Legal Education: Black Letter, White Letter or Practical Law?

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Introduction

A lawyer's reflection on his or her legal education is necessarily idiosyncratic. However many would agree that a person's legal education can have an important qualitative impact on their future performance as a lawyer (with Justice Michael McHugh as a major exception to the rule). Another significant impact upon the performance of a lawyer is the work environment in which the lawyer receives training. Good habits as a lawyer are often passed on by good mentors in legal practice. That, however, is not the subject of this paper.

In this paper I reflect on three different approaches to legal education that I have personally experienced. My LLB education can be described as doctrinal ('black letter law'). My LLM experience was almost entirely the opposite focusing heavily on alternate approaches to legal scholarship (what I shall call 'white letter law'). As a part time clinical lecturer at the University of Newcastle Law School, I have observed an approach to legal education which is different again (what I shall call 'practical law'), with an emphasis on teaching students how legal doctrine is applied to the law in practice.

Each approach will be assessed against criteria including the student's experience at the time of study as well as my subjective opinion as to the use that can be made after law school of the education offered. My perspective is necessarily one of a person who has practised as a solicitor and barrister from 1988 to the present, principally in Civil

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Litigation with a commercial emphasis.

Black Letter Law

I attended the University of Sydney in the combined Bachelor of Economics/Bachelor of Laws program from 1982–6.

I commend an approach to legal education where another degree has been obtained before, or is obtained simultaneously with, the LLB degree. A degree in an area other than law is of great assistance in providing perspective for a legal practitioner. I would especially commend an education in the humanities (including history, politics and philosophy) as highly complementary to the study and practise of the law. Even from a black letter law perspective, in my opinion, cases have to be read in their social, political and historical context.

Further, the logic of other disciplines can be modified and used in legal practice. As a barrister I regularly use methodologies of argument by Plato or Aristotle in formulating legal submissions. A consideration of the individual's relationship to the state is enhanced by the study of Hobbes, Locke, J-J Rousseau and the like. Knowledge of government and its operation is essential to understanding the Law as one of the arms of government in a civil society.

Although I did not study psychology, I suspect training in that area of learning would also be of great assistance to legal practice. The reason for that suspicion is that the practise of the Law is all about people. In litigation particularly, clients and witnesses have to remember occurrences and witnesses attempt to evade adverse evidence in cross examination. Judges are of different personalities and proclivities. A systematic approach to the study of the human psyche may well be beneficial to negotiating the human dimension of the Law. Most practitioners, by contrast, resort to an ad hoc instinctive approach to the likely motivations and actions of the people involved in the process.

Other than a compulsory subject in Jurisprudence (which had several different optional courses), my undergraduate LLB education at the Sydney University Law School in the 1980s was purely directed to teaching the law as it was. Reference to the law as it should be usually consisted of an analysis of doctrinal impurities or conflicts between Australian or English authorities. By and large the full time faculty had little experience in legal practice and were not focused on law as anything other than a narrow academic examination of legal doctrine. By temperament the teachers were often (but not exclusively) less dynamic in their presentation than one would have liked. The part time faculty (especially in the teaching of Equity) was, by contrast, exceptional. The lecturers who taught Equity have almost all subsequently been appointed to high judicial office.

There was little choice of legal subjects in the combined LLB degree. Compulsory subjects included Legal Institutions, Contracts, Torts, Administrative Law, Real Property, Equity, Commercial Law I and II, Criminal Law, Federal Constitutional Law, Succession and Jurisprudence. There were only two additional elective subjects available in the LLB degree.

My verdict on my LLB experience is that a combination of a black letter law based curriculum with frequently less than dynamic lecturers did not make for the most intellectually stimulating and interesting learning environment. That said, twenty years later, the principles of law and equity, and the approach to case analysis which I learnt at law school are still familiar and useful in everyday practice. I do not believe that a less rigorous doctrinal legal education would have had such long term largely positive benefits to my commercial law practise. Whilst the counter argument that good research skills will account for any deficiencies in the content of an LLB degree makes sense in theory, casual observation from practice suggests to the contrary.

In a doctrinal legal education, skills of case analysis and research of precedents are well developed. The conduct of legal research is necessary in practice regardless of one's knowledge of doctrine. However, time constraints in practice do not usually permit extensive research. The time to leisurely come to grips with fundamental concepts in a particular area of the Law is usually not available. A lack of appropriate doctrinal foundation can lead to misconceived actions. In a case I appeared in a few years ago, my opponent applied to amend his pleading to start a new and different cause of action after hearing my closing address. In submissions he said that it was the first case of this kind that he had appeared in and he had not studied Equity at university. He had probably left law school in excess of 15 years prior to making that statement. As unimpressive as his excuses were, in a very practical way, he was making a subjective plea for a better legal education. He felt that his legal education had not properly equipped him to perform as a barrister. It clearly had not taught him the fundamental importance of analysing the cause of action.

White Letter Law

In 1987 I commenced an LLM at the University of Toronto. A greater contrast with my experience at the University of Sydney could not have been imagined. An LLB (now a JD) was only a graduate degree in Toronto and most of the undergraduate law students had achieved very strong honours results in their first nonlegal degrees. With only 90 students from all over Canada each year in the LLB program, the Law school had a small elite feel to it. LLB students studied compulsory subjects in the

first year. The subjects included Contracts, Torts, Criminal Law, Legal process, Constitutional Law and Property. In the second and third years of the LLB degree, students had a wide variety of elective courses many of which were interdisciplinary in their content.

