The Role of Legal History in Australian Legal Education

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In the past, legal history was an integral part of the undergraduate law curriculum. Over the last four decades, the teaching of legal history has fallen into abeyance, with many law schools not even offering an elective subject in legal history. With a view to reviving legal history in Australian law schools, this article examines the purpose and place of legal history in the undergraduate law curriculum. It argues that the future of Australian legal education must include an understanding of the past.

Introduction

Legal history is a vast topic; the teaching of legal history is even vaster. In thinking about the role of the teaching of legal history in the future of Australian legal education, there are many issues which could be addressed. These include:

- What is meant by 'legal history'? Is there a settled, stable concept of legal history or are there multiple, competing conceptions of legal history?
- What is the relationship between legal history and history? Is legal history a specific sub-discipline within law or history or both?
- What are the methodologies, and the methodological problems, for legal history? Are these shared with history as a discipline or are they particular to legal history? How concerned should the teaching of legal history be with these methodological problems?

These are important questions, worthy of detailed consideration, in any full assessment of the place of legal history in Australian legal education. However, given the constraints of space, the aims of this article are more limited. This article sets out to consider what the purposes of teaching legal history are and where within the curriculum should legal history be placed. The purposes of teaching legal history may seem self-evident or well-rehearsed. Yet it is a fact that the teaching of legal history has largely fallen into abeyance in Australian law schools. In order to revive and revitalise the teaching of legal history, it is necessary to consider afresh the reasons this subject should be taught in universities. It is also not possible to consider legal history should be taught without considering the practical questions of when it should be taught.

The Purposes of Teaching Legal History

There are a number of different purposes the teaching of legal history can serve. At the outset, an obvious one should be mentioned. For many law teachers and students, as well as many legal practitioners, legal history is a subject of intrinsic interest. For such people, the study of legal history does not need to be justified. However, even for those intrinsically interested in legal history, reflecting on the purposes of teaching this subject does no harm and may indeed assist them in communicating their enthusiasm to others who are less engaged by it.

Perhaps the most frequently invoked reason for teaching legal history is that the common law, as a legal system, as a tradition and as a mode of reasoning, is based on precedent, thus

is fundamentally historical. This is fine as a statement of purpose, as far as it goes, but it conceals some assumptions about law and legal education which need to be exposed and tested. It implicitly suggests that the rationale for the inclusion of legal history in the curriculum is based on the common law. However, as judges have repeatedly emphasised, both in judgments and in their extra-curial writings, the teaching of statutory interpretation must now assume greater prominence in legal education, given the pervasiveness of statute law in contemporary legal practice. The argument that teaching legal history is vital in a common law system is really shorthand for purposes which would benefit from being articulated and justified distinctly.

A study of legal history can provide much-needed context to a given aspect of the law under consideration. Historical context can enrich an understanding of general principles and doctrines. As Lord Sumption points out in his recent speech, 'The Historian as Judge', the purpose of a common law or equitable principle is not necessarily self-evident; it is embedded in the historical context in which it originated.[1] Historical context can also enrich an understanding of constitutions and statutes. Recourse to convention debates in cases of constitutional interpretation is well-known. Regard to legislative history is often useful in statutory interpretation. Statutes are not enacted in a vacuum. They are passed in a legal, political, social and economic context which may illuminate their underlying purposes. In turn, interpretations of common law and equitable principles and doctrines, and statutory provisions, and constitutions, do not exist in a vacuum but also have a history of their own. Again, the context in which they are applied, developed or construed will affect the decisions about them. An understanding of legal history may assist students (and practitioners and judges) in understanding context, thus informing how to interpret and apply those primary sources of law: constitutions, statutes and cases. Importantly, such an understanding may assist students (and practitioners and judges) avoid mistakes, which can sometimes be made through an ignorance of legal history. An understanding of legal history then can be viewed as essential to providing a law student (or a practitioner or a judge) with a complete context in which to analyse a problem. As McHugh J famously observed in argument in *Rich and Silbermann v CGU Insurance Ltd*, '[a] lack of understanding of legal history is a misfortune, not a privilege.[2]

A study of legal history can illustrate the particularity of the common law, as a mode of legal reasoning and as a legal tradition. In doing so, it can assist students understand that the common law differs from other legal systems; that different legal systems can deal with the same problems in different ways; that the common law's approach to a problem is not intrinsically correct or the only means of resolving the issue. In this way, a study of legal history can heighten students' awareness of comparative perspectives on law. It can thus serve a distinctly jurisprudential function in legal education. In particular, as Lord Sumption argues in 'The Historian as Judge', a study of legal history can reinforce the particularity of decisions in the common law, their sensitivity to the time, place, facts and context of the decisions, what he characterises as their 'intense humanity', which may be contrasted with the tendency towards intellectual abstraction in the civil law tradition.[3]

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[1] Lord Sumption, 'The Historian as Judge', 5 (speech to Administrative Appeals Chamber / Immigration and Asylum Chamber judges, Rolls Building, 6 October 2016) <https://www.supremecourt.uk/docs/speech-161006.pdf>.

