fragmentation' of the disciplines (during the phase of urban industrial development) and a 're-ordering of intellectual life' (p.920). In the first period of this reorganisation, whilst empiricism remained the basic understanding of science, "law was conceived as the agency of ultimate harmonization and reformative action - it was to the Department of Jurisprudence as a 'final resort' that the results of the deliberations ongoing in ... other departments were to be referred." (p.922). However, by the late 1880s, disciplines as "modes of

specialised academic inquiry" (p.922) were the primary means of organisation of the social sciences. Expertise became framed, not across fields with reference to professional status, but rather within them, with reference to theory-driven communities. Perhaps because of its authority under the old domain, as well as its rooted-ness in the practical and the lack of a theoretical base, law was slow to withdraw from the old structures, and slow to accept the ascendance of the new professions. Although during this period legal education moved from law offices and into the universities, "the objective ... was at first to reach an educational accommodation oriented to reproducing the practical benefits of metropolitan law-office training, rather than to seek to transcend the 'common sense' of practice with a law-disciplinary education" (p.924). This situation was soon to change however:

> (b)y the 1890s, law's 'classical' antebellum claims to ascendancy - its 'characteristic references to legal knowledge as the product of a gradual, incremental process of discovering and perfecting natural laws embedded in human nature and reflected in the constitutional order' - were explicitly at odds with disciplines that 'understood theory as provisional, relative to the current economic and technological order, and defined rights, law and state forms as cultural creations, shaped by the conditions and needs of a particular historical context and subject to experimentation, growth and change.' (p.925, citing Furner, 1993)

It was in this context that Christopher Langdell, possibly the single most influential person in the history of legal education, introduced at Harvard University his curriculum reforms for legal education. Langdell's curriculum reforms defined not only the content and form of legal education - pure law subjects predominately, with some electives, offered as a graduate qualification - but also established a methodology for legal pedagogy. His method was based on the study of cases: students were required, through analysis of records of judicial decision-making, to extract from these cases a set of legal principles through which an understanding of the law could be constructed. This approach was radical in at least one way: it established "judicial decision-making as the central and essential act

of legal invention" (p.927), a function which had previously been seen to be the prerogative of the State. The approach moreover had a significant effect on legal analysis: for decades subsequent to the adoption of this method, the primary task of legal research was seen to be the compilation, in reasoned order and category, of case books for legal teaching. The categories of law established through these compilations became the basis of modern legal distinctions, for example between public and private law, and contract and tort (delict).

Although Langdell's method was not initially well-received in the legal community, its influence on legal education was pervasive and profound. Most importantly, it "professionalise(d) legal education by reconstituting it as the elaboration of a specific knowledge, attained through explicit and defined methods of enquiry and defended by exacting institutional standards" (p.924). This "gave law a sturdily reformed identity as a technically sophisticated and professionalised discourse of decision-making, located securely within the control of the courts and law schools" (p.929). Law's status within academia as an identifiable discipline, based on methods of qualitative empirical enquiry, was thus established. The knowledge base, in Blecher's terms, had been considerably 'hardened'.

The establishment of the control of this body of knowledge as within the legal rather than social science realm, however, created an extremely strong classification between legal and other social knowledge. Most specifically, "Langdell's instructional and analytical tracks did not lead the law school toward 'membership in the university community' nor steer law professors into alliance with their university colleagues 'in the common quest for the discovery of truth'; instead it embraced different institutional imperatives, distinct from those to which the emerging disciplinarity of the social sciences was responsive" (p.930, citing Minda, 1995). These institutional imperatives related specifically to legal education's primary purpose: "the Taylorised training of lawyers" (p.932).

It wasn't until the 1920s that Langdell's system faced challenge. Partly, this challenge arose from the frustrations of legal academia at the limited intellectual role that it played. Partly also, it arose from

outside of law, in new sociological understandings of the function of law in society. A 'legal realism' school, based on the writings of Roscoe Pound, was founded, initially at Columbia University, to explore the possibilities within legal analysis of using sociological understandings and theories. The attempt was largely unsuccessful. The two disciplines were, by this stage, intellectually too dissimilar for integration. Moreover, any appeal to social knowledges outside of the legal domain would have threatened the supremacy of the court-based authority in official policy discourse that the Langdellian system had established. This challenge was in any event to come, by the early 1930s, from outside of law, from an increasing diversity in the knowledges being used in public policy formulation. Ultimately law needed to adapt by means of assimilating aspects of these knowledges, or face an external appropriation of its own field. The understandings provided by the legal-realist framework provided the grounding for much of the subsequent development in legal theory. Thus, "(j)ust as Langedellian jurisprudence had been a reconstitution of law's political authority in the face of serious challenge, in other words, so was realism" (p.944). This was, however, a law-specific type of realism - legal liberalism.

During the 1930s and 40s law school education became institutionalised as the means of legal training. Curriculum became less of an issue than the need to 'raise standards' both of student entry and of educational provision, though not generally through increasing the range of that provision. Within legal theory, however, partly due to realism's influence, partly from an increased desire on the part of Law School faculty for the intellectualisation of their profession and partly in reaction to new social imperatives brought by the cold war and the re-emergence of social science, a sequence of new conceptions of law began: policy science, process jurisprudence, the Law and Society movement, and most recently, Critical Legal Studies have consecutively defined alternate means of conceiving of legal theory, but have not fundamentally disturbed the classification between law and the other disciplines. Although theories deriving from the social sciences have thus been taken up and used within legal theory, true interdisciplinary studies have not made much of an impact on the fundamental legal doctrine. Tomlins suggests that this is in large measure due to the practical

rationale for legal education: “the application of the disciplines was simply too distant from realisation of the essential institutional imperative - training lawyers” (p.945).

