THE 'EUROPEAN' CONTENT OF BRITISH LAW DEGREES

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THE PROCESS of European integration has reached a stage at which any self-respecting law degree course must have a 'European' dimension. Even the most Euro-sceptical law teacher can hardly ignore the pervasive influence of Community law and the Convention on Human Rights or the real desire for student mobility and transferable qualifications.

But it is easier to enthuse about the European dimension than to define what it should be and how it should be implemented. This paper seeks to identify the problems and to make some suggestions for solving them. The first part deals with the structure of law degrees generally. The second part addresses the specific problem of teaching European Community law.

THE STRUCTURE OF LAW DEGREES

Any law degree course must be selective. There is just too much law: there are new and important subject areas (e.g. administrative law, employment law, social law) and the corpus of authorities and materials within subject areas grows exponentially. The pressure to be selective will be increased by pressure to reduce (or at any rate not to increase) the length of law degree courses which, in Britain, are already amongst the shortest in Europe.

The attempt to teach too much law is in any event academically damaging. It tends towards excessive concentration on current (but ephemeral) black-letter law, encouragement of rote learning and examinations that reward skills of memory rather than skills of analysis. Introducing a suitable 'European' dimension further increases the problems of selection. So we need to define our aims at two levels:

—philosophy—what are we trying to achieve?
—content—what are we trying to teach and how?

Philosophy—What should we be trying to achieve?

We should be careful to distinguish between, on the one hand, planning a law degree course with a substantial European dimension, so structured as to offer opportunities for student mobility and transfer of

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qualifications, and, on the other, seeking to devise a uniform law degree course for all law schools. The latter is both unattainable and undesirable. *Students want to be mobile because law schools are different.*

Any degree course must strike a balance between the practical and the academic. Law schools cannot, and should not, ignore the career prospects of their students. They must have some regard to what the professions and potential employers expect.

Practitioners and their professional bodies have not always been the best guide to what should be studied, putting a premium on immediately utilisable skills and black-letter knowledge at the expense of long-term adaptability. Too many students have been taught to believe that there is a ‘right’ answer to every problem.

But academics have no monopoly of foresight. Law schools can be criticised for a blinkered concentration on conventional constitutional law, overlooking the emergence of administrative law, and on conventional contract and torts, neglecting restitution.

Perhaps it would be best to forget the traditional academic/practical distinction and to recognise that the legal profession has an interest in seeing that its recruits are well taught, while law schools have an interest in seeing that their graduates do them credit in the world of practice. Whatever may have been the position in the past, the interests of the profession and the law schools are converging.

Law as a professional discipline calls increasingly for skills of conceptual analysis and adaptability to new trends and new ideas. For today’s lawyers (and even more so for tomorrow’s) skills of critical analysis, to which the academic traditionally attaches importance, are essential *practical* skills for the practitioner.

Some practitioners recognise this very well. An interesting prescription was given to me by the members of a ‘club’ of European law firms, mainly corporate and tax lawyers, from Iceland to Greece and from Finland to Portugal. Asked what kind of graduate the universities should aim to produce for them, they replied that their ideal graduate would be one with a sound grasp of one system of national law together with private international law (their first preference) or Roman law or comparative law (second equal).

So law schools should resist pressure to concentrate exclusively on immediately useful black-letter law. The profession, in its own interest, should support them in doing so. But that is not to say, either, that law schools should concentrate on legal science in a narrow sense, neglecting the function of law and the legal process as a political, social and economic mechanism (a mistake not made by Adam Smith and his contemporaries).

Lawyers should have something to contribute, *as lawyers*, to current debates on standards in public life and the quality of criminal justice as well as, in the wider world, the future of Yugoslavia, the EU or the
World Trade Organisation. They do themselves and their profession no service if they treat law as a priestly mystery which the vulgar do not understand and which contributes nothing positive to solving the problems of society.

That is perhaps the most important reason for introducing a ‘European’ dimension to law teaching in Britain, since it involves aspects of law which go beyond the conventional law school curriculum: human rights, economic rights, rights of free movement, competition law, and so on. Even at the level of the purest black-letter law, how can one now teach the law of contract without reference to the law on restrictive practices and, consequently, to Article 85 of the Treaty of Rome? And how is the working of Article 85 to be explained without reference to market analysis and therefore to market economics?

There are, of course, other ways in which the same results could be achieved. Studying the development of the Common Law in the United States, Canada and Australia could, in many respects, fulfil the same function. The literature would be more accessible to many students because it is in English. The same might be true, for some law students, of Islamic and other non-Western systems. Nevertheless, there is an important European dimension to the current development of the law in Britain. The practising lawyer will almost certainly have to cope with it, whether the problem concerns a complex commercial transaction or social security.

