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ON LEGAL EDUCATION IN CANADA

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For now more than a quarter of a century The Canadian Bar Association has been interested in legal education and, as the result largely of discussions that have taken place at its meetings, entrance standards have been raised and studies made from time to time of methods of teaching and of what may be deemed to be an adequate curriculum for Canadian Schools of Law. Last fall, however, it seemed to the Legal Education and Training Section that the present was an appropriate time for an exhaustive survey of Canadian law schools with a view to determining whether the type of training given there measures up to what the students and the public have a right to expect.

Since the adoption of a standard curriculum for legal education in 1920, Canadian law schools have grown in members and in strength. There are one or more schools of law in each of eight of the nine provinces, and the teaching staffs have become better and better qualified as the schools have developed, so that, assuming agreement on the aims of legal education and the fundamentals of a curriculum designed in the public interest, there is no part of Canada where it cannot be adequately developed.

It should be pointed out at the outset that the present seems to be an appropriate time, perhaps it is a little belated, to study the problem, because we are living in a revolutionary epoch when law and society are bound to undergo and are now undergoing profound change, calling for greater ability in the legal as well as in the other learned professions if they are to discharge their full duty to the state. The determination of what that duty is lies at the threshold of our inquiry.¹

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¹ See: L. C. B. Gower, *The Future of the English Legal Profession* (1946), 9 *Mod. L. Rev.* 211.

The life of a lawyer may be regarded from various aspects. As a professional man he may become a practitioner, a judge or a teacher of law. As a citizen he may become a legislator, an administrator or civil servant, or a businessman.

In none of these aspects is the life of the lawyer without its public importance and, from that point of view, it is essential that the members of the profession should be adequately trained. The profession has been criticized as a monopoly by newspaper men, whose comments reveal a very limited appreciation of the organization of the various Law Societies, a failure to realize that the profession is so far from being a monopoly that it is open to all citizens of good character who attain to certain educational requirements, that the criminal law applies to lawyers as to other citizens, that the members of the profession set for themselves standards of ethics higher than those embodied in the Criminal Code and that in passing on the moral character and educational qualifications of their members the various Law Societies perform a great public service. At the same time it must be admitted that lawyers do possess certain privileges under the law, as the outcome of which they should be astute to see that they take their proper place and perform their proper function in society.

The time has gone by when it can be argued with any degree of plausibility that law schools do all that should be required of them by turning out technically trained craftsmen. The lawyer, more perhaps than the member of any other learned profession, owes a duty to society to equip himself as a policy maker. For no matter in what niche he may ultimately find himself, whether as practitioner, judge, teacher, legislator, civil servant or businessman, he finds himself dealing with matters of high public policy. The skill acquired as the result of his training should equip him to decide upon that supreme question of policy, *viz.*, the ultimate aim and basis of the organization of the state in which he lives and, having made his decision, he should, if adequately trained, find many ways in the course of his career of influencing policy to achieve his objective. He ought to be, as Dean Roscoe Pound has suggested, a member of an organization characterized by learning and imbued with the spirit of public service.

In a thought-provoking article a few years ago in the Yale Law Journal, the aim of an ideal system of legal education is put by the authors in these words:

A first indispensable step toward the effective reform of legal education is to clarify ultimate aim. We submit this basic proposition:

if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be conscious, efficient, and systematic *training for policy-making*. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.

This end is not proposed as something utterly new or exotic. Indeed most of the recent developments in legal education — from 'sociological jurisprudence' to neo-Thomism. — have tended, with varying degrees of explicitness, to move in this direction. None who deal with law, however defined, can escape *policy* when policy is defined as the making of important decisions which affect the distribution of values. Even those who still insist that policy is no proper concern of a law school tacitly advocate a policy, unconsciously assuming that the ultimate function of law is to maintain *existing* social institutions in a sort of timeless *statu quo*; what they ask is that their policy be smuggled in, without insight or responsibility. But neither a vague and amorphous emphasis on social 'forces,' 'mores,' and 'purposes,' nor a functionalism that dissolves legal absolutism for the benefit of random and poorly defined ends, nor a mystical invocation of the transcendental virtues of an unspecified 'good life,' can effect the fundamental changes in the traditional law school that are now required to fit lawyers for their contemporary responsibilities. Their direction is toward policy but their directives are at too high a level of abstraction to give helpful guidance. What is needed now is to implement ancient insights by reorienting every phase of law school curricula and skill training toward the achievement of clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility.²

