LAW SCHOOL CURRICULA IN RETROSPECT

by

Richard Arthur Blackburn

The Hon Sir Richard Blackburn, Chief Justice of the Supreme Court of the Australian Capital Territory, was Bonython Professor of Law in the University of Adelaide from 1950-1957 and Dean of the Faculty of Law from 1951-1957. He remained a member of the Faculty until 1965.

To be asked to write about law school curricula in retrospect implies that one's experience provides a qualification for critical appraisal of those curricula. I accept that I have such a qualification, but disclaim that it is the only kind of qualification or that it is superior to any other kind. I am sure that a sound curriculum is likely to be, in practice, the product of divergent views which are capable of accommodation to each other. Furthermore, I am a conservative by instinct, in that I distrust root-and-branch replacement as a method of altering the course for a University degree. Continuity is not only a necessary element in any worthwhile academic field of study, but also the most fertile soil for the growth of fruitful change. What I write hereafter is to be understood in the light of these preliminary remarks. Clarity and brevity may be achieved by accepting the risk of appearing dogmatic.

I taught law in the University from 1950 to 1957; helped to make some changes in the curriculum; then practised law professionally for nine years; and from 1966, as a judge, I have seen the work of many legal practitioners, of barristers, solicitors, and public servants, almost all of them trained in Australian University Law Schools. My views on law curricula are likely to be strongly affected by my views on the qualities and needs of legal practitioners. I do not suggest that there are not other relevant considerations.

In 1950 the process of making changes to the curriculum had a degree of simplicity and informality which it may be amusing to recall. I was the only full-time member of the academic staff of the Faculty and thus did not have to consult academic colleagues. How remote that situation must seem now; yet the Faculty had an establishment of only one full-time academic for the first seventy of its hundred years. I circulated a paper to my practitioner colleagues on the Faculty; we had a meeting — possibly two; with some modifications, they approved my proposals. We invited the Law Society (the President was Earnest Phillips KC, who was also a member of the Faculty as lecturer in Mercantile Law) to convene a special meeting of practitioners so that we could try to "sell" the new curriculum to them. Some fifty or sixty practitioners came to the meeting, as I remember. There was, of course, some opposition; it was led, with a combination of wit, forensic vigour and imperturbable good humour, by the late Charles Brebner. As was appropriate for counsel so experienced, his main argument was that I had not discharged the onus, which lay on me, of showing that any change was required. I remember

listening to this with considerable impatience and wondering why time need be wasted in demonstrating what must be obvious. I believe I would now be rather more sympathetic with that argument. At any rate, we sold our new curriculum. It was, of course, not a changeling, but a child which bore obvious resemblances to its predecessor.

For many years now, the Faculty of Law has, rightly, consisted almost entirely of academic lawyers. The contention between the supporters of an "academic" and a "professional" curriculum has proceeded intermittently, all over Australia; it was clearly apparent at the National Conference on Legal Education at Sydney in August 1976; and it still exists. I do not want to rehearse the too familiar arguments about the aims of the law course and the relative value of academic and professional subjects. My experience makes me think that these arguments are largely irrelevant, and that the controversy is a sterile one. It will be a theme of this paper that the professional purposes of a Law School may best be served by a curriculum which may appear rather more academic than some of them now do.

All Australian Law School curricula now apply, to some extent, the principle of a core of compulsory subjects and a range of electives. This represents a great change which has occurred in my time. In 1950 (before it was revised) the LL B curriculum at the University of Adelaide contained fourteen subjects, of which eleven were in the strict sense law subjects (one being quaintly entitled "Jurisprudence (including Roman Law)"). The remaining three were courses in the Faculty of Arts, of which one was Latin and two were the first and second year courses in any subject chosen by the student — except Geography, Music, Botany, Zoology and Geology; these, although courses in the Faculty of Arts, were apparently not considered fit for inclusion in a law curriculum. Mathematics, be it noted, was acceptable. There was thus, to a minimal degree (and not in the field of law), an opportunity for the student to make a choice. By contrast (to take an example at the other end of the range), the curriculum in the University of New South Wales, at present, consists of nine compulsory subjects and twenty-one elective subjects — and the student has (by my possibly inaccurate count) fifty-six electives from which to choose!