Rather than treat European law as just another topic to be added to the already long list of compulsory subjects, might one not profit from it to add a new dimension to the course as a whole?

If so, does this presuppose language skills and should they be included either as a precondition of admission or as an integral part of the law degree?

It cannot be said that language skills are absolutely essential. But language competence is normal for most continental law students and is essential for true student mobility. If law schools want to encourage student mobility and, later, professional mobility, then they will either have to encourage more and better language teaching at school by making language skills a condition for admission or, more probably, themselves organise language courses jointly with language departments.

In summary, there seem to be two ways of defining the philosophy: to educate lawyers with the basic knowledge, skills and adaptability necessary to operate in a more integrated Europe; or to educate European citizens capable of applying legal skills. One hopes these are simply two ways of saying the same thing.

The ultimate aim must be to give students the right tools, the right instincts and the right reactions. When I asked a successful Italian commercial lawyer how he managed to practise alone with one secretary,
he replied: “The law is 10% knowledge and 90% nose.” Or as Professor J. A. Smith is said to have told his class of moral philosophy: “If you work hard and intelligently, you should be able to detect when a man is talking rot, and that, in my view, is the main, if not the sole, purpose of education.”

**Content—What should we be trying to teach, and how?**

*Is there a ‘core subject’?*

It is often suggested that the European dimension can be provided by one or more ‘core subjects’. Candidates include: Roman law, jurisprudence (in the British sense—i.e. legal theory), European law (EC and/or ECHR), comparative law, private international law (conflict) and procedural law.

**Roman law** is valuable for three reasons. First, it is a way of introducing students to legal grammar: for example, the distinction between *dominium* and *possessio*, between *ius in re* and *ius in personam*, or between obligations *ex contractu* and obligations *quasi ex contractu*. More generally, it introduces them to the theory of obligations—an idea central to continental thinking which common lawyers often find difficult to grasp. (Latin used to serve a similar function as a way of introducing English-speaking schoolchildren to unfamiliar concepts, such as the gender and declension of nouns and the moods and conjugation of verbs. Once these concepts are understood, it is easier to move from one language to another.)

Second, and this is partly the same point, Roman law can be an introduction to the *ius commune Europaeum*. The Civil Law is systematic in a way that the Common Law is not. A French lawyer who sees the title of a German, Italian or Portuguese law book would know what is in that book and so, faced with a question of German, Italian or Portuguese law, would know the title of the book where the information is to be found. British lawyers have to understand how and why that is so, and how it came to be so.

Third, Roman law recognises the law of actions (procedural law) as an integral part of the legal system, on a par with, and not ancillary to, substantive law. I return to that point.

It is not impossible to teach the basic structure of the civilian systems without Latin, and Roman law is not yet a lost cause. But, as a ‘core subject’, it is likely to be available only for the few and not for the many. Enthusiasts for Roman law should recognise, too, that the civil law approach to property and obligations is only partially adequate to cope with modern situations: compare the relative adaptability for commercial purposes of common law and equity.

**Jurisprudence**, for many law students, is more of a chore or a mystery than a treat (as it should be). It can be highly relevant to European
practice: for example, a student must know what is meant by the 'hierarchy of norms', by 'interpretation' and by 'general principles of law'. But students need some basic grammar to discuss concepts. For me, the question is not whether, but when jurisprudence should be taught. It is not so much a core subject as a subject to be developed from a grasp of core subjects.

European Community Law is important as an integral part of national law and has great potential for academic study. But Community law is not a legal system in the same sense as the Civil Law or Common Law system, nor is it a suitable vehicle for teaching legal grammar other than, perhaps, the grammar of public law. The same applies, mutatis mutandis, to European Human Rights Law.

Comparative law presupposes sufficient acquaintance with at least two legal systems to make useful comparisons. At an introductory level there is a serious risk of misleading superficiality. But applied language courses can be an interesting way of introducing students to the vocabulary, procedures and thought processes of other systems before they reach the stage of studying comparative law as such.

Private international law is undervalued as an academic discipline but, like comparative law, can only usefully be introduced towards the end of a course.

The law of actions (procedure and evidence) is seriously undervalued. Most students find it interesting since it relates to what they have seen on the television. For many of them, a fascination with courts is what encouraged them to study law in the first place. Why relegate to later years—or to courses for practitioners—a subject that can stimulate the student’s interest from the beginning?

In any case, students cannot properly understand caselaw (especially ECJ caselaw) without understanding the procedural context in which cases have been decided.

