AUSTRALIAN LEGAL EDUCATION: MISCELLANEOUS COMMENTS

By P. B. CARTER*

JUST as those who can, do, and those who cannot, teach, so those who can teach, do teach, and those who cannot, write about education. Misplaced self-esteem is not the only cause of my reluctance to take this further step in the progression of mental degradation by trying to write something of my impressions of legal education in Australia. Other and more important factors contributing to my hesitation are first the realization that I personally am far from adequately qualified to say anything of value on the subject, and secondly the circumstance that almost everything of value that can be said has in fact been said very lucidly and very recently.[1]

It was my good fortune in 1953 to teach as Visiting Professor in the Law School of the University of Melbourne. I was there for almost the whole of the two main teaching terms and took some part in the regular teaching programme. I had an opportunity to see something too of the working of the School's administrative machinery. I gave either one or two lectures in each of three Australian Law Schools other than Melbourne. I was able to visit all the university Law Schools in the Commonwealth, including that of the National University at Canberra. Many of these visits however, although from my point of view highly enjoyable, were regrettably but unavoidably brief. I was in Australia for no more than five months altogether. I recite these facts here in order to emphasize two things: first, that the comments that follow are based upon my experience during a very brief sojourn in Australia; secondly, that as I spent so much more time at Melbourne Law School than I did at all the other Law Schools together, I would be surprised if my impressions are not coloured by this fact.

I deliberately postponed reading Dean Griswold's observations[2]

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[1] Griswold: Observations on Legal Education in Australia, (1952) 2 *University of Western Australia Annual Law Review*. 197.

[2] Dean Griswold comments, *inter alia*, on: (1) The lack of a national law school. (2) The unsatisfactory nature of the largely part-time law course found at every university except Melbourne and Western Australia. (3) The insufficient number of full-time teachers of law. (4) The inadequacy of law libraries. (5) The deficiencies of the lecture method and the advantages of casebooks. (6) The small amount of time spent in Australian legal offices on matters connected with administrative law. He concludes: 'The law schools are doing good work. With larger staffs, with more support, with greater freedom at the joints, they could do better work and make an even more significant contribution to Australia.'—(Editors, *Res Judicatae*).

written after his visit to Australia the previous year until after I had written a draft of this present note. Then, as a result of reading his article, I scrapped my draft. I found myself agreeing with almost every point he had made. In order to avoid a charge of plagiarism and as there seems to be no point in my attempting to say what he has already said much more effectively than I could do, I have not now attempted to give a comprehensive outline of the impressions I formed of the Australian Law Schools. Indeed of many of the things which struck me most forcibly I have not made even mention. What follows therefore is no more than a collection of random jottings upon topics of uneven importance and of somewhat arbitrary choosing.

A denizen of the Old World expects to find in a 'new' country an attitude which may be imprecisely described as progressive and a concomitant quasi-secret yearning to create a tradition. In Australia I sensed the reverse. I was conscious of an innate conservatism and suspicion of change accompanied by a sneaking but by no means widespread urge to do something new. The reasons for this phenomenon are no doubt highly complex. Probably it has something to do with the peculiarity of the relationship between this particular 'new' country and Great Britain. This phenomenon seemed in one form or another to permeate many aspects of Australian life far beyond the limits of the scope of this note. But it did seem to manifest itself very clearly both in the practice[3] and the teaching of the law. In the realm of law teaching its operation can be generalized thus. Basically Australian legal teaching methods are a caricature of those which one is told prevailed in England half a century ago: at the same time there is a number of law teachers, some happily not in junior positions, who are acutely and vocally conscious of the long overdue need for change. The main legacies of English law teaching in a largely bygone age are two. One is the notion that law is not really a subject suitable for teaching by university methods. This notion has not however operated in Australia in quite the same way as it operated, and on a reduced scale still does operate, in England. In England until recently the abler University man who intended to become a lawyer almost invariably read a more 'reputable' subject such as Greats[4] or sometimes mathematics.[5] His

[3] See comments of the present writer (1954) 4 *University of Western Australia Annual Law Review*. 67.

[4] Oxford slang for school of Literae Humaniores—the history, language and philosophy of the ancient world.

[5] Mr F. E. Smith (later Lord Birkenhead L.C.) created a precedent in 1895 as a Scholar of Wadham College, Oxford by seeking permission to read law.

law he picked up in Chambers and in the early years of practice. Personally I do not doubt that the study of the history and philosophy of the ancient world is more likely to produce a civilized and clear-thinking human being than is the study of law. This is however not really the point. It would of course be admirable if the able would-be lawyer like the able would-be anything else were to have the advantage of such an education. Whether he has the necessary time is in modern conditions (especially in England where he must do two years full-time national service) very dubious. Be that as it may, the would-be lawyer must at some stage learn law. The problem is what form should this part of his education take. Should it be an apprentice training or a scholarly study? The notion that law is not really suitable for academic study requires that it be the former. The enormous growth of English university Law Schools in recent years[6] is evidence of a marked swing in the direction of the latter. There is here, it must be remembered too, something of a vicious circle. As law becomes more and more the only subject that a would-be lawyer has the opportunity to study academically, so is the case for its academic treatment enhanced.