The current situation remains unchanged: although there have been many attempts to incorporate interdisciplinarity in legal studies through, for example, legal feminism, race and law studies, and democracy and citizenship studies, these remain on the fringe and have not fundamentally created links between law and the other disciplines. But, says Tomlins,

> In light of the ... story told here - of law’s serial successes in facing down challenges to its ascendancy in society and in the state from other practitioners of social knowledge - one might ask why lawyers should ever want to ‘make better use of other disciplines’ than the uses they have made... The story of law’s disciplinary encounters to date has by and largely been one of law’s successful appropriation of what it could use and its indifference to, and eventual discard of, what it could not. (op cit, p.965)

Although this summary does little justice to Tomlin’s very rich narrative account of the history of legal education and scholarship, it provides for the purpose of this study a sufficient basis to sketch the constraints of the social context of the educational encounter. In entering law, law students are entering a space which is clearly demarcated from the rest of the university, both literally and figuratively. They are entering a space in which a particular version of the professional requirements for practice, a particular version of a privileged discourse, has a strong hegemonic control, and within which there is very little space for other voices.

b) <u>Professional relations</u>

Tomlins’ account suggests that, traditionally, legal education has aligned itself more strongly with the profession than with the academy. Fox (1989) provides a more recent account of the American

history of legal education which focuses on changes within law schools and on their relation to the profession. She tracks changes in expectations of students from the extremely formalistic era of the 1950s, when "almost everyone wore a jacket and tie to class (almost everyone was male), stood up to recite, and respected authority" to more recent times. Thus, in the 1960s,

> legal education was largely hierarchical, formalistic, doctrinal, paternalistic and white American male. The curriculum was standard. Everyone knew what it was that a law student should know. Law was 'cold'; it was an intellectual puzzle. We, as students, learned 'the law'; or we could figure it out by logical deduction. The mind was split from the heart... (p.477)

Fox suggests that by the 1970s, however, there was a widening participation in legal education in the USA, and a greater understanding of the responsibilities of law towards society, for example in the inclusion in the curriculum of practical training run through legal clinics, created to give access to law to those unable to otherwise access this provision. Except for the first year of the curriculum that contained core courses and remained prescribed, the curriculum itself opened up to the inclusion of a large number of elective subjects. However, an overproduction of lawyers in this era, with an increasing commercialisation of the legal profession, led both to societal disillusionment with the profession, and to an alienation of the law schools from that profession.

Traditional professionalism itself may be under threat: Kritzer (1999), for example, talks about how there has been a simultaneous decline of professionalism and rise in corporate organization, leading to a state which he terms 'postprofessionalism' (p.715). He distinguishes between three different usages of the term 'professions': the lay definition, where the term is used to mean an occupation - a professional rather than amateur engagement. The historical use of the term refers to a "broad class of occupations that are characterised by 'trained expertise and selection by merit, a selection made not by the open market but by the judgment of similarly educated experts'" (p.716, citing Perkin, 1989).

The sociological definition of the term relies on a "combination of recognized exclusivity with the application of abstract knowledge", and includes "notions of altruism, regulatory autonomy through peer review processes, and autonomy vis-a-vis the service recipient" (p.717). It is in both of the latter senses of the term that law can be regarded as a profession: it is an elite and selective occupation that controls internally its own system of knowledge and criteria for judgment. Moreover, as with other professions, it is "embedded in a particular social, economic and political structure" and carries a certain amount of "prestige and autonomy"(op cit, p.718).

In Kritzer's view, what is currently threatening this professionalism can be narrowed down to three factors: "the formal professions' loss of exclusivity.... the increased segmentation in the application of abstract knowledge through increased specialization... (and) the growth of technology to access information resources" (p720). Although he does not specifically examine the status of the legal profession, it is reasonable to assume that these factors are operating, to some extent, here too. Mackie (1990) makes the point:

> The assumption that legal education is constrained by its traditional ties to a professional qualification, seems to me to be diminishing in importance ... The trends in the nature of the legal profession are suggesting a shift to a greater acknowledgment of the need for a more rounded education and one encompassing societal and interpersonal skill issues. (p.140)

These factors may indeed point to both the fact of the profession is changing, and that the traditional relationship between legal education and the legal profession is becoming more distanced. However, it would be a mistake to underplay the role that the legal profession has in legal education, in this country as elsewhere. Law plays a critical role in society's regulative structures; the legal profession is thus closely linked to power structures in society. Legal education's role is to reproduce that, and in doing this, it serves to maintain not only order but also privilege in society.

c) Legal education development in South Africa

The development of law as a profession and of legal education as a discipline with Africa generally has been set within the context of colonialism. Not only have the laws used to govern been imported from the colonial states, but regulation and reproduction of the legal profession has been controlled from without. As Ghai (1987) notes, colonial rule discouraged the study and practice of law by indigenous people, seeing it as a threat. However, as colonialism drew to a close the need for lawyers as part of a system of maintenance was seen and policy was switched accordingly. Thus, although most universities in Africa were established after the Second World War, most law schools were started only in the early 1960s.

South Africa emerged from ostensive colonial rule earlier than most African states, and legal education in this country thus has a longer history. The pattern of development however, is much the same: in the early 1800s no legal training was provided in this country. Advocates had to graduate in Holland, and there was no training required of attorneys. Under English rule, advocates had to be members of the English bar (no university training was required for admittance to the bar in England) or to have obtained a doctor of laws at Cambridge. The local degree requirement for practice was introduced in the early 1900s; this was combined with the requirement of two years of articles (practical legal training within a firm), or one year with relevant other experience (Cowan 1988).

South African law has its own developmental trajectory and a strong insularity: this undoubtedly contributed to the strong preservation of the status quo that existed in the country's legal system for most of the twentieth century. As discussed in chapter 1, the law itself in apartheid years was discriminatory and repressive. Legal culture was the same: writing in 1991, Bronstein and Hertsch describe the legal culture in this country as "dominated by white heterosexual males". Dlamini

(1992), points to the fact that, until recently, there have been few Black lawyers and academics in this country, so the "views and aspirations" (op cit, p.598) of this sector have not been accommodated. The point is also made that, since apartheid was geared towards the preservation of white privilege, it was at odds with conceptions of justice. It was suggested in Chapter 1 that in order to justify the repressive legal system, the principles of positivism and parliamentary supremacy were adopted during apartheid years (Dugard, 1986): Positivism, as a legal philosophy, stresses the disconnection of law from value judgment, and places the emphasis on black-letter and procedural law only, thus avoiding the contradiction. Within legal education, similar principles were adopted: Dlamini (1992) suggests that positivism was adopted as a response to the 'moral dilemma' of law teachers. Thus along with the law itself, legal education was "riddled with contradictions, anomalies and inconsistencies" (op cit, p.598).

Nonetheless, as outlined in chapter 1, there have been moves towards the transformation of the South African legal system since 1994. Most important of these was the introduction of the South African Constitution (1994), which issued a new 'rights era' into the legal domain. This development could have been expected to impact on legal education in at least two ways: on the content of that curriculum, and on the values underlying its teaching. The impact on curriculum, however, was perhaps less profound than could have been expected. Within the liberal universities at least, a strong emphasis on human rights law had prevailed since the late 1970s. The introduction of compulsory constitutional law courses within the legal curricula at these universities was thus not a major shift in focus. With regard to values underlying the curriculum, it has already been suggested that understandings of the aims of legal education will differ as understandings of law differ. Vettan (1999) suggests that since positivism stresses an understanding of law as body of rules, the aim of legal education in this worldview would be to teach students rules and skills. Understandings derived from the philosophy of natural law place greater emphasis on value and on the connection between law and morality, and might be expected to place higher value on independent thought and critique in education. The new constitutional dispensation in this country, with its stress on human rights, has a

natural law underpinning. To date, however, there is little evidence to suggest that legal education itself is changing: this may be due to the fact that natural law values were already fairly widespread in the Law School under study, it may simply be due to lack of research in the area, but it is also likely to be an indication of the slow pace of change in this highly contested arena.

