THE SYDNEY LAW REVIEW

VOLUME 11, No. 3 MARCH, 1988

COMMENT

LEGAL EDUCATION

*THE HON. MR. JUSTICE W. M. C. GUMMOW**

What should undergraduates study in Australian law schools? How and by whom should they be taught? It would be unwise as well as unrealistic to expect anything but diverse responses to such questions, given endemic disagreement between lawyers as to the proper nature and function of university legal education. What I propose here is not to deal with the larger questions so much as to canvass a number of particular topics. I do so not from the single perspective of solicitor, barrister, or teacher, but as one who has been all of these.

First, as to statute law. The primary concern of law teachers continues to be with the common law and thus case law. This tends to produce graduates who regard statute law as somehow of lesser standing than case law.

But a vast proportion of the time of lawyers is spent working with statutory materials and what is true of the general practitioner is true also of the High Court of Australia. The changes may have been relatively imperceptible, but techniques of statutory construction in Australia have undergone marked development in the last twenty years.[1] Further, the

* B.A.(Syd.), LL.M.(Syd.), Judge of the Federal Court of Australia. Lecturer (part-time) in Industrial and Commercial Property 1965-86; Lecturer (part-time) in Principles of Equity 1970- .

[1] See, for example, *Hope* v. *The Council of the City of Bathurst* (1980) 144 C.L.R. 1 at 7-8, *Cooper Brookes (Wollongong) Pty. Ltd.* v. *Federal Commissioner of Taxation* (1981) 147 C.L.R. 297, *Federal Commissioner of Taxation* v. *Whitfords Beach Pty. Ltd.* (1982) 150 C.L.R. 355 at 372-375, *K. & S. Lake City Freighters* v. *Gordon & Gotch Ltd.* (1985) 157 C.L.R. 309 at 311, 312, 314, 315, 321.

fields occupied by statute have expanded. One obvious example is provided by Part V of the *Trade Practices Act* 1974 (Cth.) particularly s. 52 of that Act. Misleading conduct is a genus with many species found both in traditional contract and tort law. The pervasive effect of s. 52 requires reassessment both of tort and contract, and, with Part VI of the Act, of the remedies previously available at general law. For example, in teaching the law of contract much emphasis has been placed upon the distinction between representations and promises and upon the doctrines of privity and consideration. Section 52 diminished the importance in many cases of that distinction and those doctrines. Further, although tort and contract usually were seen in the 19th century as distinct legal institutions, in truth there is much to be said for the view that contract grew out of tort.[2] Section 52 serves to draw the two together again. This tendency may be expected to increase now that the Federal Court will share jurisdiction in respect of contraventions of s. 52 with the State courts.[3] The consequence is that courses in tort and contract are incomplete without consideration of the provisions of Parts V and VI of the *Trade Practices Act*, not merely as a statutory gloss or afterthought, but as a central feature of the course.

In my observation, students do not bring from their studies and into practice of the law, any deep appreciation of techniques of statutory analysis and construction. An obvious occasion to develop these skills at law school is presented by study of the decisions on s. 109 of the Constitution. They provide abundant examples of the High Court analysing federal and State laws as an essential step in deciding whether there is inconsistency in the constitutional sense.

Secondly, as to the teaching of legal history. Students still tend to leave their studies and enter practice with the notions that legal institutions have attained a fixed or settled character, that "policy" played little part in this, that "progress" will involve the making of changes guided by "policy" and that this will be, according to individual predeliction, a good or bad thing. The study of legal history provides a valuable corrective to such simplistic ideas. The truth of course, is that the law has never "stood still", the secret of the common law being its combination of persistence and dynamism. But unless one knows how the law came to be in its present state, how can one set about with any proper assurance deciding what it ought to be? Dr. Finn's analysis of the so-called rule in *Boyce's Case*[4] is a recent and striking example of the proper use of legal history. And when faced with very contemporary legal problems such as the effect of the law as to penalties upon agreed contractual default payments[5] and statutory licensing regimes for builders,[6] the High Court went deeply into

---

[2] There is a useful discussion by Professor Waddams in Chapter 1 of "Products Liability" 2nd ed. (1980).