I discern three principles underlying a curriculum of this latter kind. The first is that the student from his own knowledge and experience is wise enough to choose the subjects which are the best for him. I believe that this principle has recently been too highly esteemed. It is time to remember that the opposite view has some claim to be heard. The function of the Law Faculty is to profess knowledge and impart it; that of the student is to confess ignorance and learn. The student has in most cases no idea, before he embarks on it, of the content of a subject; still less any idea of whether he will be "interested" in it. It is common experience that "interest" is first aroused by application. I would not abolish electives, but surely a Faculty of Law need not show so much hesitation in prescribing subjects as essential for a first degree.

The second discernible principle is that some subjects appear to be of equal value to some others, so that as between them it matters not which the student chooses. Many curricula allot points to subjects and require the acquisition of a given number of points; but the question whether the allotment of points to a particular subject is a measure of quantity or quality, or of both (and if of both, in what relation to each other) is

one which the student must discover for himself. Whatever be the basis of the allotment of points, and *a fortiori* if there are no points, I am suspicious of the reluctance displayed by some Faculties of Law to commit themselves to a discrimination between subjects. I am, for example, unhappy with a state of affairs in which International Trade and Investment can be put forward as making a contribution to the education of a Bachelor of Laws, equal to that which is made by the Conflict of Laws; I choose an example at random from the impressive list of electives offered to final year students at Monash University. For the sake of argument I assume that all the subjects offered really are law subjects — ie that their content is the law; when I look at titles such as Regulation of Capital Markets or Settlement of Industrial Disputes, I wonder. There is much to be said for expecting Bachelors of Law (or any other graduates) to be aware of the facts of the world in which they live. It does not follow that they should have the choice of qualifying either in law or in current affairs.

The third principle which seems to lie behind the curricula of today is one which is very near the centre of my theme. It is the principle that the function of a law course is the transference of knowledge of what the law is, in a number of fields, from the statutes, the cases, and the books — where it now is — to the heads of the law students. It is an essential feature of these curricula that they require a significant *spread* of knowledge over a minimum number of different topics. I say "minimum" because the idea is implicit that if x is the number of required subjects, a student who passes in (x-1) subjects will not graduate. In another sense the number of subjects could be called a maximum, because it must be, one would think, the largest number that the average student could possibly grapple with in the time available. Whichever way one looks at it, the curriculum is an *aggregation,* and its claim to be satisfactory rests partly on the idea that the *number of units aggregated* is *sufficient.*

I have some fear that the effect of a curriculum of this kind on a great many students is to lodge in their minds, for a disappointingly short time, a quantity of technical detail in discrete compartments. Too often one comes across a Bachelor of Laws with a surprisingly poor ability, or inclination, to master a new field of legal knowledge by systematic study; indeed, many seem not to be at home in a law library except when a list of references is in their hands: the idea that by one's unaided efforts it is possible through organized search and study to progress from ignorance to understanding of a given field of law, does not come easily. But is it not more important that a Bachelor of Laws should be able, and confident in his ability, to master a new topic which he needs to master, than that he should have at some time acquired a transient knowledge of a large number of different subjects? Is it not better to be able to read widely, but with discrimination and judgment, in a new field, than to have a superficial familiarity with a great many fields?

I wonder, in short, whether law faculties are nowadays trying to teach their students too much, and more specifically, including too many subjects in the curriculum. Would it be better to give more time to the development of essential skills, and less to the acquisition of knowledge of the law? My own experience makes these doubts very real ones. But I do not wish to exaggerate. The existence in every curriculum of a core

of compulsory subjects shows that the attainment of familiarity with a quantity of substantive law is indispensable. Moreover, I am not much worried about the really first-class students. For them, the question of what is in the curriculum is relatively unimportant. Given the stimulus of teachers who are at least their intellectual equals, they will thrive on almost any diet. My concern in this paper is for a curriculum which will be appropriate for the majority of students, not only for the most able.

Having offered such possibly rash criticism, I must at once add that I am not merely yearning for the good old days. Much of my concern about the curricula of today reflects my doubt about the quality of the curricula of thirty years ago. Then also we were, I think, too concerned to acquaint students with the law which they would soon have to use, and not concerned enough to develop the power of acquiring such acquaintance. Every curriculum is, in practice, a compromise, and those which I had a hand in devising were not exceptions to the rule; but in the light of my present experience I feel far more dissatisfied with them than I then did.

What, then, would I contend for if I were now involved in devising a curriculum for the degree of LL B in an Australian university? In the first place, I believe that there must be a core of compulsory subjects. I do not see how Criminal Law, Contract, Tort, or Property can possibly be excluded, though of course the content of each of the courses described by these names (or by other such names) is capable of much variation. I need not discuss them further. To them I would add some which may not receive general approval.