[2] *Rich v Silbermann v CGU Insurance Ltd* [2004] HCATrans 366 <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2004/366.html>.

[3] Sumption, n 1, 2-3.

Importantly, a study of legal history can reinforce in students' minds that the law and legal institutions are not static.[4] They have histories of their own; they change over time, sometimes incrementally, sometimes drastically. Without an understanding of legal history, there is a tendency to identify what 'the law' on a given issue is, as if 'the law' on a given issue arises sharply and distinctly, nakedly, disconnected from a larger historical context. This approach is what might be described as 'legal science'.[5] Such a process may not produce legal scientists. As Sir Walter Scott observed in his novel, *Guy Mannering*, 'A lawyer without history or literature is a mechanic, a mere working mason; if he possessed some knowledge of these, he may venture to call himself an architect.'[6] In equipping students with an understanding of legal history, legal education would be equipping law students with something practical, something that they can use in providing better legal advice.

There is then no single purpose that a study of legal history can serve. Rather, there are many different purposes. These very different purposes – intrinsic interesting; contextual; jurisprudential; practical – can be used a means of making legal history as a subject relevant to the students, with their increasingly divergent interests, which is always a significant challenge for the law teacher.

The Place of Legal History in the Curriculum

Turning then to the place of legal history in the curriculum, it is fair to observe that legal history currently occupies an uneasy place. This is perhaps in part due to the history of legal history courses in legal education. Prior to the 1960s in Australia, the study of legal history was compulsory in most law schools in Australia. In addition, many law schools mandated British history as a compulsory subject.[7] From the accounts in the Pearce Report of the way in which it was taught,[8] echoed by accounts of former judges such as Michael Kirby,[9] the teaching of legal history in that period might be charitably described as dry. The reaction to the way in which legal history was taught, as well as to its content, led, in the Pearce Report's view, to a situation where, within the space of two decades, the teaching of legal history went from being compulsory to virtually non-existent. Thirty years on from the Pearce Report, the teaching of legal history has hardly undergone a significant revival as a standalone subject, although it has not been completely eclipsed.

In terms of the current treatment of legal history in the undergraduate law curriculum, an introductory unit of study may include some treatment of legal history but it is not usually in great depth, given the other introductory materials, such as the basic skills of statutory interpretation and reading a case, as well as the sources of law and the structure of the legal system, which students need to learn. Writing in the *Australian Law Journal* in 2009, Justice Michael Kirby surveyed the state of teaching legal history in Australian law schools and found that the overwhelming majority did not teach it; that few law schools have an elective

[4] W M C Gummow, 'Legal Education' (1988) 11 SLR 439, 400.
[5] A W B Simpson, 'Legal Education and Legal History' (1991) 11 OJLS 106, 106.
[6] Sir W Scott, *Guy Mannering* (Edinburgh University Press, Edinburgh, 1999), ch 37, quoted by V Windeyer, *Lectures on Legal History* (2nd ed, Law Book Co, Sydney, 1957), vii.
[7] M Kirby, 'Is legal history now ancient history?' (2009) 83 ALJ 31, 32-33.
[8] D Pearce, E Campbell and D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Vol 1, 1987, [2.71], cited by M Kirby, n 7, 33.
[9] M Kirby, n 7, 31-32.

in legal history; and fewer still would have well-subscribed electives in legal history which are regularly offered.[10] Almost a decade on, the position has not changed drastically.

In many instances, legal history is touched upon at the beginning of a course or it may be raised during the course to illustrate a particular issue, doctrine or principle. There are some obvious disadvantages to this approach. First, such a treatment of legal history is necessarily piecemeal. Students do not have a larger framework in which to locate what they are being told. This is not only a larger understanding of legal history but of British or Australian history generally. One cannot assume that students have a sound understanding of either of those sub-disciplines, yet they are necessary to a basic understanding of the legal history which would be taught in universities.

Secondly, the historical material is easily discarded, by the lecturer, or ignored, by the student. Given constraints of time in class and the need to cover core material in compulsory units of study, the easiest material to jettison for a lecturer is often the introductory historical material. It may be provided to students in some other form, such as a podcast or a recorded lecture, which students may or may not listen to, depending upon interest. In most instances, students, who also have constraints upon the amount of time they can devote to studying for a given subject, can also overlook it, knowing that such material is rarely examinable. From experience, the beginning of a discussion of the history of a particular aspect of law, especially in compulsory units of study, is ordinarily greeted with the cessation of typing, the shutting of laptops and the downing of pens. Students do not need to ask whether this material is examinable; they already know.