The most significant development within legal education in this country post-1994 has been the move to open access to the profession through the introduction of an undergraduate LLB degree. The rationale for this development is expressed by Church (1998) thus:

> In the fledgling South African democracy, the community need for access to justice is real. In order to meet this need, not only should there be structural change with regard to access to the courts and adjudication but this should be accompanied by the development of human resources within a sound system of legal education. (p.116)

The access debate, in this context, is thus in response to local political pressures. However, broadening access in this context may have an unintended consequence: it may place the system under the kinds of stress that Fox describes. Commercialization of the profession in this country has not yet become a major issue; however, greater outputs from the legal education system as a result of the new degree requirements could lead to such a situation in the foreseeable future. Requirements for access and growth have meant a certain loss of exclusivity, and the link between the profession and the discipline is no longer as organic as it once was (whereas previously there was a high degree of intermingling between the discipline and the profession, demarcations now tend to be stronger, and relations more formal). It could be said that there is now greater jostling for power over control of the curriculum (as evidenced in the strong involvement of the profession in debates surrounding the content of the generic LLB curriculum, see Chapter 1), perhaps as a result of a perception of loss of control over the discipline by the profession. The links between the two are no longer as direct, with law school graduates no longer necessarily proceeding directly into the profession: paralegal activities

as a career direction for graduates have experienced a large growth in the past twenty years. Moreover, there are calls for new skills necessary for graduates to succeed (computer and mathematical literacy, and ethics, for example), and new demands for specialty courses particularly at post-graduate level.

Despite these challenges change in this context is slow, and control over the curriculum by the Law Schools is still high. The bulk of the legal curriculum is prescribed, with limited elective offerings in the final years of the degree. The academic base of the legal curriculum is stressed: although legal clinics have, over the past fifteen years, been established at most of the major universities, in most instances clinic work is not prescribed, but is offered as an elective. Moreover, the responsiveness of the curriculum to local values, in the form of research into customary law and the effect of law on Black people, has not been a priority; rather the focus is on "what a legal practitioner in a capitalist, First-world, free-enterprise economy would be required to know" (Dlamini, 1992, pp. 598 - 599).

d) Africanisation

Throughout Africa the introduction of law as a discipline was accompanied by a vision of lawyers as "social engineers rather than technicians" (Ghai, 1987, p.754), and was set within a strong local drive to Africanise the curriculum and its resources. Partly, this was influenced by the rise of the law and society movement in other parts of the world at the time; however, just as that movement has failed to make any significant impact on the discipline of legal education, so too did the early Africanisation movement in Africa lose momentum. It is only recently however, since democracy in 1994, that South Africa has entered this debate. Given the focus in this study on cultural model understandings of law, a brief account is given below of some of the local understandings of 'Africanisation'.

Along with calls to broaden access to legal education in this country have been calls for the

incorporation of African values into local legal understandings and curricula (eg Boniface, 2000). However, whether these values are sufficiently well defined to provide any practical base for incorporation, has been questioned (eg. English, 1996), and the existence of such values, as distinguishable from values underlying any other form of law is, in some cases, even disputed (Dlamini, 1997). The field of African jurisprudence, as an academic subject, in this country is still in its infancy. What writing there is on the subject is in diverse forms and in many instances is subsumed into writings about the interpretation of particular aspects black letter law (e.g. Bennett, 1999, on the best interests of the child).

Nonetheless, certain writers believe that there are basic principles which can be identified and used to compare different legal systems (western or indigenous). These principles, according to van Niekerk (1998) "embrace the fundamental principles of law and constitute starting points for legal reasoning" (op cit, p.160). In his argument, western legal systems are characterised by a focus on order and justice, with the associated themes of "fairness, reasonableness, generality, equality and certainty ... either as separate specific postulates, or as postulates of justice .." (op cit, p.162). In this system, "(t)he individual takes primacy over the common good and equality is assigned a central role" (op cit, p.164). He believes that these principles contrast implicitly with the most important principle underlying indigenous law: "harmony of the collectivity in which the collective good takes primacy over individual claims". Two other basic principles underlying indigenous law, according to van Niekerk, are the principle that superhuman forces are superior to man, and the 'identity' postulate, in which the world is not seen in either-or terms, but rather in both-and terms, allowing for the incorporation of new ideas into old without invalidating the old.

Johnson et al (2001) point to the fact that in indigenous culture, jurisprudential insights or philosophical understandings of the law are always couched in concrete terms, and are never stated as abstract principles. Whilst acknowledging that there are differences between different African societies in these understandings, they suggest that there is sufficient commonality for some

generalisations to be drawn. These commonalities, amongst pre-colonial African jurisprudential understandings, can be found firstly in community structure, where groups were drawn along family lines, there was a clear hierarchical structure, and property was held communally. The second commonality can be found in ruling structure, where government by the ruling chief was not autocratic, but actions were always made on behalf of the collective, and where alliances were formed over specific issues and were not held long-term. Decision-taking was through negotiated consensus, and there was no distinction between the religious and the secular. Johnson et al further identify three key concepts as being core to pre-colonial African jurisprudence, and standing in sharp contrast to understanding promoted in Western legal thought: these are social equilibrium and shame, and ubuntu.

They cite Ebo (1995) as seeing social equilibrium as the "primary purpose of indigenous justice". Thus "legal rules in African society appear less as prohibitions than as positive formulas [that] spell out rules of behaviour acceptable as proper in the mutual relations between individuals and groups". In line with this understanding, the focus in this jurisprudence is on maintenance of good relations, rather than in the threat of punishment. Shame is a critical component of this maintenance: the underlying basis of the shame concept, according to Johnson et al, lies in compensation to the victim rather than punishment of the offender. Shame, moreover, extends from the offender to his / her family or clan, and responsibility for compensation extends also to this group. The focus in indigenous law is thus on collective shame rather than individual guilt, and on compensation rather than punishment.

