TEACHING LABOUR LAW IN A COMMON LAW JURISDICTION

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When I first studied labour law (under the tutelage of Greg McCarry[1] at the University of Sydney in 1993), the subject was named 'Employment and Industrial Law', according to the usual bifurcation (at the time) of the subject into separate considerations of the individual and collective aspects of the general discipline. The Sydney Law School undergraduate course was then, and still is, a single overview course, although some Australian law schools have chosen to teach the two 'faces' of labour law – 'Employment Law', and 'Industrial Law' – in discrete electives. Separating the discipline in this way has always been problematic,[2] but it has become more so in recent years, as scholars in our discipline have interrogated the boundaries of labour law,[3] its 'vocation',[4] and its place in the law school curriculum.[5]

We are under pressure to make room in an already overloaded curriculum for numerous emerging issues, many of which do not fit easily into our traditional two-sided framework. Where, for example, do we fit the important topics considered at this conference, such as 'technological innovation and its impact on labour;' 'labour and fundamental human rights,' and 'the maintenance of family economies and the marketplace'? Each of these topics has implications for the engagement of individual workers, and for collective industrial relations policy and practice. The steady expansion of our discipline also poses challenges for teaching methodology. Do we fill our courses with 'content' and try to impart as much current knowledge of particular laws as possible, or do we focus on mapping the broad framework of the discipline and its fundamental concerns, and coaching our students in the skills they will need to keep abreast of labour law as they develop their own careers?

In this necessarily brief reflection on 'what to teach' of labour law and 'how to teach it' in a law curriculum, I will attempt to answer these questions by making two essential points.

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[1] Associate Professor Greg McCarry was one of the foundation authors of Macken, McCarry & Sappideen's *The Law of Employment*, now in its 6th edition. The evolution of this text, from its first edition (JJ Macken, C Moloney and GJ McCarry, *The Common Law of Employment*, Law Book Company Ltd, Sydney, 1978) to its sixth (C Sappideen, P O'Grady and G Warburton with K Eastman, *Macken's Law of Employment*, 6th ed, Lawbook Co, Sydney, 2009) tells its own story of the transformation of the discipline of employment law in Australia over the past thirty years. See J Riley, 'From Black Death to Work Choices: the Common Law of Employment in an Age of Statutes', (2009) 22(2) *Australian Journal of Labour Law* 224.

[2] See A Stewart, 'Teaching Labour Law: Choices and Challenges' in R Mitchell (ed) *Redefining Labour Law: New Perspectives on the Future of Teaching and Research*, Centre for Employment and Labour Relations Law Occasional Monograph Series No 3, University of Melbourne, Melbourne, 1995, at pp 211-213.

[3] See R Owens "The Traditional Labour Law Framework: A Critical Evaluation' in Mitchell, above n 2, at pp 3-28; P Gahan and R Mitchell, 'The Limits of Labour Law and the Necessity of Interdisciplinary Analysis' in Mitchell, above n 2 at pp 62-89; B Langille, 'Does "Labour Law" Still Exist in Australia?' (2007) 20 *Australian Journal of Labour Law* 239.

[4] See K Ewing, 'The Death of Labour Law?' (1988) 8 *Oxford Journal of Legal Studies* 293; H Collins, 'Labour Law as a Vocation' (1989) 105 *Law Quarterly Review* 463; B Hepple 'The Future of Labour Law' (1995) 24 *Industrial Law Journal* 303; C Arup, 'Labour Market Regulation as a Focus for a Labour Law Discipline' in Mitchell, above n 2; G Davidov 'The (Changing?) Idea of Labour Law' (2007) 146 *International Labour Review* 311.

[5] At Sydney Law School we are fortunate to be able to offer a postgraduate Masters in Labour Law and Relations degree program that allows us to teach a broad range of labour-related subjects.

First, the common law heritage that shaped the architecture of the traditional labour law curriculum is now under considerable pressure from more international and comparative law influences – and this is a very good thing. It is time that we reviewed the content and even the essential structure of courses to accommodate these new influences. Secondly, notwithstanding the pressure on law schools to train lawyers for practice,[6] the best law school curricula must concentrate on encouraging deep thinking about the underpinning purpose(s)[7] and logic of labour law, and on developing students' own skills in finding, interpreting and using legal resources, so that they are properly equipped to function in a constantly changing legal environment.