The late Mr. Justice Holmes puts the same point of view in his well-known paragraph:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a great deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation.³

Reference should also be made to Dr. C. A. Wright's able review of Schweinburg's "Law Training in Continental Europe" which appeared in the Canadian Bar Review about a year ago.⁴

² Harold D. Tasswell and Myres McDougal: *Legal Education and Public Policy* (1943), 52 Yale L.J. 203, at p. 206.

³ O. W. Holmes, Jr.: *The Common Law* (1881), p. 1. Boston: Little, Brown, and Company.

⁴ (1946), 24 Can. Bar Rev. 462.

The lawyer must then first decide for himself that fundamental question of policy whether the ultimate goal of the state is the free development of the individual human spirit in a democratically controlled society or whether the development of that spirit is to be confined by the inexorable demands of state policy, whether the interests of the individual or of the state are to be the paramount consideration — whether in short individual freedom is to be developed as an end in itself or curtailed not in the interests of one's fellow citizens, but in the interests of the state itself. Upon his decision of that fundamental question, involving a study of historical, philosophical and sociological forces, must depend the whole attitude of mind of the lawyers towards policy making; and clearly the interests of society demand that all who are in a position to influence such decisions on matters of policy are trained in such a way as to be able to do so wisely. What the world needs today in all parts of it, more than any other one thing, is the leadership of well trained, wise and public spirited men. The legal profession has provided many of them in the past and it should in the future provide many more in proportion to its members than it seems to do today.

In a democracy no class is specially designated for leadership, but lawyers, because of their knowledge of existing institutions, are naturally expected to lead. Leadership is democracy's greatest need, and the danger to democratic institutions lies in the failure to develop it. Intelligent leadership at the end of the last war might have prevented this war. This leadership must be both in thought and action. Specialists may discover new truths, but their ideas have no effect until they are accepted by the people. Progress in a democracy requires three steps — discovery of ideas, acceptance of them by the people, and their enactment as law. It is peculiarly the function of lawyers to appraise the findings of the specialists to apply them in the world of practical affairs. Lawyers' experiences fit them for this function, and their contacts give them opportunity to exercise it. Living among the people and advising them as to their affairs they develop an understanding of what is practicable, and are in a position to supply the needed leadership.⁵

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Our Law Schools have been pointing students for careers as business advisers rather than as professional statesmen. The subject matter of law is human relations and the student of human relations has a vast field to explore. He needs to study philosophy, ethics, psychology, economics, sociology, and government in their various phases. They are the stuff out of which law is made. The history of the experiences

⁵ Everett Fraser: *Legal Education* (1944), 231 *The Annals of the American Academy of Political and Social Science* 92, at p. 93.

of peoples of the past and the ways of life of peoples of the present should be to him what laboratory experiments are to the natural scientist. Study of these fields will be essential to the well trained lawyer — not to the exclusion of the study of law as it has been, but in addition to it.⁶

Let us always remember too, looking at the question from the narrower viewpoint, that it is the practising lawyer, as well as the judge, who carries out the judicial function of government and that, as Cardozo has emphasized in words that repay constant study, those performing the judicial function are very often called upon to legislate. He says:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savours of prejudice or favor or even arbitrary whim or fitfulness. Therefore in the main there shall be adherence to precedent. There shall be symmetrical development, consistently with history or custom when history or custom has been the motive force, or the chief one, in giving shape to existing rules, and with logic or philosophy when the motive power has been theirs. But symmetrical development may be bought at too high a price. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.