Ubuntu is a diffuse concept, interpreted in different ways by different writers. In its most basic formulation it can be understood to mean 'a person is a person because of other people', which embraces the key values of "group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity. In its fundamental sense it denotes humanity and morality" (S. v. Makwanyane, 1995, cited in Johnson et al, 2001, p.207). According to van Niekerk (1998) the strong

placement of the 'we' in this understanding versus the 'I' of western cultures, lead to a favouring in indigenous legal cultures of processes which can be "characterised as synthetic, totalising, integrative, non-discriminative, non-systematic, dogmatic, intuitive, non-discursive, subjective, communalistic and spiritually individualistic". These are contrasted with western legal processes which are characterised by "analysis, discrimination, differentiation, individualism, intellectualism, objectivism, inductive reasoning, scientific thought, generalisation, conceptualism, legalism, organisation, self-assertion, and impersonality" (op cit, p. 171). Stemming also from the collective rather than individual focus of ubuntu is a further fundamental difference in understandings of justice between the two cultures. The concept of human rights, which forms the basis for much of the western conception of justice is not only absent from indigenous concepts of justice, but may stand in direct opposition to indigenous culture (eg. Nhlapo, 1995 and 1996). Rather than rights-consciousness, African jurisprudence promotes duty-consciousness (Mqeke, 1999).

Regardless of these new understandings of old cultures, the South African legal system remains today based to a large extent on colonial and Western concepts of law. Whether legal understandings derived from indigenous cultures will become incorporated into a new legal system for the country, or whether they will remain on the periphery of legal understandings has not yet been debated in any meaningful way in the county, and has not yet contributed to any fundamental change in the values of the legal system itself. This is not to assume that there is a single set of values or a necessary agreement on core values within legal education. Devlin makes the point eloquently:

> (C)ontemporary legal education is about power and powerlessness; it is a microcosm of the structures of domination and subordination in our postindustrial, patriarchal society… (however, it) is not an unassailable monolith that irremediably alienates students and undercuts their social, political and communal values. Legal education is polymorphous and heterogenous; it necessarily localizes and decentralizes power and therefore provides interstitial opportunities for resistance. (1989, p.215 and p.217)

5.3.2 Legal pedagogy

Despite the inevitable value diversities in the field, the role of legal education in preserving hierarchy is perhaps beyond dispute. The manner in which it does so is explored by Kennedy:

> One can distinguish in a rough way between two aspects of legal education as a reproducer of hierarchy. Much of what happens is the inculcation through a formal curriculum and the classroom experience of a set of political attitudes toward the economy and society in general, toward law, and toward the possibilities of life in the profession. These have a general ideological significance, and they have an impact on the lives even of law students who never practice law. Then there is a complicated set of institutional practices that orient students to willing participation in the specialized hierarchical roles of lawyers. (1982, p.595, see also Kennedy, 1990)

This 'orientation to practice', in Kennedy's view, takes place through 'mystification' of legal education on three levels: firstly, teaching that is not explicit but rather depends on 'osmosis', secondly, through appeals to 'legal reasoning', and thirdly, through skills taught in isolation from practice. He points out also that there is strong modeling of values and attitudes and ways of behavior, or 'rules of the game' (op cit, p.602) in law schools, and that legal education is highly focused on the individual, which allows for "internalization of messages about the self and preparation for future hierarchies" (p.601). Thus, legal education is not only a result, but also a cause of legal hierarchy (pp.607 - 608).

The three levels of 'mystification' that Kennedy refers to provide, in essence, an outline of some of the major debates in legal pedagogy. These are briefly explored below.

a) Education through 'osmosis'

As related in the Tomlins account, part of legal education's claim to its status as an independent discipline rested on the development of specific pedagogical approaches to its subject matter. The case method introduced by Langdell in 1870 was the earliest attempt to define this pedagogy. The initial casebooks developed for this teaching method contained only cases, with no explanatory material: students had to individually decode the cases and determine their relevance. The onus in learning was thus very much on the student, with the teacher's role reduced to directing students to the appropriate materials and assessing their interpretation of them. Arguments advanced in favour of this method include that it teaches inductive methods of legal analysis and thus 'thinking like a lawyer'; that it provides an 'appropriate factual matrix' for the learning of legal application; that it demonstrates the evolving nature of law; that it necessitates a problem-solving approach by students and thus forces an active learning mode; and that it is 'pedagogically stimulating and interesting'. (Teich, 1986, p.170, see also Carter and Unklesbay, 1989, Wangerin, 1989, and D'Amato, 1987).

The Socratic method of legal teaching, involving a particular question-answer technique was, after the case method, possibly the most important development in legal pedagogy. This style of teaching was widespread in the 1950s, and was often used in conjunction with the case method. Writing in favour of this method, D'Amato (1987) argues that "the best teaching challenges and alters the mental pathways, connections and censors within the student's brain" (p.462). Good Socratic teaching ensures that the student's mind "is precisely at the point where the existing mental pathways will lead to the wrong answer" (op cit). The argument is that this forces the student to think, to make new connections, and thereby to learn, not fundamentally the law, but more fundamentally, critical legal thinking. Although pedagogically more interactive than the case method, the Socratic teaching method relies on a modeling of appropriate thinking skills, the value and appropriate use of which must be determined by the individual student. At its worst, however, the form of questioning used can be demoralizing, and can lead to a lack of certainty about appropriate response to legal dilemmas.

Writing in a context in which this form of teaching was widespread, Loftman (1975) found little correlation of student study habits with results. He suggests that the message that this conveys is that there is nothing in the student's control that can be done regarding improving grades (p.449).

Although anecdotal evidence relates the high value of these methods, there is little empirical evidence beyond this to show that these methods had any significant impact on student learning: Teich (1986) points to a century old debate about the effectiveness of different teaching approaches in law. His research identifies at least 12 different 'methods', including the case method and Socratic methods, for all of which huge claims regarding effectiveness have been made (others include the lecture method, the discussion method, and the use of simulated trials, for example). His literature search identified a number of studies that had compared different methods of instruction: these studies indicated no significant differences in student achievement across the different methods. He advances a number of possible reasons for this: students adopting differing learning styles may respond differently to different methods; all methods may share "a common deep-structure characterization of the information being taught" (p.185); or students may compensate for poor lecturing by increasing self-study.