Influence of a common law heritage

As I have been invited particularly to offer a common law perspective (and not merely an idiosyncratically Australian one[8]), I will begin with some observations on the way I believe the common law's assumptions and methods have influenced the shape of the labour law curriculum in the past. New influences – particularly international law and the recognition of a 'human rights' focus in much of the law curriculum – are gradually weakening the grip of the common law, to the benefit of our discipline generally.

It occurs to me (others may disagree) that the common law's preoccupation with the private rights derived from contract and property has influenced the shape of the labour law curriculum. The focus of the individual employment law aspect of the traditional curriculum defines the relationship between workers and those who engage their labour as a special kind of contract, the 'contract of service' or employment contract. Essential elements of the curriculum involve mapping the increasingly fluid legal boundary of that special contract,[9] and outlining the terms implied in these special contracts. Implied terms, such as the employee's duty of fidelity and good faith, derive from a much earlier status-based conception of the relationship between master and servant, so some of our feudal history is also embedded in the common law of employment. Teaching this doctrine largely involves analysis of many judicial decisions. Statutory law is taught as a set of incursions into the master's freedom to contract, through the imposition of obligatory standards for matters such as minimum pay, maximum working hours, and recreational leave entitlements. In more recent years, statutory rights against unfair dismissal have been framed as incursions into employers' common law prerogative to hire and fire at will, limited only by the terms of their own contracts of engagement.

The collective half of the curriculum has been refracted through the lens of the common

[6] See Stewart, above n 2 at p 215.

[7] For alternative perspectives on the proper purpose of labour law, see R Mitchell 'Introduction: A new Scope and a New Task for Labour Law?' in Mitchell, above n 2 at pp vii- xv; and R Mitchell and C Arup, 'Labour Law and Labour Market Regulation' in Arup et al (eds) *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press, Sydney, 2006, at pp 3-18.

[8] The uniquely Australian story would necessarily include a discussion of the particular challenges of teaching labour law in a federation of States, where the federal legislature's jurisdiction to make laws is constitutionally limited. Prior to 2005, a significant proportion of a course in Australian industrial law needed to be dedicated to matters of constitutional law. (For an encapsulated history of these constitutional complexities, see G Williams and D Hume 'Commonwealth Power over Industrial Relations: Evolution without a Referendum' in HP Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton*, Federation Press, Sydney, 2009, at pp 105-125.)

[9] See for example M Freedland, *The Personal Employment Contract*, OUP, UK, 2000.

law's abhorrence of any kind of collective action that threatens individual property rights. The formation of trade unions and controls on their activities tend to be viewed from the perspective that most industrial action can be characterized as a conspiracy to injure business-owning employers in their trade.[10] We generally teach the topic of industrial action by considering the 'industrial torts', actionable in the common law courts, except where statute provides some (often limited) immunity from suit, usually for the purpose of requiring parties to direct their disputes towards some special dispute resolution tribunal.[11]

International law influences

In more recent years, however, those of us working within a common law tradition are engaging more comprehensively with international law influences. We are beginning to consider aspects of working conditions (such as wage fixation, working time, leave entitlements) in the light of an international law focus on the protection of human rights. A curriculum that I have developed for teaching undergraduate students[12] is organized around the International Labour Organisation's fundamental principles, beginning with a thorough investigation of the notion that 'labour is not a commodity', and what that means in our contemporary world. In that course, legal regulation of wages and working conditions is examined in the light of the ILO's 'decent work' agenda. Termination of employment is treated in the context of considering the worker's and indeed the entire community's interest in job and income security, and how that is most effectively protected.[13] Regulation of collective industrial action is examined in the light of the ILO Conventions on freedom of association and rights to collective bargaining. The international law dimensions of our discipline are no longer merely incidental to a study of the local jurisdiction.[14] International law's human rights focus provides a new way of organizing a labour law course that allows us to escape some of the common law's preoccupations with the kinds of rights – contract and property rights – that tend to privilege employers. [15]

Comparative law influences

Globalisation has made us much more aware of the laws of other jurisdictions, and what we might learn from them. To some extent, the internationalization of the law school curriculum more generally has driven this more outward-looking focus, but we can also thank the constant pressure to keep up with enormous and exhausting changes in our local labour laws. In recent years it has been extraordinarily difficult to maintain an up-to-date labour law course in

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[10] See *Quinn v Leathem* [1901] AC 495.

