

# Law and Learning: Report of the Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council of Canada

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LAW AND LEARNING.  
REPORT OF THE CONSULTATIVE  
GROUP ON RESEARCH AND  
EDUCATION IN LAW, SOCIAL  
SCIENCES AND HUMANITIES  
RESEARCH COUNCIL OF CANADA.

By LEON E. TRAKMAN\*

At any stage in the development of a profession and an art, and legal education is both, a significant virtue arises in examining the history of that profession or art — how it has evolved and developed over time. For legal education such a benefit flows from the Report on Legal Education sponsored by the Social Sciences and Humanities Research Council of Canada. The Report is both critical and constructive; it is thoughtful and supported by a solid core of research while touching upon academic ideological and pragmatic issues alike. Throughout the Report the central question is: how do we better utilize the educational system to improve upon — indeed enhance — the quality of research and education in law.

At the core of the Report is a distinct ideological position, the thrust being that the law school is not only a professional, but also an intellectual centre of legal learning. Professional training is a definite part of the educational process, but it is not the exclusive segment:

[L]aw as an academic discipline is not the same as law as a subject of professional formation. We do not propose that one be substituted for the other . . . only that room should be found for both, and that both should be done purposefully and well. And we do insist that academic work in law should not always be obliged to exist on sufferance, on the margins of the professional enterprise.<sup>1</sup>

These comments are not simple rhetoric. Undoubtedly, what aspirant lawyers need, in the first instance, is a foundation in the superstructure of the legal system, a training in legal theory, in doctrine and in the conceptualisation of that doctrine. Such education is the backdrop against which all subsequent educational and practical exposure rests; it should not be usurped by a dominant professional or trade school mentality.

I cannot fault the logic of this proposition embodied in the Report. All too often the teaching profession is criticized for providing too theoretical a training for aspirant lawyers. All too often we are accused of failing to provide lawyers with an exposure to the necessary means of practice; our graduates are frequently said to lack the necessary tools to plead a case, to run a law office

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<sup>1</sup> Social Sciences and Humanities Research Council of Canada, *Law and Learning* (Ottawa: Min. of Supply and Services, 1983) at 55.

and to relate to their clientele. Yet frequently these criticisms of the academic content of legal education are remarkably short-sighted. A practical legal education must be acquired against the background of a theoretical model. To teach aspirant lawyers what the law says, is to presuppose that the student appreciates how the law has evolved in the past, and how it might or should evolve in the future. To presuppose that aspirant lawyers will be able to understand the significance of the law as a practical system, without understanding the substratum of human values upon which law itself rests, is to teach law in a vacuum; it is to liken the lawyer to an incompetent bricklayer who creates walls for their own sake, without recognizing that walls require planning and organization. The substance of the law, like the bricks and the mortar of the bricklayer, is a means towards an end, not an end in itself.

Somewhat less convincingly, the Report enters into a peculiar duality in its ideological orientation. While recognizing the utility of an "academic" and "intellectual" education in law, as distinct from a narrower "professional" one, the Report nevertheless proposes the expansion of practical and professional programmes within law schools, sometimes without acknowledging the need to expand the intellectual and theoretical bases of such programmes. Emphasis is given to the value of an expanded clinical law orientation and for more training in lawyering skills.<sup>2</sup> So too, the Report highlights the need to prepare aspirant lawyers for a multitude of different professional skills within diverse law school programmes.<sup>3</sup> These proposals are certainly laudable; aspirant lawyers do require an exposure to the relationship between law and the society in which lawyers inevitably function. They do need to develop the practical skills that are required to cater to society's demands, to provide meaningful service to those to whom they are institutionally and ethically responsible. But what is sometimes lacking in the Report is the development of a necessary integration between professional and academic training in law. All too frequently lawyers distinguish and separate the educational system into the theoretical and the practical; too often they fail to recognize the interface that really exists between theory and practice. A sound theoretical training in law has, within its very framework, a very practical component. To teach law devoid of a functional context is to create an ivory tower where one should not exist. It is to suppose that the intellectual component in legal education is distinct from its practical application, when, in fact, they are both collateral elements within a single system of education.