Perhaps for this reason, or perhaps only because of the particular stresses of tertiary education in the South African context (with large classes and very diverse student bodies), but traditional legal pedagogies not used here in their original form, although both are, to some extent, used in a reduced form. The case method of deducing principles from cases is used in conjunction with ordinary lecturing. The Socratic method is generally used more as interactive lecturing technique than in the original highly provocative sense (Watson, 2000). This reduction in method has not been accompanied by any locally developed pedagogies or means of ensuring student success. The onus, in this context, is on the student to succeed. Although student support structures are in place, it is the student's responsibility to take advantage of these. Student deficit (see Chapter 1), rather than institutional practices, is seen to be the cause of failure. The argument is that it is not the Law

School's role to spoon-feed students, but rather that students must adapt to its practices; practices which are not well elucidated even amongst staff. Students commonly report surprise on failure and do not understand where they have gone wrong, and there are frequent calls by the Law Students' Council for a review of the assessment system. The goalposts, in this context, are thus hidden, and it is the student's responsibility to seek them out. Here as elsewhere, therefore, as Kennedy suggests, the education process is, by omission, mystified.

b) Legal Reasoning

The term 'legal reasoning' is typically used in two senses. The first is a reference to the particular form of logical reasoning that is necessary to solve legal problems. The second is a broader reference to the full range of skills necessary in the problem-solving process. The first sense of the term is not unproblematic: as Harris (1980) points out, legal reasoning is not a clearly defined skill. Although very often it appears to follow a deductive form, it is not true deduction, in that the deduction applies only to "factual propositions, not (to) norms" (p.196). Legal reasoning is also not inductive, and although it may at times rely on analogical or consequential form, these forms of reasoning are insufficient by themselves. Harris shows the difficulty of attempting to provide a synthesis of how such forms might operate in practice (which form takes hierarchy over which), which shows the near-impossibility of any attempt to 'teach legal reasoning' as a well-defined skill. He further cautions that within legal reasoning, form and content are always intertwined, and one cannot be artificially taught in the absence of the other (see also Farrar and Dugdale, 1984). By its nature then, legal reasoning in this sense is inaccessible, and resists attempts at direct teaching.

The second sense of the term is far more frequently debated. Arguing in favour of a problem-solving approach to legal teaching, D'Amato (1987) suggests that

> a good law school teacher has to begin by assuming that the minds of her students have to be changed, a notion encapsulated in the cliché that law school is supposed to teach a student to think like a lawyer. Lawyering is preeminently problem-solving: thinking like a lawyer is having the ability to look at some facts, decide what is omitted and what could be added, and relate those facts to 'the law' in such a way as to solve the client's problem (pp.470 - 471)

The need for a conception of legal education as an induction to legal problem-solving techniques is echoed by Nathanson (1989), who delineates legal problem-solving as a five-stage process: 1) problem and goal identification (the formulation of which will determine the approach adopted); 2) fact investigation; 3) legal issue identification and assessment (where "legal issues are assessed in two basic ways: (a) through prediction of how they might be resolved in court; and (b) through determination of whether one side or the other can maintain a credible position); 4) advice; and 5) decision making (which itself proceeds through three stages: developing options, evaluating options, and choosing the best option). This process must take place within a planning and implementation framework. Although this approach is used intuitively by many law teachers, it is rarely done in this clearly outlined manner. Rather, students are expected to develop the technique for themselves.

Mackie (1990), although advocating a problem-solving approach, points out that the notion of "(t)hinking like a lawyer" is a confusion of objective with method (p.136). The typical response by law teachers to this dilemma is the adoption of a black letter law approach, which teaches law as a system of rules rather than as a process. He suggests that this approach has a limited relationship to legal practice, results in a reification of legal rules, and conceals power relations in society. However, as he points out, it is a very 'powerful methodological and substantive approach to legal teaching, and is the 'traditional strength' of legal education (op cit, p.139). The strength of the system may, however, lie in its selectivity: it is only those students who can penetrate the veil of legal reasoning and problem-solving that can ultimately successfully graduate into the profession. The danger in this

approach, moreover, is that it may encourage a reproductive learning style, a critique that has been leveled against South African law schools:

> Legal education in South Africa to a large extent represents a rote-learning experience of laws and legal rules. Law-school education in South Africa to large extent represents going to class, taking down verbatim the lectures of the instructor, and at the end of the year or semester being tested on what the instructor said in class. Law graduates come out of law school as 'couch-potato' law graduates – as receivers of information, and not as people who can apply knowledge to real-life legal problems. (Motala, 1996, p.695)

Issue could be taken with this view of South African legal education as a 'rote-learning experience' (c.f. Woolman et al, 1997), however, as Motala suggests, it is not common that legal reasoning and problem solving are taught explicitly in this context.

c) Skills, practice and academia

Much of the debate within legal pedagogy, particularly in this country, is on the relation between the academic and the practical in legal education. The traditional view is that the distinction is artificial, and that what is taught in law schools will enable the student to operate in practice by providing them with the intellectual skills necessary to operate in a complex social environment (e.g. Wade, 1989). The specific low-level skills necessary for this practice, it is argued, can be acquired after graduation, and are not crucially tertiary substance. This view has, however, in recent years come under increasing attack. Mokgoro (1998), for example, suggests that

> (t)here is an old school of thought which holds that law faculties or universities are not technikons and should therefore focus on what they have been created for, namely

> academic training. Universities, in my view, have to respond to the needs of the societies and communities which they serve if they are to remain relevant and not become mere ivory towers. (Mokgoro, 1998, p.5)

Church (1988) claims that the academic and practical are "divorced" (p.158) in local legal education. Her argument is for a more integrated approach to the legal curriculum:

> knowledge of substantive law is not enough. Students should also be given the opportunity of understanding and questioning rules of law in historical and philosophical perspective and courses in legal history and legal philosophy would serve these ends. Finally, for the purpose of legal development and intelligent law reform, and in order to meet the needs of an international community, courses in comparative law and in conflict of laws should be regarded as fundamental. (p.160).

Similar calls have come from others, criticizing the current system and arguing for the need both for enhanced relevance and for an integration of practical skills with the academic curriculum. The nature of the skills being sought is not always clear. An editorial in De Rebus (1995), whilst positioning itself against vocational training in the degree, suggests that there is a greater need for skills training in the degree. The types of skills envisaged here would include those of problem analysis, legal research, document drafting, and general writing – skills that seem to cross the line between the academic and the practical. In this regard, Bell (2000) distinguishes between 'soft skills', or the personal skills aimed at employability favored in current policy discourse, and 'traditional intellectual skills', such as critical evaluation, logical argument, analysis, synthesis, mathematical modeling, evaluating professional practice, and flexible and creative thought (p176), which in his view are the aims of higher education. His view is that much of the current 'skills-speak' is simply new nomenclature for what is, in any event, done.

The possibilities of a new kind of understanding of professional practice, such as that advocated by Schon (1990), where professional practice is seen, not in terms of a simple theory versus practice (or science versus application) divide, but rather as a different mode of thought which is as scientific, are, in this context, yet to be explored. Mackie (1990) suggests that such a view might "provide a link between practice and the critiques of the black-letter law approach" (p.141).

