Objectives and Methods of Legal Education: An Outline

MAXWELL COHEN*
Montreal

I

These few remarks about a very live, ever-recurring debate—perhaps a much overworked debate—are intended only as a restatement and further extension of views that I have set out more fully elsewhere.[1] It is difficult, however, to avoid the usual clichés about legal education that are expressed both by law teachers and the bar. The persistence of these clichés suggests how deeply held are some convictions about training for the law and that there may be enough truth in certain of them to justify their passionate retention.

II. *Objectives of Legal Education*

I take it there will be agreement among us—bench, bar and law teachers—that we share the same generalized views about the ends of a law school and a legal education. For the sake of some initial clarity I should like to set out the principal objectives, although Dean Wright,[2] Dean Harno,[3] Chief Justice Vanderbilt,[4] Mr. Justice Rand[5] and others have stated them with a fullness and maturity that I shall not try to match here:

*Professor of Law, McGill University; of the Bars of Quebec and Manitoba. This paper was prepared by Professor Cohen for the annual meeting of the Association of Canadian Law Teachers held at Winnipeg in June 1954. See, The Law Teachers' Annual Meeting (1954), 32 Can Bar Rev. 659, at p. 662.

[1] Cohen, The Condition of Legal Education in Canada (1950), 28 Can. Bar Rev. 267; Cohen, Book Review, Harno, Legal Education in the United States (1954), 6 J. Legal Educ. 416

[2] Wright, The University Law Schools (1950), 28 Can. Bar Rev. 140.

[3] Harno, Legal Education in the United States: A Report Prepared for the Survey of the Legal Profession (1953) pp. 161-197.

[4] Vanderbilt, Men and Measures in the Law (1949) pp. 53-66.

[5] For the most recent Canadian study see: Rand, Legal Education in Canada (1954), 32 Can. Bar Rev 387. For a suggestion of the extensive critical literature, see the references in Cohen, *supra*, footnote 1, and also A Symposium on Legal Education in Canada (1950), 28 Can. Bar Rev. 117-196

(1) A law school, and the education it provides, must train lawyers to practise law. But this apparently simple statement, of course, begs the question, for it does not tell us *how* best that training is to be achieved or *what kind of law* is best suited for the varied practice of our time. Nevertheless, the training of lawyers for practice, whether as advocates, solicitors, corporate executives or civil servants, is a paramount aim of any organized approach to legal education.

(2) Legal education must be an education that truly explores the possibilities of the subject matter. The law suffers magnificently from its inherently dual character. For it is at once a working social tool to maintain order, to resolve disputes and to create an administrative framework for civilized society, while at the same time its rules are themselves a running commentary on the values held by that society.[6] It is this dualism in the law that often creates the apparent but largely unreal split between "practice and theory". But no legal education can be said to be an education *about the law* that does not provide the student with an awareness of the sources and the nature of the rules as well as an awareness of the legal system as a whole. The law is both philosophy and social engineering. The law is art and analysis. The law is history and logic. The law is form and substance—and all these qualities must be communicated to the student, as an essential part of learning about contracts and torts (obligations), crimes, property and procedure.

(3) Legal education is part of the great process of society understanding, studying and re-examining its laws. The law school, its courses and its research are concerned not only therefore with traditional questions of history, doctrine, interpretation, form, consistency, but also with what can be discovered, "objectively", about the social impact of rules of law and, in turn, about the effect of ever-changing social experience on the law.[7] And it does not stop there because any serious study of law rules and society immediately raises questions of the "ought-to-be". What kind of rules will make for better criminal justice, for greater fairness and modernity in domestic relations, for a more practical resolution of business disputes? The law teacher and law student, perhaps uniquely, have a major opportunity and obligation to think about the rules as a whole, where they are going and where they ought to go. And this thinking, and the research activity which it calls

[6] Pound, Introduction to the Philosophy of Law (1922) pp. 59-99
[7] Paton, Jurisprudence (2nd ed., 1951) pp. 23-25.

for, is made more alive and meaningful by the very fact that it is carried on as part of the process of teaching students to become lawyers. Indeed, this early inculcation of a research and "scientific" approach, of a certain higher objectivity about rules of law and their interpretative mutations, is a quality which the lawyer can always use to make himself a better lawyer and a better citizen. As Dean Harno has said about legal education in the United States, the law schools have assumed primary responsibility for scientific scholarship in the law,[8] and this would appear to be true now for Canada as well.