Precisely this tendency to separate theoretical from practical training has rendered instruction in clinical law less successful than it might have been in our law school programmes. Attributing reduced status to clinical law in favour of supposedly more "academic" law courses has often relegated the clinical professor into a secondary or ancillary teacher, often, and undeservedly, on the periphery of the teaching profession. Properly taught, clinical law has potential as a distinctly academic course; it can be an ideal setting to examine how lawyers and courts ought to function in the context of how they actually do function. As the Report itself appreciates "[o]nly in real or simulated 'clinical' courses does the law school assist the student to develop the ability to

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<sup>2</sup> *Id.* at 51-52.

<sup>3</sup> *Id.* at 49, 53-54.

apply analytical skills and intellectual insights as the practising lawyer must apply them.”<sup>4</sup>

Perhaps the greatest strength of the Report lies in its incitefulness, in the readiness of its authors to examine the *status quo* of legal education with circumspection, critically yet not unfairly. “Canadian Law Schools”, we are told, “have opted for eclecticism, not pluralism.”<sup>5</sup> Frequently the evolution of the law school syllabus is more the result of osmosis, responding to the passing interest of the law teacher, than it is the product of deliberate planning. Often the result is a rather unsystematized mass of overlapping and diffuse courses, poorly rationalized in both logical structure and educational effectiveness.

However, one may well wonder whether the solution proposed by the Report to such eclecticism, rather than pluralism is merely eclecticism by another name. We are told that, under this “new structure”:

Faculties would offer and students would select either an academic curriculum or one of several versions of a professional curriculum. Each would have different combinations of pedagogic components such as doctrine, clinical exposure and interdisciplinary studies. Each might identify itself as suitable for generalists, litigators or other specialists, business or governmental advisers or administrators, or otherwise define its purpose or appeal.<sup>6</sup>

No doubt there is utility in these rather broad and unqualified statements. Greater systematization of courses is essential if we are to obtain more structure and cohesion within our law school programmes. An all-purpose legal education is unlikely to satisfy social demands if lawyers, in fact, do far more than practise general law. Lawyers who work for corporations or for governments need to be trained in the corporate or governmental process. Lawyers who service special interest clients require exposure to such special interests. To that extent, the Report cannot be faulted.

However, the Report is less convincing in its conception of an extended, yet integrated, law school programme. To expect legal education to expand spatially in response to a changing range of social and professional interests requires very purposeful planning. If we fail to so plan, we risk over-extending the cafeteria approach towards legal education. Unless the educational process is carefully integrated within *both* a theoretical *and* a practical framework, eclecticism will not only reappear, it will likely flourish. The risk is that we will either train lawyers to be all things to all persons, or that we will expect them to be finite specialists in a realm of ever-expanding and ever more complicated subspecialties.

The reach of pluralism goes beyond the proposals embodied in the Report. It is the product of a far deeper inquiry: an examination of the very nature and purpose of legal education, a constant reflection upon the *telos* or ends which we strive to attain within the educational model. Some of these ends are holistic: our concern to expose *all* lawyers to fundamental moral and ethical issues and our need to encourage the growth of a basic core of competence in the training of such lawyers. Moreover, it is precisely to the ques-

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<sup>4</sup> *Id.* at 51.

<sup>5</sup> *Id.* at 17.

<sup>6</sup> *Id.* at 56.

tions "what is a fundamental moral and ethical issue" and "what is competence" that many of our pragmatic concerns about specific roles and functions of lawyers are better answered. Without such basic preliminary enquiries, we might succeed in expanding or contracting the curriculum; however, the logic underlying such modification might be no less eclectic in the long-term than the problems which provoked the exercise in the first place.