I cannot exclude elementary legal history, by whatever name it is called: though it may appear as an integral part of a course designated "Introduction to Legal Method" or some such name. I remember the late Professor D P O'Connell asking rhetorically, "How can you begin to teach law to a student for whom the phrase 'the Norman Conquest' has no meaning?" and, making allowance for rhetoric, I respectfully agree that you cannot. Law is not history, but cannot be understood in a context from which history is absent. To a person who denied this proposition I would have to be content to propound it as dogma.

Constitutional Law — in the widest sense — would be another irremovable subject on my list; perhaps it would be better named Public Law. It would of course include the Constitutions of the Commonwealth and the States of Australia, but I have great doubt whether I would require everyone to enter such labyrinths as the law of "Commonwealth places" or some of the *arcana* of section 51. From the alacrity with which most legal practitioners, in my experience, disclaim competence in such fields, and express their willingness to take the advice of specialists, I have the strong impression that most law students are thoroughly frightened by their brief encounters with "advanced" Australian Constitutional Law.

I now turn to two subjects which I would make compulsory if I could, though I would expect some opposition both from my professional and my academic colleagues. The first is Statute Law. It is commonplace to remark that from the nineteenth century to the twentieth there has been an enormous shift in the centre of gravity of the law, away from case-law towards legislation. Lawyers, and especially judges, are even now often rebuked for regarding legislation as a blot on the purity of the

common law. With respect, I wonder whether LL B curricula have responded as well as they might to the shift in emphasis. The subject warrants, I believe, a full year's study by every LL B student. It would include an analysis of the legislative process; a study, partly historical, of curial attitudes to legislation; a study of statutory interpretation (a splendid field for student problem-solving exercises); and a course, including practical work, in draftsmanship; this last is in my view a discipline in the use of language which no Bachelor of Laws should have failed to undergo.

The last subject in my irreducible core may also provoke considerable dissent. It is Jurisprudence, by which I mean all of three things: analysis of legal concepts; philosophical attitudes to law; the relation of law to other disciplines, especially in the realm of the social sciences. I want to make clear that in my view this is a professional and not merely an academic requirement. I firmly believe that too many practitioners (I am not limiting my remarks to barristers, or solicitors, or public servants) are professionally handicapped by the fact that they have never been required to apply their minds to, or to express their thoughts about, the law, from a standpoint outside it. I do not accept the objection that Jurisprudence is a subject suitable only for the first-class students, unnecessary for the great majority. I vigorously reject the view that it is merely an academic frill, with no practical application to the daily problems of the law. I want all Bachelors of Laws to be able to think with detachment about what they are doing, and to put their thoughts into words. To achieve this, I cannot see that there is any substitute for a Jurisprudence course of the kind I have suggested.

There is my core: Elementary Legal History, Criminal Law, Contract, Tort, Property, Public Law, Statute Law, Jurisprudence. What then for the rest of the curriculum? Obviously, in the traditional range of law subjects, there are several more subjects which have a strong claim to inclusion — Trusts, Mercantile Law, Conflict of Laws, to name a few. Of them I say no more than that I would not make them all compulsory, nor would I allow anyone to avoid them all. Here is the place for electives. I suggest that there should be no more than four of them, and that they should be in the third year, and in the fourth year if there has to be a fourth year; I am not convinced that there has to be, but that is another subject altogether. In a slightly different class are such advanced or specialist professional subjects as Trade Practices Law, Taxation Law, Intellectual Property, and perhaps the remoter reaches of the Commonwealth Constitution. Some of these have great importance in modern professional practice, but it is another question whether they should be included for study in an undergraduate degree course. I wonder whether time would be better spent in training our Bachelors of Laws how to learn, so that they will be able to learn such subjects if they have need to do so.

I have not forgotten that provision must be made for some more academic subjects. Some will want to concern themselves with the more academic study of law; and the curriculum must allow them to do so — perhaps in a final year which qualifies them for Honours, and whets their appetite for post-graduate study. This requirement brings in such subjects as Legal History, Comparative Law, and advanced studies in other subjects. In this paper, I take this element of the curriculum for granted. I have always believed that it should be included, and my

experience has made no difference to this belief. My only remark is that modern curricula are much better in this respect than they were thirty years ago.