The law of actions is also a way into ‘other people’s law’. A great deal of superficial nonsense is talked about the differences between the common and civil law systems and this is, pre-eminently, an area in which students must be ‘able to detect when a man is talking rot’. Lawyers engaged in cross-frontier practice must go further and have a real sensitivity to differences in the approach to evidence and procedure.

That said, an understanding of the law of actions must be parallel to, and cannot be a substitute for, an understanding of substantive law. How does a student understand the nature of a possessory remedy without understanding the distinction between title and possession?

My conclusion is that the search for a single ‘core subject’ as a means of providing the ‘European dimension’ is, with the possible exception of Roman law, the wrong approach.
**A suggested approach**

Rather than attempt to define a universally applicable content for a law degree, we should concentrate on identifying, in broader terms, the desirable structure and components of such a course and the order or sequence in which those components should be taught.

The content and sequence of course components is a crucial element in adapting degree courses to student mobility. So is the separate ‘markability’ of each component for the purpose of awarding course credits and, in the longer term, mutual recognition of diplomas. These considerations have a knock-on effect on the structure of the course as a whole.

I suggest as a basis for analysis and planning the distinction made in Scottish law schools between Ordinary, Honours (undergraduate) and Masters’ (postgraduate) courses. I do not suggest that the other law schools should follow in detail the Scottish approach which, in any event, is not uniform. A somewhat comparable distinction exists in French law schools between the License, the Maitrise, and the Diplôme d’Etudes Approfondies or Diplôme d’Etudes Supérieures. I use it simply as a conceptual basis for planning.

The underlying concept is one of progressive transition from imparting examinable knowledge to developing non-examinable skills. The Scottish Diploma in Legal Practice, also taught in the university law schools, aims to develop parallel, but different, practical skills.

It is now becoming the norm for the high-flying student to take at least one Masters’ course. Masters’ courses are also particularly sought by, and suitable for, students from other jurisdictions.² So it is both reasonable and realistic to plan for a three-tier degree structure,³ reserving some subjects for Masters’ courses, rather than attempting to cram everything into the undergraduate syllabus.

Ordinary courses can be substantially lecture-based, the aim being to impart the basic legal grammar and basic knowledge of the national legal system which students need before going on to more sophisticated study. Such courses can also be suitable for training paralegals; for preparing mature students, or students with degrees in other disciplines, for entry to the profession; and as introductory courses for students from other jurisdictions.

Thus they can serve a variety of purposes without undue pressure on teaching resources. They can also offer a sufficient response to the pressure of ‘market forces’ and governmental obsession with numbers, while allowing greater scope for academic variety and inventiveness at the Honours and Masters’ levels.

The Ordinary syllabus should be planned as a whole. It should be *table d’hôte* (little if any choice on the menu) and its content essentially *national*. But new and broader titles should be adopted for the course...
components, since the conventional classification of subjects (contract, tort, real property, etc.) leads to a demand for a separate course in each subject. This leads in turn to teaching of excessive detail while important new topics, which have not yet found a secure academic niche, are omitted.

The University of Melbourne has a course in 'Torts and the process of law', in which the substantive law of torts is studied along with the law of remedies and procedure. One might envisage a comparable approach to 'Consumer rights and the process of law' or 'Commercial transactions and the process of law,' the aim being to impart an awareness of the scope and mechanisms of the legal system in order to lay the foundations of legal literacy rather than to provide total coverage of a catalogue of 'core subjects'.

While the primary focus of the Ordinary course should be on national law, some 'European' content will be necessary. I return to the EC aspect later, but the Ordinary syllabus should cover the elements of European Human Rights Law. I do not claim to be able to prescribe the content.

Time may have to be allowed for language courses, but the Ordinary syllabus need not otherwise be designed with a view to student mobility. Specifically, it is not necessary, at the Ordinary level, to split the syllabus into separately markable components if the law school would prefer to adopt a more integrated approach.

Given an adequate foundation structure at the Ordinary level, Honours and Masters' courses can be offered à la carte according to the preferences and available skills of the law school, as well as differing perceptions of what the 'European dimension' ought to be.

Courses at both levels must be designed, and separately marked or examined, with a view to student mobility and mutual recognition of diplomas. If this is done, it may well be possible to put undergraduates and postgraduates together for some courses, or at least to blur the distinction between Honours and Masters' courses when dealing with students from other jurisdictions.

This approach to planning a law degree course will not appeal to everyone, and may be impossible for some. But it has proved, in my experience at least, to be a way of combining a rigorous course in the foundations of national law (in casu Scots law) with a fair range of choice for the student and, at the same time, attracting significant numbers of Erasmus students and postgraduates.