The 'skills-speak' debate is not unique to law: the move to outcomes-based education countrywide has forced all disciplines into an examination of the 'competencies' that they develop. Law's response, however, has been less than enthusiastic. Rather than using the opportunity to clarify what, precisely, is required of a student to successfully complete a degree, the outcomes provided have tended to revert to the language of legal 'problem-solving', 'reasoning' and 'practical skills' (see, for example, the published generic LLB outcomes, SAQA, 2004).

However, there is a caution to be sounded: an over-enthusiasm for the kind of skills-based curriculum which is sometimes advocated can lead to a reduction of these skills to their most banal form. Although it is useful to be clear about what it is that we want students to learn and how we teach and measure, attempts to outline these competencies tend to result in, as Sherr (1997) says, "wave upon wave of reductive lists of skills" (p.45). Even the most basic of skills are, as Tribe (1999) points out, difficult to define and assess. The 'traditional intellectual skills' that Bell describes are even less susceptible to this rationality. The point is made by Sherr (1997):

> There is only a certain amount of information or analysis which can be reduced to an outcomes or competencies basis and measured as such… there will always be something missing - which will defy this 'bureaucratic rationalist' approach" (p.45; see also Watson, 2003).

The battle lines have, however, been drawn. At issue is not simply the inclusion of skills in to the

curriculum, or how what is taught is defined, rather, it is the role of the university itself which is being questioned. Maharaj (1994) puts the position eloquently:

> At issue is the fundamental aim of legal education, the status of law as an advanced and abstract body of knowledge, replete with theory and method, worthy of inclusion as a 'grand narrative' of academia, warring with the applied competence demands of the both the profession and societal need of that profession. Demands which, in this context, are given urgency by equity and access prerogatives, and which, within the constraints of the unequal output of the schooling process seem reasonable and obtainable. (Maharaj, 1994, pp.339 - 340)

The picture that emerges from this reading of legal pedagogy is one of an obscuration of the goalposts, a focus on the reproductive elements of the task, and an inadequate and slow response to new paradigms in education. This may not be an accurate reflection of all areas of legal education in this country, or of this particular law school, and should not be read to suggest that instances of excellent pedagogy or of transformative activities do not exist. However it does suggest that, as with curriculum development, and although debate is heated, pedagogical development in this area is slow and resistant to change.

5.3.3 Legal Language

There is a large body of literature on the subject of legal language (see, for example, Mertz 1992 and Danet, 1980 for a review of some of this literature). Much of it relates to the language of legal practice: this language has a vastly different form and function to that of academic language (Bhatia, 1987), and is not the specific focus of this research. However, to the extent that legal academic Discourse links to both academic and legal cultures and reflects aspects of each, for the purposes of

this research a short description of this domain is necessary. This section thus examines some of the specific features associated with legal language and its interpretation.

The form of legal language differs to some extent from that of everyday language use. This form is, however, not monolithic, and varies according to the specific communicative functions served in context. Thus different forms may be evident within the broad classification of legal pedagogical, academic, juridical and legislative writings (Bhatia, 1987). In legislative writing, for example, there is an evident "interplay between the main provisionary clause and the surrounding network of qualifications" (op cit, p.231). On the pedagogical side, with respect to spoken language, "it is… likely that certain methodological and conceptual features of law, particularly the way legal claims are made and the way they are supported and argued in law, will make law lectures different…" (pp.227-228), whilst written language reflects "special methodological and conceptual features of law (which) require a different treatment of various commonly used communicative devices" (p.229). However, at this level, there is likely to be much in common with other disciplines.

The textual features most associated with professional legal writing, and which may find reflection in legal academic styles, are itemised by Danet (1980). In effect, he provides a 'linguistic description' of legal language, which is briefly summarised here:

With regard to lexical features, legal language is characterised by: the use of technical terms; the use of common terms with an uncommon meaning; the use of words drawn from Latin, French and Old English origin; the use of unusual prepositional phrases (e.g. "in the event of default"); the use of doublets (e.g. "rights and remedies"); the use of formal terms; and a juxtapositioning of vagueness with over-precision. Typical syntactical features include: nominalisation (construction of a noun from a verb); the use of passive voice; extensive use of conditional phrases; unusual anaphora ("backward-oriented reference to previously mentioned nouns", rather than the use of a pronoun); whiz deletion (the deletion of a "wh-word combined with some form of the verb to be", such as

"which are"); a high frequency and unusual placement of prepositional phrases; the use of extremely long and complex sentences; the use of unique determiners (eg 'such' in the phrase "in any such event"); impersonality; the use of negatives and especially multiple negatives; and the use of parallel structures ("mostly of the form A or B"). Discourse-level features include anaphora (lack of cohesion) within and between sentences and over-compactness. Prosodic features include devices normally associated with poetry, such as alliteration, assonance, rhythm, and rhyme. (drawn extensively from Danet, 1980, pp.476 – 484).

The sum of all these features leads to a language that is complex, and is difficult even for skilled readers to comprehend. This complexity serves a particular function in social reproduction, as Goodrich (1984) points out:

> The idea of a special and separate legal language remote from common speech is the product of a society in which only a very limited class of 'legally competent' people can read the texts of that language. What is in effect the relexicalisation of the law, its archaic terminological obscurity and its pedagogic specialisation, are all geared to the reproduction of an economic elite and the discriminatory values that such an elite serves. (p.534).

The link between language and power has been established in chapter 4, and is not re-examined here. However, this particular feature of legal discourse should not be forgotten: as Mertz (1992) points out, "(n)owhere is an act of linguistic translation more obviously laden with socially powerful consequences than in judicial opinions" (p.423). Language is the tool of law. It is through language that laws are constructed, and that they are interpreted and applied.

Legal language differs from everyday usage not only in its terminology and grammar, but also, more importantly, in the rules of construction and interpretation of that language:

> A great part of a lawyer's time is spent in trying to decide upon the meaning of what people have said in various forms which give their words legal effect, such as contracts, wills and acts of Parliament… Books have been written upon the principles according to which legal documents, particularly statutes, ought to be interpreted… And I am not talking merely about the use of technical terms, which are simply words having a specialised meaning which a layman could look up in a law dictionary in the same way as he could look up medical terms in a medical dictionary. No, I am concerned with the legal rules which affect the construction given by the courts to what appears to be ordinary language. (Hoffman, 1997, pp.2 - 3)

Hoffman (op cit) distinguishes between conventional meaning of words (the definitional meaning), and the intentional meaning of an utterance:

> (n)o utterance is ever complete in itself to convey the intended meaning. It depends heavily upon the existence of a vast background of facts and a framework of mental assumptions within which the speaker is operating, all of which are assumed to be known to the listener and not therefore required to be expressly stated. (op it, pp. 4 – 5).