[3] *Jurisdiction of Courts (Miscellaneous Amendments) Act* 1987 (Cth).

[4] "A Road Not Taken: The Boyce Plaintiff And Lord Cairns' Act" (1983) 57 A.L.J. 493, 571.

[5] *AMEV-UDC Finance Ltd.* v. *Austin* (1986) 162 C.L.R. 170.

[6] *Pavey & Matthews Pty. Ltd.* v. *Paul* (1987) 162 C.L.R. 221.

questions of equitable, contractual and quasi-contractual history. Legal history has gone into decline in the law schools, being either taught in an abbreviated fashion to new students or as a specialised optional subject for antiquarians. This, in my view, is a matter for deep regret.

Thirdly, it is vital that students be given the opportunity to obtain some degree of sophistication in their grasp of the complex of normative systems that together make up the legal structure. Students arriving from tort and contract to what strikes them (initially) as the sloughs of property and equity, invariably suffer much discomfort. They have difficulty in grasping that cases are not just about whether the plaintiff or defendant loses and that often cases are about the principles by which the law adjusts rights, liabilities and priorities between a veritable gaggle of disputants. Thus they come hard upon cases such as *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd.*[7] This is but a small edge of a larger problem. Our legal system has within it conflicts or differences between statute and general law, federal and State statutes, federal and State jurisdiction, private international law and domestic law, and between public international law and municipal law. The ascertainment of "the law" as it resolves a particular dispute may involve, as several essential preliminary steps, a process of classification and characterisation. The law schools fail their students if they encourage them to look immediately to "the law" of their State or Territory in its narrowest sense.

Fourthly, as to the "casebook" method of teaching. Students rightly seek some grounding in fundamental principle as it founds the subjects they attempt. One of the mischiefs of the so-called casebook method is the encouragement to novice students to forage inconclusively in thickets at the edge of the field rather than to start from a centre of some doctrinal certainty. Immediate concentration on hard cases engenders (particularly in the better students) the attitude that all cases are unusual and uncertain. It was said of the Irish Court of Chancery that no case was certain but none was hopeless. We are not training students to practise before that tribunal. In the students' after-life in the profession most cases will be clear enough as to legal principle; the difficulty may well be rather in extracting the material facts. Perhaps ironically, a by-product of fascination with the casebook method has been a tendency, particularly on the part of younger examiners, to put before students examination questions of factual ambiguity and complexity (dignified as "issue spotting"), rather than shortly stated facts testing the students' grasp of legal principle.

Fifthly, any tendency to advocate or implement a dichotomy between "practical" and "academic" subjects is to be deprecated. This is not to say that students should be introduced only to subjects of direct use to them later as employees of large firms, or to deny the essential importance of jurisprudentially based subjects. Still less is it to say that subjects may

---

[7] (1964) 113 C.L.R. 265.

be taught even if lacking scholarly substance. But the "practical" use of a subject should not be seen as debasing its scholarly worth; the two are not antithetic and may be complementary. No subject is more "practical" than income taxation. But, as the career of Professor Parsons in this law school showed, in skilled hands the study of that subject provides excellent means both of bringing an understanding of the interrelation between general law property concepts and statute and of giving experience with complex statutes designed to implement sometimes contrary fiscal policies.

Sixthly, law is manifestly an artificial rather than a natural science, and as such is best taught, in my view, by persons with some direct experience of "the law in action". There are several reasons for this. The practitioner is more likely to have a readier grasp of what are the current contentious questions in his or her field. Those questions are unlikely to be what is in the decided cases. Decided cases often already represent times past, and many vexing problems simply never reach the courts. I do not suggest of course, that practitioners should have a predominant place in teaching. But, on the other hand, to teach what one has never at any stage practised attracts understandable scepticism from students (even if they be ignorant of the remarks of G. B. Shaw) and, on the part of the teachers, threatens to encourage in them a certain distrust of the practice of the law and of the profession.