III. *Methods of Legal Education*

If there is any dispute today about legal education it probably has to do with *methods*. But this is not the kind of dispute that is confined to law schools. Problems of educational method are a standard source of concern in most of the professions.[9] It is almost fifty years since Dr. Flexner wrote his celebrated report for the Carnegie Foundation and helped to transform the entire character of medical education in North America.[10] To this very day, however, in the best medical centers, there continues some debate over the emphasis on scientific subjects as against clinical courses and, therefore, over the problem of staff and student training.

The same is true of law. Even after seventy-five years of university law schools in the United States, with deep traditions of full-time staffs and full-time student bodies, and with faculties representing the most senior scholarship the legal profession can display, the debate is reopened from year to year on the rôle of the practising bar and of "practical" training in the preparation of the law student for admission and practice.[11]

Because of these conflicting views I should like to suggest what appears to me to be a tenable *philosophy of method* and to summarize, as well, some of the contemporary experience with methods —as that experience has expressed itself more particularly in my own faculty at McGill, and, too, among some of the other institutions whose programmes I long have observed.

---

[8] Harno, *op cit*, p 188

[9] See, Education for Professional Responsibility A Report of the Inter-Professions Conference on Education for Professional Responsibility, held at Buck Hills Falls, Penn., April 12th, 13th and 14th, 1948, *passim*.

[10] Flexner, Medical Education in the United States and Canada: A Report to the Carnegie Foundation for the Advancement of Teaching, Bulletin No. 4, 1910.

[11] Meredith, A Four-year Law Course of Theoretical and Practical Instruction (1953), 32 Can Bar Rev. 878, at pp 879-881, particularly the references in footnotes 5-9.

(1) In general I do not think that there will be any debate today about *where* the various objectives I have just set out can best be achieved. Such varied objectives need an *institution* within which to realize themselves, and the natural home for this combination of training lawyers for practice, of studying law for all its theoretical and social characteristics, and of examining law with a view to its steady improvement as a social instrument—all these aims can only be realized properly in a university or some institution akin to the university. It is sometimes forgotten that so generally conservative a student of our affairs as Dicey came to this conclusion almost seventy-five years ago in his celebrated essay "Can English Law be Taught at the Universities?"[12] I have no doubt that law can be taught for certain very narrowly conceived types of practice, and for such practice alone, in schools that have not the facilities, the standards, the atmosphere and the staffs that usually are characteristic of institutions of higher learning. But such education *may meet only one* of the objectives we have agreed upon and may meet it only on a level that does not begin to exhaust the possibilities even of the varied training required for the practice of today in many public and private law matters.

(2) If these objectives therefore require an institution of higher learning for their realization, what shall now be said about the facilities and activities of a law school in a university? I would suggest that the following lessons about law school organization and methods may properly be drawn from experience in the United Kingdom, the United States and Canada during the last two or three generations:

(a) A law school is only as good as the teaching and scholarship quality of its staff. That staff must meet tests as rigorous in training, in teaching and research skills, and in scientific judgment, as the best standards to be found in the graduate faculties, or in the other professional schools such as medicine and business administration. Not long before he died, Harlan Fiske Stone, then Chief Justice of the United States, described the legal profession as having three branches—the bench, the bar and the law schools. The recognition of this special function and status of the law school and its staff marks one of the more important changes in the character of the legal profession in North America since the turn of the century.[13]

[12] Inaugural Lecture, All Souls College, Oxford University, April 21st, 1883 (pamphlet).

[13] Harno, *op. cit.*, pp. 120-121.