In Australia the supposed unsuitability of law for academic treatment produced a tradition of apprenticeship legal training. Contemporary tendencies, as in England, are in the opposite direction. But legal education in Australia is still in very large measure a professional apprenticeship. A few students attend the university always on a part-time basis. In many cases the number of years spent full-time at the university Law School is in my view too small. Part-time university attendance seems to mean in practice that the main occupation of the student is in the lawyer's office. He supplements this by attendance at a few formal lectures. This is a system which has little to commend itself if practised by students who have not had at least three years full-time law study.

The second legacy of English law teaching is the lecture as a method of instruction. This constitutes the backbone of Australian legal education. In fact in Melbourne little else is provided. As has been pointed out many times the lecture became obsolescent as a mode of teaching with the invention of the printing press. In

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This permission was granted only very reluctantly. Law was regarded as a subject suitable only for the more lowly Commoners of the College. Mr Smith's Wadham contemporary Mr J. A. Simon (later Viscount Simon L.C.) followed a traditional pattern. He read mathematics followed by Greats.

[6] In 1954 the number of entrants for Jurisprudence Finals at Oxford was the largest ever. For the first time the entry was larger than that in any other subject except Modern History.

Oxford there are some able students who would not be seen dead at a lecture. This may be a reflection on Oxford lecturers. But it is also a reflection on the system. In the English provincial universities the lecture plays a more important part than at Oxford and Cambridge. The main reason there, as in Australia, for its survival is economic. Australian law teachers are fully conscious of its shortcomings and they are painfully conscious of the cause of its survival.

The unimportance of the lecture in Oxford is the result of the emergence in the late nineteenth century of the 'tutorial' system. This system is as Professor Derham has recently very pithily pointed out[7] extremely expensive, it is extremely wasteful, and given a first class tutor and a first class pupil it is ideal.[8] Speaking as a college tutor I would add that, as now practised, it is, for the tutor, excruciating. A system devised and ideal for first class men and high second class men is being used indiscriminately. Oxford tutors are overworked and are burning themselves out as teachers and as scholars by dissipating their efforts giving personal tutorial attention to men incapable of benefiting from it. In Oxford the system is for this reason killing its own virtues. Its introduction into Australia on anything like the scale upon which it is now applied in Oxford, even if such introduction were economically possible, would be highly undesirable for the same reason.

The development which one would like to see, and which is imperceptibly but really creeping into Oxford law teaching, is the introduction of small class-teaching as the basic instructional method. This should be supplemented for all students by a fairly heavy written work requirement. One of the great merits of the Oxford weekly essay system is that it forces even the weakest to learn to write. I have found that even very able Australian law students who come to read for advanced law degrees in Oxford are seriously handicapped through not having developed this faculty.[9]

[7] D. P. Derham: Legal Education in England and the U.S.A., *University of Melbourne Gazette* (1954) vol. x no. 3 p. 35 and no. 4 p. 54.

[8] D. P. Derham, *op. cit.*, at p. 35: 'The College tutor meets his students individually or in pairs, and from week to week sets them tasks to be returned to him in essay form for discussion during an hour's tutorial. The normal method is that the essay should be read aloud by the student to the tutor, and that it should then be discussed, and work set for the following week. It is difficult to imagine a more inefficient or expensive method of teaching law, if the amount of teaching time devoted per student to any one subject is considered. On the other hand, it is difficult to imagine any more satisfying method of teaching, if it is assumed that both a first-class tutor and a first-class student are involved. These two conditions, however, are satisfied only in a small minority of cases.'

[9] The deficiency of some highly intelligent American and Canadian students in this respect is often grotesque.

Class-teaching should *for the good student* be supplemented also by regular individual weekly tutorials on the Oxford pattern. This would involve two sacrifices. One is of principle – it would mean the deliberate rejection of the Australian shibboleth of egalitarianism. The other is personal. For the tutorial system to be worth while not only must the pupil be first class but so must the tutor. This means that the tutors should be the most experienced and most able members of the faculty. The sacrifice called for is of the time and energy of Deans and Professors.

As regards the contents of the average Law School syllabus in Australia three points struck me forcibly.

The first can be stated quite shortly. An attempt seems to be made to teach too many subjects in the time available. The inevitable result is that many subjects are learnt superficially and in an unquestioning frame of mind. The student simply has not the time to do more than grasp the general principles which are propounded to him in a cut and dried form. The fact that he cannot consider subjects in detail is not always or entirely a pity. But that he cannot question, doubt and argue about what he is told is a pity. Questioning, doubting and argument take time. When a syllabus is overcrowded anything that takes time tends to be regarded as a luxury and to be dispensed with.