If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisalment of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example

⁶ *Ibid.*, at p. 94.

of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.⁷

It would appear then that whether we look at the matter in the wider aspect of citizenship or in the narrower one of strictly technical training, neither the public nor its government can be indifferent to the political, the historical and the sociological views of those whom it proposes to permit to be its lawyers, or appoint to be its judges. Was not Mr. Roosevelt, for example, believing as he did that a planned society was essential to the welfare of the United States and being supported in that view by Congress, justified in ascertaining the views on that question of proposed appointees to judicial office, not for the purpose of committing them in advance to any type of decision on any particular statute, not for the purpose of pledging them to stretch the constitution to give effect to the new idea, but to ensure that they should take the tolerant view taken by Holmes when he advocated an elasticity of interpretation of statutes which would give the benefit of any doubt to the legislature, whose legislation in his view should be deemed constitutional unless the violation was so clear, so indisputable, that no reasonable question could arise. Neither the constitution of the United States nor that of this country is a dead and inert mass of words. In both these documents those who interpret them have found, and must continue to find, the flexibility that enables the nation to grow and develop. Of the development of nationhood through the constitution Holmes wrote, "the thing for which Hamilton argued, and Marshall decided, and Grant fought, and Lincoln died, is now our cornerstone". It may well be that seventy-five years hence, when we are as old in nationhood as our neighbours, the same thing may be said of us. But whether it is or not must depend on the product of our law schools. Their task is not the teaching of law as slavish adherence to precedent. The law must develop as society does and accord with its views of fundamental relationships. At all times in its development its principles are being challenged by others based on the opposite point of view. The antinomies, discussed by Dr. W. Friedmann in his recent work on Legal Theory, of intellect and instinct, stability and change, positivism and idealism, collectivism and individualism, democracy and autocracy, nationalism and internationalism, are even today, perhaps today more than ever, in constant struggle for recognition as the proper foundation of the law.

⁷ Cardozo: *The Nature of the Judicial Process* (1921), p. 112. New Haven: Yale University Press.

What is attempted here is to set out reasons for believing that the lawyer's function, including that of the judge, is, especially under our system of government, beyond all doubt our most important public office. In very early days, when the clergy were the most learned people in the land, they were the King's Justices. Later, as learning spread, the lawyers and judges ceased to be ecclesiastics, but they were always among the learned, the thinkers, the leaders. The important duties they perform under our system of law will not be best performed in the public interest unless they continue to be wise, thoughtful, public-spirited citizens. The judges come from the Bar. It therefore seems that not only the general body of citizens, but practising lawyers and the judges themselves have a vital interest in the matter of the education of their successors. Our lives, our liberties, our constitutional rights, to say nothing of our property, in the last analysis rest with the judge on the bench and the advocate appearing before him. Surely of all professional schools, that of the law is the most important.

If what may properly be required of an adequate system of legal education is accurately set out above, it is inconceivable that it can be found outside the walls of a university, and conversely that a university fails in the performance of its duty to the state if it does not provide the citizen with the means of acquiring it. Most Canadian universities do offer law courses either in conjunction with or apart from the Law Societies of the provinces in which they are located. In doing so they recognize the demands of the public interest. Our problem is whether those interests are adequately served by the courses that are offered. Do they give their students sufficient training to develop the capacity to analyze and choose the best among all systems of Government, Law, Finance, Business organization; for it must be remembered that the systems which we have followed without much question for centuries are being attacked from within and without by advocates of rival systems. The members of the learned professions, and particularly lawyers, should be so familiar with all those systems that they can choose the best and say why they do so. A society founded on freedom is one that thrives only in the atmosphere of free discussion. Our learned men must be capable of examining all alternatives and choosing to what ends their efforts are to be directed. That choice is one that ought to be the result of the kind of free discussion which led Milton to write in the *Areopagitica*:

He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true wayfaring christian. I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat.

* * *

And though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?

Accepting this view of what the true aim of legal education ought to be, and having in mind the fact that the matter is of supreme importance in this revolutionary, atomic age, we ask first whether Canadian pre-legal education is adequate? The aim of pre-legal education ought to be to ensure that the student entering upon the formal intensive study of law has adequate training in methods of thinking and expression. What is desired is a trained mind which endures even when the facts on which it was trained are forgotten. The medium by which these facilities are obtained is a matter of secondary importance.