THE COMMUNITY LAW COMPONENT

A basic introduction to the institutions and substantive law of the European Community should be an obligatory part of the Ordinary
The elements of Community law (institutional and substantive) can, however, be taught quite shortly. It is sometimes suggested that Community law should be taught ‘interstitially’—i.e. dispersed amongst courses dealing with different aspects of national law. This, it is said, helps to emphasise that Community law is an integral part of national law. That is true. Students must develop a ‘nose’ for the Community law point hidden in a national context. But interstitial teaching on its own is inadequate.

The reason is that Community law is systematic. It contains elements that are new and ‘foreign’ for the British lawyer. These have to be understood in order to understand why and how Community law affects national law in particular ways.

Take, for example, the direct effect of directives. This impinges on national law in fields as diverse as sex discrimination, employment (including pensions), social security, taxation, consumer contracts, public procurement and town and country planning. In order to understand how, why and to what extent directives have direct effect, one must understand the EC institutional structure, EC legislative method, the ‘constitutional’ relationship between the EC and Member States and the reciprocal obligations of Member States, the primacy of community law and the distinction between direct effect and direct applicability. How can one teach these things ‘interstitially’?

Some argue that this problem can be overcome by teaching the institutional system of the EU/EC first and then teaching substantive EC law interstitially. This is possible and, to some extent, necessary. But how, other than very abstractly, can one teach a student about the direct effect of directives without any knowledge of the substantive law to which the cases relate? What, for example, does Van Duyn mean to a student who knows nothing of the Four Freedoms?

Substantive law cannot be wholly divorced from institutional law. Indeed, one of the greatest strengths of British lawyers in practising, teaching and writing about Community law is that they do not regard them as separable.

The ‘core’ course in Community law should therefore include some institutional and some substantive law, but not too much of either.

The necessary constituents are:

1. The development and nature of Community law—a brief survey of:
   
   (i) the origins and development of the Communities (from the Treaty of Paris, through the Treaties of Rome and the Single European Act, to Maastricht and the EEA);
   
   (ii) the ‘political’ institutions and the legislative process
   
   (iii) the Court of Justice, its jurisdiction and forms of process, especially article 177;
(iv) sources (including general principles of law and fundamental rights) and interpretative methods;
(v) methods of enforcement, Community and national, which can cover the ideas of primacy and direct effect;

(2) The structure and main provisions of the EC Treaty, which (in spite of Maastricht) is still a coherent text. This would involve a brief survey of, and explanation of the interrelationship between:

(i) ‘the Principles’ (Arts. 3, 5, 6 and 7), emphasising that the Treaty sets out a programme of action;
(ii) ‘the Foundations’—the Four Freedoms (Arts. 9 & 10, 12 & 13; 30, 34 & 36; 48 & 51; 52, 53 & 55; 59, 62 & 66; and the new 73), avoiding at all costs getting bogged down in the theology of Article 30;
(iii) ‘the Common Rules’ (85, 86, 92, 93, 95 & 96), again avoiding the theology of competition;
(iv) Sex discrimination (Art. 119).

Such a course at Ordinary level (at most 15–20 hours) will give the student sufficient to cope with the impact of Community law on national law and will provide a good grounding for more detailed study of Community law at Honours or Masters’ level. Moreover, if taught alongside the basics of national law, it will alert the student to different ways of looking at law.

Specialist aspects of European Community Law (free movement of goods or persons, competition law, discrimination, external relations, etc.) can then be offered as Honours or Masters’ courses according to the interests and preferences of the teacher.

Community law at Honours and Masters’ level can also provide a context for the study of all or any of:

— a legal system in evolution;
— differing perceptions of the rôle, nature and binding force of precedent;
— legislative technique;
— the interaction, and relative enforceability of national, regional and international law;
— the interaction of law, politics and economics;
— the frontiers of constitutional law, administrative law and/or fundamental rights;
— the distinction between ‘human’, ‘fundamental’, ‘social’ and ‘economic’ rights;
— comparative law in action (the Brussels and Rome Conventions).

In that sense, European Community law can truly be a core subject, but only when students are sophisticated enough to discuss it and only
if law teachers are prepared to be adventurous enough to explore its possibilities!

1 I have lost the reference to the article where this important point is made.
2 The Foundation Senate of the new Europa-Universität Viadrina at Frankfurt-an-der-Oder, on which I served, saw the Masters' degree course, on the Anglo-American model, as an important attraction to bring together students from West and East.
3 Four-tier, if you include the 'Legal Practice Diploma'.
4 In 'European Community Law—An Introduction' (Butterworths, 2nd edition, 1995) Dr Robert Lane and I have tried to set down the essence of what we taught our students at Edinburgh.