(b) A law school needs a library equal to the tasks of teaching and of research. There are not too many Canadian libraries that can meet a rigorous scholarship and training test.[14] I do not mean that there are not libraries in all provinces that satisfy minimum, local practitioner and teaching needs. But the scientific judgment in a law school, and the quality of its research, will reflect the availability of books and documents off the beaten and narrow track of simple "course" exposition. With that kind of test, how many law school libraries in Canada can be described as adequate? Is it not a commentary on universities and the bar that the amounts voted for libraries in Canada continue, in some places, to remain as modest as they are?

(c) A law school needs a high degree of control over the student time for at least three years. This means that courses totalling 12 to 16 hours a week should result in at least two to five hours pre- and post-class preparation and study for each hour in the classroom. On a conservative calculation this would mean an average working week, for a reasonably conscientious student, of somewhere between 40 and 65 hours—not an excessive figure to expect when compared with the known discipline imposed by medicine, engineering or the graduate schools of business administration.

(d) The organization and planning of law school curricula remain among the more difficult and challenging responsibilities. What seems to be clear, however, is that the student is entitled to the soundest training in basic subjects such as contracts and torts (obligations), property, crimes and procedure, but is also entitled to training of almost equal intensity in the newer and fast-developing fields of commercial and public law.[15] In addition, if he is not to leave the law school without a sense of the legal system as a whole, he will need a reasonably sophisticated guide to the integration of all his courses into a rounded view and "feel" of the whole legal order and its operation.[16]

[14] See Cohen (1950), 28 Can. Bar Rev. 267, table 11, for an analysis of Canadian law school libraries as of 1949.

[15] Here are included, among others, courses in (Public Law) Constitutional Law, Administrative Law, Labour Law, Public International Law, Legislation, Legal Aspects of Government Regulation of Business; (Commercial Law) Insurance, Creditors Rights, Commercial Paper, Sales, Taxation, Company Law, Corporate Reorganization and Bankruptcy, Maritime Law.

[16] Rand, *op. cit.*, p. 390; Harno, *op. cit.*, p. 140. I am concerned here with the problem of a view of the legal order as a whole not unlike, I should imagine, the view a medical student has of the "whole" body physiologically and anatomically. That there is another view of a synthesis at the end of a law school course, to tie the loose ends together, is sug-

Then too, where in this organization of his courses will the student be given his initial contact with the activities of courts, clients and law offices—or what is often called "practical or clinical" training? I am one of those who believe that the major responsibility of the three-year law course is to provide the student with his basic technical and intellectual tools in understanding the law in "theory and action", and that, therefore, only a modest introduction, *in that time*, can be given to the documentation problems of practice, relations with clients and the arts and crafts of drafting and pleading.[17] But assuredly there is a place in the first three years for some practical training and, doubtless, many forward-looking law schools are conscious of the need to expand their horizons as to the introduction of clinical experience, at an early stage, through a variety of devices. These devices include seminars with practising lawyers on procedural and kindred subjects, summer employment in law offices, organized tours of the courts.[18]

At McGill we have arrived at a development that in my opinion is most desirable, namely, a fourth year, post-degree but pre-admission, in which the student is placed in *selected* offices where he is treated as a working junior and where he is employed for the better part of each day. At the same time, he remains under university supervision for the purpose of well-organized practitioner seminars on drafting, pleading, procedure, title search, commercial forms, and the like, all supplemented by mock trials, moot courts, law court tours and occasional clerkships with judges. It needs only the actual participation of the fourth-year student in the work of the minor courts to make this "internship" a quite complete one.[19]

(e) Finally the law school must be responsible for the development of teaching techniques that maintain the highest degree of student interest and impose obligations of self-reliance, and a maximum of industry. Perhaps one of the sadder experiences of a teacher is to be told by good students that a course, or a year,

---

gested by the following remarks of Richard N. Thompson of the Oklahoma Bar (cited in Meredith, *op. cit.*, p. 879): "Where are the much needed courses at the end of law study which will synthesize the learning of three years' duration and tie up the very loose ends, showing the student where his courses fit together . . . , how to set up a law office . . . , how to deal with clients not only ethically but practically, and the psychology of handling juries as well as clients and judges? Must our graduates continue to learn these answers the 'hard way' through the 'school of hard knocks'?"