The LLM degree was principally by a major thesis with only eight hours of second or third year LLB course work electives (including a compulsory graduate seminar of two hours). My first meeting with the Dean of Graduate students exposed me to the different approach to legal education at my new Law school. When asked what approach I was taking to the area of my proposed dissertation on defamation and the American first amendment, I explained that I wanted to assess the American jurisprudence and see if it was better than Defamation Law in Australia. The Dean of Graduate Studies asked are you going to use a law and economics perspective, feminist perspective, Marxist perspective, sociological perspective, law and philosophy perspective or some other approach. As I had hitherto not studied or read at law school about any of those perspectives to legal analysis, I answered with a blank look. Thankfully, the compulsory graduate seminar was a survey course on the alternative approaches to legal scholarship.

The general emphasis of the LLB and post graduate legal education at the Toronto Law School was to give the student lawyer tools to determine and argue what the Law should be. It was heavily philosophical and inter-disciplinary in its focus. By adopting a broad approach to legal scholarship, it was believed that criteria could be adopted from another discipline to justify arguments for law reform or provide the justification for normative decisions on how the grey areas of law should be decided. The ethos of the Law school was complemented by a highly committed and enthusiastic teaching faculty with classes of no more than about 15 students in the second and third year classes of the LLB degree. There were none of the lectures of between 60 and 100 students which I had experienced at the Sydney Law School.

The University of Toronto was an exciting place to study – especially as a post-graduate. However I have always harboured a concern about its utility for undergraduate students who went on to practise law. The majority of law students will not be working in law reform or sitting on the equivalent of the High Court of Australia deciding what the law should be. Some, but only a few, will ever appear to try and persuade the highest courts about the decisions they should make. I am not convinced that the philosophical inter-disciplinary approach is preferable over black letter law for an undergraduate education. In a Canadian legal context where there is a constitutional protection of rights, the lawyer does have to be equipped with tools other than the analysis of legal principle. Perhaps in that context it was a more appropriate undergraduate legal education than it would be in Australia. As a post-graduate student in Toronto, it was an outstanding experience.

Practical Law

Since 1995, I have been a part-time clinical lecturer in litigation, trial process and civil procedure at the Faculty of Law in the University of Newcastle. This involves me giving a small number of lectures each year on topics including pleadings, case analysis, *Evidence Act* procedures, interrogatories, notices to admit facts, briefing counsel and court advocacy. I also observe and comment on student rehearsals for practise court applications. There are many other practising lawyers who act as Clinical Lecturers or Clinical Consultants to the Faculty in a wide variety of areas of practice.

In my observation, the University of Newcastle Faculty of Law has a significant proportion of its full-time faculty who have had some genuine exposure to legal practice. This reflects the founding philosophy of the faculty to be practical and relevant to students who aim to be practitioners. Almost 100% of the full time faculty at Sydney and Toronto when I attended them were career academics. At Newcastle, there are also career academics but I think they are balanced with teachers who have practical experience. The practical knowledge of many of the teaching faculty is complemented by other aspects of the Law School. Students may elect to study, simultaneously with their LLB studies, courses in practical legal education which will enable them to be admitted as a legal practitioner. The Law faculty has an associated legal centre where students are able to work as part of a team on real cases. The legal centre has a strong track record of excelling in major public interest cases. A group of part-time clinical lecturers expose students to war stories from practice.

The law student at Newcastle has every opportunity to leave the monastic study of the Law (as I experienced at Sydney) and see how legal doctrine taught in the classroom operates in real life. My own approach to teaching as a clinical lecturer is to break up the learning of rules with concrete case examples from legal practice. In this way the student can learn how what may seem like meaningless or irrelevant rules of practice or evidence can be used to achieve forensic advantages in litigation. I also try very hard to involve students in lectures by asking them questions and being open to any questions they should ask. An interactive approach is, I believe, more stimulating than passive lecturing. As a student I always found interactive teaching to be most interesting. Whether I have achieved an interesting teaching environment is for my students to say. I have generally found them to be attentive and responsive over the last 10 years.

Conclusion

The practical approach to legal education at Newcastle has great merit. The environment for the student has the appearance of being more relevant and stimulating than I experienced as an undergraduate. Upon graduation, the students from Newcastle are well prepared to practise. They appear highly motivated and questioning students. The Newcastle Law School appears a more dynamic environment than the environment I experienced when I was at Sydney. However the Sydney Law School imparted a high level doctrinal education to its students. The University of Toronto had a rich intellectual environment which challenged the students. Most of those students, however, have probably found that in practice they are not pushing the boundaries of the Law to the extent that their legal education suggested. After leaving Toronto I practised in a major Sydney commercial Law firm. I remember during my first year of practise reflecting on the fact that despite being surrounded by university medallists and people of great intellect, discussion never passed from what the Law was to what the Law should be. There were no chargeable hours in hypothesising about a better world. Clients would not pay for that luxury.