The goal to be aimed at seems to be well summed up in the words of the Committee of the Association of American Colleges, which considered the report of a Committee of the American Bar Association. The conclusions of the Committee were:

Your committee calls special attention to five principal points made in the report, with each one of which it is in hearty accord:

1. The report holds that prelegal education is more than a matter of certain courses or of particular extracurricular activities or of a certain number of years of study. In the words of Chief Justice Harlan Fiske Stone, 'the emphasis should be on the intellectual discipline which the student derives from courses and by [sic] particular teachers, rather than on the selection of particular subjects without reference to the way in which they are taught.'

2. There is a preponderating desire among practising lawyers and judges to move forward in education to meet new conditions of life — an attitude which, as the report points out, is quite the reverse of the generally charged conservatism of the bar.

3. There is unanimous opposition to required courses in prelegal training. The list of subjects given below is a list of recommended subjects. None is a required subject. Mr. Vanderbilt circulated a questionnaire and received responses from 118 distinguished lawyers and judges as to recommended subjects, extracurricular activities and length of course. The subjects recommended by these leaders, with the number of recommendations received for each are: English language and literature 72, government 71, economics 70, American

history 70, mathematics 65, English history 63, Latin 60, logic 56, philosophy 50, accounting 47, American literature 45, physics 44, modern history 43, sociology 42, psychology 39, ancient history 38, chemistry 38, mediæval history 37, ethics 34, biology 30, scientific method 25, physiology 21, French 20, Spanish 20. No other subject had more than eighteen votes.

Your committee would summarize this list of recommendations as calling for the inclusion of a sound prelegal course of English language and literature and American literature, history with a strong preference for English and American history, adequate courses in the basic social sciences of governments, economics and sociology, at least one laboratory science, mathematics (strongly emphasized), courses in philosophy, ethics and logic, accounting (a relatively new and important subject for lawyers), psychology and a foreign language, preferably Latin.

4. There is hearty concurrence among those responding to Mr. Vanderbilt's questionnaire in the importance of such extracurricular activities as develop capacity for independent thought and action, especially when they involve training in expression.

5. The great weight of this legal and judicial opinion believes that the present minimum requirements for admission to law school of a two-year college course is inadequate and should be extended to three years, and as soon as practicable, to four years.

With these findings of the Bar Association Committee, your committee reports its agreement. In order to accomplish the purposes of the report, we recommend finally that secondary school authorities be advised of the action of this body, so that students planning on a prelegal course in college may take in high school the subjects that are the necessary prerequisites to the college courses especially in such fields as mathematics and Latin.

Accepting these as the requisites of adequate pre-legal training, it seems to follow that a good Arts degree should be a condition precedent to a course in law. The combined courses offered in some of our universities, giving the law faculty as they do the opportunity to view the education of the lawyer as a whole and to have some voice in the Arts options open to law students, seems to us the plan that ought to be adopted.

An alternative is the Minnesota 2-2-2 plan,⁸ or the similar course that is being given a trial at Harvard.

In the matter of technical training there is no doubt that we in Canada are committed largely to the case method of instruction in most courses taught by full-time teachers, many of whom have had the five years or more of practice that is desirable in a teacher. Some courses are not adapted to the case system; in others satisfactory case books are not available, and it has been discovered that with large classes the use of

⁸ Hall: A 2-2-2 Plan for College-Law Education (1942), 56 Harv. Law Rev. 245.

the reports themselves is impossible and, with small classes, the wear and tear on the books is too great. It has been demonstrated, however, that the teachers in our Canadian schools have the capacity and they should be encouraged and given financial assistance to publish their own case books.

The intelligent study of cases under wise guidance has come to be regarded as the best method of studying law. It has been criticized by Dr. Redlich (*The Common Law and the Case Method in American Law Schools*) on the ground that the lecture, the text book and other literary aids are slighted, resulting in an exaggeration of the value of the analytic method of the case system.

These criticisms seem to have been met in Canadian schools where the method is used only where adaptable, where it is supplemented as it ought to be by lectures and references to text books and other literary aids, and where under efficient instruction the better students finish their course in a subject with at least the outlines of a text book of their own, which ought to be the aim of the teacher of a course.