[17] Rand, *op. cit.*, pp. 402-403; Harno, *op. cit.*, pp. 149-150.

[18] Harno, *op. cit.*, pp. 172-176; Meredith, *op. cit.*, pp. 891-892.

[19] See Meredith, *op cit*, for details of the McGill programme.

could have been covered or studied in half or a third of the time, for all examination purposes. There is something wrong with teaching or with a faculty tradition that lets the student get away with marginal effort and pass examinations, at the same time, with reasonable marks. In part the fault often lies with the unhappy consequences of the oversimplified, didactic materials frequently found in the straight lecture method. Here student responsibility is largely confined to the rapid taking of notes or, what is very often the case, the copying of another's or buying a set from a predecessor. Undoubtedly, the really first-class student is unaffected by teaching that imposes so little burden. He will find his own reasons for study, for reflection, for masticating the tough materials of the law. But good teaching is designed *not for the first-rate* man, who is capable of finding his own salvation, but for those students for whom a little guidance, pressure and inspiration will combine to *raise* their own sights and push the "C"-man toward class "B" performance and make the "B"-man reach for "Distinction".

All this means that the law teacher has a duty to think about and to plan creatively his teaching programme and methods. My own experience leads me to believe that the most important method that legal education has developed, faced with large classes in the United States and Canada, is that technique which encourages *pre-class* preparation by the student *and which leads to his greater understanding of, and participation in, the discussion during the class-room hour.*[20] This is a far cry from rapid note-taking with an occasional relevant or irrelevant question or interjection. A law student ought to be able to read a document or a series of documents, whether cases or statutes or text writers, and have some reasonably tight, considered view to express in class when he is forewarned about the ground to be covered. The student gains both from the dialectical process of teacher-student exchange and from the responsibility that preparation imposes on him.

IV

We are moving slowly but surely toward maturity in legal education in Canada. One of the happier indices of that maturity is the growing acceptance of the full-time law teacher as the natural trustee for scientific scholarship and scientific teaching of the law. But the law teacher needs his part-time colleague at the bar to give the law school its live and continuing contacts with the profession,

[20] For recent discussion and criticism of the case method and its variants see Harno, *op. cit.*, pp. 51-70 and 137-140; Rand, *op. cit.*, pp. 397-399; Vanderbilt, *op. cit.*, p. 11.

and to make possible an early, organized approach to some clinical training. Yet such practical training must be balanced against the deeper needs for a generalized legal education in the student's early years, for which the law school is primarily designed.

I will not, however, be satisfied that legal education in Canada has reached anything like its full potential until I see the following kind of evidence:

(1) An increase in the number of full-time teachers with adequate training and research experience.

(2) A salary schedule for law teachers that will attract the very ablest young men at the bar.

(3) University budgets providing for library facilities sufficient to give each law school, not only complete Canadian sources, but reasonable Commonwealth, United States and comparative law sources as well.

(4) The development of sufficient staff, as well as curricula organization, to allow for options in depth, in private and public law, at the third or graduating year level. Only two or three law schools now have such a programme.

(5) Adequate staff and funds to provide for post-graduate studies—designed, in part, with the hope of providing larger opportunities for scientific study of Canadian law and legal-social needs.

(6) More willingness on the part of both the law schools and the bar to devise interesting and helpful methods to bridge the gap between legal education and legal practice. At the same time a recognition on all sides that the fundamental task of the law school is to provide a sound, general legal training, where "clinical" instruction, in the first three years, can share only modestly in the school time.

(7) The development of more and better teaching materials by way of course books and text books, designed for Canadian use and reflecting the superb Canadian opportunity to study comparative law in action—because of the existence side by side in Canada of the two great legal systems of the modern world. This editorial output can only come from staff specialization and staff leisure—which means more teachers, more specialization and more research.

This bare outline of "objectives" and "methods" has proven longer than planned. I hope I shall be forgiven for repeating many things that are the common property of us all. But the opportunity to give a statement of my views at my home law school—Manitoba—was too important to miss, even at the risk of stating the obvious frequently, and the disputed occasionally.