CURRICULUM

Bridging the divide between traditional and professional legal education

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Because traditional legal education is about law and professional legal education is about lawyering, a big conceptual divide exists between the two. When legal problems are presented to students in traditional education, these problems focus on the identification and assessment of substantive legal issues. When legal problems are presented to students in professional education, they are actually client problems, which are different from substantive legal problems. Client problems relate not just to legal issues but to the much more complex problem of how to help clients resolve or prevent legal conflict.

Confronted with students whose thinking has been shaped by traditional legal education, the professional legal educator needs to help them bridge the divide between learning substantive law and learning how to solve clients' problems. One way of doing this is to change students' conceptualisation of legal subject matter as a whole without denigrating their traditional education. This can be achieved by providing them with a theoretical framework for legal problem solving and demonstrating how their prior traditional education fits into that framework.

Since the aim of legal education should be to teach people how to solve their clients' legal problems, substantive law does not take up very much space on the conceptual lawyering map. However, it is still crucial because it helps lawyers to solve these problems.

Defining competent lawyering as the ability to solve legal problems makes the most sense from both a theoretical and curriculum-design standpoint. The problem-solving process is not only the essence of legal practice, but it can be presented in such a way that it encompasses much of legal practice. This can be done with a model or framework for solving legal problems — a process model illustrating both a general theory of legal practice and the process of solving legal problems. Process models are useful because they reinforce the idea that people should solve complicated problems by going through a process. They can begin at the beginning and proceed through stages. Another reason is that, in tense situations when clear thinking should prevail, one can follow a premeditated series of steps to solve problems.

Stage one of the process is problem and goal definition. Stage two is fact investigation. Stage three is legal issue identification and assessment. Stage four is advice and decision making. Stage five is planning and implementation.

For the legal problem-solver, one important feature, particularly in the planning and implementation stage, is the tendency for the problem to change or evolve into a new and different problem. Things can be planned only up to a certain point, beyond which new problems arise and new decisions have to be made. When new problems arise, the lawyer has to renew the problem-solving process, returning to the beginning in order to re-examine the goals, gather new facts, identify issues, develop and evaluate new options, and modify plans.

Aside from seeing problem-solving as a linear process of stages, therefore, lawyers should see it as a fluid process — either as a process of continual renewal as new problems arise or as one requiring modification as they move through the stages.

Although this problem-solving framework may seem disconnected from traditional legal education, meeting points between them do exist. Why study contracts without examples of contracts? Why study criminal law without learning how to defend criminals, or tort law without learning how to sue a wrongdoer, or property law without learning how to transfer property? Despite recent changes that have brought more courses relevant to legal practice into the curriculum, many law schools still provide an educational regime that focuses mainly on law, is not sufficiently connected to real life and does not include enough about practice. One of the limitations students need to understand is that what they learn in law school is based on law school thinking, which is related to, but quite different from, lawyer thinking.

Not surprisingly, law school thinking is strongly influenced by judgments and by the many books and articles that law teachers write about them. The main result of this influence is to focus thinking not on clients' legal problems, but on legal issues that judges have to resolve. The principal problem considered in many law school classes is similar to what lawyers do when they make a prediction assessment. In other words, given a set of facts, which legal issues applied in what way will determine the outcome in front of an intelligent judge? Students, like judges, look at both sides of legal issues and at conflicting issues. As a result of this kind of educational shaping, the structure of law students' thinking is like that of appeal-court judges. They are often not taught to focus on the client's problem and how to solve it.

The role played by conflict-blocking lawyers is one of the least understood and most neglected in law schools. Law schools spend much of their time on sources of law, such as judgments and legislation, but the one source that probably produces more law than any other is overlooked. That source is conflict-blocking lawyers who are engaged in the enterprise of law-making. This, of course, is not the law-making that goes on in legislatures or the courts, although it is related to these sources. This is the vast business of law-making that goes on every day in lawyers' offices and in the legal departments of thousands of firms: the creation of private law accomplished through the negotiation and drafting of agreements and transactions that govern legal relations between people.

The study of law is a mere prerequisite to the main aim of developing lawyers who can solve problems. In traditional legal education, legal theory is knowledge-oriented — focused on the classification of, and relationship between, legal concepts. But professional education requires more of a process orientation. It regards lawyering theory as a problem-solving process.

In the traditional legal education map, lawyering education is not prominently displayed; lawyering and teaching about lawyering are merely a small, remote region in the grand continent of the law. But on the new map, lawyering and teaching lawyering occupy a much larger and clearly identifiable region of intellectual work. Substantive law, although critical to legal education, is just one of numerous knowledge and skills prerequisites from which the complex intellectual project of lawyering can benefit.

INDIVIDUAL SUBJECTS/ AREAS OF LAW

Teaching native title
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The aims and objectives of introducing native title material into Property Law are twofold. In a general sense this material enables students to develop some familiarity with the historical, social and political factors which have shaped the principles and rules forming part of modern property law. More specifically, indigenous perspectives are important in terms of evaluating the conflicts inherent in orthodox legal doctrines of Property Law. Doctrines such as possession, tenure and estates cannot be taught without a detailed examination of native title and the Australian cases which surround it.

Property starts with its core, the concept of property, and moves on to the classification and interaction of property interests. The *Mabo* decision is fundamental to the contemporary understanding of Australian Property Law. The difficulty is where to start discussing it in detail. Thus *Mabo* exemplifies the Property Law teacher's dilemma. It is a detailed and lengthy case which raises a number of complex new concepts. The challenge for teachers is to know where to introduce the case and, once introduced, to know how much detail is required at any particular point in the course.

In the Law Faculty of Monash University the authors teach the *Milirrpum* case in the early 'concepts' part of the course to illustrate what were traditionally recognised as essential characteristics of proprietary interests, leaving the *Mabo* and *Wik* cases and the *Native Title Act* until students are more familiar with the context of Property Law.

The application of the principles expressed in *Mabo* can be perceived as ambiguous by law students because they are determined by reference to the customs and traditions of the claimants. Students have difficulty marrying the black letter common law doctrine with the apparent fluidity of the indigenous title. Further, they struggle with concepts such as extinguishment, the co-existence of interests and the effect of the legislative schemes. Often this leads to difficulties in applying the concepts and laws of native title to problem based questions. The transformation of 'propositional' knowledge into 'practical' knowledge is tricky in all Property problems but with the added complexity of indigenous title, special attention is needed for students to come to grips with the process.

University teaching may have traditionally been viewed as the transmission of a knowledge base from teachers to students. However, recent academic attention has focused on developing a wider range of skills in students. One of the ways to achieve student based learning, rather than 'top down' teaching, is to break the large groups into smaller groups to work on the issues raised by native title. This can be achieved by utilising teacher-based tutorial or discussion groups, by student led self-learning groups and group presentations to the class.

The inclusion of alternative voices and perspectives within the teaching of native title issues is an important counter to the sometimes frenzied hype surrounding the subject. Ideally, one may be able to include presentations by indigenous representatives. If this is not possible, students should be provided with material written by indigenous people or videos that convey their perspectives.

In terms of the traditional examination based curricula, native title is