Legal Education in Early Queensland

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The English historian Lord Dacre, aka Hugh Trevor-Roper, has a theory that each country has a sustaining national myth of its own. For English people, theirs has, he considers, for long been the myth of the "law state". By that is meant a belief in a society governed by laws, rather than by the whim of the most powerful individual or group among them.

Australia, in company with other English speaking countries, has inherited this tradition, and since we feel flattered to believe we belong to a society which adopts that view of itself, there is some reason for supposing Lord Dacre may be right. After all, it is true to say that, of the 12 oldest democracies in the world, five are English speaking and use English law; and one of the others was largely the creation of 19th century British diplomacy. Along with Switzerland, Belgium is one of only two European countries which have a jury system like our own. Sir James Killen may like to know that nine of them are constitutional monarchies.

In the context of Trevor-Roper's thesis, it is worth pointing out that "God Save the Queen" is one of only two national anthems, of which I am aware, that includes a prayer for the national legal system. National anthems (which are really national hymns) have a regrettable tendency to celebrate the last occasion on which the nation flattened the people next door, or to look forward to the next time when they will do it again. But the second stanza of the British national anthem (the words of which were written by a lowland Scot) includes the line *May she defend our laws*. The only other anthem that refers to law is, as far as I know, "Scots what hae". In celebrating their victory over the English at Bannockburn in 1314 (which, chronologically speaking, was their last), it incorporates this couplet:

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"Wha for Scotland's king and law
Freedom's sword will strongly draw?"

There may therefore be some substance in the theory that English speaking people have an underlying respect for their legal institutions, despite current efforts by some journalists in Australia to persuade our people to the contrary. Even the French now seem to be abandoning the inquisitorial system.

What is certainly true is that, at least in the past, legal culture permeated English or British national consciousness to a remarkable degree. It is impossible to read very far into Shakespeare without encountering legal imagery. Try Sonnet 87 as an example. A recent biography of the Bard shows him to have been a persistent and successful litigant, with only a limited commitment to the current fashion for mediation. He may have been atypical; but the extent to which some knowledge of the law penetrated English society in days gone by is pretty striking. J H Baker, the doyen of contemporary English legal historians, ascribes it to the influence of the Inns of Court in London, which he regards as having been England's third university. My own acquaintance with the reception of English law abroad has helped to confirm an impression that many of the early colonial administrators, leading settlers, and even military commanders, in the early Caribbean and American colonies had spent some time at the Inns of Court. In those days a smattering of legal knowledge was considered necessary for participation in public life. Even today, a disproportionate percentage of our politicians seem to have studied law, or at least to have begun the study of it. But so, too, had Robespierre and Lenin.

By the second half of the 18th century, the system of legal education at the Inns of Court was in an advanced state of decay. Lectures and moots were no longer being regularly conducted for the benefit of students. Sons of wealthy American colonists many of them from South Carolina, who had, at great expense, gone to London in some numbers to acquire a legal education, were generally disappointed with what they found there in the way of legal education – or so they told their parents on returning home. For young men, London had other attractions. In its place, and for the first time, English law began to be taught in an English university, by Blackstone at Oxford in 1755. The lectures he gave formed the basis of his immortal four volume *Commentaries on The Laws of England* published in 1765, which is said to have circulated more widely than any other book in English apart from the King James Bible. John Marshall, who was to become the greatest of the American Chief Justices, is said to have read it three times before he turned 27. When Yale College closed during the War of Independence 1775-1783, the young James Kent (who was later to produce a four-volume *Commentaries* of his own) stayed at home to read Blackstone, and wisely ignored the clamour outside.

It was therefore no accident that, in the same year as the war ended, the first American law school was established in 1783. London ceased to be the place to which Americans went for their legal education. The first American law school was not, as you might expect, Harvard, which did not begin teaching law until 1817, which was some time before English law first began to be taught at Cambridge. It

was at Lichfield in Connecticut. The Lichfield law school did not last long, but it marked the beginning of academic teaching of English law outside England.

Coming closer to home, law degrees were not offered in a university in Australia until 1856 at Melbourne, or until 1890 at Sydney. There was, of course, no Law Faculty at Queensland University until 1936. It was a year otherwise notable for general lawlessness. Hitler reoccupied the Rhineland; Mussolini invaded Abyssinia; the Japanese began their drive into China. Having already disposed of some millions of his fellow countrymen in the USSR, Stalin turned his attention to killing those that were left, which included his own Party colleagues and army generals. And all this because none of those nations had a national anthem embodying a prayer for the national legal system, or perhaps a legal system worth praying for.

Apart from the establishment of the Law School in Queensland, the only redeeming feature of 1936 is that it was the year of my birth. If you went to see what a law school looks like after 60 years, you need only look at me. Judged by that comparison of the years, the QUT Law School, which was the second of the current five in Queensland, may not seem old. But the QUT Law School has been established for 20 years, which is a long stretch of anyone's life on earth.

I promise not to use up quite so much of your time here with what I have to say tonight. I was asked to be brief and witty, and to speak of history as I went. Only the last part of that brief has been accepted.