[11] See for example *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, where much argument concerned the extent to which a statutory provision granting immunity for 'protected' industrial action should be narrowly construed, given that it compromised the employer's common law right to access to the courts to protect contract and property rights.

[12] This course was taught in 2007 and 2008 in the undergraduate LLB program at the University of New South Wales.

[13] This topic leaves room for considering the 'labour market regulation' approach to our discipline: some jurisdictions attempt to foster job security by focusing on policies that encourage full employment, rather than providing individual rights to contest dismissal.

[14] See Stewart, above n 2 at pp. 202-3.

[15] See R Owens and J Riley *The Law of Work*, OUP, Melbourne, 2007, as a relatively new text organized on the principle that international and comparative law influences should be emphasized in the study of labour law.

Australia, let alone a current textbook.[16]

We experience this pressure particularly acutely in Australian law schools, where the basic undergraduate law qualification (the Bachelor of Laws, undertaken in the equivalent of six semesters of full time study) is also the essential qualification for legal practice. There is still considerable pressure to prepare students for practice in the local jurisdiction, and I have spoken to many colleagues who see this as the principal objective in all law courses, including those in labour law. Frequent major reforms have made it difficult if not impossible to meet such an objective. From another perspective, however, the reforming zeal of our legislatures has encouraged us to think of our subject from a broader and more critical policy perspective. We have been encouraged to look at other systems, to consider how other jurisdictions have dealt with common problems. Rather than allow ourselves and our students to become buried under an avalanche of new and highly technical rules, we may choose instead to focus on the underpinning policy of the laws, and how that policy translates into legislation. For example, in considering how effectively our own 'transfer of business' rules balance the competing interests of business in restructuring for improved efficiency, and of workers in maintaining hard-won wages and conditions, it is a particularly useful class exercise to consider the European Union's *Transfer of Undertakings Directive* 2001/23. As Kahn-Freund wrote, in 1966, the comparative method allows us to escape the 'labyrinth of minutiae in which legal thinking so easily loses its way', and we may instead see the 'great contours of the law and its dominant characteristics'.[17]

Teaching methods

This brings me to my second essential point. If international law has enriched the content of our labour law courses and allowed us to transcend some of the presumptions fossilized in our common law heritage, comparative law has permitted more room for critical reflection in our courses. Certainly, the pressure to prepare students for practice persists. But what is the best preparation, in a world where even the essential architecture of laws can change so fundamentally and so rapidly? Where is the point in learning – in excruciating detail – a pile of rules that will change before one has an opportunity to test-drive them in practice?

We do our students a greater service if we build a curriculum that maps those 'great contours of the law and its dominant characteristics', encourages critical thinking about the relationship between law and policy, and provides training in the essential skills of legal research and analytical thinking, so that they are well-equipped to continue to teach themselves in the future. We will of course need to engage with the detail of current laws, but I suggest we do so by way of illustration and 'case studies', focused on encouraging a deeper understanding of the purposes of law and its potential. After all, we are not merely training more drones for business and industry. We are preparing a new generation of law reformers and legal architects, who will bear responsibility for the shape of our labour laws in the future. As one of our disciplinary pioneers has said: '[L]aw is neither a professional tool nor an academic toy...it has higher purposes than the convenience of the legal profession or the training of the minds of students.'[18]

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[16] Australian labour law has experienced three big shifts in recent years as a consequence of major federal law reforms. The Howard Liberal/National Coalition government enacted the *Workplace Relations Act 1996* (Cth), and then the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). The Rudd Australian Labor Party government enacted the *Fair Work Act 2009* (Cth).

[17] O Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 *Law Quarterly Review* 40 at 40.

[18] Kahn-Freund, above n 17 at 61.

This is especially true in the fundamentally important field of labour law.