None of this is to undermine the functional virtues embodied in the Report, in particular, its capacity to identify very real needs in the Canadian system of legal education. Conscious of the isolation of the law school from other segments of the university community, the Report aptly extols the benefits that flow from intra-faculty contact, particularly the advantage of interdisciplinary humanism.<sup>7</sup> So too, the Report reflects upon the minimal interaction that takes place among colleagues at different law schools across Canada and the advantages that would flow from greater academic contact among law teachers engaged in similar research and teaching activities at different institutions.<sup>8</sup> The Report aptly addresses the utility of research and study leaves in which professors can develop their teaching and writing interests with a reduced or otherwise modified work load. Attention is given to the value of law teaching clinics and visitorship programmes in which teaching and research skills are evaluated, synthesized and developed under the helpful eye of experienced colleagues.<sup>9</sup> Emphasis is placed upon strengthening law school libraries to accommodate the ever-growing activities of the interdisciplinary and specialist researcher. Law libraries are needed which readily cooperate with one another in providing a speedy and efficient service to their student and teacher dependents.<sup>10</sup>

Nor is the Report unrealistic in many of its pragmatic goals. Recognizing the inability of each and every law school and law library to cater to each and every legal interest that might appear on the horizon, the authors suggest a sensible compromise. Law schools should concentrate upon their institutional strengths, not their peculiar weaknesses. Thus law school programming should stress regional and local interests where that law school is peculiarly equipped to respond to those interests. No one law school should seek to serve all persons and all purposes at all times. To do so is unrealistic in practice and, ultimately, damaging to the educational system as a whole.<sup>11</sup>

The Report is not unduly pessimistic about the prospects of achieving these functional ends. The authors recognize both the youthfulness of the Canadian system of legal education<sup>12</sup> and the fact that, despite our borrowed legal traditions, law schools and law libraries have improved significantly in size and in quality over time and now favour intense research more readily than ever before.<sup>13</sup> The size of law faculties is now far larger and more diverse

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<sup>7</sup> *Id.* at 47-56.

<sup>8</sup> *Id.* at 90-91.

<sup>9</sup> *Id.* at 125-29.

<sup>10</sup> *Id.* at 38-40.

<sup>11</sup> *Id.* at 126-27.

<sup>12</sup> *Id.* at 12.

<sup>13</sup> *Id.* at 38-40.

than in prior decades<sup>14</sup> and our teaching profession now provides an eminently more intellectual and humanistic system of education.<sup>15</sup> Law courses are no longer so narrowly based and practice-oriented as they were previously; they are increasingly inventive, and inherently more interdisciplinary in their foundation.<sup>16</sup> All in all, incrementalism in Canadian legal education has not been too disappointing.

No doubt many of the proposals contained in the Report are impeded by very real financial constraints. Law professors who are expected to widen the horizons of their respective disciplines have very real material needs. Release time for faculty, reduced course loads and the chance for cross-fertilization of ideas may well be necessary to increase the store of published Canadian works — but they cost money.<sup>17</sup> Nor is empirical study proposed in the Report likely to evolve in a vacuum; financial incentives are necessary to produce such studies. Law faculties need exposure to expertise provided by other sectors of the university community; and the teaching profession itself needs to be educated as to the value of such empiricism in its own evolution — all this costs money.<sup>18</sup>

These expenditures implicitly proposed in the Report are certainly not valueless — very much the contrary. However, before such expenditures can be suitably made, legal educators need to rationalize their material and financial requirements, lest decision by osmosis displace planning in the educational design. Unless material needs are suitably prioritized in accordance with the integrity and sufficiency of law school programmes, the likely result will be more innovation coupled with less direction.

The material betterment of law schools also hinges upon the goodwill and conviction of those who sponsor legal education — the taxpayer and the government, the university and the lawyer, the students and the faculty members alike. As the Report aptly recognizes,<sup>19</sup> it is in these areas, in our relationship with universities, governments and the practising bar, that fences are in need of repair; not simply in order to acquire financial support, but also to ensure a necessary interaction with those whom we are inextricably linked.

The Report also appreciates that, while material support for legal education is important, such support is often impeded by negative attitudes expressed towards the law teaching profession.<sup>20</sup> Thus the study recognizes the lack of reinforcement given to law schools by both other segments of the legal profession and by other segments of the university community;<sup>21</sup> but it offers limited suggestions as to how to deal with such attitudinal impediments. Certainly inviting legal practitioners, as the Report suggests, into masters of law and other legal graduate programmes has virtue;<sup>22</sup> but only so long as such attempts do

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<sup>14</sup> *Id.* at 18.