Yet, of course, historical material can be vitally important to an understanding of the development of the law and the law's current state, beyond being intrinsically interesting. The history of defamation law is an example of this. Defamation law has a long, continuous history in Anglo-Australian law, dating back to at least the twelfth century. It derives from multiple sources, including sources not usually encountered by students – the ecclesiastical courts; the Court of Star Chamber; the statutory offence of *scandalum magnatum*; as well as the royal courts.[11] Defamation law has long been criticised for being arcane, complex, technical and artificial.[12] Its reputation as such is attributable in significant measure to its history. Unlike many other areas of private law, defamation law has not undergone substantial rationalisation and modernisation;[13] it has not sought to come to terms with its history. A proper understanding of defamation law and the problems confronted in its current manifestation, as well as the prospects for reform, can only be reached through an appreciation of, and an engagement with its history. Defamation law is not the only area of law from which a contemporary understanding would benefit from a grasp of legal history.

Legal history can be used to give shape or structure to a course or to an area of law. For instance, at the University of Sydney, torts is the first substantive law subject students encounter. The teaching of torts begins with the historical distinction between trespass and the action on the case, before moving on to examine the forms of trespass to the person and trespass to land. There are a number of benefits to this approach, apart from introducing students to the long, continuous history of tort law in Anglo-Australian law. It introduces students to a rudimentary distinction which inheres in the structure of Australian tort law –

[10] M Kirby, n 7, 35-36.
[11] See generally D Rolph, *Defamation Law* (1st ed, Thomson Reuters, Sydney, 2016), ch 3.
[12] Rolph, n 11, [1.10]-[1.40].
[13] Rolph, n 11, [1.40], [3.10].

the distinction between causes of action which are actionable *per se*, providing protection of interests that the common law has long sanctioned as highly prized, and between causes of action where damage is the gist of the action. Educating students as to the historical background of tort law can illuminate how the modern law of tort law is structured. An understanding of legal history is also important in understanding why tort law has developed in the way that it has. The history of tort law is intimately connected with how society operated at various points in time. It is no accident that the first torts to crystallise in the common law in the thirteenth and fourteenth centuries were the torts of trespass to the person, as a time when civil justice and the court system were emerging. It is no accident that negligence emerged as the most important cause of action in the late nineteenth and early twentieth centuries, when modes of transportation, employment and consumption shifted dramatically as a consequence of the Industrial Revolution, making the experience of negligently inflicted transport and motor accidents, workplace accidents and product liability much more likely than intentional wrongdoing.

The question then is how should legal history be treated in the law curriculum in the future. It cannot seriously be suggested that legal history should be made a compulsory subject again. In a crowded curriculum, there is little room for another compulsory subject like this; there would be little appetite or receptivity to such a development.

Rather than legal history being taught in one place, either on a compulsory or an elective basis, it is preferable to think about embedding legal history in multiple places to reinforce its ongoing significance. It is important to have more than a rudimentary introduction to legal history in introductory units, otherwise students will be confused about some basic features of the legal system and its institutions and processes. Outside of introductory units, legal history and its relevance needs to be made prominent where it occurs in the curriculum. This will help to highlight the importance of legal history to all aspects of the curriculum – not just another compartment or silo of legal knowledge. In addition, legal history should be offered as a stand-alone, later-year elective to cater to the interests of students who are motivated to learn more about it.

Talking about the revival of the teaching of legal history may seem backward-looking. Legal history was taught in the past and was compulsory. It is not possible or perhaps even desirable to go back into the past but lessons can be learned from the past. One lesson to be learned from the way legal history was taught in the past is how not to teach it in the future. Prior to the 1960s, when legal history was taught, there was a heavy emphasis on English legal history. This is understandable. However, this tended to occur at the expense of, or to the complete exclusion of, Australian legal history. Any revival of the teaching of legal history needs to consider carefully what or whose legal history is to be taught. Given the formative influence of English legal history, there will necessarily be a focus on English legal history. However, it is no longer possible only to focus on English legal history. The unique story of Australian legal history needs also to be told in a detailed, meaningful way, not merely as an addendum to a course in English legal history. The concept of ‘Australian legal history’ should be broadly defined. It needs to encompass the contribution of indigenous law, as well as the experience following the arrival of the Europeans in 1788. Depending upon where legal history is taught, it will be necessary to have regard to the particular legal developments within that jurisdiction – all the Australian States and Territories have different histories, thus necessarily have different legal histories.

Conclusion

It may be somewhat odd to be discussing the importance of teaching legal history in the context of a conference on the future of Australian legal education. The teaching of legal history as a stand-alone subject is something which occurred frequently in the past. There is something about the idea of teaching legal history which may, to some minds, seem old-fashioned, even quaint. However, as many eminent judges have emphasised on many occasions, an understanding of legal history is vitally important to practising lawyers. There are well-known aphorisms about the importance of history from thinkers from Cicero to George Santayana, which I have forbore from citing. Permit me one clichéd quote. As William Faulkner famously observed in his 1951 novel, *Requiem for a Nun*, 'The past is never dead. It isn't even past.'[14] The most important reason for incorporating legal history into legal education is the need to disabuse students of the notion that they will be operating and advising in some kind of perpetual present, where the past provides no context and has no bearing. That is why the future of Australian legal education must include a study of the past.

[14] W Faulkner, *Requiem for a Nun* (Vintage, London, 1996).

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