It will be said that my suggestions would apparently reduce the total work-load of an ordinary undergraduate. My reply would be, first, that the amount of work required of students depends on what their teachers require of them, not necessarily on the number of subjects they are required to study. I have already suggested that the number of subjects perhaps requires reduction. But secondly, I would say that my proposal is to reduce the work-load in one respect in order to restore it in another. I return to a suggestion I made earlier: it is what I would like to regard as the "message" of this paper.

Much more time and attention should, I believe, be given to explicit instruction and practice in the essential skills of the lawyer — the ability to read with comprehension, to write with precision, to think with accuracy. This is a matter of which the professional importance is as great as the academic importance. The more highly a lawyer develops his ability to read intelligently, the less likely that he will shrink from, or be overwhelmed by, the task of acquiring advanced knowledge whenever it is needed. The better a lawyer can write — be it a treatise, a statute, a conveyance, a pleading, an affidavit or a letter that he is required to write — the better lawyer he will be. If he is trained to read and trained to write he must also be trained to think. I do not believe, in short, that enough is done to train law students in the use of the English language as lawyers should use it. Law is language; the law consists of words. What is not expressed in words is not law, whatever else it may be. I would want every Bachelor of Laws to be explicitly trained in the two uses of language which are both of the essence of legal skill: Legal reading and legal writing. Legal thinking goes with them.

I know, of course, that in modern LL B courses much time is spent by students in writing papers on legal subjects, and by teachers of law in reading and appraising them. I wonder whether more attention could be given to the art of writing itself, to the use and arrangement of words? I remember a conversation some years ago with a University teacher of law on the subject of marking students' examination scripts. I made some such trite remark as that to write under pressure for three hours puts a strain on the student's command of language. The reply was: "I don't worry much about that; I try to read between the lines to see whether the student really understands the point; if he does, it doesn't matter if his expression of it is poor." The anecdote is trivial but it has remained in my memory as an example of what is to me basic heresy.

So with reading. Law students spend a vast amount of time reading "cases and materials" and they have the benefit of expert assistance from lecturers and tutors to explain the topics about which they are required to read. I wonder whether more time might be given in the curriculum to express instruction, and practice, in how to read, especially in how to read in an unfamiliar topic? Books of "cases and materials" are of course essential, but they are, by nature, designed to ease the reader's way. Pre-digested food does not call for gustatory discrimination. I have wondered whether a course in reading for law students might include written exercises on subjects in which the students have had no instruction whatever, to be completed without the help of reading lists or

references. Some of the advanced professional subjects would provide good fields for this kind of work, for example, patent law.

I cannot feel satisfied with an LL B curriculum unless it trains its students to read, speak and write as lawyers; trains them, in fact, in legal method as well as in substantive law. Of course there is not a watertight compartment between the two, and students do, under existing curricula, get training of the kind I am suggesting. I wonder, however, whether we tend at present to leave it to the law teacher to produce the desired result as a sort of external polish — a by-product of the main process which is the teaching of substantive law? I wonder whether we should not also adjust our curricula — whether by introducing subjects explicitly entitled Legal Method, or what you will; or perhaps by merely reducing the number of substantive law subjects to make time for a much greater emphasis on the essential skills of the lawyer.

I am not suggesting that we should not worry about what LL B graduates know. I am only trying to say that it is at least equally important to ensure that they are capable of acquiring knowledge when they lack it, and that they know how to use what knowledge they have. These are not merely practical skills or professional tricks, but, in my view, the very essence of what an academic training in law ought to provide.

All this is not merely (though it includes) a lament for bygone standards of literacy. With the hindsight I am now privileged to apply, I am sorry that I did not say thirty years ago what I am saying now. It is true that I should also be directing my remarks at the curricula of the secondary schools, and that University teachers of law are entitled to expect that their students will come to them with better training in the command of English words, the writing of orderly and precise English, and the ability to read with understanding, than they now have. The despised and forgotten Latin I, which all LL B students once had to pass, compelled them to some degree of attention to the structure and vocabulary of English. I do not suggest restoring it: I only note that it has gone without any apparent substitute. But the proposition that remedial action is required to restore fundamental standards of literacy is only incidental to my theme. What I am concerned about is not remedial action, but something which is quite independent of it, and would be required even if the remedial action were not. I believe that it is an essential part of an LL B curriculum, be its purpose academic or professional, to provide instruction and training in the use of language — the essential material without which law cannot exist. I offer the suggestion that a more deliberate effort be made to include that instruction and training.