<sup>15</sup> *Id.* at 47-54.

<sup>16</sup> *Id.* at 34-36.

<sup>17</sup> *Id.* at 115-29.

<sup>18</sup> *Id.* at 92-96.

<sup>19</sup> *Id.* at 105-107.

<sup>20</sup> *Id.* at 42-43.

<sup>21</sup> *Id.* at 43.

<sup>22</sup> *Id.* at 137-38, 148, 160.

not amount to convincing the already converted by extending the ivory tower superiority of the law school to the privileged few. Certainly there are advantages in law teachers participating more actively in co-operation with the university community, the practising bar and government.<sup>23</sup> However, to do this often requires careful thought and planning, lest motives be misunderstood and services provided be less than adequate.

The problem of moulding attitudes is immense: how do we, as legal educators, demonstrate our particular utility to society at large, to governments, to practising lawyers and to other members of the university community? How do we show that we are willing and able to provide such services; and in so doing, how do we promote the betterment of the art and the profession of legal education itself? Recognizing that pure altruism is often costly, there is need to demonstrate that law teaching involves, not intellectualism for its own sake, but rather an intellectual approach to legal education that has a very real and practical significance to those whom we are pledged to serve — the society in which we and our graduates inevitably operate.

The value of the Report on legal research and education cannot be underestimated. The first comprehensive attempt of its kind in Canada, it is outspoken and well documented.<sup>24</sup> In its cogent reasoning, it is backed up by carefully prepared questionnaires submitted, for instance, to a vast number of law professors.<sup>25</sup> The proposals which it presents are reinforced by a comprehensive study of legal programmes in common and civil law jurisdictions — their nature and content, their strengths and weaknesses.<sup>26</sup> The Report is also painstaking in its evaluation of the virtues and deficiencies of Canadian law school libraries.<sup>27</sup>

Generally, the finances of the Social Sciences and Humanities Research Council of Canada have been very well spent. The study has provided for a solid foundation upon which the reform of Canadian legal education can be planned with future generations in mind.

Yet anyone who expects to find in the Report a short-hand, or even a long-hand device for solving the complex and growing problems that prevail within the profession of legal education in Canada will be disappointed. The Report presents itself as a pragmatic device; its final proposals are general rather than specific in nature. They do not purport to be a package of carefully integrated proposals; nor are they woven into a carefully planned and penetrating ideology. In many respects, this seeming weakness of the Report may constitute its very strength. To be too specific in planning at this early stage in the process of educational reform introduces the risk that haste may

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<sup>23</sup> *Id.* at 47-56.

<sup>24</sup> See, e.g., supporting documents of the Consultative Group: Janisch, *Profile of Published Legal Research* (Ottawa: The Consultative Group on Research and Education in Law, 1982); McKennirey, *Sources of Support for Legal Research* (Ottawa: The Consultative Group on Research and Education in Law, 1982); McKennirey, *Canadian Law Professors* (Ottawa: The Consultative Group on Research and Education in Law, 1982); McKennirey, *Canadian Law Faculties* (Ottawa: The Consultative Group on Research and Education in Law, 1982).

<sup>25</sup> McKennirey, *Canadian Law Professors*, *id.* at 11-51.

<sup>26</sup> McKennirey, *Canadian Law Faculties*, *supra* note 24, at 19-29.

<sup>27</sup> *Id.* at 35-44.

well produce dissension and worse still, disorder. Many of the questions raised in the Report have never been formally, and sometimes not even informally, canvassed in the past, certainly not in Canada. In addition, many of the ideas presented in the Report will warrant very careful debate and refinement by law deans, law professors, law librarians and a host of other interested persons before an ideologically integrated package of proposals can be developed.

Used as a bible and treated as words from on high, the intent of this Report is unlikely to be advanced. Employed as a research tool and as the expression of thought by some of the more refined legal minds in Canada, it is a sure device in the proud yet still infant growth of Canadian legal education.