Without a University to teach law in early Queensland, the profession was reduced to its own exertions. Some attempt was made to train, or at least to test, young lawyers in what Daniel Boorstin has called the mysterious science of the law. In 1867 Rules of Court were promulgated for holding examinations for barristers and solicitors to be conducted by their respective professional Boards. In the case of barristers, the Rules provided for a preliminary examination in Greek and Latin; Mathematics, Algebra, or Logic; Ancient History, English History, and Universal History, by which, inevitably for those times, was meant only European History. The procedure under those Rules required a candidate to make in advance, from a prescribed list, nominations of the books from which he elected to be asked examination questions. Among others, they included *Euclid, Books I to VI*, and Boole's *Laws of Thought*. In case from that title you suppose that "thought laws" were an invention of the 19th century, *Boole's Laws* was not a manual on how to please the government, but a work on logic. For Greek, you could choose any epistle from the *New Testament*, or from Homer's *Iliad*. In Latin, the choice was any three orations of *Cicero*, or a book of *Virgil* or *Horace*. In History, the texts included Hallam's *Constitutional History of England*, still considered a classic on the subject.

Would-be solicitors, or attorneys as they were then called, were simply expected to have "a competent knowledge of the subjects of a liberal education, of which the subjects Greek or Latin must be one". This was especially useful in defending drunken bullockies in the Police Magistrate's Court at Boggabilla. You could avoid the embarrassment of failing the Bar Board tests if you already had a degree in Arts from Oxford, Cambridge, Dublin, London, Sydney, or Melbourne. The four ancient universities of Scotland were completely ignored. With discrimination like that, it is

no wonder Scotland recently voted for legislative independence. However, speaking as a descendant of that admirable race, I expect that educated people like the Scots would not have found the local examination at all difficult to pass.

The underlying purpose in Queensland evidently was to produce a profession rather more broadly educated than, say, Baron Martin of the Court of Exchequer in the mid-19th century. Not being known to have read anything outside the law reports or a racing guide, he was once prevailed on by a colleague to take home a copy of *Romeo and Juliet*. On being asked for his impression when returning it shortly afterwards, he pronounced it "A tissue of improbabilities from beginning to end". By contrast, Baron Gurney was reported to have taken *Gale on Easements* on his honeymoon "for light reading". There is no record of what his bride was thinking about while he read it.

Not that there were no examinations in law in early Queensland. Six subjects were prescribed for barristers: Real Property; Procedure; Equity; Admiralty, Matrimonial and Insolvency; Criminal Law; (and a surprising combination) Evidence and Contracts, with a lengthy list of texts from which to choose questions on these topics. The subjects for attorneys were much the same. Since no book seems to have been prescribed for contract or for admiralty law, I imagine they were popular choices. The book list, and correspondingly the potential range of questions, was potentially enormous.

Much the same system still prevailed when I arrived in Queensland almost a century later in 1960. Armed with three University degrees but no professional qualification, I submitted myself as a Bar Board candidate. I was generously permitted an exemption from Roman law, in which I had majored for my Arts degree in South Africa. The method of preparing for the course was the time-honoured one of preparing and studying answers to questions set in past examination papers, which were purchased at small cost from Col. Smith, the Librarian at the Supreme Court Library. He was a memorable old fellow, who's qualifications for that office were a leg wound and an Military Cross for bravery both gained in World War 1. The questions revealed more about the origins and religious affinities of the examiner, than about the subjects themselves. Past papers, I discovered, threw up questions in Constitutional Law and International Law like the following:

1. Discuss the constitution of the Upper House of the Irish Dail.
2. Explain the impact on relations between the Papacy and Italy of concluding the Lateran Treaty.

In the paper that confronted me as a candidate in Constitutional Law, I found the examiner had broadened his range. Write a note, he instructed, on the Chiltern Hundreds. I had seen the film some years before; but, with my head packed full of worthless information about implied prohibitions and immunities of instrumentalities, to say nothing of freedom of interstate trade, I suffered a memory lapse and had to forego answering that question. Since the pass mark overall was 60%, and for each paper 50%, it was an omission to be regretted.

Back in Queensland in 1867, there was no instruction to be had on the mysteries of the law, other than that provided by part time tutors. In the 1880s Fred Swanwick began coaching would-be students for admission as barristers and solicitors, a function which, according to Ross Johnston's *History of the Bar*, was later continued by Fred's son at their spacious home in East Brisbane. In a sense, the Swanwicks were therefore our first Law School. Before someone is inspired to endow a Swanwick Chair of Law at QUT, let them first discover the reason why Fred was teaching law instead of practising at the Bar. It was not that the rewards for teaching were greater then than they are now. He had been struck off in 1882 for various misdeeds, including misappropriating the funds of a client. At least, let it not be a chair in Legal Ethics.

Despite the defects of the early legal education system (or the lack of it) some astonishingly good lawyers, such as Sam Griffith, Pat Real, and Charles Chubb successfully emerged in colonial Queensland. Few of us, however, have their natural brilliance, or their aptitude for the hard work of training ourselves in the law by private study. What we need to show us the way is a Law School like QUT.

Divine mercies are few, and, considered from the standpoint of most of us, they seem to be thinly spread. But, for saving so many young souls in the last 20 years from the torment of the Board system of examinations, and for sending them forth on the path of the law, the QUT Law School deserves to be beatified or even canonised. Many lawyers in Queensland and elsewhere have good reason to be grateful to QUT and to those who founded and taught in it.

Mr Chairman, I have spoken far too long for all the good I have done. A colleague of mine is fond of telling a tale about a judge who dreamed he was trying a long and boring case, when he suddenly woke up to find he was trying a long and boring case.

I must not put you through the same ordeal. In another 20 years time you, and (with unusual good luck) even I, will be back here again for the next dinner of this kind.