Consideration might well be given, however, to the following:

(1) That in all cases before the student enters upon any part of his formal study of the law, he should have the benefit of an introductory course of lectures covering the whole field of the law. Fortunately there are good books available for the purpose, which can be made a foundation for such a course. Geldart's "*Elements of English Law*", Williams' "*Learning the Law*" and Vanderbilt's "*Studying Law*" are three that at once come to mind, while suitable case books for United States schools at least, which may be suitable also for use in Canadian schools, are Scotland Simpson's "*Cases and Other Materials on Judicial Remedies*", and Dowling, Patterson and Powell's "*Materials for Legal Method*".⁹

Such a course should be given as an introduction to the other subjects of study. It might be covered in only one or two weeks of intensive work with three hours of lectures a day, the different topics to be covered being divided up among the members of the staff.

(2) The curriculum of most of our schools appears to be pretty crowded and to have developed by the piling of courses in segments of subjects one upon the other, as though the aim were to turn out experts in those little branches of the law.

⁹ Valuable reviews of these case books are to be found in (1946), 24 *Can. Bar Rev.* 935 and (1947), 7 *University of Toronto Law Journal* 310.

The real aim of legal training should be the mastery of the broad principles of the law in all its aspects, leaving the matter of expert training to post-graduate or office study. There should be an entire revamping of the curricula of most of our schools so as to divide the field of study into its main parts. The following division is suggested:

Property Law,
Contract Law,
Family and Inheritance Law,
Equity,
Delicts,
Practice and Conveyancing,
Legislation,
Public and Administrative Law,
Comparative Law,
Jurisprudence.

Each of these heads should be assigned to an instructor, whose aim should be to teach the various aspects of the subject matter of the heading so that in the end the student has a coordinated view of the subject. Jurisprudence is necessary to give a coordinated view of all subjects in relation to each of them. The latest texts (Hall's Readings, Stone and Paton) emphasize the three main aspects from which jurisprudence should be studied:

- (1) the analysis of legal concepts and principles;
- (2) the philosophy of law;
- (3) sociological or functional jurisprudence — law in relation to society.

While Legal Ethics is a subject that may lend itself to a formal lecture or two, possibly by some of the judges, it should not be absent from the mind of any instructor throughout his work. The mental attitude that gives this subject vitality and arouses a sense of social responsibility in lawyers is more the natural outcome of contact with those who possess it than of any formal course of instruction.

(3) Consideration should be given to the proper place of public and administrative law, and to comparative law. The former, as has been so forcibly pointed out from time to time, looms larger from year to year in practice.¹⁰

¹⁰ (1946), 9 Mod. L. Rev., at pp. 211-215.

Fortunately, again, the material for the teacher to work with is in many cases voluminous and in all cases adequate. It is a simple matter of selection, bearing in mind that the field is so broad and the matters to be dealt with so complicated that the function of the law school can only be to furnish the student with a sound method of approach.

What has been suggested in the way of a curriculum will involve more time and it may be that the addition of a year to the law side of the course is at the moment impracticable, though an ideal to be aimed at. A stop-gap could be found in the assigning of summer reading, to be followed by tests at the opening of the fall term. In a good many cases call to the bar must be, and in our view should be preceded by a year under articles, followed by an examination in practice. It is suggested that the year under articles might be utilized also for assigned readings, to be followed by test before actual call to the bar, and that arrangements might be made during this year for courses of lectures by active practitioners, which would consist of practical demonstrations in the various fields of every day office routine. This system seems to work well at Dalhousie.

A more general word should perhaps be said. Would it not be a means of promoting Canadian unity if there should be at some large centre in Canada a law school, the graduates of which would be admitted to the bar of any province of Canada? It may be suggested that the differences between the Quebec Code and the law of the common-law provinces are so great that this might be difficult of achievement. On the other hand it can be said that the study of comparative law is essential to the training of an all-round lawyer and, if this be so, then Canadian students have at their doors a most practical and useful way of making it.

It should be said too that Canada's place in the world today is such that Canadian students ought to have available in Canada facilities for post-graduate study of law more adequate than are presently offered to them, and that in some of the larger universities in the country concentrated attention should now be given to the development of such facilities.