The treatment of Roman Law by Australian Universities varies a great deal from School to School. In Sydney for instance very considerable provision seems to be made for its teaching. But in some law schools the subject is neglected. In Melbourne it is excluded altogether, except for a few disconnected scraps which have found their way into comparative law – an optional subject. It is my firm belief that where there has been neglect the education offered by the school in question must suffer. In teaching jurisprudence to fourth year students in Melbourne I was constantly reminded of this yawning gap in their elementary legal education. Many Australian law teachers – in fact I think most – were at one time themselves law students at Oxford. The heavy dose of Roman Law which they then received has, I suspect, infected them with a lasting hatred of the subject. This is itself a terrible condemnation of the amount of Roman law taught, and the way in which it is taught, at Oxford. It is scarcely however a justification for ignoring the subject altogether. In a country in which classical education is the exception rather than the rule, the inclusion in the syllabus of much text work is probably out of the question – anyhow in any compulsory paper. The Oxford Roman Law syllabus, heavily laden as it is with

detailed study of Digest and Institute texts, would be out of place in Australia.[10] But the case for a comprehensive study of the general principles of Roman private law is a different one and in my view a strong one. Rome and Westminister Hall have been the two great law-givers to what is now Christendom. That what purports to be an education in one system, should not include as an essential constituent at least consideration in outline of the other system, savours of isolationism of the worst sort.

Lastly I would venture to say a word about jurisprudence. This is the legal academic subject *par excellence*. That it should tend to be underdone in law schools which tend to be subject to pressure from the profession would not be surprising. In Melbourne however considerable time was devoted to it. I would however like to make two hostile comments upon the way it is there treated.[11] Firstly, the student tends to use an elementary although admirable textbook and nothing else, apart of course from the inevitable lecture notes. The remedy for this lies in the hands of those who frame examination questions.

Secondly, I cannot forbear from expressing the regret that far more of the jurisprudence course is not devoted to problems of logical and linguistic analysis. The significant developments in philosophical thought which have taken place in recent decades open up large opportunities of re-investigation of juristic problems and juristic terminology. It would be possible to find time to concentrate upon exploiting these possibilities in a jurisprudence course, if much of what is at present treated there were treated in another part of the curriculum. I refer to what is sometimes called functional or sociological jurisprudence and to a large number of common law topics which owing to their theoretical nature seem to have found their way into the Melbourne jurisprudence course. The proper time to study the theoretical bases of, and social purpose of, a rule of law is when the rule itself is being studied. This proposal ties up of course with the desirability of allowing more time for the study of various branches of law so as to give the student time to consider and to question the theory and purpose of each rule as he meets it. This arrangement would be advantageous to the study both of law and of jurisprudence. It would certainly be preferable to the practice of studying a common law subject by committing its rules to memory, taking an examination at the end of the year, and then

[10] In the view of the present writer it is also out of place in Oxford.

[11] These objections have to some extent been met by recent alterations in the treatment and scope of the subject.—(Editors, *Res Judicatae*).

in the following year indulging in over-generalized speculation about already half-forgotten rules.

Examinations in most Australian law schools are held annually. This frequency encourages cramming. Were a student obliged to postpone his examination until the end of two or three consecutive years, very few memories would stand the strain. Intelligence and understanding would accordingly assume greater importance. An examination of this magnitude would moreover require a measure of intellectual stamina and general mental toughness not called for when examinations are taken piecemeal.

Dean Griswold looking through American eyes noticed the shortcomings of law library facilities in Australia.[12] Professor Derham has written in similar vein: 'In certain respects, the better American Law Schools put the English and Australian Law Schools to shame.'[13] I do not doubt the validity of this judgment. I would add to it however that some Australian Law School libraries put English Law School libraries to shame. The position regarding non-English materials in, for instance, Oxford libraries is highly unsatisfactory. The same cannot be said of the position regarding non-Australian materials in many Australian University law libraries.

The Australian law teacher must be seriously handicapped by lack of textbooks, casebooks and instructional material generally. The practice is to use English books and to indicate to the student points upon which the local State law differs. In some fields of law this situation although not ideal is not impossibly difficult. In others however it is far from satisfactory. It was my experience to attempt to teach private international law in Victoria, a constituent unit of a federal structure (the constitution of which incidentally includes full faith and credit provisions) at an early stage of factual development and geographically somewhat remote from politically foreign law districts. For this the materials used were prepared for students in a country with a unitary constitution, a country at an advanced stage of factual development and in close geographical proximity to foreign law districts. The measure of insularity of the approach to be found in most English textbooks does no more than increase their inadequacy.

There are no doubt solid economic causes for the present situation. Be that as it may, to me the conclusion was irresistible that Australian law teaching will never be on a satisfactory basis until standard Australian teaching materials are available. A cognate

[12] *Loc. cit.*, 206.
[13] *University of Melbourne Gazette* (1954) vol. x no. 4 p. 54.

need is that for a law journal which is both national rather than State and academic rather than practical.

I have already made my excuses for the inconsequence of the foregoing remarks. To observe that personally I enjoyed my stay in Melbourne and in Australia immensely would also be inconsequential. Nevertheless I unhesitatingly record this fact here because it is true.