Errors of interpretation in ordinary language usage can arise with respect of either conventional or intended meaning. Much of the interpretative process relies upon context (in Gee's terms, on the guesses made by the receiver about the choices made by the speaker). In legal language, however, the speaker's intention, for the most part, is seen as irrelevant: "the effect of an instrument depends on what the words objectively mean" (op cit. p.9). The role of the author is thus diminished, and, in legal instruments in particular, the author of a particular text is not seen as an individual but rather as a 'fiction of the law' (the 'reasonable man'). This situation is compounded by the fact that in law, in many instances, the author of a particular text is purely of drafter of meanings constructed elsewhere.

The background for interpretation, in legal texts, is thus 'artificially restricted' (op cit, p.15). Although speaker's intention is thus back-grounded as a rule for interpretation (in most instances, there are exceptions), there is nonetheless in legal interpretation a process of meaning construction, the rules of which are not accessible to the layperson, since they rely to a large extent, on knowledge of the procedural rules governing the context. Thus the interpretative process is not internal to the text itself (as its 'objectivity' would appear to suggest), but is reliant on an understanding of a system of procedural rules with regard to the meanings that are available in context.

The latter point is stressed by Goodrich (1984):

> the 'distinctive' character of legal language and the logically 'puzzling' structure of rules of law, which are … not amenable to 'common' modes of definition, are the product of their belonging to, or presupposing, a system of rules… At the level of definition, it is the interdependence of rules that must be looked to for the definition of any particular term. (p.524, see also Goodrich 1987).

However, the suggestion that legal interpretation can be un-problematically deduced from knowledge of this system of rules is ideologically loaded. Goodrich points to the fact that much research aimed at studying the 'grammar of law', or at 'outlining the semantics of rule application',

> have been exercises aimed at asserting or defending the positivist view that law is an internally defined 'system' of notional meanings or of specifically legal values, that it is a technical language and is, by and large, unproblematically, univocal in its application… What has been consistently excluded from the ambit of legal studies has been the possibility of analysing law as a specific stratification or 'register' of an actually existent language system, together with the correlative denial of the heuristic value of analysing

> legal texts themselves as historical products organised according to rhetorical criteria. (1997, p.1)

Understandings of legal interpretation thus depend on understandings of law, and there are competing discourses within law. Whereas a natural law conception would stress the authority of law, a positivist conception will stress the objectivity of law, and its existence as an empirically analysable body of rules. Alternate conceptions may stress, rather, the socially constructed nature of the interpretive process. Umphrey (1999), for example, shows how "(m)eanings…emerge…from a process of discursive conflict and negotiation between the domains of legal consciousness and formal law" (p.393), where legal consciousness is "the meanings attached to the law in the everyday world of social relations". (p.395)

An understanding of legal language and discourse that perhaps best fits with the understandings of Discourse community adopted in this study is provided in the work of Boyd White (1985). Boyd White sees law, not as 'objective reality', but as an 'activity', or specifically, a rhetorical activity, where 'rhetoric' is seen as "a set of resources for thought and argument" (p.33). In his view, although law does consist of a body of rules, these are negotiable. Moreover, legal language itself is not entirely predetermined: "the legal speaker always acts on the language that he or she uses; in this sense legal rhetoric is always argumentatively constitutive of the language it employs" (p.34). His third point is that rhetorical community exists and is established by legal language: "it is at once a social activity - a way of acting with others - and a cultural activity, a way of acting with a certain set of materials found in the culture" (p.35). In this sense then, in his view, one can see law as an activity: as something that people do with their minds and with each other as they act in relation both to a body of authoritative legal material and to the circumstances and events of the actual world (p.52).

Boyd White points to the fact that there are different levels of legal literacy, ranging from the literacy

necessary to engage in everyday life in society, to the literacy that results from years of professional training. In addressing the question of the ideal level of legal literacy that a layperson should have, he suggests that:

> the most serious obstacles to comprehensibility are not the vocabulary and sentence structure employed in law, but the unstated conventions by which the language operates: what I call the 'invisible discourse' of the law. Behind the laws, that is, are expectations about the ways in which they will be used, expectations that do not find explicit expression anywhere but are part of the legal culture that the surface language simply assumes. These expectations are constantly at work, directing argument, shaping responses, determining the next move, and so on. Their effects are everywhere, but they themselves are invisible. It is these conventions, not the diction, that primarily determine the mysterious character of legal speech and literature – not the vocabulary of the law, but what might be called its 'cultural syntax'. (p.63)

He suggests that the 'mystification' of legal language derives from four factors: first is the form of the legal rule which leads the reader to expect that interpretation and application is simple: "it appears to be a language of description, which works by a simple process of comparison, but in cases of any difficulty it is actually a language of judgement, which works in ways that find no expression in the rule itself" (p.65). Secondly, legal rules appear to follow a deductive reasoning process, but do not: "each term in legal rule has a range of possible meanings… and the intellectual process of law is one of arguing about which of them is to be preferred" (p.66). Thirdly, resolution to the ambiguities of the legal problem must be expressed in binary form; as though the rule were expressly defined and deductive reasoning had been applied. The fourth factor is that of the procedural nature of law, and the fact that "every question of interpretation necessarily involves these procedural questions as well" (p.70). Thus, legal Discourse

> is in a double sense (both substantively and procedurally) constitutive in nature: it creates a set of questions that reciprocally define and depend upon a world of thought and action; it creates a set of roles and voices by which meanings will be established and shared. (op cit, p.71)

Boyd White adds a final caution to this analysis: in his view, law's connection to power can be 'overstated'. In some instances law has little power, and law is not the only means of power (p.238). Moreover, law, through its recourse to the procedural, fundamentally limits its own powers, and the powers of individuals within it. Importantly, "law… serves as the language into which other languages, and stories told in them, are translated and in that way comprised into a single order" (p.240). It is thus not only an interpretive, but also a compositional process. Constitutive relations flow in both directions: from the social, through the language, to the individual, and from the individual, through interpretation and composition, back to the social.

5.4 Context of culture

> Legal education is an elaborate conversation, a conversation with a history of puzzling over how authority works, how rules matter, and how conflicts can be resolved. As law teachers we make a life out of this conversation, confronting in different ways and from different perspectives the puzzle of law, its role in society, and its influence on our lives. (Elkins, 1987, p.526, see also Elkins, 1988)

The above section provides characterization of law in its academic environs. Some indication has been given that it is a well-insulated entity, operating within its own sphere and within its own constraints. The Tomlins account illustrates legal education's attempt to create a 'hard knowledge' space for itself, its justification of this knowledge base through strong control over the cohesion of the

discipline, and its resistance to any blurring of its classificatory boundaries with other knowledges. Other literature explored highlights legal education's professional links and reproductive role, the mystique and opaqueness of its knowledge criteria, the disjunction between learning and doing law, and the particular form of legal language.