Finally, I should mention the significance of the observations as to precedent by four members of the High Court in *Cook* v. *Cook*.[8] The legal education offered in Australian law schools in "case law" subjects appears still to be Anglo-Australian in emphasis. When I was a student this was even more the case. We were given the impression that *McRae's Case*[9] represented the sum total of the High Court's contribution to contract law. Indeed, it was only in 1967 that it became plainly apparent that the common law in England and Australia might differ with respect to the same subject matter.[10] United States' decisions were referred to in the study of federal constitutional law but otherwise were a vast *terra incognita*. Williston and Corbin were but names.

This has changed, but at a slow pace. Counsel may still, even in matters of procedure, cite pronouncements of the English Court of Appeal in 1890 in preference to Australian appellate decisions. In the Australian text books that have appeared at such a rapid rate over the last twenty

---

[8] (1986) 162 C.L.R. 376. Mason, Wilson, Deane, and Dawson, JJ. said (at 390):

> The history of this country and of the common law makes it inevitable and desirable that the courts of this country will continue to obtain assistance and guidance from the learning and reasoning of United Kingdom courts just as Australian courts benefit from the learning and reasoning of other great common law courts. Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.

Cf. *R.* v. *Judge Bland Ex parte Director of Public Prosecutions* [1987] V.R. 225, *Cid* v. *Cortes* (SC of N.S.W., Young, J. 13/5/87, unrep.).

[9] *McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377.

[10] *Australian Consolidated Press Ltd.* v. *Uren* [1969] 1 A.C. 590.

years, the only non-Australian authorities discussed in any depth tend to be English.

Changes in these matters must begin at grass roots level, that is to say, in the teaching of law. For law teachers, compliance with the High Court's directive requires at least two important shifts in emphasis. First, it is Australian case law that is being taught and primary attention must be given to pronouncements of Australian courts upon the topic in hand. This is so even if current Australian authority accepts or adopts the reasoning in the English decisions; *a fortiori* if the Australian decisions have taken their own course. Thus, after *Darlington Futures Ltd.* v. *Delco Australia Pty. Ltd.*[11] one would expect the English decisions upon construction of exclusion clauses to be treated comparatively, and historically, not as the starting point for treatment of the subject. This brings me to the second point. It is that law teaching must, if it is to be scholarly, avoid the kind of chauvinism which in the last sixty years has cut off United States lawyers from any real understanding of current developments elsewhere in the common law world. American lawyers of great eminence, Kent, Story, Field, Holmes, Cardozo, Learned Hand, Williston and A. W. Scott, saw themselves as participants in a supra-national common law system. That no longer appears to be so in the United States; it would be a pity if, in time, we were also to turn in upon ourselves.

Obviously, the United States decisions provide a vast pool of case law. It is of uneven quality. One task for the good teacher is to become familiar with the great *savants* of the American past and, more dauntingly, to extract what is of value from contemporary decisions and academic writing of that country. These labours are of assistance not only to students but to the Australian courts. The High Court of Australia, in marked contrast to the House of Lords, has for many years (certainly since the appointment of Sir Owen Dixon in 1929[12]) paid close regard to academic writings and has acknowledged its indebtedness in this regard. That is still far from the case in the House of Lords.[13] Academic writing tends to look beyond the parochial and now has an even more important role to play in assisting Australian courts.

---

[11] (1986) 161 C.L.R. 500.

[12] See, for example, *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor* (1937) 58 C.L.R. 479 at 500-502, 520-521; *Cowell* v. *Rosehill Racecourse Co. Ltd.* (1937) 56 C.L.R. 605 at 620, 625-6, 637-8, 641-2; *Mills* v. *Mills* (1938) 60 C.L.R. 150 at 181-2; *Chester* v. *Waverley Corporation* (1939) 62 C.L.R. 1 at 11, 25-26, 32-34.

[13] *Spiliada Maritime Corp.* v. *Consulex Ltd.* [1986] 3 All E.R. 843 at 863-4 perhaps marks the beginning of a new era. But *cf.* Paterson "The Law Lords" (1982) at 14-20.