Despite the attempts that have been made over the past century to consolidate and define the legal knowledge base, in terms of Becher's characterization of content, law remains a soft knowledge system. This is evidenced by the lack of a clear and linear development pattern in research advancement, by the fact that problems to be researched are at the researcher's discretion rather than being clearly defined by the field, and by the fact that explanation is not a key aim of research. Becher's own research, which included empirical research into academic legal culture through interviews with academics both within and outside of the culture, confirms this finding. (It is interesting to note that although a literature search was also conducted for related information, he notes that there is a 'neglect of documentation' on academic legal culture - his literature search "drew a complete blank" , p.32.)

Becher's research findings suggest that the legal knowledge system is primarily applied, rather than pure (in his view the "study of jurisprudence represents a pure component, whereas family law is nothing if not applied", p.155). It is possible to take issue with this classification: most legal academics would not regard their work as applied. This perhaps results from a different definition of what constitutes applied research than the one offered in the study. Thus, legal research, although it relates to an object (law) and not to theory except in its jurisprudential aspects, does not relate to the empirical object of law (its effects). Applied research, in the legal sense, refers far more to research on workings of law (court decisions and empirical studies on legal effects, for example) rather than on law itself. The distinction is not a critical one though: what can be said with some certainty is that legal research is not, primarily, highly theoretical and abstract. Also not crucial to this study, but of interest, is that the legal research culture can be classified as rural: competition and time pressure are

not strong, and research efforts tend to be individual rather than collaborative. Specialisation is not high (Becher points to the fact that there is a traditional notion in legal education that everyone should be able to teach every subject, p.118), and emphasis on the completion of doctorates as a part of the essential academic career route has traditionally not been high (op cit, p.108).

What is of interest in terms of Becher's classification is the position of law on the community axis. In terms of Becher's general findings, hard knowledge systems are generally associated with, or generate, convergent communities, whilst soft knowledge systems are linked to divergent communities. One might, therefore, expect law to exhibit a divergent culture on the basis of its soft knowledge system. Whilst it is true that some of the characteristics of divergent communities are evident in the legal academic community, law also displays many of the characteristics of convergence. Becher himself characterises academic law as falling in the 'intermediate ground' between convergent and divergent cultures:

> (w)hat disables academic lawyers from unequivocally convergent status is a continuing dispute about the nature of the subject. Although they have 'the same basic intellectual knowhow', 'a common core of technique', 'a shared data base' and 'the same form of thought and rules in formulating argument', they are nonetheless divided in their views about whether law departments ought to concentrate on the content of their subject (black letter law) or should aim to place it in its social context (the socio-legal approach), or indeed view it from a predominately sociological perspective (the sociology of law movement). This uncertainty over what the discipline is or ought to be makes it inappropriate to categorise academic law as a highly convergent field. (p.156)

The strong relation of the legal discipline with the profession may aid in providing cohesion to what would otherwise be a divergent discipline. The specific form of legal language, to the extent that it influences legal academic language, undoubtedly contributes also to this. In addition, aspects of

convergence and divergence may also be historically determined with regard to specific context of time and place. (Becher points to this in saying that "academic communities are subject to influences from the wider society as well as from the inherent nature of the epistemological issues on which they are engaged" p.150.) The time of this study was a particularly difficult one for the law school under study: university proposals regarding the restructuring of faculties were being debated, with the proposal being that the Law Faculty be incorporated into a larger Faculty of Commerce, Law and Management. Although this restructuring has subsequently come to pass, it was hotly contested by the Law School at the time. This outside threat at the time of this study thus caused an unusual amount of convergence in the community.

The extent of convergence of the legal academic community is suggested also by the strength of the boundaries between its content and other contents. As has been shown, legal content is generally strongly classified from other contents, except where these are appropriated to the discipline. This strong boundary strength is evidenced in the lack of academic and curriculum interactions with other disciplines and in the stronger links formed with the profession than with the academic community.

Although there is nothing inherent in the subject matter of law to make it so, it is also true that the organization of the curriculum *within* law is strongly classified: subjects are taught as though they were entirely independent, with no overarching linkages. The structure of the curriculum is more strongly controlled at its outset (the first two years, with the exception of the course under study, focus on black -letter law), proceeding from surface to deep structure. This very strong framing at the outset diminishes slightly towards the end of the curriculum, where there are more elective courses, more 'sociological-type' content, and the practical skills training which provides linkages: the frame is thus reduced once students have proceeded to a certain level of socialization. The curriculum is thus a collection code, of a specialized nature (the control over the content imposed by the requirements of the curriculum is such that all subjects within the disciple come from a 'common universe of knowledge", Bernstein, 1975, p.161).

Framing at the level of the teacher is particularly strong in the first two years of the curriculum, where large classes are taught in parallel by different lecturers and where the content is prescribed. Framing from the pupil's perspective in the classroom is exceptionally strong, again particularly in the first two years of study, with no control granted over the selection, organization, pacing and timing of knowledge. Classification between class knowledge and everyday knowledge is also strong.

The implication of the juxtaposition between the soft knowledge system, the uncharacteristically convergent community, the strong knowledge classification and the strong framing of content in this context suggests that a strong socialization model is operating in this context. This has implications particularly for the constitution of identity in the context: the context is likely to operate through strong authority external to the student, to generate strong definitions regarding class membership, and to develop strong loyalties in its subjects. Individual deviances from the norms thus set up are not likely to be tolerated. The extract from Kennedy (1990) reproduced above suggests that this is in fact the case; that strong control is exercised over 'values, attitudes and ways of behaviour' appropriate to insiders to this domain.

Legal education has been shown to be a site where, traditionally, authority, insularity and resistance to change are high. The authority in this context derives from the content of the domain, from its strong professional links, and from the specific form and activity of its language. This is not easily challenged. However, as has been shown, there are currently pressures being placed on this system. Internationally, the rise of a new commercialism is threatening traditional professionalism: the pressures exerted by globalisation undoubtedly contribute to this. Locally, changes to the law itself have opened the way for a new set of values underpinning the system, and calls are being made for greater inclusivity in legal understandings. Local understandings of education are also changing, and are calling into question traditional understandings of the role of the university in the context. These changes are, however, yet to impact on legal education practice in this country in any significant way.

It may well be that, just as it has withstood the pressures of the past, legal education will withstand these pressures. In the broader social domain, legal education, with law itself, must remain inviolate.